

ENGLAND AND WALES / JUDGMENT

Fisher & Ors v Harrison & Ors

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Case No: A2/2002/0377 Royal Courts of Justice Strand, London, WC2A 2LL Tuesday 29 July 2003
Neutral Citation No. [2003] EWCA Civ. 1047 IN THE SUPREME COURT OF JUDICATURE COURT OF
APPEAL (CIVIL DIVISION) ON APPEAL FROM THE QUEEN'S BENCH DIVISION (LIVERPOOL
DISTRICT REGISTRY) (HHJ KERSHAW QC SITTING AS A JUDGE OF THE HIGH COURT) Before :
LORD JUSTICE ALDOUS LORD JUSTICE MANCE and LORD JUSTICE LATHAM

- ----- Between : FISHER & ORS
- and - HARRISON & ORS Appellants Respondents
- ----- (Transcript of the Handed Down Judgment of Smith Bernal Wordwave
Limited, 190 Fleet Street London EC4A 2AG Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)
- ----- John McCarroll (instructed by Messrs Berrymans Lace Mawer) for the
Appellants Clive Lewis (instructed by Treasury Solicitors) as Advocate to the Court
- -----

Judgment

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Introduction

1. 2. 3. 4. This is an appeal from a judgment given on 31st January 2002 and an order made on 8th March 2002 by His Honour Judge Kershaw QC. The appeal first came before a court consisting of Aldous LJ and myself on 19th March 2003. As a result of that hearing, we concluded that the appeal raised potentially novel points of some general interest in pensions law, which required the matter to be fully re-argued before a court of three, with the assistance of an advocate to the court. The new points related primarily to the ambit of s.91(2) of the Pensions Act 1995 and the possibility that, in view of its provisions, a freezing order dated 7th April 1998 and a consent order dated 30th May 2000 should not have been made. In these circumstances, the matter came back before Aldous LJ, Latham LJ and myself on 26th June 2003, with Mr Clive Lewis as advocate to the court. The first and second appellants (represented by Mr McCarroll) are assignees under an assignment dated 14th January 1993 of the rights of a company called Oakstone Limited ("Oakstone"). The first and second respondents (Mr and Mrs Harrison) were until June 1989 owners of a company called

B. J. Harrison Limited (“the company”). Mr Harrison is in poor health, and it was Mrs Harrison who made oral submissions before the judge. Neither Mr nor Mrs Harrison appeared before us. In June 1989 the Harrisons sold their shares in the company to Oakstone. Under the present proceedings as they were begun in 1990 first Oakstone and, after 14th January 1993, the appellants as assignees pursued the first and second respondents for damages for breach of various share sale warranties in the agreement for sale of the company. Judgment was eventually given on 16th December 1999 in favour of the appellants for £24,582.35 plus costs. Mr Harrison was the sole beneficiary of an occupational pension scheme established by the company as “Principal Employer” by a “Declaration of trust and omnibus proposal” dated 19th February 1980. The company was until 4th August 2000 the sole trustee of the scheme, although it went into insolvent liquidation on 29th October 1996. On 4th August 2000 the company resigned as trustee and the liquidator appointed the third respondents (Mr Farrar and Ms Goodman, who are we understand independent actuaries) as trustees. Mr Farrar appeared before us in person. The Declaration of trust and omnibus proposal provided for the scheme to be administered in accordance with rules (“the Rules”) to be adopted by the company as Principal Employer and trustee; and the omnibus proposal consisted of a proposal to National Provident Institution (“NPI”) for “such assurances and annuities as are required to secure benefits under the Scheme from time to time”. Rules were duly adopted on 21 st May 1980. Extracts are appended to this judgment. They linked the benefits to be provided under the scheme to the amounts provided by the policy to be issued by NPI. Mr Farrar provided us with a copy of the policy dated 21st October 1980, issued to the trustee of the scheme and stated to commence from 1st March 1980. The policy provides that the benefits in respect of a member “shall correspond with the benefits for him in accordance with the Rules ...”. The Rules and policy provided inter alia for a pension payable either on retirement from service at normal retirement date (Rule 4(a)) or, in the event of a member leaving service at an earlier date, other than by retirement or death, then, subject to certain conditions, from normal retirement date (Rule 12). In either case, a member had the right to take a part of his 5. 6. pension entitlement by way of lump cash sum, receiving correspondingly reduced monthly pension instalments thereafter. There was also provision whereby pension entitlement might be taken (e.g by way of annuity) from a provider other than NPI. Mr Harrison left service in mid-1989 after he and his wife sold their shares in the company to Oakstone. They went to live in Spain. His normal retirement date for the purposes of the scheme was his 60th birthday on 15th June 1996. The course of events in 1996 with regard to his entitlement under the scheme was helpfully clarified by documents obtained from NPI and put before us by Mr Farrar on 19th March 2003. It differs from that which appeared on the very limited material available before the judge. In short, by letter dated 29th March 1996 Mr Harrison asked for information about the method and amount of payment due when he reached 60. In reply on 16th April 1996 NPI wrote a letter to “The Trustees of the BJ Harrison Ltd. RBS” at Mr Harrison’s Spanish address enclosing a “maturity pack” for his retirement, offering various options under the scheme. Option 2 was a tax-free cash sum of £19,168 and a personal pension from NPI of £1,110.12 per annum. Option 2 was the same tax-free sum,

