SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2019] SC GLA 82

SQ68-19

JUDGMENT OF SHERIFF JOHN N McCORMICK

in the cause

GARY JOHN COOK

Applicant

against

THE ACCOUNTANT IN BANKRUPTCY

Respondent

Act: Dobie; Campbell Smith LLP
Alt: Lloyd; Harper Macleod LLP

GLASGOW, 26 September 2019.

The sheriff, having resumed consideration of the cause, sustains pleas in law numbers 1 and 2 for the applicant, whereby excludes the estate specified in Schedule 1 to the application from vesting in the applicant's trustee; refuses plea in law number 3 for the applicant as unnecessary; repels pleas in law numbers 1 and 2 for the respondent and assigns 11 October 2019 at 09.30 as a hearing on expenses.

Note:

[1] On joint motion this case had been transferred to Glasgow Sheriff Court to proceed through the commercial procedure. I heard parties in debate on 14 August 2019 by which time the pleadings had been adjusted, the facts agreed, written submissions had been exchanged and a joint bundle of authorities was lodged. At debate Mr Dobie for the

applicant spoke first. The point at issue here is narrow but significant. I was advised that there is no relevant Scottish authority.

[2] Section 11(1) of the Welfare Reform and Pensions Act 1999 ("the 1999 Act") as adapted for Scotland by section 13, reads:

> "Where an award of sequestration on the estate of a person is made after the coming into force of this section [namely, 11 November 1999], any rights of his under an approved pension arrangement are excluded from his estate for the purposes of the Bankruptcy (Scotland) Act 2016."

[3] Section 85(1) of the Bankruptcy (Scotland) Act 2016 reads:

> "(1) Any income, of whatever nature, received by the debtor on a relevant date, other than income arising from the estate which is vested in the trustee in the sequestration, is to vest in the debtor."

The issue

[4] Where a debtor elects to draw down the entire proceeds of his approved pension arrangement, is this sum income for the purposes of section 85(1) of the Bankruptcy (Scotland) Act 2016?

[5] In my opinion the answer is yes. Any payment or payments to a debtor from his or her approved pension arrangement is income which vests in the debtor for the purposes of section 85(1) of the Bankruptcy (Scotland) Act 2016 irrespective of the level of that sum or the regularity of the sums drawn or paid.

Authorities and materials referred to during the debate

Raithatha v *Williamson* [2012] EWHC 909 Ch

Horton v *Henry* [2016] EWCA Civ 989

Macdonald v *KPMG LLP*, Sheriff Deutsch, 29 April 2006

Gatty v *Maclaine* 1921 SC (HL) 1

"Bankruptcy" by Donna W. McKenzie Skene, (2018)

"Pension Law Reform": The Report of the Pension Law Review Committee – CM2342(1993)

"A New Contract for Welfare: Partnership and Pensions" – CM4179(1998)

Bankruptcy (Scotland) Act 2016 - Guidance for Agents of the Respondent

Background

[6] The facts had been agreed. In September 2017 the applicant applied to the respondent for his own sequestration in accordance with rule 7.3(1) of the Sheriff Court Bankruptcy Rules 2016. On 11 September 2017 the respondent sequestrated the estate then belonging to, or which should thereafter belong to, the applicant and declared the same to belong to the applicant's creditors for the purposes of the Bankruptcy (Scotland) Act 2016. The respondent appointed himself to be the applicant's trustee and appointed Wylie & Bisset LLP, Chartered Accountants, to exercise the functions of the respondent in terms of section 201(2) of the Bankruptcy (Scotland) 2016 Act.

[7] Prior to his sequestration the applicant had worked for Diageo Plc and had paid contributions to an occupational pension scheme. This was an approved pension arrangement within the meaning of sections 11(1) and 13 of the Welfare Reform and Pensions Act 1999.

[8] On 31 January 2018 the applicant retired from his employment. The applicant was allowed access to his pension from the effective date of the termination of his employment rather than waiting to his normal retirement age. The applicant elected to draw the proceeds to which he was entitled in a single lump sum. The gross amount of his pension proceeds were £194,260.14 with the net sum, after reduction of PAYE income tax, being £130,342.44. The net sum was paid directly into the applicant's bank account.

