Neutral Citation Number: [2023] EWHC 1939 (Ch)

Case No: BR-2023-000401

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF THE INSOLVENCY ACT 1986
AND IN THE MATTER OF THE BANKRUPTCY OF WILLIAM STEPHEN O'LEARY

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26/07/2023

Before :

LOUISE HUTTON KC
Sitting as a Deputy Judge of the High Court

- -

Between :

(1) MALCOLM COHEN
(2) SHANE CROOKS
(As Joint Administrators of the Estate of James Donald Hanson)
(3) CREDITFORCE LIMITED

Applicants

- and -

(1) WILLIAM STEPHEN O'LEARY (A BANKRUPT)
(2) MATTHEW CHADWICK
(3) SUSAN BERRY

Defendants

- -

Saaman Pourghadiri (instructed by **Browne Jacobson LLP**) for the **Applicants**
Simon Hill (instructed on a Direct Access basis) for the **First Respondent**

Hearing date: 18th July 2023

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Approved Judgment

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Remote hand-down: This judgment was handed down remotely at 10am on 26 July 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

Louise Hutton KC :

1. The First and Second Applicants are the Joint Administrators of the estate of the late James Donald Hanson. Together with the Third Applicant they are judgment creditors of William Stephen O'Leary, the First Respondent.

2. The Applicants obtained judgment against Mr O'Leary in proceedings before the Royal Court in Jersey in Claim No.2019/093. The judgment was handed down on 17 December 2021 ("the Jersey Judgment") and by order of the same date the Royal Court (among other things) made a declaration that Mr O'Leary was liable to pay equitable compensation for breach of trust to the Applicants in the sum of £32,666,771.

3. On 16 March 2022 that part of the Jersey Judgment was registered in the King's Bench Division under the Foreign Judgments (Reciprocal Enforcement) Act 1933.

4. Mr O'Leary subsequently applied for his own bankruptcy and a bankruptcy order was made on 21 July 2022. The Second and Third Respondents to this application are Mr O'Leary's trustees in bankruptcy. They have been served with this application but have taken no part in it. It is anticipated that Mr O'Leary will be discharged from bankruptcy on 21 July 2023.

5. On 2 June 2023, the Applicants issued an application in Mr O'Leary's bankruptcy seeking:

    i) Permission under s.285(3) to bring an application "*for an order seeking an injunction akin to that ordered in Bacci v Green to come into effect on the First Respondent's discharge from bankruptcy*";

    ii) An order that Mr O'Leary should provide certain information about his private pension to the Applicants' solicitors;

    iii) Orders described as "*Bacci v Green*" relief to take effect from 21 July 2023 (the anticipated date of Mr O'Leary's discharge from bankruptcy) ordering Mr O'Leary to delegate to the Applicants' solicitors his powers to elect to withdraw benefits from his private pension; giving the Applicants' solicitors authority to elect that Mr O'Leary draw down on his pension by any means that appear expedient to them and authority to elect that Mr O'Leary's pension is received into their client account; and prohibiting Mr O'Leary from otherwise dealing with the assets within his private pension scheme.

6. The application stated that it was necessary for it to be heard before Mr O'Leary's discharge from bankruptcy on 21 July 2023 and the application was listed to be heard in the Insolvency and Companies List on 18 July 2023 (three days before the anticipated date of discharge).

7. At the conclusion of the hearing I informed the parties that the application for permission under s.285(3) would be granted and that orders would be made: (i)

requiring Mr O'Leary to provide certain information by way of witness statement, (ii) authorising the Applicants to communicate with Mr O'Leary's pension provider in order to obtain information about Mr O'Leary's pension, and (iii) adjourning the balance of the application with directions for evidence on Mr O'Leary giving an undertaking (which was offered during the hearing in the event that I decided not to dismiss the application entirely but to adjourn it to another hearing). As I made clear at that time, Mr O'Leary's undertaking therefore came into effect immediately. These are my reasons for that decision.