plus an “Open Market Option” sum of £11,678.54 available for transfer to another pension provider. Initially, Mr Harrison chose “Tax-free cash and Open Market Option” (and that remained the apparent position before the judge). However, it is now clear that he changed his mind and altered his signed instructions to NPI to select a “Tax-free cash and reduced pension”. In other words, he elected to take his pension from NPI, not from some other company. On 8th May 1996 NPI sent him a TAPS form to enable monthly payments into his bank account, saying that it would then be able to set up the annuity. Mr Harrison completed and returned the TAPS form, and NPI wrote on 28th May 1996 saying that it “would set up your pension and pay your tax-free cash on your retirement”. An internal note made by NPI indicates that on 4th June 1996 the first appellant, Mr Fisher, then contacted NPI. He identified himself as, or as speaking for, the “Trustee of the Scheme and Principal Employer” (i.e. for the company which held both positions) and he said that he should be signing any discharge form. In so far as the company was trustee and he would have had to sign for the company, that was technically correct, as NPI noted on its internal form. However, it is clear that Mr Fisher’s purpose was not the performance of the company’s duties as trustee. It was to protect the personal interests of himself and the second appellant, arising from their outstanding proceedings against Mr and Mrs Harrison for alleged breach of the share sale warranties. That appears very clearly from a letter dated 7th June 1996, written by Lace Mawer, solicitors. Lace Mawer wrote purportedly on behalf of the company “as trustee and Principal Employer”. They asserted that Mr Harrison could not “legitimately obtain payment by-passing the trustees”, that the signatures required before payment were those of the two appellants and that “We will immediately get them to sign any forms you may require for this purpose”. However the real point of their letter is displayed by its last paragraph: “Since Mr Harrison resides out of the jurisdiction, we are clearly anxious to ensure that the monies due to him under the pension scheme are retained pending the outcome of the litigation.” 7. Lace Mawer were by now acting for the two appellants in the outstanding proceedings against Mr and Mrs Harrison for breach of the share sale warranties. On the same day that Lace Mawer wrote this letter, they also amended and re-served the statement of claim by which such proceedings were being pursued. The conflict of interest and breach of trust involved in writing the letter dated 7th June 1996 should have been obvious to Lace Mawer, as to the appellants. Mr McCarroll (to whose clear and helpful advocacy in a difficult case we pay tribute) did not defend it. The letter was however effective for its purpose. On 17th June 1996 NPI wrote to Mr Harrison saying that it was unable to proceed with payment of his pension, or to have any further dealing with him “as we must deal with the trustees”, and told Lace Mawer that it had said this. In answer to a solicitors’ letter from Mr Harrison, NPI simply refused to give any information “without the authority of the trustees”. 8. So matters apparently rested until on 7th April 1998 a freezing order was made, by (as it happens) myself on circuit in Liverpool at the instance of the appellants. This restrained Mr and Mrs Harrison from removing from the jurisdiction or in any way disposing or dealing with or diminishing the value of inter alia “any sum or sums paid or payable now or hereafter to the {Harrisons} or either of them or at their order and/or any claim to receive payment of any such sum in respect of [the Scheme] established by

Declaration of Trust dated 19th February 1980". Having now seen the order, I have the very faintest recollection only of making it, and none of the evidence upon which it must have been based. However, I am confident that I cannot have been shown or referred to ss.91-92 of the Pensions Act 1995, which Mr McCarroll put before us on the present appeal for the principal purpose of drawing our attention to s.91(1). 9. For convenience, I set out at this point relevant parts of the Pensions Act 1995: "91 Inalienability of occupational pension

- (1) Subject to subsection (5), where a person is entitled, or has an accrued right to a pension under an occupational pension 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, or accrued right, to a pension under an occupational pension scheme cannot, apart from sub-section (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.
- (5) In the case of a person ("the person in question ") who is entitled, or has an accrued right, to a pension under an occupational pension scheme, subsection (1) does not apply to any of the following, or any agreement to effect any of the following-
 - (a) an assignment in favour of the person in question's widow, widower or dependant,
 - (b) a surrender, at the option of the person in question, for the purpose of-
 - (i) providing benefits for that person's widow, widower or dependant, or (ii) acquiring for the person in question entitlement to further benefits under the scheme,
 - (c) a commutation -
 - (i) of the person in question's benefit on or after retirement or in exceptional circumstances of serious ill health, (ii) in prescribed circumstances, of any benefit for that person's widow, widower or dependant, or (iii) in other prescribed circumstances,
 - (d) subject to subsection (6), a charge or lien on, or set-off against, the person in question's entitlement, or accrued right, to pension (except to the extent that it includes transfer credits other than prescribed transfer credits) for the purpose of enabling the employer to obtain the discharge by him of some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by him,
 - (e) subject to subsection (6), except in prescribed circumstances a charge or lien on, or set off against, the person in question's entitlement, or accrued right, to pension, for the purpose of discharging some monetary obligation due from the person in question to the scheme and -

