Neutral Citation Number: [2022] EWCA Civ 1393

Case No: CA-2022-000591

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Andrew Hochhauser KC (sitting as a Deputy High Court Judge)
[2022] EWHC 486 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2022

Before:

LORD JUSTICE NEWEY
LORD JUSTICE MALES
and
LORD JUSTICE ARNOLD

- -

Between:

(1) DAVID BACCI **(2) MICHAEL BOYLE** **(3) PAUL MUNDY** **(4) MAREK ZWIEFKA-SIBLEY** **(by way of an assignment by the Joint Administrators of FundingSecure Limited)**	**Claimants/ Respondents**
- and -	
MATTHEW GREEN	**Defendant/ Appellant**

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- -

Fenner Moeran KC (instructed by **Michelmores LLP**) for the **Appellant**
Saaman Pourghadiri (instructed by **CANDEY**) for the **Respondents**

Hearing date: 29 September 2022

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Approved Judgment

This judgment was handed down remotely at 10.00am on 25 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Newey:

1. This is an appeal from a decision of Mr Andrew Hochhauser KC, sitting as a Deputy High Court Judge, dated 7 March 2022. It raises issues as to the extent to which a judgment creditor can satisfy the judgment from pension rights to which the debtor is entitled in circumstances where the debtor has been the subject of a bankruptcy order but, having been incurred in respect of fraud, the debt has persisted beyond the debtor's discharge from bankruptcy.

Basic facts

2. In 2016-2017, the appellant, Mr Matthew Green, was lent sums by FundingSecure Limited ("FSL") on the footing that FSL would have security over various artworks. Mr Green having failed to repay FSL, it brought proceedings against him in which it alleged, among other things, that he had not had good title to the artworks. On 29 January 2019, Ms Julia Dias KC, sitting as a Deputy High Court Judge, acceded to an application by FSL for summary judgment, finding that Mr Green had "no real prospect of successfully defending [FSL's] deceit claim in respect of the loan made to [Mr Green] on 26 July 2017" and that Mr Green had "no real prospect of successfully defending [FSL's] claims for debt and dishonest breaches of contract". Judgment was entered against Mr Green in the sum of £3,233,625.76 and Mr Green was further ordered to pay FSL's costs of the claim on the indemnity basis.

3. On 25 February 2019, a bankruptcy order was made against Mr Green. He was subsequently discharged from bankruptcy. While, however, such discharge serves to release the individual from most debts, there is an exception for fraud: section 281(3) of the Insolvency Act 1986 ("the 1986 Act") provides that discharge "does not release the bankrupt from any bankruptcy debt which he incurred in respect of … any fraud or fraudulent breach of trust to which he was a party". Mr Green's liability to FSL having arisen from deceit and dishonesty, his debt has not been extinguished.

4. By section 306 of the 1986 Act, a "bankrupt's estate" vests in the trustee in bankruptcy, and "bankrupt's estate" is defined in very wide terms by section 283 in combination with section 436. However, "rights … under an approved pensions arrangement" are excluded from a bankrupt's estate by section 11 of the Welfare Reform and Pensions Act 1999.

5. On 23 October 2019, FSL went into administration. In 2020, the joint administrators assigned FSL's claims against Mr Green to the respondents, Mr David Bacci, Mr Michael Boyle, Mr Paul Mundy and Mr Marek Zwiefka-Sibley. Under the terms of that agreement, 25% of the recoveries from these proceedings will be paid to FSL and accrue to the benefit of the company's creditors, who include 1,393 individual investors. The respondents ("the Creditors") are four of those investors and provided some £811,000 of the money loaned to Mr Green.

6. Mr Green's principal asset is his interest as a member of the Richard Green (Fine Paintings) Executive Pension Scheme ("the Pension Scheme"), an occupational pension scheme registered with HM Revenue and Customs ("HMRC"). The Pension Scheme was established in 1982 to provide pension benefits for employees of Richard Green (Fine Paintings) and owns the property in New Bond Street in London from which that business trades. In February 2021, a trustee of the Pension Scheme gave

evidence that the building had last been valued at about £55 million. Each member of the Pension Scheme has an "Accumulated Credit", and Mr Green's "Accumulated Credit" accounts for some 20.07% of the total fund. However, a pension sharing order ("PSO") has been made under section 24B of the Matrimonial Causes Act 1973 in favour of Mr Green's wife. The upshot, as the Judge noted in paragraph 29 of his judgment, is that "Mr Green has a pension fund worth around £8.5m, although 56.1% of that now belongs to Mrs Green as a result of the PSO".

