Pensions, personal bankruptcy and creditor recovery: recent developments

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Introduction

Savings within pension schemes (whether personal pensions or occupational pension schemes) often constitute a significant asset of an individual and hence a potential target for creditors of the individual member or, following a bankruptcy, a trustee-in-bankruptcy of the individual member, seeking to be able to pay off liabilities incurred by the individual.

As such, significant protections have been included in UK legislation for pension assets, in particular where the pension scheme is 'approved' and where the bankruptcy is in England and Wales.[1] Even here, the inter-relation between the pensions protections and the general insolvency provisions in the Insolvency Act 1986 (IA 1986) can give rise to difficult issues. These can increase if there are overseas elements or if the pension arrangement is not an 'approved' scheme.

With that in mind, in this article we discuss the overlaps between pensions and personal bankruptcy, with particular reference to three recent cases decided in the past two years:

- *Wilson v McNamara;*[2]
- *Bacci v Green;*[3] and
- *Office of the Bankruptcy Adjudicator v Shaw.*[4]

We also discuss the potential for charging orders against pension funds before (or sometimes after) any bankruptcy, considering the confirmation of the extended jurisdiction in *Blight v Brewster*[5] by the recent decisions in *Bacci v Green*[6] and *Manolete Partners plc v White*.[7]

There are four main areas covered below:

(1) What impact does bankruptcy have on (UK and overseas) pension savings?
(2) Can creditors enforce against pension savings (before, during and after bankruptcy)?

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1 This article does not consider the issues that arise if the bankruptcy is outside England and Wales.
2 [2020] EWHC 98 (Ch), [2022] EWHC 98 (Ch) and [2023] EWCA Civ 20.
3 [2022] EWCA Civ 1393, [2023] Ch 201, [2023] Pens LR 2.
4 [2021] EWHC 3140 (Ch), [2022] BPIR 807 (HHJ Hodge QC sitting as a Judge of the High Court).
5 [2012] EWHC 165 (Ch), [2012] 1 WLR 2841 (Gabriel Moss QC).
6 [2022] EWCA Civ 1393, [2023] Ch 201, [2023] Pens LR 2.
7 *Re Lloyds British Testing Ltd (in liquidation); sub nom Manolete Partners plc v White* [2023] EWHC 567 (Ch) (HHJ Hodge KC).

(3) When might pension savings prevent a debtor from declaring bankruptcy?
(4) How should pension trustees respond to bankruptcy and enforcement actions?

We conclude that – notwithstanding the legislative protections applicable to most UK pension savings on the member's bankruptcy – pension savings are now increasingly vulnerable to enforcement actions by creditors.

What impact does bankruptcy have on (UK and overseas) pension savings?

If an individual is declared bankrupt in England and Wales, the general rule is:

(a) all of the individual's property and assets at the commencement of the bankruptcy form part of the bankrupt's estate (with some limited exceptions) and are transferred by statute to, and fall under the control of, the trustee-in-bankruptcy (IA 1986, s 306) and would be realised to attempt to meet the claims of relevant creditors;
(b) any after-acquired property (defined in IA 1986, s 307) can be claimed by the trustee-in-bankruptcy for the creditors;
(c) the trustee-in-bankruptcy is able to require the bankrupt to assist in carrying out its functions, including realising assets (IA 1986, s 333); and
(d) the trustee-in-bankruptcy can apply to court for an income payments order (IPO) claiming future income of the bankrupt (received during the period of the IPO, which can extend after the discharge of the bankruptcy) for the benefit of the bankruptcy estate (IA 1986, s 310).

The relevant property of a bankrupt falling within his or her estate is widely defined (IA 1986, ss 283 and 436). Over the years there has been discussion in the courts as to whether it can include pension assets (within either personal or occupational pension schemes), particularly given the terms of most occupational schemes dealing with both bankruptcy and limits on assignment.

WRPA 1999, s 11

This position has, since 2000, been clarified by the Welfare Reform and Pensions Act 1999 (WRPA 1999), s 11 in relation to (broadly) UK tax registered pension schemes. The legislation states that any rights of the bankrupt 'under an approved pension arrangement' are excluded from the bankrupt's estate – WRPA 1999, s 11(1). This currently provides:

(1) Where a bankruptcy order is made against a person on a bankruptcy application made or petition presented after the coming into force of this section,[8] any rights of that person under an approved pension arrangement are excluded from that person's estate.

8 Ie 29 May 2000 – Welfare Reform and Pensions Act 1999 (Commencement No 7) Order 2000 (SI 2000/1382), art 2(a).

The term 'approved pension arrangement' is defined in s 11(2) (as amended) as:

> (a) a pension scheme[9] registered under section 153 of the Finance Act 2004;
> […]
> (c) an occupational pension scheme[10] set up by a government outside the United Kingdom for the benefit, or primarily for the benefit, of its employees;
> […]
> (g) an annuity purchased for the purpose of giving effect to rights under a scheme falling within paragraph (a), including an annuity in payment before 6th April 2006, giving effect to rights under any scheme approved—
>
> (i) before that date under Chapters I, III or IV of Part XIV of the Taxes Act;[11] or
> (ii) any relevant statutory scheme, as defined in section 611 of that Act;
>
> (h) any pension arrangements of any description which may be prescribed by regulations[12] made by the Secretary of State.

The 2002 regulations,[13] made under WRPA 1999, s 11(2)(h), prescribe, under reg 2, the various other arrangements as being approved for the purposes of s 11 as well. These are discussed further below.

More limited protections apply under WRPA 1999, s 12 in relation to unapproved arrangements.[14] The s 12 protections are discussed in more detail below.

After-acquired property: s 307

Section 307, allowing the trustee-in-bankruptcy to claim after-acquired property, does not apply to 'property which by virtue of any other enactment is excluded from the bankrupt's estate' – IA 1986, s 307(2)(b).

This means that the exclusion by WRPA 1999, s 11 of pensions and other rights under an approved pension arrangement has the effect that the after-acquired property provision in s 307 does not apply to the rights under an approved pension arrangement.[15]

Exclusions from s 11 protection

But this protection under s 11 following bankruptcy for an approved pension arrangement and its assets is subject to some exceptions:

(i) The trustee-in-bankruptcy can apply for an IPO in relation to income payments actually made out of the approved pension arrangement during a period named in the IPO (which

9 'Pension scheme' has the meaning given in section 150(1) of the Finance Act 2004 – WRPA 1999, s 11(11)(b).
10 '*occupational pension scheme*' has the meaning given in section 150(5) of the Finance Act 2004 – WRPA 1999, s 11(11)(a).
11 '*Taxes Act*' means the Income and Corporation Taxes Act 1988 – WRPA 1999, s 11(11)(d).
12 See reg 2 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
13 The Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
14 See regs 3 to 6 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
15 See eg Gloster LJ in *Horton v Henry* [2016] EWCA Civ 989, [2017] 3 All ER 735 at [26].

can extend after the bankruptcy is discharged). This applies notwithstanding the exclusions in WRPA 1999, s 11 or s 12 – IA 1986, s 310(7). However, the bankrupt cannot be forced to exercise any rights to draw benefits from an approved pension arrangement (see *Horton v Henry*, discussed below).

(ii) Contributions previously paid into the approved pension arrangement (or assets in the approved pension arrangement) may be recoverable by third parties (or the trustee-in-bankruptcy) under:

  (a) the general rules for reversing transactions or claiming assets (eg if paid in breach of trust); or
  (b) the specific clawback provisions applicable to a bankruptcy under IA 1986, s 339 (Transaction at an undervalue) or s 340 (Preferences). These provisions have a specific time period before the start of bankruptcy to which they can apply; or
  (c) the clawback provision dealing with transactions defrauding creditors (IA 1986, s 423).

(iii) The court has a specific power to order recovery if 'excessive' pension contributions have been made (IA 1986, ss 342A to 342C, added by WRPA 1999) – see further below.

The position on a bankruptcy may be affected by whether or not the pension arrangements (occupational pension or personal pension) include a non-assignment or a forfeiture provision:

- Generally for occupational pension schemes, forfeiture of benefits is limited by the overriding provisions of s 92 of the Pensions Act 1995 (PA 1995). This allows a forfeiture provision to apply only in the cases specified in that section. The exempted cases (where forfeiture was still allowed) used to include on the bankruptcy of the member – PA 1995, s 92(2)(b) – but this was deleted by WRPA 1999.
- Personal pensions are not within PA 1995, s 92, but for personal pensions a specific provision prohibiting forfeiture 'by reference to' bankruptcy was inserted (from 6 April 2002) into the Pension Schemes Act 1993 (PSA 1993) by WRPA 1999 – PSA 1993, s 159A.

Trustee-in-bankruptcy cannot force member/bankrupt to draw benefits: **Horton v Henry**

WRPA 1999, s 11 does not specifically deal with two potential rights of the trustee-in-bankruptcy, where the bankrupt pension scheme member had (or would in the future have) a right to draw benefits from the approved pension arrangement (eg was over the minimum pension age, currently usually age 55), to require the bankrupt to exercise those rights and draw some or all of the relevant benefits (less tax which would be deducted at source). IA 1986, s 310(7) expressly allows an IPO to be made in relation to any payments actually received from the approved pension arrangement after the IPO is made, ie after the start of the bankruptcy.

Caselaw was confused on whether the trustee-in-bankruptcy could require the bankrupt to exercise any right to draw benefits. But since October 2016 this has been resolved by the decision of the Court of Appeal in *Horton v Henry*.[16] The Court of Appeal held that the effect of the statutory exclusion in s 11 was wide enough to mean that the trustee-in-bankruptcy could

16 [2016] EWCA Civ 989, [2017] 3 All ER 735.

not obtain an IPO against the benefits emerging from an 'approved pension arrangement' until they were actually paid, nor force the bankrupt to cooperate in drawing any benefits under an approved pension arrangement.

