



PENSION POTS: AN ASSET BEYOND THE REACH OF CREDITORS?

Manolete Partners PLC v White [2024] EWCA Civ 1418

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Introduction

On 15 November 2024 the Court of Appeal handed down judgment in a case concerning the ability of judgment creditors to obtain an injunction requiring a judgment debtor to draw down a lump sum from an occupational pension scheme of which they are a member, in order to make that lump sum available to the creditor.

The Court held that s.91(2) of the Pensions Act 1995 (“PA 95” and “s.91”)) prevented such an injunction being granted. In so doing it quoted extensively from the 1993 report of the Pension Law Review Committee chaired by Professor Sir Roy Goode (the “PLRC Report”) and concluded that the “clear intent” of that report was that pension rights that a member would become entitled to under an occupational pension scheme should be immune from attachment by judgment creditors. The Court construed s.91 so as to give effect to that intention.

Previous cases have reached the contrary conclusion, though in none of them has it been argued that s.91 prevented the order being made. Thus in *Blight v Brewster* [2012] EWHC

165 (Ch) an equivalent order was made against a member of a personal pension scheme, not an occupational pension scheme, and so s.91 did not apply. In *Bacci v Green* [2022] EWHC 486 (Ch) the court ordered a member of an occupational pension scheme to delegate to a judgment creditor's solicitor his power to revoke enhanced protection for tax purposes and to elect to receive a lump sum payment (which could then be the subject of a third party debt order in favour of the creditor). In that case it was not argued that s.91 prevented such an order. *Bacci v Green* concerned a judgment in fraud but it has been followed in cases not involving fraud.¹ In those cases also it was not argued that s.91 prevented the order being made.

Key Facts

Mr White owned and controlled a company called Lloyds British Testing Limited, which entered liquidation in 2017. The liquidators assigned certain claims that the company had against Mr White for breach of fiduciary duty to a litigation funder called Manolete. Manolete then obtained judgment against Mr White for c.£1m, which it sought to enforce.

Mr White was the only member of an occupational pension scheme that the Company had established for his benefit. He had reached normal retirement age in 2017. At that time he had exercised a right under the scheme's rules to ask for some of the moneys available to him under the scheme to be designated a "Drawdown Pension Fund", and agreed with the trustees to take £250,000 from that fund. A balance of £750,000 remained.

At first instance, the Judge made an order under s.37 of the Senior Courts Act 1981 that Mr White should (i) give notice to the trustees of the pension scheme "*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*", (ii) direct the trustees to pay the funds drawn down into a nominated bank account in his name, and (iii) notify Manolete of that account.

¹ *Brake v Guy* [2022] EWHC 1746 (Ch) and *Lindsay v O'Loughnane* [2022] EWHC 1829 (QB).

The Judge's stated intention was to allow Manolete to enforce its judgment against that bank account. The Judge said that he was following the approach in *Blight v Brewster*, and applied the reasoning in *Bacci v Green* to explain why s.91 did not prevent him making the order.

Section 91 of PA95

This section provides as follows (insofar as is relevant):

91. — *Inalienability of occupational pension.*

(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,*
- (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 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.*

...

(4) *Subsection (2) does not prevent the making of—*

- (a) an attachment of earnings order under the Attachment of Earnings Act 1971, or*
- (b) an income payments order under the Insolvency Act 1986.*

(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—*

(a) an assignment in favour of the person in question's widow, widower, surviving civil partner or dependant,

(b) a surrender, at the option of the person in question, for the purpose of—

- (i) providing benefits for that person's widow, widower, surviving civil partner or dependant, or*
- (ii) acquiring for the person in question entitlement to further benefits under the scheme,*

(c) a commutation—

- (i) of the person in question's benefit on or after retirement or in exceptional circumstances of serious ill health,*
- (ii) in prescribed circumstances, of any benefit for that person's widow, widower, surviving civil partner or dependant, or*
- (iii) in other prescribed circumstances,*

- (d) *subject to subsection (6), a charge or lien on, or set-off against, the person in question's entitlement, or right, (except to the extent that it includes transfer credits other than prescribed transfer credits) 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,*

...

- (6) *Where a charge, lien or set-off is exercisable by virtue of subsection (5)(d), (e) or (f)*

- (a) *its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question's entitlement or accrued right, and*

- (b) *the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme, and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.*

...

The Appeal

Mr White argued that the order of the first instance judge was prohibited by s. 91(2) of PA 95. When seen in the context of Manolete's plans to attach moneys in the relevant bank account, the effect of the judge's order was that Mr White would not "receive" his pension; Manolete would. That was contrary to the statutory purpose of s.91, namely to protect pension entitlements from creditor claims.