- (i) arising out of a criminal, negligent or fraudulent act or omission by him, or (ii) in the case of a trust scheme of which the person in question is a trustee, arising out of a breach of trust by him.
- (6) Where a charge, lien or set-off is exercisable by virtue of subsection (5)
- (d) or (e) –
- (a) its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question's entitlement or accrued right, and
- (b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme, and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff. 92 Forfeiture, etc.
- (1) Subject to the provisions of this subsection and section 93, an entitlement, or accrued right, to a pension under an occupational scheme cannot be forfeited.
- (2) Subsection (1) does not prevent forfeiture by reference to –
- (a) a transaction or purported transaction which under section 91 is of no effect, or
- (b) the bankruptcy of the person entitled to the pension or whose right to it has accrued, whether or not that event occurred before or after the pension became payable. Sections 91 to 93 supplementary 94.-
- (2) In those sections, “pension” in relation to an occupational pension scheme, includes any benefit under the scheme and any part of a pension and any payment by way of pension. Interpretation of Part I 124.-.....
- (2) For the purposes of this Part –
- (a) the accrued rights of a member of an occupational pension scheme at any time are the rights which have accrued to or in respect of him at that time to future benefits under the scheme, and
- (b) at any time when the pensionable service of a member of an occupational pension scheme is continuing, his accrued rights are to be determined as if he had opted, immediately before that time, to terminate that service; and references to accrued pension or accrued benefits are to be interpreted accordingly.” It is clear from the language of the 1995 Act and specifically also from s.68(1), (2) and (5), giving power to existing trustees to modify a scheme to enable it to conform with ss.91 and 92, that those sections applied to existing schemes with effect from 6th April 1997, when the 1995 Act was brought generally into effect. 10. It is common ground that, at least as regards any pension instalments falling due

in the future, s.91(2) should have been before me in April 1998 and would have precluded the making of any freezing order referring to those instalments. Whether s.91(2) has any wider effect is in issue. There was however no subsequent application to discharge the freezing order or any part of it. Indeed, it was expressly continued in force until further order by HHJ Hegarty's order dated 16th December 1999 giving judgment against Mr and Mrs Harrison for £24,582.35 plus costs. 11. Next, on 30th May 2000, following negotiations between the parties, a consent order was put before and made by HHJ Kershaw which is potentially critical in the present appeal. It reads as follows: "BY CONSENT IT IS ORDERED:-

1. That the Defendants hereby consent to the benefits and proceeds of the B J Harrison Limited Retirement Benefits Scheme, established by declaration of trust dated 19th February 1980 and administered by NPI under reference 741239 being paid out to the solicitors for the first and second plaintiffs/claimants.
2. Upon receipt of the said monies, the defendants will be discharged from any further liability to the first and second plaintiffs/claimants by virtue of the Order of His Honour Judge Hegarty QC dated 16th December 1999, including both damages and costs.
3. There be no Order as to the costs of this application save legal aid assessment of the first and second plaintiffs/claimants costs." 12. Again, it is clear that s.91(1) and (2) of the Pension Act 1995 was not before the judge when he made this order. Issues now arise as to the construction of those subsections, as to the construction of the consent order and as to whether severance of the consent order is possible, if otherwise necessary to uphold any part of it. In the event, however, nothing was paid out under the consent order to the appellants. The appellants assert that this was because Mr and Mrs Harrison raised objections, and the third respondents felt that they should not pay out without a court order. The appellants therefore joined the third respondents as parties and introduced into the present proceedings a claim that, by reason of the consent order, the proceeds and benefits of the scheme were held on bare trust for them. Under fresh pleadings, the appellants sought declarations "that they are the beneficial owners of the benefits and proceeds of the Scheme which the [Harrisons] would have been entitled to receive but for the consent order dated 30th May 2000" and that "the Third Defendants [now Respondents] do pay or re-settle, as the case may be, the proceeds and benefits of the Scheme...". In response the third respondents denied that they held that proceeds or benefits of the scheme upon bare trust for the appellants and further contended that the consent order "activated rule 19(b) which has resulted in the forfeiture of Mr Harrison's benefits and proceeds from the Scheme except on grounds of hardship, such payments to be made direct to him". The proceedings below 13. 14. The issues so joined came before HHJ Kershaw. He recorded that Mr McCarroll had abandoned any argument that Mr Harrison had been entitled to, and had, by the consent order, determined the trust scheme, and in that way created a "bare trust". But a number of further arguments were advanced. One was that the company's winding up in 1996 brought Rule 18 into operation, that this meant that the trust terminated and that the effect was to entitle Mr Harrison unconditionally to benefits (consisting, so the argument

apparently went, of the present capital value of his pension benefits under the NPI policy). The judge held that, although the trust ought to have been wound up, Rule 18 would have required the trustee to arrange similar substitute benefits under a substitute policy with the NPI or another provider, so that there was no difference in substance between Mr Harrison's entitlement before and after the company's liquidation. There has been no challenge before us to the judge's conclusions on this issue, so that Rule 18 can be put on one side. Turning to Rule 19(b), the judge accepted the third respondents' submission that Mr Harrison had, by the consent order, attempted to dispose of or deal with his benefit(s) under the scheme, and so that he had forfeited such benefit under the terms of that Rule. The judge had recorded earlier in his judgment a submission by Mr McCarroll that the consent order in any event created a "bare trust" in respect of sums payable under the scheme prior to the consent order, particularly the lump sum cash payment for which Mr Harrison had elected. A skeleton dated 7th January 2002 submitted by Mr McCarroll to HHJ Kershaw makes clear that this submission was based on the same distinction, between a beneficiary's absolute right to pension payments already fallen due and rights to future payments, which has featured strongly in argument before us. The judge did not specifically address this submission in the context of Rule 19(b). He must implicitly have thought that no such distinction fell to be drawn, when it came to considering the scope of any forfeiture worked by Rule 19(b). He therefore declared that Mr Harrison was under Rule 19 deemed at no time to be entitled to any benefit under the scheme and that any benefit to which he would otherwise have been entitled was forfeited. The third respondents and below (as I understand it) Mr and Mrs Harrison accept this conclusion. Certainly, there is no respondents' notice challenging it. The issue on appeal 15. The appellants now appeal and seek a declaration that the third respondents hold upon trust for them absolutely those scheme proceeds and benefits (including the lump sum) which became due between 15th June 1996 and the 30th May 2000. Mr McCarroll concedes that pension payments falling due in months after the consent order of 30th May 2000 have been forfeited on the basis identified by the judge, namely that the consent order was an attempt to assign such future benefits. But in his submission, rule 19(b) does not work any forfeiture of the lump sum that ought to have been paid under the scheme in June 1996 and the monthly pension instalments that ought to have been paid under the scheme between 15 th June 1996 and 30th May 2000. Nature of pension entitlement