[9] Thereafter Wylie & Bisset LLP, as agent for the respondent, sought to maintain that the proceeds of the pension vested in the respondent and that the applicant must account to the respondent for the pension proceeds in their entirety. This raises a secondary matter, namely, personal bar. (Although not strictly necessary, I deal with that issue at paragraphs [87] to [95] below.)

The crave

[10] In terms of crave 1 the applicant craved the court to "exclude the estate specified in schedule 1 to this application from vesting in the applicant's trustee in sequestration". Schedule 1 contains details of the pension policy. The crave seeks to exclude this asset from vesting in his trustee in terms of sections 78(11) and (12) and 85(1) of the Bankruptcy (Scotland) Act 2016.

Submissions on behalf of the applicant

[11] The subject matter of this application is the sum of money identified in the schedule to the summary application ("the pension proceeds"), which is presently held by solicitors. The issue which this court requires to determine is: "To whom does that sum of money belong?"

[12] The statutory framework within which the issue requires to be determined consists of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act") and the Welfare Reform and Pensions Act 1999 ("the 1999 Act"). Beyond that statutory framework, the common law will also come into play.

[13] The applicant's case is presented on two fronts, namely, vesting and personal bar.

[14] Each of the parties to this application maintains that the pension proceeds vest in him by virtue of the application of the relevant provisions of the 2016 Act, as modified by the 1999 Act. In approaching this issue, it will be necessary for the court to determine the nature of the sum in dispute. There are a number of possibilities.

[15] Are the pension proceeds an asset which vests in the applicant's trustee in sequestration with effect from the date of sequestration? It is common ground between the parties that in the circumstances of this case they are not.

[16] Are the pension proceeds a non-vested contingent interest which vests in the applicant's trustee as from the date of sequestration, subject to a contingency which may or may not be purified during what is known as "the relevant period"? It is the applicant's position, on the basis of the authorities to be referred to, that they are not.

[17] Are the pension proceeds an asset which was, as at the date of sequestration, neither a vesting asset nor a non-vested contingent asset, but which came to the debtor from an outside source during the relevant period, sometimes referred to as an "after-acquired asset" or "*acquirenda*"? It is the applicant's position, on the basis of the authorities to be referred to, that they are not.

[18] Are the pension proceeds income of the debtor within the meaning of section 85 of the 2016 Act? It is the applicant's position that they are.

[19] It is common ground between the parties to this application that the sum in dispute here is not an asset which vested in the respondent as at the date of sequestration.

[20] Are the Pension Proceeds a non-vested contingent interest, or *acquirenda*?

[21] These two possibilities are considered together, because the distinction between a non-vested contingent interest and *acquirenda* is important to the determination of this case. An asset can be one or the other, but not both.

[22] The relevant provisions of the 2016 Act are:

78(1) The whole estate of the debtor vests for the benefit of the creditors in the trustee in the sequestration, by virtue of the trustee's appointment, as at the date of sequestration.

78(9) Any non-vested contingent interest which the debtor has vests in the trustee as if an assignation of that interest had been executed by the debtor (and intimation of assignation made) at the date of sequestration.

78(10) Any non-vested contingent interest vested in the trustee by virtue of subsection (9) is, where it remains so vested as at the date which is 4 years after the date of sequestration, re-invested in the debtor as if an assignation of that interest had been executed by the trustee (and intimation of assignation made) at that date.

79(5) In this Part "relevant date" means a date after the date of sequestration and before the date which is 4 years after the date of sequestration.

85(1) See paragraph [2] above

85(2) But subsection (1) is subject to sections 90 to 97 (which deal with debtor contributions).

86(4) Subsection (5) applies where any estate, wherever situated -
(a) is acquired by the debtor on a relevant date, and
(b) would have vested in the trustee in the sequestration if it had been part of the debtor's estate on the date of sequestration.

86(5) The estate vests in the trustee for the benefit of the creditors as at the date of acquisition.

[23] In light of these provisions, a non-vested contingent interest is an asset the existence of which is known, or which is ascertainable, as at the date of the debtor's sequestration. There will be a contingency which requires to be purified before any part of this asset vests in the trustee for the benefit of the debtor's creditors. The best way of explaining this concept is by way of illustrations.

