Neutral Citation Number: [2024] EWCA Civ 1418

Case No: CA-2023-001116

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
His Honour Judge Hodge KC (sitting as a Judge of the High Court)
[2023] EWHC 567 (Ch) and [2023] EWHC 1350 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 15 November 2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE GREEN
and
LORD JUSTICE SNOWDEN

- -

Between :

MANOLETE PARTNERS PLC	**Applicant/ Respondent**
- and –	
IAN RUSSELL WHITE	**Respondent /Appellant**

- -

Brad Pomfret KC and Reuben Comiskey (instructed *pro bono* by **Edwin Coe LLP**) for the **Appellant**
Joseph Curl KC and Jon Colclough (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing date : 4 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on Friday 15 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This appeal raises the question of whether, and if so, in what circumstances, a judgment creditor can obtain a mandatory injunction requiring a judgment debtor to draw down a lump sum from their occupational pension fund and to direct that the resultant payment be made into a specified bank account to be notified in advance to the judgment creditor.

2. The issue arises because of the terms of section 91 of the Pensions Act 1995 ("section 91" and the "1995 Act"). Section 91 is headed "Inalienability of occupational pension" and provides, in relevant part,

> "(1) Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme -
>
> (a) the entitlement or right cannot be assigned, commuted or surrendered,
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> (b) the entitlement or right cannot be charged or a lien exercised in respect of it, and
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> (c) no set-off can be exercised in respect of it,
>
> and an agreement to effect any of those things is unenforceable.
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> (2) Where by virtue of this section a person's entitlement to a pension under an occupational pension scheme, or right to a future pension under such a scheme, cannot, apart from subsection (5), be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension.
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> (3) [Repealed]
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> (4) Subsection (2) does not prevent the making of -
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> (a) an attachment of earnings order under the Attachment of Earnings Act 1971, or
>
> (b) an income payments order under the Insolvency Act 1986.
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> (5) In the case of a person ("the person in question") who is entitled to a pension under an occupational pension scheme, or has a right to a future pension under such a scheme, subsection (1) does not apply to any of the following, or any agreement to effect any of the following
>
> …

> (d) … a charge or lien on, or set-off against, the person in question's entitlement, or right … for the purpose of enabling the employer to obtain the discharge by him of some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by him…"

3. The Appellant ("Mr. White") was the owner and controller of Lloyds British Testing Limited (the "Company"). He is also the only member of an occupational pension scheme which was established for his benefit by the Company about twenty years ago (the "Scheme"). Upon reaching his normal retirement age in 2017, Mr. White asked for some of the amount available to him under the Scheme to be designated as a draw down pension fund and elected to draw down a proportion of that fund from the Scheme. Since then he has not sought to draw down any other monies from the Scheme.

4. The Company went into administration in 2016 and then into insolvent liquidation in 2017. The Respondent ("Manolete"), which is a litigation funder, took an assignment from the liquidators of claims for breach of fiduciary duty owed by Mr. White to the Company. In 2022, Manolete obtained a judgment against Mr. White for about £1 million (including interest and costs).

5. After the judgment remained unsatisfied, HHJ Hodge KC (the "Judge") made the order now under appeal. The Judge ordered Mr. White to give notice to the Scheme trustees (Mr. White and his son), exercising such rights as he might have to draw down his entire pension fund and directing payment to a UK bank account in his own name. The Judge also ordered Mr. White to give details of the nominated bank account in advance to Manolete, together with information as to the progress of the proposed sale of the property owned by the Scheme that would enable it to make the draw down payment. The Judge held that Manolete was entitled to such information in order to prepare itself to make an application to enforce its judgment against the nominated bank account.

6. Mr. White appeals against those orders pursuant to permission granted by Arnold LJ. The appeal was first listed on 12 April 2024, on which occasion the hearing was adjourned to enable Mr. White to see if he could obtain *pro bono* representation: [2024] EWCA Civ 356. He subsequently did so, obtaining representation via Advocate, the Bar's national *pro bono* charity, and by solicitors acting on a *pro bono* basis.

7. For the reasons that follow, I consider that Mr. White's appeal should be allowed.

The Facts

The Company and the Pension Scheme

8. The Company was formed in 2002 and conducted a business specialising in the inspection, testing and repair of lifting equipment. Mr. White was the main director, employee and shareholder of the Company.

9. On 1 July 2003 the Company established the Scheme which was entitled "The Lloyds British Small Self-Administered Pension Scheme". The Scheme was the subject of a Deed of Amendment executed on 14 August 2006 under which the object of the Scheme was described as the provision of money purchase benefits for or in respect of persons who are or have been employed by the Company as principal employer. In fact, Mr.

White is and has been the only member and beneficiary of the Scheme. Notwithstanding that limited membership, Manolete did not dispute before the Judge and accepted on appeal that the Scheme is an "occupational pension scheme" for the purposes of section 91.[1]

10. Pursuant to the 2006 Deed of Amendment, the Scheme was to be governed by the terms of Standard Life's General Rules coded SAS71 from time to time, the relevant iteration of which was promulgated in April 2015 (the "Scheme Rules"). For present purposes, the following Scheme Rules are relevant to Mr. White's rights to draw down his pension fund.

> "**6A Retirement**
>
> (1) The amount available to apply under this Rule shall be determined by the Trustees, on the advice of the Actuary, having regard to the Member's Interest and such other Rules as affect the Member's entitlement to benefit.
>
> (2) On the retirement of a Member from the Service at his Normal Retirement Date, the Trustees shall apply the amount available under this Rule to -
>
> (a) pay any Lifetime Allowance Charge;
>
> (b) pay to the Member a lump sum in accordance with Rule 6B;
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> (c) provide for the Member a pension payable in accordance with section (3) of this Rule and, if the Member so requests and the Insurer is willing to accept such a request, that pension will include [death benefits] …
>
> (3) The Trustees shall secure any pension payable under this Rule by purchasing a Lifetime Annuity from an insurer of the Member's choice on such terms that meet the conditions set out in paragraph 3 of Schedule 28 to the Finance Act 2004.
>
> …
>
> (6) If, on or after the Member's Normal Minimum Pension Age, the Member asks for all of the amount available under this Rule (or a specific proportion of that amount) to be … designated as a Drawdown Pension Fund and the Trustees agree then the Trustees shall -

1. The definition of an occupational pension scheme is to be found in section 1 of the Pension Schemes Act 1993 which is imported by reference into the 1995 Act.

> (a) pay any Lifetime Allowance Charge due; and
>
> (b) … hold the balance of the designated amount as a Drawdown Pension Fund to be applied under Rule 6C.
>
> …
>
> **6C Member's Drawdown Pension Fund**
>
> (1) Where a Member has a Drawdown Pension Fund, the Member shall agree with the Trustees the income to be withdrawn from the Drawdown Pension Fund in each Drawdown Pension Year … and the number of instalments in which that income is to be paid. The Trustees may delay the payment of any income to allow sufficient time to sell any illiquid investments.
>
> …
>
> (3) The Member may at any time direct the Trustees to use the Drawdown Pension Fund to secure a pension for him in accordance with the provisions of section (3) of Rule 6A that commences on a date agreed between them. The Trustees may delay the securing of the pension to allow sufficient time to sell any illiquid investments."

11. The Scheme Rules also contain a number of Miscellaneous Provisions in Rule 11 concerning the inalienability of the interest of a member. These include the following, in which references to the Pensions Act are to the 1995 Act,

> "(1) **Benefits non-assignable.** Except where permitted both in terms of sections 91 to 93 of the Pensions Act and in terms of the Rules or Pension Sharing Rules, no person having a beneficial interest in the Scheme shall assign, commute, surrender or charge that interest or any part of it, nor can such interest be forfeited or a lien or set-off be exercised in respect of it. Where a person having a beneficial interest in the Scheme agrees to a purported transaction which would, if belonging absolutely to that person, be of no effect under section 91(1) of the Pensions Act, benefits shall cease to be payable to that person under the Scheme and the Trustees may in their absolute discretion apply any moneys which have ceased to be payable to that person for the maintenance or otherwise for the support or benefit of that person or pay the moneys to any other person to which such a payment can be made in terms of section 92(3) of the Pensions Act, but in no circumstances shall any payment be made to a purported assignee.
>
> …

> **(5) Charge on benefits for debt due to the Employer.** Subject to sections 91 and 93 of the Pensions Act, all benefits payable or prospectively payable to a beneficiary under the Scheme shall stand charged with and be subject to reduction on account of a monetary obligation due to the Employer by the beneficiary and arising out of a criminal, negligent or fraudulent act or omission by the beneficiary … Where the beneficiary disputes the liability, the Trustees shall not exercise the charge unless the obligation has become enforceable under an order of a competent court … The Trustees may in their absolute discretion pay the amount of the charge to the Employer."

