HORTON V HENRY: "AND HAST THOU SLAIN THE JABBERWOCK?"

An article that considers the Court of Appeal's decision in *Horton v Henry [2016] EWCA Civ 989* where the Court of Appeal dismissed a trustee in bankruptcy's appeal against the High Court's decision that a bankrupt's unexercised rights to draw his personal pension did not represent income to which he was entitled within the meaning of section 310(7) of the Insolvency Act 1986.

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With the long-awaited decision of the Court of Appeal in *Horton v Henry*, the Looking Glass decision in *Raithatha v Williamson* is finally laid to rest.

On 7 October 2016, after a deliberation of almost 6 months, the Court of Appeal finally handed down its judgment on the appeal in *Horton v Henry [2016] EWCA Civ 989* ("Henry"). This was an appeal by the trustee in Bankruptcy of Michael Henry from the decision of Mr Robert Englehart QC, sitting as a Deputy Judge of the High Court, (Chancery Division) dated 17 December 2014 (*[2014] EWHC 4209 (Ch)*, in which the judge had dismissed the trustee's application for an income payments order ("IPO") pursuant to section 310 of the Insolvency Act 1986, (IA 1986). The application was solely in respect of income which might become payable to Mr Henry from his personal pension schemes were he to elect to exercise his contractual rights under the pension policies so as to draw down a lump sum and other payments. Crucially, although eligible to do so, he had made no such election so that, as at the date of the application, the pension was not in payment, and he did not intend to make any such election in the foreseeable future. The judge held that, in these circumstances, the court had no jurisdiction to make an IPO.

In a unanimous decision, the Court of Appeal dismissed the trustee's appeal and in doing so has finally put an end to one of the most extraordinary judicial heresies to have arisen under the IA 1986 in its thirty-year history.

The story begins back in April 2012, with the decision of Mr Bernard Livesey QC, sitting as a Deputy Judge of the High Court (Chancery Division), in *Raithatha v Williamson [2012] EWHC 909 (Ch); [2012] 1 WLR 3559* ("Williamson"). *Williamson* also concerned an application by a trustee in bankruptcy for an IPO in relation to a pension not yet in payment. The facts differed slightly from those in Henry, but the differences are immaterial. The essential point in both cases was whether the trustee in bankruptcy could obtain an order from the court (in effect, a mandatory injunction) to compel the bankrupt to call down his pension when the bankrupt had decided not to do so, even though he had reached the age when he would have entitled to do so under the terms of the relevant pension policies. The question turned (in Williamson as in Henry) on the correct statutory interpretation of section 310 of the IA 1986 as amended by the Welfare Reform and Pensions Act 1999 ("WRPA").

Section 310 of the IA 1986 allows the trustee to apply to the court (prior to the bankrupt's discharge: subsection (1A)), for an IPO as long as the effect of the IPO would not be to reduce the bankrupt's income below that which the court considers necessary to meet the reasonable domestic needs of the bankrupt and his family (subsection (2)). An IPO can extend beyond the date of discharge but it cannot last longer than three years (subsection (6)). An IPO must either take the form of an order that the bankrupt pay the trustee an amount equal to so much of the bankrupt's income as the order specifies or it can require a third party (usually an employer) to pay this sum to the trustee in lieu of the bankrupt (subsection (3)). Subsection (7) provides a definition of "income" for the purposes of section 310, which as originally enacted read as follows:

> "the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment".

Prior to the coming into force of the WRPA, it was settled law that the rights under a personal pension scheme of an individual who was declared bankrupt (what Ferris J in *Re Landau [1998] Ch. 223* famously referred to as his "bundle of contractual rights") constituted a chose in action and thus "property" within the meaning of sections 436 and 283 of the IA 1986 and that as such they vested in the trustee in bankruptcy upon his appointment pursuant to section 306 of the IA 1986. These rights included the right to choose when and in what manner to call down the pension, whether to elect to take a lump sum and/or to acquire an annuity, and so forth. This meant that, with regard to such schemes, the trustee could exercise those rights as he saw fit, within the range of options permitted by the rules of the pension policy itself and would do so in such a way as to maximise the benefit for the creditors as a whole: where the bankrupt was, or became, eligible to draw down his pension, but had not done so prior to his bankruptcy, the trustee could simply make the necessary elections in his place.

