Case No: [redacted]ar 2020

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (Ch D)

[redacted]

IN THE MATTER OF Mr M [redacted]

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

[redacted], *Thursday 23 January 2020*

BETWEEN:

(1) [redacted]
(2) [redacted]
(Joint Trustees in Bankruptcy of Mr M [redacted])

Applicants

and

(1)Mrs M [redacted]
(2) MH [redacted]
(3) ILA [redacted]
(4) Mr M [redacted]

Respondents

ORDER

UPON the application of the Joint Trustees in Bankruptcy of Mr M ("the Joint Trustees") by application notice dated 1 November 2018 – that all beneficial rights and interest in pension policy number 80001007 issued by [redacted] ("the [redacted] Policy") vest in the Joint Trustees (the "Joint Trustees' Application")

AND UPON the application of Mr M by application notice dated 29 March 2019 to be joined as a party to these proceedings and for other relief in opposition to the Joint Trustees' Application including a declaration that section 11(1) and (2)(a) of the Welfare Reform and Pensions Act 1999 ("WRPA") is incompatible with EU law ("the EU law Issue") ("Mr M's application")

AND UPON the order of ICC Judge of 18 June 2019 directing that the EU law Issue be tried as a preliminary issue ("the Preliminary Issue") and that in this respect Mr M shall be the Applicant and the Joint Trustees in bankruptcy shall be the Respondent

AND UPON Hearing Counsel GP and JBR for Mr M and DJR and JBA for the Joint Trustees in bankruptcy

AND UPON READING the documents recorded in the Court File as having been read

AND UPON FINDING that in order to enable the Court to give judgment in this case on the preliminary issue it is necessary to resolve questions concerning the interpretation of European Union (EU) law and that it is appropriate to request the Court of Justice to give a preliminary ruling thereon

IT IS ORDERED that

1. The questions set out in the attached Schedule ("the Questions") concerning the interpretation of Article 49 of the Treaty on the Functioning of the European Union ("TFEU") and /or Article 24(1) of Directive 2004/38/EC ("the Citizens' Rights Directive") be referred to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU.

2. All further proceedings in the above named matter be stayed until the Court of Justice has given its ruling on the Questions or until further order.

3. This Order be communicated to the Court of Justice forthwith.

4. The final determination of the Preliminary Issue be reserved to the Judge.

5. The costs of the making of this Order are reserved to the Judge.

Service of this Order

The Court has provided a sealed copy of this Order to the serving party:

EC [redacted]

SCHEDULE TO THE ORDER OF 23 JANUARY 2020

REQUEST FOR PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

A. Referring Court and Parties to the main proceedings and their representatives

1. The Referring Court is the High Court of Justice, Business and Property Courts of England and Wales, Insolvency and Companies List (Chancery Division), [redacted]

2. The present reference is made under Article 86(2) of the Withdrawal Agreement between the European Union and the United Kingdom. It may be noted that that provision, and the provision in Article 89(1) of that agreement that requires judgments and orders of the Court of Justice to have binding force in their entirety on and in the United Kingdom, have been implemented into UK law (sections 1A and 7A of the European Union (Withdrawal) Act 2018) and so have, under UK law, direct effect in the United Kingdom.

3. The relevant parties in the main proceedings (Case No: [redacted] for the purposes of this reference are [redacted] ("**Mr M**") on the one hand and on the other hand his Trustees in bankruptcy, [redacted] ("**the Joint Trustees**").Mr M's solicitors are EC of [redacted] and the Joint Trustees' solicitors are ESI [redacted]

B. The subject matter of the dispute and the relevant facts

4. The Joint Trustees claim for the benefit of the bankruptcy estate an investment held in an Irish pension scheme, [redacted] ("**the Scheme**"), in the form of a unit linked retirement policy issued by [redacted] ("**the Policy**"). The Scheme had been approved under Irish tax legislation as an Exempt Approved Scheme[1]. The Joint Trustees' primary claim is that the beneficial interest in the Policy remained with Mr M at the time of his bankruptcy in England in 2012 and so vested in his Joint Trustees as part of the bankruptcy estate by virtue of the vesting provisions of the Insolvency Act 1986[2].

5. Mr M's case is that any rights he had under the pension scheme should be excluded from the bankruptcy estate. The basis for this contention is that if instead of being a member of an Irish pension scheme he had been a member of a UK pension scheme and if that scheme had been registered under section 153 of the Finance Act 2004, then the pension scheme would have been regarded as an "approved pension arrangement" and any rights he had under it would have been excluded from the bankruptcy estate under section 11(1) and (2)(a) of the Welfare Reform and Pensions Act 1999 ("**WRPA 1999**")[3]. In his application before the Court, he claimed that EU law, namely Articles 21, 45, and/or 49 of the TFEU[4] and /or Article 24 of Parliament and Council Directive 2004/38/EC ("**Citizens Rights Directive**" or "**CRD**") and /or Article 7 (2) of Parliament and Council Regulation 492/2011/EU[5] required the same treatment to be accorded to Mr M's rights under the Scheme.