7. Once a member of the Pension Scheme has attained the age of 55, as Mr Green will on 28 October 2022, he can ask for his "Accumulated Credit" to be applied in providing pension benefits pursuant to Rule 5 of the Pension Scheme's Rules. In Mr Green's case, the options open to him will, as matters stand, be affected by the fact that he claimed "enhanced protection" under paragraph 12 of schedule 36 to the Finance Act 2004 when the "lifetime allowance" was imposed under that Act to cap the value of the pension benefits that a person may have without incurring tax charges. With "enhanced protection", Mr Green could take a lump sum of £375,000 tax free by way of a "Pension Commencement Lump Sum". A person who has "enhanced protection" can, however, revoke it by giving notice to HMRC under regulation 4(6)(c) of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006. Were Mr Green to do so, he could opt to receive both a "Pension Commencement Lump Sum" and a "Lifetime Allowance Excess Lump Sum". The "Pension Commencement Lump Sum" ("PCLS") would be tax free, but would be less than £375,000: on the figures we were given, £268,275 or, if Mr Green sought "individual protection", £312,500. The "Lifetime Allowance Excess Lump Sum" ("LAELS") could be of up to the difference between the balance of Mr Green's "Accumulated Credit" and the lifetime allowance (at present, £1,073,100), but would be subject to a 55% tax charge. In broad terms, therefore, were Mr Green to revoke his "enhanced protection", he could obtain lump sums totalling about £1.6 million after payment of about the same sum in tax. The balance of Mr Green's "Accumulated Credit" would be used to fund a pension.

The order under appeal

8. On 2 June 2021, the Creditors applied for relief designed to allow them to recover as much as they can of the sums owed to them by Mr Green from benefits which he can claim from the Pension Scheme. To that end, they wish Mr Green's "enhanced protection" to be revoked and the maximum possible PCLS and LAELS to be asked for. These sums would be deposited in a bank account of Mr Green, but, if needs be, the Creditors would seek a third party debt order in respect of it. They also envisage requesting an attachment of earnings order in relation to pension paid to Mr Green.

9. Acceding to the Creditors' application, the Judge made an order which, among other things, requires Mr Green to delegate to the Creditors' solicitors his power to notify HMRC that he is revoking his "enhanced protection", his power to notify HMRC that he is seeking "individual protection" and his power to elect to draw down on his pension under the Pension Scheme once he has turned 55. The order further gives the Creditors' solicitors "authority to elect that [Mr Green] draws down on his pension by way of taking a Pension Commencement Lump Sum, Lifetime Allowance Excess Lump Sum and/or any other pension, by providing notice in writing to [the trustees of the Pension Scheme]".

Blight v Brewster

10. The Creditors relied in support of their application on the decision of Mr Gabriel Moss QC, sitting as a Deputy High Court Judge, in *Blight v Brewster* [2012] EWHC 165 (Ch), [2012] 1 WLR 2841. In that case, the claimants obtained judgment against the defendant for a fraud he had committed and wished to recover some of what they were owed from pension rights which he held. The defendant was entitled to elect to draw down 25% of his pension as a tax free lump sum, but a District Judge held that the defendant could not be compelled to make such an election. Mr Moss allowed an appeal. He observed at paragraph 60 that, "[a]s a matter of impression, if [the District Judge's conclusion] were correct then this would work a substantial injustice to the claimants, who have been the victims of fraud and forgery", continuing:

> "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. The defendant clearly has the means of paying the 25% to the claimants: all he has to do is to give notice to Canada Life."

After citing *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 ("*TMSF*"), where the Privy Council ordered a debtor to delegate to receivers his right to revoke trusts which he had established, Mr Moss said at paragraph 68:

> "The Privy Council, at para 59, considered that the powers of revocation were such that in equity, the debtor could be regarded as having rights tantamount to ownership. The same in my view must apply to the defendant's ability in the present case to elect to take his cash payment from Canada Life."

Mr Moss went on:

> "70. The present situation seems to me to be analogous to the situation faced by the Privy Council. 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.
>
> 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. Mr Weale 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.
>
> 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."

11. Mr Moss explained in paragraph 75 that he thought it appropriate to take a simpler course than had been adopted in *TMSF*:

> "In my judgment, it is not necessary to go to the disproportionate trouble and expense in a case of this kind to appoint a receiver by way of equitable execution and then force the defendant to delegate his power of withdrawal to the receiver, as was done in the Privy Council case. The defendant in this case can simply be ordered to delegate the power of election to the claimants' solicitor and for the court to authorise the solicitor to make the election in his name. Upon the election being made, the sum payable by Canada Life will then become due to the defendant and can be made the subject of the third party debt order."