[24] A classic example would be a claim for damages at the instance of the debtor which is in dependence before the courts as at the date of sequestration. The claim may have a material value, but is being defended by the alleged obligant on the merits. The value of the

claim is therefore a contingent asset, the contingency being a decree by the court to the effect that the defender is (a) liable in contract or delict and (b) due to pay the pursuer (the debtor) the appropriate amount of damages. If the court finds the defender liable and makes an award, the contingency will be purified. If the court assoilzies the defender the contingency will lapse.

[25] Another example would be the debtor with a wealthy aunt who has left him a substantial bequest in her will.

[26] As at the date of sequestration, the debtor has no more than a *spes* in relation to his aunt's bequest. However (assuming for the moment that the bequest is in a liquid sum), it can be said that the debtor has a contingent interest in the money value of this bequest.

[27] The debtor's interest will, in the above circumstances, be subject to at least one, arguably two, contingencies. The first, and obvious, one is that the aged aunt dies within the "relevant period" [4 years, see section 78(10)]. If the aunt survives beyond the end of that period, the contingency expires.

[28] It could also be argued that the asset is subject to a subsidiary contingency, being that the aged aunt does not alter her testamentary provisions in a manner such as to disinherit the debtor prior to her death.

[29] In any event, if the aged aunt dies without having altered her will and before the end of the relevant period, the bequest from her to the debtor will not be *acquirenda* in the estate, but rather a non-vested contingent asset which becomes a vested asset upon purification of the contingencies.

[30] Contrast this with a debtor who, as at the date of sequestration, is not the beneficiary of anybody's will as at that time. There is nothing capable of vesting in the trustee, whether or not subject to a contingency.

[31] But in this scenario, the aged aunt may alter her will after the date of sequestration but before the relevant date [section 79(5)], leaving the debtor a substantial amount of money. She then dies, again before the relevant date.

[32] This would be what the law correctly regards as *acquirenda*. As at the date of sequestration there was nothing. By a combination of circumstances over which neither the debtor nor the trustee had any control, a sum of money comes into the estate which falls to the trustee to be distributed among the debtor's creditors. This is the true meaning of *acquirenda*.

[33] Another classic example of *acquirenda* would be the debtor who indulges in the EuroMillions Lottery during the course of his sequestration. As at the date of sequestration, there would be nothing. If the debtor enters the lottery and wins, his winnings would in the true sense of the word be *acquirenda* falling to his trustee for distribution among his creditors. [Note: the respondent did not necessarily accept this example as correct. Much might depend on an argument as to whether the winnings were fruits from a debtor's income.]

[34] Are the pension proceeds income in the debtor's hands? All of the indicators in the statutes and the cases confirm that this is indeed the case.

[35] Income from employment is universally accepted as something which does not vest in a debtor's trustee, subject to the detailed provisions in relation to debtor contributions [see section 85(1)].

[36] Income from a pension is, likewise, universally regarded as something which does not vest in the debtor's trustee, again subject to the possibility of debtor contributions.

[37] The grey area, which arises in stark relief in this case, is the inter-relationship between the weekly, monthly or quarterly income which an individual may derive from his pension as against a lump sum which can be drawn down.

[38] The first point to make is that the legislation scrupulously avoids identifying any "cut-off point" above which a payment from a pension will cease to be income and instead become a vesting asset. If the respondent's position is correct, this would be an extraordinary omission. Without statutory guidance, where is a trustee, or a court, supposed to draw the line? Is it at £500, or £1,000, or £5,000 or £30,000?

[39] The absence of any indication as to when a pension payment ceases to be income and becomes a vesting asset (namely 100% of its value) is a strong indicator to the effect that all pension payments were intended to be treated in the same way.

[40] This is the clear assumption lying behind the pre-legislation reports and the post-legislation cases.

[41] The respondent's own guidelines recognise this dichotomy, and insofar as they come off the fence at all, they veer towards a pension lump sum being subject to a debtor contribution rather than vesting in the trustee.

[42] While it is not submitted that the tax treatment of the sum drawn down by the applicant in this case is determinative of the nature of the payment for insolvency purposes, the HMRC position is of considerable significance. The money drawn down by the applicant in this case was taxed as income.

[43] Underpinning the whole policy of the legislation as regards pension funds, and the application of the law in practice, is the view that the substantial cost to the taxpayer of the preferential treatment of pension contributions during an individual's working life are not

intended to accrue for the benefit of a bankrupt employee's creditors. Were that the case, it would operate as a major disincentive to the making of pension savings.

