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## ALTERNATIVE ENFORCEMENT – PENSIONS AND POWERS

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1. The conventional enforcement methods provided by the CPR are well known to litigators. Charging orders over land and shares, third party debt orders and attachments of earnings are routinely deployed by judgment creditors.
2. However, there are other options available where traditional enforcement fails to clear a judgment debt in full. The Court of Appeal's recent decision in *Bacci v Green* [2022] EWCA Civ 1393 provides a pointed recent example of an extremely flexible and developing enforcement approach via injunctive relief.
3. In a nutshell, creditors can seek injunctions requiring judgment debtors to exercise or delegate personal or proprietary rights and powers to make their assets available for enforcement.

### I. PENSIONS

4. There has been something of an influx of pension-related enforcement decisions in the past 10 years with the most recent discussion of the topic to be found in *Bacci v Green*. *Bacci* concerned the enforcement of debts via the exercise of pension rights to which the debtor was entitled and which, incidentally, constituted his principal asset. By revoking the “enhanced protection” enjoyed under the valuable pension scheme, Mr Green would be able to draw down (i) a tax-free Pension Commencement Lump Sum (PCLS); and (ii) a Lifetime Allowance Excess Lump Sum (LAELS), subject to a 55% tax charge. The exercise of these rights would therefore clear the way for lump sums totalling £1.6 million after tax deductions.
5. At first instance the Judge made an order under section 37(1) of the Senior Courts Act 1981 (“SCA”) requiring Mr Green to delegate to his Creditors' solicitors his power to notify HMRC that he was exercising various powers afforded to him under the pension scheme in such a way as to maximise his present entitlements and make them available for the purposes of enforcement. The court also gave the Creditors' solicitors authority to elect that Mr Green draws down the PCLS and LAELS by providing notice to the trustees of the pension scheme.
6. Enforcing against pensions recent popularity can be traced to the decision of Mr Gabriel Moss QC in *Blight v Brewster* [2012] EWHC 165 (Ch). At first instance, it was held that whilst a debtor was entitled to elect to draw down 25% of his pension as a tax-free lump sum, he could not be compelled to make such an election. The appeal was allowed and the debtor forced to draw a lump sum for the practical benefit of the creditor. Centrally, the debtor was ordered to delegate to the claimants' solicitor the power to elect to receive 25% of his pension as a lump sum, up to the amount needed to pay the balance of the judgment debt.
7. The important point of general application arising from the Court of Appeal in *Bacci* is that enforcing in this manner via a S.37 SCA injunction against the debtor does not require the creditor to identify a proprietary right or a right tantamount to ownership which the debtor is compelled to realise or deal with. Indeed, a spotlight was cast on the flexibility and incremental development of injunctive relief available under S.37 SCA.
8. Further, Newey LJ held that it is open to a court to dispense with the appointment of a receiver and simply grant an injunction requiring the debtor to exercise or delegate his powers in respect of the pension. This wide receiver-less approach is to be welcomed and may hold significant benefits for

enforcement, being less costly and more expeditious than appointing receivers by way of equitable execution. It shall be referred to below as the “power model” of enforcement.

9. Before turning to broader considerations of how the power model applies more widely, it is worthwhile noting that pensions are susceptible of tracing and enforcement by way of a proprietary claim: see *Clark v Cutland* [2003] EWCA Civ 810.

## II. POWERS, DELEGATION AND EXERCISE

10. The authority underlying the power model is the Privy Council's decision in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, which concerned the delegation of a power held by a judgment debtor to revoke a trust and to thereby vest valuable assets into the hands of the judgment debtor for enforcement purposes.
11. The question for the Privy Council was whether there is a discretion to appoint receivers over the powers of revocation and to order the debtor to assign or delegate the powers to the receivers (and, in default, to order that the assignment or delegation may be executed on his behalf by the receivers or other person appointed by the court). The final words “or other person appointed by the court” are important and shall be returned to below.
12. The importance of such a jurisdiction to turn the unrealisable into the realised cannot be understated. Taking enforcement against trusts by way of example:
  - 12.1. Money held by trustees cannot be attached by a creditor of the settlor: *Vyse v Brown* (1883–84) L.R. 13 Q.B.D. 199).
  - 12.2. A trustee is not a debtor of their beneficiary unless they hold money which it is their duty to pay to the beneficiary: *Webb v Stenton* (1882–83) L.R. 11 Q.B.D. 518.
  - 12.3. Money held by a bank for a trustee is not a debt due to a beneficiary: *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm).
  - 12.4. The appointment of a receiver cannot achieve the ends of enforcement where one is concerned with a discretionary trust as receivers cannot be appointed in terms that compel a trustee to exercise the discretion in favour of such a beneficiary: *Webb v Stanton*. There must be something clearly due to the debtor which creates an assignable interest over which a receiver can be appointed.
13. Therefore, power to remove the trust from the equation and vest assets in the hands of the debtor beneficially can be extremely powerful if available. The classic method is to appoint a receiver by way of equitable execution. However, what has developed in *Bacci* and other cases is a “power” model of enforcement that does not necessarily involve a receivership.
14. It is here that the importance of the words “*in default, to order that the assignment or delegation may be executed on his behalf by the receivers or other person appointed by the court*” emerges.