In *Henry*, the bankrupt, who was 59 when the application was issued, had a pension fund which he had not yet accessed and – for obvious reasons – did not wish to access during his bankruptcy. His trustee-in-bankruptcy sought an order from the court that Mr Henry elect to draw down his pension so that it could be the subject of an income payments order under IA 1986, s 310. In the Court of Appeal, the judge's decision to refuse the application was upheld, and earlier authority to the contrary overruled. Gloster LJ held that the trustee-in-bankruptcy's functions do not include seeking to recover for creditors property which has been expressly excluded from the estate by statute.

The result of this is that in some cases debtors with significant pension funds might be well advised to make themselves bankrupt in order to protect the fund. However, as we discuss below, the existence of the assets in the pension fund may mean that this is no longer a possibility for debtors over the minimum pension age (currently age 55[17]).

Income payment orders (IPO): s310

As mentioned above, IA 1986, s 310(7) expressly allows an IPO to be made in relation to any payments actually received from the approved pension arrangement after the making of the IPO, ie after the start of the bankruptcy. This applies notwithstanding the exclusions from the bankrupt's estate in WRPA 1999, ss 11 or 12.[18]

IPOs are also expressly exempted from the restrictions from assignment or charge over pension rights under an occupational pension scheme – PA 1995, s 91(4)(b).

An IPO requires a court order[19] on the application of the trustee-in-bankruptcy made before the discharge of the bankrupt – IA 1986, s 310(1A). The court cannot make an order if the effect would be to reduce the bankrupt's income (together with any rights to guaranteed minimum pensions[20]) 'below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family'[21] – IA 1986, s 310(2).

An IPO must state for how long it lasts. This period can end after the discharge of the bankruptcy, but may not last for more than three years after the order is made – s 310(6).

An IPO only applies to payments made after the IPO starts. Payments made from an approved pension arrangement before an IPO order are:

(a) not caught by the s 306 vesting, nor the s 307 after-acquired property provision; and
(b) are not within the scope of a later IPO order.

17 With effect on and from 6 April 2028, this age is to rise to age 57. Definition in FA 2004, s 279(1) (definition of 'normal minimum pension age') substituted by FA 2022, s 10(2). There is transitional protection for some members under provisions added by FA 2022, s 10, including a new FA 2004, Sch 36, para 23ZA.

18 Section 310(7) expressly refers to WRPA 1999, ss 11 and 12. Conversely it does not expressly refer to other exclusions – eg the exclusion of state benefits under Social Security Administration Act 1992, s 187 (see n 30 below).
It may well be that in practice whether or not state benefits could be included within an IPO is not material, given that they are unlikely to be large and an IPO cannot be made if the Court considers that if the effect would be to reduce the bankrupt's income (together with any rights to guaranteed minimum pensions) 'below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family' – IA 1986, s 310(2).

19 An income payments agreement (IPA) under s 310A does not need a court order, but is treated as enforceable as if it were an IPO – IA 1986, s 310A(2). It therefore seems that an IPA is also allowed despite the exclusions under WRPA 1999, ss 11 and 12.

20 Ie GMPs. See n 35 below.

21 On the meaning of 'family', see *Fowlds v Bucknall* [2020] EWHC 329 (Ch) (Marcus Smith J).

Following *Horton v Henry*, it is clear that in relation to an 'approved pension arrangement' the trustee-in-bankruptcy cannot force the member to start drawing his or her benefits. In relation to a pension arrangement that is not within WRPA 1999, s 11 (ie not 'approved'), this seems to leave it open for a trustee-in-bankruptcy to be able to force a member to draw benefits or exercise elections.

It seems that a bankrupt who could draw benefits and is concerned about the potential for an IPO being made, could decide (depending on his or her financial situation):

(a) not to draw any benefits until the time for a potential IPO has passed; or
(b) perhaps seek to draw benefits (perhaps all as a lump sum), after the bankruptcy has started, but before an IPO is made – in which case the amount received before an IPO started would seem to be outside the bankruptcy.[22]

It is still slightly unclear whether any lump sum drawing (or flexible drawdown) from an approved pension arrangement could still be claimed by the trustee-in-bankruptcy under an IPO (as being income). IA 1986, s 310(7) defines income to include 'all payments from a pension scheme', but despite this it is not absolutely clear whether a lump sum payment (or drawdown payment) from a pension scheme automatically falls within s 310(7) as a result of the words quoted or whether such a payment still needs to qualify as a 'payment in the nature of income' within the preliminary words of s 310(7):

> (7) For the purposes of this section the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment and (despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999) any payment under a pension scheme but excluding any payment to which subsection (8) applies.

In *Raithatha v Williamson*[23] Bernard Livesey QC (sitting as a Deputy Judge of the Chancery Division) held at [29]:

> I reject the submission that the payment of a 'lump sum' does not constitute a 'payment in the nature of income'. The suggestion that it could not be income begs the question what it might be called if it were not income. I do not accept that the words 'which is from time to time made to him' means that the payments must be periodical or regular to qualify as a payment in the nature of income. There is nothing to prevent a one-off payment, or a number of one-off payments on different occasions from different sources as a result of different entitlements, being regarded as payments in the nature of income from time to time made to him. This was the view of Evans-Lombe J in *Supperstone v Lloyd's Names Association Working Party* [1999] BPIR 832 [esp. at 840H to 841A] and it is clearly correct.

22 The bankrupt is obliged to give the trustee-in-bankruptcy notice 'within the prescribed period' of any increase in his or her income – IA 1986, s 333(2). The prescribed period is 21 days from the bankrupt becoming aware of the relevant facts relating to such increase – Insolvency (England and Wales) Rules 2016, rule 10.125(1).

This notice requirement seems to apply even where the relevant income etc is from an approved pension arrangement within s 11 and so does not form part of the bankrupt's estate, nor can be within the after-acquired property provision in s 307.

23 [2012] EWHC 909 (Ch), Bernard Livesey QC (sitting as a Deputy Judge of the Chancery Division).

Raithatha v Williamson was later overruled by *Horton v Henry*, but not on this point.[24] In Scotland in *Cook v Accountant in Bankruptcy.*[25] the Sheriff Court referred (at [66] to [71]) to *Raithatha v Williamson* and *Horton v Henry* and held that they demonstrated that in England a lump sum payable out of a pension counted as income for the purposes of s 310(7).

State pensions and GMPs

State pensions[26] (including the SERPS and the state second pension, S2P) do not pass to a trustee-in-bankruptcy, nor can they be assigned or charged. The Insolvency Service *Technical Guidance for Official Receivers*[27] comments 'A state pension cannot form part of a bankrupt's estate, no matter the date of the bankruptcy petition.'[28]

Social Security Administration Act 1992 (SSAA 1992), s 187[29] as amended provides that:

> every assignment or charge on [state benefits] and every agreement to assign or charge such benefit shall be void; and, on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors.

It has been held that such a provision is not incompatible with the making of what is now an IPO: *Re Garrett*[30] in relation to the Bankruptcy Act 1914, s 51, applying *Re Shine*[31] and *Re Huggins*.[32] But the exclusionary wording in SSAA 1992, s 187 was given a wide meaning by the House of Lords in relation to the Scottish bankruptcy laws: *Mulvey v Secretary of State for Social Security*[33] (a case decided under s 32(5) of the Bankruptcy (Scotland) Act 1985).[34]

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24 See the agreement on this point (but criticism of election issues) by John Briggs '*The recent court decision of Raithatha v Williamson: creditors' right to an IPO/IPA over more than the debtor's 'pension in payment"* (2012) 25 Insolv Int 65. John Briggs noted that the argument as to income or not was raised in *Krasner v Dennison* [2001] 1 Ch 76 at 86H but was not dealt with in the judgment (as Chadwick LJ dealing with the pre WRPA 1999 position did not deal with s 310 issues, instead deciding that the pension vested in the trustee-in-bankruptcy under IA 1986, s 306).

25 [2019] Sc GLA 82, [2019] 9 WLUK 419, 2020 SLT (Sh Ct) 1, 2019 GWD. 33-523.

26 Including pensions payable under Pt 1 of the Pensions Act 2014 (s 187(1)(zb) of the SSAA 1992) and any benefit as defined in s 122 of the Social Security Contributions and Benefits Act 1992 (s 187(1)(a), of the SSAA 1992).

27 www.gov.uk/guidance/technical-guidance-for-official-receivers [accessed 26 July 2023].

28 See 57.11, citing SSAA 1992, s 187.

29 Similarly, Police Pensions Act 1976, s 9.

30 [1930] 2 Ch 137 (Farwell J). Farwell J at p 141/142 noted that a payment order did not involve any vesting in the trustee-in-bankruptcy: 'An order under s.51, sub-s. 2, does not have the effect of passing any part of the pension to the trustee in the sense of vesting it in him.'

31 [1892] 1 QB 522.

32 (1882) 21 ChD 85. See also Ian F Fletcher, *The Law of Insolvency* (5th ed, 2017, Sweet & Maxwell) at 8-082.

33 1997 SLT 753, HL(S).

