

Neutral Citation Number: [2023] EWHC 1350 (Ch)

Case No: CR-2021-MAN-000222

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

**In the matter of Lloyds British Testing Limited (In Liquidation)**  
**And in the matter of the Insolvency Act 1986**

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

Date: 22 May 2023

**Before:**

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

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**Between:**

**MANOLETE PARTNERS PLC**

**Applicant**

**- and -**

**IAN RUSSELL WHITE**

**Respondent**

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**MR JON COLCLOUGH** (instructed by **Addleshaw Goddard LLP**) for the **Applicant**  
**MR TOM ASQUITH** (for the **Respondent**)

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**APPROVED JUDGMENT**

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## **HIS HONOUR JUDGE HODGE KC:**

1. This is my extempore judgment on the substantive form of order that is to be made following on from the reserved judgment that I handed down on 16 March 2023 which bears the neutral citation number [2023] EWHC 567 (Ch).
2. The substance of my decision was set out at paragraph 80 of that judgment which this extempore judgment should be read alongside. I indicated that I proposed to make an order that did no more than require the respondent to give written notice to the occupational pension scheme trustees asking, so far as necessary, for all of his remaining pension fund to be designated as a drawdown pension fund, exercising such rights as he might have to draw down the entire fund, and directing that payment be made to a nominated UK bank account, denominated in sterling, in the name of the respondent, and previously notified in writing to the applicant.
3. I indicated that clearly further consideration would need to be given to the mechanics of effecting drawdown and the payment of any resulting tax liabilities. There would also need to be provision for the most expeditious and cost-effective means of addressing any default on the part of the respondent in complying with the terms of the order. I invited the parties to seek to agree the terms of the draft order in the light of my judgment; and I indicated that if they could not do so, I would rule on the final wording.
4. The actual form of order that was made on 16 March referred to the notice contemplated by paragraph 80 of my judgment as ‘the drawdown obligation’. Paragraph 1 of the order provided that the respondent should comply with the drawdown obligation in the form of an order to be approved by the court. For the avoidance of doubt, the respondent need take no steps until such time as that order was approved by the court.
5. Paragraph 3 provided for there to be a further remote hearing today, before me, with a time estimate of 90 minutes to determine: (1) the form of order referred to, and (2) any application by Mr. Asquith, representing the respondent, for permission to appeal. I provided for the time for filing any appellant’s notice at the appeal court to be extended to 21 days after that hearing; and I gave the parties liberty to apply about the terms of this order.
6. I have received written skeleton arguments from both Mr. Colclough, who appears for the applicant, and from Mr. Asquith for the respondent. There is no issue as to the first two paragraphs of the order, although I should point out that at the moment, paragraph 1 contemplates that an act should be done by 4 p.m. on the next (late) May Bank Holiday Monday and therefore it seems to me that it would be sensible to defer that until 4 p.m. on 30 May, and for the date in the next paragraph to be correspondingly moved back by a similar 24 hours.
7. Paragraphs 1 and 2 are, however, not contentious. Under paragraph 1, the respondent is, by 4 p.m. on a specified date, to notify the applicant of the UK bank account (denominated in sterling and in the respondent’s name) into which he will request payment in accordance with paragraph 2. Under that paragraph, by 4 pm. on a date seven days later the respondent is to give written notice to the pension scheme trustees exercising (so far as is necessary) such rights as he may have under the pension

scheme rules, or under the general law, to draw down his entire remaining pension fund (including, if necessary, asking for that fund to be designated as a drawdown pension fund and/or for the trustees to take such steps as are necessary to enable him to drawdown his entire remaining fund). The respondent is to direct the pension scheme trustees to make any payment to the bank account nominated under paragraph 1.