12. At the hearing before the Judge, there was a dispute about how Mr. White had accessed his pension fund and as to the status of his remaining rights under the Scheme. However, following the hearing of the appeal, the parties agreed that in 2017, after reaching his normal minimum pension age of 55, Mr. White must have elected (and the then Scheme trustees must have agreed) that £1 million of the amount available to him under the Scheme should be designated as a Drawdown Pension Fund under Rule 6A(6) of the Scheme Rules. Of this fund, Mr. White elected to receive a total of £250,000 as a lump sum, leaving a balance of £750,000 to be held and applied in accordance with Rule 6C of the Scheme Rules.

13. The parties are also agreed that Mr. White has the ability under Scheme Rule 6C(1) to seek to agree with the Scheme trustees the amount of income to be withdrawn from the balance of this Drawdown Pension Fund in each Drawdown Pension Year, together with the number of instalments in which that is to be paid. This could include seeking a single payment of all of that remaining fund, or no payment at all in any Drawdown Pension Year. Alternatively, Mr. White has the right, pursuant to Rule 6C(3) to require the Scheme trustees to use the balance of his Drawdown Pension Fund to purchase an annuity for him, commencing on a date to be agreed. The trustees are able to delay any such payment, or purchase of an annuity, in order to enable any necessary illiquid assets to be sold.

14. The parties are further agreed that Mr. White has the power under Scheme Rule 6A(6) to seek to agree with the Scheme trustees that any remaining assets held within the Scheme and available to him should be designated as a further Drawdown Pension Fund to be held and dealt with in the same way under the terms of Scheme Rule 6C.

15. In this regard, the Scheme owns a commercial property in Swansea (the "Property"). The Property was originally acquired in about 2006 using monies contributed by the Company to the Scheme. After its acquisition, the Property was leased by the Scheme to the Company and occupied by it for the purposes of its business. When the Company went into liquidation in 2017, the liquidators disclaimed the lease of the Property, which has since been occupied by a number of third party businesses. The current occupier pays an annual licence fee of £60,000. In 2018, the Property was said to be worth about £800,000.

The insolvency of the Company and the proceedings by Manolete against Mr. White

16. The Company went into administration in November 2016 and into creditors' voluntary liquidation in November 2017. The unpaid claims of creditors were in excess of £3 million and included a large number of small trade creditors.

17. In August 2020, Manolete took an assignment from the liquidators of claims that Mr. White had breached his fiduciary duties to the Company by causing it to make a series of substantial payments in the period of 20 months before it went into administration. The payments included payments towards a number of luxury cars, a helicopter, foreign holidays for Mr. White, payments towards his home, and rent on his son's flat. Under the terms of the assignment of the claims, Manolete was required to pay a significant portion of any recoveries from Mr. White to the liquidators for the benefit of the Company's creditors.

18. Misfeasance proceedings were issued by Manolete against Mr. White in April 2021, claiming in excess of £6.9 million together with interest and costs. The proceedings were heard at a trial before the Judge in August 2022. The Judge gave an *ex tempore* judgment of which, regrettably, no transcript is available. There is a dispute between the parties as to the basis for that decision, and in particular whether it amounted to a finding that Mr. White had acted "criminally, negligently or fraudulently" within the meaning of section 91(5)(d) of the 1995 Act and Scheme Rule 11(5). I shall return to that issue later in this judgment.

19. After giving judgment, the Judge made an order on 25 August 2022 requiring Mr. White to pay Manolete a total of £996,014.22, which sum comprised a principal amount of £657,149.85 with the balance being interest and costs (the "Judgment Debt"). Mr. White did not pay any part of the Judgment Debt in accordance with the Judge's order, and has not done so since.

The application for the order now under appeal

20. In default of payment of the Judgment Debt, by a further application which was sealed on 25 November 2022, Manolete applied for an order pursuant to section 37 of the Senior Courts Act 1981 ("section 37") that its solicitor be given authority to take certain steps. In the witness statement in support of its application, those steps were said to be based upon the decision of the late Mr. Gabriel Moss QC (sitting as a Deputy High Court Judge) in Blight v Brewster [2012] EWHC 165 (Ch), [2012] 1 WLR 2841 ("Blight v Brewster").

21. The specific order sought was that Manolete's solicitor be authorised to exercise Mr. White's rights (i) to instruct the trustees of the Scheme to sell the Property, (ii) to draw down such sums from the proceeds of sale up to the amount of the Judgment Debt, and (iii) to direct the trustees to pay such sums to Manolete in satisfaction or partial satisfaction of the Judgment Debt. In the alternative, Manolete sought a third party debt order pursuant to CPR 72 to become effective the moment that the debt became due from the trustees of the Scheme to Mr. White.

22. Mr. White filed evidence opposing the making of any such order. Among other things, he contended that the relief sought by Manolete was prohibited by section 91 of the

1995 Act, alternatively that it should not be granted as a matter of discretion under section 37.

23. Manolete's application was heard by the Judge on 13 March 2023. In response to the point that the relief sought was prohibited by section 91, Mr. Curl KC, who appeared with Mr. Colclough for Manolete, reformulated the relief sought twice, first in his skeleton argument and then in the draft order which he presented to the Judge.

24. In the draft order, the main relief sought was a mandatory injunction that Mr. White delegate to Manolete's solicitor (a) the power to draw down funds from the Scheme, and (b) to nominate the bank account into which payment of any funds should be made. By implication, that nominated bank account was to be under the control of Manolete, because the draft order further provided that upon receipt of any funds drawn down, *Manolete* was to apply the funds, first to pay any sums owing to the former professional trustee of the Scheme, secondly in discharge of any tax owing by Mr. White to HMRC as the result of the draw down, and thirdly to Manolete, "up to the outstanding amount of, and by way of discharge of, the Judgment Debt".

25. The relief sought by Manolete was strenuously opposed by Mr. Asquith, counsel who then appeared for Mr. White.

The Judgment

26. In his reserved judgment, [2023] EWHC 567 (Ch), [2023] 1 WLR 3292 (the "Judgment"), the Judge first rejected a suggestion that the late reformulations of the relief sought by Manolete were unfair to Mr. White. The Judge commented, at [17], that,

> "It has always been clear that what [Manolete] is seeking is substantive injunctive relief under section 37. The issue (as Mr. Asquith clearly recognises) has always been (and remains) whether [Mr. White] should be required to access his "pension pot" so as to enable him to satisfy his substantial judgment debt. The mechanics for achieving this are essentially a matter of form rather than substance … [Manolete] is not wedded to [a] particular form of order, and is content to leave it to the court to craft an appropriate form of order.. "

27. The Judge then referred to a number of cases including, in particular, the decision in Blight v Brewster; the decision of Mr. Andrew Hochhauser QC (sitting as a Deputy High Court Judge) in Bacci v Green: see [2022] EWHC 486 (Ch); and the decision of the Court of Appeal in the same case [2022] EWCA Civ 1393, [2023] Ch 201.

28. For present purposes it is sufficient to note that in Blight v Brewster, claimants who had been victims of a fraud, and who had a judgment against the defendant fraudster, obtained an order that the defendant should give notice to the trustees of his personal pension scheme to draw down a tax-free lump sum of 25% of the fund, so that the resultant debt due to the defendant from the trustees could be made the subject of a third party debt order in favour of the claimants. The case did not concern an occupational pension scheme, so the issue of section 91 did not arise.