34 Per Lord Jauncey:

> 'I therefore conclude that the purpose of that part of sec 187(1) above set out was to make clear beyond peradventure that the permanent trustee could have no interest in any entitlement of a debtor to receive any of the social security benefits to which it applied. I should add further that while the theoretical possibility of a permanent trustee invoking sec 32(2) in relation to a debtor whose sole income consisted of such benefits remains, the probability of any such invocation being successful must, at least in the case of those benefits such as income support benefit which are income-related, be virtually nil. In short, it can never have been contemplated in social security legislation that any part of the income-related benefits to which sec 187(1) applied would find their way into the hands of the permanent trustee of a bankrupt beneficiary and, indeed, the trustee has no right to proceed against the respondent for payment of any part of the benefit to which a debtor may be entitled.'

Similar non-assignment provisions as for state benefits apply to guaranteed minimum pensions (GMPs)[35] – s 159 of the Pension Schemes Act 1993[36] (PSA 1993). Section 159 renders void 'any assignment of or charge on that pension, and every agreement to assign or charge that pension'.

Unlike the state benefit provision (in SSAA 1992, s 187), PSA 1993, s 159 does not now expressly refer to a bankruptcy.[37] Merely preventing assignment would not be enough to take the benefit out of the bankrupt's estate – eg *Rowe v Sanders*.[38] In practice a GMP will almost always arise under an occupational pension scheme which is a UK 'approved pension arrangement' and so will be excluded from the bankrupt's estate under WRPA 1999, s 11.

However, PSA 1993, s 159 does go on to provide, in s 159(4A), that 'no order shall be made by any court the effect of which would be that he would be restrained from receiving anything the assignment of which is or would be made void' by s 159(1).

Under s 159(4B), it is provided that 'Subsection (4A) does not prevent the making of an attachment of earnings order under the Attachment of Earnings Act 1971'. This is similar to PA 1995, s 91(4)(a) dealing with occupational pension schemes generally, but there is no express equivalent in s 159 to the IPO provision in PA 1995, s 91(4)(b) – see below.

There are also statutory restrictions on suspending or forfeiting guaranteed minimum pensions (GMPs).[39]

An income payments order (IPO) cannot be made in relation to a GMP as GMPs are expressly excluded from being part of the income of the bankrupt – IA 1986, s 310(7) to (9).

Public sector pensions

Some statutory pension provisions, such as those applicable to members of the armed forces, provide that any assignments of the pension shall be void, but add that nothing is intended to prejudice any other enactment providing for payment to a bankrupt's trustee.[40]

The Local Government Pension Scheme (LGPS), for example, includes both non-assignment wording (reg 84(2)) and a provision that benefit does not pass to a trustee, but allows

35 The provisions relating to GMPs used to apply as well to 'protected rights' (ie the benefits representing contracted-out benefits on a defined contribution basis). However, these references were deleted on the abolition of protected rights from 2012.

36 Protected rights were within s 159 until their abolition in 2012 – s 159(1) amended from April 2012 by Pensions Act 2008 (Abolition of Protected Rights) (Consequential Amendments) (No2) Order 2012 (SI 2011/1730).

37 PSA 1993, s 159(5) used to refer GMP rights not vesting in a trustee-in-bankruptcy but was repealed from April 2002 by WRPA 1999. See *Horton v Henry* at [22].

38 [2002] EWCA Civ 242, [2002] Pens LR 367.

39 See the summary in the paper by Jonathan Moody, 'Inalienability of pension: section 91 Pensions Act 1995' (APL 2013 Summer Conference).

PSA 1993, ss 13 and 17 provide for a minimum level of pension (the GMP) to be paid, but PSA 1993, s 21 allows for this to be suspended or forfeited in prescribed circumstances. The relevant circumstances are in Occupational Pension Schemes (Schemes that were Contracted-out) (No2) Regulations (SI 2015/1677), reg 26(2) (formerly the Occupational Pension Schemes (Contracting-out) Regulations 1996 (SI 1996/1172, as amended), reg 61). The permitted forfeiture events do not include assignment or bankruptcy, but are limited to (a) treason; (b) breach of the Official Secrets Act; (c) (in the case of an armed forces pension scheme) 'an act which is gravely prejudicial to the defence, security or other interests of the State'; and (d) (in the case of a spouse pension) unlawful killing of the spouse from whom the GMP is derived.

40 Ian F Fletcher, *The Law of Insolvency* (5th ed, Sweet & Maxwell, 2017) at 8-082, giving, as examples: Army Act 1955, s 203; Air Force Act 1955, s 203; Naval Discipline Act 1957, s 159(4) and (4A).

an IPO (reg 84(3)). The Local Government Pension Scheme Regulations 2013 (SI 2013/2356) provide at reg 84(2) and (3):

> '84. ….
>
> (2) No such benefit is assignable or chargeable with that person's, or any other person's, debts or other liabilities.
>
> (3) On the bankruptcy of a person entitled to a benefit under the Scheme no part of the benefit passes to any trustee or other person acting on behalf of the creditors, except in accordance with an income payments order or agreement under section 310 or 310A of the Insolvency Act 1986'.

Recovery of excessive contributions

A trustee-in-bankruptcy can apply to court for an order in circumstances where excessive contributions have been made to a registered pension arrangement – IA 1986, s 342A. Such an order aims to restore the position to what it would have been had the excessive contributions not been made – IA 1986, s 342A(2).

For the court to make such an order it needs to be satisfied that the excessive contributions have unfairly prejudiced the individual's creditors – IA 1986, s 342A(2)(b). In particular the court will consider:

- whether any of the contributions were made for the purpose of putting assets beyond the reach of any or all of the individual's creditors – IA 1986, s 342A(6)(a); and
- whether the contributions were excessive in view of the individual's circumstances when those contributions were made – IA 1986, s 342A(6)(b).

In *Wilson v McNamara,*[41] Nugee J (as he then was) pointed out (at [37]) that these provisions direct the court to look at the circumstances prevailing at the time that the contributions are made. Nugee J stated that he 'need not consider if these are the only potential relevant circumstances'.

Nugee J also contrasted the IA 1986, s 342A(6) provisions as remodelled by WRPA 1999 with those formerly in place for occupational pension schemes under s 342A(3)(a)-(c), as originally inserted by PA 1995, where the Court was also directed to consider whether the level of benefits under the scheme (and any other occupational pension scheme to which the bankrupt was entitled or likely to become entitled) was excessive.

There is no time limit set for recovery under s 342A – the contributions could have been made some years before the bankruptcy.

The requirements for the statutory power to arise are quite stiff. There have not been many reported examples of this power being used – but for an example, see *Stanley v Wilson.*[42]

41 [2020] EWHC 98 (Ch).
42 [2015] 8 WLUK 49, [2017] BPIR 227 (HHJ Raeside QC).

WRPA 1999, s 12: protection for unapproved pensions

The protection for pension rights and funds in WRPA 1999, s 11 has been described as the 'gold standard' of protection.[43] The legislation however is only expressed to extend to 'authorised pension arrangements.' As noted above, these are mainly limited to pension arrangements which are registered for tax purposes under the Finance Act 2004 (FA 2004), although the Secretary of State has power to extend this by regulations. Some regulations have been made,[44] but the extensions are mainly limited to cases where UK tax relief has been granted on contributions.

Conversely, WRPA 1999, s 12 deals with 'unapproved arrangements'. The relevant schemes are described in regulations, along with the protections conferred.[45] Broadly these give the court power to make an exclusion order on application by the bankrupt (or for a qualifying agreement with the trustee-in-bankruptcy), within fairly tight time limits. The Court is directed to have reference to the future likely needs of the bankrupt and whether any other pensions are likely to be received (other than state pension) – reg 5(3).

Section 11 protection for foreign pensions? **Wilson v McNamara** *[2020] and [2022]*

As mentioned above, the WRPA 1999, s 11 protection is stated to apply, in addition to UK tax registered pension schemes, to pension arrangements prescribed by regulations. The 2002 regulations,[46] made under WRPA 1999, s 11(2)(h), prescribe, under reg 2, the following arrangements as being approved for the purposes of s 11 as well:

> 2(1) The arrangements prescribed for the purposes of section 11(2)(h) of the 1999 Act (pension arrangements which are 'approved pension arrangements') are arrangements (including an annuity purchased for the purpose of giving effect to rights under any such arrangement)—
>
> (a) to which—
> (i) the holder of an office or employment has contributed by way of payments out of earnings which have been allowed as a deduction under paragraph 51 of Schedule 36 to the Finance Act 2004 (individuals with pre-commencement entitlement to corresponding relief),
> (ii) Article 17A of the Convention set out in the Schedule to the Double Taxation Relief (Taxes on Income) (Republic of Ireland) Order 1976 (pension scheme contributions) applies;
>
> (b) made with a scheme which is an occupational pension scheme—
> (i) registered under section 153 of the Finance Act 2004, or
> (ii) which is to be treated as becoming a registered pension scheme under section 153(9) of the Finance Act 2004 in accordance with Part 1 of Schedule 36 to that Act;
>
> (c) to which section 308A of the 2003 Act (exemption of contributions to overseas pension scheme) applies;

43 *Wilson v McNamara* [2020] EWHC 98 (Ch) at [35].
44 See reg 2 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
45 See regs 3 to 6 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
46 The Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).

(d) which are exempt or qualify for relief from, or are not liable to charge to, income tax by virtue of section 614 or 615 of the Taxes Act (exemptions and reliefs in respect of income from investments etc of certain pension schemes and other overseas pensions), or section 629, 630 or 643 of the 2003 Act (pre-1973 pensions paid under the Overseas Pensions Act 1973 and Malawi, Trinidad and Tobago and Zambia government pensions);

(e) made with—

(i) a public service pension scheme, or

(ii) an occupational pension scheme established under the auspices of a government department or by any person acting on behalf of the Crown.