8. While the s.285(3) application for permission was properly brought in Mr O'Leary's bankruptcy, it is not clear to me that the balance of the application is properly brought in the bankruptcy proceedings. The balance of the application seeks (essentially) to enforce the judgment which has been registered in the King's Bench Division and the relief sought by this application (save for the s.285(3) relief) would most naturally have been made in those King's Bench Division proceedings. As set out below, the relief other than the s.285(3) permission sought by this application does not relate to Mr O'Leary's bankruptcy or assets which have formed part of his bankruptcy estate. Save for the fact that it was appropriate for the s.285(3) application to be made in the bankruptcy proceedings, no reason for the balance of the relief being pursued in the bankruptcy proceedings was identified by the Applicants at the hearing.

9. In the interests of dealing with the proceedings in accordance with the overriding objective, and given the urgency of the substance of the application, with Mr O'Leary due to be discharged from bankruptcy on Friday 21 July, I concluded I should in any event hear the entire application so that it could be determined as efficiently as possible. Neither party objected to this course when I raised the issue at the hearing.

The application for permission under s.285(3) Insolvency Act 1986

10. Section 285(3) of the Insolvency Act 1986 provides:

> "*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 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.*"

11. The Applicants seek permission "*to commence their Application*" now because of what is said to be a risk of dissipation of Mr O'Leary's personal pension if no relief is granted before his discharge from bankruptcy on 21 July.

12. Mr Pourghadiri, appearing for the Applicants, relied on what was said by David Richards J (as he then was) in *Bank of Ireland v Colliers International UK plc* [2013] Ch 422 (considering the equivalent provisions applying to companies in administration). At [32] David Richards J said that the fact that the requirement for permission for the commencement of proceedings applies to insolvency proceedings under the control of the court: bankruptcy, winding up by the court and administration,

and not to companies in creditors' voluntary winding up suggests that the real purpose of the provisions is that identified by Black LJ in *Boyd v Lee Guinness Ltd* [1963] NI 49 at 57, namely to ensure that the whole of the task of supervising the collection and distribution of the company's assets should be committed to the winding up court and, accordingly, that all proceedings having any bearing upon the winding up of the company should remain under the supervision and control of that court.

13. Mr Pourghadiri submitted that, in light of that purpose, permission should be granted because (as set out below) the balance of the application was concerned with enforcing a debt which would survive Mr O'Leary's discharge from bankruptcy against an asset which the trustees in bankruptcy had stated was not available to them in the bankruptcy. In a letter dated 22 March 2023 to the Applicants' solicitors, the solicitors for the trustees in bankruptcy stated:

> "*In the circumstances Mr O'Leary's private pension at present does not fall within his bankruptcy estate and therefore is not available to the Trustee in bankruptcy to use to satisfy bankruptcy debts such being the line consistent with Section 11 of the Welfare Reforms and Pensions Act 1999. That on the basis that Mr O'Leary's private pension comprises uncrystallised pension benefits, there is nothing that the Trustee can do to compel the bankrupt to draw his private pension and the dicta of Court of Appeal in Horton v Henry applies.*"

14. Further, the *Bacci v Green* relief sought was expressed in the draft order to come into effect after Mr O'Leary's discharge. To permit the application to be commenced would not therefore infringe the purpose of s.285(3).

15. Mr Hill, appearing for Mr O'Leary, opposed the application on the basis that while he accepted that (as held in *Bank of Ireland v Colliers*) permission could be given retrospectively, there was no good reason why the Applicants had not applied for permission first and separately, before issuing the substantive part of their application. It followed, he submitted, that permission should be refused because there was no good reason for the application for permission not being made first, as the section envisages.