[44] The risk of abuse is dealt with by the provisions relating to excessive pension contributions, such that an insolvent debtor cannot place his assets beyond the reach of his creditors by the mere expedient of paying them into his pension fund. However, absent excessive contributions, the policy of the law is that a working person's contributions to a pension should be protected from attachment or other enforcement by creditors.

[45] Further protection for creditors is provided by the rules which stipulate that, if a pension is in payment, any excess in such payments over and above the debtor's reasonable needs, as assessed by application of the "common financial tool", can be ingathered by the trustee through a voluntary debtor contribution or a debtor contribution order. That is clearly how the politicians and the civil servants saw the system working.

[46] It must be borne in mind that if the respondent's argument in this case is correct, the trustee will be entitled to every last penny of the debtor's pension fund, not half, not 70%, not 80%, but 100%. The debtor will be left with absolutely nothing.

[47] That was not the intention of Parliament when it legislated to protect a debtor's pension fund from both attachment and bankruptcy, and it is not what the law as enacted provides.

Personal Bar

[48] The factual background lying behind this plea is agreed by both parties. In particular, the respondent agrees that the applicant relied on the letter dated 29 March 2018 from Wylie & Bisset LLP to Diageo in deciding to draw the lump sum from his pension at the time when he did. (It should be noted that although the respondent accepts that the

applicant did as a matter of fact rely on the letter in making his decision, he does not accept that the applicant was entitled to rely on the letter, nor to interpret it in the way that he did).

[49] The sole basis upon which the respondent seeks to contend that his representation to the effect that he had no interest in "this policy" does not bar him from adopting the position which he now seeks to adopt, is that the information contained in the letter was factually correct at the time when the letter was issued.

[50] The applicant's answer to this is that the letter contained partial information, but also omitted vital information. Accurately stating some of the important facts, but not all of them, can be a misrepresentation just as much as inaccurately stating the relevant facts. Wylie & Bisset LLP is authorised and regulated by the Financial Conduct Authority and, as such, is subject to stringent requirements in relation to clarity of information and effectiveness of communication. In order to provide the applicant with accurate, as opposed to misleading, information about the position it would have been necessary for the respondent through his appointed agent to add a mere ten words at the end of the second paragraph in the letter. These would be: "…but if you cash it in, we'll take the money"; or perhaps: "…but if you cash it in, the proceeds will vest in your trustee".

[51] Confronted with either of the above alternatives, the applicant would not have drawn down his entire pension fund as a lump sum at the time when he did, knowing that he would immediately have to hand over the whole fund to his trustee.

Submissions on behalf of the respondent

[52] The applicant was sequestrated on 11 September 2017 by the respondent on the application of the applicant himself. The date of the sequestration was 11 September 2017. In terms of section 78(1) of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"), the

applicant's whole estate as at the date of the sequestration (subject to certain limited exceptions) vested in the respondent for the benefit of the applicant's creditors.

[53] In terms of section 86(4) and (5) of the 2016 Act any estate acquired by the applicant on a relevant date (as defined by section 79(5)) and which would have vested had it formed part of his estate as at the date of sequestration, also vested in the respondent.

[54] It is admitted that the applicant had an interest in a Diageo Lifestyle Pension Plan ("the Pension"). It is further admitted that, as a consequence of the applicant's ill-health he became entitled to draw down funds from the Pension. It is also admitted that he did, in fact, draw down funds from his Pension during the course of 2018. It is admitted that those funds totalled £194,260.14 and that the net amount paid to him after tax was £130,342.44 and those funds were paid into his bank account. Later those funds were transferred from his bank account to solicitors.

[55] All of the funds were drawn down on a "relevant date".

[56] The dispute between the parties is whether or not those funds vested in the respondent by virtue of section 86(4) of the 2016 Act, or whether they were excluded from vesting by virtue of section 11 of the Welfare Reform and Pensions Act 1999 ("the 1999 Act").

[57] The respondent's position is that the funds vested in him by virtue of section 86(4) of the 2016 Act.

[58] Section 11(12) of the 1999 Act provides that:

> "a person shall be treated as having a right under an approved pension arrangement where –
>
> (a) he is entitled to a credit under section 29(1)(b) as against the person responsible for the arrangement (within the meaning of Chapter 1 of Part IV), and
>
> (b) the person so responsible has not discharged his liability in respect of the credit."

