Neutral Citation Number: [2022] EWHC 1829 (QB)

Case No: QB-2009-000127

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2022

Before:

MR SIMON BIRT QC
(Sitting as a Deputy Judge of the High Court)

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Between:

SEAN LINDSAY	**Claimant**
- and -	
JARED MICHAEL O'LOUGHNANE	**Defendant**
- and -	
(1) PRUDENTIAL ASSURANCE COMPANY LIMITED	
(2) ROYAL LONDON MUTUAL INSURANCE SOCIETY LIMITED	
(3) AEGON SCOTTISH EQUITABLE PLC	**Third Parties**

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Mr Brian Hurst (directly instructed) for the Claimant
The Defendant appeared in person
The Third Parties did not appear

Hearing date: 13 June 2022

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Approved Judgment

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

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.00am on 14 July 2022.

Mr Simon Birt QC:

Introduction

1. This application represents the latest engagement in a long-running battle between the Claimant, Mr Sean Lindsay, and the Defendant, Mr Jared O'Loughnane. Following a trial in 2010, Mr O'Loughnane was ordered to pay substantial amounts to Mr Lindsay, both by way of damages and in respect of the costs of the action. Those amounts have largely gone unpaid, though Mr Lindsay has managed to recover some of the judgment debt owed to him by way of enforcement. This application represents an attempt by Mr Lindsay to recover amounts from pension funds held in the name of Mr O'Loughnane towards the outstanding judgment debt.

2. At the hearing before me (held via Microsoft Teams), Mr Lindsay was represented by Mr Hurst (instructed on a direct access basis) and Mr O'Loughnane appeared in person.

Background – the trial and the judgment of Flaux J

3. The dispute has its origins in the matters set out in the Judgment of Flaux J (as he then was), dated 18 March 2010: [2010] EWHC 529 (QB); [2012] B.C.C. 153 ("**the 2010 Judgment**").

4. In brief summary, Mr O'Loughnane was the managing director and majority shareholder of a company engaged in currency conversion called FX Solutions Ltd ("**FX Solutions**"). Mr Lindsay engaged in a number of foreign exchange transactions with FX Solutions for the purpose of transferring euros abroad.

5. Under the company's standard terms and conditions, money which was paid to it by clients was held on trust pending the purchase of the relevant foreign currency. The company began to experience financial difficulties and was unable to pay its debts. Nevertheless, Mr O'Loughnane accepted instructions from Mr Lindsay to conduct three transactions in June and August 2008 and two transactions in September 2008 to convert sterling to euros.

6. In the June-August transactions the euros were received into Mr Lindsay's foreign bank account late. The excuse that Mr Lindsay was given was that the delay had been due to the inefficiency of the bankers. That was untrue. The real reason "*was that by mid May 2008 at the very latest and in any event before the trades in June and August 2008, FX Solutions was hopelessly insolvent, unable to pay its debts as they fell due*" something that "*was known to [Mr O'Loughnane] before those trades took place*" (2010 Judgment, paragraph 7). Mr Lindsay's money was not kept in the trading account of FX Solutions on trust for him pending the purchase of the foreign currency, but rather "*unbeknownst to [Mr Lindsay] his money was used to pay other creditors of FX Solutions or business and other expenses of FX Solutions and [Mr O'Loughnane] in an illegitimate manner ...*" (2010 Judgment, paragraph 8).

7. Mr Lindsay paid £565,000 to FX Solutions in September 2008 for conversion into euros, which were then to be transferred to his bank account in Corfu. The conversion was not made and the transfer was not effected. On 18 September 2008, FX Solutions went into administration and, in due course, into liquidation.

8. Mr Lindsay was one of the major creditors of FX Solutions in the liquidation, and he has made a recovery in the liquidation, as noted further below.

9. Flaux J held Mr O'Loughnane liable in deceit, for the reasons set out fully in the 2010 Judgment, and (in an order also dated 18 March 2010) ordered him to pay to Mr Lindsay:

   (1) £565,000 plus interest, at 2% above the Bank of England base rate, from September 2008 to 18 March 2010; with interest at the Judgments Act rate thereafter. This was subject to a deduction for any amount that Mr Lindsay managed to recover through the liquidation of FX Solutions.

   (2) The costs of the action on the indemnity basis. A payment on account of those costs was ordered in the sum of £495,000.