16. I decided that permission should be given. For the reasons identified by the Applicants, the relief sought does not affect the assets which are in the bankruptcy estate or the rights of the creditors who are entitled to prove in the bankruptcy. Although permission is typically applied for before commencing proceedings, it is clear that (as Mr Hill accepted) permission can be granted retrospectively and therefore, as here, at the outset of an application. It does not seem to me that in the absence of any suggestion of prejudice to the bankruptcy process (the trustees in bankruptcy having indicated that they take no position on the application), permission should be refused simply because it was not the subject of a separate earlier application.

The relief sought by the balance of the application

17. In summary, the Applicants seek, following Mr O'Leary's discharge from bankruptcy, to enforce their judgment debt against Mr O'Leary's rights to his private pension, said by the Trustees in bankruptcy to be worth around £1 million.

(i) Will the judgment debt survive Mr O'Leary's anticipated discharge from bankruptcy?

18. The primary ground on which Mr Hill opposed the balance of the application was the submission that the judgment debt which the Applicants seek to enforce will not survive Mr O'Leary's discharge from bankruptcy. By s.281(1) Insolvency Act 1986, "*Subject as follows, where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts*".

19. It is common ground that the judgment debt is a "*bankruptcy debt*". What is said by the Applicants, and disputed by Mr O'Leary, is that Mr O'Leary will not be released from the bankruptcy debt on his discharge on 21 July because by s.281(3), "*Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party.*"

20. The Applicants say that it is clear from the Jersey Judgment that the judgment debt was "*incurred in respect of … [a] fraudulent breach of trust*" to which Mr O'Leary was a party. Mr Hill, on behalf of Mr O'Leary, says that that is not the case and relies, in particular, on the fact that both the Jersey Judgment and the order made by the Jersey court on judgment, refer to liability for the judgment sum being imposed as a liability to pay "*equitable compensation for breach of trust*", rather than "*equitable compensation for <u>fraudulent</u> breach of trust*".

21. The Jersey Judgment is 86 pages long and followed a 10 day trial at which Mr O'Leary was the only participating defendant. Having read that judgment, it is clear to me that the Jersey Judgment imposed the liability to pay equitable compensation which is reflected in the order it made on judgment (and in turn in the English order recognising that judgment under the 1933 Act) in respect of Mr O'Leary's fraudulent breach of trust. That is clear from the Jersey Judgment as a whole but in particular from paragraph 270. That paragraph follows a heading in bold asking the question, "***Did Mr O'Leary breach his duties as bare trustee by transferring the assets of the Trust to the Panamanian Foundation and thereby terminating the Trust?***" Paragraph 270 then answers that question as follows:

> "*We unhesitatingly answer this question in the affirmative. We have set out the duties that Mr O'Leary owed to the Trust above. We have no doubt that Mr O'Leary acted dishonestly and, therefore, fraudulently when he breached his duties as bare trustee. In particular, he:*
>
> *(i) concealed his actions from Mr Hanson and Creditforce;*
>
> *(ii) took advantage of Mr Hanson's declining health to carry out the transactions;*
>
> *(iii) instructed experts who he knew had no experience or skills in looking after charity money – instead selecting advisers who specialised in asset protection;*
>
> *(iv) failed to keep a proper paper trail of communications with the advisers and advice that they gave in order to, in our view, conceal his actions;*
>
> *(v) lied to and misled the professionals who were instructed to assist the executors after Mr Hanson's death;*
>
> *(vi) concealed his activities from the Neatly Board; and*

> *(vii) deliberately set up an entity, first in St Kitts and then in Panama, which he knew that he could benefit from personally, owing to their terms. Neither entity was exclusively charitable and, indeed the proper entity to set up in St Kitts would have been a charitable trust (not a foundation) and the proper entity to set up in Panama would not have been the Private Investment Foundation that Mr O'Leary selected on the advice of an adviser who is now serving a sentence for imprisonment for dishonesty.*"

22. This is also made clear by paragraph 291 of the Jersey Judgment where, under the heading "***Equitable compensation***", the Deputy Bailiff stated:

> "*In view of our findings, Mr O'Leary is liable to make good to the Plaintiffs the value which the ARTL shares would have had if they had not, in breach of trust, been transferred to the Panamanian Foundation.*"

23. As set out above, the findings of fraudulent breach of trust set out at paragraph 270 of the Judgment were made in answer to the question whether Mr O'Leary had breached his duties as trustee "*by transferring the assets of the Trust to the Panamanian Foundation*". There is no doubt that the liability to pay equitable compensation imposed by the Royal Court was imposed in respect of those findings of fraudulent breach of trust: it is those "findings" in paragraph 270 of the Jersey Judgment which the Royal Court is referring to in paragraph 291.

24. Further, in the following paragraph, paragraph 292 of the Jersey Judgment, the Deputy Bailiff continued, "*We note that there is no limitation or prescription period applying to the Plaintiffs' claim in these circumstances as Mr O'Leary was party to a fraud and, in any event, he in addition, converted Trust property to his use by transferring the Trust to a non-charitable trust and personally benefitting from it to the tune of at least £1 million. Accordingly, pursuant to Article 57(1) of the Law, no period of limitation or prescription applies*." This again makes it clear that the Royal Court was finding Mr O'Leary liable in respect of fraudulent conduct. Mr Hill relied on the fact that Article 57 is not limited to fraudulent conduct, and on the fact that the Deputy Bailiff referred in paragraph 292 to Mr O'Leary having converted trust property to his use (the other aspect of Article 57) as well as to fraud. Both those points are correct, but they do not change the fact that paragraph 292 includes a statement that there was no limitation or prescription period applying to the claim for which Mr O'Leary was being held liable "*as Mr O'Leary was party to a fraud*".

25. I therefore do not accept Mr Hill's submissions that Mr O'Leary's liability to pay the judgment debt is not a liability "*incurred in respect of ... any fraud or fraudulent breach of trust*" because there is no sufficient connection (as he put it, no "*qualifying nexus*") between the judgment debt and the fraud/fraudulent breach of trust found by the Royal Court.

26. Mr Hill relied in support of his submissions that there was a need for such a connection or nexus on *Mander v Evans* [2001] 1 WLR 2378 and *Templeton Insurance Ltd v Brunswick* [2012] EWHC 1522 (Ch). In *Mander v Evans*, Ferris J said (at [11]) that it was necessary to determine "*what 'bankruptcy debt' the court is concerned with, because section 281(3) has no application unless the debt was 'incurred in respect of' fraud to which the defendant was a party*". In *Templeton v Brunswick*, HHJ Simon Barker QC, sitting as a Judge of the High Court, said (at [55]), "*The purpose of s.281(3)*

as a qualification to s.281(1) is to prevent a person from using the process of bankruptcy or invoking his bankruptcy and discharge therefrom as a medium for becoming free from debts and liabilities resulting from his actual dishonesty." Mr Hill relies on the word "*resulting*" in support of his argument.

27. Mr Hill posits a case where the elements of a cause of action are made out and there is a separate finding of dishonesty in relation to the defendant's conduct on a marginal issue. In such a case there would be a finding of dishonesty in the judgment but the order that the defendant should pay compensation would not have been "*incurred in respect of*" the dishonesty for the purposes of s.281(3), but separately incurred in respect of the established cause of action.

28. I accept that point and I accept that the words "*incurred in respect of*" in s.281(3) involve a need to determine whether the relevant bankruptcy debt was "*incurred in respect of*" a fraud or fraudulent breach of trust to which the defendant was a party, rather than imposed in respect of a cause of action in which no relevant finding of fraud or fraudulent breach of trust was made against the relevant defendant. However, for the reasons set out above, it is clear from the Jersey Judgment that that requirement in s.281(3) is satisfied here.