[59] On the various dates in 2018 when the applicant drew down funds from his pension, he was no longer entitled to a credit (or credits) against the person responsible for the pension schemes (the trustees or administrators thereof) as the person responsible had discharged that liability by making payment to the applicant. The sums paid to him therefore ceased to be rights under an approved pension arrangement, as defined in section 11 of the 1999 Act, and instead became funds at credit in a bank account in respect of which his bank came under an obligation to account to him. As a consequence, as at the date of sequestration, the funds were simply an asset to which section 86(4) of the 2016 Act applied and not rights under an approved pension arrangement with the result that they vested in the respondent as trustee.

Personal Bar

[60] The applicant avers that as a consequence of the representations that were made by the respondent to him and his representatives, the respondent is personally barred from maintaining that the funds vest in him as trustee.

[61] It was accepted that the rule of personal bar is as outlined by Lord Chancellor Birkenhead in *Gatty* v *Maclain* 1921 SC (HL) 1 at 7.

[62] In the present circumstances, the statements that are alleged to have been made concerning the state of facts anent the respondent's interest in the Pension Policy were (i) factually correct, and (ii) the respondent does not seek to affirm that a different state of facts existed at the same time.

[63] In any event, the statements complained of were statements of law and were correct statements of law at that time. In the circumstances the doctrine of personal bar does not arise.

[64] It is submitted that both arguments are irrelevant, therefore the preliminary plea for the respondent should be sustained, the applicant's pleas in law repelled and the application dismissed.

Decision

[65] In deference to the parties' submissions, I approach the issue by discrete routes but reach the same conclusion.

[66] In the English decision, *Raithatha* v *Williamson* [2012] EWHC 909 Ch, Bernard Livesey QC, sitting as a Deputy Judge of the Chancery Division, said at paragraph 29:

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

[67] *Raithatha* was overruled in the case of *Horton* v *Henry* [2016] EWCA Civ 989 but not on the above point. The appeal in *Horton* raised the question of the statutory interpretation of section 310 of the Insolvency Act 1986 and section 11 of the Welfare Reform and Pensions Act 1999 and concerned whether a pension entitlement in respect of which a bankrupt has a present right to draw down payment (but which he had not yet exercised) falls to be included in the assessment of his income "to which he from time to time becomes entitled"

within the meaning of section 310(7) of the Insolvency Act 1986 and, if so, on what terms to make an income payments order under section 310.

[68] In *Raithatha* Mr Bernard Livesey QC determined that the respondent's uncrystallised pension rights did not fall to be assessed as part of his income for the purposes of section 310 of the Insolvency Act 1986. He therefore dismissed the application for an income payments order.

[69] The case of *Horton* overruled *Raithatha* but, significantly, not in relation to Mr Livesey's analysis at paragraph 29 which I have quoted above.

[70] Moreover, at paragraph 44 in *Horton*, the court opined:

> "The Insolvency Act, and the relevant provisions of the Pensions Act 1995 and the WRPA [Welfare Reform and Pensions Act 1999], draw a clear distinction between, on the one hand, *rights* under a pension scheme and, on the other hand, *payments* made under such a scheme. Since the coming into effect of section 11 of the WRPA *rights* under a pension scheme do not vest in the trustee on the bankruptcy and, for example, a *capital* sum received from a pension scheme after the bankruptcy could not be the subject of a claim in respect of after-acquired property under section 307. After-acquired property becomes comprised in the bankrupt's estate under the provisions contained in section 307, but pension rights are clearly excluded from the possibility of becoming after-acquired property – see section 307(2)."

[71] In England it appears to be accepted that funds drawn from a pension are income. I agree with that analysis.

[72] I turn now to look at the Scottish provisions to see if there is any meaningful distinction. There is none.

[73] I refer to the Welfare Reform and Pensions Act 1999, section 11(1) quoted at paragraph [2] above. Sections 11 and 12 of the 1999 Act apply to Scotland in terms of section 13 of the Act (section 13 makes appropriate allowance for Scottish terminology). A debtor contribution order may be made irrespective of sections 11 and 12 of the Welfare Reform and Pensions Act 1999 (see Bankruptcy (Scotland) Act 2016, section 90(5)).