29. Bacci v Green was a case involving an occupational pension scheme, where (as in Blight v Brewster) the claimants had been the victims of a fraud and had obtained a judgment against the defendant fraudster. They had also obtained a worldwide freezing order in support of execution of the judgment. The claimants sought an order that the defendant (i) delegate to the claimants' solicitor his power to revoke his enhanced protection for tax purposes and to elect to receive a lump sum payment and further payments from his occupational pension scheme, and (ii) disclose details of his bank account into which such payments should be directed to be made, whereupon the funds would be subject to the worldwide freezing order and were intended to be the subject of a third party debt order (see [14] and [41] of the judgment).

30. At first instance, the deputy judge's attention was drawn to section 91, but counsel for the defendant did not argue that it prevented the order sought from being made. In deciding to make the order, the deputy judge said, at [40],

> "Section 91 of the 1995 Act does not prevent the court granting the Order. The Order does not have the effect of restraining [the defendant] from receiving the pension. It does the precise opposite - it ensures that payment of [the defendant's] pension is effected, rather than remaining trapped in the Fund. Again, as a matter of principle, Mr. Moeran does not rely upon section 91 of the 1995 Act to oppose the orders sought."

31. At [29] of his Judgment in the instant case, the Judge drew together the principles that he derived from Blight v Brewster and the first instance decision in Bacci v Green,

> "29. Like Blight v Brewster, Bacci v Green was a case where the judgment was founded on fraud. The real significance of the case is twofold. First, the court's holding that the making of an order which affects that part of the judgment debtor's pension which cannot be withdrawn without incurring a liability to tax is not "an impermissible extension of Blight v Brewster". Second, that section 91 is no obstacle to the court ordering a judgment debtor to access their pension pot. As Mr. Asquith emphasises, that second development was the product of a concession by counsel appearing for the judgment debtor; but as Mr. Curl points out, the concession was made by experienced leading counsel specialising in pensions law, and was one which commended itself to the experienced Deputy High Court Judge."

32. After referring to the decisions in Brake v Guy [2022] EWHC 1746 (Ch) and Lindsay v O'Loughnane [2022] EWHC 1829 (QB) that had followed Bacci v Green at first instance, the Judge also considered the decision of the Court of Appeal in Bacci v Green. At [39], the Judge noted that in light of the concession made by counsel at first instance, there was no attempt to argue on appeal that section 91 prevented the court from granting the relief sought.

33. In his Judgment in the instant case, the Judge set out *in extenso* the respective submissions of counsel on the issue of whether section 91 prevented the court from making an order of the type made in Blight v Brewster in relation to an occupational pension scheme. He came to his conclusions on the point at [74],

> "74. I have set out the rival submissions on this aspect of the case earlier in this judgment. Like many issues of construction, contractual or statutory, the point is ultimately a short one. Having carefully weighed the competing submissions, and recognising that I am free to come to a different conclusion, ultimately I have decided that the analysis and reasoning of Mr. Hochhauser in Bacci v Green is to be preferred. Provided I direct that payment of [Mr. White's] pension pot is to be made to a nominated UK bank account in [his] name … , I do not consider that there will be any contravention of the statutory prohibition in section 91 of the Pensions Act 1995 because, as explained by the deputy judge in that case, the order will not have the effect of restraining [Mr. White] from receiving that pension pot but rather the opposite: it will ensure that the payment of that pension pot is made to [Mr. White], rather than remaining within the Scheme wrapper. In my judgment, it makes no difference that the order is motivated by the objective of enabling that pension pot to be applied in satisfaction of a pre-existing judgment debt owed to [Manolete] by [Mr. White]. As [paragraph 4.14.33 of the 1993 report of the Pension Law Review Committee chaired by Professor Sir Roy Goode] makes clear, whilst the asset represented by future pension entitlements is immune from the claims of a member's creditors,
>
> > "The position is otherwise, of course, when the pension has come into payment, as regards sums that have been paid over by the trustees to the beneficiary or have become due for payment. These are income in the hands of the scheme member and do not enjoy any greater protection from creditors than any other income of the scheme member.""

34. At [77], when considering the exercise of discretion under section 37, the Judge commented that the Judgment Debt "was the result of [Mr. White's] misfeasance and breaches of fiduciary duty whilst acting as the Company's controlling director and shareholder". He added, at [79],

> "79. I derive no assistance, either way, from the exception in section 91(5)(d) of the Pensions Act [1995]. That sub-section is directed to charges, liens, and set-offs, and not to the grant or withholding of injunctive relief. It also relates to criminal, negligent, or fraudulent acts or omissions, and not to misfeasance as a company director, in breach of the strict fiduciary duties he owed to the company."

The Consequentials Judgment and the Order

35. After handing down his Judgment, the Judge held a further hearing to consider the terms of his order, and gave a further judgment in that respect: see [2023] EWHC 1350 (Ch) (the "Consequentials Judgment"). The core terms of the order made by the Judge on 22 May 2023 (the "Order") were as follows,

> "1. By 4pm on [a date 14 days after determination of this appeal] ("the Notification Date"), [Mr. White] shall notify [Manolete] of the UK bank account (denominated in sterling and in the name of [Mr. White]) into which he will request payment in accordance with paragraph 2 below.
>
> 2. By 4pm on the date 7 days after the Notification Date, [Mr. White] shall 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 the 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 draw down his entire remaining fund). [Mr. White] shall direct the Pension Scheme trustees to make any payment to the bank account nominated under paragraph 1 above."

36. In addition, the Judge's Order included the following provisions, which were added in response to a submission by Mr. Colclough that Manolete needed to be able to "police" the Order in the same way as if it had a freezing injunction against Mr. White or an order for sale of the Property,

> "6. [Mr. White] shall, to the extent he is aware of the information, within 72 hours of becoming aware of any of the events listed in the following sub-paragraphs, notify [Manolete] of the following.
>
> 6.1. The Property being placed on the market for sale, including the price at which it is being marketed.
>
> 6.2. The name of the conveyancing solicitor(s) instructed by the Pension Scheme trustees in respect of the sale.
>
> 6.3. The acceptance of any offer for the Property, including the identity of the proposed purchaser, the proposed sale price and the like details of any other offers that have been made but not accepted.
>
> 6.4. The exchange of contracts, including the contractual date for completion.
>
> 6.5. Completion of the sale of the Property."

37. In the Consequentials Judgment, at [16], the Judge explained why he was including these provisions in the Order,

> "I am satisfied that it is necessary and appropriate for those provisions to be included. [Manolete], as the person interested in the sale of the Property, and the realisation by [Mr. White] 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. [Manolete] 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.*"
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> (my emphasis)

The Appeal and Respondent's Notice

38. Mr. White contends that when viewed against the background of the application by Manolete, the effect of the Judge's Order was that he would not receive his pension from the Scheme, but that it would be attached by Manolete and used to discharge the Judgment Debt, and that this was prohibited by section 91(2). He contends that in making the Order, the Judge adopted an artificial approach that was contrary to the clear meaning and statutory purpose of sections 91(1) and (2) of the 1995 Act that entitlements and rights to future benefits under occupational pension schemes should be immune from the claims of creditors.

39. Manolete contends that the reasoning at first instance in Bacci v Green was correct and that the effect of the Order is to require Mr. White to receive his pension, rather than to restrain him from doing so. Manolete relies on the fact that at present it has no order in its favour enabling it to execute against the money to be drawn down from the Scheme, and it submits that if it does not obtain any further order there will be nothing to prevent Mr. White from doing what he wants with his pension.

40. In the alternative, by an application made at the end of May 2024, Manolete seeks permission to file a Respondent's Notice out of time. Manolete seeks to contend that it has, or is entitled to, a charge on Mr. White's pension fund to secure payment of its Judgment Debt under Scheme Rule 11(5), as permitted by section 91(5)(d). Manolete contends that the Judgment Debt is a liability owed by Mr. White to the Company arising out of negligent or fraudulent actions by him within the meaning of section 91(5)(d), and that the Judge was wrong to suggest otherwise at [79] of the Judgment.

41. Mr. White resists permission being given to Manolete to rely upon its Respondent's Notice. He points out that the argument based upon Scheme Rule 11(5) was not raised before the Judge and was raised only shortly before the appeal hearing. In any event, he contends that the Judge was right to hold that the breaches of fiduciary duty for which he had been found liable did not fall within the exception in section 91(5)(d).