Mr Moss added, however, in paragraph 77:

> "if it were not possible to make such an injunction, then I would appoint a receiver by way of equitable execution and require the delegation of the election to the receiver in the manner set out by the Privy Council".

The present appeal

12. Mr Green challenges the Judge's decision on three grounds. In the first place, Mr Green contends that his power to revoke his "enhanced protection" is neither "property" nor "tantamount to ownership" and, hence, that it cannot properly be the subject of an order under section 37(1) of the Senior Courts Act 1981 ("the 1981 Act"). Secondly, Mr Green maintains that the Judge failed to recognise that it is contrary to public policy to exercise section 37(1) of the 1981 Act in such a way as to deprive a person who has become bankrupt of pension rights. Thirdly, Mr Green argues that the fact that revocation of "enhanced protection" would occasion large tax liabilities made it inappropriate to make an order providing for such revocation.

13. Sensibly, Mr Fenner Moeran KC, who appeared for Mr Green, focused on the substance of the Judge's order rather than its form. Section 37(1) of the 1981 Act provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

In terms, therefore, section 37(1) empowers the Court to grant injunctions and appoint receivers, not to authorise someone to make an election on a defendant's behalf, as the orders made in both *Blight v Brewster* and the present case have. In *Blight v Brewster*, Mr Moss considered that he could avoid the "disproportionate expense" of "appoint[ing] a receiver by way of equitable execution and then forc[ing] the defendant to delegate his power of withdrawal to the receiver". Mr Moeran accepted that, supposing the circumstances to be such that relief pursuant to section 37(1) were justified, it would make sense to make an order along the lines of the short cut adopted in *Blight v Brewster*. Mr Moeran's case was that relief under section 37(1) was not justified at all.

Ground 1: Could the power to revoke "enhanced protection" be the subject of an order under section 37(1) of the 1981 Act?

14. Mr Moeran did not dispute that *Blight v Brewster* had been correctly decided. That being so, he did not deny, either, that a Court could grant relief under section 37(1) of the 1981 Act as regards a debtor's rights to call for a PCLS or an annuity. Those rights, Mr Moeran said, are, or are equivalent to, property and so can properly be the subject of orders under section 37(1). Mr Moeran argued, however, that the right to revoke "enhanced protection" is different. That, he said, is neither property nor tantamount to it. So far as the right to revoke "enhanced protection" is concerned, Mr Moeran submitted, the Creditors are trying not merely to protect existing property but to force Mr Green to *create* property, and that is no more permissible than an order requiring a person to generate earnings by, say, doing a job or writing a book. Mr Moeran did not quarrel with the proposition that, in one sense, the Court's powers to grant receivers and injunctions under section 37(1) are unconfined where the person in question is within the Court's jurisdiction, but, he said, the circumstances in which it is proper to exercise those powers are nonetheless limited.

15. That last point is borne out by the authorities. In *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, Pickford LJ noted that the word "jurisdiction" can be used in two senses. He said at 563:

> "The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the Court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

In *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320, Lord Scott drew this distinction in the context of section 37(1) of the 1981 Act. He said at paragraph 30 that, "provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it". It was therefore clear, Lord Scott said in paragraph 25,

that Park J had had jurisdiction to grant injunctive relief as he had against a Mr Le Roux and a company referred to as "Fintrade", both having been within the territorial jurisdiction of the Court when the order was made and served with an originating summons shortly afterwards. The issue, Lord Scott explained in paragraph 25, was "not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it".

16. That the powers conferred by section 37(1) of the 1981 Act are subject to constraints is confirmed elsewhere. In *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303, [2009] QB 450 ("*Masri*"), Lawrence Collins LJ disavowed at paragraph 175 any suggestion that section 37(1) was to be taken as conferring an unfettered power, quoting this passage from Lord Brandon's speech in *South Carolina Insurance Co v Assurantie Maatschappj "De Zeven Provincien" NV* [1987] AC 24, at 40:

> "although the terms of section 37(1) of the Act of 1981 and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years".

In the same vein, Lord Collins noted in *TMSF*, at paragraph 57, that *Masri* had "confirmed that section 37(1) does not confer an unfettered power". In *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, [2022] 2 WLR 703 ("*Broad Idea*"), Lord Leggatt, with whom Lords Briggs, Sales and Hamblen agreed, endorsed at paragraph 57 the following passage from Spry, *"Equitable Remedies"*, 9th ed., at 333:

> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

Lord Leggatt went on to emphasise, at paragraph 59, "the ability of courts with equitable powers to modify existing practice where to do so accords with principle and is necessary to provide an effective remedy", but that means that the circumstances in which it is proper to exercise such powers may change, not that they are wholly at large. In fact, the Court of Appeal (Baker, Phillips and Nugee LJJ)) has very recently held *Broad Idea* to have established that the grant of an injunction under section 37(1) depends on two requirements being met, namely, "(i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies

exercising the power to order the defendant to do or not do something": see *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312 ("*Re G*"), at paragraphs 55, 61, 69 and 71.