10. In the 2010 Judgment, Flaux J set out the following in relation to Mr O'Loughnane's evidence at the trial:

> "16. The contrast between the claimant [Mr Lindsay] and the defendant [Mr O'Loughnane] as witnesses could not be greater. The defendant's demeanour in the witness box was arrogant and shameless, in the sense that he was prepared to lie and did lie about the essential issues in the case. He lied about the extent to which he was aware of the hole in FX's accounts and appreciated the company was insolvent, seeking to blame Mr Barnett for never having provided a clear explanation of the hole. The truth is that he was well aware of the hole having improperly used client monies from the trading account over some considerable period of time and permitted his friend Mr Leahy to do so, effectively using it as a personal bank account.
>
> 17. Equally, he lied about the extent to which he was involved in or at the very least aware of the trades with the claimant. In particular, he lied about the fact that a critical email from his work email address had been sent by him on 30 June 2008, maintaining the absurd fiction that he had been working at home that day, where there was no remote access, notwithstanding that a number of emails sent from his work email address that day can only have come from him. Overall, I accept the submission of Mr Maclean that I should reject the defendant's evidence, save to the extent that it is corroborated by other independent evidence."

11. Since then, Mr Lindsay has made various efforts to seek to collect the judgment sums due to him. I was told that Mr O'Loughnane has paid no part of the outstanding sums voluntarily. Some recovery has, however, been made from various sources, and further efforts are continuing, as I note below. Mr Loughnane now (since around 2009) resides in the USA.

12. I also add that a freezing order was made against Mr O'Loughnane on 19 February 2009, relating to his assets within England and Wales up to the value of £700,000. It

was made without notice, and I was not shown any subsequent orders expressly continuing that order, but was told that the order remains in place.

Enforcement to date

13. I was not given a definitive account in relation to each of the sums recovered thus far, but was told they have mainly included sums received by way of the sale of properties against which Mr Lindsay had registered charging orders following the judgment, as well as reduction of the judgment debt by way of recovery by Mr Lindsay of an amount of £82,080.72 in the liquidation of FX Solutions. I was told that the total recovered to date by Mr Lindsay from all sources (including from the FX Solutions liquidation) was £309,988.57.

14. There remain a number of properties, against which Mr Lindsay registered charging orders, and which have been sold and the sale proceeds paid into court, but in respect of which there are other claims. Mr Hurst told me that there are other on-going proceedings to deal with entitlement to those proceeds of sale, with the other competing charge-holders being (so Mr Lindsay says) individuals who are family and/or friends of Mr O'Loughnane and who were granted charging orders over the properties by Mr O'Loughnane after the judgment had been given against him. Those allegations are the subject of those other proceedings and I say no more about them. If Mr Lindsay is wholly successful in those proceedings, that will result in the judgment debt being reduced by a further sum of £190,000.

15. Even if Mr Lindsay were to be wholly successful in those proceedings, there would therefore still remain a substantial amount outstanding in relation to the judgment debt. The principal amount due as at 19 March 2010 was £1,089,723.20 (being £565,000 in damages, plus an amount of pre-judgment interest, and the payment on account of costs of £495,000). Judgments Act interest at 8% per annum ran on so much of that amount as remained outstanding from time to time.

Current application

16. As a result of the above, Mr Lindsay continues to pursue enforcement of the judgment in his favour for the remaining amounts due. The current application seeks to enforce against pension funds held in Mr O'Loughnane's name.

17. The pensions in question are:

    (1) One policy with the First Third Party ("**Prudential**") with a transfer value as at 5 November 2020 of £13,516.02.

    (2) Two policies held with the Second Third Party ("**Royal London**"). Their transfer values as at 29 September 2020 were £38,487.97 and £1,201.90 respectively.

    (3) One policy held with the Third Third Party ("**Aegon**"). Its estimated value as at 5 October 2020 was £5,368.50.

18. Each of the above pension providers had sent letters which were provided to me confirming the above information as well as other details about the policies. The

terms of the pension policies themselves were not provided. None of the pension providers appeared at the hearing.

19. Each of these pensions is a Personal Pension Plan. The Aegon plan had formerly been an Occupational Pension Scheme, whose trustees took out the current plan when the Occupational Pension Scheme was due to be wound up. (At the date of the transfer of benefits into the current plan, the value of the plan was £2,525.89). Aegon have confirmed that the plan is now a Personal Pension Plan and is to be treated as such.