Even by the date of *Re Landau* the position was otherwise with regard to rights under an occupational pension scheme. Following the recommendations of the Goode Report (*Pension Law Reform: The Reform of the Pensions Law Review Committee – Cmd 2342-1), Parliament had enacted, in sections 91 to 95 of the Pensions Act 1995* ("PA1995"), measures to remove certain pension payments and certain pension rights, including the rights under an occupational pension scheme, from the bankruptcy regime. This meant that, where such a scheme was already in payment, some such payments would be taken into account on an application for an IPO by the trustee, but where this was not the case the trustee could not interfere. This distinction was made plain by various insertions made by PA1995 into section 310 of the IA 1986: words were inserted into subsections (2) and (7) and added two new subsections. In particular, at the end of section 310(7) of IA 1986 (see above), PA1995 inserted the additional words "and any payment under a pension scheme but excluding any payment to which subsection (8) applies". (It then inserted a new subsection (8) that exempted certain payments and a new subsection (9) that provided exegesis.)

The reasoning in *Re Landau* with regard to the bankrupt's rights under a personal pension scheme vesting in the trustee was extensively reviewed against the relevant legislative framework and approved by the Court of Appeal in *Krasner v Denison [2001] Ch 76*. By the time that *Krasner v Denison* reached the Court of Appeal, however, Parliament had enacted the WRPA, sections 11 and 12 of which were designed in effect to reverse *Re Landau* with regard to approved personal pension schemes, as the judgment of Chadwick LJ in *Krasner v Denison* accepted.

What WRPA did was expressly to bring the position with regard to approved personal pension schemes into line with that for occupational pensions (as the Goode Report had originally suggested). On the reasoning of Ferris J in *Re Landau* and the Court of Appeal in *Krasner v Denison*, this meant that the bankrupt's rights under such a scheme no longer vested in the trustee, so that decisions as to whether, when and in what way to exercise those rights remained exclusively matters for the bankrupt and the trustee had no right to intervene; by contrast, however, where the bankrupt had chosen to exercise those rights in such a way as to result in the pension being in payment, there was no reason why such payments could not be taken into account on an application by the trustee for an IPO. This was made explicit by the insertion, by WRPA, into that part of subsection (7) of section 310 of the 1986 Act that had previously been inserted by PA1995 (above), of a parenthetical gloss, so that the combined insertion made by PA1995 and WRPA into section 310(7) of the 1986 Act now reads:

> "and (despite anything in section 11 or 12 of Welfare Reform and Pensions Act 1999) any payment under a pension scheme but excluding any payment to which subsection (8) applies".

Section 11(1) of WRPA provides that, with regard to any bankruptcy made on a petition presented after the coming into force of that section (i.e. 29 May 2000),

> "any rights of [the bankrupt] under an approved pension arrangement are excluded from his estate".

The pension schemes under consideration in both *Williamson* and *Henry* were approved pension arrangements within the meaning of section 11 of WRPA. It follows that the bankrupt's "bundle of contractual rights" (to use Ferris J's terminology) under those schemes in each case remained vested in the bankrupt. For this to have any meaning at all, it must

mean that the choices as to when and in what manner to exercise those rights remained his and his alone. Unless and until the policy holder elects to exercise his rights under the scheme in a particular way, he will not be entitled to any payments at all. The distinction between the rights of the policy holder under a pension scheme and payments made to him, following and as a result of the exercise of such rights is fundamental to pension law. As has now been confirmed by the Court of Appeal in *Henry*, the insertions by PA1995 and WRPA into section 310 of the IA 1986 all relate to payments and not to the bankrupt's rights under any pension scheme.

The present writer appeared as counsel for the bankrupt in *Williamson*. All of the above was carefully explained to the judge. Regrettably the judge reserved his judgment for a period of about 6 weeks and by the time judgment was finally handed down the judge appeared to have become confused as to the precise arguments that had been presented to him: at least, the judgment itself does not set out those arguments accurately.

Be that as it may, the judge construed the words "every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled" in section 310(7) of the IA 1986 as including any payment to which Mr Williamson could become entitled if he chose to exercise his pension rights in the way that his trustee wished him to and the way the court believed he should. The judge accepted the argument advanced on behalf of the trustee that since Mr Williamson had "but to ask for" the pension payments, he should be treated as being "entitled" to those payments. This is, of course, to confuse an entitlement to exercise a right in a particular way, a right that statute, in the form of section 11 of WRPA, has decreed should continue to vest in the bankrupt, with an entitlement to payment, which could only arise (if at all) after certain elections had been made in the exercise of those rights.

Crucially it is also to fail to recognise that this is not a question of simply calling for a payment to be made, but rather is determining a host of intricate choices that are the bankrupt's alone to make. The judge did not even venture to suggest by what power the court could compel the bankrupt to make these choices. In essence, though not perhaps in so many words, the judge found that the parenthetical words inserted into subparagraph (7) (cited above) should be construed so as to have the effect of disapplying the provisions of section 11 of WRPA in the context of IPOs. This is to use words that have been inserted into another statute by an amending statute (and inserted in parentheses at that) so as to effect the meaning of the substantive provisions of the amending statute. This is to turn statutory construction upside down. The reasoning used by the judge to reach this conclusion is muddled and the result was one that ran a coach and horses through the legislative reform behind WRPA and the policies that underpinned it.

