Neutral Citation Number: [2022] EWHC 1746 (Ch)

Case No: BL-2019-BRS-000028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 11 July 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

BETWEEN:-

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Claimants

-and-

(1) GEOFFREY WILLIAM GUY
(2) THE CHEDINGTON COURT ESTATE LIMITED
(3) AXNOLLER EVENTS LIMITED

Defendants

-and-

JAMES HAY PENSION TRUSTEES LIMITED

Third Party

- -
- -

Mrs Nihal Brake for herself and Mr Andrew Brake, **Claimants**
(**Jon Colclough** settled a skeleton argument for Mr Brake, but was not instructed for the hearing)
Calum Mulderrig (instructed by **Stewarts Law LLP**) for the **Defendants**
Charlotte Pope-Williams (of **Pinsent Masons LLP**) for the **Third Party**

Hearing dates: 30 May 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 11 July 2022.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the further consideration of a third-party debt order ("TPDO") made on an interim basis by Lewison LJ on 4 April 2022. The order followed the dismissal by the Court of Appeal on 2 March 2022 of an appeal by the claimants/appellants ("the Brakes") against a decision of my own at the trial of this claim: see [2022] EWCA Civ 235 (appeal); [2021] EWHC 671 (Ch) (trial). Following the appeal, the Court of Appeal ordered that the Brakes pay the costs of the appeal of the defendants/respondents ("the Guy Parties"), and ordered an interim payment on account of £70,000 by 4 PM on 16 March 2022. That sum was not paid on that date, nor, so far as I understand, thereafter.

2. Subsequently, the Guy Parties made an application for a TPDO by notice dated 17 March 2022, although the notice was sealed by the Court of Appeal only on 28 March 2022. In the notice the third party was stated to be within England and Wales, and to owe money to one of the Brakes, namely the second claimant Andrew Brake. The third party was identified as "James Hay Partnership", of an address in Salisbury.

3. In support of the application the Guy Parties said this:

> "The judgment creditor's legal representatives have received confirmation by email from Mrs Brake on behalf of the judgment debtor dated 26 September 2021 that James Hay Partnership holds pension … in the name and for the benefit of Mr Andrew Brake …
>
> The judgment creditor's legal representatives are aware that the judgment debtor is eligible to drawdown the pension and has previously done so in respect of his tax-free allowance, as confirmed by Mrs Brake on 14 March 2022 … The value of the pension following the drawdown of Pension Commencement Lump Sum was £89,522.89 (as at September 2021)."

4. As I say, Lewison LJ was invited to and did make the interim TPDO on 4 April 2022. He directed that the further consideration of the application should be at a hearing listed before me, not before 28 April 2022. The interim TPDO was served on the James Hay Partnership by email sent in the afternoon of 4 April 2022, and the application notice for the TPDO and documents in support were also served on the James Hay Partnership by email within half an hour thereafter. Receipt was acknowledged by email, expressly on behalf of the "James Hay Partnership", by email on the morning of 5 April 2022.

Relevant procedural rules

5. Third-party debt orders (formerly known as garnishee orders) are governed by CPR Part 72. CPR rule 72.2 relevantly provides that:

> "(1) Upon the application of a judgment creditor, the court may make an order (a 'final third party debt order') requiring a third party to pay to the judgment creditor –

> (a) the amount of any debt due or accruing due to the judgment debtor from the third party; or
>
> (b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application.
>
> (2) The court will not make an order under paragraph 1 without first making an order (an 'interim third party debt order') as provided by rule 72.4(2)."

6. CPR rule 72.6(4) provides that:

> "Any third party other than a bank or building society served with an interim third party debt order must notify the court and the judgment creditor in writing within 7 days of being served with the order, if he claims –
>
> (a) not to owe any money to the judgment debtor; or
>
> (b) to owe less than the amount specified in the order."

7. CPR rule 72.8 relevantly provides that:

> "(1) If the judgment debtor or the third party objects to the court making a final third party debt order, he must file and serve written evidence stating the grounds for his objections.
>
> […]
>
> (4) Written evidence under paragraphs (1), (2) or (3) must be filed and served on each other party as soon as possible, and in any event not less than 3 days before the hearing."

Procedural matters

First listed hearing for further consideration

8. No notice was filed by the third party under CPR rule 72.6(4) within the seven days of service of the interim order. Consistently with the order of Lewison LJ, on 7 April 2022 I directed that the hearing for further consideration of the application for a TPDO should take place before me at 2 PM on 29 April 2022. Since the expression "days" in the expression "not less than three days" is to be construed as "clear days", excluding (a) the day on which the period begins and (b) the day on which the hearing takes place (see CPR rule 2.8(2), (3)), that would mean that any evidence under CPR rule 72.8(1) would have to be filed by 25 April 2022. No such evidence was filed by that date.

Second listed hearing for further consideration

9. As it happens, the hearing listed for 29 April 2022 did not go ahead. In the light of submissions made to me by the parties, on 27 April 2022 (when I was hearing another aspect of the litigation) I vacated that hearing and relisted it for 10 May 2022, with a time estimate of 30 minutes. At that stage there was no indication that there would be any argument or other submissions made on behalf of the third party, except so far as

was necessary to ensure that the third party was not ordered to pay money which it did not have or incur liabilities which it could not discharge. As it was put by Ms Chatten, in-house counsel for the third party, in an email to the court on 26 April 2022,

> "James Hay is essentially a neutral third party in this matter, and so does not either support or oppose the third party debt order".

10. On 4 May 2022 and on 5 May 2022 the Guy Parties' solicitors wrote to Ms Chatten, asking her to confirm that the third party was adopting a neutral position, and that its only concern was not to incur any liability. On 6 May 2022 Ms Chatten replied to these enquiries, stating that:

> "James Hay's position will be set out in a position statement which I understand will be exchanged with the Parties on 9 May 2022. James Hay is neutral on the merits of the underlying disputes to the application. That neutrality is not to say that James Hay is passive in its approach to the Third Party Debt Order application, however, and James Hay must be sure that the application has been brought on the correct footing and that any final order that might be made would be properly enforceable."

11. The Guy Parties' solicitors replied on the same day, saying:

> "We agree that any order must be enforceable and effective – on this point there are a number of issues that could usefully be addressed in your position statement which will be of assistance to the court (1) the content/form of any notices/instruction required by James Hay to draw down funds; (2) any timing issues in respect of drawing down funds; and (3) what information James Hay may require from Mr Brake (if any) to calculate tax due on any payment."

12. Early on 9 May 2022 Ms Chatten replied to the email from the Guy Parties' solicitors, saying:

> "I am afraid that I will not have time to alter the position statement to include those items as I am going to be in meetings most of the morning. To answer a question that you posed in an earlier email, to which I have not yet replied, James Hay does not have preferred wording for a third party debt order – however, its primary concern is that the wording requiring James Hay to pay a specified sum makes clear on its face that a lesser sum will be payable if that is all that can be realised from the SIPP/assets for whatever reason, and that there will be no residual liability on James Hay itself for any shortfall."

