INSOLVENCY BULLETIN

Volume 4, Issue 7 May 2023

A PENSION POT MAY BE DRAWN DOWN TO SETTLE A JUDGMENT DEBT

There have been recent developments as to whether or not creditors may attack a debtor`s pension. Readers will recall *Horton v Henry [2016]* where the Court of Appeal conclusively held that a trustee in bankruptcy could not require a bankrupt to draw down their pension. Pensions were not therefore “property” which vested in the trustee in bankruptcy. Apart from clawing back excessive pension contributions, there was not much else a trustee in bankruptcy could do.

Two recent cases have made major inroads into the ring fencing of pensions. Curiously enough, both involved creditors and not trustees in bankruptcy.

In *Re Bacci v Green [2022],* the Court of Appeal took a dim view of Mr Green who had committed fraud. He had provided assets as security for a loan which it later transpired were not owned by him but by third parties. The security therefore proved ineffective and judgment was obtained against Mr Green for £3M. The lender was in the unfortunate position of being an unsecured creditor. The position was further complicated by Mr Green being made bankrupt and subsequently discharged. In accordance with *Horton v Henry,* the pension did not therefore fall within the bankruptcy estate.

However, as the judgment against Mr Green was based on fraud, the judgment debt survived his bankruptcy under section 281 of the Insolvency Act 1986. The lender was therefore still able to enforce judgment. The lender itself then went into administration (which is not relevant to the case here) and the judgment was assigned to certain creditors.

Mr Green`s only asset was his pension. These creditors could have applied to appoint a receiver but they applied, instead, for an injunction requiring Mr Green to delegate his powers under his pension to their solicitors. The creditors were successful and so their solicitors were able to draw down Mr Green`s pension in partial satisfaction of the £3M judgment. The Court of Appeal adopted the policy decision that the Courts should not allow a fraudster to hide behind their pension.

In the more recent case of *Re Lloyds British Testing Ltd (in liquidation) Manolete Partners PLC v White [2023]*, the Court similarly took a dim view of Mr White. In the period of 20 months prior to administration, Mr White had gone on a spending spree and had lavished almost £1M of company money on sports cars, a helicopter and extravagant holidays.

The claims against Mr White as director for misfeasance and breach of fiduciary duty were assigned to a well known insolvency litigation funder (“Manolete”) which agreed to pay to the company part of any net recovery. Manolete brought proceedings against Mr White and obtained judgment against him for almost £1M.

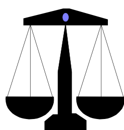
Once again, Manolete was in the position of being an unsecured creditor and the debtor`s only asset was his entitlement to draw down against the company occupational pension scheme. Mr White was not made bankrupt.

Manolete applied for an injunction requiring Mr White to draw down against the company pension scheme. It was an important consideration for the Court that Mr White`s only asset, namely the pension fund, had been derived entirely from funds provided by the company. Furthermore, that Mr White`s misfeasance and breaches of fiduciary duty had been carried out against the very same company.

It was therefore just, equitable and convenient to order Mr White to draw down his benefits under an occupational pension scheme financed by his employer to satisfy a substantial part of the judgment against him, some of which would be used to benefit the company`s creditors as well.

Editors` Note

It is curious that an unsecured creditor should have greater rights to a debtor`s pension than a trustee in bankruptcy. Creditors should therefore investigate the best course of action open to them before rushing to commence bankruptcy proceedings.



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