6. This "EU compatibility point" was ordered to be tried as a preliminary issue between Mr M as Applicant and the Joint Trustees as Respondents on the basis of agreed or assumed facts by a High Court Judge. In the event, the case proceeded by reference only to Article

[1] Approved as a Retirement Benefits Scheme for the purposes of Part 30, Chapter 1 of the Taxes Consolidation Act 1997 ("**TCA 1997**") and treated as an Exempt Approved Scheme for the purposes of section 774 of that Act
[2] Sections 283(1)(a) and 306
[3] See paragraph 24 below
[4] Treaty on the Functioning of the European Union
[5] Of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the Union

49 TFEU (and Article 24 CRD)[6]. Having heard the arguments of Mr M and the Joint Trustees, the Judge, [redacted], gave judgment on [redacted] (neutral report citation [redacted]).

7. The paragraphs which follow in this section *B.* contain an account of the facts on which the questions referred to the Court of Justice for a preliminary ruling are based.

8. Mr M was made bankrupt in the High Court in London on 2 November 2012 on his own petition, presented that day. Prior to his bankruptcy Mr M had been a high-profile property developer operating primarily, if not exclusively, in Ireland. But he and his wife moved to London in July 2011, and the Court accepted that he had moved his centre of main interests (or COMI) from Ireland to England by the date of presentation of the bankruptcy petition.

9. On 20 December 2002 [redacted] (**"the Company"**), a company operating largely if not exclusively in Ireland and through which Mr M was engaged in the building and property development business, established as employer and trustee an occupational pension scheme for Mr M with a payment of €6,161,256, paid as a single premium on [redacted] the Policy, under which benefits would be paid on Mr M's retirement or earlier death. The Policy was unit-linked, and the premium secured 6,161,256 units in a fund called the FF [redacted]. The asset underlying the FF was a shopping centre in Dublin [redacted]. The Policy was governed by Irish law.

10. In November 2010 the Company was put into receivership in Ireland at the suit of NAMA (the National Asset Management Agency) which had acquired the Company's debts to the Bank of Ireland. Its failure resulted from the crash in the Irish property market.

11. On 16 July 2009 Mr M and Mrs M established a new Irish company, [redacted] (**"S Industries**"), with Mr M as director, and Mrs M as director and secretary. Mr M was a director of S Industries from 16 July 2009 to 14 April 2012. He was also an employee of S Industries from 1 December 2009 to 31 January 2011.

[6] No reliance was in the end placed on Article 45 TFEU. Mr M [redacted] says this is because he did not need to rely on Article 45 TFEU. The Joint Trustees' position is that Mr M [redacted] is not a "worker" (or "work seeker").

12. By Deed dated 31 August 2009 (**"the Deed"**) S Industries as Principal Employer established a pension scheme, the Scheme [redacted], with effect from that date, with [redacted] ("**MH**") as Pensioneer Trustee and Mr M and Mrs M as Additional Trustees. The Scheme is governed by Irish law.

13. The Scheme was established as a retirement benefits scheme as defined in section 771 TCA 1997, to provide relevant benefits as defined in section 770(1) TCA 1997 for such of the employees of S Industries and Associated Employers as should be included therein as Members; under the Rules annexed to the Deed, a person was eligible for inclusion in the Simcoe Scheme if he were an employee (which for this purpose included directors and officers) of the Employers, and the Employers so decided. The Members of the the Scheme have in fact been Mr M, Mrs M and their son, RM[7].

14. By clause 3 of the Deed the Scheme was to be established so as to be capable of being approved by the (Irish) Revenue Commissioners pursuant to section 772 TCA 1997 and of being treated by the Revenue Commissioners as an exempt approved scheme pursuant to section 774 TCA 1997. By letter dated 28 October 2009 an Inspector of Taxes wrote to Marine House on behalf of the Revenue Commissioners to the effect that the Scheme had been approved as a Retirement Benefits Scheme for the purposes of Part 30, Chapter 1 of TCA 1997, and would be treated as an Exempt Approved Scheme for the purpose of section 774 TCA 1997, in each case with effect from 30 August 2009.

15. By clause 18 of the Deed if a Member was entitled to a benefit under any other retirement benefits scheme the Trustees had power to accept a transfer payment in accordance with rule 9 of the Rules; rule 9 empowered the Trustees to accept all or any of the assets of the other scheme relating to the Member. By Deed of Assignment dated 7 December 2009 the Company as trustee of the Policy assigned the Policy to MH and Mr M and Mrs M as Trustees of the Scheme, to hold the Policy subject to the provisions of the Policy documents and endorsements thereto, and in consideration of the Scheme assuming the obligation to provide a pension appropriate to the Policy.

