Neutral Citation: [2012] EWHC 165 (Ch)

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Mr G Moss QC sitting as a Deputy High Court Judge

9th February 2012

BETWEEN:

CHRISTOPHER JOHN BLIGHT (1)

DAVID MEREDITH (2)

KAREN LEWIS (3)

Claimants/Appellants

-and-

ROGER BREWSTER

Defendant/Respondent

Mr. Christopher Spratt, instructed by C.L. Clemo & Co for the Claimants/Appellants

Mr. James Weale, instructed by Crawfords for the Defendant/Respondent

JUDGMENT

Introduction

1. This is a reserved judgment in the Claimants' application for permission to appeal, and if granted, appeal against the order of District Judge Lynda Nightingale dated 24th March 2011. In summary, the order provided that the Claimants' solicitor take all necessary steps to complete and finalise the sale of certain shares which formed the subject matter of a charging order in favour of the Claimants as part of the enforcement of a judgment. The order also discharged a third party debt order in relation to the right of the Defendant to draw down 25% of his Canada Life pension. This order had been sought also by way of attempted enforcement of the Claimants' judgment.

2. The shares in question were held by the Defendant through a broker, Savoy Investment Management Limited, who in turn used a nominee, Pershing Securities Limited, as registered owner of the shares.

3. For the reasons set out below, I consider that the orders below were incorrectly made, permission to appeal must be given and the orders below must be reversed in the manner indicated at the end of this judgment.

Background

4. The Claimants and the Defendant were apparently friends. The Defendant, who had no investment qualifications, persuaded the Claimants to part with money for him to invest on their behalf.

5. The investment was solicited and obtained on the basis of fraud and forgery, as was held by Deputy Master Hoffman in a summary judgment application in which he gave judgment on 19th February 2008. This judgment is part of a long and detailed saga of steps and hearings which I need not go into for the purposes of this judgment. It is however important to remark that the money solicited from the Claimants included sums for the purchase of shares in a listed entity called Bowleven Plc, which the Defendant had not passed on to the Claimants.

6. Certain further issues, which need not be gone into here, were dealt with by Mr Bernard Livesey QC sitting as a Judge of the Chancery Division in a judgment of 29th July 2009. He found that the Defendant had been "not entirely honest" (paragraph 4), that he had a "lack of honesty" and that he had "obtained money, even from his friend, Mr Blight, by fraud" (second paragraph given the number 4). At paragraph 6, Judge Livesey refers to the fact that at the summary judgment application before Deputy Master Hoffman, the Defendant consented to an order for delivery up of Mr Blight's share certificate in Bowleven Plc. It seems from Judge Livesey's judgment that Mr Blight had invested his £50,000-worth of life savings with the Defendant. I must mention by way of a small degree of balance that Judge Livesey also considered the Defendant to be "a person of some complexity" and "well meaning".

The Orders of District Judge Parkes

7. The Claimants' application for enforcement of their judgment against the Defendant came before Deputy District Judge Parkes, who gave judgment on 13th May 2010. It appears from the transcript of the hearing that the Claimants had a charging order over certain Bowleven shares held by the Defendant and were seeking a sale after 14 days. The Defendant was not opposing a sale of those Bowleven shares but was seeking a deferral of 60 days in the hope that the Bowleven shares would rise in value in the meanwhile and would lead to a larger discharge of his judgment debt.

8. I note that in the context of a discussion about sale, the Claimants' solicitor referred to the fact that the shares were held in the indirect holding system via Savoy Investment Management Limited and referred to the question of how a "transfer" might be effected, clearly in the context of a potential sale (page 10, line 1 of the transcript). The Defendant argues at page 13 of the transcript that the Bowleven shares were at the lowest point they had ever been in their whole history being placed on the Stock Exchange and that is why he was pleading for a deferred sale of 60 days.

9. Deputy District Judge Parkes made two separate orders. One order, which she called the "first" order, was for the sale of the lease of a property in which the

Defendant had an interest and gave conduct of the sale to the Claimants' solicitor (paragraphs 2 and 3). Paragraph 4 of the order dealt with the mechanics of sale.