Analysis

The background to section 91

42. As appreciated by the Judge, the background to the inclusion of section 91 in the 1995 Act is to be found in the 1993 report of the Pension Law Review Committee chaired by Professor Sir Roy Goode (the "PLRC Report"). The committee was set up in the aftermath of the scandal over the misuse of pension funds by the late Robert Maxwell, and it was asked to review the framework of law and regulation within which occupational pension schemes operated.

43. In Chapter 4.14 the PLRC Report considered, among other things, (i) whether scheme entitlements under a funded occupational pension scheme should be treated like an ordinary asset, capable of being assigned or charged during the lifetime of the scheme member, and (ii) whether, and if so, in what circumstances, such pension rights might be lost, wholly or in part, through attachment by creditors before or upon bankruptcy.

44. At paragraph 4.14.2, the PLRC Report noted that pension trust deeds almost invariably prohibited dealings with pension entitlements, giving as an example a clause to similar effect as Scheme Rule 11(1) in the instant case (above). The PLRC Report pointed out that such clauses effectively prevented any dealings with pension benefits except to the extent permitted by the trust deed or scheme rules; that except as provided, trustees were not required to recognise the title of any assignee or chargee, and that if such an attempt were made to assign or charge a person's interest under the scheme, the benefits would cease to be payable altogether.

45. At paragraphs 4.14.3 and 4.14.4, the PLRC Report explained and endorsed the policy behind such restrictions on the assignment of pension entitlements,

> "4.14.3 The prohibition against dealings with pension entitlements during a scheme member's lifetime is designed to fulfil two objectives. First, it is intended to avoid additional administrative burdens which would arise if the scheme administrator had to recognise the title of assignees and charges. Secondly, and more fundamentally, the purpose of a pension scheme is not to build up an assignable asset but to provide income to support members upon their retirement and to their dependants on the member's death. The State has an interest in such provision, for in its absence the State itself may have to provide the requisite retirement support. Accordingly, approval of a scheme for tax purposes is dependent on the inclusion of a provision in the trust deed or rules precluding assignment or surrender of a pension except within the permissible limits of commutation or by way of surrender or allocation of pension to provide a pension for a surviving spouse or dependant, or exchange of a non-indexed for an indexed or a lower indexed or a higher non-indexed pension of equal actuarial value.
>
> 4.14.4 The evidence submitted to us shows a broad consensus that pension entitlements should not be disposable during the lifetime of the member. We endorse this approach. We consider

> that quite apart from tax considerations public policy requires that pension rights should be utilised only for the purposes for which they are established. In the United States the provisions of the Internal Revenue Code requiring inalienability as a condition of tax relief have been reinforced by the Employee Retirement Income Security Act (ERISA), which specifically directs pension plans to prohibit assignment or alienation. Section 65 of the Ontario Pension Benefits Act operates even more directly by providing that every transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void. We recommend similar legislation for the United Kingdom, so making inalienability a rule of general application, not merely a condition of approval for taxation purposes or a rule confined to short services benefits, [guaranteed minimum pensions] and protected rights payments. There should be exceptions from this rule to reflect any decisions which may be made on the divisibility of pension rights on divorce, and to accommodate customary arrangements which are consistent with pensions policy, such as transfers to another scheme, limited commutation, surrender of part of pension to provide a pension for a surviving spouse or dependant, and the like."

46. At paragraphs 4.14.20 and 4.14.21 the PLRC Report gave further support to such clauses prohibiting alienation, and specifically indicated that the asset represented by rights to future pension payments should not be available to creditors in the bankruptcy of the scheme member,

> "Attempted alienation
>
> 4.14.20 The typical pension provision referred to above, by which pension rights come to an end on an attempted alienation, is intended to ensure that pension rights are not treated as disposable asset, and to enable the trustees, where alienation is attempted, to make future pension payments to the spouse or dependants of the member. A provision of this kind is considered valid under the existing law so long as it goes not further than limiting the conditions in which future entitlements arise and does not purport to confer a power to forfeit rights to pensions that have come into payment. We consider this to be fully consistent with the policy recommended in paragraph 4.14.4 and see no objection to such provisions.
>
> Bankruptcy
>
> 4.12.21 We recommend later that the asset represented by future pension rights (as opposed to pension payments themselves) should not be treated as a bankruptcy asset. In line with that recommendation we see no objection in provisions in scheme documents allowing trustees to terminate a member's future pension rights on his or her bankruptcy and, and when the

> pension is due to come into payment, to make payments to the member's spouse and dependants."

47. Those considerations then formed the basis for paragraphs 4.14.33 to 4.14.35 of the PLRC Report. As I have indicated, a short extract from paragraph 4.14.33 was relied upon by the Judge in [74] of his Judgment. The Judge did not, however, cite the full terms of those paragraphs, which were as follows,

> "4.14.33 As noted above, future pension rights are in principle an asset of the scheme member and as such are available to be taken in execution to satisfy a judgment debt and to be distributable among creditors in the scheme member's bankruptcy. But since scheme rules nearly always provide for rights of pensions not in payment to cease on levy of execution, attachment of earnings or bankruptcy there is in practice no asset or pension income capable of being attached or otherwise made available to creditors. Accordingly the same factor that precludes assignment renders the asset represented by future pension entitlements immune from the claims of a member's creditors. The position is otherwise, of course, when the pension has come into payment, as regards sums that have been paid over by the trustees to the beneficiary or have become due for payment. These are income in the hands of the scheme member and do not enjoy any greater protection from creditors than any other income of the scheme member.
>
> 4.14.34 It may be thought unfair to creditors that the asset represented by future pension rights should not be attachable. But it has to be remembered that employers do not establish schemes in order to benefit creditors of scheme members, nor is substantial tax relief given for that purpose. To allow future pension entitlements to be attached by execution creditors or made a bankruptcy asset would be to frustrate that fundamental purpose. The evidence submitted to us shows a broad consensus in favour of exempting future pension entitlements from the claims of creditors.
>
> 4.14.35 We therefore consider that the immunity currently granted by the Social Security Pensions Act 1975 to [guaranteed minimum pensions] and entitlements to protected rights payments should be extended to cover all pension entitlements. This would not preclude execution creditors from attaching money in the hand paid to the scheme member or due for payment, nor would it prevent trustees in bankruptcy from exercising their normal statutory right to apply for an income payments order requiring the bankrupt to pay over income in excess of what is necessary for meeting the reasonable domestic needs of the bankrupt and his family. Except as already provided by statute, there is no reason why pension payments made or due to a scheme member should be treated differently from other income in the scheme member's hands or enjoy any special

> immunity. But exemption of the asset represented by the future pension rights would give statutory effect to the protective trust provisions so widely adopted in scheme documents, enabling trustees to pay future benefits to a spouse or other dependent instead of to the scheme member."

48. The PLRC Report therefore drew a clear distinction between (i) monies that have been paid over, or have become due for payment to a member of an occupational pension scheme, and (ii) "future pension entitlements" or "future pension rights" to which the member might become entitled under the scheme in the future. Whilst the former would enjoy no special status when in the hands of the member, the clear intent of the PLRC Report was that entitlements or rights to future benefits under occupational pension schemes should be immune from attachment by judgment creditors, and should not form part of the estate which would vest in a trustee in bankruptcy for the benefit of the general body of creditors of the scheme member.

49. As part of its review of the protection to be given to future benefits under occupational pension schemes, the PLRC Report also considered, at paragraph 4.14.18 et seq., the question of whether provisions in scheme rules giving an employer rights of charge, lien and set-off to recoup loss caused by the misconduct of a scheme member needed to be modified.

50. At paragraph 4.14.30, the PLRC Report commented that as permitted by para 18 of Schedule 16 to the Social Security Act 1973 (which was repealed and replaced at about this time by section 79(2) of the Pension Schemes Act 1993 in the same terms), the rules of a pension scheme might validly empower the employer to exercise a charge or lien on a member's short service benefit, or a set-off against that benefit,

> "… for the purpose of enabling the employer in order to obtain the discharge by the member of some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by the member".

51. The PLRC Report concluded, at 4.14.32, that this legal position was generally satisfactory, but that the conditions that had to be satisfied for the exercise of a charge, lien or right of set-off in respect of short service benefits should be extended to long service benefits, and that it should not be possible for an employer to use such a remedy against benefits due to a surviving spouse or dependent.