20. The history of this plan, however, caused a question to arise as a result of section 91 of the Pensions Act 1995, which applies to Occupational Pension Schemes and provides:

> "(1) Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme
>
> (a) the entitlement or right cannot be assigned, commuted, or surrendered,
>
> (b) the entitlement or right cannot be charged or a lien exercised in respect of it, and
>
> (c) no set-off can be exercised in respect of it,
>
> and an agreement to effect any of those things is unenforceable.
>
> (2) Where by virtue of this section a person's entitlement to a pension under an occupational pension scheme, or right to a future pension under such a scheme, cannot, apart from subsection (5), be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension."

I will return to this point below.

21. The initial application was issued as an application for a third party debt order in respect of the Prudential pension. That came before Master Dagnall on 13 May 2020, who made an interim third party debt order, to apply to debts due or accruing due by the third party to Mr O'Loughnane, or which may become due and payable, under the pension plans held with it in Mr O'Loughnane's name. He gave permission to Mr Lindsay to amend and re-serve the application as one for an order under section 37 of the Senior Courts Act 1981. It was so amended on 5 May 2020.

22. Mr Lindsay issued a further application on 6 July 2020, naming Royal London and HSBC as third parties in respect of pensions said to be held with them; that application was subsequently amended on 2 September 2020 (pursuant to the order of Master Dagnall dated 1 September 2020, referred to further below) to name Aegon in place of HSBC.

23. When the matter came back before Master Dagnall on 6 August 2020 and 1 September 2020, it is clear that he had some concerns, including as to his own jurisdiction as a Master to make the order sought. As a result, he referred the application to be heard by a Judge, as well as ordering the third parties to provide certain information concerning the pension plans held with them, making directions for the service of evidence, as well as permitting the amendment to the second application notice that I have already noted.

24. The order now sought by Mr Lindsay is one that, in summary:

    (1) Requires Mr O'Loughnane to give written notice to each of the three pension providers requesting they continue to hold his pension, requesting draw down on the date specified as his normal retirement date (or age 55, if later), and directing payment to Mr Lindsay.

    (2) In default of Mr O'Loughnane giving such notice, Mr Andrew Tate be authorised to give that notice as Mr O'Loughnane's agent. (I was informed that Mr Tate is the liquidator of FX Solutions as well as of GlobalFX.com Ltd, another company formally associated with Mr O'Loughnane).

    (3) Making provision for the payment of any tax that falls due on the payments out by the pension providers.

25. Although the application notices referred (briefly) also to the appointment of a receiver as an alternative form of relief, that was not developed or pursued at the hearing, indeed Mr Hurst's skeleton argument did not advance any submissions about the appointment of a receiver (stating that it was "*no longer procedurally necessary*"), and (as noted by Master Dagnall in his order dated 1 September 2020) some of the matters that would have needed to be addressed in the evidence if such an application were to be pursued were not so addressed (including those under CPR PD 69 paragraph 4.2). As a result, I do not deal any further with the appointment of a receiver.

Jurisdictional basis and case-law

26. As noted above, this application was initially formulated as an application for a third party debt order. However, as subsequently recognised on behalf of Mr Lindsay, that is not an application that can be made (at least not at the present time) in respect of the pension plans. There is no debt currently owed by the pension providers to Mr O'Loughnane in respect of which such an order could be made.

27. However, that does not mean that there is no order than can be made in such a situation, as has been held in particular in two cases dealing with pension plans.

28. In *Blight v Brewster* [2012] EWHC 165 (Ch), Mr Gabriel Moss QC (sitting as a Deputy High Court Judge) identified that in such a circumstance the Court can use its powers under section 37(1) of the Senior Courts Act 1981 in relation to the granting of injunctions and receivership. He relied upon the decision of the Privy Council in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17, a case concerning a right of revocation of a trust held by the debtor where the question was whether the court could order the defendant to

exercise the power of revocation so that he would recover substantial trust assets over which the receivers appointed by way of equitable execution could take possession. As put by Mr Moss QC in *Blight* (at paragraph 67):

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

29. The Privy Council held that the court could so order. Mr Moss QC held that the situation in *Blight* was analogous, where the defendant had a right to elect to draw down 25% of his pension as a tax free sum. He said at paragraph 70: "*There appears to me to be a strong principle and policy of justice to the effect that debtors should not be allowed to hide their assets in pension funds when they had a right to withdraw monies needed to pay their creditors.*"

30. Accordingly, having decided that it was not necessary to go to the disproportionate trouble and expense of appointing a receiver by way of equitable execution, he concluded that he could make an order that the defendant delegate to the claimants' solicitor the power to make in the defendant's name the election to receive his tax free 25% payment (up to the amount needed to repay the balance of the judgment debt). He also ordered that, if the defendant did not comply with the order, the claimants would be authorised by the Court to write to the pension company in his name, making the election on his behalf. The third party debt order was then made so as to take effect from the moment that the debt created by the election to take the lump sum became effective.

