KEY POINTS

- *Blight v Brewster* relied on the debtor being forced to elect to draw down a tax-free lump sum; this would give rise to a debt due from the pension provider to which the judgment debt could attach.
- Scheme rules may confer a discretion on pension providers whether or not to give effect to an election. In such a case, it is likely that the provider should exercise the discretion in the best interests of the judgment debtor.
- It is doubtful whether the best interests of the judgment debtor are best served by paying the proceeds of his or her pension fund over to the judgment creditor.

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Enforcing judgments against pension assets: reappraising *Blight v Brewster*

The decision in *Blight v Brewster* [2012] EWHC 165 (Ch) opened up the possibility of enforcing a judgment debt against the debtor's pension fund where the debtor was over 55 and had not already elected to purchase an annuity. However, the decision did not give any consideration to the rules of the pension scheme, and this article explores their potential impact.

PENSION SCHEMES

For many working people, their most valuable asset after their home is their private pension fund. Indeed, since the introduction of auto-enrolment, which is being phased in between October 2012 and October 2018, the proportion of the population for whom this statement is true is only likely to increase. This makes private pension assets a tempting target for judgment creditors. (Because the state pension is not paid from a defined fund, there is limited opportunity for enforcement in that regard, and state pensions are not considered further in this article.)

Typically, the pension provider and scheme administrator is an insurance company. Contributions will usually be made both by the employer and the employee and some tax relief added. In terms of legal structure, there are two main categories of private pension schemes: occupational and personal pension schemes.

An occupational pension scheme must be established by an employer, and it will be operated under a trust structure. A personal pension scheme is not established by any particular employer (although an employer may facilitate its employees' membership) and can either be set up under a trust or under a contract between the member and the provider.

Pensions can also be categorised as defined benefit pensions, also known as final-salary pensions, and defined contribution pensions, also known as money-purchase pensions.

Occupational pension schemes may be either defined benefit or defined contribution schemes. Defined benefit pensions were historically the most common type of occupational pension scheme established by employers, but are now increasingly less common due to their expense. On retirement, the member will receive a specified proportion of their final or career average salary.

Personal pension schemes are almost invariably defined contribution schemes. On retirement, the defined contribution member will have a fund available, the size of which will depend on contributions and investment returns, from which he or she can either purchase an annuity (a contract, typically with an insurer, for the payment of a regular income) or can take an income directly (known as drawdown).

The member will also have the opportunity to take on retirement a tax-free pension commencement lump sum of up to 25% of the value of their fund at that time. As from 6 April 2015, following the Taxation of Pensions Act 2014, members of defined contribution schemes have been permitted to take a lump sum greater than 25%, but are charged to tax at their marginal tax rate on the excess over 25%.

An attempt to assign pension benefits will usually result in the pension being forfeited under the scheme rules (specifically permitted in the case of occupational pensions by s 92 Pensions Act 1995). The effect of forfeiture is that the member loses his or her right to elect for benefits and the provider can pay benefits at its discretion to the member, his or her spouse or civil partner or dependents.

PRIVATE PENSION FUNDS AS AN ASSET FOR ENFORCEMENT PURPOSES

Judgment creditors may wish to enforce against income and/or lump sum pension benefits, especially since the 2014 reforms which permitted the entire fund to be drawn down at once.

Where a judgment debtor's pension is already in payment through an annuity, the court can make an attachment of earnings order under part 89 of the Civil Procedure Rules and s 24 Attachment of Earnings Act 1971 (1971 Act). However, in doing so, under s 6(5) of the 1971 Act the court would need to specify a "protected earnings rate, that is to say the rate … below which, having regard to the debtor's resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced". Since in general annuity payments are already relatively low and thus unlikely to exceed the protected earnings rate by any significant margin, and because creditors see limited advantage in receiving instalment payments over a long period of time, obtaining an attachment of earnings order is only likely to be beneficial in a few cases.

Likewise, it is not possible to attach the judgment debt directly to the pension fund by obtaining a third-party debt order under part 72 of the CPR. The fund itself is not a debt for these purposes, among other reasons because a liability cannot be a debt for the purposes of a third-party debt order if it is contingent on the happening of an event: *Dunlop & Ranken v Hendall Steel Structures*

[1957] 1 WLR 1102. The pension provider's liability to pay is contingent both on the member electing to draw benefits under the scheme, such as a lump sum, annuity or drawdown, and, in the cases where it has a discretion, on the provider deciding to give effect to the election.