[74] The applicant contends that the distinction between a non-vested contingent interest and *acquirenda* is important to the determination of this case and that an asset can be one or the other, but not both. These submissions were useful to eliminate the wrongful categorisation of the proceeds.

[75] The issue for me is of course not the source of the proceeds (an approved pension arrangement is beyond the grasp of the trustee) but whether any or all payment derived from that approved pension arrangement is income. If not, the proceeds (whether or not beyond a certain level) become a vesting asset (an asset vesting in the trustee).

[76] An approved pension arrangement is a savings vehicle for the delivery of future income. The increased range of available options does not change that core purpose. A pensioner now has a say in the pace of delivery. He has the choice to draw that income as a single payment, by regular payments or by a combination of the two, but the essence is the same. The sum at credit in the debtor's bank account was his (pension) income under section 85(1) of the 2016 Act; not an asset which, by mere dint of payment, then becomes vested in the trustee in terms of section 86(4).

[77] It is common ground that an approved pension arrangement does not vest in the trustee. In my opinion the proceeds derived from an approved pension arrangement fall squarely within the provisions of section 85(1) of the 2016 Act. That income, irrespective of the level, vests in the debtor, not the trustee. (The wisdom of a debtor drawing the entire fund – which might be a substantial sum – as a single payment, is not a matter for me.)

[78] For the sake of completeness, I was referred to the unreported case of *Macdonald* v *KPMG LLP* dated 29 April 2006 by Sheriff A F Deutsch. On 18 March 2012 Mr Macdonald reached the age of 60 (which was the relevant retirement age in respect of his two pensions). The lump sum components of each of his pension schemes were paid into Mr Macdonald's

bank account on 19 March 2012. The Accountant in Bankruptcy awarded sequestration against Mr Macdonald on 20 March 2012. The chronology was critical to the determination of that case. As at 20 March 2012 Mr Macdonald had sums at credit in his bank account. These sums (derived from his pensions) had been deposited immediately prior to his sequestration. Sheriff Deutsch concluded at paragraph [5] that:

> "Once the lump sums were paid into the applicant's bank account he ceased to have any lawful claim in respect of those funds against the Principal Civil Service Pension Scheme; rather his right was now to demand payment from his banks. Any withdrawals which the applicant might have made from his bank account of funds, which had emanated from the pension schemes, would not have been the exercise of rights under an approved pension arrangement. Withdrawals would have been an exercise of his right under his contract with his bank."

[79] Sheriff Deutsch dismissed the application to exclude the sums deposited in Mr Macdonald's bank account. As at the date of Mr Macdonald's sequestration, the source of the funds at credit in his bank was irrelevant. That case can readily be distinguished from the current scenario.

[80] I now turn to look at the respondent's guidance issued to agents acting on his behalf. In doing so, I accept of course that this is not authority, but opinion. I refer to it for two reasons. Firstly, it was referred to during the debate without objection. Secondly, it might assist a purposive approach to statutory interpretation (*Littlewoods* v *HMRC* [2017] UKSC 70). In paragraph 6.19 of the guidance the respondent opines:

> "The general position is that where the debtor is in receipt of any form of pension or annuity at the date of bankruptcy, such payments are classed as income which, as per section 85(1) of the Act, does not vest in the trustee. It is of course open to the trustee to seek a contribution from such income through a debtor contribution order, as per section 89(1) of the Act, <u>including a one-off contribution from any lump sum payment received by the debtor</u>". (my emphasis)

[81] Again, at paragraph 6.19.1, referring to an occupational pension and including reference to a lump sum element, the respondent concludes that a trustee might seek a

debtor contribution order in relation to an entitlement to a pension "including any lump sum element".

[82] In summary, absent Scottish authority in relation to the payment of the pension proceeds viz-a-viz income or lump sum, the respondent has promulgated his own advice. It corresponds with my view.

[83] Finally, the applicant has had income tax deducted from the payment he received. That level of tax may require to be adjusted at the conclusion of the tax year. However, for the purposes of the Bankruptcy (Scotland) Act 2016, the treatment of the lump sum as income is at least consistent with its treatment by HMRC.