31. *Blight* was recently applied in the case of *Bacci v Green* [2022] EWHC 486 (Ch), a decision of Mr Andrew Hochhauser QC (sitting as a Deputy High Court Judge). In that case, the judgment debtor had an interest in an occupational pension scheme, and the claimants sought injunctions (under section 37 of the Senior Courts Act 1981) that the judgment debtor delegate to the claimants (by their solicitor) (a) his power to notify HMRC of the revocation of his "Enhanced Protection" concerning his lifetime allowance in relation to his pension, (b) his right to call for a lump sum under the pension scheme, and (c) his right to call for a pension under the pension scheme. The claimants sought authority to exercise those delegated powers so that, when the judgment debtor turned 55, they could call for both a tax free lump sum and a Lifetime Allowance Excess Lump Sum ("**LAELS**") (i.e. a lump sum subject to a 55% tax charge), as well as a pension from the remaining pension funds. Once those funds were paid into one of the judgment debtor's bank accounts (as nominated by the claimants), the claimants intended to seek a third party debt order to recover the judgment debt out of that bank account.

32. In *Bacci*, Mr Hochhauser QC confirmed in his judgment that section 91 of the Pensions Act 1995 did not prevent the making of such an order. The order would not have the effect of restraining the judgment debtor from receiving the pension. He also

determined that the order in relation to the revocation of the Enhanced Protection was not an impermissible extension of *Blight v Brewster*. Although taking the step of revocation did not itself give a right to call for property or trigger a transfer of property, but rather changed the tax treatment of property and changed the rights of access to the funds (namely, the pension holder would have the right to payment of a LAELS once the Enhanced Protection was revoked), that was not a reason not to make that order. That was an integral part of the means of obtaining immediate access to the judgment debtor's property (namely the LAELS) and the revocation was the only means by which access to that asset could be obtained.

33. Mr Hurst also relied upon *Goyal v Goyal* [2017] EWFC 1, in which Mostyn J made an injunction against the husband requiring him to procure that a proportion of income deriving from an annuity as it arose was paid to the wife. The Judge made that order "*pursuant to the principle expounded in Blight v Brewster…*" (see paragraph 14), although there was no further explanation of the principle.

34. Mr Hurst also cited *Horton v Henry* [2016] EWCA Civ 989 as approving *Blight*, but it seems to me little weight can be placed on that. It was a case concerning bankruptcy, which brings different principles into play – here, Mr O'Loughnane has not been made bankrupt. Although, in her judgment in *Horton v Henry*, Gloster LJ referred to *Blight v Brewster* as providing a potential order in a pre-bankruptcy situation, she also expressly noted at Note 9 at the end of her judgment that she was assuming, without deciding, that *Blight* was a correct decision (there having been no argument to the contrary).

35. The authorities referred to above (in particular, *Blight* and *Bacci*) identify the jurisdiction to make the type of order sought in this case. As noted above, there were certain points noted by Master Dagnall as arising in relation to the order sought which I should say something about:

(1) The order here seeks payment of the entirety of the funds held in the pension plans, not just the tax-free amounts. However, it does not seem to me to be a point of principle that prevents the Court making an order in the terms sought that what is sought here is ultimately payment of the entirety of Mr O'Loughnane's pension funds, rather than the tax free 25% as was the case in *Blight*. If Mr O'Loughnane is able to access the entirety of his pension funds at age 55, albeit subject to tax apart from the tax free 25%, then there is no reason in principle why an order cannot be made in respect of the entirety of those funds. I note that in *Bacci* the order made was not confined to the tax free 25%. There may be points that need to be taken into account in relation to the need to deal with the tax position, and here Mr Lindsay recognises as much, and I will return to that later in this judgment.

(2) The order sought is for Mr O'Loughnane to give notice to the pension providers in respect of his future entitlement (principally, directing the pension plans be held until he reaches the age of 55 and then drawn down and paid, ultimately to Mr Lindsay), rather than an order which might have immediate effect. Although this was a concern raised by Master Dagnall, it does not seem to me to cause a difficulty in principle with the order (though it may go to the court's discretion as to whether to make it now). I note that the order made in *Bacci* also concerned future draw down such that there would be practical effect when the defendant reached the age of 55. Master Dagnall raised his concerns in September 2020 at

which point Mr O'Loughnane's turning 55 (which I was told would be on 19 September 2023) was some 3 years away. Given the passage of time since, that is now only a couple of months over a year away. It seems to me this is the right point in time to deal with the making of the order, and allows time to deal with any other matters arising (if, for example, the order is not complied with or for some other reason there are other associated orders that need to be made) before the date is reached.