(2) Paragraph (1)(e) above does not apply to any employer-financed retirement benefits scheme arrangement which has been provided to an employee as part of or in addition to any pension arrangement referred to in paragraph (1)(e) above.

(3) For the purposes of this regulation—

[…]

(b) 'occupational pension scheme' has the meaning given in section 1 of the Pension Schemes Act 1993;

(c) 'public service pension scheme' has the meaning given in section 1 of the Pension Schemes Act 1993.

Wilson v McNamara [2020] EWHC 98 (Ch)[47] and, on return from the CJEU, [2022] EWHC 98 (Ch)[48] concerned whether an Irish pension of an Irish citizen made bankrupt in England and Wales was protected under English law from his trustee-in-bankruptcy. The issues in the *McNamara* case are outlined below (adapted from [2] to [5] in the 2022 judgment of Nugee LJ).

Wilson v McNamara

Mr McNamara, an Irish citizen, was made bankrupt in England (on his own petition). Prior to his bankruptcy he had been a property developer in Ireland. The proceedings concern the impact of his bankruptcy on any rights that he might still have under an Irish pension scheme, the Simcoe Scheme. The Simcoe Scheme held a unit-linked retirement policy issued by Irish Life and this was claimed by his Joint Trustees in Bankruptcy for the bankruptcy estate. Mr McNamara however contended that any rights he had under the Simcoe Scheme should be excluded from his bankruptcy on the basis that this was required by EU law, and specifically by Art 49 TFEU.

This issue was argued before Nugee J (as he then was) in 2020 as a preliminary issue on agreed facts – [2020] EWHC 98 (Ch). Nugee J decided at the first hearing that the question whether the impact of insolvency on pension rights was within the scope of Art 49 TFEU was not *acte clair*, and that it was appropriate to make a reference to the CJEU to seek a preliminary ruling on this question.[49]

In effect the reference to the CJEU asked whether the relevant English provisions for exclusion from bankruptcy of the bankrupt's pension rights (namely s 11 WRPA 1999, supplemented by various regulations) were compatible with EU law.

47 [2020] 2 CMLR 27, [2020] BPIR 661, [2020] Pens LR 15.

48 An appeal to the Court of Appeal has been filed.

49 The reference to the CJEU was made before the UK's final withdrawal from the EU.

The CJEU handed down judgment on 11 November 2021 under the name *BJ and OV v Mrs M & others* (Case C-168/20) EU:C:2021:907. In summary the European Court decided that Art 49 TFEU precluded a provision of the law of a Member State which made the automatic exclusion of pension rights from bankruptcy dependent on a requirement that the pension scheme be tax approved in that Member State, unless such a provision were justified in the public interest. In other words, the CJEU accepted that the relevant English provisions did constitute a restriction on freedom of establishment and would therefore be contrary to EU law unless justifiable.

Nugee J had in the 2020 judgment expressed his own (provisional) view that:

- the impact of insolvency on the accrued pension rights of a person exercising the right of self-establishment as a self-employed person was within the scope of Art 49 TFEU;
- there had not been equal treatment between UK nationals and nationals of another Member State; and
- the relevant English provisions therefore constituted discrimination in the enjoyment of a social advantage prohibited by Art 49 TFEU and Art 24 CRD: see the 2020 judgment at [122] to [125].

Nugee J had also heard argument on the appropriate remedy if there were unlawful discrimination and went on to consider that question to avoid it having to be revisited. He concluded that it would be appropriate to read down s 11(2)(a) of WRPA 1999 so that it included an exclusion of pension rights under a scheme established in another Member State which was 'recognised for tax purposes' within the meaning of reg 2(3) of The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, (SI 2006/206): see the 2020 judgment at [126] to [133].

Since the (Irish) Simcoe Scheme was (or very probably was) recognised for tax purposes within that meaning, the preliminary issue would therefore be answered 'Yes', that is that Mr McNamara's rights under the Simcoe Scheme would be excluded from his bankruptcy in England and Wales.

In 2022, Nugee LJ (as he had then become) sitting as a judge at first instance heard the case when it was referred back by the CJEU: *Wilson v McNamara* [2022] EWHC 98 (Ch). The parties had been unable to agree an order based on the CJEU's decision, the trustees-in-bankruptcy arguing that they should be able to argue that the CJEU had made it clear that the relevant provisions in WRPA 1999 (and the regulations) were only unlawful if they could not be justified and that it was for the UK referring court to decide whether there was any justification.

Ultimately, in the 2022 judgment, Nugee LJ decided that it was too late for the trustees-in-bankruptcy to raise justification arguments in relation to the UK legislation and that judgment on the preliminary point should therefore be given to Mr McNamara – ie that Mr McNamara's rights under the Irish pension scheme (the Simcoe Scheme) would be excluded from his bankruptcy in England and Wales. The Court of Appeal later[50] upheld the judgment of Nugee LJ on this point.

In effect Nugee LJ held (see [71], [78] and [83] of the 2022 judgment) that s 11 of the WRPA 1999 should be read down by adding at the end of WRPA, s 11(2)(a):

> or is an 'overseas pension scheme' (within the meaning of s 150(7) FA 2004) established in a Member State of the EU.

50 *Wilson v McNamara* [2023] EWCA Civ 20, [2023] BPIR 574, [2023] Pens LR 5.

Nugee LJ commented that this would 'import two further requirements, one that it was a 'pension scheme' as defined by s 150(1), Finance Act 2004 (FA 2004), and the other that it satisfied the requirements of reg 2(2) of' the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 (SI 2006/206).

FA 2004, s 150(7) defines an 'overseas pension scheme':

> (7) In this Part 'overseas pension scheme' means a pension scheme (other than a registered pension scheme) which—
>
> (a) is established in a country or territory outside the United Kingdom, and
> (b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue.

The relevant regulations are the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 (SI 2006/206, as amended).

The term 'overseas pension scheme' is defined in reg 2, broadly as a scheme which:

(a) Is a pension scheme (s 150(7)) as defined in FA 2004, s 150(1);[51] and
(b) Is regulated (reg 2); and
(c) The scheme is open to persons resident in the country or territory in which it is established - reg 2(3)(condition 1); and
(d) Either (i) does not provide for tax relief on contributions; or (ii) the scheme is liable to taxation on its income and gains and is of a kind specified in Schedule 1 to the Regulations;[52] or (iii) all or most of the benefits paid by the scheme to members who are not in serious ill-health are subject to taxation – reg 2(3)(condition 2); and
(e) The scheme is approved or recognised by, or registered with, the relevant tax authorities as a pension scheme in the country or territory in which it is established – reg 2(3) (condition 3).

In the 2022 judgment in *Wilson v McNamara*, Nugee LJ noted that his decision would not bind any other person, save the current parties. He held that his decision on this point would not preclude any other person, including government if it so wished, from seeking to argue in any future case that the restrictions in s 11 of WRPA 1999 were in fact justified on the basis of an overriding public interest; if such justification were made out, that would self-evidently be sufficient reason for the Court to decline to follow my decision in the present case.

This means that Mr McNamara should have his Irish pension protected in his bankruptcy in England and Wales by WRPA 1999, s 11. It may be open to other persons who are

51 FA 2004, s 150(1) provides:

> '(1) In this Part 'pension scheme' means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons—
> (a) on retirement,
> (b) on death,
> (c) on having reached a particular age,
> (d) on the onset of serious ill-health or incapacity, or
> (e) in similar circumstances.'

52 Schedule 1 specifies a 'complying superannuation plan as defined in section 995-1 (definitions) of the Income Tax Assessment Act 1997 of Australia.'

bankrupt in England and Wales with pensions in an EU Member State to seek the same result, but also open to the trustee-in-bankruptcy to argue that the exclusion from s 11 is justified.[53]

The decision in *Wilson v McNamara* is clearly limited to pensions established in another EU Member State (as it is based on issues on the right of self-establishment as a self-employed person was within the scope of EU law, ie Art 49 TFEU). It would not apply to a pension arrangement established outside the EU.

Can creditors enforce against pension savings (before, during and after bankruptcy)?

Under the first heading, we considered the restrictions on enforcing against pension savings during bankruptcy. But what if the member/debtor is not (yet) bankrupt?

Charging Orders Act

Where the pension fund is constituted as a trust, the member may have an equitable interest in the fund (even if, as is usual, there is no vested interest in any *part* of the fund). Such an interest might in principle be subject to a charging order under s 2(1)(a)(ii) of the Charging Orders Act 1979, although a 'mere hope' under a discretionary trust would be unlikely to qualify. But there are barriers in the way of obtaining a charging order over an interest in a pension scheme.

- First, under s 91(1) of the Pensions Act 1995, no entitlement or future right under an *occupational* pension scheme can be assigned or made the subject of a charge or lien.
- Secondly, the rules of many *personal* pension schemes have 'anti-charging' clauses which automatically forfeit the right to benefit if the member's interest is assigned or charged.[54]
- Thirdly, even where an interest is charged, then it is not obvious how it can be realised, until the member makes an election to take a benefit (as to which election, see below).

Third Party Debt Order

Likewise, it is not possible to require payment of the benefit (not already in payment) from the pension fund by obtaining a third-party debt order under Part 72 of the Civil Procedure Rules (CPR). The fund itself is not a 'debt', because the pension provider's liability to pay is contingent both on the member electing to draw benefits under the scheme, such as a lump sum, annuity or drawdown,[55] and, in the cases where it has a discretion, on the provider deciding to give effect to the election. A contingent liability cannot be a debt for the purposes of a third-party debt order: *Dunlop & Ranken v Hendall Steel Structures*.[56] We discuss below the position of the pension trustees where they have a discretion as to payment.