16. Mr McCarroll's submission, even if otherwise good in law, depends upon it being correct to treat Mr Harrison as having absolute rights to the immediate payment of sums due as against the scheme trustees. So I start by considering the curious situation which arises because the trustee failed (as it appears) to sign and submit the relevant forms to NPI to enable NPI to pay out under the policy the lump sum and monthly payments which Mr Harrison had requested and to which he was on the face of it entitled under the scheme. If it is right to make that the distinction that Mr McCarroll advocates between, on the one hand, absolute rights to immediate payments and, on the other, entitlement to future payments, then I would accept that Mr Harrison's rights as against the trustees of the scheme to a lump

sum in 1996 and to an annual pension during the period between 15th June 1996 and 30th May 2000 fell within the former category. The only reasons why such sums were not paid was the trustee's default up to 7th April 1998 and, as from that date, the order (which s.91(2) should have precluded) prohibiting further payments. Construction of clause 19(b) 17. I turn therefore to consider the relevance of the distinction. As a matter of policy, it has evident attraction. The Inland Revenue insisted on the inclusion in any scheme like the present of a clause along the general lines of clause 19(b). The tax regime encouraged such schemes, the aim of which was to provide for the retirement of individuals who might otherwise constitute an extra burden on society at large. That aim would be undermined, if pension benefits were, long prior to any retirement, available to be assigned to, or used as security for indebtedness incurred to, third parties. However, once a pension payment has been made to and received by a pensioner, it is his own money which he is free to use as he wishes. He may have debts to pay with it. A creditor may be able to execute a judgment against it. Where, as here, a lump sum payment should have been forthcoming in June 1996, or pension payments thereafter, the question arises: why should the pensioner not be able to deal with these by assignment, as if they had been made when they should have been, when they would have been his money to deal with as he chose? 18. Further, clause 19(b) is a forfeiture clause of some severity. Although its underlying rationale appears to derive from the Inland Revenue's view of the national interest, coupled perhaps with a desire to protect pensioners, the operation of clause 19(b) deprives a pensioner of any legal entitlement to pension benefit and leaves him or her with no more than a claim on the trustee's discretion in the limited context of hardship. That Mr and Mrs Harrison appear to have preferred an analysis of forfeiture is the result of the special facts of 19. 20. 21. this case, particularly (a) the consent order, which (as they perceived the position at trial) would mean that they would not receive anything if there was no forfeiture, and (b) Mr Harrison's frailty, which means that he has every prospect of receiving hardship payments if there was a forfeiture, and to receive them in Spain where they would be difficult for his creditors to reach. The scope of any forfeiture is however a matter of construction of clause 19(b). Despite the policy considerations identified in the previous paragraphs, it is possible to mount a substantial contrary argument, in favour of the view that clause 19(b) embraces all pension rights, including any which have already matured into absolute entitlement to immediate cash payments. The concept of "benefit" used in the scheme is a general concept. No express distinction is drawn between payments already due and future instalments. Other parts of clause 19 itself can be said to favour a conclusion that the concept of benefit in clause 19(b) covers all rights, present or future. Thus, clause 19(a) provides a power to withhold payment of any benefit under the scheme, where the trustee requires further information. Clause 19(c) contains a power which applies to sums otherwise payable to a beneficiary (and must apply whether or not the beneficiary's incapability existed at the time when payment first became due or arose at some later date before payment had actually been made). Above all, clause 19(d) clearly provides for a forfeiture of benefit in the sense of sums which have already become payable but have not actually been paid (in this case because not claimed). I find less relevance in other terms of the scheme, but clause 8, for