(3) In relation to jurisdiction to make the order I should also note Master Dagnall's concern that the Aegon policy is a successor policy to the occupational pension policy originally held with HSBC, and therefore if it had remained in its original form it would have been subject to section 91 of the Pensions Act 1995. There are two answers to this. The first is that this policy is no longer an occupational pension policy, but is a personal pension scheme, and therefore no longer falls under section 91. Aegon have expressly confirmed that it is to be treated as a personal pension policy. Second, even if that is wrong, the judgment and reasoning of Mr Andrew Hochhauser QC in *Bacci* (which was not available when Master Dagnall made his order) explain why in any event section 91 does not prevent the Court from making the type of order now sought.

36. As a result, pursuant to the principles outlined and applied in *Blight* and in *Bacci*, the Court has the power to make the order sought by Mr Lindsay at paragraph 1 of the draft order (which I have summarised briefly at paragraph 24(1) above).

37. I should also note that one of the other concerns that was raised by Master Dagnall when the matter came before him in August and September 2020 was whether or not a third party debt order could be made prospectively regarding a debt which had not yet become payable. He noted that such an order had been made in *Blight* (see paragraph 78 of the judgment of Mr Moss QC). However, he also noted that a third party debt order can only be made in respect of a debt that is due or accruing due, and referred to the decision of HHJ Pelling QC in *Wilson v Sinclair* [2020] EWHC 1249 (Comm), in which the Judge had set out the relevant principles and some of the case-law (see paragraphs 24 to 33).

38. It seems to me that the two are not irreconcilable. The order made in *Blight* was stated by the Deputy Judge (at paragraph 78) to take effect only from the moment that the debt created by the election to take the lump sum became effective. In other words, it was not an order that the third party pay a debt that had not yet accrued due to the defendant (which is an order than cannot be made), but rather an order that would direct payment by the third party once the debt had accrued due.

39. However, whether that part of the *Blight* decision can be reconciled with the authorities on third party debt orders, and whether a contingent third party debt order can be made in the manner it was in *Blight*, is not a point that arises on the terms of the draft order that Mr Lindsay seeks on this application. The draft order put before the court for the purposes of the hearing included provisions directing Mr O'Loughnane to give notice to his pension providers of certain matters, and a provision for authorising another person to do so in default (which I consider further below), but does not include any provision in respect of attaching a future debt that it is said would, as a result of such notification, become due or accruing due. The order sought as outlined in the skeleton argument served by Mr Hurst was in similar terms

(described in paragraphs 7, 31 and 36). As a result, this particular the point identified by the Master does not arise on the application brought at the hearing and I do not need to determine it.

Making the order in the circumstances of this case

40. There being jurisdiction to make the order sought at paragraph 1 of the draft order, it appears to me that I should do so here, for the following reasons.

41. First, Mr O'Loughnane was found liable, on the basis of his deceit, for a substantial sum of money resulting in a judgment which, despite Mr Lindsay's efforts, the latter has only been able to enforce to a partial extent. There remains a substantial judgment debt outstanding. The starting presumption is often said to be that the court should assist the judgment creditor to recover the debt due to him. See, for example, Lord Brightman in *Roberts Petroleum v Bernard Kenny Ltd* [1983] 2 AC 192 at 207E:

> "A judgment creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment debtor by all or any of the means of execution prescribed by the relevant rules of court."

42. Second, although there was some reference by Mr O'Loughnane in his submissions to what he regarded as delay by Mr Lindsay in advancing this particular means of enforcement, that does not seem to me to be a valid objection here. Execution of judgments is not caught by the 6 year period under section 24(1) of the Limitation Act 1980: see *Lowsley v Forbes* [1998] 3 WLR 501 (although recovery of arrears of interest after 6 years is barred by section 24(2)). It may be that a delay can be something to be taken into account in the exercise of the court's discretion, but it is only one factor, and then generally only where that delay has prejudiced the judgment debtor: *Westacre Investments Inc v Yugoimport* [2008] EWHC 801 (Comm), in particular at paragraphs 22 and 26. As Tomlinson J put it in that case, the key question will ordinarily be whether the judgment creditor has so conducted himself as to lead the judgment debtor reasonably to believe that the judgment debt would not be enforced. That was not (and could not be) said in this case. Moreover, at the hearing Mr O'Loughnane confirmed that if this application had been brought sooner, that would have made no difference to the position he is in or to what he would have done. He has not suffered any prejudice by reason of any delay. In addition, not only has Mr Lindsay been seeking by various means to enforce his judgment for some time, but the orders he now seeks are ones that will not have any material financial effect until Mr O'Loughnane turns 55 (in over a year's time), such that it is doubtful there would have been anything to gain by having brought this application any earlier.