Application for adjournment

13. A few hours later on 9 May 2022, the Brakes and the Guy Parties exchanged short skeleton arguments in preparation for the hearing the following day. However, at the same time, and undoubtedly to the surprise of the Guy Parties, the third party served a 13 page "Position Statement" raising a number of legal objections to the making of a final TPDO. The document was actually dated 3 May 2022, but served on the parties and sent to the court only six days later. The legal objections raised included (i) identification of the wrong legal entity name in the third party debt order, (ii) disputing whether any debt had accrued at all, and (iii) raising an issue about the third

party's duties to Mr Brake. As a result, the Guy Parties made an urgent application to the court to adjourn the hearing for the following day, and relist it on the first available date on or after 3 June 2022, with a time estimate of half a day. They also asked the court to reserve the costs of the adjournment, but indicated that they would be seeking those costs from James Hay in due course.

14. I dealt with that application in the afternoon of 9 May 2022, and sent my decision out by email to the parties and to the third party at 17:58. I noted that no explanation had been given for the delay in the third party serving and filing the position statement since it was made on 3 May, and that that statement took a stance which was on the face of it inconsistent with previous statements on behalf of the third party that it was neutral. I also said that it was surprising that the legal and factual arguments now put forward had not been previously raised, particularly given that the third party did not comply with either CPR rule 72.6(4) or CPR rule 72.8.

15. As I said in my email, it was on the basis of the lack of any notice of objection, taken together with the statements of neutrality, that I caused the hearing for further consideration to be listed for 30 minutes. It was now obvious that the position was very different. I therefore vacated the hearing for the next day, and gave directions for the service of further evidence and for the hearing to be relisted. I directed that the third party comply with its obligation under CPR rule 72.6(4) by 4 PM on Wednesday, 11 May 2022, and file and serve any evidence for the purposes of CPR rule 72.8 by 4 PM on Friday, 13 May 2022. I directed that the Guy Parties file and serve any evidence on which they wished to rely by 4 PM on 20 May 2022.

Third listed hearing for further consideration

16. The hearing was in fact relisted for 30 May 2022. In the interim, Ms Chatten on behalf of the third party produced (i) a document dated 11 May 2022, and headed "THIRD PARTY'S GROUNDS OF OBJECTION TO THE PROPOSED FINAL THIRD PARTY DEBT ORDER", (ii) a first witness statement dated 13 May 2022, and (iii) a second witness statement dated 18 May 2022, each with an exhibit. Strictly, only the first of the two witness statements was permitted by my directions. One of the Guy Parties' solicitors, Harry Spendlove, made a witness statement (his fourth), dated 23 May 2022, in reply to the first and second witness statements of Ms Chatten. This was three days late, but it was made also in reply to the second witness statement of Ms Chatten, for which, as I say, she had no permission. However, at the hearing no objection was taken by any party to any of this evidence being taken into account, and I have accordingly done so.

The further application

17. Also in the interim, on 20 May 2022, the Guy Parties made a further application by notice, seeking three further orders:

> "1. An order pursuant to CPR rule 19.2 to substitute James Hay Pension Trustees Limited (the Third Party) for the James Hay Partnership in the Defendants' application dated 17 March 2022 for a third party debt order;
>
> 2. An injunction pursuant to s. 37 Senior Courts Act 1981 requiring the Second Claimant to: (i) delegate to the Defendants the Second Claimant's rights to

authorise the Third Party to drawdown his IG SIPP … (the Pension); (ii) to provide to the Third Party and/or the administrator of the Pension (James Hay Administration Company Ltd) any and all information and/or documentation required to facilitate the draw-down of the Pension;

3. An injunction pursuant to s. 37 Senior Courts Act 1981 requiring the Third Party to comply with any request and/or instruction received from the Defendants to draw-down the Pension pursuant to the rights delegated under paragraph 2(i) above."

18. On 24 May 2022, after considering submissions from the Brakes and the Guy Parties, I directed that this further application should be heard together with the further consideration of the TPDO on 30 May 2022. I directed that the Brakes and the third party should be permitted to file evidence in response to the application, which both did. Ms Chatten for the third party made a third witness statement dated 26 May 2022. Andrew Brake made two short witness statements, one dated 26 May 2022 and the other dated 29 May 2022.

The name-change application

19. I should say at the outset that the application under paragraph 1 of that notice, to substitute James Hay Pension Trustees Limited for the James Hay Partnership in the original application, was expressly consented to by the third party in a letter of 25 May 2022, and (at least) not opposed by the Brakes. This was a sensible position to adopt. It is clear from the email correspondence which I have seen that the phrase "James Hay Partnership" was used (and, indeed, expressly stated to be used) as a trading name for a number of companies in the James Hay group. This included and includes James Hay Pension Trustees Limited, which is the trustee that holds the assets for the benefit of the pension beneficiary, in this case Mr Brake.

20. At the time that they issued the TPDO application, the Guy Parties did not know that this was the full and correct name for the company which held the pension assets. Indeed, they had been told by Mrs Brake that the pension was held by "James Hay Partnership". That is unsurprising, since the name "James Hay Partnership" appears on much of the documentation. It was also the name in which the receipt of the interim TPDO was acknowledged. It was not suggested that anyone (and especially not the third party) had been misled by the Guy Parties having used the trading name rather than the company's official title, and I can see no reason not to make the order under that paragraph.

Mr Brake's pension

Pension Trust Deed

21. The evidence shows that Mr Brake's pension with the third party is an "IG SIPP (Modular iSIPP)" pension governed by the James Hay iSIPP Guide and the James Hay Personal Pension Plan – Scheme Rules. Mr Brake's pension is held under the terms of the James Hay Personal Pension Plan Trust Deed, made on 4 April 2019, to which the third party is a party. This was exhibited to Ms Chatten's first witness statement. Clause 1.3.19 of the deed provides that

"'Provider' means James Hay Services Ltd and any successor for the time being as provider of the Scheme, in accordance with clause 3…"

Clause 1.3.20 provides that

"'Rules' means the Rules of the Scheme, including where appropriate all former Rules of the Scheme and the provisions of any Schedule or Appendix to the Rules … as amended from time to time."

And clause 1.3.21 provides that

"'Scheme' means the pension scheme that is governed by this Deed and known as the James Hay Personal Pension Plan".

22. Clause 2 of this deed relevantly provides that

"2.1. The Provider hereby confirms the establishment of the Scheme under irrevocable trust on 15 November 1995 …

[…]

"2.6. Each Member's or Survivor's Fund shall … be held as a separate trust fund distinct from the other Member's or Survivor's Funds under the Scheme. … "

23. Clause 4.9 of the deed relevantly provides:

"All Arrangements issued or held under the Scheme … shall as further described in the Rules be so issued or held subject to:-

(a) overriding laws;

(b) the Rules;

(c) the Trust Deed … ;

(d) applicable provisions of the Terms and Conditions,

and accordingly also to all relevant powers of the Scheme Administrator and (where applicable) the Professional Trustee … In the event of any inconsistency as between the requirements listed in paragraphs (a) to (d) above, earlier paragraphs shall take precedence over later paragraphs."