10. The other order, which she called the "second" order contains a declaration that by virtue of the charging orders dated 13th October 2010 the Claimants were entitled to an equitable charge on the Defendant's interest in 80,000 Bowleven shares. Paragraph 8 of this order says that it is to be read subject to the "first" order. Whereas the first order refers to a judgment debt of £225,630.16, the amount ordered to be paid from the proceeds of sale of the shares to the Claimants is said in paragraph 5(2) to be £146,963.30, which I was told by Counsel for the Defendant represented the likely balance after the realisation of the lease. However, this has to be read in the context of clause 1 of the second order which provided that the remainder of the order would not take effect "if the Defendant by 4.00pm on 14 June 2010 pays to the Claimant [*sic*] the judgment debt of £146,963.30 secured by the charges". It seems impossible that anyone thought that the lease would be sold under the first order within a month and in fact the Defendant only had to give possession under paragraph 5 of the first order on 14 June 2010, yet the amount of the relevant judgment debt for the purposes of the second order deducts the prospective proceeds of sale of the lease. This suggests to me that the use of the sum of £146,963.30 does not assume that the sale of the lease will necessarily occur first. As will be seen below, the use of this sum arose from a fear of double counting.

11. It is also clear from the transcript of the hearing before District Judge Parkes that there was no intention to defer the sale of the shares until after the lease. The Claimants argued for a 14 day delay on sale and the Defendant argued for 60 days. He sought a delay of the sale of the shares because he thought they would rise in value and he also sought a delay in the sale of the lease, on the grounds that there were elderly sitting tenants with health problems who had to be given notice and rehoused.

12. District Judge Parkes ruled that he would delay the sale of both the lease and the shares for 30 days and that delay is laid down in both orders. The

Transcript contains no suggestion that District Judge Parkes intended the share sale to be delayed beyond the sale of the lease and the orders have no such provision.

13. The Defendant however argues that the orders taken together provide that the property was to be sold first and the shares should only be sold secondly. Both orders operate successfully without any implication of such a term and it has to be borne in mind that despite the use of £146,963.30 as the sum payable from the shares in the second order, paragraph 7 of the second order allows either party to apply to the Court to vary the order "or for further direction about the sale of [*sic*] the application of the proceeds of sale or otherwise", so the amounts specified in the orders could be adjusted in the light of subsequent events.

14. The Defendant, like the District Judge, relies on the provision in paragraph 8 of the second order that it is to be read "subject to" the first order. However, the transcript of the hearing before District Judge Parkes (page 25) shows that this was inserted to avoid "double accounting" [*sic*]. There is no suggestion at all that it has anything to do with the timing of the sale of the shares.

15. The basic approach is that a mortgagee or chargee of two different assets can choose which he wishes to sell first. It is difficult to see why a court order of sale to assist an equitable chargee should subject the recovery of the debt to the kind of delay suggested by requiring one asset to be sold after another. In particular, where one of the charged assets is land, which has a relatively stable value, and the other shares, which can go up or down rapidly, it would be very odd to suppose that the sale of the shares should wait until the after the sale of the property, which could take a substantial amount of time, during which there was a risk that the shares would become considerably less valuable. The fact that the value of the shares has now plummeted illustrates the improbability of the court in ordering a sale of shares requiring the chargee to wait until after the sale of a property.

16. One also sees from the transcript of the hearing before her, that District Judge Parkes was acutely aware of the potential for a drop in share price during the 60 days the Defendant was asking for and she rejected the 60-day plea by

giving a delay of only 30 days. It cannot sensibly be supposed that having chosen to delay the sale of the shares (as well as the lease) for only 30 days, rather than the 60 days sought, she then subjected the sale of the shares to a potentially even longer delay by postponing it beyond the sale of the lease.

Was there a "sale" within the meaning of the second order?