29. I do not accept Mr Hill's further submission that because the Royal Court's order made a declaration that Mr O'Leary was liable to pay equitable compensation "*for breach of trust*", that that liability (imposed for the reasons set out in the Jersey Judgment) was not "*incurred in respect of … any fraud or fraudulent breach of trust*". The fact that an order following judgment records a declaration of liability for breach of trust when the judgment has found fraudulent breaches of trust does not mean that the liability is being imposed for a breach of trust which was not fraudulent. The nature of the breach of trust is to be identified by considering the relevant judgment as a whole. There is generally no need for the order itself to record whether the breach of trust was fraudulent or not. As the Jersey Judgment makes clear that Mr O'Leary was liable to pay equitable compensation for his fraudulent breaches of trust, the fact that the order does not include the word "*fraudulent*" does not take the matter further.

30. Mr Hill submitted in support of this argument that it is unusual for an order to record declarations as to the basis on which liability was being imposed on a defendant and that where such declarations are made, they are effectively conclusive as to the basis of that liability. Mr Hill did not identify any evidence or authority for this submission and I do not accept that as a matter of general principle the fact an order on judgment contains declarations as to the basis of liability means that the reasons set out in the judgment are not relevant to show the basis on which the liability has been imposed. In this case, the order of the Royal Court in fact makes the position clear: it expressly states that the declarations and orders being made are made "*for the reasons set out in a judgment delivered by the Deputy Bailiff*" (i.e. the Jersey Judgment).

31. Mr Hill submitted that there was a conflict between the Jersey Judgment and the Royal Court's order on judgment because the order did not refer to a "*fraudulent breach of trust*". I do not accept that submission. There was no need for the order to refer to a "*fraudulent breach of trust*". It declared Mr O'Leary liable to pay equitable compensation for breach of trust, and the reasons for that declaration are set out in the Jersey Judgment, which (as set out above) include findings that Mr O'Leary's breaches of trust were dishonest and fraudulent.

32. For the same reasons, the fact that the English order of 16 March 2022 registering the judgment did not refer to "*fraud"* or "*fraudulent breach of trust*" does not assist Mr O'Leary.

33. I therefore decided that Mr O'Leary could not successfully oppose the grant of the relief sought on the basis that the judgment debt would not survive his discharge from bankruptcy because the judgment debt is a debt "*incurred in respect of … [a] fraud or fraudulent breach of trust*" to which Mr O'Leary was a party.

(ii) Should "Bacci v Green" relief be ordered?

34. The next question is whether that relief should be granted.

35. The injunctive relief which is sought in order to permit the Applicants to enforce (after Mr O'Leary's discharge from bankruptcy) the judgment debt against Mr O'Leary's private pension was described by the Applicants as a "*Bacci v Green Order*".

36. In *Bacci v Green* [2023] Ch 201, the respondent, Mr Green, was a discharged bankrupt and a judgment debtor, the debt having survived his bankruptcy pursuant to s.281(3). His principal asset was his interest as a member of an occupational pension scheme. The applicant judgment creditors sought relief designed to allow them to recover as much as they could of the sums owed to them by Mr Green from benefits which he could claim from the pension scheme. The judge (in a decision upheld by the Court of Appeal) made an order which, as set out in Newey LJ's judgment at [9], "*requires Mr Green to delegate to the Creditors' solicitors his power to notify HMRC that he is revoking his 'enhanced protection', his power to notify HMRC that he is seeking 'individual protection' and his power to elect to draw down on his pension under the Pension Scheme once he has turned 55. The order further gives the Creditors' solicitors 'authority to elect that [Mr Green] draws down on his pension by way of taking a Pension Commencement Lump Sum, Life Allowance Excess Lump Sum and/or any other pension, by providing notice in writing to [the trustees of the Pension Scheme]* ".