24. Clause 5.4 of the deed relevantly provides:

"The Professional Trustee's only duty is to own the assets of the Scheme. It shall only act or exercise its powers and discretions in relation to the Scheme at the order of the Scheme Administrator … "

25. Clause 8.4 of the deed provides:

"A Member or Survivor who is entitled or prospectively entitled to any benefit under the Scheme is obliged to provide the Scheme Administrator with all information required by it and requested in connection with the administration of

the Scheme. The Scheme Administrator shall be entitled to withhold benefits in respect of any Member or Survivor until the necessary information is supplied".

26. Clause 9.14 of the deed provides:

> "The Scheme Administrator shall not be prevented or restricted from exercising in its own interest any power or discretion (and nor shall it be obliged to account for any benefit as a result of any such exercise) under or in connection with the Scheme."

27. Clause 11.5 of the deed provides:

> "Except where they have expressly agreed to the contrary none of the Scheme Administrator, the Professional Trustee and any Co-trustees shall be under any duty to any Member, Survivor or other beneficiary to consider the tax implications of the operation of the Scheme in relation to such Member, Survivor or beneficiary or to ensure that the Scheme is operated in a manner which avoids or limits the application of any tax charges, penalties or other costs."

28. Finally, clause 16 of the deed comprises a lengthy and elaborate clause, so far as possible exonerating the trustee, the scheme administrator and the pension provider from any liability. Clause 16.1 is an overarching general provision, which provides:

> "To the full extent permitted by law, the Provider, the Scheme Administrator, the Professional Trustee, and any Co-trustees shall have no responsibility for the liabilities associated with any Member's or Survivor's Fund (other than from the assets allocated to that Fund)."

29. There then follow a further six subclauses making detailed provision for particular circumstances. But the first part of clause 16.2 also provides:

> "In particular, none of the Provider, the Scheme Administrator, the Professional Trustee, or any Co-trustees (and no officer or employee of any of them) (the **Protected Persons**) shall be liable for any breach of trust or duty, whether committed or omitted by them or by any other person and any Protected Person shall be responsible only for his, her or its own breach of trust or duty knowingly and deliberately committed … "

30. For present purposes I do not think it is necessary to refer to any other of the provisions of clause 16, except clause 16.6, which excludes the general duty of care under section 1 of the Trustee Act 2000.

Scheme Rules

31. The James Hay Personal Pension Plan Scheme Rules, which are the Rules of the Scheme, were also exhibited to Ms Chatten's first witness statement. They relevantly provide as follows (the words in italics being so in the original, to indicate defined terms):

> "2. DEFINITIONS
>
> […]

Member's income withdrawal means a *member's income withdrawal* as defined in paragraph 7 of Schedule 28 of the *finance act*. Broadly, it means any amount (other than under a *member's short-term annuity*) paid from the *member's drawdown pension fund* or *member's flexi-access drawdown fund*.

3. MEMBERS, ARRANGEMENTS AND BENEFIT OPTIONS

[…]

Arrangements and benefit options

3.13. The *scheme administrator* may at its discretion decide not to make benefit options available in order to avoid making an *unauthorised payment* or a payment which it believes to be – or which it expects [sic] to be – an *unauthorised payment* following legislative change or clarification.

[…]

5. MEMBER TAKES HIS OR HER OWN BENEFITS

5.1 … a *member* may arrange with the *scheme administrator* that he or she will start taking benefits for himself or herself from part or all of an arrangement …

Those benefits may take the form of one or more of the lump sum and pension benefits permitted by the 'lump sum rule' and the 'pension rules' … including: –

- a *pension commencement lump sum*;
- an *un-crystallised funds pension lump sum*;
- a *serious ill health lump sum* or … a *small commutation lump sum*;
- *member's drawdown pension* in the form of *member's income withdrawals* or (at the discretion of the *scheme administrator*) the purchase of a *member's short-term annuity*;
- a *member's lifetime annuity* or (at the discretion of the *scheme administrator* …) *member's scheme pension*; and
- a *lifetime allowance excess lump sum*.

6. BENEFITS FOR MEMBER

Lump Sum for the Member

6.1. The *member* may choose to receive a *pension commencement lump sum* or an *uncrystallised funds lump sum* on the *pension date* subject to the relevant conditions specified in and prescribed under the *finance act*.

[…]

Pension benefits for the Member

6.3. After any *pension commencement lump sum* or *uncrystallised funds lump sum* has been paid as described in rule 6.1, any remaining part of the *member's fund* will be used to provide pension benefits for the *member* which start on the *pension date* through one or more of: –

- the provision of *member's drawdown pension* in the form of: –
  - *member's income withdrawals*;
  - (at the discretion of the *scheme administrator*) the purchase of *member's short-term annuity*;
- (at the discretion of the *scheme administrator ...*) the payment of member's scheme pension; and
- the purchase of a member's lifetime annuity from an insurer.

Member's Drawdown Pension – Availability and Options

6.4. Where the option is available under the scheme, at the *scheme administrator's* discretion the *member* may … designate part or all of his … *member's fund* for the provision of *member's* drawdown pension on a specified basis in the form either of –

- *member's income withdrawals* that are drawn direct from; or
- a *member's short-term annuity* that is purchased from,

the *member's drawdown pension fund* or the *member's flexi-access drawdown fund …*

[…]

6.9. The precise options which are open to a *member* in respect of *member's drawdown pension* under any particular arrangement shall depend upon and be provided subject to the terms of the arrangement and such other terms as may be agreed between the *member* and the *scheme administrator*."

Terms and Conditions

32. The fourth witness statement of Mr Spendlove exhibits a further document from the third party called "SIPP Terms and Conditions." This is stated to apply to (amongst other pensions) the "James Hay Modular iSIPP (Modular iPlan)." As already stated, that is the pension which Mr Brake has with the third party. Paragraph 2.1 relevantly provides that the expression "Technical Guide" means "the document providing detailed technical guidance about your SIPP", that the expression "James Hay Online or JHOL" means "the secure online portal accessible on our Website, or any replacement or successor, in whatever form", and that the "SIPP Companies" means "the relevant companies listed in respect of your SIPP at clause 3.1 below, as the context requires". Clause 2.2.1 relevantly provides that "we, us and our" means "the SIPP Companies". Clause 3.1 relevantly provides that, in relation to the James Hay

Modular iSIPP, the relevant companies are the Scheme Provider, the Scheme Administrator and the Professional Trustee (the third party).

33. Paragraph 4 of that document is headed "KEY DOCUMENTS". It provides as follows:

"Your key documents, which are available on request, are:

(1) Trust Deed and Rules for your SIPP as amended from time to time (Trust Deed and Rules);

(2) these Terms and Conditions;

(3) your completed application form;

(4) Charges Schedule;

(5) Permitted Investments List;

(6) Individual user terms and conditions for JHOL (where applicable);

(7) Key Features Document (where applicable); and

(8) Technical Guide."