17. The principal issue debated on this application relates to the correct legal characterisation of what happened after the orders. Paragraphs 2, 3 and 4 of the second order provided:-

"2. The right to transfer the said shares and to receive the dividends now due or to accrue thereon vest [*sic*] in the Claimant;

3. The sale shall be conducted by Savoy Investment Management Limited of 7 Hanover Square, London W1S 1HQ;

4. As many of the said shares as shall be required to repay the Claimants the amount due to them be sold by Savoy Investment Management Limited on behalf of the Claimant at not less than £1.13 per share unless that figure is changed by further order of the court;"

18. It seems to me that what paragraph 2 is doing is enabling the Claimants as equitable chargees to be able to pass title to the shares to a purchaser. The conduct of the court sale is given to the Defendant's broker.

19. It is elementary that a mortgagee or a chargee cannot sell to himself (the "self-dealing"rule). That is why, if he wishes to purchase the mortgaged property, he will opt for a court sale. Likewise, an equitable chargee cannot without the chargor's agreement sell the charged property without an order of the court. As I see it, what paragraphs 2, 3 and 4 are doing is to order a court sale of the shares. The wording of paragraphs 2, 3 and 4 suggest that a sale to a third party was envisaged by the court, but there is nothing in the second order which prohibits a purchase by the chargees. Since this is a court-ordered sale, the chargees themselves are perfectly entitled to buy.

20. The critical issue which divides the parties is whether what actually happened purportedly pursuant to the second order constituted a sale within the order. A sale is essentially the passing of some type of property or interest in return for a price. The price can be paid in cash or otherwise, including a set-off or credit in respect of a liquidated cross-debt, such as the judgment debt here.

21. What happened here was that the shares were transferred by Savoy Investment Management Limited to the chargees at the market price. No suggestion of undervalue has been made by the Defendant. The Claimants gave credit against the market value of the shares in respect of their judgment debt. On the face of it, therefore, property was transferred from the Defendant to the Claimants in return for a price.

22. The Defendant seeks to raise a technical point to the effect that what happened was not a sale within the order but a mere transfer and crediting.

23. The Defendant accepted that the second order did not in any way prevent the Claimants from purchasing. Had the shares been sold in the market, the Claimants plainly could have been purchasers. The question here is whether it made any difference that, instead of the Claimants buying through the market, they obtained the shares by a transfer and the crediting of the market price, avoiding commission and any costs. The avoiding of commission and costs of course was beneficial to the Defendant, since he obtained a larger deduction from the judgement debt and this again illustrates the technical nature of his objection.

24. The Defendant in fact accepted that had the Claimants agreed to purchase through the market and the commission had been paid, the transaction would have been a sale within the order. He also accepted that in objective economic terms what had happened had the same effect as a sale by the open market/commission and costs route. However, the Defendant relied on a series of documents to argue that there was no sale within the order.

25. Firstly, the Claimants' solicitors by a letter dated 13th June 2010 written to Savoy Asset Management Limited stated *inter alia* as follows:-

"We are instructed by our clients that they do not ask for the shares to be sold but instead request a transfer of the 80,000 Bowleven Plc shares jointly into the following names"

And then there is a reference to two of the Claimants.

26. The question of whether a transaction did or did not amount to a sale is a conclusion of law from the facts and does not depend on the subjective thoughts of the Claimants or their solicitors. But in any event, in the context of the second order, it seems to me that what the Claimants' solicitors are saying is that they don't wish the shares to be sold through the market but by a direct sale to two of the Claimants. A transfer which was not a sale would make no sense at all in the context of the second order.

27. The Defendant argues that if a sale was intended, it is surprising that no price is mentioned. However, since the Bowleven Plc shares are quoted, the price was obviously going to be the market price on the day of transfer.

28. Secondly, the Defendant produced an email from a gentleman at Savoy to the Defendant stating that the Bowleven shares were transferred into the joint names of two of the Claimants following an instruction in terms of the letter of 15th June 2010 referred to above. The writer then states:-

"As far as I know Savoy has not subsequently received any instruction to sell shares."

29. I think the key word here is "subsequently". In other words, what Savoy are saying is that there was a sale to two of the Claimants but there has been no subsequent instruction to sell the shares.

30. It is also the case that the Defendant produced this email for the first time at the hearing of the application and failed to produce his email on 19th January 2011 which prompted this email in response. The email of 19th January 2011 would have to be seen to put this email in context.