### *The Scope of Receivership/Power Enforcement*

15. The jurisdiction of receivers was expounded in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2015] 1 All E.R. (Comm) 336 at [48]:

*48. Receivers can be appointed to exercise the rights of shareholders.... More recently, Lakatamia Shipping Co v Nobu [2014] EWCA Civ 636 shows that a receiver can only be appointed over the assets of the judgment debtor itself and that assets of a company in which the judgment debtor holds shares are not assets of the judgment debtor, even in the case of a 100% shareholding... However, a receiver would be able to exercise the judgment debtor's rights over its shareholdings which are assets of the judgment debtor itself. That could include a sale of the shares, the exercise of voting powers, the appointment of directors and seeking a winding up of the subsidiary companies and, in consequence, a distribution of any of their surplus assets.*

*The effect of such an appointment “is that it does not create a charge on the property, but that it operates as an injunction against the judgment debtor receiving the income”,<sup>157</sup> or dealing with the property to the prejudice of the judgment creditor.*

16. Whilst the court in *Cruz City* spoke of the jurisdiction of a receiver, the parallels with the delegation of a personal power model adopted in *Tassaruf*, deployed in *Blight* and confirmed in *Bacci* is readily apparent. As summarised in Snell’s Equity at 19-031:

*“The receiver will commonly be authorised to take steps to recover the assets, exercising the judgment debtor’s rights, including taking legal proceedings against third parties. Amongst other things, a receiver may be authorised to exercise the judgment debtor’s rights as a shareholder, under a pension scheme, or as settlor of a revocable trust. The order may give the receiver a power of sale, and a receiver may apply to the court to approve a particular transaction.”*

17. It is notable that the range of examples of the powers a receiver may be appointed to exercise in large part mirror the powers which have been held to be delegable by court order. Receivership is not a cheap method of enforcement. Delegating or assigning a power or authority on the other hand is likely to be more cost-effective where it does not involve the appointment of a remunerated office-holder.

18. The power model can readily apply to:

18.1. Pension draw downs and ancillary rights arising under pensions (such as refusing/revoking enhanced protection and calling upon taxable, rather than purely tax free, sums) (*Bacci*)

18.2. Revoking a settlor interested trust (*Tassaruf*)

18.3. Exercising powers as a shareholder (*City Cruz*)

18.4. Pursuing claims against third parties (*Masri No2* [2009] QB 450). In the authors’ view, a right to rescind a transaction and recover title is analogous to a combination of the right to pursue a claim against a third party and revoke a settlor interested trust and ought to be similarly exigible by way of enforcement.

19. This position is unsurprising as the appointment of a receiver is founded upon an injunctive basis as noted in *Masri No2* (the decision giving rise to *Tassaruf*) and the court’s injunctive powers are extremely broad. The basis for receivership is not the creation of a charge over the relevant property but in effect appointing a different individual to exercise the rights or powers of the debtor (which may require assignment to said receiver by the appointing order).

20. Receivership therefore extends further to:

20.1. An appointment of receivers over future debts: *Soinco v Novokuznetsk Aluminium Plant* [1998] 1 Q.B. 406. The power model of enforcement can readily achieve this by way of a direction to the debtor to pay the judgment creditor.

20.2. Appointment over a right of indemnity, not giving rise to a debt: *Bourne v Colodense Ltd* [1985] I.C.R. 291

21. In the writers’ view, given the recognition that the court may (1) appoint someone other than a receiver to execute the assignment or delegation for the debtor and (2) the appointee can be the solicitor of the relevant creditor (*Blight v Brewster*), the above powers and rights can be enforced potentially more expeditiously than via the classic appointment of a receiver (*Bacci v Green* at [23]).

22. The additional recognition that the court’s in personam injunction jurisdiction can readily compel a debtor to exercise or delegate powers without more is to be welcomed: *Bacci* at [28] and opens to door to a range of creative enforcement approaches.

23. As Gabriel Moss QC held:

*“In my judgment, it is not necessary to go to the disproportionate trouble and expense in a case of this kind to appoint a receiver by way of equitable execution and then force the defendant to delegate his power of withdrawal to the receiver, as was done in the Privy Council case. The defendant in this case can simply be ordered to delegate the power of election to the claimants' solicitor and for the court to authorise the solicitor to make the election in his name. Upon the election being made, the sum payable by Canada Life will then become due to the defendant and can be made the subject of the third-party debt order.”*

24. It follows that all of the aforesaid methods of enforcement via an equitable execution receivership should be available under the delegated power model without the necessity for a receiver to be appointed.
25. The second stage of enforcement against the precise asset in question that is realised via the mandated exercise or delegation of a power will vary between assets. A third-party debt order can be made prospectively, taking effect only from the moment that the debt created by the election to take the lump sum becomes effective (*Lindsay v O'Loughnane* [2022] EWHC 1829 (QB) *obiter*).
26. The distinction between injunction *as* enforcement and an injunction/direction as a *prelude* to enforcement should be borne in mind. In *Goya v Goya* [2017] EWFC 1, Mostyn J granted an injunction against a husband requiring him to procure that a proportion of income deriving from an annuity as it arose was paid to the wife. Whilst such orders are helpful, their means of enforcement is via contempt proceedings which is rather undesirable. Any method of more direct enforcement which circumvents contempt proceedings against the debtor commends itself.
27. Perhaps the ideal application of the *Bacci* approach, therefore, is where an injunction can be used to require a debtor to exercise or delegate rights/powers, thereby altering their rights and entitlements with third parties and which, in turn, permits a “traditional” mode of enforcement to be pursued.
28. Finally, it remains fair to observe that “normal” modes of enforcement should be the first port of call. The appointment of a receiver by way of equitable execution or the delegation of powers will generally be permitted where there is some hindrance or difficulty in using the normal processes of execution. However, there are no rigid rules as to the nature of such hindrance or difficulty, which may be practical or legal, and it is necessary to take account of all the circumstances of the case: *City Cruz* at [47].

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