34. Paragraph 5 of that document is headed "SERVICES". Paragraph 5.1 is headed "Services provided" and relevantly provides:

"In accordance with these Terms and Conditions, we shall:

[…]

(9) pay pension benefits and/or death benefits;

[…]".

35. Paragraph 5.2 is headed "When we shall refuse to carry out our services". It provides:

"Our services shall not be carried out if doing so breaches or is contrary to any:

(1) law, regulation, code of practice or industry guidance;

(2) regulatory requirements (including FCA recommendations or decisions of the Financial Ombudsman Service);

(3) document listed in clause 4."

36. Paragraph 11 of that document is headed "PAYMENTS OUT/BENEFITS". It relevantly provides that:

"11.1. The Technical Guide provides rules for payment of benefits on retirement and death and does not form part of these Terms and Conditions.

> 11.2. Retirement benefits will be paid in accordance with HMRC rules and the Technical Guide.
>
> […]
>
> 11.5. … we may decline to follow your instructions (we will inform you within a reasonable time if so). In particular we will refuse to carry out your instructions where any required documentation is not satisfactorily complete.
>
> 11.6. You undertake to withdraw from your SIPP only for the purpose of taking benefits in accordance with HMRC rules."

37. Paragraph 19 is headed "OTHER IMPORTANT TERMS". Paragraph 19.10 is headed "Priority of the Trust Deed and Rules". It provides:

> "If there is an inconsistency between any of the provisions of these Terms and Conditions, the documents listed at clause 4 and the Trust Deed and Rules respectively, the provisions of the Trust Deed and Rules shall prevail over these Terms and Conditions, and the documents listed at clause 4."

38. Paragraph 20 of the document is in section 2, and is headed "LOGIN AND SECURITY". So far as relevant, it states:

> "23.1. If the service allows you to provide us with instructions about your SIPP, we may refuse to act on any instructions which are unclear, or if we doubt their authenticity. We may refuse to complete an instruction in such circumstances if we believe or suspect:
>
> (a) it may place us in breach of any legislation or law; or
>
> (b) it relates to fraud or any other criminal act.
>
> […]."

Technical Guide

39. The "Technical Guide" referred to in the Rules is exhibited to Ms Chatten's second witness statement. In a section headed "Taking money out", the guide states as follows:

> "Benefit options
>
> You can take as little or as much as you want from your modular iSIPP. You have the choice of taking your funds as an income for life by purchasing a lifetime annuity, or you can access your funds as and when you want through one or more lump sums and income drawdown. Or you can have a combination of both.
>
> To access your funds, you will have two main choices:
>
> - You can put your funds into drawdown, known as flexi-access drawdown, from which you can take out any amount over whatever period you choose as an income withdrawal, or

> - You can take a single or series of lump sums from your un-crystallised funds (any funds not already designated for income), known as an uncrystallised funds pension lump sum …
>
> Flexi-access drawdown
>
> If you choose to access your pension through drawdown for the first time, the funds will be crystallised (designated) into flexi-access drawdown. You can take a tax-free lump sum of up to 25% of the funds you crystallise, and there will be no limit on the amount of income that you can draw from the remaining value of the crystallised funds in your plan each year. You can take income payments annually, half yearly, quarterly or monthly. Any income payment via flexi-access drawdown will be taxable under PAYE and will trigger the money purchase annual allowance rules. … "

40. A benefit statement sent by the third party to Mr Brake on 14 September 2021 showed that Mr Brake had by that date already moved his entire pension to "Flexi-access drawdown". It also showed that in addition he had already drawn down 25% of its value as a tax-free lump sum. Accordingly, the remainder of the pension fund (just over £89,000) was left in "Flexi-access drawdown". Ms Chatten's second witness statement on behalf of the third party confirmed that as a result Mr Brake is now able to draw down all remaining funds in "Flexi-access drawdown" *without* completing a further benefit payment form, and merely by asking for payment via the third party's website. This is because he had already completed the benefit payment form (and completed the risk-based questions) on 20 August 2021, in order to access his pension. It was submitted to me at the hearing, and not challenged, that it was this document which satisfied the Guy Parties that there was a debt due to Mr Brake to which a TPDO could attach.

Online Terms and Conditions

41. The fourth witness statement of Mr Spendlove also exhibits a document headed "James Hay Online Terms & Conditions for Members". This states in particular that

> "These Terms and Conditions specify important conditions and information about the James Hay Online Service … offered by James Hay Partnership …. The Service is available to customers of our SIPP, GIA, ISA, and Wrap Products … who have completed the James Hay Online registration process. …
>
> […]
>
> 4. Instructions
>
> If the Service allows you to instruct us in relation to your Product, instructions may be refused which are unclear where their authenticity is doubted. We may refuse to complete an instruction in such circumstances if:
>
> (a) we believe or suspect it may place us in breach of any legislation or law; or
>
> (b) we believe or suspect it relates to fraud or any other criminal act.
>
> […]."

42. I have to say that this complex but abundant cornucopia of contractual and noncontractual documentation (of which I have extracted just a few clauses) relating to the provision of pension benefits for Mr Brake must leave him, all laypersons, and probably many lawyers too, with a headache. Yet, it is on the basis of these many and varied (and perhaps not completely consistent) documents that I must decide this case.

Final Third Party Debt Order

The need for a debt

43. In order to make a third party debt order, the court must be satisfied that there is a *debt* due from a third party to the judgment debtor. As already set out above, CPR rule 72.2(1) refers to

> "any debt due or accruing due to the judgment debtor from the third party…"

44. The test for whether there is a debt due or accruing due for this purpose has been judicially stated to be whether or not the creditor could immediately and effectually sue (see *Taurus Petroleum Ltd v State Oil Marketing Company* [2018] AC 690, [88]), or whether there is some contingency or condition precedent that has not yet been satisfied (see *Hardy Exploration and Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm), [120]). A common object of third party debt order applications is the judgment debtor's current bank account, which (when in credit) represents a debt due from the bank to its customer, for which the customer could effectually sue. The important thing to notice is that a judgment creditor cannot by using the third party debt order procedure be put in a better position than the judgment debtor was. As it was put in an old case, "the judgment creditor … can only obtain what the judgment debtor could honestly give him": *Re General Horticultural Co, ex p Whitehouse* (1886) 32 Ch D 512, 516.

45. In *Blight v Brewster* [2012] EWHC 165 (Ch), the claimants had obtained summary judgment for a money sum against the defendant, and were seeking to execute that judgment against him. One of the assets which he had was an interest in a pension with Canada Life. The district judge at first instance had refused to make a TPDO in relation to this interest. The claimants appealed.

46. The deputy judge, Gabriel Moss QC, said:

> "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."