31. Thirdly, the Defendant relies on a letter of 22nd November 2010 from Share Data Limited enclosing a valuation of the shares and an invoice. The Defendant argues that the valuation was obtained five months after the time

credit was given and that this suggests that there had not been a sale within the order. He argues that this shows that the Claimants had not considered the transaction to be a sale and he accuses them of trying to dress it up as a transaction of sale retrospectively.

32. The subjective views of the Claimants and their solicitors are irrelevant. Moreover, the Bowleven shares had a market price and I am not sure why a valuation was needed. There is no suggestion in the evidence that the stake was large enough to have any significance in terms of the total shareholding in the company, so as to attract a premium. The obtaining of this valuation after the event does not alter the fact that the shares passed to two of the Claimants for a price.

33. Fourthly, the Defendant relies on a letter from the Claimants' solicitors to Canada Life Limited dated 6th July 2010. I set out the second and third paragraphs of the letter in full:-

> " The total sum now owed by the Defendant Mr Brewster is £273,657.26 which will increase on a daily basis to take account of statutory interest.
>
> We have commenced enforcement against Mr Brewster and have obtained orders in respect of shares in Bowleven Plc and his flat at 15 Sillwood Hall, Montpelier Road, Brighton. We do not know what price the flat will achieve in the market but we expect the net equity to be in the region of £70,000. The sale price of the shares is in the region of £100,000."

34. The letter goes on to say that credit for the sums mentioned will be given against the judgment and that the Claimants will be seeking to enforce against Mr Brewster's pension, held by Canada Life, for the remainder.

35. The Defendant argues that since this letter was written after the transfer, it shows that no sale had yet taken place, as it does not credit the value of the shares. However, I was told by Counsel on behalf of the Claimants that they did not receive the share certificate until 8th July 2010 and therefore the sale was still in progress at this stage as far as they were concerned.

36. The fifth point taken by the Defendant is that he says that the transfer to only two out of the three Claimants is an oddity if the purpose of the transfer was to

provide repayment of the judgment debt which was held by all three of the Claimants. It seems to me that there is nothing to stop two out of the three Claimants becoming purchasers instead of all three and the question of how the effect on the judgment debt is dealt with between the Claimants is a matter for agreement between the Claimants. There is nothing at this point to indicate that there had not been a sale.

37. Sixthly, the Defendant relies on the fact that a letter of 9th August 2010 from the Claimants' solicitors to the Defendant in relation to the pension aspect does not mention that a sale has taken place. However, the Defendant accepted during the hearing of this application that he received regular statements in relation to the shares from Savoy. He said that he believed that he had received a statement to the effect that the shares had been transferred but not that they had been sold. The difficulty with this is that these statements are in the Defendant's possession and control and he has not produced any of them. During the trial he produced a last minute up-to-date statement from Savoy which has nothing material on it. Moreover, once the Defendant received his statement, even if it only showed a transfer, he must in the context of the second order have assumed that there had been a sale. I can read nothing to the contrary from the fact that the letter of 9th August 2010 omits any mention of the sale of the shares. The letter is dealing with the pension aspect, which is dealt with later in this judgment.

38. The seventh point made by the Defendant relies on a letter from the Claimants' solicitors dated 18th February 2011, in the third paragraph of which it is claimed that paragraph 2 of the second order:

> "vested the shares in our clients with the right to receive dividends and provided that our clients had the right to transfer the Shares. There is no restriction in the Order prohibiting them from transferring the Shares to themselves and request was made of Savoy Assets Management Limited for transfer to two of our three clients."

39. The question of whether there was or was not a sale within the terms of the order is an objective legal conclusion and does not depend on the subjective views of any party, including the Claimants' solicitors, let alone their use of

the word "transfer" rather than "sale". Moreover, the letter is correct in saying that the order gave the Claimants the right to transfer the shares and that the order did not prevent the Claimants from transferring the shares to themselves. The statement that Savoy were asked to transfer the shares to two of the Claimants is not inconsistent with that transfer being part of a sale. Indeed, delivery under the sale could not take place without a transfer.