8. The area of contention concerns paragraphs 3 and 4 proposed by the applicant. Mr. Asquith, for the respondent, objects to these. Paragraph 3 merely defines references to ‘the Property’. ‘The Property’ is the commercial property in Swansea which is effectively the sole asset of the occupational pension scheme. Paragraph 4, as presently drafted, provides for the respondent, to the extent that he is aware of the information, within 24 hours of the event listed in the following sub-paragraphs, to notify the applicant by email (at a nominated solicitor’s email address) of the following:
  - i) The Property being placed on the market for sale, including the price at which it is being marketed;
  - ii) The name of the conveyancing solicitors instructed by the pension scheme trustees in respect of the sale;
  - iii) The acceptance of any offer for the Property, including the identity of the proposed purchaser, the proposed sale price, and details of any other offers that have been made but not accepted;
  - iv) The exchange of contracts, including the contractual date for completion, and
  - v) Completion of the sale of the Property.
9. Mr. Colclough submits that such provisions are needed to enable the applicant effectively to police the order. He has drawn an analogy to other forms of policing provision. First, the standard form freezing injunction, which requires the provision of wide-ranging asset disclosure in order to enable the applicant properly to police the order; and, secondly, the standard form of order for sale on an application under the Trusts of Land and Appointment of Trustees Act, which frequently requires the party who has been given the conduct of the sale to disclose information to the other party interested in the property.
10. Mr. Colclough has identified four potential areas of concern. First, whether the respondent makes the request; second, whether the respondent and his son, in their capacity as the pension scheme trustees, comply with such a request; third, whether the Property is sold at market value; and fourth, what is to happen when the money is to be paid into the nominated bank account. Mr. Colclough submits that there is a need for some policing mechanism in order to address those concerns. In particular, he points out that at present there is nothing that would enable the applicant to take any steps to ensure that when the money comes in to the nominated bank account, there is an opportunity for the applicant to take steps effectively to attach those monies, by way of partial satisfaction of the outstanding judgment debt it has against the respondent as a result of my money judgment, in the sum of a little under £1

million, that was made following the trial of this action by my order of 25 August 2022.

11. Mr. Asquith, for the respondent, has identified a number of concerns. He submits that paragraphs 3 and 4 of the proposed order are unnecessary and burdensome. He submits that compliance with those paragraphs may be potentially costly and time-consuming; and that the inclusion of a penal notice raises concerns as to the potential enforcement of the order by way of an application for committal. He submits that there is a real risk of satellite litigation if an order is made in the extended terms proposed by Mr. Colclough. He makes the point that this order relates to a pension fund and not a piece of real property; and, to that extent, it differs from the form of order for sale made under the Trusts of Land and Appointment of Trustees Act.
12. At most, Mr. Asquith submits that all that is needed is for the applicant to be informed of the ultimate sale price of the Property. He has made certain other criticisms of detail which I have already indicated should be addressed, and I have suggested ways of dealing with them. He has also indicated that for someone who travels, particularly abroad, a requirement to notify the applicant's solicitors within 24 hours is unduly burdensome; and he has suggested that 72 hours would be more helpful.
13. I am satisfied that, subject to the modifications I have already suggested, and a further modification that I will mention in a moment, it is appropriate to include provisions along the lines of paragraphs 3 and 4. I am satisfied that they are necessary in order to enable the applicant properly to police the order, and to ensure that the whole objective of the order is achieved, in the sense of enabling the applicant, once the principal asset of the pension fund has been sold, and the net proceeds paid over to Mr. White, to be in a position to take steps then to seek to satisfy the judgment debt it has obtained against him out of those sale proceeds.
14. I am not persuaded by Mr. Asquith's point that this is enforcement against a pension fund rather than a property. The reality is that the Swansea property is effectively the only asset, albeit presently illiquid, of the occupational pension scheme. I am therefore persuaded by Mr. Colclough that I should include provisions along the lines of those in paragraphs 3 and 4.
15. Unfortunately, the addition during the drafting process of the words "to the extent he is aware of the information" have created certain practical difficulties as regards the remaining wording. What the opening words of paragraph 4 should say is that: The respondent shall, to the extent he is aware of the information, within — and I accept Mr. Asquith's point that it should be 72 rather than 24 hours — of the respondent becoming aware of any of the events listed in the following sub-paragraphs, notify the applicant by email — with the solicitor's email address — of the following:
  - (1) The Property being placed on the market for sale, including the price at which it is being marketed.
  - (2) The name of the conveyancing solicitor or solicitors instructed by the pension scheme trustees in respect of the sale.