Where the pension fund is constituted as a trust, the member may have an equitable interest in the trust property. Such an equitable interest might in principle be subject to a charging order under s 2(1)(a)(ii) Charging Orders Act 1979 – although where the trust is a discretionary trust, as it might be following forfeiture, then the member will not have an equitable interest, but a mere hope that the trustees will exercise their discretion in his or her favour, and such an interest cannot be made subject to a charging order. But there are barriers in the way of obtaining a charging order over an interest in a pension scheme. First, under s 91 Pensions Act 1995, no entitlement or future right under an occupational pension scheme can be made the subject of a charge or lien. Secondly, even where an interest is charged, then it is not obvious how it can be realised, until the member makes an election to take a benefit.

It is probably worth noting briefly that where a claimant him or herself has a beneficial interest in the funds which were paid into the pension, perhaps because they were misappropriated in breach of fiduciary duty or acquired by fraud, then there is likely to be much less difficulty. In such a case, the beneficial interest will transfer to the assets in the fund or to the defendant's interest in the scheme, and the matter will involve a proprietary claim to those assets or interest rather than a process of enforcing a judgment debt.

BLIGHT v *BREWSTER*

Such was the legislative background to the judgment of Gabriel Moss QC, sitting as a High Court judge, in *Blight*.

Mr Blight and others had been defrauded by Mr Brewster and had obtained summary judgment against him. One of Mr Brewster's assets was his personal pension fund. As he was over 55 years old, he was able to elect to draw down 25% of its value as a tax-free lump sum.

Unable to enforce directly against the pension for the reasons given above, the judgment creditors sought an order compelling Mr Brewster to make the election, with the intention that once the election had been made then the pension provider would owe a debt to Mr Brewster against which the creditors would be able to obtain a third-party debt order.

The application succeeded. The right to draw down the pension was not itself a debt to which the judgment could be attached; the debt only arose if an election were made. However, the court had the power to order the debtor to make the election so as to make the judgment order effective, and the judge explained why it would be appropriate to do so as follows:

> "70. … There appears to me to be a strong principle and policy of justice to the effect that debtors should not be allowed to hide their assets in pension funds when they had a right to withdraw moneys needed to pay their creditors.
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> 71. Whilst Parliament has seen fit in the area of bankruptcy to create special statutory protections for pensions, no such intervention has taken place in the area of the enforcement of judgments. [Counsel] for the defendant nevertheless suggested that public policy requires pensions to be treated as exceptional when it comes to the execution of judgments on the basis of the special treatment under bankruptcy law.
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> 72. In my judgment, that suggestion is erroneous. A person who files successfully for bankruptcy surrenders all his assets, save those protected by law, to a trustee in bankruptcy for the payment of his debts. Filing for bankruptcy is a relief from the ability of creditors individually to execute upon the debtor's assets, in favour of collective execution. But this relief comes at a significant price. Bankruptcy carries very important disadvantages in terms of obtaining credit and acting as a director of a limited liability company, such restrictions being designed to protect the public. A judgment debtor in my view cannot have the benefits of bankruptcy without its burdens. If he chooses the advantage of not being bankrupt, for example because he considers himself to be solvent, then he must pay his debts or his assets (including contingent assets subject to some act on his part) will be amenable to the enforcement of judgments by individual creditors."

Further, in circumstances where the debtor refuses to make a written election, then the court can make an order under s 39 Senior Courts Act 1981 that another party, for example the solicitors acting for the judgment creditor, make it on his behalf.

There are several points which arise from this:

- There was nothing controversial about the conclusion that the court had the jurisdiction to order the debtor to take steps for the purpose of making the money judgment effective.
- While it is clear that Mr Brewster had conducted himself in the most reprehensible manner, having committed fraud and forgery, there is no reason to limit the use of this procedure to fraud claims. In principle, it should be available to enforce any kind of judgment debt, although perhaps in situations where the debtor is less morally blameworthy the court will be less inclined to exercise its discretion in the creditor's favour.
- Many pension funds will only permit "authorised" payments to members and, unless members suffer from ill-health, payments will not in most cases be authorised until the member reaches the age of 55 (see ss 164-166 and s 279 Finance Act 2004). Thus, the approach adopted in *Blight* is normally only available to creditors where the debtor is aged 55 or over.
- However, leave the application too late, and the debtor may already have elected to purchase an annuity. Timing can be crucial.
- The order in *Blight* was made only in relation to the 25% tax-free lump sum. But, even before the 2015 reforms, there was no reason in principle why the

jurisdiction should be limited to the tax-free lump sum if the scheme permitted the drawdown of greater sums, albeit upon payment of tax at the rate of 55p in the £1. Since those reforms, the whole of the debtor's pension fund is vulnerable.