[7] There was no evidence before the Court as to whether [redacted] was an employee, director or officer of Simcoe.

16. In the period ending 31 August 2011, the Trustees of the Scheme made certain payments to Mr M. (He was born in 1950 and so had turned 60 in 2010). It has been assumed for the purposes of the preliminary issue in the main proceedings that these payments did not represent his full entitlement to benefits under the Scheme and that he had not received his full entitlement by the time of the commencement of his bankruptcy on 2 November 2012.[8]

17. By Deed dated 26 July 2011 Mr M was removed as Trustee of the Scheme by S Industries (acting as Principal Employer), leaving MH and Mrs M as the Trustees.

18. On 13 April 2012 S Industries was registered under the (UK) Companies Act 2006 as an overseas company that had established a UK establishment. The application for registration gave the date the establishment was opened as 1 December 2011, with an address in London, and with Mr M as director and Mrs M as director and secretary.

19. Mr M ceased to be an employee of S Industries in January 2011. He moved to London in February 2011 first on a part-time basis and then in July 2011 Mr M and Mrs M moved to the UK on a full-time basis. He commenced trading as a property and construction consultant in the United Kingdom and from August 2011 he rented offices in London for the purposes of carrying out that trade. He advised the Irish Revenue Commissioners by letter dated 26 March 2012 from his tax advisers that he now resided in London and having registered for VAT with HMRC his UK tax adviser submitted his VAT return for the period ended 31 July 2012 and a self-assessment tax return for the year ended 5 April 2012.

20. Mr M was made bankrupt in the High Court in London on 2 November 2012 on his own petition, presented that day.

21. At the time Mr M moved to the UK he owed very large personal liabilities to NAMA and to others – with, according to the Joint Trustees, the total claims against his estate exceeding €1 billion.

[8] Whether that assumption is correct, and if so, whether the entitlement was disposed of at undervalue, is the subject of a separate dispute – which has been stayed pending the determination of these proceedings.

22. In the absence of oral evidence, the Referring Court was able to reach no conclusion as to whether Mr M deliberately moved to London with a view to establishing his COMI in the UK so that he could in due course be made bankrupt in London rather than Dublin. However, the Court expressed the view that it was a reasonable inference that at the time Mr M re-located to the UK his future bankruptcy was either inevitable, or at least very probable. Further, the suggestion that he moved to London with a view to bankruptcy taking place there, whilst unproven, was a plausible one.[9]

23. In the case of the Scheme no pension contributions were made in respect of Mr M or Mrs M after they moved to the UK.

C. The tenor of national provisions applicable to the case[10]

24. Protection for the pension rights of those made bankrupt in the UK is now found in sections 11 and 12 WRPA 1999. The effect of section 11 is to exclude the rights of a bankrupt under an approved pension arrangement, which includes any UK pension scheme that has been registered with Her Majesty's Revenue and Customs ("**HMRC**"), from his bankruptcy estate. It provides, so far as relevant, as follows:

> "11 Effect of bankruptcy on pension rights: approved arrangements
> (1) Where a bankruptcy order is made against a person on a bankruptcy application made or petition presented after the coming into force of this section, any rights of his under an approved pension arrangement are excluded from his estate.
> (2) In this section "approved pension arrangement" means–
> (a) a pension scheme registered under section 153 of the Finance Act 2004
> …
> (h) any pension arrangements of any description which may be prescribed by regulations made by the Secretary of State
> …
> (11) In this section–
> …

[9] Judgment, para 20.
[10] Note the Judge described these as intricate and difficult to summarise

(b) "pension scheme" has the meaning given in section 150(1) of the Finance Act 2004 and "registered pension scheme" means a pension scheme registered under section 153 of the Finance Act 2004."

The section came into force on 29 May 2000."

25. The Scheme has never been registered with HMRC under section 153 of the Finance Act 2004 ("**FA 2004**").

26. In respect of approved pension arrangements, trustees in bankruptcy can still (1) recover "excessive" pension contributions: see s 15 WRPA 1999; and (2) make a claim to certain income payments for a limited period after bankruptcy pursuant to court order or agreement: see s 310 and s 310A of the Insolvency Act 1986.

27. If a pension scheme is not an approved pension scheme for the purposes of section 11 WRPA 1999, it may be possible for the bankrupt nevertheless to benefit from section 12 WRPA 1999. This provides, so far as relevant, as follows:

"12 Effect of bankruptcy on pension rights: unapproved arrangements

(1) The Secretary of State may by regulations make provision for or in connection with enabling rights of a person under an unapproved pension arrangement to be excluded, in the event of a bankruptcy order being made against that person, from his estate for the purposes of Parts VIII to XI of the Insolvency Act 1986."