example, might also be said to imply that the concept of “benefit” is capable of including a current absolute right to payment. Clause 19 is not however concerned with a single cohesive subject. It is a collocation of provisions covering different issues. The most cogent considerations to my mind therefore derive from the language of clause 19(b) itself, and from its context and purpose, which consist, as I have said, in the regulation of dispositions or dealings in order to satisfy Inland Revenue concerns and/or to protect such members. In that light, I find compelling Mr McCarroll’s submissions in favour of a narrow meaning of the concept of benefit in the context of clause 19(b). In support of his submissions on construction, Mr McCarroll also referred us to *In re Scientific Instrument Pension Plan Trusts* [1999] Ch. 53. In that case Rattee J accepted the application to pension trust deeds of the principle, whereby a forfeiture provision in a will or other trust instrument, purporting to forfeit an absolute or life interest in the event of voluntary or involuntary alienation, is “void as repugnant to the essential alienability of the interest given”. That principle was applied by the High Court of Australia in *Caboche v. Ramsay* (1993) 119 ALR 215, in the context of a superannuation fund scheme, under which Mr Alan Bond was entitled on retirement to a sum equating, in one way or another, with the whole of the “member account balance” standing to his credit in the scheme. Clause 16 of the scheme in *Caboche v. Ramsay* provided (1) that “A benefit payable out of the scheme shall not be assignable at law or in equity” and (2) that “If a person to whom a benefit is or may be payable ... does or permits any act or thing or some event happens whereby the whole or any part of that benefit may become payable to or vested in any other person then that benefit shall be forfeited”. The language of clause 16 was held by the Australian High Court to cover situations where, following retirement, sums equal to the member account balance had already become payable. On that basis, clause 16 was held void, with the consequence that, on Alan Bond’s bankruptcy subsequent to retirement, his right to receive an amount equivalent to the member account balance subsisted and vested in his trustee in bankruptcy. 22. In *In re Scientific Instrument Pension Plan Trusts* Rattee J distinguished the scheme in *Caboche v. Ramsay* as being concerned with very different terms and benefits from those before him. The scheme in *In re Scientific Instrument* provided for a more conventional pension, with the usual right to commute part for a lump sum. Clause 24 prohibited assignment “of any benefit under” it, and provided that “if any member shall assign or charge any present or future benefit arising under [the scheme] or attempt or purport to do so or if any other act shall be done or event shall happen whereby the same if belonging absolutely to the member or other person would be vested in or payable to or charge in favour of any other individual firm or company the member shall forfeit all rights whatsoever to such benefit”. Rattee J concluded as a matter of construction that clause 24 was concerned solely with “instalments of annuity accruing due after the act or event of determination” and not with the member’s “right to instalments (including his right to commute instalments) accrued due before such act or event” (p.62). His reasoning may be fortified by the consideration that, if it is the law that a forfeiture provision purporting to forfeit an absolute right to immediate payment under a pension scheme is “void as repugnant to the essential alienability of the interest given”, then no well-informed

draftsman of a forfeiture clause would intend to embrace absolute rights. This is all the more so the case, if, as Rattee J concluded, the law would avoid the entirety of any such forfeiture clause (including any provision in it for forfeiture of future rights), so that there would, in other words, be no possibility of severance. 23. That the principle applied in *Caboche v. Ramsay* covers pensions schemes was accepted by the Pension Law Committee chaired by Professor (now Sir) Roy Goode when producing its report “Pension Law Reform” dated September 1993 (Cm 2342-I): cf paragraph 4.14.20 of the report. The report led directly to ss. 91-94 of the Pensions Act 1995 (although these sections had earlier legislative precursors in relation to short service pensions). The Goode report expressly recommended that forfeiture provisions should be permissible in relation to “future pension rights (as opposed to pension payments themselves”: paragraphs 4.14.20-21. The report went on to recommend statutory protection against attachment of future benefits (save by attachment of earnings order under the Attachment of Earnings Act 1971 or income payments order under the Insolvency Act 1986: cf now s.91(4) of the 1995 Act); but it distinguished the position regarding “sums that have been paid over by the trustees to the beneficiary or have become due for payment”, which “are income in the hands of the scheme member and do not enjoy any greater protection from creditors than other income of the scheme member”: paragraphs 4.14.33-35. These last paragraphs were quoted with approval by Chadwick LJ giving the only full judgment in this court in *Krasner v. Dennison*

[2000] 3 AER 234, paragraphs 57-58. Thus it seems clear that Parliament has enacted legislation on the basis of the legal principle identified in *Caboche v. Ramsay*. 24. The Goode report addresses the rationale of the distinction between pension rights that have fallen due for payment and future rights in paragraphs 4.14.3-4. The main emphasis there is on the public policy (quite apart from tax considerations) “that pension rights should be only for the purpose for which they were established”. But paragraph 4.14.3 also refers to the prohibition against dealings with pension entitlements as “intended to avoid additional administrative burdens which would arise if the scheme administrator had to recognise the title of assignees and chargees”. That factor might be suggested to militate generally against allowing any assignment of pension sums which have already fallen due for payment, and against construing forfeiture clauses in a limited sense which would permit such an assignment, purported assignment to be made without forfeiture. This is so, even though the paradoxical effect of giving such a forfeiture clause a wider ambit would, on the principle in *Caboche v. Ramsay*, be to render the clause entirely void. But the Goode report later observes that forfeiture rules are only valid so long as they do not purport to confer a power to forfeit rights to pensions that have already come into payment (paragraph 4.14.20), and that scheme rules “nearly always provide for rights of pensions not in payment to cease on levy of execution, attachment of earnings or bankruptcy” (paragraph 4.14.33). So the Goode report does not really support a suggestion that the limited administrative burden which might be involved in handling assignments of pension payments that had already fallen due for payment (and should therefore already have been paid) is a relevant factor in the construction of any forfeiture clause. 25.