17. The principal authority on which Mr Moeran relied in support of his submissions on this ground of appeal was, I think, *TMSF*. As Lord Collins explained at paragraph 54, the question in that case was whether there was a discretion to appoint receivers over the powers of revocation of the trusts which the debtor (Mr Demirel) had established and to order him to assign or delegate those powers to the receivers (and, in default, to order that the assignment or delegation may be executed on his behalf by the receivers or other person appointed by the court). Answering the question in the affirmative, Lord Collins said:

> "59. In the opinion of their Lordships the decisions in *Masri (No 2)* [2009] QB 450 and its predecessors lead to the conclusion that in the present case the jurisdiction should be exercised. The powers of revocation are such that in equity, in the circumstances of a case such as this, Mr Demirel can be regarded as having rights tantamount to ownership. The interests of justice require that an order be made in order to make effective the judgment of the Cayman court recognizing and enforcing the Turkish judgment.
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> 60. There is no invariable rule that a power is distinct from ownership. Nor (as the cases on the rule against perpetuities show) is there an invariable rule that any departure from the distinction between power and property is effected solely by legislation. As Lord St Leonards said (and Hoffmann LJ approved [in *Clarkson v Clarkson* [1994] BCC 921]), 'To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes', and in *In re Triffitt's Settlement* [1958] Ch 852, 861 Upjohn J said that 'where there is a completely general power in its widest sense, that is tantamount to ownership'.
>
> 61. In the present case the appropriate order would be that Mr Demirel should delegate his powers of revocation to the receivers, so that they can exercise them. There is no impediment to the court making such an order. The court may make an ancillary mandatory order: see *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139 (power to order transfer of assets from one jurisdiction to another in aid of Mareva injunction) …."

In paragraph 63, Lord Collins noted that the conclusions he had arrived at thus far made it "unnecessary to decide the question, canvassed in argument, whether the court has jurisdiction, instead of ordering the delegation of the powers of revocation to the receivers, to order Mr Demirel to revoke the trusts, with the result that he would have substantial assets of which the receivers could take possession".

18. Mr Moeran stressed that Lord Collins' reasoning depended on the powers at issue being "such that in equity … Mr Demirel can be regarded as having rights tantamount to ownership". While, Mr Moeran argued, the same might be said of a power to elect for a PCLS or an annuity, Mr Green's ability to write to HMRC to revoke his "enhanced protection" is not a property right or "tantamount to ownership" of anything.

19. In my view, however, Mr Green's right to revoke his "enhanced protection" did not have to be either property or "tantamount to ownership" for it to have been proper for the Judge to make the order he did.

20. I am prepared to assume that there is room for argument as to whether Mr Green's ability to revoke his "enhanced protection", taken in isolation, should be regarded as property or "tantamount to ownership". However, Mr Moeran (rightly) accepted that Mr Green's rights to call for a PCLS and an annuity could be the subject of a receivership order, and it seems to me that the same must apply as regards his ability to opt for a LAELS. Rule 5 of the Pension Scheme's Rules requires the trustees to apply a Member's "Accumulated Credit" "by providing benefits in accordance with the Member's instructions (subject to complying with the provisions of Part III of this Schedule)". Of course, Mr Green cannot direct the trustees to give him a LAELS for so long as he has "enhanced protection", but that does not strike me as important. Mr Green has a contingent right to payment of a LAELS and, just as it was held in *Masri* that there is "no reason why … the court should not exercise a power to appoint a receiver by way of equitable execution over future receipts from a defined asset" (see paragraph 184), there would appear to be no reason why a receiver should not be appointed over a contingent right. The fact that the right to a LAELS is subject to a contingency (viz. revocation of "enhanced protection") should not, I think, prevent it from being considered property or "tantamount to ownership", nor from being the subject of the appointment of a receiver. Looking at matters slightly differently, I cannot see why it should not be possible to appoint a receiver in respect of the *totality* of Mr Green's right to give the Pension Scheme's trustees instructions under Rule 5 of the Rules, including the right to call for a LAELS subject to revoking "enhanced protection".

21. Further, it appears to me that, as an adjunct to such a receivership, the Court could direct Mr Green to revoke his "enhanced protection" or, alternatively, to delegate his power to do so. The Court of Appeal affirmed the power to make an ancillary mandatory order in *Masri*: see paragraph 61. A direction to exercise or delegate the power to revoke "enhanced protection" would further the aims of the receivership and so, in my view, could properly be made on an ancillary basis.