28. Regulations have been made under both sections 11(2)(h) and 12(1) WRPA 1999 (among other enabling provisions), namely The Occupational and Personal Pension Schemes (Bankruptcy) (No. 2) (Regulations) 2002, SI 2002/836 ("**the 2002 Regulations**"). They came into force on 6 April 2002.

29. Reg 2 of the 2002 Regulations sets out the arrangements which are prescribed under section 11(2)(h) WRPA 1999 and hence are approved pension arrangements. It includes the following provision in reg 2(1)(c):

"2 Prescribed pension arrangements

(1) The arrangements prescribed for the purposes of section 11(2)(h) of the 1999 Act (pension arrangements which are "approved pension arrangements") are arrangements (including an annuity purchased for the purpose of giving effect to rights under any such arrangement)—

…..

(b) to which section 308A of the 2003 Act (exemption of contributions to overseas pension scheme) applies;".

30. Pursuant to section 12(2) WRPA 199, by regulations 4 to 6 of the 2002 Regulations, a bankrupt can either apply to court for an exclusion order for the purpose of excluding his rights wholly or in part under an "unapproved pension arrangement" from his bankruptcy estate (by reference to the future likely needs of him and his family) or reaching a qualifying agreement to similar effect with his trustee in bankruptcy.[11] The Referring Court accepted that the Scheme appeared to satisfy the requirements of an "unapproved pension scheme"; however, these are less advantageous provisions from the point of view of the bankrupt.

31. The reference in reg 2(1)(c) of the 2002 Regulations to "section 308A of the 2003 Act" is a reference to the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA 2003**"), s. 308A of which provides as follows:

"308A Exemption of contribution to overseas pension scheme

(1) No liability to income tax arises in respect of earnings where an employer makes contributions under a qualifying overseas pension scheme in respect of an employee who is a relevant migrant member of the pension scheme.

(2) In subsection (1) —

"*qualifying overseas pension scheme"*, and

"*relevant migrant member"*

have the same meaning as in Schedule 33 to FA 2004 (overseas pension schemes: migrant member relief)."

[11] See Judgment, at paragraphs 26 to 29. It is to be noted that Mr M[redacted] has applied to the court (in the alternative) for an "exclusion order".

The purpose of Schedule 33 to FA 2004 is to enable a member of an overseas pension scheme, and his employer, to claim relief against contributions to that scheme in appropriate circumstances.

32. The purpose behind sections 11 to 16 WRPA 1999 taken together is that pension rights are intended, and tax relief is given, to support individuals in the future in retirement, not for the benefit of creditors if the individual becomes bankrupt before retirement, and that save where "excessive contributions"[12] can be shown to be made, those rights should be exempted from bankruptcy. Section 11 WPRA 1999 is (broadly) limited to tax-approved schemes because one of the features of tax approval (as it then stood) was that it limited the benefits that could be paid to the member (for example in occupational schemes by reference to his salary and period of service). There is by contrast no limit to the benefits that can be provided under unapproved schemes, so it is not perhaps surprising that it was thought inappropriate to exempt those in their entirety, but only to the extent that they were reasonably needed by the bankrupt and his family.[13]

33. In its judgment the Referring Court has assumed that a scheme registered outside the UK can in principle register with HMRC under section 153 FA 2004. The chief advantages of being a registered pension scheme are (i) that relief is given against income tax for contributions to the scheme by or on behalf of a member, and (ii) that the fund itself is exempt from income tax and capital gains tax. But both of these reliefs are only relevant to a scheme if the payment of contributions, or the receipt of income and capital gains respectively, would otherwise give rise to a liability to UK taxes, and in a case like that of the Scheme where no further contributions were being made, and there is no reason to suppose that the fund was deriving income or capital gains from a UK source, there is no obvious reason why there should be a liability to UK taxes at all.

34. On the other hand registration brings with it a number of disadvantages: by section 160(1) the only payments which such a scheme is authorised to make to, or in respect of, a member are those specified in section 164; and section 164 is quite prescriptive as to the payments that can be made (see sections 164-169). If a scheme makes an unauthorised payment to a member, tax at 40% is payable, either by the member (under section 208), or, if the member

[12] See paragraph 26 above.
[13] See Judgment, paragraphs 43 to 44.

does not pay, by the scheme administrator (under sections 239-241)[14]. Moreover, by regulations made under FA 2004 (the Registered Pension Schemes (Provision of Information) Regulations 2006, SI 2006/567), the administrator of a registered pension scheme is obliged to send detailed information to HMRC in relation to a large number of reportable events.