40. The Defendant also relies on the transcript of the hearing before District Judge Nightingale. The Defendant relies in particular on a passage at 30C-G of the transcript which includes the words uttered by the Claimants' solicitor:-

"Supposing there had been an actual sale from Savoy to the Claimants …"

41. However, these words have to be seen in context. At page 30E-F of the transcript, the same solicitor makes the point that the Claimants were "not estopped from buying the shares in any way." He then goes on to say that the Claimants "bought them at the proper price." The Claimants' solicitor also says at page 27 of the transcript "They could have transferred to anyone in the world, but, by agreement, we transferred them and we gave credit for the correct price of the shares at that date … so there has been a transfer, there has been a sale by Savoy to my clients …".

42. There is absolutely no doubt in my mind that the Claimants argued very clearly below that the transfer and crediting of the market value had amounted to a sale. Unfortunately, this does not seem to have been appreciated by the District Judge in her judgment below.

43. Lastly, the Defendant argues that in order to allow the appeal I would need to conclude that the District Judge was wrong and that if two views of the events were possible I must give some deference to the District Judge. The Defendant argues that the District Judge had been entitled to reach the conclusion that she did.

44. The issues in this case are legal issues arising from documents and there has been no oral evidence or cross-examination before the District Judge. I am therefore in as good a position as she was, or arguably better, because of the

further documents produced and the further arguments of Counsel for both sides, to rule on the legal issues.

45. With the greatest of respect to the District Judge, her judgment shows that she completely misunderstood the argument being put by the Claimants, which she characterised as follows:-

> "The Claimants argue that Order 2 does not require the Shares to be sold by the Claimants and that the Claimants have, as they are entitled to do under the provisions of the Order, elected to keep the shares. A value of £102,000 to the shares as at the date of the transfer on 25th June 2010 has been applied and credit for this sum has also been offset against the outstanding balance of the judgment debt owed by the Defendant."

46. As can be seen from the quotes from the transcript of the argument referred to earlier in this judgment, the Claimants were not arguing that they had simply kept the shares: they were arguing that the transfer and crediting had been pursuant to a sale.

47. I conclude therefore that what happened amounted to a sale within the second order.

Estoppel

48. The Claimants ran an alternative argument based on estoppel but in view of my conclusions on the question of sale it is not necessary to go into that issue.

Paradoxes

49. During the hearing, I was told that the price of the Bowleven shares had plunged, so as if they were sold now pursuant to the District Judge's order below, the Defendant would receive a much smaller credit against his judgment debt than the credit given by the Claimants.

50. The Defendant at first sight therefore seemed to be arguing against his own interests. I was told however that the Defendant wishes to allege that the transfer of the shares to the Claimants was wrongful and then claim that the Claimants became constructive Trustees for him and were liable to the Defendant for the loss of value in the shares since the time of the transfer. The

shares had risen by the time of the transfer and have plummeted since. This claim has not been argued and I make no ruling about it, but on its face it seems fanciful. If the transfer had been outside the second order, it would be void or voidable. The Defendant would still own the shares subject to the Claimants' equitable charge. He would have lost nothing and the Claimants would have gained nothing as a result of the purported transfer to two of the Claimants. There was no time limit for a sale under the second order and a valid sale could now take place, with much less deducted from the Defendant's judgment debt.

51. I was also puzzled as to why the Claimants wished to pursue the appeal, since they had made a substantial loss on the shares in the interval since they acquired them and under the order below they could now credit much less to the Defendant's judgment debt. I was told that the Claimants' concern was the costs position.

52. I am not ultimately concerned with the motives of the parties and their legal aspirations but note the above points to complete the picture.

<u>The second order could be amended</u>

53. Clause 7 of the second order provides: "Either party may apply to the Court to vary the terms of this Order or for further direction about the sale of [*sic*] the application of the proceeds of sale or otherwise;"

54. Mr. Weale, who appeared for the Defendant accepted that I had jurisdiction to vary the second order. He argued that in my discretion I should not do so, because there had not been a sale but the Claimants had tried to dress it up as such. He argued that it would now be manifestly unjust to validate the transfer.