The legislative scheme

52. The great majority of the recommendations in the PLRC Report were accepted by the Government and formed the basis for sections 91 to 95 of the 1995 Act: see "*Security, Equality, Choice: The Future for Pensions*" (1993) (Cmd 2594) at paras 1.12 and 1.13.

53. As originally enacted, section 91 of the 1995 Act provided,

> "(1) Subject to subsection (5), where a person is entitled, or has an accrued right, to a pension under an occupational pension scheme—

> (a) the entitlement or right cannot be assigned, commuted or surrendered,
>
> (b) the entitlement or right cannot be charged or a lien exercised in respect of it, and
>
> (c) no set-off can be exercised in respect of it,
>
> and an agreement to effect any of those things is unenforceable.
>
> (2) Where by virtue of this section a person's entitlement, or accrued right, to a pension under an occupational pension scheme cannot, apart from subsection (5), be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension.
>
> (3) Where a bankruptcy order is made against a person, any entitlement or right of his which by virtue of this section cannot, apart from subsection (5), be assigned is excluded from his estate for the purposes of Parts VIII to XI of the Insolvency Act 1986 …
>
> (4) Subsection (2) does not prevent the making of –
>
> …
>
> (b) an income payments order under the Insolvency Act 1986.
>
> (5) In the case of a person ("the person in question") who is entitled, or has an accrued right to a pension under an occupational pension scheme, subsection (1) does not apply to any of the following, or any agreement to effect any of the following
>
> …
>
> (d) … a charge or lien on, or set-off against, the person in question's entitlement, or accrued right, to pension, for the purpose of enabling the employer to obtain the discharge by him of some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by him…"

54. By section 124(2)(a) of the 1995 Act, the "accrued rights" of a member of an occupational pension scheme at any time were defined as the rights which have accrued to or in respect of him at that time to future benefits under the scheme. In Aon Trust v KPMG [2006] 1 WLR 97 at [125] and [181] the Court of Appeal accepted an argument based on dicta in Barclays Bank plc v Holmes [2000] PLR 339 at [129], that the word "entitlement" in a similar provision in section 67(2) of the 1995 Act had in mind a case where the right to payment of a pension had arisen (i.e. a pension already "in payment"), and the phrase "accrued right" related to a member's right to a future pension.

55. Section 91 was amended by the Welfare Reform and Pensions Act 1999 (the "WRPA 1999"). One drafting change, made by paragraph 57 of Schedule 12 WRPA 1999, was to replace the concept of "an accrued right" with "a right to a future pension". That change appears to have made no substantive difference to the regime and to be consistent with the approach taken in Aon Trust.

56. A second, and more substantive, change was that the provisions in relation to bankruptcy in section 91(3) of the 1995 Act were repealed and replaced by section 11 WRPA 1999. The purpose of the change was to extend the protection already given to occupational pension schemes against the claims of creditors in a bankruptcy to other types of pension arrangements, for example personal pensions. To that end, section 11 WRPA 1999 provided, in relevant part,

> "(1) Where a bankruptcy order is made against a person on a bankruptcy application made or petition presented after the coming into force of this section, any rights of his under an approved pension arrangement are excluded from his estate."

The definition of "approved pension arrangement" was originally to be found in the Income and Corporation Taxes Act 1988 but is now to be found in section 153 of the Finance Act 2004. That makes provision for the registration of pension schemes, including occupational pension schemes: see section 150(5) of that Act.

57. When enacting section 11 WRPA 1999, Parliament clearly intended to extend the protection on bankruptcy to a wider variety of pension schemes. There is no indication in any of the legislative materials that Parliament intended to alter or diminish the general immunity from attack by creditors which was given to entitlements and rights to future pensions under occupational pension schemes by the remaining provisions of section 91. That has remained the position.

58. As the PLRC Report discussed, there are specified limitations to such immunity. Most relevantly for present purposes, as highlighted above, section 91(5)(d) of the 1995 Act permits a charge, lien or set-off to be exercised against the rights of a member for the purpose of enabling the employer to obtain the discharge of debts due to it arising out of a "criminal, negligent or fraudulent act or omission" by the member. I shall return to that provision in the context of Manolete's application to rely upon a Respondent's Notice.

59. A further potential inroad into the immunity of entitlements or rights to a future pension under an occupational pension scheme is confirmed by section 91(4) of the 1995 Act which permits the making of an attachment of earnings order or an income payments order if the member becomes bankrupt.[2] Section 95 of the 1995 Act also inserted sections 342A to 342C into the Insolvency Act 1986, providing for the recovery by a trustee in bankruptcy, for the benefit of creditors, of excessive contributions made into

[2] The income payments order regime was examined in relation to a personal pension in Horton v Henry [2017] 1 WLR 391. The Court of Appeal held that when assessing the bankrupt's income for the purposes of making an income payment order under section 310 of the Insolvency Act 1986, the court could not do so on the basis that the bankrupt could be ordered to crystallise and draw down the balance of his personal pension fund. Gloster LJ observed, at [42]-[44], that both the 1986 Act and the 1995 Act draw a clear distinction between, on the one hand, *rights* to elect to receive payments under a pension scheme in the future and, on the other hand, *payments* actually made or to which the member is actually entitled.

an occupational pension scheme within 5 years of the presentation of a bankruptcy petition (or between the presentation of the petition and the bankruptcy order).

The approach to interpretation

60. The words of section 91(2) must be construed against the statutory purpose and the general scheme of the legislation: see e.g. R (PACCAR) v Competition Appeal Tribunal [2023] UKSC 28, [2023] 1 WLR 2594 at [40]-[41].

61. It is also clear that when applying statutory provisions to facts, a court should adopt a "real world" approach: per Lord Wilberforce in WT Ramsay v IRC [1982] AC 300 ("Ramsay") at 326. Accordingly, where a series of individual steps are planned as a composite whole, the statute ought to be applied to that composite whole: see UBS AG v HMRC [2016] UKSC 13, [2016] 1 WLR 1005 at [62].

62. These principles were affirmed by the Supreme Court in a non-tax context in Rossendale BC v Hurstwood Properties [2021] UKSC 16, [2022] AC 690. Lords Briggs and Leggatt (with whom Lords Reed, Hodge and Kitchen agreed) stated, at [12]-[13],

> "12. Another aspect of the Ramsay approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle. Although a statute must be applied to a state of affairs which exists, or to a transaction which occurs, at a particular point in time, the question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether the state of affairs or transaction falls within the statutory description, construed in the light of its purpose. In some of the cases following Ramsay, reference was made to a series of transactions which are "pre-ordained": see e.g. IRC v Burmah Oil Co [1982] STC 30, 33 (Lord Diplock); Furniss v Dawson [1984] AC 474, 527 (Lord Brightman). As a matter of principle, however, it is not necessary in order to justify taking account of later events to show that they were bound to happen - only that they were planned to happen at the time when the first transaction in the sequence took place and that they did in fact happen: see IRC v Scottish Provident Institution [2004] 1 WLR 3172, para 23, where the House of Lords held that a risk that a scheme might not work as planned did not prevent it from being viewed as a whole, as it was intended to operate.
>
> 13. The decision of the House of Lords in Barclays Mercantile Business Finance v Mawson [2005] 1 AC 684 made it clear beyond dispute that the approach for which the Ramsay line of cases is authority is an application of general principles of statutory interpretation. Lord Nicholls of Birkenhead, delivering the joint opinion of the Appellate Committee (which also comprised Lord Steyn, Lord Hoffmann, Lord Hope of

> Craighead and Lord Walker of Gestingthorpe), identified the "essence" of the approach (at para 32) as being:
>
> > "to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description."
>
> Lord Nicholls also quoted with approval (at para 36) the statement of Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets (2003) 6 ITLR 454, para 35, that:
>
> > "… the driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

63. Given the legislative history that I have set out, I consider that the legislative purpose behind sections 91(1) and (2) remains that identified in paragraphs 4.14.34 and 4.14.35 of the PLRC Report. The intention is that a member's entitlement or right to future benefits under an occupational pension scheme should remain available to provide support to that member in retirement, so that, subject to specific exceptions, in the same way that such entitlement or rights should not to be capable of alienation by the member, they should also be immune from attachment to pay the claims of creditors.