35. The Referring Court accepts in its judgment:

(1) That registration under section 153 FA 2004 was not a mere formality (for the Irish scheme administrator); it was a significant step which carried with it potentially onerous obligations and even if (which is not something that can be assumed), a pension scheme established outside the UK could comply with the requirements for UK registration as well as whatever the requirements of its home jurisdiction were, it was therefore not something that such a scheme should undertake unadvisedly.

(2) That even on the assumption that the UK legislation is in principle capable of applying to pension schemes established outside the UK, it would be surprising if many such schemes thought it advantageous to register with HMRC in the UK. In particular the Referring Court does not find it surprising that an Irish pension scheme established in such a way as to comply with the requirements of the Irish tax legislation should not wish also to have to comply with the (different) requirements of the UK tax legislation.

(3) It is self-evident that migrant workers (whether employed or self- employed) from other EU Member States are more likely than UK nationals to have acquired pension rights in other Member States, and that it follows that they are more likely than UK nationals to have pension rights under arrangements which are not registered under section 153 FA 2004, either because such arrangements could not meet the requirements for registration, or because there are solid reasons why they would choose not to be so registered.

[14] All section references in this paragraph are to the FA 2004

36. However, section 11 WRPA 1999 does not only apply to pension schemes registered under s. 153 FA 2004. It also applies to prescribed arrangements, that is those set out in reg 2 of the 2002 Regulations. That includes "qualifying overseas pension schemes" to which s. 308A ITEPA 2003 applies.

37. To be a qualifying overseas pension scheme, a scheme must first be an *"overseas pension scheme"*: schedule 33, para 5(1) FA 2004. This term is defined in section 150(7) FA 2004 as follows:

> "In this Part *"overseas pension scheme"* means a pension scheme (other than a registered pension scheme) which–
> (a) is established in a country or territory outside the United Kingdom, and
> (b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue."

38. The Scheme plainly satisfied the condition in sub-para (a); as to sub-para (b), the relevant regulations are The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206 ("**the 2006 Regulations**") and under the 2006 Regulations the prescribed requirements are satisfied if, among other things:

> "the scheme is an occupational pension scheme and there is, in the country or territory in which it is established, a body–
> (i) which regulates occupational pension schemes; and
> (ii) which regulates the scheme in question"[15].
>
> And "if the scheme is "recognised for tax purposes"[16].

39. In its judgment the Referring Court proceeded on the basis that these requirements are satisfied, and the Scheme was, or at any rate probably was, an overseas pension scheme as defined in section 150(7) FA 2004. The Irish model of exempt approval for pension schemes appears very similar both in language and effect to the UK model of exempt approval that formerly applied here before it was replaced by the system of registration;

[15] Reg 2(2)(a)
[16] Reg 2(3)

and although the Court was not addressed on them, the provisions of Part 30 of TCA 1997 were before the Court and from which it appears both (a) that Ireland has a system of taxation of personal income under which exemptions are available in respect of pensions and which confers a number of exemptions from income tax and (b) that most of the benefits paid by the scheme to members are subject to taxation.

40. The requirements for the Scheme to be a "qualifying overseas pension scheme" are set out in para 5 of Schedule 33 to FA 2004. Para 5(1) provides as follows:

> "For the purposes of this Schedule an overseas pension scheme is a qualifying overseas pension scheme if—
>
> (a) the scheme manager has given to the Inland Revenue notification that it is an overseas pension scheme and has provided any such evidence that it is an overseas pension scheme as the Inland Revenue may require,
>
> (b) the scheme manager has undertaken to the Inland Revenue to inform the Inland Revenue if it ceases to be an overseas pension scheme,
>
> (c) the scheme manager has undertaken to the Inland Revenue to comply with any prescribed benefit crystallisation information requirements imposed on the scheme manager, and
>
> (d) the overseas pension scheme is not excluded from being a qualifying overseas pension scheme by sub-paragraph (3)."

41. It was not contended that the Scheme was a "qualifying overseas pension scheme": the necessary notification and undertakings to HMRC had not been given. However the Referring Court considered that the first two requirements do not appear onerous and the third one (c) above[17] would not in practice have been onerous since the prescribed requirements only require information to be given in relation to relevant migrant members and in the case of the Scheme no contributions were made in respect of Mr M or Mrs M after they moved to the UK, and hence there were no relevant migrant members and no information to give.

[17] (d) above can be ignored

42. In its judgment the Referring Court accepted that as there were no relevant migrant members in the Scheme there was therefore no reason for the Scheme to take the trouble to qualify as a qualifying overseas pension scheme. It was also accepted that there is usually little reason for an overseas pension scheme to go to the trouble of notifying, and giving undertakings to HMRC so as to become a qualifying overseas pension scheme unless it is expected that contributions are going to be made to the scheme by or on behalf of members who have moved to the UK and are relevant migrant members. Many migrant workers who come to the UK from other Member States are likely to have rights under pension arrangements that do not have any reason to take the necessary steps to become qualifying overseas pension schemes (even if they could otherwise qualify); and that whether they do so or not is not usually a decision for the member but for the scheme itself. In the case of ordinary employees who are members of occupational pension schemes, they generally have no control over the decisions of those running the scheme.

