

Pension elections and bankruptcy

At first glance the relevance of a bankrupt's ability to make elections under a pension scheme would be of little interest to his trustee in bankruptcy. This is because, under the **Welfare Reform and Pensions Act 1999**, since May 2000 a bankrupt's rights under an approved pension arrangement are excluded from his estate in bankruptcy. The change in legislation provided a valuable protection to bankrupts' pensions.

Excessive pension contributions

This concession was not without reservation. With the protection of pensions, a new provision was introduced, which enables a trustee to seek an order of the Court recovering excessive contributions made into a pension scheme, where it has unfairly prejudiced the individual's creditors. "Excessive" is described as an amount which is excessive in view of the individual circumstances when those contributions were made. Whilst a common sense approach should easily spot contributions which may be regarded as being excessive a more detailed examination of the circumstances existing at the time of the contributions may render relatively modest contributions potentially excessive. A key factor will be whether the debtor was insolvent at the time the contribution was made or in consequence of it.

Pension sharing arrangements

The Welfare Reform and Pensions Act 1999 changes also apply to pension sharing arrangements.

These provisions enable a trustee to pursue an excessive contributions claim, even where the pension has been subject to a pension sharing arrangement. The rights under such arrangements may also be potentially attacked as a transaction at an undervalue and/or as a preference. Where the pension sharing arrangement is held to be either a transaction at an undervalue or a preference, then any order that is subsequently made will override the terms of any pension sharing agreement.

Income payment agreements and orders

A further consequence of the change in treatment of pensions in bankruptcy was that the provisions relating to income payments orders/agreements were amended to provide that, for the purposes of determining income for an income payments order, any payments under a pension scheme would be included.

Raithatha v Williamson [2012] EWHC 909 (Ch)

The significance of the change in legislation and the amendments to Section 310 dealing with income payments orders was not fully explored until the decision in **Raithatha v Williamson**. In that case the bankrupt had a pension fund valued at £990,000. Whilst the pension could have been taken at the age of 55, he was at the time of his bankruptcy 59 years old. The bankrupt was working and had made it clear that he had no intention of drawing down his pension entitlement.

The trustee applied for an income payments order under Section 310 of the **Insolvency Act 1986** and obtained an injunction preventing the bankrupt from taking steps to draw down a lump sum. The main issue in the case was whether the right to claim a lump sum under the pension should be taken into account in making an income payments order.

An income payments order under Section 310 may be made where the bankrupt has an entitlement to elect to draw a pension, but has not at the time of the application, exercised it. The relevant part of Section 310(7) IA 86 being:

"For the purposes of this section, the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled...including any payment under a pension scheme".

In **Raithatha v Williamson** Bernard Livesey QC held in favour of the trustee in finding that the Court could take into account the potential benefit of a lump sum under pension arrangements even though the bankrupt had not yet elected to take it. He also ordered that the injunction preventing the bankrupt from dealing with his pension would continue. The bankrupt appealed.



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Good law – Bad law – Appeal

The original decision in **Raithatha v Williamson** was greeted with caution by commentators and with little surprise when it was announced that the bankrupt had appealed. The decision left a number of questions unanswered. In particular Section 310 (2) provides that an income payments order shall not have the effect of reducing the income of the bankrupt below what appears to be necessary for meeting the reasonable domestic needs of the bankrupt and his family. Questions remain as to what are “the needs of the bankrupt and his family”, and for how long they should be taken into account. The drawing down of a capital sum at an earlier stage in order to meet the terms of an income payments order will inevitably adversely affect the future returns and possibly the future needs of the bankrupt and his family.

In the case of **Raithatha v Williamson** and other similar cases, the appeals will not now be heard as the parties, presumably recognising the risks and potential costs of continuing the litigation have reached a settlement.

Where to now for IPO's and pension elections?

We now have a situation which could be regarded as bad law becoming good as the decision in **Raithatha v Williamson** remains. For trustees in bankruptcy there are likely to be relatively few cases where the implications of **Raithatha v Williamson** will be felt. For the few cases where there is a sufficiently large pension pot, and the bankrupt has not yet elected to take rights under his pension which he might otherwise have done, the application for an income payments order must be made before the expiry of one year from the date of the bankruptcy order. In situations where the decision does apply, the ability to elect to draw down the benefits under a pension scheme whether by way of a lump sum and/or an annuity will be taken into account in determining the amount of an income payments order which may continue for a period of up to 3 years. This can achieve a substantial benefit to the estate and creditors.