64. To that end, it is also notable that section 91(2) is drafted in terms that prohibit the making of an order "the effect of which" would be that a member would be restrained from receiving their pension. The statute does not simply prohibit the making of an order restraining a member from receiving their pension. In my judgment, the wider formulation reinforces the view that the court should look at the substantive result that will follow from the order that it is being asked to make, in the real world context in which it is being asked to make it. The court should not simply focus on the form of the order in isolation.

65. Moreover, given the very clear policy and purpose identified by the PLRC Report that future benefits under occupational pension schemes should be for the support of the member in retirement, and that (subject to the exceptions set out) the entitlement or rights to such future benefits should not be capable of alienation and should be protected from attachment by judgment creditors, in my view, the reference to a member "receiving" their pension in section 91(2) must be to a member receiving the pension *for their own benefit*. Specifically, that would not be the case where the debt giving rise to a pension payment was attached or charged in favour of a judgment creditor, or where the effect of the order would be that, upon receipt, the member would be prohibited from using the pension monies except to pay a judgment debt.

Application of section 91(2) to the instant case

66. As I have explained, so far as the £750,000 balance of the Drawdown Pension Fund is concerned, Mr. White can seek to agree with the trustees that he should receive a payment or payments of income in the future pursuant to Rule 6C(1). Alternatively, under Rule 6C(3) Mr. White can require the trustees to use the balance of that fund to purchase a lifetime annuity for him, commencing on a date to be agreed. As to any further funds that the Scheme might obtain from sale of the Property, Mr. White can ask the trustees to agree that they should be designated as a Drawdown Pension Fund to be held and dealt with in the same way.

67. Prior to such requests and obtaining the agreement of the trustees, Mr. White presently has no entitlement or right to any immediate pension payment from the Scheme, and none will be made. Instead, he falls squarely within the scope of sections 91(1) and (2), being a person who has an entitlement or rights to a future pension under an occupational pension scheme.

68. The relevant question is thus whether the effect of the Order made by the Judge would be that Mr. White would be restrained from receiving the future pension payments which would result from him seeking to exercise such rights under the Scheme Rules.

69. In that regard I consider that it is entirely clear that the order sought by Manolete, as originally framed in the application, and indeed as set out in the draft provided by Mr. Curl to the Judge, would have contravened section 91(2). The application simply sought an order that Mr. White exercise any and all of his rights under the Scheme Rules and that he instruct payment of his pension to be made directly to Manolete. In no sense could it be said that Mr. White would receive such payment. Nor was the alternative sought by Manolete any better: it sought a third party debt order to take effect at the moment that a debt became due to Mr. White from the Scheme trustees. That would also have operated to prevent Mr. White receiving any of his pension monies.

70. Mr. Curl's revised draft order was no different in substance. It required Mr. White to direct that payment should be made into a designated account, whereupon *Manolete* would apply the monies in payment of the former trustee's fees, in payment of any tax liability, and then directly in discharge of the Judgment Debt. Although the mechanism was not spelled out, it is apparent that at all relevant times the monies would be under the control of Manolete to be applied as specified. Again, in no sense would such monies be received by Mr. White in any capacity.

71. The Order which the Judge eventually made was different in form to the orders originally sought in the application or as proposed by Mr. Curl. Although the Judge had earlier indicated at [17] of his Judgment that he did not think that whatever order he crafted would change the substance, he nonetheless explained, at [74], that the feature of the Order that in his view prevented it from contravening section 91(2) was that it provided for any monies drawn down to be paid into a nominated UK bank account in Mr. White's own name. But even if paid into an account in Mr. White's own name, I consider that it was quite plain that Mr. White was never intended to be able to access or use those monies for his own benefit. As the Judge made clear, both in [17] and [74] of his Judgment, the objective of his Order was that what he described as Mr. White's "pension pot" would be used to satisfy Manolete's Judgment Debt.

72. To that end, the Judge accepted the submissions on behalf of Manolete that Mr. White should have to give advance notice to Manolete of the details of the bank account into which any payment would be made, together with details of the progress of the sale of the Property which would enable any further pension payments to be made. In [16] of his Consequentials Judgment, the Judge could not have been clearer that his purpose in requiring such information to be given was so that Manolete could have the time to prepare to take steps enforce its judgment against that bank account.

73. On appeal, Mr. Curl sought to rely upon the fact that Manolete does not, as yet, have any further order which would prevent Mr. White from using the funds paid into the nominated bank account for his own benefit. That argument was totally unreal. Consistent with the intention plainly manifested in its application and in its earlier draft order, Manolete went to the trouble of persuading the Judge to make an order that it should be given advance notice of the nominated bank account into which payment was to be made, together with information as to the progress of sale of the Property so that it could "police" the Order, as if it had a freezing injunction or an order for sale of the Property. The clear intention behind such provisions was to facilitate Manolete applying for an order prior to any payment being made by the Scheme so as to ensure that Mr. White would not be at liberty to use any pension monies for his own benefit.

74. In the real world, the idea that Manolete would stand idly by and permit the pension monies to be paid by the Scheme to Mr. White and then to be disbursed by him from his account is absurd. Indeed, if Manolete were not intent upon obtaining Mr. White's "pension pot" to satisfy its Judgment Debt, then it is not immediately apparent what standing or interest it had in asking the court to interfere with Mr. White's choices as regards his pension in the first place.

75. In reality, Manolete's argument amounted to an assertion that the Order made by the Judge requiring Mr. White to draw down his pension was not prohibited by section 91(2) because it did not itself prevent Mr. White from receiving his pension monies; but when Manolete then came to make its application to enforce its judgment over the monies in the designated account, it would doubtless contend that such enforcement order would also not fall foul of section 91(2), because it would apply to monies which by then had actually been paid or were due to be paid into Mr. White's account. In essence, Manolete's contention is that by making two orders in sequence, the court can achieve a result that would plainly be prohibited if it were to make one composite order. That is precisely the type of artificial and non-purposive approach to the interpretation and application of a statute that has been firmly rejected in cases such as Ramsay, UBS AG v HMRC and Rossendale BC v Hurstwood Properties.

76. Instead, in my view, the correct approach to section 91(2) required the Judge to take a more realistic and purposive view of the order he was being asked to make. He should have recognised that his Order formed part of a pre-planned sequence of steps that was designed to enable Manolete to enforce its Judgment Debt over the monies required to be drawn down from the Scheme and paid into the designated account. As such, the Order had the prohibited effect that Mr. White would be prevented from receiving his future pension from the Scheme.

77. Although the Judge supported his decision by adopting the very brief reasoning at first instance in Bacci v Green, I do not consider that such reasoning can withstand scrutiny. I should stress that this is not intended as a criticism of the deputy judge in that case,

since it is very clear that the section 91 point was not argued before him. As indicated above, Andrew Hochhauser QC stated,

> "The order does not have the effect of restraining [the defendant] from receiving the pension. It does the precise opposite - it ensures that payment of [the defendant's] pension is effected, rather than remaining trapped in the fund."

78. With respect, this reasoning was incomplete and missed the point of the legislation. It did not address the underlying statutory purpose of section 91(2) and took an unrealistic view of the order in isolation. By focussing on the position of the fund, rather than the member, the deputy judge did not consider the capacity in which the member might receive payment, or any restrictions on the use to which the member could put the pension money. Specifically, the reasoning did not consider whether it should make any difference that when the monies were paid into the designated account, they would be subject to the worldwide freezing order that was in place, and nor did it take into account that there was intended to be an application for a third party debt order in favour of the claimants. In my judgment, those factors plainly meant that the effect of the order was that the defendant would not be free to receive his future pension for his own benefit, and hence I consider that it was prohibited by section 91(2).

79. At [74] of the Judgment in the instant case, the Judge also referred to the PLRC Report as further justification for his decision. Again, however, I do not think that his reasoning stands scrutiny. The Judge stated,

> "As [paragraph 4.14.33 of the PLRS Report] makes clear, whilst the asset represented by future pension entitlements is immune from the claims of a member's creditors,
>
> > "The position is otherwise, of course, when the pension has come into payment, as regards sums that have been paid over by the trustees to the beneficiary or have become due for payment. These are income in the hands of the scheme member and do not enjoy any greater protection from creditors than any other income of the scheme member.""