- (3) The acceptance of any offer for the Property, including the identity of the proposed purchaser and the proposed sale price, and the like details of any other offers that have been made but not accepted.
- (4) The exchange of contracts, including the contractual date for completion, and
- (5) The actual completion of the sale of the Property.
16. I am satisfied that it is necessary and appropriate for those provisions to be included. The applicant, as the person interested in the sale of the Property, and the realisation by the respondent of the net sale proceeds, should know when the Property is on the market, the price at which it is being marketed, and who has the conduct of the sale so that they can be made known of the terms of the order. The applicant also needs to know of the acceptance of any offer for the Property, including the identity of the purchaser and the proposed sale price. It is entitled to know whether other offers have been made but not accepted. It is necessary for it to know the date of exchange of contracts and the contractual date for completion. Also, it needs to know the date of completion of the sale of the Property, when the funds will shortly thereafter be disbursed to the nominated bank account. It needs to know those matters so that it can prepare itself to make an application in connection with enforcement of the judgment against that nominated bank account.
17. As I say, it is necessary for there to be some slight adjustment. The details of other offers need to be particularised, as I have sought to do. The timescale must run from the time when the respondent first becomes aware of the information; and 72 hours is a more reasonable period than the 24 hours presently proposed. Subject to those modifications, however, I consider it appropriate for the order to include provisions in the terms of paragraphs 3 and 4.
18. That concludes my judgment on the terms of order; and I will now proceed to hear Mr. Asquith's application for permission to appeal.

#### Submissions

HIS HONOUR JUDGE HODGE KC:

19. This is my extemporary judgment on the application made by Mr. Asquith on behalf of the respondent, Mr. White, for permission to appeal my substantive decision. As I have already indicated, I extended time for permission to appeal until 21 days from the date of today's hearing.
20. Mr. Asquith has formulated two alternative grounds of appeal. The first is that section 91 of the Pensions Act, which I considered in my substantive judgment, does in fact prevent the court from making the order that was sought by the application, and which the court has now made. The second ground of appeal is that the court should have exercised its discretion in Mr. White's favour by refusing to make the order under the *Blight v Brewster* jurisdiction in favour of the applicant. In particular, Mr. Asquith wishes to contend that it was wrong for the court, at paragraph 77 of its judgment, to take account of the fact that the pension fund had been derived entirely from funds provided by the company, and to view that as either a highly important consideration or as a relevant consideration at all.

21. Mr. Asquith recognises that the court must be satisfied either that the appeal would have a real prospect of success, or that there is some other compelling reason for the appeal to be heard.
22. So far as the section 91 point is concerned, Mr. Asquith reminds the court that its decision was that section 91 (2) of the Pensions Act 1995 did not prevent it from making the order sought by the applicant. He invites the court to grant permission to appeal on this point for the following reasons: First, that if the respondent were to succeed on this point it would be decisive. The applicant's application would fail. Mr. Asquith submits that there is a real prospect of persuading the court that section 91 does in fact deprive a pensioner from accessing his pension pot, and that the sort of order made by the court in this case has that effect. If one focuses on the respondent's ability to deal with the pension as he sees fit, then clearly the pensioner is being deprived of accessing his pension. He submits that there is a real prospect that the Court of Appeal would accept that line of argument.
23. Mr. Colclough says that that simply does not meet the point that was made by Mr. Hochhauser KC, sitting as a Deputy Judge of the High Court, in *Bacci v Green* and which I independently have found to be a complete answer to the section 91 point. That is that an order of the kind made in this case does not have the effect of restraining Mr. White from accessing his pension. It does precisely the opposite: it ensures that Mr. White has access to his pension fund rather than it remaining trapped in the fund. All the order does is to require him to access his pension so as to enable the judgment creditor then to seek to enforce against the funds that have been accessed.
24. Mr. Colclough makes the point that there is no reason to think that the experienced pensions silk who appeared in *Bacci v Green* had been wrong not to seek to argue the contrary. Mr Colclough also submits that it is difficult to accept that the Court of Appeal in the same case missed the point despite Lord Justice Newey's express reference, in his leading judgment, to section 91, at paragraph 30 of his judgment. Mr. Colclough also makes the point that it is unlikely that the Court of Appeal would differ from Mr. Simon Birt KC, sitting as a Deputy Judge of the High Court, in *Lindsay v O'Loughnane*, approving the judgment and reasoning of Mr. Hochhauser in *Bacci* and his explanation as to why section 91 does not prevent the court from making the type of order now sought.
25. Mr. Colclough submits that the central finding at paragraph 74 of my judgment is plainly right, as is paragraph 80 of my judgment. In short, he submits that there is a clear consensus on the issue amongst first instance judges and practitioners, such that there is no real prospect of success on appeal.
26. Mr. Asquith contends that there is such a real prospect; but, in any event, he submits that the point is an important one, as reflected in the facts that it was because of this point that the court reserved judgment, and that the decision has generated significant interest in specialist publications and websites and amongst practitioners.
27. Mr. Asquith also points to the fact that there is as yet no Court of Appeal authority directly in point on this question. That all points to there being some other compelling reason for the appeal to be heard. He says that even if the court were to

disagree about Mr. White's real prospects of success on appeal, it is surely right for the Court of Appeal to be able to pronounce on this important issue.