Manolete argued the contrary, on the basis that the judge's order did not prevent Mr White receiving his pension but achieved the precise opposite. It compelled him to draw the pension down, into his bank account, and no more.

Manolete also sought to file a late Respondent's Notice that relied on s.91(5)(d). Manolete argued that the underlying judgment against Mr White, based on breach of his fiduciary duties, gave rise to a monetary obligation due to it (as assignee of the employer in question) arising out of a "negligent" or "fraudulent" act within the meaning of s.91(5)(d).

The Court of Appeal's Judgment

The lead judgment was given by Lord Justice Snowden, with whom Lady Justice Asplin and Lord Justice Green agreed and added brief judgments of their own.

The Court refused to allow the late Respondent's Notice, but did say that it was "far from obvious" that a liability for breach of fiduciary duty fell within the terms "negligence" or "fraud" in s.91(5)(d). Manolete argued that (i) breach of fiduciary duty amounted to "equitable fraud" and therefore "fraud" in s.91(5)(d), and (ii) that by misapplying company funds in breach of his director's duty to exercise reasonable care and skill Mr White was guilty of "negligence" for the purposes of s.91(5)(d). Snowden LJ doubted that "fraud" in s.91(5) included the "rather archaic and vague concept" of equitable fraud, and noted that breach of fiduciary duty was inherently different to negligence. The former can arise without fault and without causing loss, such as where the director takes personal advantage of an opportunity that belongs to the company, even where the company could not afford to take it up.²

As regards the appeal, Snowden LJ concluded that the legislative purpose behind s.91(1) and (2) was that identified in the PLRC Report, namely that a member's entitlement or right to future benefits should be available to fund retirement and not be vulnerable to enforcement action by creditors. He interpreted s.91(2) so as to give effect to that purpose, including by construing the reference to "receiving" in s.91(2) as "receiving for [the member's] own benefit". Thus Manolete's argument that the order compelling Mr White to draw down was one that resulted in him "receiving" his pension was rejected; the order would not result in him "receiving" it for his own benefit, but instead would result in him placing it in a bank account for Manolete to enforce against.

² *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

As regards the previous cases, Snowden LJ noted that s.91 does not apply to personal pensions and so was not in issue in *Blight v Brewster*. He also noted that in *Bacci v Green* the s.91 issue had not been argued, and the judge's treatment of it was accordingly brief (but also partial, and wrong).

Asplin LJ stressed a different point in her judgment, and one that is relevant to personal pensions. She identified the various steps to be taken under the scheme rules before Mr White had any present right to his pension, in the sense of a right to payment. Those steps included asking the trustees to designate money as a Drawdown Pension Fund, and "agreeing" with the trustees the amount of income to be paid from that fund. Asplin LJ said:³

"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."

An order that simply compels a member to take certain steps regarding their pension thus ignores the role of the trustees and may well not result in any pension falling due.

Notes for the Future: (1) pensions schemes other than occupational pension schemes

It is worth noting that a number of pension schemes are not affected by s.91, so that enforcement against members "pots" in those schemes remains possible.

Firstly, s.91 does not affect overseas pension schemes, which are not uncommon for well-paid individuals. One reason for this is that before 2006 HMRC granted approval to certain occupational pension schemes, but provided that salary above an "earnings cap" could not be taken into account in calculating benefits. As a result, executives benefited from setting up "unapproved" retirement benefit schemes (URBS), which were not infrequently

³ At [115].

set up offshore and thus outside the protections of s.91. Since 6 April 2006 the equivalent has been an employer-financed retirement benefit schemes (EFRBS), also not uncommonly set up using an offshore trust. Local law, and the terms of the scheme's trust deed, will determine whether and how enforcement can take place in relation to such schemes.

Secondly, s.91(1) makes clear that s.91 applies only to entitlements under an "occupational pension scheme". That phrase is defined in s.1 of the Pension Schemes Act 1993 (see s.176 of PA 95), using a definition that excludes personal pension schemes.

It therefore appears that judgment creditors are still able to enforce against rights in personal pensions, following *Blight v Brewster*, but that members of occupational pension schemes enjoy far greater protection.

A similar difference in treatment occurred as regards the vesting of pensions in trustees in bankruptcy under s.306 of the Insolvency Act 1986, before the passage into law of s.11 of the Welfare Reform and Pensions Act 1999. As the Court of Appeal explained in *Re Henry (a Bankrupt)*,⁴ before that Act a bankrupt's rights under a personal pension vested in his trustee in bankruptcy whereas rights under an occupational pension scheme were made unassignable by s.91, could be forfeit on bankruptcy under s.92 PA 95, and thus did not vest.