80. As I see it, that passage focussed on the wrong part of paragraph 4.14.33 of the PLRC Report, omitted reference to the relevant parts of paragraphs 4.14.34 and 4.14.35, and begged the very question that the Judge had to decide.

81. At the start of this passage, the Judge brushed over the fact that Section 91(2) was designed to give effect to the clear recommendations in the PLRC Report that a member's entitlement or right to future pension payments was an asset that should be immune from the claims of creditors. Instead, the Judge cited the second part of paragraph 4.14.33 which dealt with the position that would apply if a draw down notice had been given, and benefits had either already been paid over to the member, or had become due for payment. But as I have explained, that was not the position in the instant case. Mr. White has not been paid any money from the £750,000 balance of his Drawdown Pension Fund, and in the absence of any agreement with the trustees he has no present right to any such payment. Nor does he have any present right to payment of any other monies derived from realisation of the Scheme's remaining assets. And

whether section 91(2) prohibited the making of an order requiring Mr. White to take steps to obtain and exercise such rights in a way that would enable Manolete to take steps to execute its Judgment Debt over such future payments was the very question before the Judge.

82. For these reasons, I consider that the Order made by the Judge was prohibited by section 91(2) and Mr. White's appeal should be allowed.

83. In deciding that the appeal should be allowed, I am acutely conscious that it might well be thought that the underlying merits of the case are not on Mr. White's side. He has not paid the large Judgment Debt against him, the many small creditors of his failed Company remain unsatisfied, and he stands to continue to benefit from the Scheme and the Property that it owns.

84. Broad merits-based considerations such as these played a part in the approach of the courts to the exercise of discretion in Blight v Brewster and Bacci v Green. So, for example, in Bacci v Green in the Court of Appeal, Newey LJ commented, at [33],

> "33. In my view, the public policy which led Parliament to protect pension rights in bankruptcy will, at most, normally be a factor of very limited significance when a court is considering whether to grant relief to a creditor in respect of a judgment founded on fraud by the debtor. While Parliament evidently thought it right to provide protection for pension rights *in bankruptcy*, it is equally clear that its intention has been that debts arising from fraud should survive bankruptcy, and it has nowhere said that the creditor should then be unable to have resort to the debtor's pension rights in the way that he could have done pre-bankruptcy or a post-bankruptcy creditor could. Nor is that surprising. In Blight v Brewster, Mr. Moss commented that "The idea that the fraudster and forgerer can enjoy an enhanced standard of living at his retirement instead of paying the judgment debt would be a very unattractive conclusion". While Mr. Moss made the remark in the context of the particular case before him, it has a wider resonance."

85. As I have explained, however, Blight v Brewster was not a case involving an occupational pension scheme, it and Bacci v Green were both cases of actual fraud, and Newey LJ made his remarks in Bacci v Green without the section 91 point having been taken. In contrast, the instant case involves an occupational pension scheme in which the section 91 point has been taken, and no-one is suggesting that Mr. White has been found guilty of actual fraud.

86. It might also be said that the Scheme in this case, which exists for the sole benefit of the owner and controller of a small private company, bears little resemblance to the typical occupational pension scheme operated by an employer for the benefit of a more numerous workforce that was the focus of the PLRC Report. But at the risk of stating the obvious, the argument advanced by Manolete in the instant case would have the result that the protection of section 91(2) could be by-passed in any case where an employee member of a more typical occupational pension scheme owed a judgment

debt, leaving the decision whether to deprive the employee of his future pension to the individual judge's view of the merits.

87. For the reasons that I have explained, that is not the law. Where occupational pensions are involved, the courts must give effect to the statutory regime in section 91(2), which reflects the balance which Parliament has chosen to strike between the public policy of protecting such pensions from the claims of creditors, and the public policy of ensuring that judgment debts are paid. It has done so by a general prohibition in section 91(2) on creditors having access to entitlements and rights to future pensions from occupational pension schemes, subject to a number of specific exceptions.

88. The exceptions to the general prohibition include section 91(5)(d), which permits clauses such as Scheme Rule 11(5), allowing an employer to charge occupational pension benefits with the discharge of liabilities owed to the employer arising from certain types of misconduct by the scheme member. That exception was not relied upon before the Judge, but it formed the basis of Manolete's (late) application to rely upon a Respondent's Notice, to which I now turn.

The Respondent's Notice

89. Manolete seeks to advance a new argument on appeal that the Judge's Order should be upheld as the enforcement of such a charge under Scheme Rule 11(5), arising from Mr. White's misconduct in relation to the Company.

90. The basis upon which the Court of Appeal will permit a new point to be taken on appeal was discussed in Notting Hill Finance v Sheikh [2019] EWCA Civ 1337, [2019] 4 WLR 146. After referring to Singh v Dass [2019] EWCA Civ 360, I stated, at [26]-[28],

> "26. … there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.
>
> 27. At one end of the spectrum are cases such as Jones v MBNA International Bank [2000] EWCA Civ 514 in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight….
>
> 28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which

> can be run on the basis of the facts as found by the judge in the lower court: see e.g. Preedy v Dunne [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

91. I would note, in passing, that because the point in relation to Scheme Rule 11(5) was not raised before the Judge, there was no finding in the Judgment as to whether the assignment by the liquidators to Manolete of the Company's causes of action against Mr. White also included the benefit of any charge over Mr. White's pension entitlements under Scheme Rule 11(5), so as to enable Manolete to seek to take steps to enforce such charge. The causes of action assigned were defined in the assignment in very broad terms, but the assignment did not mention the Scheme Rules or any such charge. The point was not, however, taken by Mr. Pomfret KC.

92. Even assuming that Manolete would be entitled to enforce such a charge, for the following reasons I consider that this case falls at the wrong end of the spectrum of cases that I referred to in Notting Hill Finance v Sheikh, and that permission should not be given for Manolete's argument to be raised for the first time on appeal.

93. Looking, first, at the nature of the proceedings before the Judge, there is very limited information as to the basis upon which the Judge made his findings on liability against Mr. White. That is because, for reasons not fully explained, a transcript of the substantive judgment which formed the basis for the Judgment Debt is not available. Moreover, since Manolete did not raise the Scheme Rule 11(5) point at the hearing of the application under section 37, the Judge did not deal with the basis of his findings on liability other than in his very brief observations in [77] and [79] of the Judgment. On the face of it, therefore, this Court cannot consider the Scheme Rule 11(5) point on the basis of the facts as found by the Judge, since we have no reliable information as to what those facts were.

94. Further, to the extent that the Judge did address the wording of section 91(5)(d) in paragraphs [77] and [79] of his Judgment, it is clear that he did not consider that Mr. White's liability arose out of a criminal, negligent or fraudulent act or omission. The Judge indicated that he obtained no assistance in the exercise of his discretion from the terms of section 91(5)(d), because his findings were of "misfeasance as a company director, in breach of the strict fiduciary duties he owed to the company". This clearly implied that the Judge thought that, on the facts, the basis for Mr. White's liability fell outside section 91(5)(d).

95. In an attempt to overcome such problems, Mr. Curl sought to suggest that irrespective of the facts, since Mr. White had been found liable for breach of fiduciary duty in misapplying company assets, there could only be one answer to the question of whether Scheme Rule 11(5) applied as a matter of law. Mr. Curl submitted that the Judge's dismissal, in [79], of the relevance of section 91(5)(d) was "obviously wrong", because (i) any breach of fiduciary duty constitutes "equitable fraud" which falls within the meaning of "fraud" in section 91(5)(d); (ii) any misapplication of company funds is necessarily a breach of the duty of a director to exercise reasonable skill and care under section 174 of the Companies Act 2006, and is within the meaning of "negligence" in section 91(5)(d), irrespective of the source of such duty; and (iii) on the scale of

misconduct, it would be absurd if section 91(5)(d) permitted a charge to be imposed for negligence as well as for fraud, but not for any breach of fiduciary duty.