In the result, I would construe the ambit of clause 19(b) as limited to future pension payments. On that basis, Mr Harrison was entitled to dispose of or deal with (and to attempt to dispose of or deal with) those pension rights to which he had an absolute entitlement, consisting of the lump sum which should have been paid in June 1996 and the pension instalments which should have been paid from June 1996 to 30th May 2000. Nothing in the consent order or in the agreement underlying it can have led to the actual or purported forfeiture of those absolute rights. Scope of s.91 of Pensions Act 1995 26. The next, key question is whether the appellants can in this situation enforce the consent order. This raises directly for consideration the scope of s.91 of the Pensions Act 1995 (paragraph 9 above). In the appellants' submission: (a) s.91 must be read in the light of the Goode report's distinction between absolute rights to pensions already due for payment and rights to future payments or benefits, and (b) the consent order is to be construed as applying only to such absolute rights, which Mr Harrison remained free to dispose of or deal with under the forfeiture clause. As to (a), Mr Lewis raised before us as alternative possibilities, first, that both ss.91 and 92 may apply to all pension rights, whether or not they relate to sums already due for payment or, secondly, that s.91 at any rate may so apply, even if s.92 does not. Both possibilities would be in clear conflict with the reasoning in the Goode report, which, as stated in *Krasner v. Dennison*, led to the Pensions Act 1995. Ss.91 and 92 employ effectively the same trigger wording – referring to entitlement or an accrued right. The natural conclusion is that they have the same general ambit. Mr McCarroll submits that entitlement is a less specific right than an accrued right (defined in s.124(2) in terms excluding an absolute right to a sum which should already have been paid), while Mr Lewis suggests that entitlement is capable of covering the whole field, of which an accrued right is only one example, and therefore of embracing any absolute right to a sum already payable. I prefer Mr McCarroll's submission both as more natural and likely and as the only conclusion consistent with the Goode report. It follows that there is nothing in the Pensions Act 1995 to invalidate any aspect of the consent order if the consent order is (like clause 19(b)) limited to future rights. Scope of consent order 27. 28. It seems clear that neither the parties when they agreed, nor the court when it made, the consent order on 30th May 2000 had the Pensions Act 1995 in mind in any way at all, any more than either they or I had it in mind when the freezing order was made on 7 th April

1998. The potential effects of the Pensions Act 1995 were first drawn to the parties' attention by this court in the context of the present appeal. So the Pensions Act 1995 cannot be a reliable aid or background to the construction of the consent order. The consent order must have rested on some agreement between the parties which would in turn have had a context. We invited attention to this during the hearing, but no material was tendered in addition to the exiguous information to be gathered from the papers. There are at least three possible constructions that might be put on the concept of "benefits and proceeds": (1) they are limited to sums absolutely due by 30th May 2000; (2) they embrace all sums which have already become or may in future become payable under the scheme; and (3) they embrace

all such sums, but only up to a point at which the judgment debt and costs are discharged in full.

29. Mr McCarroll submitted before us that the correct analysis was (1), and that it would reflect the nature of the consent order as a compromise. The difficulty with that is that it is not even clear how far and in what sense the consent order was a compromise. It is right that the judgment given on 16th December 1999 was for £24,582.35, plus costs, which was on any view more than can have been due to Mr Harrison as at 30th May 2000 under the scheme. But there is no evidence (a) that or how far the appellants were willing to accept less than the judgment debt plus costs, or (b) that they had any information about the current value of sums already payable as at 30th May 2000 or indeed about the current value which might be put on the total of sums already due as at 30th May 2000 plus sums which might thereafter become payable under the scheme. The latter would no doubt depend on an actuarial assessment in respect of both the Harrisons, and could conceivably give either less, although perhaps more probably more, than the judgment sum plus costs, even taking into account notional interest. 30. 31. The verbal force of Mr McCarroll's submission that the consent order should be confined to payments already accrued due lies in the consent which it recites to the benefits and payments "being paid out" and in the provision that "upon receipt of the said monies", the Harrisons will be discharged. If the benefits and payments include future pension monies becoming payable from time to time, there can be no immediate payment out and no obvious point (short of the death of both the Harrisons) at which discharge from the pre-existing judgment can be said to take place. On the other hand, the words "benefits and payments" are general and it is very difficult to think that, if the intention had been to limit them to the lump sum and pension instalments already accrued due as at 30th May 2000, this would not have been expressed, making it clear to all concerned that future payments were to go to the Harrisons. The background of 32. 33. 34. the freezing order, which covered both sums already due and future sums payable, underlines this. On Mr McCarroll's current submission, the consent order would not cover all monies which were covered by the freezing order, yet nothing in the consent order released the freezing order as regards future sums payable. On the alternative view, that the consent order covers the whole territory of the freezing order, no further provision relating to the freezing order was required. Another significant feature emerges from the course of the proceedings below. It appears that no-one suggested, until a relatively late stage, any distinction between sums already payable by 30th May 2000 and future rights. The freezing order drew no such distinction. The appellants' primary case below was that they were under the consent order the persons absolutely entitled to the whole of a fund held within the scheme. By reply skeleton dated 7th January 2002, Mr McCarroll advocated the distinction under clause 19(b) between sums already due and future sums payable which he has (successfully) advanced on this appeal. But he drew no such distinction in relation to the consent order. Even in his skeleton dated 22nd February 2002 for this appeal he was accepting (against his clients' interest) that the consent order embraced and so led to a forfeiture under clause 19(b) in respect of future sums payable: see paragraph 7(23). So the

case was argued below and the appeal initially brought on the basis that the consent order covered all benefits and proceeds, whether due already or payable only in the future. The judge, who did not accept either the appellants' primary case or any such distinction, concluded that the scheme continued to provide for a lump sum and instalments; on this basis he drew attention (at pages 13-14) to the potential difficulty in seeing how, on that basis, the discharge under clause 2 would operate, and (at page 23) to the possibility, which he thought "not at all fanciful", that the consent order could "be impeached on the ground that either or both of the parties were acting under a mistake that there was a fund which could be transferred". If the parties' state of mind, when they agreed the consent order, was that there was a single disposable fund, then it is no surprise that the consent order did not distinguish between sums already payable and future benefits. In these circumstances, I have come to the conclusion that the consent order covers all benefits and proceeds under the scheme, without drawing any such distinction. Further, I see no real basis for construing it as covering future payments, only up to a point at which the judgment plus costs and interest would be exactly satisfied. Again, if that had been intended, it would surely have been stated. In so far as the consent order covers any future pension instalments, it is, as Mr McCarroll accepts, unenforceable as regards them. It records their assignment to the appellants contrary to s.91(1)(a) of the 1995 Act. Further, although it is drafted as a record of the Harrisons' consent to payment out, the effect of the consent order must implicitly be to restrain them from receiving future payment instalments. Severance