- Subject to the matters canvassed below, the decision applies equally to personal pensions and occupational pensions, and equally to trust and contract based schemes.
- As a practical point, it is necessary to ensure that the interim third-party debt order is not made, or at least does not become effective, until after the election has taken effect and the debtor's right ceases to be contingent.

THE POSITION IN BANKRUPTCY

By contrast, the position where the debtor has been made bankrupt is substantially more favourable to the debtor, who receives express statutory protections.

In order to support those who have made attempts to save for their retirement, successive reforms have culminated in s 11 Welfare Reform and Pensions Act 1999 (1999 Act), which provides that where a person is made bankrupt, his or her rights under an approved pension arrangement are excluded from the bankruptcy estate. To deter abuse of this shelter from creditors, ss 342A-C Insolvency Act 1986 are intended to allow the trustee to recover excessive pension contributions for creditors, although in practice these provisions are seldom resorted to.

The impact of s 11 of the 1999 Act was recently confirmed by the Court of Appeal in *Re Henry* [2016] EWCA Civ 989. In *Henry*, the bankrupt, who was 59 when the application was issued, had a pension fund which had not yet been utilised and which he had no intention of utilising. His trustee in bankruptcy sought an order from the court that Mr Henry elect to draw down his pension so that it could be the subject of an income payments order under s 310 Insolvency Act 1986.

The judge's decision to refuse the application was upheld, and earlier authority to the contrary overruled. Gloster LJ held that the trustee's functions do not include seeking to recover for creditors property which has been expressly excluded from the estate by statute.

> "It would drive a coach and horses through the protection afforded to a bankrupt's pension rights by the 1986 Act and pension legislation if a trustee were able, in effect, to require a bankrupt to make the entirety of his pension available for satisfaction of his creditors' claims, by the simple expedient of a request under section 333 or a court order under section 363(2), thereby converting excluded property into 'income'".

In response to the arguments put by Counsel for the trustee that this created an anomaly between the protection afforded to bankrupts and the position of judgment debtors, Gloster LJ cited the passage at para 72 of *Blight* (reproduced above) which gives reasons for distinguishing the position of these two categories of debtor.

The result of this is that in some cases judgment debtors with significant pension funds might be well advised to make themselves bankrupt in order to protect the fund – although they would need to do so before the election to draw the pension is made under the *Blight* procedure, otherwise the pension payment will fall into the bankruptcy estate. Nonetheless, bankruptcy might not be the most attractive choice for all debtors, especially where they wish to act as company directors or (less creditably) where they have entered into transactions which could be reviewed and reversed under the Insolvency Act 1986 by a trustee and they wish to avoid this happening.

THE PROVIDER'S DISCRETION

However, there was no analysis in *Blight* of the terms of the scheme and in particular of the effect of the provider's discretion whether and how to provide benefits, and how therefore the provider should respond to an election made by or on behalf of the debtor member to draw down a lump sum against which the third-party debt order could be made.

Different schemes give the provider as trustee or administrator varying amounts of discretion in their operation. So, for example, the rules of some schemes provide no automatic rights to members, and that they can only exercise options under the rules with the consent of the provider.

Further, some scheme rules now contain a clause that grants the provider the discretion whether to act in accordance with a member's instructions in circumstances where it has become aware that the member's power to give instructions has been delegated to, or that the member's instructions are being given at the behest of, a creditor or trustee in bankruptcy.

Moreover, as noted above, scheme rules also commonly grant the provider a discretionary power to forfeit a member's benefits where they assign or surrender their rights or attempt to do so, with a further discretionary power to apply the benefits so forfeited to the member, his or her spouse or civil partner or dependents. Thus, in *Raithatha v Williamson* [2012] 1 WLR 3559, the member's trustee in bankruptcy was sufficiently concerned about forfeiture that he obtained an injunction preventing the bankrupt from making an election which might otherwise wholly forfeit his entitlement to a lump sum (para 45).

Historically, the power of forfeiture has been used to protect the member from creditors. For example, before it was precluded by s 14 of the 1999 Act, it was common for occupational pension schemes to contain a clause forfeiting benefits on bankruptcy and giving the trustee a discretion as to how to apply them to the member or his or her family. This would allow the trustee to decide to apply them in such a way as to minimise the risk of their falling into the hands of the trustee in bankruptcy.

Moreover, it is not possible for the member or his creditor to thwart the administrator's discretion by winding up the trust and directing the trustees to hand over the trust property under *Saunders v Vautier* (1841) 4 Beav 115. In *Thorpe v HMRC* [2010] EWCA Civ 339 it was held that *Saunders v Vautier* did not apply to the claimant's rights as the sole member of a pension scheme where, as is commonly the

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case, the scheme allowed for the possibility of death in service benefits to, *inter alia*, his children.