53 The position may also be altered by the impact of the fiendishly complex Brexit legislation, in particular the European Union (Withdrawal) Act 2018, as amended and the Retained EU Law (Revocation and Reform) Act 2023 (when it comes into force).

54 As mentioned at n 15 above, this cannot apply where the forfeiting event is bankruptcy – PSA 1993, s 159A.

55 See eg *Blight v Brewster* [2012] EWHC 165 (Ch), [2012] 1 WLR 2841 (Gabriel Moss QC) at [59] and *Brake v Guy* [2022] EWHC 1746 (Ch) at [44], citing *Taurus Petroleum Ltd v State Oil Marketing Company* [2018] AC 690 at [88] and *Hardy Exploration and Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm) at [120]. In *Brake* at [52], HHJ Matthews held that there is no debt if the relevant assets in the pension fund are held in the form of investments (and not cash).

56 [1957] 1 WLR 1102 (Div Ct).

Occupational pension schemes – effect of s 91 of the Pensions Act 1995

For an occupational pension scheme[57] (but not a personal pension) a court is not allowed to make an order in relation to a person's entitlement under a scheme (or right to a future pension), if the effect of the order would be to restrain that person from receiving that pension (or other benefits[58]) – PA 1995, s 91(2).[59] This restriction does not apply to occupational pension schemes that do not have UK tax registration.[60] There are exclusions allowing an attachment of earnings order or an income payments order (IPO) – PA 1995, s 91(4).[61]

It seems likely that the prohibition under s 91 only applies to the rights under the occupational pension scheme and the prohibition does not apply to a benefit that has fallen due for payment, nor to the proceeds once the payment has been made (eg into the member's bank account, which may have been charged) – eg Mance LJ in *Fisher v Harrison*[62] and (in another context) Gloster LJ in *Horton v Henry*.[63]

In *Bacci v Green,*[64] it was conceded that s 91 did not apply. In *Manolete Partners plc v White,*[65] HHJ Hodge KC followed *Blight* and *Bacci* and ordered that the debtor member could be compelled to draw down his benefits under an occupational pension scheme. HHJ Hodge held that the prohibition in PA 1995, s 91(2) did not prohibit such an order. He noted that the point had not been expressly decided in the earlier cases, but concluded:

> Having carefully weighed the competing submissions, and recognising that I am free to come to a different conclusion, ultimately I have decided that the analysis and reasoning of Mr Hochhauser in *Bacci v Green* is to be preferred. Provided I direct that payment of the respondent's pension pot is to be made to a nominated UK bank account in the name of the respondent, I do not consider that there will be any contravention of the statutory prohibition in s. 91 of the Pensions Act because, as explained by the Deputy Judge in that case, the order will not have the effect of restraining the respondent from receiving that pension pot but rather the opposite: it will ensure that the payment of that pension pot is made to the respondent, rather than remaining within the Scheme wrapper. In my judgment, it makes no difference that the order is motivated by the objective of enabling that pension pot to be applied in satisfaction of a pre-existing judgment debt owed to the applicant by the respondent. As Professor Goode's

57 As defined in PSA 1993, s 1. Note that this can include a scheme established outside the UK. The s 1 definition changed at the end of 2020 as part of Brexit. The definition in s 1 now includes occupational pension schemes established in another Member State (before 2020 these were excluded from the definition).

58 See PA 1995, s 94(2): 'pension' includes 'any benefit under the scheme and any part of a pension and any payment by way of pension'.

59 On s 91, see the paper by Jonathan Moody, 'Inalienability of pension: section 91 Pensions Act 1995' (APL 2013 Summer Conference).

60 Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc.) Regulations 1997 (SI 1997/785), reg 8(3): 'section 91(2) of the 1995 Act shall not apply in relation to schemes which are not registered schemes'. However,the exclusion from s 91(2) in reg 8(3) does not apply to the Armed Forces Pension Scheme and public service schemes – reg 8(4).

61 Legislation does allow further exceptions – pension sharing orders and attachment (formerly earmarking) orders on divorce etc (see s 44(1), WRPA 1999 and s 166(5), Pensions Act 1995).

62 [2003] EWCA Civ 1047, [2004] OPLR 127 at [26].

63 [2016] EWCA Civ 989, [2017] 3 All ER 735 at [42].

64 [2022] EWCA Civ 1393, [2023] Ch 201, [2023] Pens LR 2.

65 *Re Lloyds British Testing Ltd (in liquidation); sub nom Manolete Partners plc v White* [2023] EWHC 567 (Ch) (HHJ Hodge KC).

> Report (previously cited) makes clear, whilst the asset represented by future pension entitlements is immune from the claims of a member's creditors …

It is to be noted that HHJ Hodge did not order direct payment from the scheme to the creditor, instead requiring payment to be made into a nominated account of the member/debtor (over which presumably the creditor would already have obtained security).

Prohibition on assignment

A prohibition on assignment as such (whether in a statute or a scheme rule) does not seem to be engaged by the vesting of the bankrupt's estate in the trustee-in-bankruptcy on the making of a bankruptcy order under IA 1986, s 306. For pension rights within an approved pension arrangement (and where the bankruptcy petition is after May 2000) this is because the pension rights do not fall within the bankrupt's estate – WRPA 1999, s 11 and for an unapproved arrangement (where an order is made), s 12.

For pension arrangements outside s 11 (or s 12), the previous law will apply and it will usually be the case that the bankrupt member's rights and benefits (including future benefits under a pension scheme) transfer to the trustee-in-bankruptcy[66] under s 306.

A provision in the relevant scheme stating that an assignment (or charge) is ineffective will not apply to this statutory transfer, as it will not be a transfer made by the bankrupt, instead being by operation of law, with no need for an assignment – IA 1986, s 306(2). See for example Ferris J in *Re Landau*.[67]

Attachment of Earnings Act 1971

Where a debtor's pension is already in payment through an annuity, the court can make an attachment of earnings order under Part 89 of the Civil Procedure Rules (CPR) and s 24 of the Attachment of Earnings Act 1971 (the 1971 Act). The term 'earnings' is defined in the 1971 Act expressly to include pensions (s 24(1)(b)), but does not include 'pension, allowances or benefit payable under any enactment relating to social security' (s 24(2)(c), as amended).

As noted above, attachment of earnings by an order under the 1971 Act is an exception to the prohibition for occupational pension schemes on assignments or charges (PA 1995, s 91) or in relation to GMPs (PSA 1993, s 159).

However, in making an attachment order, under s 6(5) of the 1971 Act, the court would need to specify a 'protected earnings rate' being a rate 'below which, having regard to the debtor's resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced'. That vastly reduces the benefit of such an order, because the speed at which the debt would be paid off is likely to be commercially unacceptable to most creditors.

66 See *Re Landau* [1998] Ch 223, *Krasner v Dennison* [2001] Ch 76, *Patel v Jones* [2001] BPIR 919 and *Rowe v Saunders* [2002] EWCA Civ 242. For the pre-1996 view, see Ian Greenstreet 'When can a trustee-in-bankruptcy get his hands on your pension?' (1996) 10 TLI 6.

67 [1997] 3 All ER 322 at 328. Citing on this: *Re Riggs ex p Lovell* [1901] 2 KB 16 (Wright J);, and *Re Griffiths* [1926] Ch 1007 (Romer J).

However, despite the limits and protections noted above, the court may be able to force the member to make an election to draw benefits:

- before bankruptcy: *Blight v Brewster;*[68] or
- after bankruptcy (but only if the cause of action has survived the bankruptcy discharge): *Bacci v Green.*[69]

We discuss these situations further below.

Before Bankruptcy: Blight v Brewster *[2012] EWHC 165 (Ch)*

The protection in WRPA 1999, s 11 for an approved pension arrangement only applies in relation to a bankruptcy. Before any formal bankruptcy takes place, it would still be possible for a judgment creditor of a member to seek an injunction (perhaps in support of a receivership order) requiring the relevant member to exercise any rights to draw down all or part of his or her benefits under a pension arrangement.

Tax rules for a UK tax registered pension arrangement (Finance Act 2004, ss 165 and 279) mean that no benefits can usually be paid out of a registered pension scheme before the relevant member reaches the minimum pension age. Currently this is age 55,[70] but it is due to increase on and from 6 April 2028 to age 57 (Finance Act 2022, s 10, amending FA 2004, s 279). The minimum pension age does not apply to ill-health pensions and some members can have a protected pension age which is earlier.

But once the member is over the minimum pension age (currently age 55), then it is possible (at least if the member is not the subject of a bankruptcy order[71]) for the Courts to grant an injunction requiring the member to exercise any right to draw all or part of his or her benefits.

In *Blight v Brewster*[72] Gabriel Moss QC (sitting as a deputy High Court judge) decided that a member (Mr Brewster) who was a judgment debtor could be compelled (by way of equitable execution[73]) to take his pension lump sum so that it would be claimed by his creditors. The member was entitled to draw his pension but had elected not to do so. There is no mention in the judgment of Mr Brewster being bankrupt.

The pension was stated in the judgment in *Blight* to be with 'Canada Life' and so presumably was a personal pension[74] (and not an occupational pension scheme). This point is not mentioned in the judgment, but this is presumably the reason why the judgment does not discuss any limit on court orders under the Pensions Act 1995, s 91(2) (which does not apply to personal pensions).