35. Mr McCarroll submits nevertheless that the consent order (and the agreement underlying it) can be severed and so continue valid as regards the lump sum and pension instalments which had become due and payable by 30th May 2000. I am not able to accept that. The consent order records a unitary agreement, for discharge of the outstanding judgment subject to the benefits and proceeds being paid out to the appellants' solicitors. If the benefits and proceeds means all sums due under the scheme, whether already payable or becoming due in future, then it would be to make a different agreement to delete any reference to future benefits and proceeds and to uphold the discharge on the basis of payment only of the sums which had become payable by 30th May 2000. Leaving aside the problem that the consent order cannot obviously be made subject to any form of blue-pencilling, it would "entirely alter the scope and intention of the agreement" or make a new contract for the parties: see Chitty on Contracts (28th Ed), vol. I paras. 17-189 and 192. Conclusions as to freezing and consent orders 36. The position therefore is that neither the Mareva injunction that I granted on 7th April 1998 nor the consent order dated 30th May 2000 should have been made in the terms in which they were, and, further, that no part of the consent order can be either severed or upheld. These orders were made by the court in ignorance of the Pensions Act 1995, which the appellants should have put before the court. In those circumstances, and in the event that the court reached the conclusions which I have expressed, Mr McCarroll acknowledged that it was incumbent on his clients to amend their notice of appeal to apply to this court for whatever order is appropriate in relation to such orders to give effect to such conclusions. The right course is to order that both the Mareva or

freezing order dated 7 th April 1998 and continued by HHJ Hegarty on 16th December 1999 and the consent order dated 30th May 2000 should be set aside, subject to the appellants' right to re-apply to this court on the handing down of this judgment either for the freezing order to continue, or for a fresh order to be made, so far as concerns any pension sums to which Mr Harrison had acquired an absolute entitlement as at 30th May 2000. Conclusions as to appeal 37. In these circumstances, the appellants' claim to enforce the consent order fails, and the appeal must be dismissed, not on the ground that all benefit under the scheme was forfeited as the judge held, but on the grounds that (1) the only forfeiture under clause 19(b) related to future benefits falling due after 30th May 2000, (2) it is for the trustees under the terms of clause 19(b) to decide whether and how to exercise any discretion that they may have in the case of hardship with respect to such forfeited benefit, and (3) the consent order (which is the basis of the appellants' claim to the benefits payable under the scheme up to 30th May 2000 which are not forfeited under clause 19(b)) is unenforceable in so far as its terms also embraced future benefits, and must on that basis be set aside in its entirety, leaving the appellants to pursue such other steps as may be open to them to enforce any rights they have under or with respect to the judgment dated 16th December 1999. 38.

Through Mr Farrar's skeleton argument before this court, although not in any respondents' notice, the third respondents sought to raise a number of points. These are either covered by the setting aside of the freezing order and consent order, or unnecessary to examine further in view of the conclusions already expressed on the appeal. Lord Justice Latham: 39. I agree.

Lord Justice Aldous: 40. I also agree. Order: Appeal dismissed; consent order and the freezing order set aside; fresh freezing order substituted in the terms discussed; detailed assessment of the appellant's Community Legal Services Funding certificate; the appellant to pay the trustee's costs here and below to be assessed; no order for costs here and below in relation to the other parties; counsel to lodge a draft minute of order. (Order does not form part of the approved judgment) ANNEX (Extract from the Rules of the Scheme – paragraph 3) "1. Definitions "Member" means a person who has been granted membership of the Scheme provided that he continues to be in Service or is in receipt of a pension under the Scheme, or there is a contingent benefit under the Scheme in respect of him. "Beneficiary" means a person who is in receipt of a pension under the Scheme as a Member or as the widow or a Dependant of a deceased Member. "Assurance Office" means an Insurance Company which assures benefits under the Scheme. "Policy" means the policy effected by the Trustee with the Assurance Office to provide the benefits for the time being under the Scheme in accordance with the Rules and with the instructions of the Principal Employer.

2. Individual Terms of Membership In the absence of a Special Rule to the contrary the Principal Employer shall have sole discretion in deciding which persons in Service shall be admitted to membership of the Scheme, subject to the approval of the Assurance Office. The Trustee shall have power to arrange for provision under the Policy of benefits in accordance with the instructions of the Principal Employer. The Principal Employer shall not normally give instructions for such benefits to commence or increase otherwise than at the Commencing Date or an Anniversary Date. The Trustee shall notify each Member of the

benefits relating to his membership as shown in benefit statements issued from time to time by the Assurance Office.