22. It thus seems to me that the Judge would have had power to grant the Creditors relief along the lines they were seeking by (a) appointing a receiver over either Mr Green's right to give the Pension Scheme's trustees instructions under Rule 5 of its Rules or, more specifically, in respect of Mr Green's contingent right to claim a LAELS and (b) giving an ancillary direction for Mr Green to exercise or delegate his power to revoke his "enhanced protection".

23. There is, however, another way in which it could have been proper for the Court to assist Creditors: simply by granting injunctive relief, without the appointment of a receiver. The Privy Council addressed the question of whether a power to revoke a

trust was property or "tantamount to ownership" when deciding whether it had been appropriate to appoint *receivers*. Section 37(1) of the 1981 Act also empowers the Court to grant *injunctions*, and I do not think the question of whether a power is property or "tantamount to ownership" can have the same significance when the question is not whether a receiver should be appointed over a power, but whether an injunction should be granted in relation to it.

24. In *TMSF*, Lord Collins noted at paragraph 56 that *Masri* confirmed or established the following principles:

> "(1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under section 37(1); (2) the court has power to grant injunctions and appoint receivers in circumstances where no injunction would have been granted or receiver appointed before 1873; (3) a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amenable to execution at law; and (4) the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations."

In *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm), Males J, after quoting this passage from Lord Collins' judgment in *TMSF*, observed at paragraph 47(a) that the "demands of justice" "include the promotion of the policy of English law that judgments of the English court and English arbitration awards should be complied with and, if necessary, enforced". I agree.

25. In the present case, the Creditors have the benefit of an unsatisfied judgment against Mr Green, whose only material asset is his interest in the Pension Scheme. The Creditors thus have a clear interest in obtaining recovery through Mr Green's pension rights, and facilitating that would be in line with "the policy of English law that judgments of the English court … should be complied with and, if necessary, enforced" and so, potentially, the "demands of justice". That there may be no precise precedent for an injunction requiring a person with pension rights to exercise both them and a right to revoke "enhanced protection" need not, moreover, be a bar to such an order: *Masri* shows that "the court has power to grant injunctions … in circumstances where no injunction would have been granted or receiver appointed before 1873", and it is plain from *Broad Idea* that the power to grant injunctions, like that to appoint receivers, can be developed incrementally.

26. As mentioned above, the Court of Appeal concluded in *Re G* that the grant of an injunction depends on "(i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something". The Court also noted that there is a "general principle that a Court may grant ancillary orders, including injunctive orders, to ensure that its orders are effective": see paragraph 71. In the present case, the Creditors have an evident "interest … which merits protection", and the "general principle" to which the Court referred would be capable of justifying the grant of injunctive relief against Mr Green.

27. I do not consider that there is any relevant analogy between an order relating to the exercise of Mr Green's right to revoke his "enhanced protection" and one which would require him, say, to do a job or write a book. It is of course the case that an order of the latter kind could not legitimately be made to facilitate recovery of a judgment debt. "Enhanced protection" can be revoked simply by a notice to HMRC, and, under the Judge's order, the notice would be given by the Creditors' solicitors rather than Mr Green himself. There is no parallel with what an order to do a job or write a book would require.

28. In the circumstances, it would, in my view, have been open to the Judge, if he had thought it an appropriate exercise of his discretion, to have dispensed with the appointment of a receiver and just to have granted injunctive relief requiring Mr Green either to exercise or to delegate both his power to revoke "enhanced protection" and his right to instruct the trustees of the Pension Scheme to provide him with, among other things, a LAELS. As can be seen from paragraph 56(1) of his judgment, the Judge took the view that "it is wrong to regard the act of revocation of Enhanced Protection in isolation, as opposed to being an integral part of the means of obtaining immediate access to Mr Green's property". I agree. Given the role that revocation of the "enhanced protection" would play in allowing the Creditors to obtain payment from Mr Green's pension rights of some of what is owed to them, I cannot see why there should be any bar on granting an injunction under section 37(1) of the 1981 Act in relation to the exercise of the right to revoke.

29. I do not therefore accept Mr Moeran's contention that an order requiring Mr Green to delegate his power to revoke his "enhanced protection" was not one that could be made under section 37(1) of the 1981 Act. To the contrary, it seems to me to have been open to the Court to make such an order, if it thought fit, either as ancillary to an appointment of receivers or as part of free-standing injunctive relief. In short, the power to revoke "enhanced protection" *could* be the subject of an order under section 37(1) of the 1981 Act.