43. On this point, the Joint Trustees submitted that whatever the position with ordinary employees (or "workers"), the same was not necessarily true of the self-employed (and certainly not in the case of Mr M). However, the Referring Court considered that it cannot be assumed that those moving to the UK to establish themselves as self-employed will always, or even usually, either be in a position to procure that the pension schemes in their home state in which they have accrued rights should take the necessary steps to register as a qualifying overseas pension scheme, or that it would occur to them to try to do so.

44. Further, the Referring Court observed that in Mr M's case, it was very doubtful if the prospect of him becoming bankrupt in the UK was in fact hypothetical. Indeed, his bankruptcy may very well have been the very reason for his re-location.[18]

45. It was submitted on behalf of Mr M that it made no difference to his case that he relied solely on his right of establishment under Article 49 TFEU and that the relevant principles of EU law applied indifferently or equally as between the various provisions concerned with freedom of movement. However, the Referring Court concluded on the basis of the two cases cited by Mr M[19] that although the rights of freedom of movement for workers

[18] Judgment, paragraph 60.

[19] Judgment of 20 May 1992, *Ramrath v Ministre de la Justice*, C-106/91, EU:C:1992:230 and Judgment of 30 January 2007, *Commission v Denmark*, C-150/04, EU:C:2007:69.

(Art 45), freedom of establishment (Art 49), and freedom to provide services (Art 56) are all facets of the fundamental right of freedom of movement (now found in Art 21 TFEU) and that the basic principles applicable to them are the same, nevertheless the three rights are not identical and do need to be looked at separately, as the ECJ did in *Commission v Denmark*. In particular, that what may be an obstacle or restriction to freedom of movement in the case of a worker will not in all cases be equally an obstacle or restriction in the case of a self-employed person seeking to exercise the right of establishment. Whether it is or not requires a consideration of the facts, and since the factual situation of self- employed persons is not in all respects the same as that of workers, it is possible that what is an obstacle for one is not for the other.

46. The Referring Court accepted that it had not been shown that the provisions of ss. 11 and 12 WRPA 1999 have a tendency to deter the exercise of individuals' freedom of movement[20]. The Judge acknowledged that for most people the prospect of bankruptcy, at the stage at which they are considering moving to the UK, is presumably remote, whether they are workers or self-employed. Further, even for those like Mr M where the likelihood is that the prospects of bankruptcy were anything but remote at the time he moved to London, it cannot be said that ss. 11 and 12 have a tendency to deter without examining whether the UK insolvency provisions are more or less advantageous to the bankrupt than the Irish provisions. Since neither side had adduced evidence as to the position on bankruptcy in Ireland, that had not been shown.

47. Mr M's position was that it was unnecessary to show that the provision in question is liable to have a deterrent effect or that what was required was a comparison between the position of the migrant worker in the host state and in the home state; what was relevant was the comparison between the position of a migrant worker in the host state and the position of nationals of the host state.

48. Mr M submitted that the retention of his pension rights was a "social advantage" and in this regard relied on Article 49 TFEU in conjunction with Article 24 CRD. In this context, the Referring Court considered that the question is whether the preservation of pension rights on bankruptcy is "within the scope of the Treaties" (per Article 18 TFEU) and

[20] Judgment, paragraph 106.

specifically within the scope of Article 49 TFEU. Further, in this latter respect, the critical question was whether the exclusion of pension rights on bankruptcy is something that can impact on the right of establishment or is otherwise within the scope of Art 49 TFEU.

49. On this point, the Judge accepted that the prohibition on discrimination is not limited to specific rules on the pursuit of occupational activities but is also concerned with other matters that can impact on the pursuit of an occupation. But he was unsure as to whether the availability of pension protection upon bankruptcy can impact on the rights of establishment or is otherwise within the scope of Article 49 TFEU.

50. The Judge was referred to Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, as showing that it was assumed that equal treatment of pension rights for both employed and self-employed persons fell within the scope of freedom of movement

51. The Referring Court recognised that the effect of this Directive was to ensure that a migrant worker who moved from his home state to another should not be discriminated against as compared with those who remained in his home state, and it was not suggested that it had any direct application to the facts of the present case. It was however relied upon on behalf of Mr M as an illustration of the fact that preservation of pension rights could be regarded as falling within the scope of the right of free movement.

52. The Referring Court did not however regard this as determinative: it is obvious that it might have a deterrent effect on migrant workers if by moving to another Member State they would lose their pension rights in their home country. The present question is a rather different one.