28. Mr Asquith makes the point that a respondent to any similar application will still be entitled to argue that the judgment that I have handed down is wrong, and therefore is not binding on them. Given the short nature of the section 91 point, and its importance to respondents, it is not implausible that the point will be contested in future cases at first instance. It will not assist either insolvency practitioners, or assignees of their claims, nor respondents to such applications, nor the courts, if the point falls to be re-litigated at High Court level time after time.
29. In support of that, Mr. Asquith has referred me to the observations of Deputy Insolvency and Companies Court Judge Addy KC in the case of *Hex Technologies Limited v DCBX Limited* [2023] EWHC 537 (Ch) at paragraph 69, approving what is said at paragraph 32 of volume 11 of *Halsbury's Laws of England* concerning the decisions of co-ordinate courts. That states that there is no rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction.
30. However, the editors go on to state that the opinion has been expressed that where a judge of first instance, after due consideration, has come to a definite decision on a matter arising out of a complicated and difficult enactment, a second judge of first instance, sitting in a court of co-ordinate jurisdiction, should follow that decision. It refers to the modern practice of a judge of first instance, as a matter of judicial comity, usually following the decision of another judge of first instance, unless convinced that that judgment was wrong. Here, there is a unanimous view on the part of judges of first instance that the section 91 prohibition is not engaged in circumstances such as those of the present case.
31. I am not satisfied that there is any real prospect of the Court of Appeal taking a different view from that which, after due and careful consideration, I have arrived at. I am also not satisfied that there is a compelling reason why this matter should be considered by the Court of Appeal in view of that apparent unanimity of view on the part of judges of first instance. This is a case where, if the Court of Appeal considers that it is a matter that it should entertain, then it is a case where permission to appeal should be given by that court, rather than the judge of first instance who has formed a clear view as to the true meaning and effect of the statute. So I refuse permission to appeal on ground one.
32. So far as ground 2two is concerned, relating to the exercise of the court's discretion, I am not satisfied that there is any real prospect of Mr. White persuading the Court of Appeal that I took an irrelevant consideration into account in arriving at my decision. Mr. Asquith takes the point that the funding that was provided for the purchase of the property by the pension fund was intended for the benefit of Mr. White, and not the company or its creditors. He says that there is no sufficient temporal, or causal, connection between the purchase of the property that forms the principal asset of the pension fund and the use of the company's money for that purpose.
33. He points to the fact that the misfeasance, and the purchase, were wholly unrelated, either factually or in point of time. He also submits that if one looks at the position of someone who had funded the pension themselves, as a result of having taken higher dividends, or salaries from the company, then, in those circumstances, that would not

have been a relevant consideration; and, by parity of reasoning, the source of funds for the purchase of the property should not have been taken into account by the court in this case.

34. In my judgment, there is no real prospect of persuading the Court of Appeal that this was an irrelevant consideration; and the weight to be given to that factor was a matter for the trial judge in the exercise of his discretion. Once again, I can see no real prospect of success on ground two, and in that case there is no other reason, still less any compelling other reason, for the court to give permission to appeal.
35. So, for those reasons, I refuse permission to appeal. Had I given permission, then I would have acceded to Mr. Asquith's invitation to stay the requirements of paragraphs 1 and 2 of the order pending final determination of the appeal. However, for the reasons I have given, I refuse permission to appeal. If there is an application for permission to appeal to the Court of Appeal, then it will be sensible for that to be viewed by the single Lord Justice by reference, not simply to my reserved written judgment, but also to the extempore judgments I delivered following formal hand-down on 16 March and also dealing with the form of order and the application for permission to appeal today.
36. However, for the reasons I have given, I refuse permission to appeal. Any further application for permission can be made to the Court of Appeal; and my earlier order has already extended the time for filing any appellant's notice at the appeal court to 21 days from today. So that concludes this extempore judgment on the respondent's application for permission to appeal.

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**(This Judgment has been approved by HHJ Hodge KC.)**