37. As set out above, the Applicants in this case sought relief intended to have a broadly similar effect.

38. One significant difference between this case and other cases in which similar relief has been granted (the Applicants relied on *Blight v Brewster* [2012] 1 WLR 2841, *Brake v Guy* [2022] EWHC 1746 (Ch), *Lindsay v O'Loughnane* [2022] EWHC 1829 (QB) and *Manolete Partners v White* [2023] EWHC 567 (Ch) in addition to *Bacci v Green* itself) is that in this case, the Applicants when issuing the application and, until partway through this hearing, had no information about Mr O'Leary's pension beyond the information provided by the Trustees in Bankruptcy that Mr O'Leary had a private pension and that it was worth around £1 million.

39. As a result of the Applicants' lack of information, the relief sought falls into two parts.

40. The first part of the application is for an order that Mr O'Leary should, to the best of his ability, provide the following information about his pension to the Applicants' solicitors:

    (a) the name of his pension provider,

(b) the provider's contact address,

(c) the plan or reference number for the pension, and

(d) any copy of the pension rules or details of the benefits which are in Mr O'Leary's possession).

41. The second part of the draft order sought by the Applicants is as follows:

"*3. Paragraphs X – Y of this Order will take effect from 21 July 2023.*

4. The First Respondent shall delegate exclusively to Browne Jacobson LLP his powers to elect to withdraw benefits from his private pension scheme.

5. Browne Jacobson LLP shall have authority to elect that the First Respondent draws down on his pension by any means that appear expedient to it.

6. Browne Jacobson LLP shall have authority to elect that the First Respondent's pension is received into Browne Jacobson LLP's client account.

7. The First Respondent shall not otherwise deal with the assets within his private pension scheme."

42. Although the order that Mr O'Leary should provide information comes first, the basis for making that order is the Court's power to make the second part of the order (or an order to similar effect) in due course. If there were no prospect of such an order being made in this case, then it would not be appropriate to order Mr O'Leary to provide the information sought.

43. In light of the authorities cited above, Mr Hill did not contend that, if his argument on s.281(3) failed (with the consequence that the judgment debt would survive the bankruptcy), there would be any reason why the Court could not make the order sought. He instead submitted that the Court should refuse the order in the exercise of its discretion on the grounds of Mr O'Leary's impecuniosity. I address impecuniosity below.

44. As set out above, the fact that the Applicants in this case had (until partway through the hearing) almost no information about Mr O'Leary's pension, and certainly no understanding of the relevant scheme and Mr O'Leary's rights under that scheme, is a relevant difference between the circumstances in which orders were made to permit enforcement of judgment debts against judgment creditors in the cases cited above and the circumstances of this application.

45. I concluded that it would not be just and convenient in all the circumstances of the case to grant orders at this stage requiring Mr O'Leary to delegate his powers to withdraw benefits to the Applicants' solicitors and authorising the Applicants' solicitors to elect that Mr O'Leary should draw down on his pension "*by any means that appear expedient*" to them. That is because there is at present no evidence as to the nature of Mr O'Leary's pension scheme and his rights and benefits under that scheme. That is very different to the situation before the Court in *Bacci v Green* itself (see the information available as to the relevant pension scheme at [6-7 and 20]), in *Blight v Brewster* (see at [58]), in *Brake v Guy* (see at [21-42]) and in *Manolete Partners plc v*

White (see at [46-49 and 59]). I note that the correspondence exhibited to the evidence filed by the Applicants in support of this application included letters in which they had sought the information about the pension now sought by this application from Mr O'Leary and the trustees in bankruptcy. Those letters both stated that if the information requested was not provided, "t*he application will be 2 stage … firstly for the production of information and documentation concerning the pension by a specific time limit; secondly for the substantive application to obtain a Bacci v Green Order*". The Applicants did not identify any reason why that position had changed save for the urgency imposed by the date of Mr O'Leary's discharge from bankruptcy being 21 July 2023.

46. During the hearing, Mr O'Leary in fact provided to the Applicants' solicitors the name and address of what he described as his pension provider, together with a plan or reference number for his pension. He also confirmed that the pension was not an occupational pension.