In *Blight*, the court allowed the judgment debt to be enforced against the member's lump sum entitlement, ordering the member to delegate the power of election to the claimant's

68 [2012] EWHC 165 (Ch), [2012] 1 WLR 2841 (Gabriel Moss QC).
69 [2022] EWCA Civ 1393, [2023] Ch 201.
70 The age increased from 6 April 2010 to age 55 – Finance Act 2004, s 279(1).
71 When IA 1986, s 285(3) prohibiting legal process against the debtor or their property may be relevant.
72 [2012] EWHC 165 (Ch), [2012] 1 WLR 2841 (Gabriel Moss QC).
73 Under the power to grant injunctions under s 37 of the Senior Courts Act 1981. Following the Privy Council decision in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 and not following a divorce case, *Field v Field* [2003] 1 FLR 376.
74 See also *Bacci v Green* [2022] EWHC 486 (Ch) at [38].

solicitor. The court would then authorise the solicitor to make the election in the defendant's name. Immediately following the election, the sum payable from the pension fund would be subject to a third-party debt order.

It seems that this could not apply if the member has no right or entitlement to draw benefits (eg if the pension scheme only allows benefits to be drawn with a third party's consent and potentially may not apply if there is a protective anti-deprivation/assignment provision in the pension scheme[75]).

Subsequent cases applying and extending Blight v Brewster

Blight v Brewster has since been followed in various family cases.[76] It was cited by the Court of Appeal in *Horton v Henry* [2016] EWCA Civ 989, [2017] 3 All ER 735 on the distinction between the position of a debtor before bankruptcy and after. But Gloster LJ made it clear that she was assuming for the purposes of the judgment in *Horton v Henry* (but without deciding) that the decision in *Bright v Brewster* was correct – at [39], footnote 9.

Blight was also followed by the High Court in *Bacci v Green*,[77] subsequently upheld by the Court of Appeal in *Bacci v Green,*[78] discussed below. In *Bacci*, the order arguably went further than *Blight* in allowing the order to extend not just to a right for the member to draw their pension and other rights, but also ordering the member to exercise his revoked enhanced protection and so draw down a larger amount that would otherwise have been paid.

Blight has also been followed in two recent pension cases (decided before the decision of the Court of Appeal in *Bacci*): *Brake v Guy*;[79] and *Lindsay v O'Loughnane*.[80]

Brake v Guy followed both *Blight* and *Bacci* (at first instance) and rejected (at [67]) an argument that these cases only applied where there had been fraud. Similarly in *Lindsay v O'Loughnane* an order was made, but the judge refused to make a default order allowing the creditor to exercise options (on the debtor's behalf) in relation to the pension if the judgment debtor failed to comply with the order.[81]

In a divorce case, *Maughan v Wilmot,*[82] Mostyn J briefly considered *Blight* and considered that the court could order a transfer, commenting at [22]:

> [Counsel for the husband] seeks to argue that the court does not have power to make a mandatory order to require draw-down of pension funds or, still less, to require a transfer of funds to a flexible access product. In fact, such an order could be made: see *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17, *Blight v Brewster* [2012] 1 WLR 2841, *Goyal v Goyal* [2016] EWFC 50, [2017] 2 FLR 236, [2016] 4 WLR 170, [2017] 1 FCR 188 at [44].

75 See Pensions Act 1995, ss 91 to 94 for occupational pension schemes and Pension Schemes Act 1993, ss 159 and 159A for GMPs and personal pensions.

76 Eg *Goyal v Goyal* [2016] EWFC 50, [2016] 4 WLR 170 at [44] and *Maughan v Wilmot* [2020] EWHC 885 (Fam), [2020] 2 FCR 429, (Mostyn J) at [22].

77 [2022] EWHC 486 (Ch) at [30] to [38].

78 [2022] EWCA Civ 1393, [2023] Pens LR 2.

79 [2022] EWHC 1746 (Ch) (HHJ Paul Matthews, sitting as a High Court judge).

80 [2022] EWHC 1829 (QB) (Simon Birt QC, sitting as a deputy judge of the High Court).

81 It seems that the judgment debtor did fail to comply and an order authorising an insolvency practitioner with knowledge of the proceedings to sign the forms on behalf of the debtor was subsequently made in November 2022: *Lindsay v O'Loughnane* [2022] 11 WLUK 215 (Simon Burt KC).

82 [2020] EWHC 885 (Fam), [2020] 2 FCR 429 (Mostyn J).

Similarly in the criminal confiscation case, *R v Asplin (No 2),*[83] Males LJ in the Court of Appeal envisaged (at [15]) a transfer from an occupational pension scheme to a personal pension being possible. However, this was expressly stated to be subject to the potential for the trustees of the occupational pension scheme to forfeit the benefits before such a transfer (on the basis of a lien rule in favour of the defrauded employer).

In *Manolete Partners plc v White*[84] HHJ Hodge KC followed *Blight* and *Bacci* and ordered that the debtor member could be compelled to draw down his benefits under an occupational pension scheme. HHJ Hodge considered the earlier cases in detail and held (at [43]):

(1) The court's power to make an order derives from Senior Courts Act 1981, s 37(1). However, it is not necessary to show the existence of 'property' against which a receiver can be appointed. The court has the power to 'assist creditors' by granting 'free-standing injunctive relief': *Bacci v Green* in the Court of Appeal.
(2) The 'starting presumption' is that the court should 'assist' the judgment creditor to recover the judgment debt: *Lindsay v O'Loughnane* and *Bacci v Green* in the Court of Appeal.
(3) The payment of tax on the realisation of a judgment debtor's assets is an ordinary part of the process of execution, and is no bar to the making of an order: *Bacci v Green* (at first instance and in the Court of Appeal), *Guy v Brake*, and *Lindsay v O'Loughnane*.
(4) There is no bar to making an order in respect of an occupational pension, whether under s 91 of the Pensions Act or otherwise: *Bacci v Green* (at first instance) and *Lindsay v O'Loughnane*. This point was contested, but ultimately HHJ Hodge agreed (see above).
(5) There is no 'principled distinction … between different kinds of liability' (ie between fraud and non-fraud cases). The principle is that 'debtors should not be allowed to hide their assets in pension funds': *Brake v Guy*.
(6) It is very unlikely that impecuniosity is likely to be 'decisive of the outcome': *Lindsay v O'Loughnane*.

In *Manolete*, HHJ Hodge also discussed how the discretion to agree to an order against the debtor would be exercised ([77] to [80]), in particular noting that the relevant pension was derived from the company which was now claiming.

After Bankruptcy: Bacci v Green *[2022] EWHC 486 (Ch) and [2022] EWCA Civ 1393*

Bacci v Green[85] involved a claim by judgment creditors to enforce a judgment against Mr Green against his beneficial interest under a tax registered money purchase occupational pension scheme. There was also a worldwide Freezing Order outstanding against Mr Green. Following the freezing order and the judgment for the debt, Mr Green was declared bankrupt.

83 [2022] EWCA Crim 9, [2022] Crim LR 590. Involving confiscation orders (under Criminal Justice Act 1988, s 72(7)) and compensation orders (under Powers of Criminal Courts (Sentencing) Act 2000, s 130).
84 *Re Lloyds British Testing Ltd (in liquidation); sub nom Manolete Partners plc v White* [2023] EWHC 567 (Ch) (HHJ Hodge KC).
85 [2022] EWHC 486 (Ch) (Andrew Hochauser QC, sitting as a deputy Judge of the High Court).

At first instance, Andrew Hochauser QC (sitting as a deputy Judge of the High Court) in *Bacci* followed the decision in *Blight* and granted an order requiring Mr Green to elect to receive benefits under the pension scheme when he reached age 55 (ie in October 2022):

- The claimant's solicitors were to be delegated power on behalf of Mr Green to make various elections to arrange for lump sums and pensions to be paid by the scheme (see [12] and [13]).
- These would be paid to one of Mr Green's bank accounts nominated by them, which account will be subject to the worldwide freezing order.
- The claimant then intends to recover out of that bank account by seeking a third-party debt order (see [14]).

The decision of the High Court was upheld on appeal – *Bacci v Green*.[86]

The judgments in *Bacci* note that the effect of the various elections would include a revocation to HMRC of Mr Green's enhanced protection in relation to his lifetime allowance. This would allow a greater lump sum to be drawn from the pension scheme (albeit with (broadly) a 55% tax charge deducted by the scheme before payment).

The Court of Appeal judgment in *Bacci* states that Mr Green's bankruptcy had been discharged.[87] It has been commented that Mr Green's discharge from bankruptcy had taken effect before the first instance hearing.[88] Usually the discharge would have effect to release the relevant debts (assuming they were provable debts) – IA 1986, s 281(1). But in *Bacci*, the judgments make it clear that the debts were incurred in relation to 'fraud'[89] and so the exception from discharge would apply – IA 1986, s 281(3).

The *Bacci* judgment at first instance, *Bacci v Green,*[90] points to the distinction in the type of pension scheme involved, compared with that in *Blight*. It notes (at [38]) that the scheme in *Bacci* was an occupational scheme, although that in *Blight* appears to have been a personal pension scheme. The limits in PA 1995, s 91 are discussed in *Bacci* at first instance at [39] and [40]. Although Mr Green's counsel did not argue that s 91 applied, the judge reached the conclusion that the limits in s 91 did not apply to the order sought, commenting:

> 40. S.91 of the 1995 Act does not prevent the Court granting the Order. The Order does not have the effect of restraining Mr Green from receiving the pension. It does the precise opposite – it ensures that payment of Mr Green's pension is effected, rather than remaining trapped in the Fund.

Section 91 was not mentioned in the Court of Appeal judgment (save for a brief comment on the history of bankruptcy protection).

86 [2022] EWCA Civ 1393, [2023] Ch 201. See also *Cohen v O'Leary* [2023] EWHC 1939 (Ch) (Louise Hutton KC), in which the Court ordered a bankrupt to provide information about his pension savings in anticipation of considering whether to make a *Bacci v Green* type order.