That appeared unfair, and indeed discriminatory against the self-employed, but in *Re Malcolm*,⁵ the Court of Appeal dismissed an appeal against a decision that the fact that an occupational pension scheme could lawfully contain a forfeiture clause operative upon the bankruptcy of a member, whereas a personal pension policy could not, did not constitute unlawful discrimination against the bankrupt owner of a personal pension in the peaceful

⁴ [2016] Pens LR 311.

⁵ [2004] EWCA Civ 1748.

enjoyment of his possessions contrary to art.14, read with art.1 of the First Protocol to the ECHR.⁶

“[T]he differential treatment in bankruptcy of the contractual pension rights of the self-employed and the pension rights of those employees who are members of an occupational pension scheme set up by way of trust which (under the trust provisions) provide for forfeiture of rights on bankruptcy, is not a difference of treatment based on discrimination on the grounds of status - or on any other ground which offends that Article ... The differential treatment arises because the rights are not similar”.

Is the same differential treatment now in place for enforcement by judgment creditors? One answer lies in the judgment of Asplin LJ and in a careful consideration of the rules of the personal pension. If they, like the rules in Mr White’s case, require agreement by the trustees or exercises of discretion then it may be that the member has no present right to a pension and no ability to direct the trustees to pay it. In such a case the model of *Blight v Brewster* becomes problematic because the court is not merely compelling the member to draw down, but is also requiring choices to be made as to whether to draw down as lump sum, annuity, other income, or combinations of these. These considerations caused the Court of Appeal in *Re Henry*⁷ to conclude that an income payments order was not available where a member had only a right to elect to draw down a personal pension but had not done so. They may lead a court to decline to direct a member of a personal pension to draw down their fund.

This is not a straightforward area. The origin of the *Blight v Brewster* analysis is the flexibility of the court’s jurisdiction under s.37 of the Senior Courts Act 1981 to appoint a receiver by way of equitable execution over an asset that was not presently amenable to execution at law. An order appointing such a receiver may also require the judgment debtor to delegate powers to the receiver, so that the receiver can access assets.⁸ A receiver will not

⁶ At [27].

⁷ *Supra*, at [47].

⁸ e.g. *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721, concerning a power of revocation of a trust.

be appointed to receive an interest in a fund where the disposal of it depends on the absolute discretion of trustees; by contrast, if the debtor has rights “tantamount” to ownership e.g. by controlling third parties, then a receiver might be appointed.⁹ It will be necessary to consider the rules and context (including the issue of control) of the personal pension with care.

Notes for the Future: (2) reframing the underlying judgment

The decision is also likely to result in a new focus on s.91(5)(d) in cases brought against members by employers or their assignees. With hindsight, it is likely to have been possible to frame the case for breach of director’s duties against Mr White as one in negligence, if not actual deceit, and to obtain a judgment falling within that subsection. That could then have supported a charge against Mr White’s entitlements under the scheme.

Two issues that will need consideration in that scenario are (i) the terms of any deed of assignment, and (ii) the need for an English court judgment or an arbitration award. As to (i), assignees will have to ensure that their deeds of assignment are broad enough to include the right to such a charge, as well as the underlying claims for e.g. breach of fiduciary duty. As to (ii), s.91(6) provides that in the event of a dispute as to the amount of a member’s liability to the employer, *“the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator”*. The term “competent court” is not defined in PA 95. In *Pensions Ombudsman v CMG Pension Trustees Ltd*,¹⁰ it was held not to include the Pensions Ombudsman, but the King’s Speech of July 2024 announced plans to change that status. In short, some planning may be needed to ensure that an attempt to rely on s.91(5)(d) does not fall foul of other parts of s.91.

⁹ *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139. See further Kerr & Hunter on Receivers & Administrators, 22nd edn, Chapter 3 “Over what Property a Receiver may be appointed” (edited by Prof P Walton and one T Robinson...).

¹⁰ [2024] Pens LR 3.

Conclusion

The Court's decision is a robust application of the principle in the PLRC Report that future pension rights in occupational pension schemes should not be available to pay creditors in a member's bankruptcy or by reason of enforcement action pre-bankruptcy. There are limitations to that immunity, including a charge under s.91(5)(d) but also an attachment of earnings order or an income payments order.¹¹ Perhaps more interesting is the position of personal and overseas pensions, and the impact of Asplin LJ's judgment on the availability of enforcement against such pensions by means of a receiver or equivalent jurisdiction.

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¹¹ s.91(4).