47. In light of concerns expressed by the Applicants that the entity identified might be a financial adviser which dealt with the pension on Mr O'Leary's behalf rather than the pension provider itself, Mr Hill indicated on instructions that Mr O'Leary was willing to provide a witness statement by 4pm on the day after the hearing (19 July 2023) confirming to the best of Mr O'Leary's ability the information sought by the Applicants' draft order. He also indicated on instructions that Mr O'Leary did not object to the Applicants' solicitors being authorised to communicate with the pension provider or any administrator or trustee of the scheme to obtain information about Mr O'Leary's benefits or rights in the scheme.

48. Mr Hill, on behalf of Mr O'Leary, in any event sought an adjournment of the application for *Bacci v Green* relief in order that Mr O'Leary could file evidence, including supporting documents, going to the issue of his impecuniosity. Mr O'Leary had filed on the day before this hearing a witness statement in which he stated (among other things) his and his wife's monthly income and outgoings, identified that they gave rise to a deficit of just under £1,000 per month currently met from his wife's available resources, referred to his own ill health, stated that he had been counting on having his personal pension available to him after his discharge from bankruptcy to meet his needs and that he was therefore concerned that, if the Applicants obtained the relief they sought, he would be left "*in a distraught and impecunious financial situation, particularly in light of my on-going poor physical and mental health brought on as a consequence of my stroke, and that I will be unable to meet my everyday costs and outgoings*".

49. Mr Pourghadiri complained that this witness statement was filed very late and, in particular, that it was without any supporting documentation evidencing the financial position described by Mr O'Leary. Mr Pourghadiri further submitted that the situation was very similar to that in *Lindsay v O'Loughnane* [2022] EWHC 1829 (QB) where Simon Birt QC, sitting as a deputy judge, considered a submission by the judgment debtor, Mr O'Loughnane, that the judgment creditor's application to enforce the judgment debt against his personal pensions should be dismissed on grounds of his impecuniosity. Mr Birt QC said, "*If Mr O'Loughnane had wanted this court to find that he was impecunious, and to contend that was a reason the order should not be made, it was incumbent upon him fully and frankly to set out his position in his evidence, including explaining how his accommodation was paid for, his lifestyle was funded and*

so on. Moreover, given the findings made by Flaux J about Mr O'Loughnane and his evidence at trial, as noted above, it would in any event be difficult to accept his word without full documentary support and corroborative material".

50. In his submissions in answer, Mr Hill applied for an adjournment so that Mr O'Leary could file evidence exhibiting documents to demonstrate the truth of what he said about his financial situation. In making that application for an adjournment, Mr Hill indicated that the Applicants would be protected in the meantime by the order they sought restraining Mr O'Leary from dealing with this pension. I asked whether Mr O'Leary was willing to give an undertaking in those terms to be in force until the adjourned hearing and Mr Hill confirmed (on instructions from Mr O'Leary who was present throughout the hearing) that he was willing to do so. During a short adjournment, the terms of the undertaking were agreed between the parties and Mr Hill confirmed during the resumed hearing that Mr O'Leary would, if an adjournment was ordered, give an undertaking as follows:

> "*The First Respondent undertakes that until further order of the Court, the First Respondent must not remove from England and Wales or in any way dispose of, deal with, or diminish the value of any of his assets in any private pension in which he is a beneficiary or draw down on any private pension in which he is a beneficiary.*"

Decision on the application

51. In the circumstances, I indicated at the hearing that I had decided to give permission under s.281(3), to order a witness statement from Mr O'Leary giving the information identified in paragraph 2(a) to (d) of the draft order filed by the Applicants, to authorise the Applicants to communicate with Mr O'Leary's pension provider in order to obtain information about Mr O'Leary's pension and that I would order the adjournment of the balance of the application with directions, that remaining part of the application to be transferred from the Insolvency and Companies List to the Business List, on Mr O'Leary's undertaking, which would (as I said at the hearing) therefore take effect immediately.