Ground 2: Public policy

30. During the 1990s, Parliament took steps to limit very substantially the extent to which trustees in bankruptcy can have recourse to pension rights. Following the publication of the 1993 report of the Pension Law Review Committee chaired by Professor Sir Roy Goode, rights under occupational pension schemes were excluded from a bankrupt's estate by section 91 of the Pensions Act 1995. A 1998 Green Paper (Cmd 2342-1), *"A New Contract for Welfare: Partnership in Pensions"*, proposed at paragraph 49 that personal pension holders should enjoy similar protection and, accordingly, that "all tax-approved private pension rights should be exempt from the bankruptcy process, thus falling outside the jurisdiction of the trustee in bankruptcy". Thereafter, as already mentioned, section 11 of the Welfare Reform and Pensions Act 1999 excluded *all* rights under an "approved pension arrangement" from a bankrupt's estate. With a view to avoiding abuse, sections 342A-342C of the 1986 Act were enacted to enable a trustee in bankruptcy to recover "excessive pension contributions". In *In re Henry (A Bankrupt)* [2016] EWCA Civ 989, [2017] 1 WLR 391, Gloster LJ observed in paragraph 45:

> "In my judgment, Parliament has decided to draw the balance between, on the one hand, the interests of the state in

> encouraging people to save through the medium of private pensions (so that in old age or infirmity they will not be a burden on the resources of the state), and, on the other, the interests of creditors in receiving payment of their debts, by the mechanism of sections 342A to 342C of the 1986 Act which enable a trustee to claw back excessive pension contributions made by the bankrupt where such contributions have unfairly prejudiced the bankrupt's creditors."

31. Mr Moeran submitted that the public policy underlying the 1990s legislation was a relevant consideration for the Judge to take into account when deciding whether to accede to the Creditors' application and, in fact, a sufficiently important one that the Judge should not have made any order in the Creditors' favour. He pointed out that there is in respect a significant difference from *Blight v Brewster* since in that case, unlike this one, the debtor had not become bankrupt. Mr Moeran also stressed that there is no question of Mr Green having derived his pension rights from anything related to the transactions giving rise to the judgment which the Creditors are seeking to enforce.

32. For his part, Mr Saaman Pourghadiri, in able submissions on behalf of the Creditors, emphasised section 281(3) of the 1986 Act, excepting debts incurred in respect of fraud from release. The fact, Mr Pourghadiri argued, that pension rights of the debtor would not vest in a trustee in bankruptcy is immaterial. Once the debtor had been discharged from bankruptcy, the creditor would be just as able to have resort to pension rights to satisfy the debt as would have been possible before the bankruptcy and as a post-discharge creditor could. It was open to Parliament to provide for pensions to be protected from even creditors who are victims of fraud, but it did not do so. Mr Green is thus, so Mr Pourghadiri said, arguing that public policy calls for a result which is the precise opposite of that for which Parliament has legislated.

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 "[t]he 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.

34. In the present case, the Judge summarised Mr Green's case on public policy in paragraphs 53 and 54 of his judgment, but rejected it. He said in paragraph 56(2) of his judgment:

> "In my view, there is no public policy which prevents the s.37(1) jurisdiction from being exercised. On the contrary, the overriding public policy consideration is that contained in

> s.281(3) of the 1986 Act, which was expressly referred to in the January 2019 Order when granting the Claimants summary judgment. Fraudsters should not prosper."

35. Mr Moeran focused on the Judge's reference to "no public policy" preventing the exercise of the section 37(1) jurisdiction. However, I do not think the Judge should be taken to have overlooked Mr Moeran's submissions on public policy, which he had outlined only a few paragraphs before, or to have held that the public policy which Mr Moeran had identified could not be taken into account. It seems to me that, on a fair reading of the judgment, the Judge should be understood to be saying that, overall, public policy favoured the grant of relief. That, moreover, was a conclusion which was certainly open to him.

36. In the circumstances, this ground of appeal fails.

Ground 3: Tax liabilities

37. Mr Green's third ground of appeal, like his first, was directed at relief which the Judge granted as regards revocation of Mr Green's "enhanced protection". The grounds of appeal asserted that the Judge had ignored or dismissed the adverse impact on and cost to Mr Green of revoking the "enhanced protection", that the Judge had thereby failed to take account of a relevant consideration and that, given the adverse impact on and cost to Mr Green, it was neither "just" nor "convenient" for the Judge to exercise his discretion as he did.