96. It is unnecessary for the purposes of this case finally to decide the point, but suffice to say that for (at least) the following reasons, Mr. Curl's contention that any liability for breach of fiduciary duty necessarily falls within the exception in section 91(5)(d) is very far from obvious as a matter of law.

97. First, we were not shown any authorities on the origins of the critical wording in section 91(5)(d) of the 1995 Act, or the Social Security Act 1973 that preceded it. The simple fact is that the words do not refer to breach of fiduciary duty. That was a concept well known in the context of employees in 1973, and that omission was unlikely to have escaped the notice of the Pension Law Review Committee which looked at the wording and expressed themselves satisfied with it in 1993. If it had been intended to permit a charge on occupational pension rights or entitlements in a case of liability arising from a breach of fiduciary duty, that could easily have been said expressly when the 1995 Act was drafted.

98. Secondly, I very much doubt that the draftsman of section 91(5)(d), who referred to the common law concepts of criminality, negligence and fraud, would have intended that the latter term should also include the rather archaic and vague concept of "equitable fraud". Although the term "fraud" had come to be used in the nineteenth century in the old Courts of Chancery to mean any breach of duty to which equity had attached its sanction, the importation of such a concept into other areas of law had long been criticised: see Nocton v Lord Ashburton [1914] AC 932 at 953-4 per Viscount Haldane LC, referred to by Millett LJ in Armitage v Nurse [1998] Ch 241 at 250C-G.

99. Thirdly, there is a clear conceptual distinction between breaches of fiduciary duty and breaches of a duty of care. That was explained in the seminal decision of Millett LJ in Bristol and West BC v Mothew [1998] Ch 1 at 16-19, making the point that the distinguishing obligation of a fiduciary is the obligation of loyalty, and (agreeing with the comments of Ipp J in Permanent Building Society v Wheeler (1994) 14 ACSR 109 at 158), that a director's duty to exercise skill and care is not a fiduciary duty. Likewise, and with particular relevance to the Judge's comments in the Judgment at [79], liability for breach of fiduciary duty can be strict, and need not involve any lack of good faith or lack of care on the part of the fiduciary: see e.g. Regal (Hastings) v Gulliver [1967] 2 AC 134 and Boardman v Phipps [1967] 2 AC 46.

100. Fourthly, and following on from the third point, I do not think that it would be absurd if section 91(5)(d) were to permit an employer to impose a charge on the occupational pension entitlements of a scheme member if they had caused loss due to negligence, but did not permit it to do so in every case of breach of fiduciary duty. Whilst some breaches of fiduciary duty may be egregious and cause substantial loss, that is not always the case. Some breaches of fiduciary duty can arise without fault and may not cause any loss to the employer – e.g. where the member exploits an opportunity obtained because of their fiduciary position, but does so in good faith and without any lack of care, in circumstances in which the employer could not take up the opportunity itself. Precisely where a particular breach of fiduciary duty falls on the spectrum of wrongdoing will be very fact-sensitive, and to permit an employer to impose a charge on the occupational pension entitlements of an employee in any case which could be characterised as a breach of fiduciary duty would be a far-reaching step.

101. I would therefore refuse permission for Manolete to rely upon its Respondent's Notice.

Disposal

102. I would allow the appeal and set aside the Order.

103. Since preparing this judgment in draft I have had the benefit of reading the draft judgments of Lord Justice Green and Lady Justice Asplin. I agree with the observations in both those judgments.

Lord Justice Green:

104. I agree with the judgment of Lord Justice Snowden for the reasons that he has given, and with the additional observations of Lady Justice Asplin. I wish to add one observation which takes as its starting point the analysis of statutory purpose in both of those judgments. The order under appeal was the exercise of judicial discretion pursuant to section 37 of the Senior Courts Act 1981. Pursuant this power the High Court may by order grant an injunction in all cases in which it appears to the court to be "just and convenient to do so".

105. There are two ways of analysing the present case. First, the High Court exercised its powers so as to achieve a result expressly prohibited by primary legislation. Secondly, the High Court exercised its power to achieve a result not explicitly prohibited, but which nonetheless led to a result contrary to the purpose of the primary legislation.

106. In the argument before us it was submitted, in particular by the respondent, that the exercise of the statutory power under section 37 did not collide with the prohibition in section 91. The argument advanced was that the order was consistent with the statutory regime under the Pensions Act 1995. It was argued that it was not an improper use of section 37 to make an order which tested the very limits of the statutory prohibition, being only by a microscopically thin slither outside the prohibition.

107. There can be little doubt but that the exercise of discretion to bring about a result prohibited by a statute is an illegitimate exercise of the statutory power under section 37. The gravamen of the argument before us was that the order in question did not collide with the statutory purpose. In the view of both Lord Justice Snowden and Lady Justice Asplin this argument lacked reality. I agree.

108. I would add only that, even if it were the case, to test the argument, that the order made did not strictly speaking collide with the section 91 it would nonetheless, in my judgment, remain an unlawful exercise of the section 37 power because it plainly thwarted the clear statutory purpose and brought about a result undermining Parliament's intent.

109. This is not a case where the court was exercising its injunctive power to address something which was at the very border of, but nonetheless properly beyond, a statutory limitation. This is a case where the order made by exercise of the discretionary power was contrary to the evident will of Parliament and was manifestly crafted by recourse to what can only be described as a circumventory artifice.

110. Putting the point in the context of the language of section 37, it was not an order that it was "just and convenient" for the court to make.

Lady Justice Asplin:

111. I, too, would allow the appeal and set aside the Order for the reasons given by Lord Justice Snowden. I also agree with the further observations of Lord Justice Green. In my judgment, the circumstances fall squarely within section 91(1) and (2) of the Pensions Act 1995.

112. First, as a beneficiary of the Scheme, Mr. White has no right or entitlement to the Property which is a Scheme asset. Nor is he entitled to require the trustees of the Scheme (which happen to be himself and his son) to sell the Property. That is for the trustees to determine in accordance with their fiduciary duties and the requirements of the Rules of the Scheme. Mr. White is entitled, qua beneficiary, to ask for any amount available under Rule 6A of the Rules of the Scheme to be designated as a further Drawdown Pension Fund: Rule 6A(6). Of course, were he to do so, he and his son, in their capacity as trustees, in exercise of their fiduciary duties, would have to consider whether to agree and when doing so they would have to decide whether it was appropriate to sell the Property, being the only further substantial asset in the Fund.

113. Secondly, even if Mr. White were to exercise his entitlement under Rule 6A(6) to ask for an amount to be designated as a further Drawdown Pension Fund, he would not become entitled to receive a pension. As Snowden LJ points out, at that stage, the provisions contained in Rule 6C come into play. Under that rule, Mr. White "shall agree" with the trustees the income to be withdrawn from the Drawdown Pension Fund in each Drawdown Pension Year. It is possible that he may seek to agree an income of zero. Whatever the level of income proposed, even though Mr. White and his son are the trustees, they may not agree to the proposal put forward by Mr. White as beneficiary. In my judgment, therefore, no present right to a pension arises at that stage.

114. Thirdly, the same is true in relation to the £750,000 odd which may still be within the first Drawdown Pension Fund from which Mr. White received £250,000. The payment of income in any Drawdown Pension Year is subject to agreement between Mr. White as beneficiary and the trustees (who, as I have already mentioned, happen to be Mr. White and his son). There can be no present right to that income, in the sense of a right to payment until, at the very earliest, an agreement is reached.

115. The Judge's Order takes no account of the separate legal identity of the trustees and the need for agreement. It assumes that a beneficiary of an occupational pension scheme, in the circumstances which apply under the relevant Rules of this Scheme, can merely direct the trustees how to proceed and require them to do so. This is not the case.

116. Further, I agree with Lord Justice Snowden that it is necessary to focus on the reality of the Order. It is wholly unrealistic to suggest that the Order would not restrain Mr. White from receiving a pension. Although the sum would be paid into a bank account in his name, such a payment would be merely a step towards payment of that sum to Manolete. To suggest that Mr. White would, nevertheless, "receive" the sum is absurd.

117. As I have already mentioned, I also agree with Lord Justice Green that the Order which was made by the exercise of a discretionary power was contrary to section 91 and was crafted in an attempt to circumvent the effect of the section. It cannot be "just and convenient" for the court to exercise a power in such a way.