87 *Bacci v Green* [2022] EWCA Civ 1393, [2023] Ch 201 at [3]. Usually discharge occurs one year after the bankruptcy commences – IA 1986, s 279(1). A bankruptcy commences on the date of the bankruptcy order – IA 1986, s 278(a).

88 Practical Law Pensions, case report on *Bacci v Green* at first instance (at Comment, para 1).

89 That is fraud in the sense used in IA 1986, s 281(3). Ie dishonesty – see *Masters v Leaver* [2001] 1 WLR 2378, [2001] 3 All ER 811; *Mander v Evans* [2001] 1 WLR 2378, [2001] 3 All ER 811; and *Woodland Ferrari v UCL Group Retirement Benefits Scheme* [2002] EWHC 1354 (Ch), [2003] Ch 115 (Ferris J).

90 [2022] EWHC 486 (Ch).

Effect of IA 1986, s285(3)? Restriction on legal process

There is also no reference in the *Bacci* judgments to the effect of the restriction on legal process in IA 1986, s 285(3). This section provides:

> (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall–
>
> (a) have any remedy against the property[91] or person of the bankrupt in respect of that debt, or
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.

The extended meaning of property in IA 1986, s 436 will apply to cover pension rights. Where WRPA 1999, s 11 applies to exclude rights under an authorised pension arrangement, this only excludes those rights from the bankrupt's estate and does not operate to exclude those rights from being part of his or her property. This means that the restriction in s 285(3) could still apply. It is not clear if the s 285(3)(a) restriction ceases to apply once the bankrupt has been discharged. There seems little reason for it to remain in relation to debts that could have been proved in the bankruptcy, as normally these will have been discharged and released.

When might pension savings prevent a debtor from declaring bankruptcy?

Under the previous heading, we discussed how the policy of protecting pension savings is qualified by the ability of *creditors* to enforce against those savings either before or – in some circumstances – after bankruptcy.

We now turn to another such qualification, which is a restriction on the ability of *debtors* – again, depending on the circumstances – to invoke the protections of the personal bankruptcy regime at all.

Following the introduction of the pension freedoms legislation with effect from April 2015, it is considerably easier to access pension savings after the age of 55. Previously, access to pension savings was tightly controlled: aside from the typical (but limited) cash lump sum, savers looking to retire could only expect to receive a fixed (or index-linked) annual income.

By removing the requirement for savers to purchase an annuity, the legislation made it simpler to draw down from pension savings on an ad hoc basis. That includes an ability – subject only to tax charges (usually deducted at source by the pension scheme) – for savers to withdraw their entire pension savings in a single lump sum.

With that flexibility, though, comes vulnerability. A debtor who has reached minimum pension age (currently usually age 55) may now be prevented from declaring bankruptcy where they have pension savings available to pay their debts.

Office of the Bankruptcy Adjudicator v Shaw [2021] EWHC 3140 (Ch)

This risk to pension savers is illustrated by the recent decision of HHJ Hodge QC, sitting as a High Court Judge, in *Office of the Bankruptcy Adjudicator v Shaw*.[92]

91 The term 'property' in s 285 is any of the bankrupt's property, whether or not comprised in his estate – IA 1986, s 285(6).
92 [2021] EWHC 3140 (Ch) (on appeal from the County Court at Liverpool, unreported [2020] 5 WLUK 239).

(a) The factual background was not in dispute. Mr Shaw was indebted to creditors in a sum of just under £170,000. His assets included four pension plans, the principal of which was valued in excess of £400,000. The question was whether that pension should be taken into account when determining whether Mr Shaw was able to pay his debts.

(b) The Bankruptcy Adjudicator held that the pension *should* be taken into account and therefore refused to make a bankruptcy order. Mr Shaw then obtained a re-hearing before a District Judge, who disregarded the pension and found that on a cash-flow basis Mr Shaw had insufficient assets with which to pay his debts as they fell due. The District Judge therefore made the bankruptcy order.

(c) On appeal, HHJ Hodge QC noted that the case raised a fundamental, and apparently novel, question: what is the evidential burden, if any, resting on an applicant for a bankruptcy order to adduce evidence as to his inability to access his pension savings for the purposes of demonstrating – as required by IA 1986, s 263K(1)(b) (as amended) – that he or she is unable to pay their debts at the date of the adjudicator's determination of the bankruptcy application?

(d) In answering that question, HHJ Hodge QC began with the principle that the value of pension savings should be taken into account in determining whether a debtor is insolvent on a cash-flow basis, *provided that* those pension savings are – on the facts – sufficiently realisable within an appropriate timescale. He found that Mr Shaw had borne the evidential burden of proving that his pension savings *were not* so realisable, and he had provided little or no evidence in order to do so. It followed that, on the limited evidence before her, the District Judge ought to have concluded that Mr Shaw's pension savings *were* sufficiently realisable[93] such that he *was* able to pay his debts as they fell due.

(e) HHJ Hodge QC therefore allowed the appeal and annulled the bankruptcy order. Presumably, this resulted in Mr Shaw having to draw down on his pension(s) as a means of paying his creditors. That was a very significantly worse outcome for Mr Shaw than if he had succeeded in declaring bankruptcy – then, as set out above, his pension savings would have been protected (in accordance with s 11 of WRPA 1999) and his creditors left unsatisfied.

There are three key points to note arising out of *Shaw*.

(1) First, applying for bankruptcy cannot be used as a way of safeguarding pension savings after age 55, if those pension savings would mean that the individual could pay his or her debts. Unlike the District Judge, HHJ Hodge QC was unmoved by the submissions made on behalf of Mr Shaw that by taking the pension savings into account the Court would – in effect – be requiring Mr Shaw to withdraw them to pay his creditors. It was irrelevant that this was 'anomalous' when set against the policy of protecting pensions on bankruptcy. There was no such policy prior to bankruptcy, as *Blight v Brewster* – discussed above – had made clear. The courts will not allow bankruptcy to be used as a device to avoid payment of liabilities from assets, even if those assets would not form part of the bankruptcy estate.

93 Similarly, in a later case *R v Asplin (No 2)* [2022] EWCA Crim 9, [2022] Crim LR 590 involving confiscation orders (under Criminal Justice Act 1988, s 72(7) and compensation orders under Powers of Criminal Courts (Sentencing) Act 2000, s 130), the Court of Appeal held at [15] to [31] that pension assets and rights of defendants within an occupational pension scheme should be considered to be realisable assets of the defendants based on a cash equivalent transfer value (CETV) calculation and gross of tax.

(2) Second, adverse tax consequences have only limited relevance. Mr Shaw's tax-free lump sum of 25 per cent would not have been sufficient to have discharged his debts, but he would have been able to withdraw in excess of that lump sum – subject to income tax at his marginal rate – so that the debts could be discharged in full. The only question was whether the *net* amount was sufficient to discharge the debts. So – in contrast with the exercise of discretion in *Bacci v Green,* discussed above – the decision whether Mr Shaw could be adjudged bankrupt was a hard-nosed one. Mr Shaw was able to pay his debts, and so he simply had no option but to suffer the tax consequences of doing so.
(3) Third, this case underscores the need for creditors to be cautious before presenting a bankruptcy petition against a debtor who has substantial pension savings. The debtor's application will fail if the pension savings are sufficiently realisable within an acceptable timescale. But on a creditor's petition, the burden of proof (under IA 1986, s 271(3)) is reversed – so, in the absence of evidence as to the availability of the pension savings, the petition will succeed, and the pension savings will be put out of reach for enforcement purposes.

In our view, there is now a clear trend of the courts favouring the payment of creditors over the protection of pension savings. Debtors who are yet to reach the minimum pension age (currently 55) will still have the advantage of limited protections, but – unless they are prepared to apply for bankruptcy – their pension savings will remain vulnerable to creditors who are prepared to bide their time.

How should pension trustees respond to bankruptcy and enforcement actions?

The trend towards enabling enforcement is likely to result in pension trustees[94] of approved pension arrangements (so protected in a UK bankruptcy) seeing more of this kind of application in future. So how should pension trustees respond when an attempt is made to enforce against funds which they hold?

The *bankruptcy* of a pension saver will have no direct impact upon their pension savings because such savings will fall outside their estate – we discuss this under the first heading above.

What is more likely to trouble pension trustees is any attempt to enforce against funds *outside bankruptcy*. Every case will be different, but we suggest that the following are key themes to consider.

Is there a proprietary claim?

First, pension trustees should consider whether a proprietary claim is being asserted against funds which they hold. The obvious example is a tracing claim, where the traceable proceeds of fraud – held on constructive trust for the victim – have been paid into the pension scheme. In those circumstances, the claim is not the enforcement of a debt but the vindication of a proprietary right.

94 The position of individual pension trustees who themselves become bankrupt is outside this paper. See the talk in the 2018 Nugee Lecture series by Thomas Robinson 'When does a claim survive a trustee's bankruptcy (s281(3) of the Insolvency Act 1986) and enforcement against a trustee's pension'.

Trustee discretion?

Secondly, pension trustees should keep in mind their duties to seek to act in a way that promotes the success of the scheme in general (sometimes potentially misleadingly telescoped into a best interests of the members duty). Save, controversially, in the context of so-called 'insolvent trusts', trustees do not owe a duty to act in the interests of their beneficiaries' creditors.

The extent to which the pension trustees have a choice – having regard to those duties – about how to respond, will depend in large part upon the rules of the relevant pension scheme.