52. I decided that the balance of the application (i.e. the part of the application which is to be dealt with at an adjourned hearing) should be transferred from the Insolvency and Companies List to the Business List because the application for that relief will be heard after Mr O'Leary's anticipated discharge from bankruptcy and because (as the Applicants identified in seeking permission under s.285(3)), the balance of the relief sought does not concern bankruptcy assets or Mr O'Leary's bankruptcy proceedings.

53. I raised with the parties during the hearing the possibility of the court making an order under CPR 30.5 to transfer the proceedings currently on foot in the King's Bench Division to this Division and treating this application as if made in those proceedings. Neither party objected to such a course, although neither party in fact made any such application. In the event, I have concluded that an order transferring the King's Bench Division proceedings is not necessary for the grant of the relief ordered today and that for that reason, and because no application for transfer was made, I should not make such an order at this hearing.

Application for order for alternative service

54. Finally, Mr Pourghadiri applied at the hearing for permission pursuant to CPR 6.27 for his instructing solicitors to serve Mr O'Leary by an alternative method, namely by email to the email address which Mr O'Leary has on occasion used to communicate with them. He relied in support of that application on the evidence filed for this hearing, which described difficulties encountered in serving documents on Mr O'Leary. The background to the application for permission to serve Mr O'Leary by email is that Mr O'Leary has not instructed solicitors to act for him on this application (Mr Hill was instructed to appear at this hearing on a direct access basis).

55. When the application was made, Mr Pourghadiri expressly acknowledged that he was not seeking an order for alternative service of the order containing Mr O'Leary's undertaking for the purpose of contempt proceedings. Accordingly, if there were any question of contempt proceedings, personal service would not have been dispensed with for the purpose of CPR 81.4 by the order for alternative service sought at this hearing.

56. The application for permission to serve by email was (on instructions) not opposed by Mr Hill for Mr O'Leary, although he relayed his client's objection to what was described as "*aggressive*" correspondence sent by email, typically on a Friday afternoon.

57. In those circumstances, I indicated I would make the order sought. My reasons are as follows:

(a) The Second Witness Statement of Mr Hirst ("Hirst 2"), filed on behalf of the Applicants for this hearing, provides evidence of difficulties the Applicants had encountered in the past in serving documents on Mr O'Leary.

(b) Hirst 2 also provides evidence that emails sent by the Applicants' solicitors to Mr O'Leary on 28 April 2023 and 3 May 2023 led to a letter in response from Mr O'Leary, sent by him by email on 4 May 2023, referring to the Applicants' solicitors' letters of 28 April and 3 May 2023 "*sent to me by email*".

(c) Taken together with the fact that, on instructions from Mr O'Leary, Mr Hill did not oppose the application, I am therefore satisfied that there is no reason to believe that Mr O'Leary has any difficulty in receiving documents by email rather than by post or hand delivery.

(d) Service using an email address is not unusual. It is expressly provided for by CPR 6.20(d) and Practice Direction 6A which provides that:

> "*Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means—*
>
> *(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving—*
>
> *(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and*
>
> *(b) the fax number, e-mail address or e-mail addresses or other electronic identification to which it must be sent"*.

(e) As Mr O'Leary is able to receive documents by email and has indicated that he is willing to do so, directing that documents may be served on him in that way will further the overriding objective by increasing the likelihood of them coming to his attention reliably and quickly.

58. It would have been possible for the parties to agree, pursuant to CPR 6.20 and Practice Direction 6A, that documents could be served on Mr O'Leary by email. That does not make it inappropriate in the circumstances of this case to grant the application for permission to serve by email pursuant to CPR 6.27 given that I am satisfied for the reasons set out above, and on the basis of the evidence filed for this hearing, that there is "*good reason*" to do so.