4. Retirement Pension Any pension to which a Member is entitled shall be payable during his lifetime.
- (a) On retirement at Normal Retirement Date A Member who retires from Service at Normal Retirement Date shall be entitled to a pension of the amount provided for him by the Policy. Provided that the Aggregate Pension shall not exceed two-thirds of Final Remuneration or such lesser amount as may be necessary in order not to prejudice Approval of the Scheme.
5. Commutation of Pension When a Member either retires, or elects at Normal Retirement Date too receive a pension (although he is remaining in Service after that date), he may elect to commute any pension benefit to which he is entitled under the Scheme for an immediate cash sum which does not exceed the limitations stated in this Rule and which is determined in accordance with the scale in this Rule. Any such election to commute pension benefit must be made before the Member has received any pension payment. Scale If an immediate cash sum is provided in accordance with this Rule, the maximum retirement benefit in pension form which could otherwise be provided for the Member under the Scheme without prejudicing approval of the Scheme will be reduced in accordance with the following scale [SCALE]
7. Payment of Pensions All pensions shall be payable by monthly instalments, the first payment being due on the first day of the month following the event on which commencement of the pension depends and the final payment being the last instalment due on or prior to the day of the event which causes the pension to cease.
12. Withdrawal from Service A Member shall have no rights under this Rule, except in respect of any contribution made by him and/or any transfer payment to the Scheme from another retirement benefits scheme in respect of him, unless either
 - (a) he has completed at least 5 years' qualifying service and attained the age of 26 years, or
 - (b) he is notified by the Trustee, with the approval of the Principal Employer, that condition (a) is waived. If a Member leaves Service, other than by retirement or death, and condition (a) or
 - (b) of the second paragraph of this Rule is met he shall be entitled to a pension at Normal Retirement Date of the amount provided by the Policy, provided that the Aggregate Pension shall not exceed one-sixtieth of Final Remuneration for each year of continuous Service (with a maximum of 40 years) or such larger amount as will not prejudice Approval of the Scheme. The Trustee shall have power to arrange for any benefit provided under this Rule to be secured by a policy The policy shall be endorsed showing in monetary terms the extent to which benefits may be taken as a single cash payment as commutation or on death.

15. Trusteeship When payment of a Member's pension is to commence, the Trustee shall have power to arrange for the amount provided by the Policy for the provision of that pension and of any contingent pension in respect of the Member to be applied to purchase similar pensions from a United Kingdom office or branch of an Insurance Company other than the Assurance Office. Provided that the purchase price shall be transferred directly from the Assurance Office to that other Insurance Company (unless, with the agreement of the Assurance Office, the transfer is made through a broker arranging the transaction) and that for the purposes of Rule 10 the pensions purchased in accordance with this paragraph shall be deemed to be benefits provided by the Policy.
18. Winding-up The trustees of the Scheme shall terminate if
- (a) the Principal Employer ceases carrying on business otherwise than in such circumstances that arrangements satisfactory to the Trustee are made for another employer to undertake the Principal Employer's obligations under the Scheme, or
 - (b) the Trustee considers it necessary or desirable that the Scheme be terminated. On such termination the Scheme shall be wound-up. Each Member shall be entitled to the benefits in respect of him under the Policy, and the Trustee (who shall continue in office during and notwithstanding the winding-up) shall arrange for each benefit under the Policy to be secured by a policy which would not prejudice Approval of the Scheme if it were not being wound-up and which is granted by a United Kingdom office or branch of an Insurance Company in the relevant Member's name, provided that if the only benefit under the policy in respect of any Member is a pension ceasing on the death of a person other than the Member it shall be granted in the name and for the benefit of that person. Each policy shall be endorsed stating that it cannot be assigned or surrendered and showing in monetary terms the extent to which benefits may be taken as a single cash payment as commutation or on death.
19. General The rights of any person under the Scheme shall be subject to the following provisions
- (a) A Member shall produce any information (and confirmative evidence) which the Trustee reasonably requires for the purposes of the Scheme. When any person claims payment of any benefit under the Scheme, the Trustee shall have power to withhold such payment until such person produces any information (and confirmative evidence) which the Trustee reasonably requires. When evidence is produced of the date of birth of any person whose age is relevant to the provision of a benefit under the Scheme and that date is found to be otherwise than as previously advised to the Trustee, he shall have power to adjust that benefit as determined by the Assurance Office and to deduct any over-payment of pension which has been made from any subsequent payment of that pension.
 - (b) Except as provided in these Rules no person for whom a benefit is provided under the Scheme shall have Power in any way to dispose of or deal with any such benefit or his interest in it. If any such person does so or attempts to do so, or if the interest of any such

person is charged or otherwise affected by any judgement or Order of the Court or by any other legal process, that person shall be deemed at no time to have been entitled to any benefit under the Scheme, and any benefit to which he would otherwise be entitled shall be forfeited to the Trustee for payment to the Participating Employers in the proportions in which they have contributed to the cost of the benefit, provided that in cases of hardship the Trustee shall have power at his absolute discretion to make payment of any such forfeited benefit to or for the personal support and maintenance of that person and/or of his wife, children or Dependants, so long as no payment is made to any assignee.

- (c) If any Beneficiary is (in the opinion of the Trustee) incapable of managing his own affairs owing to any physical, mental or other disability, the Trustee shall have power in respect of any sum which would otherwise have been payable to such Beneficiary to make payment for his benefit to such other person as is appointed by the Court or (if no such appointment has been made) selected by the Trustee (whether or not such person is nominated by the Beneficiary) and the receipt of such other person shall be a complete discharge to the Trustee for such payment.
- (d) If any part of any benefit payable under the Scheme is not claimed within six years of becoming payable that part shall be forfeited and the Trustee shall pay it to the Participating Employers in the proportions in which they have contributed to the cost of it.”

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Prepared on 28 October 2026 · Esheria