43. Third, Mr O'Loughnane's main objection to the order sought appeared to be that he says he is impecunious, and that he is entitled to his pension funds as his remaining source of income. He pointed to the terms of the freezing order (that has been in place since February 2009) which permitted him to spend £750 per week towards his living expenses; a sum which was subsequently increased (by agreement) to £1,000 per week. He said that Mr Lindsay was wrong to think that he had other funds or sources of income.

44. This point deserves a little further by way of explanation of the background. It is clear that Mr Lindsay does not believe Mr O'Loughnane in his assertions about his financial position, and seeks to paint him as someone who has squirrelled away substantial assets and has been skilfully avoiding execution of the judgment for years. Mr O'Loughnane refutes that entirely. However, neither party addressed this in any detail in the evidence before me, which led to some unsatisfactory exchanges about Mr O'Loughnane's asset position during the course of the hearing.

45. Although Mr O'Loughnane had not addressed his financial position in any detail in his evidence filed for this hearing, he attached to his skeleton argument a 2020 Connecticut tax return. This, by itself, was not very helpful. First, there was no explanation in evidence about it, nor any confirmation in any formal way of what Mr O'Loughnane sought to tell me about it during the course of the hearing. Second, because it had only been put in by way of skeleton argument and not according to the timetable for evidence, Mr Lindsay did not have any appropriate opportunity to put in counter-evidence of his own to deal with it.

46. In any event, what Mr O'Loughnane told me about it did not seem to advance matters to any substantial degree. It appeared to be a joint tax return of Mr and Mrs O'Loughnane – it bore both of their names and appeared to record joint income. Although Mr O'Loughnane told me during the course of the hearing that the income it recorded was Mrs O'Loughnane's income only and that he had received no income, this was not something he had said in his evidence, and there was nothing to verify it save for his word (for example, there was nothing from Mrs O'Loughnane confirming it to be true).

47. Mr O'Loughnane also sought to explain some matters about his accommodation in the US, where he lives in a house on what Mr Hurst described as "Connecticut's Gold Coast" which was said to be rented at $75,000 per year (a sum not in evidence, but which appeared to be accepted). Mr O'Loughnane said at the hearing that the names on the lease were not only his, but also his wife's and a third person, who lives in part of the house and shares the rent. He said that he personally does not contribute to the rent, but is dependent upon his wife for that, as he said he is for all other living expenses. But no details were given of how much the third party contributes to this rent, or how his wife pays the balance, given the relatively low levels of income disclosed in the 2020 tax return.

48. The information presented was therefore far from any sort of complete picture, and not in any sort of proper form as evidence. Mr Hurst made it clear that had Mr O'Loughnane sought properly to evidence his alleged impecuniosity through his evidence filed for the application, Mr Lindsay would have put in his own evidence, gathered from various searches and inquiries, to say that Mr O'Loughnane did appear to have means from somewhere, was living the lifestyle of someone with money, and was running a business generating substantial funds, such that even if it was all held other than directly in his own name, the effect was that as a matter of practice he was not impecunious.

49. These are not matters that can properly be taken into account on the basis of anecdotal summaries from counsel at a hearing, or indeed (on the other side) from Mr O'Loughnane who had not put his own position into evidence.

50. 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.

51. 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.

52. It is also the case that this is not the first occasion within the enforcement process that Mr O'Loughnane has asked the court to take such matters into account, and he has previously been ordered to give full particulars of his financial circumstances and means of living. In 2014, Mr Lindsay made an application for a third party debt order in respect of the amount of approximately £3,700 held in an account at Lloyds Bank. In response, Mr O'Loughnane made an application for hardship relief under CPR 72.7. The matter came before Carr J who observed that although Mr O'Loughnane had said he had been without money for living expenses since February 2014, he had given no details as to how he had been living nor any particulars of his financial circumstances. The Judge pointed out that it was incumbent upon Mr O'Loughnane to make full and frank disclosure of his financial circumstances and, accordingly, ordered (by order of 24 June 2014) that he file and serve a full and verified schedule of current assets and income and a verified statement as to his financial and personal circumstances and means of living since February 2014. (I note for completeness that Mr O'Loughnane says he was not served with that order until the time for compliance with it had passed, and that his attempt to get an extension of time was subsequently refused by Andrews J even though he had by then provided some information.) Nothing approaching that was served for the purpose of this application.

