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# FOCUS

## BANKRUPTCY

### Inside:

We examine what the High Court's decision means for creditors

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## Can creditors lay claim to super contributions made by a person in the lead-up to bankruptcy?

The High Court has ruled that superannuation contributions made before a person becomes bankrupt are unavailable for claw-back by the trustee in bankruptcy and therefore not recoverable by the bankrupt's creditors. Senior Associate Dirk Fairweather looks at this case and its implications.

### Cook v Benson

On 19 June 2003, the High Court of Australia determined in *Cook v Benson* that payments made as contributions to superannuation funds at the direction of a person who later became bankrupt could not be recovered for the benefit of the bankrupt's creditors, provided they were made as arm's length, commercial transactions.

### Rolling over superannuation entitlements

Peter Benson had been employed by Industrial Sales and Service (Tas) Pty Ltd (*ISAS*) since 1972, and was a member of the *ISAS* superannuation fund. Mr Benson's employment was terminated on 20 April 1990, when *ISAS* ceased carrying on business.

Mr Benson then became entitled to a lump sum benefit of \$96,000 under the rules of the *ISAS* superannuation fund. That amount was paid to him on 17 September 1990. As Mr Benson was then well below the normal retirement age, he would be required to pay tax on any portion of his superannuation entitlements that he did not 'roll over' into another bona fide superannuation fund.

After consulting a financial planner, Mr Benson decided to roll over \$80,000 of his ISAS superannuation entitlements. In September 1990, he directed the making of three payments, of \$20,000, \$40,000 and \$20,000 respectively, into three other superannuation funds.

## Subject to claw-back in bankruptcy?

Four months earlier, on 16 May 1990, a creditor had obtained judgment against Mr Benson for just over \$35,000. By September 1990, this judgment debt remained unpaid.

A sequestration order was made against Mr Benson's estate on 21 July 1992, but his bankruptcy was deemed to have commenced on 18 September 1991 (the date of his act of bankruptcy).

*At that time, section 120 of the Bankruptcy Act 1966 (Cth) provided for a retrospective 'clawing back' by a trustee in bankruptcy of any disposition of property by the bankrupt within two years before the commencement of bankruptcy.*

At that time, section 120 of the *Bankruptcy Act 1966* (Cth) provided for a retrospective 'clawing back' by a trustee in bankruptcy of any disposition of property by the bankrupt within two years before the commencement of bankruptcy.

However, the legislation also contained some exceptions to this 'claw back' provision, including an exemption under s120(1)(a) for 'a settlement... made in favour of a purchaser... in good faith and for valuable consideration'.

The trustee of Mr Benson's bankrupt estate sought a declaration from the Federal Court that each payment was void under s120. Mr Cook also sued the corporate trustees of the three superannuation funds into which Mr Benson's ISAS superannuation entitlements had been rolled over (the corporate respondents), seeking orders that they repay the respective amounts of \$20,000, \$40,000 and \$20,000.

The trial judge held that the exemption in s120(1)(a) was not made out, and awarded judgment in favour of the trustee in bankruptcy. In a 2-1 decision, the Full Court of the Federal Court allowed an appeal by Mr Benson.

The trustee in bankruptcy appealed to the High Court. A majority of the High Court dismissed that appeal with costs.

## Are contributions to super funds 'purchased' by the fund's trustees for valuable consideration?

The High Court considered two questions relating to s120(1)(a) as it stood at the relevant time, namely, whether the corporate respondents:

- could properly be described as 'purchasers' of the contributions respectively paid to them at the direction of Mr Benson; and
- had provided 'valuable consideration' to Mr Benson for his contributions.

*They held that the corporate respondents had undertaken to provide Mr Benson with the rights and benefits to which he would, in due course, become entitled under the rules of each superannuation fund. Those rights and benefits constituted substantial and valuable consideration for Mr Benson's contributions to each fund.*

In their joint reasons, Chief Justice Gleeson and Justices Gummow, Hayne and Heydon answered both questions in the affirmative.

They held that the corporate respondents had undertaken to provide Mr Benson with the rights and benefits to which he would, in due course, become entitled under the rules of each superannuation fund. Those rights and benefits constituted substantial and valuable consideration for Mr Benson's contributions to each fund.



The majority also held that s120(1)(a) does not refer to a 'purchaser' in the limited sense of a purchase and sale, but to a person who in a commercial sense provides a *quid pro quo*. Since the corporate respondents had provided valuable consideration (in the relevant commercial sense) in return for Mr Benson's contributions, there was no reason to deny to them the character of a purchaser.

In a dissenting judgment, Justice Kirby held that the corporate respondents were not 'purchasers' of the money sum of \$80,000 divided into three lots, and further held that no 'valuable consideration' was given for any purchase of those sums of money as such.

## Lessons learned

Since the 1993 amendments to the *Bankruptcy Act*, a bankrupt's interest in a 'regulated superannuation fund' up to his or her Reasonable Benefit Limit (calculated under the *Income Tax Assessment Act 1936* (Cth)) is not available for distribution among his or her creditors.

This case arguably allows a person facing bankruptcy to protect additional cash assets from creditor claims by paying them as contributions to a superannuation fund.



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