53. The Judge stated in his judgment:

> "*I have not found this an entirely easy question, nor one that is really answered by the materials I have been shown. On the one hand provisions as to the effect of insolvency on accrued pension rights are not, in the language of Commission v Italy, something that "prevent[s] the taking up or pursuit of" self-employed activity, or "rules relating to the various general facilities which are of assistance in the pursuit of those*

activities", or "restrictions … liable to constitute an obstacle to that pursuit". Indeed for reasons already given in the present case the prospect of insolvency probably contributed to Mr M's decision to exercise his right of establishment in the UK. On the other hand, one of the features of self-employment is that it often involves the self-employed person incurring personal liability in connection with his business activity, and hence it can as a general rule be said that the risk of personal insolvency is connected with the right of establishment."

And later in his judgment:

"*In the present case the answer to the question whether the impact of insolvency on pension rights is within the scope of Art 49 is self-evidently a matter of EU law and is in my judgment critical to the decision of this Court and hence the jurisdictional criterion is therefore satisfied.*
Nor do I consider that I can with complete confidence resolve the issue myself; nor do I consider that the answer is acte clair. Nor is this a case where there is an established body of case law that can easily be transposed to the facts of the case, or one where the question turns on a very narrow point dependent on a specific set of facts, where the ruling is unlikely to have any application beyond this case.

In those circumstances I have decided that it is appropriate to make a reference to the CJEU to seek a preliminary ruling on this question."

D. Brief summary of the arguments of the parties

54. The overall submission made on behalf of Mr M is that as a matter of EU law his rights should not depend on whether he had spent his working life in the UK (and had acquired pension rights in a UK registered pension scheme) or was a migrant worker who had spent most of his working life in another Member State such as Ireland, and whose associated pensions rights were likely to be in a scheme based in that Member State ("the home State scheme"), and had then moved to the UK before becoming bankrupt. Mr M's position is that the same principles apply to the self-employed.

55. The key problem was that unless the migrant's home State scheme happened to be registered with HMRC in the UK (something that may not be under his control, but a matter for his employer (in the case of a worker) or in any event the administrator of the scheme, and which would not generally or necessarily give rise to any tax or other advantage for the scheme and which was also likely to generate an additional regulatory burden for the scheme in that the scheme would then have to comply with UK regulations as well as home state regulations), a literal reading of section 11 WRPA 1999 would mean that he would not receive the same protection for his pension rights on bankruptcy as a UK worker or self-employed person (whose pension scheme would be registered in the UK in order to obtain the tax advantages in the UK that accrue to registered pension schemes).

56. That meant that the Court was obliged to "read down" section 11 WRPA 1999 so as to give it a conforming interpretation with EU law so that the Scheme was to be regarded as an approved pension arrangement, with the result that Mr M's rights under the Scheme were excluded from his bankruptcy estate.

57. The submissions for the Joint Trustees can be summarised as follows. The provisions applicable on personal insolvency differ from one Member State to another. That much is recognised in Council Regulation 1346/2000 on insolvency proceedings ("the 2000 Insolvency Regulations"). The UK provisions on the protection of pension rights in bankruptcy are just part of the overall UK insolvency regime. The question is whether they constitute a restriction on freedom of movement, and in particular (since reliance is placed on Art 49 TFEU) the right of establishment. They plainly did not in fact deter Mr M from relocating to the UK in exercise of the right of establishment. Nor can it be said that they were likely to do so: that could only be done if it could be shown that the UK insolvency regime as a whole was less favourable to the bankrupt than (in this case) the Irish insolvency regime, and no attempt had been made to do that. Mr M could not pick and choose the bits of the UK insolvency regime he liked and challenge the bits he did not like. Even if that was wrong, and it was appropriate to look at the UK provisions on pension rights in bankruptcy by themselves, they did not constitute an obstacle or restriction to the freedom of establishment; nor had it been shown that they were less favourable to Mr M than the Irish provisions on pension rights in bankruptcy. There was therefore no basis for contending that s.11 WRPA 1999 breached Article 49 TFEU. Further, in so far as Mr M relied on Article 24 CRD, Article 21 TFEU makes clear that it takes effect "subject to the

limitations and conditions laid down in the Treaties and the measures adopted to give them effect". Such measures include the 2000 Regulation which recognises that the provisions on insolvency will, in the absence of harmonisation at EU level, differ as between the Member States.

58. It was further submitted on behalf of the Joint Trustees that to afford Mr M the protection of his pension rights would be to put Mr M in a *better* position than UK nationals who – in order to obtain this protection would have had to register their scheme under s 153 FA 2004 and comply with the conditions for registration.