38. The Judge explained in paragraph 55 of his judgment that Mr Moeran had submitted that it was not "just, equitable or convenient" to make an order against Mr Green, in part on the basis that "[m]aking the proposed order will trigger a substantial additional tax charge, although in oral submissions Mr Moeran candidly admitted that the loss of Enhanced Protection is unlikely to have any practical effect on Mr Green, given his personal circumstances and the existing [worldwide freezing order against him]". In paragraph 56(3) of his judgment, however, the Judge said:

> "In the exercise of my discretion, I find that it is just, equitable and convenient to make the orders sought by the Claimants, subject to the necessary amendments to take account of the points made by the Trustees and Mrs Green …. There are compelling reasons for the Claimants, who are amongst those who have been defrauded by Mr Green to be able to have access to his money to satisfy the judgment debt. None of the points made on behalf of Mr Green set out at paragraph 55 above detract from this. Indeed, the fact that the revocation of the Enhanced Protection is unlikely to have any practical impact upon him is a point in favour of granting the relief sought, not for declining to make it. I attach little weight to the possible impact on the future contingent event of a compromise with the Claimants."

39. Mr Moeran argued that the Judge had not taken into account the fact that revocation of withdrawal of the LAELS, following revocation of "enhanced protection", would trigger a tax liability of some £1.6 million. He also took issue with the suggestion that

he had accepted that loss of "enhanced protection" was unlikely to have a practical impact on Mr Green. His point, he said, had been that there would be no such impact *in the short term*.

40. Mr Pourghadiri submitted that there was no basis for interfering with the Judge's exercise of his discretion and that the Judge had anyway been right. The tax liability was no more than a factor to be taken into account, and the Judge had done so. Further, the lump sums which the Creditors are trying to recover would not exhaust Mr Green's "Accumulated Credit" in the Pension Scheme, with the consequence that he would still receive an annuity, and the Creditors' ability to reach that by means of an attachment of earnings order would be subject to the constraints for which section 6(5) of the Attachment of Earnings Act 1971 provides. Mr Pourghadiri also maintained that Mr Moeran *had* indicated to the Judge that the tax charge would not have practical impact on Mr Green, given that the debt to the Creditors exceeded the total value of Mr Green's interest in the Pension Scheme.

41. Mr Pourghadiri cited in support of his submissions a passage from the decision of Judge Paul Matthews, sitting as a Judge of the High Court, in *Brake v Guy* [2022] EWHC 1746 (Ch). In that case, judgment creditors applied for an injunction under section 37(1) of the 1986 Act requiring a debtor (a) to exercise his right to require a pension fund to be liquidated and paid out and/or (b) to delegate that right to the judgment creditors so that (in either case) the debtor would then have a debt due to him in respect of which a third party debt order could be made: see paragraph 60. Acceding to the application, Judge Matthews said in paragraph 72:

> "Moreover, the fact that any drawdown by Mr Brake would be subject to tax is in itself of minor importance. For example, if a judgment creditor obtains a charging order on assets owned by the judgment debtor, and thereafter obtains an order for their sale, that sale may involve a liability to capital gains tax on the part of the judgment debtor. But no one suggests that, *merely* because there is a tax liability arising as a result of the sale, therefore the sale should not have been ordered, or should not take place. Selling assets to raise money to pay debts often involves costs which reduce the value available to pay creditors. (I accept of course that, if the amount of tax would be so great that as a result there was no real benefit to the judgment creditor, the court might well decide not to order the sale.)"

42. In my view, the short answer to this ground of appeal is that the Judge clearly had in mind the tax liability which would arise from revoking "enhanced protection" and claiming the LAELS, and he was not obliged to give that fact any greater weight than he did. As Judge Matthews noted, the mere fact that execution of a Court order would occasion a tax charge is not a bar to making it, and, on the facts of the present case, the Judge was amply entitled to conclude that it should not deter him from granting the Creditors relief.

Conclusion

43. I would dismiss the appeal.

Lord Justice Males:

44. I agree with the judgment of Lord Justice Newey.

45. For my part I detect no real difference between what Lord Justice Newey says in paragraph 16 of his judgment and what is said by Lord Justice Arnold. In any event this is not a case in which it is necessary to explore the outer limits of the court's powers under section 37(1) of the Senior Courts Act 1981. The remedy sought by the respondents is in support of a legal right to payment of the appellant's judgment debt and does not involve any novel extension of the law beyond established principles.

Lord Justice Arnold:

46. I agree that this appeal should be dismissed. In relation to grounds 2 and 3, I entirely agree with Newey LJ's reasons. In relation to ground 1, I agree with Newey LJ's reasons subject only to the qualification that I disagree with Newey LJ's statement in paragraph 16 of his judgment that "the powers conferred by section 37(1) of the 1981 Act are subject to constraints". The powers are not conferred by section 37(1), nor are they subject to constraints if "constraints" means limits.