55. I disagree. Even if I had come to the conclusion that there had not been a sale, it is still clear to me that the transaction had been carried out in good faith and at market value. The Defendant had actually gained from the way in which the transaction was carried out as opposed to a sale through the market which would have incurred commission. He would be worse off if the shares had to

be sold now in view of the drop in price, as less would be credited to his judgment debt.

56. Accordingly, I propose to vary the second order by providing specifically that Savoy would be entitled to sell to all or any of the Claimants and that such sale be executed by the transfer of the shares into the name of the purchaser or purchasers in return for a credit of the market value against the judgment debt.

57. Moreover, in case I am wrong about the true construction of the two orders, and if they require the lease to be sold first, I propose to amend the orders to make it clear that the property and the shares may be sold in any order. That was clearly the intention of District Judge Parkes, as reflected in the transcript of the hearing before her.

The Defendant's pension

58. The Defendant has a right to elect to drawdown 25% of his pension as a tax free sum. The question is whether that right and the 25% can be reached by execution in order to recover the balance or part of the balance of the judgment debt.

59. The Claimants applied for a third party debt order. This was clearly unviable taken by itself, because the right to elect the drawdown was not a debt. A debt would only arise if the election were made. The District Judge below so held, in my view correctly. The Claimants also argued that the Court could compel the Defendant to elect to take his lump sum now. However, the District Judge held:

> "The court cannot force the Defendant to make an election that is not in his financial interest and there is no jurisdiction to make any form of mandatory order against the Defendant in these circumstances."

60. As a matter of impression, if this were correct then this would work a substantial injustice to the Claimants, who have been the victims of fraud and forgery. 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.

61. The Defendant relies on *Field v Field* [2003] 1 FLR 376. This concerned an application to enforce an order that a husband pay a wife a lump sum payment by an injunction or through a receiver by way of equitable execution. These remedies were aimed at requiring the husband to elect to take a lump sum entitlement under a personal pension scheme.

62. An order to pay a lump sum is an order of the court and I cannot myself see why in principle the injunction and receivership powers in section 37(1) could not be used in aid of the court order in order to make it effective.

63. The learned Judge however rejected the use of these powers in that case in a concise judgment. He rejected the notion of appointing a receiver because there was no income or property belonging to the debtor to "receive". His rejection of the injunction to force an election (which would have created a debt due to the debtor) was based on the notion that the injunction would be "a free-standing enforcement procedure in its own right." As the Privy Council pointed out in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17 at [63], "[t]he basis for such a characterisation of the order in that case is not clear."

64. The Privy Council themselves distinguished *Field v Field* on the basis that it regarded the injunctive relief as not being "free-standing" where it is ancillary to execution: *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17. This was a case concerning a right of revocation of a trust held by the debtor and the question was whether the court had jurisdiction to order the Defendant to exercise the power of revocation so that he would recover from the trust substantial assets over which the Receivers appointed by way of equitable execution could take possession. The relevant passage is at paragraph 63:

"The second objection was based on the decision of *Field v Field* [2003] 1 FLR 376. In that case a husband had defaulted on an order to pay a lump sum to his former wife. The husband had a non-assignable right to elect for a lump

sum payment under his employer's pension scheme. It was held that the pension could not be reached by the wife through an order requiring the husband to elect a lump sum payment and appoint a Receiver to receive the proceeds. Wilson J thought that to make such an order would amount to "a free-standing enforcement procedure in its own right," which was not permitted by section 37; at [17]. The basis for such characterisation of the order in that case is not clear. In the present case the order would be ancillary to TSMF's rights as judgment creditors. The Board considers there is force in the criticism of the reasoning of this decision in Gee, *Commercial Injunctions*, 5th ed 2004, paras 16.017-018, but as indicated above, this is not a question which falls to be decided on this appeal."

65. The present case, like that one, concerns the request for an injunction to aid the enforcement of a judgment. The Privy Council decision shows that *Field v Field* is not an impediment to the use of an injunction in the present type of case. I would add that although *Field v Field* was distinguished by the Privy Council, the injunction and receivership remedies in that case were in my view sought to enforce a judgment and were not sought as "free-standing" remedies. In my view, *Field v Field* should not, in the light of the comments of the Privy Council, be followed. It is inconsistent with the reasoning of the Privy Council. It creates a substantial injustice.