47. Unfortunately, the deputy judge did not set out any of the terms under which the pension (and in particular the 25% tax free sum) was due to be paid. Accordingly, I do not know if there were any real contingencies upon which the pension was to be paid,

or whether the pensioner defendant was immediately entitled to the fund. Nor do I know if the fund was in cash or invested. What the deputy judge said was that the defendant had a right to elect to drawdown 25% of his pension as a tax-free sum. He treated this as involving a contingency which had not yet been satisfied, and therefore turned to consider whether the court should instead make an order requiring the defendant to make an election to drawdown that 25% of his pension. Ultimately, he considered that he should do so. I will come back to consider that decision in due course.

48. In the meantime, the first question that I must deal with is whether there is a debt due to Mr Brake under the terms of his pension with James Hay Partnership. In this respect, I must look at the facts of this case, and in particular the terms of the agreement with the third party, rather than at whatever may have been the agreement in other cases, such as *Blight v Brewster*, especially since I do not know what were the terms of the pension scheme in play in that case, or the state of investment of the fund.

49. I have set out above the relevant provisions. They show that Mr Brake had three main ways to benefit from his pension. The Technical Guide shows that he could elect to purchase an annuity for his life, he could elect to take lump sums, or he could elect for income withdrawal, called "flexi-access drawdown". Although the scheme administrator had power under clause 3.13 of the Scheme Rules to decide not to make a benefit option (such as flexi-access drawdown) available, it did not do so. It is clear from the materials before me that Mr Brake before September 2021 *had* opted under clause 6.4 of the Scheme Rules for flexi-access drawdown, and in respect of the whole fund. Mr Brake took out 25% of the fund straight away, with no tax consequences, because the law so allows. But it is clear that he can now (using the third party's website) withdraw any amount over whatever period he chooses as an income withdrawal, although further withdrawals would attract liability for income tax, deducted at source.

50. On behalf of the third party, Ms Chatten says (first witness statement, paragraph 3.8) that Mr Brake has not made an election to draw down from his pension fund. She also says (third witness statement, paragraph 3.1) that the pension fund is invested and held in an investment manager account: it is not in cash. (In passing, I make the point that funds for investment are sometimes held temporarily in cash, usually in small sums. I have not seen a schedule of the investments here and do not know whether there was any cash at all at the time that the interim TPDO was served on the third party. There appears to have been a sum of £136 in cash as at 26 May 2022, but for the present I proceed on the basis that there was in fact none as at 4 April 2022.)

51. The third party accordingly submits that there is no debt to which a final TPDO can attach. The skeleton argument lodged on behalf of Mr Brake makes the same point. Although the Guy Parties' skeleton argument was not clear on the point, at the hearing before me their counsel accepted that there was no debt due until an election was made by or on behalf of Mr Brake to draw down all or part of the remaining funds. In my judgment, this concession was correctly made.

52. Although Mr Brake now has unrestricted access to his pension fund (subject only to administration costs and tax liabilities), it is held in the form of *investments*, and not in cash. If it had been in cash, I consider that on the facts of this case it would have

been a debt due to him, just like cash in a current bank account. The fact that he would have to make a request for the money to be paid to him, would not mean that it was not owed to him, again just like a current bank account. The further fact that the exact amount owed to him could not be known until the tax liability and any costs had been deducted would not matter either. It would be capable of being rendered certain, and that is sufficient. But here the funds are *invested*, and therefore Mr Brake has, not a debt owed to him, but a beneficial interest in those investments (subject to tax and costs). I do not pause to consider whether a charging order could have been obtained in relation to them. That is not this application. As things appear to me to stand at present, the interim TPDO cannot therefore be made final.

Constitution of the application

53. The third party made a further important submission with which I must also deal. This related to the parties against whom the TPDO should be made. It was submitted that any final TPDO would have to be against both the third party (the trustee) and also James Hay Administration Company (the scheme administrator). This was because, under the terms of the trust, the third party's only role was to hold the pension fund and deal with it as directed by the scheme administrator (see clause 5.4 of the trust deed). All the actual decisions were taken by the latter. Thus, it was said, the application for a TPDO was not properly constituted.

54. As to this, the Guy Parties pointed out at the hearing that they had originally applied for the TPDO against "James Hay Partnership", because that was what Mrs Brake had told them was the name of the entity liable to pay Mr Brake's pension. In fact, as I have said, that is a trading name for several companies in the same group. Indeed, it was the third party's position statement, served on 9 May 2022, that for the first time made this clear. But that statement also said this:

> "The correct entity to enact and enforce a valid Third Party Debt Order against Mr Brake's SIPP would be James Hay Pension Trustees Limited, which is the professional trustee of James Hay Pension Plan, the registered pension scheme under which Mr Brake's SIPP has been established."

55. That statement made no suggestion that the scheme administrator was *also* a required party for the purposes of a TPDO. For my part, I think it is rather hard for the third party now to complain that the scheme administrator ought to be made a party as well. The third party acknowledged service of the interim TPDO on 5 April 2022 in the name "James Hay Partnership". It had an opportunity right from the outset, either by complying with CPR rule 72.6(4) within five days of being served with the order, or by serving evidence by way of objection to the final TPDO under CPR rule 72.8(4) by 25 April 2022, to inform the Guy Parties that they needed to join other or different parties. But they did not do so. They let them go on with their application.

56. Nevertheless, at the hearing I sought to test this objection of improper constitution of the application. I put to the third party's counsel that, if she was right that, when the administrator gave a direction to the trustee, the trustee had no choice but to obey, then there was no need to join the trustee at all, and the claim for a TPDO should be made only against the administrator. Rather to my surprise, and contrary to her original submission, she then told me that she thought that that was correct.

57. So I then put to her what I called the "other side of the coin". If the claim were solely against the trustee, and it was ordered to pay over the fund it was holding, I asked what would be the trustee's defence to not paying the money in accordance with that order. In particular, would it be a defence for the trustee to say, "Oh, but I can only pay if the administrator tells me to"? In that case counsel submitted that, since the court order was a lawful order with which the trustee must comply, it counted as an "overriding law" within clause 4.9 of the trust deed, and therefore took priority over the scheme rules, the trust deed and indeed all the other pension scheme documents. Accordingly, counsel accepted that the trustee, even if the only party to the order, would have to obey it.

58. On the facts of this case, the relationship between the trustee and the administrator, is (as counsel for the third party accepted in argument) rather like that between a custodian trustee and a managing trustee under the Public Trustee Act 1906, section 4. However, it seems to me that that relationship is irrelevant. This is because, in the events that have happened, and in particular Mr Brake's decision, since implemented by the administrator, to crystallise his pension fund, withdraw 25% of the value tax-free, and leave the rest in flexi-access drawdown, there are no longer any relevant discretions which can be exercised to prevent Mr Brake having access to those funds, so long as he gives effective instructions in appropriate documentary form. The funds are indefeasibly his, at least in equity. That means that, assuming the other conditions for a TPDO are met, it is not necessary for the administrator to be joined in order for the court to make a TPDO against the trustee.