E. The questions referred for a ruling

59. The Referring Court therefore refers the following Questions to the Court of Justice for a preliminary ruling under Article 86 of the Withdrawal Agreement and Article 267 TFEU:-

(1) Where a national of a Member State has exercised his rights under Articles 21, 49 TFEU and the Citizens' Rights Directive (Parliament and Council Directive 2004/38/EC) by moving to or establishing himself in the United Kingdom, is it compatible with those provisions for section 11 WRPA 1999 to make exclusion from bankruptcy of pension rights in a pension scheme, including those established and tax approved in another Member State, dependent on the pension scheme being, at the time of the bankruptcy, registered under s 153 FA 2004 or prescribed by regulation 2 of the 2002 Regulations and thus tax approved in the United Kingdom ?

(2) In answering Question (1), is it relevant or necessary:

(a) to determine whether the individual moved to the United Kingdom in order, primarily, to declare his bankruptcy in the United Kingdom?

(b) to take into account (i) the protections which may be available to the bankrupt in respect of unapproved pension schemes under s 12 WRPA 1999 and (ii) the possibility for the trustees in bankruptcy to recover sums in respect of approved pension arrangements?

(c) to take into account the requirements to which pension schemes registered and tax approved in the United Kingdom are subject?

F. View of the Referring Court on the answer to be given to the questions referred for a preliminary ruling

60. The provisional view of the Referring Court is that the impact of insolvency on the accrued pension rights of a person exercising the right of establishment as a self-employed person in another Member State is sufficiently closely connected with that activity (even if, as in this case, the insolvency does not arise from that activity but from previous activities in his home state) to be within the scope of Art 49 TFEU.

61. In the view of the Referring Court, if that is right, then it follows that there has not been equal treatment. A UK national who becomes bankrupt is very likely to find, even if he takes no particular steps in this regard, that his accrued pension rights are protected on bankruptcy by the operation of s. 11 WRPA 1999, because the vast majority of pension rights in the UK are held under pension schemes registered with HMRC under s. 153 FA 2004 because of the tax advantages that can be thereby secured. Nationals of other EU Member States are far more likely to have accrued pension rights in schemes that are not registered.

62. It was argued on behalf of the Joint Trustees that whatever the position with employees, for a self-employed person to comply with the requirements of the 2006 Regulations and register their overseas pension scheme as a qualifying overseas pension scheme was not an onerous administrative requirement. It is accepted that it is likely that Mr M could in fact have asked the trustees of the Scheme to do this and that it would not have been difficult for them to do so, nor is there any particular reason to think that the trustees would have refused. It is to be inferred that the reason that this was not done was not because it

was difficult or onerous, but because by the time he established himself in the UK it was thought that he had drawn all his benefits from the Scheme anyway so there was no need to take any further steps. But one cannot assume that those moving to the UK to establish themselves as self-employed will always, or even usually, either be in a position to procure that the pension schemes in their home state in which they have accrued rights should take the necessary steps to register as a qualifying overseas pension scheme, or that it would occur to them to try to do so.

63. In those circumstances the Referring Court considers that the provisions of sections 11 and 12 WRPA 1999 and the 2002 Regulations, under which the full protection of section 11 WRPA 1999 is only available to those with rights under approved pension arrangements, although not expressly drafted by reference to nationality, are liable to affect a substantially higher proportion of nationals of other Member States exercising their right of establishment in the UK. If therefore the impact of bankruptcy on accrued pension rights is within the scope of Article 49, they constitute discrimination in enjoyment of a social advantage which is prohibited by Art 49 TFEU and Art 24 CRD.

64. If this view is well-founded – which is the question on which the Court of Justice is asked to give a preliminary ruling – then Referring Court takes the view that it is able, by applying the principle of conforming interpretation, to interpret section 11 WRPA 1999 in such a way as to eliminate discrimination and that this can be done by interpreting the national provisions to extend to a pension scheme approved by or registered with the tax authorities of another Member State. This is in line with the purpose of the legislation which is to ensure that pension rights are fully protected only when they arise under arrangements approved by or registered with or recognised by the relevant tax authorities in the Member State in which they are established.

Dated 25 March 2020

[redacted]The Judge

[redacted] a Judge of the High Court, Business and Property Courts (Chancery Division)

Reference to be sent to the Court Registry of the Court of Justice by email (DDP-GreffeCour@curia.europa.eu) or by post to the Registry of the Court of Justice, Rue du Fort Niedergrünewald, L-2925, Luxembourg, LUXEMBOURG).

Documents to be included in the reference: -

1. The Judgment of Judge [redacted]
2. The Trustees' application of 1 November 2018
3. Mr M's application of 29 March 2019
4. ICC Judge [redacted] order of 18 June 2019 with Preliminary Issue and Schedule of Agreed and Assumed Facts
5. The witness statement of Mr M dated 2 November 2012
6. The witness statement of the trustee dated 1 November 2018