So, in circumstances where the provider has been granted a discretion, how should that discretion be exercised? Where the scheme is constituted as a trust, the trustee will be subject to fiduciary duties and it seems likely that the trustee must exercise the discretion for proper purposes and in the best interests of the beneficiaries. Where the scheme is contractual, then the administrator may not be a fiduciary as such, but nonetheless may be subject to duties to exercise any discretion in the best interests of the member either:

- because there is an express term to this effect; or
- because this is the effect of rules made under the Financial Services and Markets Act 2000, such as COBS 2.1.1R, which requires regulated firms "to act honestly, fairly and professionally in accordance with the best interests of its client".

There is support to be gained for this view from the Law Commission Report *Fiduciary Duties of Investment Intermediaries* (Law Com No 350), which considered at 8.46 to 8.50 the issue of contractual "fiduciary-like" duties, although in the context of investment decisions by pension providers rather than the context of the payment of scheme members' debts.

The next question is therefore whether it can be said to be in the best interests of the member to make a payment to a judgment creditor in reduction of his or her debts.

GRUPO TORRAS

The question of whether a trustee should pay from the trust fund the creditor of a beneficiary was considered in *Grupo Torras SA v Al-Sabah* (No 6) [2002] WTLR 337; (2001-02) 4 ITELR 555, a decision of Gloster, Sumption and Rokinson JJA sitting as the Jersey Court of Appeal.

Grupo Torras had obtained judgment against Sheikh Fahad for over US$680m in respect of a conspiracy to defraud. The Sheikh was the settlor and one of the beneficiaries of a Jersey discretionary trust for the benefit of the Sheikh and certain other family members containing assets worth some US$16m. The trustee of the trust sought directions from the court whether to distribute the majority of the trust funds to the Sheikh by way of payment to Grupo Torras, effectively surrendering its discretion to the court. To this course, not surprisingly, the Sheikh objected, arguing that it would constitute a breach of the trustee's fiduciary duties.

At first instance, the Royal Court identified three key questions:

> "(i) Can a trustee … make a distribution for the benefit of a beneficiary against the objections of that beneficiary to the proposed distribution? (ii) On the facts of this case, would a distribution by way of payment to [Grupo Torras] in reduction of Sheikh Fahad's debt be a payment for the benefit of Sheikh Fahad? (iii) If so, should the court, putting itself in the position of a trustee, exercise its discretion to make such a payment …?".

The Royal Court decided in respect of the first question that although a trustee could not force an objecting beneficiary himself to accept a distribution, it could make such a distribution by way of a payment to a third party. In respect of the second question, however, on the facts of the case there would be no such benefit to Sheikh Fahad and it followed that the court should not exercise its discretion to make the payment.

The Court of Appeal upheld that decision. While a payment to a beneficiary's creditor may in some situations be for the beneficiary's benefit, this would not always be the case and it would depend on all the circumstances. However,

> "in considering whether it would be 'beneficial' to a beneficiary for his debts to be discharged or reduced from trust funds, one does not merely look at the balance sheet effect of the payment. Rather, … one must consider whether the beneficiary's position after the payment would be better from a realistic, commonsense point of view."

Since payment even of the entire trust fund to Grupo Torras would not have gone anywhere near discharging the entirety of the debt due to it, the Sheikh would be heavily insolvent whether or not the distribution was made, and so in practical terms the distribution could not be said to be for his benefit.

APPLYING *GRUPO TORRAS* TO PENSIONS

What might have been the position if the scheme rules had been before the court in *Blight* and had given the pension provider a discretion whether to give effect to the drawdown request?

As *Grupo Torras* makes clear, the issue of whether a payment to a creditor benefits the member is a question of fact in each case with subjective and objective elements. In many situations, however, it would plainly be in the member's best interest to apply the pension fund to another family member, or alternatively to purchase an annuity or put the pension into drawdown, rather than to pay it to a judgment creditor, and perhaps the pension provider could be persuaded, or restrained, accordingly. It is possible that such a case might end in a different outcome from that in *Blight*, one in which the pension fund would be preserved for the debtor's family or converted into an annuity rather than being paid to the judgment creditor. ■

Further Reading:

- The frontiers of pensions: The Pensions Regulator's powers and their enforcement against foreign targets (2011) 4 JIBFL 192.
- Freezing orders and third parties – casting the net just wide enough (2014) 8 JIBFL 518.
- LexisPSL: Banking & Finance: What happens to a pension scheme on a company's insolvency?