Enforcement issues

An income payments agreement (IPA) may be enforced as if it were an income payments order (IPO). Both an IPO and an IPA may provide that a third party shall make payments to the trustee instead of the bankrupt. Beyond that the Insolvency Act provides no further guidance as to how a trustee might enforce an IPO/IPA where for instance the bankrupt is self-employed and simply refuses to make the specified payments. Whilst the bankrupt may be in contempt of Court in failing to comply with the order/agreement, in practical terms enforcement can prove difficult.

In **Raithatha v Williamson** the trustee recognised that the bankrupt may take steps to claim the lump sum pension benefit himself without accounting to the estate in bankruptcy pending the outcome of the trustee's application. The trustee had good grounds for believing that this might be the case and the Court agreed with him and granted the trustee injunctive relief to prevent dissipation of the pension benefits. Following the Court finding that the income payments order would take into account the lump sum benefit that could be claimed in exercise of the right to elect, the Court continued the injunction in order to facilitate enforcement. This example of the Court enhancing the trustee's powers of enforcement in respect of an income payments order was a significant step forward.

Faced with a similar situation a trustee may also seek to rely on the decision in **Blight v Brewster [2012] EWHC 165 (Ch)**. Although not a bankruptcy case, in that case the claimants sought to enforce against Mr Brewster's pension and in particular his right to elect to draw down 25% of his pension fund. The question the Court had to consider was whether the 25% could be reached by execution to satisfy the Judgment debt already obtained. The claimants applied for a third party debt order but it was clear that this was unviable as the right to elect the drawdown was not a debt. The Court had to consider whether or not it could compel the Defendant to elect to take the lump sum now.

Matrimonial lump sum orders

Gabriel Moss QC first of all considered the decision of **Field v Field [2003] 1 FLR 376** which concerned attempts to require a husband to take a lump sum entitlement under a personal pension scheme in



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order to make payments to the former wife under a matrimonial order. In that case, the Judge rejected the possibility of appointing a receiver because he considered that there was no income or property belonging to the debtor to “receive”. The Judge also rejected the possibility of an injunction to force an election as this was based on the notion that the injunction would be “a freestanding enforcement procedure in its own right”.

Gabriel Moss QC decided that **Field v Field** should not be followed. He recognised that Parliament had, in the area of bankruptcy, created special statutory protection for pensions but that no such intervention has taken place in the area of enforcement of judgments. He held that it was not necessary to go to the trouble and expense of appointing a receiver. He could simply hold that the defendant be ordered to delegate the power of election to the claimant’s solicitors and for the Court to authorise the solicitors to make the election under the pension scheme in the name of the debtor. The Judge also noted that if it were not possible to order an injunction then a receiver could be appointed by way of execution and require the delegation of the election to the receiver.

Whilst **Blight v Brewster** is not a bankruptcy case, it does demonstrate a mechanism by which the Court in matrimonial proceedings could order that the defendant be forced to draw down the lump sum in order to meet payments due under a matrimonial order. The Courts approach in such cases should be compared with that of the Courts approach to such elections in bankruptcy cases. In bankruptcy the rights of the bankrupt vest in the trustee in bankruptcy. However Section 11 of the Welfare Reforms and Pensions Act 1999 provides that in respect of a bankrupt “any rights of his under an approved pension arrangement are excluded from the estate”. This includes any rights to elect which are also excluded and do not pass to the trustee. In **Raithatha v Williamson** the Court was willing to provide injunctive relief to protect the pension in the interim. If the bankrupt fails to make the election following an income payments order being granted then the trustee could seek an order in the terms of **Blight v Brewster** authorising the trustee to make the election on behalf of the bankrupt.

Conclusion

Now that an appeal will not be heard in the case of **Raithatha v Williamson**, trustees are left with the ability, in cases where there is a sufficiently large pension pot, to take into account any lump sum or other pension benefit that has not yet been taken by way of an election in applying for an income payments order. If the pension fund is big enough, then it may also warrant protection pending an income payments order being made and its compliance. Both the cases of **Raithatha v Williamson** and **Blight v Brewster** give guidance as to the approach the Court may take to assist in enforcing an income payments order and where necessary the making of an election under a pension scheme.

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