The present writer was not alone in finding the judgment in Williamson not only unsatisfactory in its outcome, but fundamentally flawed in its logic (See, for example, John Briggs: "The recent court decision of *Raithatha v Williamson*: creditors' right to an IPO/IPA over more than the debtor's 'pension in payment'" (2012) Insolv. Int. 25(5), 65-71). The judge himself gave permission to Mr Williamson to appeal and an appeal was lodged. Regrettably for the proper development of the law and for those having to work in the insolvency and pension industries Mr Williamson and his trustee reached a compromise just before the matter came on before the Court of Appeal. The result has been a four and half year wait for the issue to be properly considered by the Court of Appeal.

In the meantime, the decision in *Williamson* gave much cause for concern at the lower levels of the judiciary and in cases where the issues were contested it was occasionally not followed: a particular example was the case of *Re X [2014] BPIR 1081*, a decision of District Judge Smith in Manchester.

The potential effect of the decision in *Williamson* took on an even more alarming dimension when in 2014 George Osborne, then Chancellor, announced the government's intention to reform pension law so as to allow policy holders to draw down the whole of their pension in one scoop. In April 2015 this reform was implemented. What many regarded as the wayward decision in *Williamson* thereby acquired potential consequences well beyond what was contemplated at the time.

In December 2014 the case of *Henry* came before Mr Robert Englehart QC. The judge carefully reviewed the relevant legislation *de novo* and reconsidered the reasoning in the *Williamson* decision in light of that. He reached the independent conclusion that *Williamson* had simply got it wrong and refused to follow it. The first instance judgment in *Henry* provided a clear and reasoned analysis of the legislative material and a coherent approach to statutory construction. Following this decision, as a matter of jurisprudence (see *Colchester Estates (Cardiff) v Carlton Industries Plc [1986] Ch 80, at 85F, per Nourse J.*), this later decision

was to be preferred. It was, for example, followed by Registrar Jones in *Hinton v Wotherspoon [2016] EWHC 623 (Ch)*, who, in addition to the jurisprudential argument, gave as an additional reason for preferring *Henry* to *Williamson* the fact that it was in any event "plainly correct". Nevertheless, given the two conflicting first instance decisions it was right and proper that the Court of Appeal should have been afforded the opportunity to review this point and (as had been the case in *Williamson*) the judge himself gave permission to appeal.

Although it has been a long time in coming, the decision of the Court of Appeal in *Henry* has finally arrived. Gloster LJ, with whom McFarlane LJ and Sir Stanley Burton agreed, fully accepted the careful reasoning of the judge below, citing with approval his summary of the statutory position (set out in paragraph 26 of his judgment). The court rejected the analogy the trustee sought to pray in aid of a self-employed man who does work for a client and then deliberately does not invoice for that work until after he has been discharged from bankruptcy so as to avoid the sums that subsequently become payable from becoming part of his income for the purposes of considering an IPO. Gloster LJ observed that this situation was "totally different in character from the exercise of a particular option under a pension plan" (paragraphs 49-50). The court also rejected the notion that it had the power, pursuant to section 333 of the IA 1986, to compel a bankrupt to exercise those rights in any particular way.

As a matter of statutory construction, in the course of which the court derived considerable assistance from the relevant explanatory notes (such notes being documents prepared by the Government to explain the purpose of a Bill laid before Parliament) and noting the comment of Lord Steyn in *R (Westminster City Council) v National Asylum Support Service [2002] UKHL 38*, at paragraph 5, the court held that it was perfectly plain that Parliament had intended to draw a sharp distinction between the rights to decide when and how to call down his pension, which remained the bankrupt's alone to exercise as he saw fit, and the entitlement to payments where a pension was already in payment, which the court could and should take into account when considering an IPO. The court went on to hold that:

> "as a matter of ordinary language the phrase 'payment in the nature of income ... to which he from time to time becomes entitled' refers to a pension in payment".

In rejecting the reasoning of Mr Bernard Livesey QC in *Williamson*, Gloster LJ said:

> "It seems to me that he failed to appreciate the effect of the fundamental changes brought about by section 11 of the WRPA with regard to the protection of rights under private pension plans in bankruptcy or the alignment of such protection to that which had previously been afforded to rights under occupational pension schemes."

Now, therefore, after many years of having to work with a construction of the relevant statutes that would have been worthy of Humpty Dumpty himself, a world in which these statutes are to be understood in terms of "ordinary language" has been restored. While it is a matter of some regret to the present writer that he did not get the chance to correct this mistake before the Court of Appeal in *Williamson*, it is some considerable comfort to know that the arguments that were advanced on behalf of the bankrupt in *Williamson* have been vindicated at last and that justice and common sense have finally prevailed.