53. Lastly, the exception in the freezing order does not seem to me to add anything here. It does not provide for Mr O'Loughnane to be guaranteed to retain sufficient funds against enforcement of the judgment such that he can spend £1,000 per week in perpetuity. Certainly against the background of his failure to make disclosure of how he meets his living and other expenses it is difficult to put weight on this.

54. Accordingly, I cannot proceed on this application on the assumption that Mr O'Loughnane is impecunious. In any event, it is difficult to see how that fact would itself be decisive of the outcome of this application. There was no application made by Mr O'Loughnane for any sort of stay of the enforcement process on this basis, or for any form of hardship relief (if any were available). Moreover, whilst he says that he, personally, is impecunious, there was no suggestion that he was facing hardship, given that his living expenses and lifestyle are paid for, so he said, by his wife. None of the points he made about his financial position alter the fact that he continues to owe substantial sums as a judgment debtor to Mr Lindsay as a result of the deceit for which he was found liable.

55. The result of the above is that I find it just, equitable and convenient to make the order and will, in principle, make the order that is sought at paragraph 1 of the draft order. I will return to the drafting of its terms below.

The proposed default provision - authorisation of a third party

56. Paragraph 2 of the order sought by Mr Lindsay requires further consideration. This contains the proposed provisions authorising Mr Tate to send the relevant notifications to the pension companies if Mr O'Loughnane fails to do so.

57. In relation to the Court's jurisdiction to make such an order, Mr Hurst relied upon section 39 of the Senior Courts Act 1981. As amended, this provides as follows:

> "(1) Where the High Court or family court has given or made a judgment or order directing a person to execute any conveyance, contract or other document, or to indorse any negotiable instrument, then, if that person—
>
> (a) neglects or refuses to comply with the judgment or order; or
>
> (b) cannot after reasonable inquiry be found,
>
> that court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that the negotiable instrument shall be indorsed, by such person as the court may nominate for that purpose.
>
> (2) A conveyance, contract, document or instrument executed or indorsed in pursuance of an order under this section shall operate, and be for all purposes available, as if it had been executed or indorsed by the person originally directed to execute or indorse it."

58. Master Dagnall, in his order of 1 September 2020, had highlighted a potential problem arising under this section in the current case. He noted that there was "*conflicting case-law …regarding whether the exercise of a power (in particular under section 39 of the Senior Courts Act 1981) to authorise a person to do an act which another should have done under an order requires an actual non-compliance to have occurred as a matter of the jurisdiction arising.*" He cited *Blight* and *Gee v Gee* [2020] EWHC 1842 (Ch).

59. *Gee v Gee* is a decision of HHJ Matthews sitting as a Judge of the High Court which dealt with the obligation of the defendant in that case to transfer shares to the claimant by executing and delivering a stock transfer form. The main dispute dealt with in the judgment was whether or not that obligation was conditional upon an obligation of the claimant. HHJ Matthews held it was not. In addition to the order requiring the defendant to deliver the executed stock transfer form, the claimant asked for an additional order under section 39. At paragraph 26, the Judge recorded the common ground between the parties that the words "*neglects or refuses to comply with the judgment or order*" in subsection (1)(a) were "*jurisdictional, so that the court cannot make an order under this section unless it is first satisfied that the test represented by those words (or the alternative in paragraph (b)) is met.*" In the case before him, HHJ Matthews concluded that this requirement was satisfied, because the defendant

had failed to comply with the previous order (the correct interpretation of which had been the main subject of the judgment).

60. The White Book 2022 at note 9A-138 records that an order under section 39(1) should not be made in anticipation of a failure to execute unless the defendant has already shown by his conduct that he refuses and will refuse to execute, citing *Savage v Norton* [1908] 1 Ch 290. That has been accepted in a number of cases, including *Beveridge v Quinlan* [2019] EWHC 424 (Ch) (where Snowden J referred to this proposition at paragraph 39 in refusing to make an order in anticipation of default), *Juul Labs Inc v Quick Juul Limited* [2018] EWHC 3335 (IPEC) (where the Judge, again Snowden J, cited the same proposition, although on this occasion in granting the relief sought on the basis that the defendant had shown by his conduct that he would refuse to execute: paragraph 17) and *Bank of Scotland v Waugh* [2014] EWHC 2835 (Ch) (see paragraphs 29-30). It does not appear that this point was raised with the Deputy Judge in the *Blight* case, which does not record express consideration of it.