47. As counsel for Mr Green himself submitted, the orders under appeal are "effectively injunctions". As Lord Scott of Foscote explained in *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320:

> "25. … The power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the Supreme Court [now Senior Courts] Act 1981 and its statutory predecessors. It derives from the pre-Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) powers of the Chancery courts, and other courts, to grant injunctions: …
>
> 30. … provided the court has *in personam* jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it. …"

48. Where the court has jurisdiction to grant an injunction, the ultimate criteria for the exercise of the jurisdiction are justice and convenience. As Newey LJ notes, in *Convoy Collateral Ltd v Broad Idea International Ltd* [2022] UKPC 703, [2022] 2 WLR 703 the majority of the Privy Council (Lords Leggatt, Briggs, Sales and Hamblen) expressly endorsed at [57] the passage from Spry, *Equitable Remedies* which Newey LJ quotes. I shall set it out again, this time with added emphasis:

> "*The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited.* Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of

> powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

49. Thus there must be a principled basis for the exercise of the jurisdiction, but that does not mean that the practice of the courts cannot, should not or does not change. On the contrary, as Lord Scott went on to observe in *Fourie v Le Roux* at [30]:

> "The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since *The Siskina* [1979] AC 210 was decided and is unrecognisable from the practice to which Cotton LJ was referring in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39–40".

50. This point is illustrated by *Cartier International AG v British Telecommunications plc* [2018] UKSC 28, [2018] 1 WLR 3259. In that case the claimants were the owners of registered trade marks who sought orders requiring internet service providers to block (or at least attempt to block) the ISPs' customers from accessing various websites which were selling counterfeit goods to UK consumers. It was common ground throughout the proceedings that the ISPs were not liable either as primary tortfeasors or as accessories for infringement of the trade marks. One of the issues was whether the English courts had power to grant a mandatory injunction against the ISPs given that they were innocent of any wrongdoing and thus the claimants had no cause of action against them. There was no precedent for the grant of an injunction in such circumstances (although website-blocking orders had been made against ISPs in copyright cases in exercise of the power conferred by section 97A of the Copyright, Designs and Patents Act 1988). The High Court, Court of Appeal and Supreme Court nevertheless all held that the English courts did have such power because the ISPs were subject to the courts' *in personam* jurisdiction, and that it was appropriate to exercise that power, notwithstanding the absence of precedent and the fact the ISPs were not wrongdoers, because the ISPs were in a position to stop the websites using the ISPs' services to infringe the claimants' trade marks by selling goods to the ISPs' customers. As Lord Sumption stated when giving the unanimous judgment of the Supreme Court at [15]:

> "Website blocking orders clearly require more than the mere disclosure of information. But I think that it is clear from the authorities and correct in principle that orders for the disclosure of information [pursuant to *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133] are only one, admittedly common, category of order which a court may make against a third party to prevent the use of his facilities to commit or facilitate a wrong. I therefore agree … that the website blocking order made in this case could have been made ... on ordinary principles of equity."

51. As Lord Leggatt explained in *Convoy v Broad Idea* at [52]-[58], the Court of Appeal in *Cartier* rejected the ISPs' argument that website blocking orders could not be granted against them because the ISPs had not invaded or threatened to invade any legal or equitable right of the claimants, nor had the ISPs behaved in an unconscionable manner, and expressly endorsed Dr Spry's analysis; and that analysis was implicitly endorsed by the Supreme Court in the passage I have quoted. Accordingly, Lord Leggatt said at [58]:

> "The correctness of what Spry refers to as 'the preferable analysis' must, in the Board's view, now be regarded as settled."

52. *Convoy v Broad Idea* is not binding on this Court, but in *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312 Baker LJ delivering the judgment of the Court of Appeal (himself, Phillips and Nugee LJJ) said at [61}:

> "Having regard to its source we would in any event have given [*Convoy v Broad Idea*] very great weight, but having read and considered the authorities for ourselves, we regard Lord Leggatt's analysis as compelling and unanswerable. It is not necessary to repeat his reasoning. It is sufficient to say that we respectfully agree with it. In these circumstances in our judgment we should follow *Broad Idea* and decide that it now represents the law of England and Wales as to the circumstances in which the Court may grant an injunction, or in other words what the 'just and convenient' test in s.37 of the 1981 Act requires."

53. In the present case counsel for Mr Green rightly accepted that the High Court had *in personam* jurisdiction to grant the orders in question against Mr Green. As Newey LJ has explained, there is a very clear principled basis on which to exercise the jurisdiction, namely to achieve justice, or, more specifically, to enable a judgment debt to be (partially) enforced against a fraudster.