[84] Treating any sum or sums drawn or paid from an approved pension arrangement as income reflects the wording of section 11(1) of the Welfare Reform and Pensions Act 1999 and section 85(1) of the Bankruptcy (Scotland) Act 2016 when set against the current options available to pension policy holders. This interpretation is purposeful and pragmatic. It avoids determining artificial thresholds (for example, that beyond a certain percentage of the fund, pension proceeds become an asset vesting in the trustee and/or that a withdrawal beyond a specific monetary figure becomes an asset vesting in the trustee) which would be an arbitrary and artificial exercise outwith statutory authority.

[85] If I am correct and such payments are income, that interpretation is consistent with the position south of the border. It also aligns insolvency practice with the treatment of the sum for PAYE purposes. On the other hand a trustee has the option to seek a debtor contribution order (2016 Act, section 90).

[86] For the foregoing reasons I conclude that any payment or payments to a debtor from his or her approved pension arrangement is income which vests in the debtor for the

purposes of section 85(1) of the Bankruptcy (Scotland) Act 2016 irrespective of the level of that sum or the regularity of the sums drawn or paid.

Personal Bar

[87] Parties were agreed that if I decided the case as I have, I need not deal with the issue of personal bar. That said the applicant wished me to express a view. I do so in short terms. By way of background the following four issues are relevant to the conclusion I reach.

[88] Firstly, by letter dated 16 March 2018 Diageo Pensions wrote to Wylie & Bisset LLP, the agents for the respondent, in the following terms:

> "I have been in conversation with Mr Cook who has advised me he has made you aware of the recent changes in his employed status and the options now available to him.
>
> To allow us to progress any settlement or transfer of pension benefits I would appreciate if you could confirm that with regard to the Bankruptcy (Scotland) Act 2016, as accountant in Bankruptcy, you have no interest in this policy.
>
> In addition, if the above is true, please confirm we would be able to deal directly with Mr Cook and any Financial Adviser he appointed and that any monies paid to him or transferred to another pension arrangement could be completed directly and without the involvement of the accountant in Bankruptcy."(sic)

[89] Secondly, by letter dated 29 March 2018 Wylie & Bisset LLP replied to the pension trustees as follows:

> "As this is an occupation pension scheme, it does not vest in the sequestration in terms of The Welfare Reform and Pensions Act 1999. Accordingly, we have no interest in this policy."

[90] Thirdly, I take into account what had been agreed between the parties (already noted at paragraph [48] but repeated here for ease of reference) namely:

> "The respondent agrees that the applicant relied on the letter dated 29 March 2018 from Wylie & Bisset to Diageo in deciding to draw the lump sum from his pension at the time when he did. (It should be noted that although the respondent accepts that the applicant did as a matter of fact rely on the letter in making his decision, he does

> not accept that the applicant was entitled to rely on the letter, nor to interpret it in the way that he did)."

[91] Finally, I note the applicant's plea in law number 3 reads:

> "The respondent being personally barred from maintaining that the pension and/or its proceeds vested in the respondent and not the applicant, decree should be granted as craved."

[92] Had I required to decide on this issue, I would have sustained the third plea in law for the applicant. Wylie & Bisset LLP was acting on behalf of the respondent when the reply was framed. The reply was succinct and unequivocal.

[93] I refer to *Gatty* v *Maclaine* 1921 SC (HL) 1 and in particular, the opinion of the Lord Chancellor (Lord Birkenhead) at page 7 where he opined that:

> "the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."

[94] Standing (a) the letter from the pension trustees to those acting on behalf of the respondent; (b) the reply by the agent on behalf of the respondent and (c) the concession/agreement that applicant had relied on the reply; then, by applying the ratio in *Gatty*, in my opinion it was reasonable for the applicant to conclude that the respondent had "no interest in this policy" or that any interest in the policy had been waived. The respondent would have been personally barred from challenging the dealing (2016 Act, section 87(4) as qualified by section 87(5)(c)).

[95] In context, it was evident that the applicant, via his pension provider, was considering "the options now available to him" on retirement and anticipating that "monies" from the approved pension arrangement might be paid directly to the applicant (depending of course upon the reply). The applicant and, for that matter, the pension trustees, were entitled to rely on the plain wording of the reply.

Expenses

[96] I was not addressed on expenses. I have assigned a hearing to determine expenses but if expenses can be agreed, parties should advise the commercial clerk and I will issue the appropriate interlocutor without the necessity of a hearing.