59. I add that, in my view, the third party's reference to clause 4.9 of the trust deed, and to "overriding laws", is a red herring. As I understand the matter, a TPDO to pay money to a creditor of a beneficiary under a trust can only properly be made where the trustee holds money in its hands that it is its duty to pay to the beneficiary. It would not, for example, be proper for the court to make a TPDO against a trustee of a life interest settlement to require it to pay money to a creditor of the remainderman under that trust. This is because there is no money in the trustee's hands which it is then the duty of the trustee to pay to the remainderman. Even if there were income in cash in the trustee's hands, that would be payable to the life tenant, and not to the remainderman. In my judgment, the reference in clause 4.9 to "overriding laws" would not make such a TPDO appropriate if, in its absence, it would not be appropriate. And if it *were* otherwise appropriate to make a TPDO against a trustee, because there were monies held by the trustee which under the terms of the trust were to be paid to the judgment debtor, a provision in the trust deed that orders of the court ranked *below* the terms of the trust deed or the scheme rules would of itself not prevent the TPDO from having priority over the deed or rules. So too here. But since, as I have said, there are only interests in *investments* held by the trustee for the benefit of Mr Brake, and not cash, it would not be right, at this stage, to make a TPDO against the third party trustee.

Ancillary Orders

60. The Guy Parties alternatively ask for ancillary orders that would, if granted, lead to the pension fund being liquidated, and so constituting a debt owed to Mr Brake. They are the subject of paragraphs 2 and 3 of the application notice of 20 May 2022. The Guy Parties seek the grant of an injunction under section 37 of the Senior Courts Act 1981 requiring Mr Brake (i) to exercise his right to require the pension fund to be liquidated and paid out, and/or (ii) to delegate that right to the Guy Parties, so that (in

either case) Mr Brake would then have a debt due to him from the third party. The court could then make a TPDO in respect of that debt. The Guy Parties rely on the decisions of the High Court in *Blight v Brewster* [2012] 1 WLR 2841, to which I have already referred, and *Bacci v Green* [2022] EWHC 486 (Ch), which followed it.

The authorities

61. In *Blight v Brewster*, Gabriel Moss QC, sitting as a deputy judge, referred to the then recent decision of the Privy Council in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721, to the effect that a receiver could be appointed of the right of the settlor under the terms of a trust to revoke it, by way of equitable execution of a judgment against him. He said:

> "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."

62. The deputy judge considered the facts of that case, and concluded

> "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."

63. In *Bacci v Green*, Andrew Hochhauser QC, sitting as a deputy judge of the High Court, was faced with a similar problem, and was referred to the decision of Gabriel Moss QC in the earlier case. As he said,

> "32. At [75]-[76], Gabriel Moss QC held that the Court could order the defendant to delegate his power to elect to receive the PCLS to the claimant's solicitors. The delegation to the solicitors was a proportionate shortcut to the appointment of a receiver by way of equitable execution pursuant to s.37(1) Senior Courts Act 1981 … "

64. The deputy judge went on:

> "38. In *Blight v Brewster* the scheme appears to have been a personal pension scheme. In the present case it is an OPS. There appears to be established precedent in the Family Division of *Blight v Brewster* orders being granted in respect of OPSs. Similar principles therefore can be applied here. I do not understand Mr Moeran [counsel for the judgment debtor] to suggest the contrary."

Ultimately, the deputy judge made similar orders to those made by Gabriel Moss QC.

Just and convenient

65. In the present case, neither the third party nor Mr Brake challenged the correctness of the decisions in *Blight v Brewster* and *Bacci v Green*, though Mr Brake reserved the right to do so on appeal. Instead, they both sought to argue that it was not "just and convenient" on the facts of this case to grant either injunction. The Guy Parties on the other hand argued that it was both just and convenient to grant the injunctions. In summary, they said that the interests of justice were irresistible, and Mr Brake was readily able to withdraw his pension entitlement to meet his costs liability, and could be ordered to do so. Alternatively, he could be ordered to delegate his right to the Guy Parties, who could then exercise it on his behalf. The Guy Parties had had to defend themselves against "a raft of proceedings" by the Brakes, spending some £7.5 million in legal fees, but so far recovering only a fraction of them from the Brakes. There would be no prejudice to the third party, because whatever was left after the deduction of tax and administrative costs would be a liability owed to Mr Brake, which would be discharged by payment to the judgment creditor. Nor would there be any prejudice

to others, as there were no other significant creditors known to the Guy Parties, but, even if there were, their claims would be insignificant compared to those of the Guy Parties.

Distinguishing Blight v Brewster

66. In the skeleton argument prepared for Mr Brake by counsel, Mr Brake drew the court's attention to what were submitted to be "the limits of *Blight v Brewster*". In particular, that case was concerned with the judgment debtor's right to draw down 25% of his pension fund tax free. However, in the present case, Mr Brake had already drawn down the 25% tax-free lump sum, so that any further drawing would involve incurring a tax liability. It was therefore argued that it would not be just and convenient to require Mr Brake to draw down his pension in a tax-inefficient way.

67. The third party made the same point, adding that Mr Brake's tax code was currently unknown to it, and also that the amount left in the fund after deduction of taxes and costs would not pay the whole of the costs liability. The third party also argued that *Blight v Brewster* and *Bacci v Green* were both cases of fraud, and that the principle acted upon there did not apply where the liability of the judgment debtor was not caused by his fraud. Now, the minor premise of the argument is correct. In both cases the liability of the judgment debtor arose through fraud. That is not the case here, where Mr Brake has simply lost an appeal and has been ordered to pay the costs. But I do not accept the major premise, that it is only where fraud causes the liability that an injunction can be granted to require the judgment debtor to do something to crystallise a debt, nor the conclusion that therefore it cannot be done here.

68. As counsel for the Guy Parties pointed out, the statement of principle set out by the deputy judge in *Blight v Brewster* at paragraph 70 (which was cited earlier in this judgment), does not distinguish between different sources of liability of the judgment debtor. He does not say that "*fraudulent* debtors should not be allowed to hide their assets in pension funds". He simply says that "*debtors* should not be allowed to hide their assets in pension funds". And, for my part, I can see no principled distinction to draw here between different kinds of liability. I respectfully agree with the statement of Gloster JA, in *Re Esteem Settlement* 2001 JLR, 540, [40], where she summarised points made by the court below with apparent approval:

> " … it is not the policy of the law or the practice of the Courts to differentiate between debts according to a moral standard. Thus, for example, the law does not differentiate in a bankruptcy between claims arising out of fraud and those arising out of ordinary trade. … "

69. Of course, I accept that fraud is, in a general sense, regarded as more serious than, say, ordinary breach of contract or negligence. But the relevant conduct in considering whether to grant the injunction is not what causes the liability. It is instead the use of pension funds to prevent creditors being paid.

The exercise of discretion

70. But the third party made a further point, that, even if the request to drawdown were made by or on behalf of Mr Brake, the third party had a broad discretion as to whether to act on the instruction. It referred in particular to paragraph 6.9 of the Scheme Rules,

and clause 11.5 of the Terms and Conditions, both of which were set out earlier in this judgment.