(a) The rules of some schemes provide no automatic rights to members, such that they can only exercise options under the rules with the consent of the provider or the employer (for example drawing benefits before normal pension age).
(b) Moreover, scheme rules also commonly grant the provider with discretionary powers to forfeit a member's benefits where they assign[95] or surrender their rights or attempt to do so, with a further discretionary power to apply the benefits so forfeited to the member, his or her spouse or civil partner or dependents.
(c) Some more recent scheme rules even contain a clause that grants the provider the discretion whether to act in accordance with a member's instructions in circumstances where it has become aware that the member's power to give instructions has been delegated to, or that the member's instructions are being given at the behest of, a creditor or trustee-in-bankruptcy.

The question whether a trustee should pay from the trust fund the creditor of a beneficiary was considered in the Jersey case, *Grupo Torras SA v Al-Sabah (No 6),*[96] a decision of Gloster, Sumption and Rokinson JJA sitting as the Jersey Court of Appeal. There, the beneficiary of a (non-pension) trust objected to the trustee exercising a discretion to paying the majority of the trust fund to his creditors, on the basis that it would not be in his best interests. The trustee surrendered its discretion to the court and, at first instance, the judges refused to make an order for payment. On appeal, the Court of Appeal refused to overturn the first instance court, holding that the decision was a matter for its discretion and one which it was entitled to reach in accordance with applicable legal principles, stating:

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

In considering how to respond, pension trustees should note carefully the impact which a member's bankruptcy would have on the pension savings they hold (this is discussed above). Where bankruptcy is the likely alternative if the creditor is unable to enforce against the pension savings, the impact of bankruptcy will be highly relevant to an assessment of the member's best interests.

95 Assignment of benefits may result in an unauthorised payment for pension tax purposes – Finance Act 2004, s 172. Conversely, a charge over benefits is not within an assignment within s 172. Conversely, in relation to the prohibition under PA 1995, s 91 applies to both an assignment or a charge over benefits.
96 [2002] WTLR 337, (2001-02) 4 ITELR 555 (Jersey CA).

In many cases, it would plainly be in the member's interests to apply the pension fund to another family member – or alternatively to purchase an annuity or put the pension into drawdown – rather than to pay it to a creditor.

Trustees taking part in proceedings?

Thirdly, pension trustees should consider what role – if any – they should play in any proceedings. It is likely that they will wish to take a neutral role, participating only insofar as necessary to ensure that whatever order is made is one which the trustees can carry into effect without undue difficulty. To do otherwise carries with it a serious risk as to costs. Depending on the circumstances this can even lead to an indemnity costs order – see eg *Brake v Guy* [2022] EWHC 1911 (Ch).

Conclusion

The position of a pension remains potentially complex both on a member's bankruptcy and on the potential for enforcement by a creditor. There remains a complex inter-action between:

- scheme rules;
- pensions legislation;
- insolvency legislation; and
- (to a degree) tax legislation

Bankruptcy

Broadly, for a trustee-in-bankruptcy in England and Wales there may be little prospect of recovery from a UK tax registered pension scheme for the benefit of creditors (absent seeking to claw back contributions or using the 'excessive contributions provisions).

It is now clear that the trustee-in-bankruptcy cannot force the bankrupt to draw benefits (or increase the amount already being paid) – *Horton v Henry*.

There may be scope, if the bankrupt reaches normal pension age during the time that could be covered by an IPO, for the trustee-in-bankruptcy to force the commencement of benefits by the pension scheme to the member. The scheme rules may provide that this is automatic unless the member seeks a deferral (and the relevant scheme trustee or provider agrees), although a lump sum commutation may be more dependent on trustee or employer consent. It is untested whether the co-operation obligation on the bankrupt could allow the trustee-in-bankruptcy to prevent the member exercising such a deferral (or withdraw one if given during the bankruptcy).

The position of the bankrupt with benefits under an unapproved arrangement is much less protected. He or she may seek an order under WRPA 1999, s 12, but this requires the court to balance the position.

For overseas pension arrangements within the EU, there is likely to be scope for a bankrupt to seek the full s 11 protection following the decision in *Wilson v McNamara*.

Before bankruptcy

Before bankruptcy has occurred, it seems likely that a creditor may be able to seek an order (or injunction) enforcing a judgment by way of requiring the member to trigger benefits under

a pension scheme (assuming the member is aged over minimum pension age) and paying the amount received (less tax) into a bank account (which is then charged) – *Blight, Maughan, Asplin*.

This can extend to forcing the member to exercise tax options – *Bacci*.

This process looks easiest if the member has (or will shortly have) a current right to relevant benefits under the scheme. If he or she does not, then an alternative may be to seek an order requiring the member to establish a new pension scheme (without the same limitations) and exercise the member's statutory right to take a transfer to the new scheme. This may be within the scope of a potential court order.

Such a process does not seem to be an 'assignment' triggering a tax charge, nor running contrary to a prohibition on assignments (either under scheme rules or, for occupational pension schemes, under PA 1991, s 91) – *Blight*. It may be more arguable that it could constitute a 'charge' and so relevant if this is also prohibited.

When considering if a person is insolvent for the purposes of making a bankruptcy order, the court will have regard to potential pension benefits – *Office of the Bankruptcy Adjudicator v Shaw*.

Trustee or employer discretions

If any benefits require the trustee (or employer under an occupational pension scheme) to give a consent, then it may be that the discretion holder (if a trustee) needs to consider the impact on the member of the exercise of the discretion.[97] Does this further the purpose of the scheme? It may be arguably for the benefit of the bankrupt member if all or part of his or her debts are paid off, but this looks more tricky following the Jersey private trust case – *Grupo Torras SA*. A different issue may arise for employer discretions (as the employer does not owe the same trust duties as a trustee).

But care needs to be taken by the trustee (or pension provider). Defending a claim (eg for a receivership order) can expose the provider to a costs liability, and, depending on the circumstances can even lead to an indemnity costs order – see eg *Brake v Guy*.[98]

After bankruptcy

Once the member has been discharged from bankruptcy, the relevant provable debts will usually be considered settled (by the recovery under the bankruptcy).

However, if the relevant debts are not discharged (eg because these were derived from fraud), then it seems that the creditor may then be able to force the member to draw benefits and pay them into a charged bank account – *Bacci*.

97 In a personal pension, it is unlikely that there will be a discretion, or, if there is, it will be construed in a limited way – see *Brake v Guy* [2022] EWHC 1746 (Ch) at [74].

98 [2022] EWHC 1911 (Ch).

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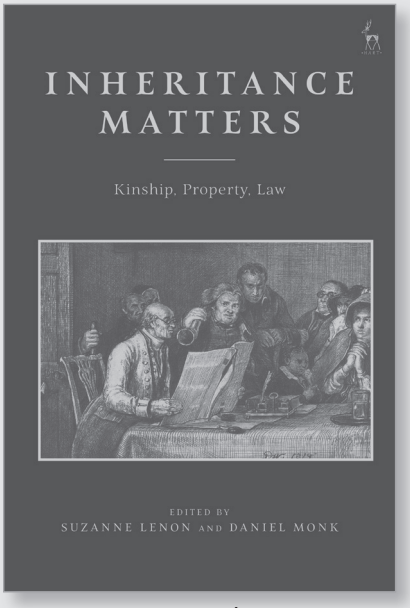

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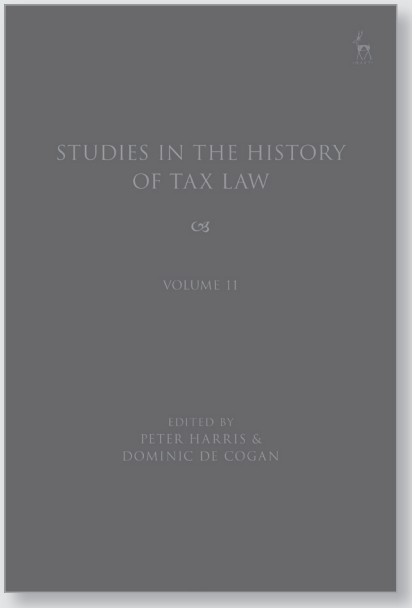

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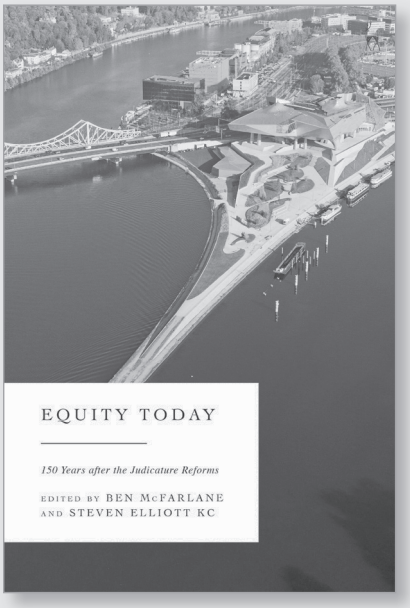

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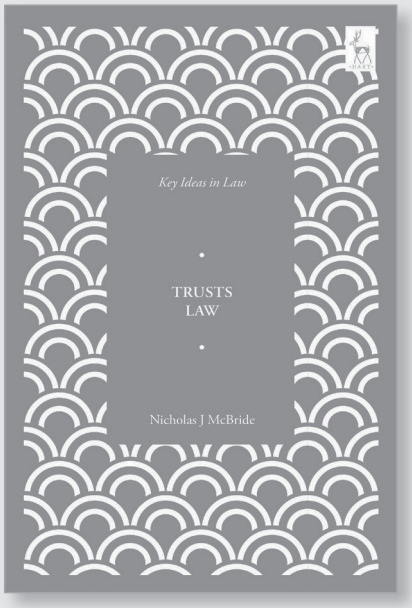

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