66. A number of other relevant points arise from the Privy Council judgment. Section 37 of the Supreme Court Act 1981, now known as section 37 of the Senior Courts Act 1981, gives the court power to grant injunctions and appoint Receivers whenever it is just and convenient. The Privy Council considered at paragraph 5 that the appointment of a Receiver by way of equitable execution is not "execution" in the ordinary legal sense of the word but a form of equitable relief for cases in which execution in that sense is not available. At paragraph 6, following the Court of Appeal in *Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2009] QB 450, the Privy Council held that jurisdiction to appoint a Receiver by way of equitable execution is not limited to a chose in action which was presently available for legal execution. The remedy extends to whatever is considered in equity to be assets.

67. The precise question before the Privy Council was whether the power of revocation of a trust is sufficiently close to the notion of property as to enable the equitable remedy of a receiver by way of equitable execution to be available to ensure that a judgment debtor does not put himself beyond the reach of the judgment creditor and whether the appointment can be made effective by ordering the debtor to transfer or delegate the power of revocation to the Receivers (and, in default, ordering the transfer or delegation to be executed on his behalf).

68. The Privy Council at paragraph 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 and again I consider the reasoning in *Field v Field* (on the receivership issue) to be flawed in view of the reasoning of the Privy Council and that it should not be followed.

69. In terms of exercising a discretion on the question of the injunction remedy, the Privy Council considered at paragraph 56 that the demands of justice were the overriding consideration in considering the scope of the jurisdiction under section 37 and that the court has power to grant injunctions and appoint Receivers in circumstances where no injunction would have been granted or Receiver appointed before 1873. Moreover, a Receiver by way of equitable execution could be appointed over an asset whether or not the asset was presently amenable to execution at law. The jurisdiction could be developed incrementally to apply old principles to new situations. In that case, the interests of justice required that an order be made in order to make effective the judgment of the Cayman court recognising and enforcing the Turkish judgment. At paragraph 61 the Privy Council considered that the appropriate order would be that the debtor should delegate his power of revocation to the Receivers so that they could exercise them.

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 monies 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.

73. I should add that it is not clear to me that the Defendant could in fact seek the protection of English bankruptcy laws, since he is said to reside in Spain and therefore it is unclear whether his "centre of main interests" is located in the UK so as to enable him to open a main proceeding in the UK: see Article 3(1) of the EC Regulation on insolvency proceedings (1346/2000). It has not been suggested that he has an "establishment" within the UK within the definition in Article 2(h), enabling him to open an independent territorial or a secondary proceeding under Article 3(2).

74. The District Judge below considered whether the Defendant's potential 25% lump sum could be reached by execution and whether in aid of that execution the court had jurisdiction to make an order that he withdraw the monies. The

Privy Council case had not been discovered or cited to the District Judge and therefore one can understand the difficulty she felt herself in. She held that she lacked jurisdiction to order the Defendant to make the required election. In the light of the Privy Council's decision, it can be seen now that that was an erroneous approach and that there is jurisdiction to make such an order, which in these circumstances should plainly be exercised.

75. 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.

76. I propose therefore to order that the Defendant sign such letter as may be presented to him by the Claimants' solicitors to delegate to the Claimants' solicitor the power to make in the Defendant's name the election to receive his tax free 25% payment, up to the amount needed to repay the balance of the judgment debt. I also propose to order that if the Defendant does not comply with this order, the Claimants be authorised by the Court to write in the Defendant's name to Canada Life making the election on his behalf and in his name. There is no question here of assigning the right to make the election: there is simply a question of authorising another party to act on the Defendant's behalf. A copy the order of the court together with the Claimants' solicitor's letter should be sufficient authority for Canada Life to act on the election.

77. I would add that 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.

78. In any event, I will restore the third party debt order discharged below, to take effect from the moment that the debt created by the election to take the lump sum becomes effective. I will also give liberty to apply in case any further difficulty is encountered by the Claimants in enforcing their judgment.

MR G MOSS QC