71. So far as concerns paragraph 6.9 of the Scheme Rules, that applies at the early stage of deciding what options are open to the scheme member. However, that stage has long since passed. Mr Brake was given the option (under paragraph 6.4) of flexi-access drawdown, expressly chose it, and the administrator implemented it. His pension is therefore now wholly in flexi-access drawdown, and clause 6.9 is irrelevant. As the Guy Parties pertinently pointed out, clause 6.3 of the scheme rules shows that the member can choose to take member's income withdrawals from funds in flexi-access drawdown, which is a choice which (unlike others set out in that clause) is *not* stated to be subject to the discretion of the scheme administrator.

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.)

73. So far as concerns clause 11.5 of the Terms and Conditions, it is absurd to suppose that that clause confers a general discretion on the scheme trustee to withhold otherwise accrued benefits from scheme members who have given valuable consideration for their rights. That would be a commercial nonsense, indeed, probably commercial suicide. In my judgment, clause 11.5 is simply concerned with establishing that the relevant instructions are supported by any necessary documentation (for example, the benefit payment form). It does not give the third party any general discretion to withhold those benefits. If however (and contrary to my view) it did, that clause would then be inconsistent with the Technical Guide, which makes clear that a member may access funds in flexi-access drawdown "as and when you want": see [39] above. And, in that case, paragraph 19 of the Terms and Conditions makes clear that, if there is an inconsistency between the Terms and Conditions and the Technical Guide, the latter prevails.

Fiduciary position

74. The third party also submitted that it stood in a fiduciary position towards Mr Brake, and was therefore obliged to act in Mr Brake's best interests. Accordingly, the third party should not be forced to pay any of his pension to the Guy Parties. But, in my judgment, once Mr Brake (or his agent) gives an effective instruction to the third party to liquidate the fund and pay it out, the third party has no discretion not to implement it, even if it thinks that this is not in Mr Brake's best interests. It is the same as if the sole beneficiary of a trust, of full age and sound mind, directed the trustee to pay the trust fund over to him, under the so-called rule in *Saunders v Vautier*, and the trustee declined to do so, saying that it was not in the beneficiary's best interests to do so. So, once the third party has money in its hands which it is its

duty to pay to Mr Brake, it can be made subject to a TPDO: see for example *Re Greenwood* [1901] 1 Ch 887, 890-91.

The impact of fiscal considerations

75. The third party also submitted that its fiduciary duty to act in Mr Brake's best interests entailed taking into account all relevant factors, which included fiscal ones. In support of that, it referred to the decision of the Court of Appeal in *Pitt v Holt* [2012] Ch 132, where Lloyd LJ, with whom Mummery and Longmore LJJ agreed, said

> "127. … Fiscal considerations will often be among the relevant matters which ought to be taken into account. … "

In fact, that case went to the Supreme Court, together with the case of *Futter v Futter* (under which name it is reported). Lord Walker of Gestingthorpe, with whom all the other members of the court agreed, accepted that fiscal consequences may be relevant for trustees to take into account, though he warned that some might say that

> "the greater danger is not of trustees thinking too little about tax, but of tax and tax avoidance driving out considerations of other relevant matters": [2013] 2 AC 108, [65].

76. But, even on the footing that fiscal considerations would be relevant to the exercise of a discretion conferred on trustees, in my judgment the trustee in this case had no such discretion to exercise. Even if it did, as long as there were still a significant benefit to the judgment creditor in doing so, I do not think that the fact that *some* income tax would be due by Mr Brake on the liquidation and payment out of his pension fund could justify not making an appropriate order to enforce the costs order in the present case, any more than it would justify not making a charging order just because a sale would trigger a charge to capital gains tax.

77. It was claimed before me that Mr Brake would pay tax at the rate of 55%, although there was no satisfactory evidence that that would in fact be his marginal rate. It appears that Mrs Brake paid 55% tax on another pension liquidation (be it noted, involving the same third party, although without any apparent qualms on its part), and it seems to have been assumed that the same would apply here. But it was also suggested (and Mrs Brake confirmed at the hearing: transcript, page 113) that the 55% rate was paid because no tax information was available to the pension provider, who accordingly applied an "emergency" tax code, and that an application for repayment of any tax overpaid may be made hereafter. Since (as I understand the matter) Mr Brake has no current employment, and no assets producing any significant income, I do not understand how he could have such a high marginal rate, and I would require more information before I could safely proceed on that basis.

78. But, even if he did, the liquidation and payment out of this fund would still enable Mr Brake to discharge a significant part of the costs liability of £70,000. According to Mr Brake's own evidence this would be about £40,000 (*ie* 45% of £89,000). Whether that is right or not, a figure of that sort is certainly a significant part of the costs liability in this case. Mrs Brake in oral submissions called this sum "a drop in the ocean" of the

£7.5 million that the Guy Parties claim to have spent in whole litigation. I therefore turn to consider that argument.

The "drop in the ocean" argument

79. Mrs Brake did not herself refer to this case, but in *Re Esteem Settlement* 2001 JLR 7, [61], the trust in question was a discretionary trust for a class of beneficiaries including the settlor and members of his family. The trust fund was now worth about $18 million. After creating it, the settlor had committed huge frauds against his employer, and judgment had been given against him for sums which, after setting off other assets available, left about $687 million outstanding. On that sum interest was continuing to accrue at an annual rate of 8%, or about $55 million per annum. The trustee sought an order that the trustee be directed to apply the trust fund of $18 million in partial satisfaction (*ie* about 2.6%) of the outstanding judgment debt. The Royal Court of Jersey held (at [60]) that such an application would not be for the benefit of the settlor-beneficiary, being instead for the benefit of the judgment creditor, and *ex hypothesi* would not be for the benefit of the other beneficiaries. The decision was upheld by the Court of Appeal of Jersey: 2001 JLR 540.

80. Yet in my judgment the proper comparison here is not with the £7.5 million that the Guy Parties claim to have spent in all the different claims in this extended litigation between the parties. The Guy Parties do not have costs orders against the Brakes for anything like that sum. Nor is the proper comparison even with the total amount of the unsatisfied costs orders in all the different claims, whatever that is. Instead, in my judgment, it is with the costs order in *this* appeal in this claim: £70,000 against £40,000. *Esteem* was also a different case for another reason, because the only person interested in this fund is Mr Brake. Whatever the position in *Esteem*, I consider that a payment of that amount or thereabouts, in the context of this appeal, would certainly be just.

The impact of regulatory requirements

81. The third party further submitted that there were regulatory requirements imposed on the third party by the Financial Conduct Authority's Principles for Business, and by the Conduct of Business Sourcebook ("COBS") Rules, both made under the Financial Services and Markets Act 2000, section 137A. It was submitted that these would be breached if the injunctions sought were granted. And section 138D of the 2000 Act gives retail clients such as Mr Brake a cause of action against regulated bodies who breach FCA requirements. There might also be Financial Ombudsman Service liability for failure to exercise a discretion in accordance with FCA requirements. It was submitted that there were various of the Principles for Business and the COBS Rules that were relevant to the exercise of discretion by the third party. However, the Guy Parties pointed out that, although the scheme administrator was an entity registered with the Financial Conduct Authority, and the FCA Business Principles and the COBS Rules accordingly applied to it, the third party (the trustee) itself was *not* so registered, and those Principles and Rules therefore did not apply.

