

## Former pension trustees, freezing orders and pensions scams (Dalriada Trustees Limited v McAuley)

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**Pensions analysis:** Deputy Judge Robert Miles QC sitting in the Chancery Division of the High Court has granted summary judgment and renewed a freezing order against former trustees of a pension scheme who had wrongly facilitated pension liberation. Ben Fairhead, a partner specialising in commercial litigation with a particular focus on pensions-related disputes including professional negligence claims at Pinsent Masons comments on what lessons can be learned from this case for pensions law practitioners.

### Original news

*Dalriada Trustees Limited v McAuley and others* [2017] EWHC 202 (Ch)d

*In what is thought to be a rare pension liberation case to be reported, a deputy judge has granted summary judgment in the sum of £1.5m to pension scheme trustees appointed by the Pensions Regulator (TPR). The judge has also put in place a freezing order for £3.275m against former trustees of the pension schemes, who had breached their duties when entering into an investment that facilitated pension liberation.*

### What is the background to the case?

Mr and Mrs McAuley had formerly been the trustees of these two pension schemes:

- innovation property retirement benefit scheme, and
- Merseyside care retirement benefit scheme

TPR using its statutory powers had appointed Dalriada Trustees Limited (Dalriada) to replace them as trustees. The former trustees had allowed a purported investment to be made that enabled payments to be made to members of the pension schemes (pension liberation). In total £4.3m had been paid into the schemes. Some of that money had ended up in the hands of the scheme members. Where funds are released to members before they reached the pension age of 55, they would be potentially liable to a tax charge of up to 55% of the funds received and the schemes would also be liable to an additional tax charge due to HM Revenue and Customs (HMRC).

The former trustees had not obtained written advice from an appropriately qualified or regulated person before making any investments as they were required to do under [section 36](#) of the Pensions Act 1995 ([PA 1995](#)). Some of the pension funds were paid to a company owned by the former trustees without any proper documentation about the payment. The former trustees had also paid some funds to Mr Simmons who is the uncle of Mrs McAuley. Substantial sums were also paid under gilt option agreements to another company (Arterial Distribution Limited) which then entered into a consultancy agreement with an offshore company (International Investment Associates, incorporated in the United Arab Emirates) under which the latter would retain a very substantial part of the investment (84%).

### What were the issues before the High Court?

At a hearing in 2014, a judge had already granted Dalriada a freezing order against the former trustees in the sum of just over £600k. The former trustees applied to discharge that freezing order. Dalriada applied for summary judgment for the full amount of its separate claim in relation to the monies paid under the gilt option agreements. Dalriada submitted the following:

- the £3.275m payment was made in breach of the trustees' duties
- no reasonable trustee in a position to act as an ordinary prudent man of business would have made such an investment without obtaining professional advice
- the former trustees' conduct breached their duties under [PA 1995, s 36\(3\)](#), and
- the former trustees had no reasonable prospect of success in defending Dalriada's claim

## What conclusions did the High Court reach and what were its reasons?

Although Deputy Judge Miles discharged the initial freezing order, this proved to be a pyrrhic victory for the former trustees. The deputy judge granted Dalriada summary judgment for just over £1.5m. He accepted that some scheme members had received payments but it was not clear to him how many had not. He ruled that the former trustees:

- had no defence to Dalriada's claim under [PA 1995, s 36](#)
- could not rely on a contractual clause exonerating them from personal liability because [PA 1995, s 33](#) prevented this
- had made £3.275m of payments which no trustee exercising proper skill and care would make, and
- exercising the most rudimentary due diligence would have questioned the financial arrangements about the consultancy agreement

The judge went on to grant a new freezing order in Dalriada's favour for £3.275m pending trial or further order. His reasons for this included:

- there was a risk that Dalriada's judgment would go unsatisfied if a freezing order was not made
- the former trustees had allowed themselves to become part of a significant operation involving commercial impropriety
- the payments made to companies owned by the defendants suggested a degree of commercial impropriety
- that payments had been made to an individual who was a relative had not been volunteered, and
- taking all these factors together suggested a casual disregard for their duties and conduct as trustees

However the deputy judge decided that the former trustees had at least a better than fanciful chance of arguing that allowance should be made in respect of the amounts paid to scheme members. He noted that these proceedings remained at an early stage and no disclosure had yet been provided.

Accordingly he was only prepared to grant summary judgment for the lesser sum of £1.5m.

## What are the implications of the High Court's decision? Will the judgment assist in combating pension liberation?

The decision is helpful in highlighting the investigatory powers that are available to TPR and professional firms it appoints under [PA 1995](#). It shows that action is being taken by TPR against the perpetrators of pension liberation schemes. Any trustee or former trustee who has not exercised the appropriate level of care and skill remains vulnerable to action to recover scheme assets.

It is noteworthy too that the High Court was able to make the findings it did on a summary judgment application. Scheme trustees have to exercise an appropriate level of due diligence before permitting payments out of the scheme. This is the first reported case of this nature to reach the courts but others are likely to follow. Where assets have been liberated in a manner which is not transparent or where fraud is suspected or where investigation reveals that money has gone back to scheme members before scheme retirement dates are the most vulnerable to challenge. Finally, scheme members remain liable to pay tax of up to 55% of the funds received and HMRC is vigilant in pursuing claims for these tax payments.

*Interviewed by David Bowden.*

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