61. Mr Hurst also referred to CPR rule 70.2A, which provides (so far as material):

> "(2) Subject to paragraph (4), if a mandatory order, an injunction or a judgment or order for the specific performance of a contract is not complied with, the court may direct that the act required to be done may, so far as practicable, be done by another person, being—
>
> (a) the party by whom the order or judgment was obtained; or
>
> (b) some other person appointed by the court.
>
> …
>
> (4) Paragraph (2) is without prejudice to—
>
> (a) the court's powers under section 39 of the Senior Courts Act 1981; …"

62. It does not seem to me that this presents Mr Lindsay with any better route to the order that he seeks. It requires there to have been an order that has not been complied with, and therefore presents a similar jurisdictional question.

63. There seem to me two problems with including the default provision that is sought by Mr Lindsay. First, considering the authorities referred to above, the question whether Mr O'Loughnane will default on an order to notify his pension providers in the terms sought was not addressed with any particularity on the facts by Mr Hurst. It was asserted that default "*is anticipated*", but not more than that. Mr O'Loughnane is a judgment debtor who is in default, but that by itself does not mean that he is bound to disobey the court's order that is sought in relation to his pension fund. That does not seem to be sufficient to satisfy the jurisdictional provision. Second, separately, the default provision that is sought would appoint Mr Tate as authorised to give the notice, but nothing was adduced on behalf of Mr Lindsay to confirm that Mr Tate was content to fulfil this role.

64. There is of course a temptation to make the order now including the default provision, if only in order to save the time and cost that would be associated with a further hearing if Mr O'Loughnane did not comply with it. That, however, would overlook the jurisdictional provision. I also note that was something that was not considered a sufficient basis for making the order by Snowden J in *Beveridge v Quinlan*.

65. The order sought is for Mr O'Loughnane to give notice in advance of the anticipated date for any draw down of his pensions. If he fails to do so, Mr Lindsay may then seek the default order (with appropriate confirmations in respect of Mr Tate or whoever else it is proposed exercise the relevant authority in place of Mr O'Loughnane). In the meantime, Mr Lindsay continues to have the protection of the freezing order, of which I understand the pension companies have been given notice.

66. Accordingly, I will not include the default provision in the order that I make at this time.

Conclusion and the terms of the order

67. I have already explained that I will in principle make the order sought under paragraph 1 of the draft order, but not that sought under paragraph 2 at this stage (though, insofar as it needs to be stated, Mr Lindsay has liberty to apply in relation to that in the event of any default).

68. In relation to the terms of the order that is sought, Mr O'Loughnane confirmed at the hearing that he had no submissions to make about it. However, there are some points that need to be taken into account in its formulation.

69. In addition to the matters already referred to, the draft order also seeks to deal with any tax that will be payable on draw down of the funds by (as I understand the proposed drafting) providing for it to be paid from the funds held in the pension plans before payment out of the balance net of any tax liability. I was not addressed at all on the rules relating to the payment of tax in such a situation or the mechanics of it. In principle, however, what is suggested seems to be a sensible overall scheme. However there are at least three overlapping issues with the drafting: i) the draft order does not make it clear who it is that will make the payments to HMRC (there is an overuse of the passive voice that in this instance leads to a lack of clarity); ii) related to this, and to the structure adopted in the draft order, there is a more general difficulty in the provisions relating to the payment of tax that it is not clear to whom this part of the order is being directed – the order sought is one directed against Mr O'Loughnane to give notice in the terms set out in the first paragraph of the draft but the third paragraph (dealing with tax liability) appears to be in part freestanding; and iii) paragraph 1 of the draft order (comprising terms of the notification to the pension providers) is unclear in stating that "the fund available on draw-down" is to be paid "forthwith" to Mr Lindsay, both in terms of the amount in question (because the later provisions suggest it is to be paid net of tax) and in terms of timing.

70. It does not seem to me that any of this gives rise to an issue of principle, but rather requires revisions to the drafting to make these matters clear. I would ask the parties to seek to agree terms of the order in light of this judgment, and if they cannot do so I will rule on the final wording.