82. But, even if the trustee *were* so registered, and as I have already said, if Mr Brake or someone authorised to act on his behalf were to give instructions for the liquidation and payment out of his pension fund, I do not consider that the third party would have

any relevant discretion to exercise. So, in my judgment, those Principles and Rules would have no role to play in the exercise of a discretion.

83. Moreover, even if I were wrong about that, and they *had* a role to play, and even if the court granted an injunction which *required* a regulated body to take action which constituted a breach of FCA requirements, the regulated body would obviously have the defence that it was required so to act by compulsion of law: *cf Tournier v National Provincial Bank* [1924] 1 KB 461, 473, 481, 486. Indeed, during the hearing counsel for the third party expressly conceded as much (transcript, pages 100-102). In this connection I observe that it is trite law that an injunction granted by a court of unlimited jurisdiction, like the High Court, even if it turned out to have been granted irregularly, is to be obeyed unless and until set aside: *Hadkinson v Hadkinson* [1952] P 285, 288, CA; *Isaacs v Robertson* [1985] AC 97, PC; *M v Home Office* [1994] 1 AC 377, HL.

The impact of the mental health crisis moratorium

84. At the hearing Mrs Brake said that Mr Brake was still subject to the mental health crisis moratorium, and should not be made to sign documents. If there were any suggestion that Mr Brake had lost capacity, and should be represented by a litigation friend, then of course the appointment of such a friend would be a step to be taken. But the Mental Capacity Act 2005 provides by section 1(2) that a person

> "must be assumed to have capacity unless it is established that he lacks capacity".

Moreover, by section 2(3) of the Act, a

> "lack of capacity cannot be established merely by reference to–
>
> (a) a person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity."

But no such suggestion was made (by anyone) that Mr Brake had lost capacity, and I saw nothing that suggested to me that this was the case. So I have made no decision that Mr Brake lacks capacity, and I must therefore proceed on the basis that he possesses it.

Prejudice to Mr Brake

85. Mrs Brake went on to submit that Mr Brake had been prejudiced by the matter's not having been heard on 10 May 2022. She said that, if it had, and it had emerged that there was no debt due, so that the final TPDO could not be made, Mr Brake would have bought an annuity, or perhaps petitioned for his own bankruptcy. But the Guy Parties had sat on the matter, she said for two months. In my judgment, there is nothing in this criticism.

86. First of all, the Guy Parties did not "sit on the matter", and in any event certainly not for two months. The Court of Appeal ordered a payment on account of costs on 16 March 2022. The Guy Parties applied for a TPDO by notice dated the next day. The interim order was made by Lewison LJ on 4 April, with a hearing for further

consideration fixed for 29 April in accordance with the interim order itself. That date was adjourned by consent to 10 May, when it was listed for 30 minutes. There was nothing to suggest any difficulty in making a final order until the third party's revelatory position statement on 9 May. At that stage it was entirely reasonable to adjourn the hearing fixed for the next day in order to enable the Guy Parties to consider the position. The directions I gave ended with the service of evidence in reply on 20 May. In fact the Guy Parties served a further application on that day, and evidence in relation to that was served right up until 29 May. The hearing was in fact on 30 May. I do not think anyone, least of all the Guy Parties, "sat on the matter".

87. Second, there is no evidence before the court that Mr Brake would have bought an annuity, or petitioned for his own bankruptcy if the interim TPDO had been discharged on 10 May. In particular, Mr Brake himself does not say this even though he could easily have done so, in one or other of his two witness statements before the court. Moreover, he had ample opportunity to do either of those things *before* the interim order was made (although he may perhaps have required consent under the freezing injunction to buy the annuity), but there had been no suggestion from him of either. In the light of everything that has happened in this litigation until now, I am sceptical of unsupported (indeed, inadmissible) assertions of this kind by Mrs Brake. So, I am not satisfied that Mr Brake has been prejudiced at all. Certainly, he could not, consistently with the freezing injunction, have drawn down the fund and hidden it elsewhere, and (for example) not being able to use it to pay another creditor does not in itself prejudice him.

88. Mr Brake also argued that it would not be right to make the TPDO final, because he and his wife also owed more than £98,000 in unpaid legal costs to their former solicitors, Ashfords LLP. The problem however is that Mr Brake is not a bankrupt. As Gabriel Moss QC said in *Blight v Brewster*, in a passage which has already been quoted above,

> "72. … 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."

89. On the other hand,

> "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."

That is what has happened here. The Guy Parties obtained a court order for payment by Mr Brake of a sum of money. As is their right, they have sought to enforce that order against him. For whatever reason, Ashfords LLP does not (so far as I know) have a court order, and has not taken any enforcement action against him. In the absence of bankruptcy, the Guy Parties are free to take their own course, just as Ashfords LLP have done.

Conclusion

90. In my judgment, it is indeed just and convenient for the court to make an injunction ordering Mr Brake to exercise his right to draw down his remaining pension entitlement from the third party. Mr Brake has been ordered to pay to the successful respondents their costs of his unsuccessful appeal. He has an asset which can be realised for their benefit. The authorities make clear that it does not matter that the asset concerned is a pension entitlement. The old paternal policy of preventing pension scheme members realising more than a proportion in cash and requiring the remainder to be used in the purchase of an annuity has gone. It is not clear how much will become payable to Mr Brake, because the tax and administration costs deductible have not been calculated. Nevertheless, as I say, I am satisfied that a significant proportion of the costs liability of £70,000 will be satisfied by the making of a final TPDO in relation to the debt that will become due from the third party upon the exercise by Mr Brake of his right. I am quite satisfied that the third party has no relevant discretion to exercise, although I accept that it is entitled to be satisfied that the right has been properly exercised, and that all relevant information and documentation has been supplied and completed.

91. I will accordingly direct that (i) the Guy Parties consult the third party as to the form of documentation and information which the third party requires for Mr Brake to exercise his right, (ii) Mr Brake provide to the Guy parties all such information as may be reasonably required by the third party which it is in his power to provide, (iii) the Guy Parties then draft the relevant documentation, submitting it to Mr Brake for any comments he may have, (iv) the Guy Parties then consider any such comments and settle the documentation. I will order that Mr Brake then execute the documentation forthwith and return it to the Guy Parties for onward transmission to the third party. If he should fail to execute the documentation forthwith, or to transmit it to the Guy Parties, then Mr Gatt QC, or failing him another of the partners in the solicitors for the Guy Parties, shall be authorised under section 39 of the Senior Courts Act 1981 to execute it on his behalf. Upon the implementation of the exercise of the right by Mr Brake, the third party shall, after deduction of any required tax and fees, pay to the Guy Parties the lesser of (i) the sum of £70,569 or (ii) all remaining sums in Mr Brake's pension fund.