

## **Pensions and Bankruptcy**

From April 2015, pensioners reaching the age of 55 will be entitled to draw their entire pension fund to do with as they wish. The pension minister famously stating the money could be 'used to buy a Lamborghini' and then the pensioner could rely on the state pension if or when their funds ran out. The government's policy is to empower pensioners with a choice as to how to best plan for their retirement. This is obviously very attractive to a solvent pensioner, but what impact could these reforms have for an insolvent pensioner?

The Welfare and Pension Reform Act ["WRPA"] in 1999 effectively 'excluded' pensions from Bankruptcy. Excessive contributions into a plan could be reclaimed, and any annuities in place could be treated as Income. The pension fund itself was however excluded from the assets vesting in the Trustee. The rationale for this approach was that pensioners should have a sufficient provision for their retirement.

This changed in 2012 following the High Court decision in *Raithatha v Williamson*. The court ruled that the bankrupt's right to draw down a personal pension could be subjected to an Income Payments Order ["IPO"]. This effectively put the pension fund within the assets available to the Trustee and opened the doors for Trustees to seek IPOs, which last for 3 years, for any bankrupt aged 52 or over. This allowed the Trustee to then recover the 25% lump sum element of the pension fund as soon as the Bankrupt reached 55 years old. In light of the new rules effective in April this year, this would potentially allow the Trustee to realise the entire pension fund for the benefit of the estate.

In 2014, the High Court decision in *Horton v Henry* contradicted the decision in *Raithatha v Williamson* and leaves the law unclear as to whether pensions form part of the Bankrupt's estate. In *Horton v Henry*, the court agreed that pensions already in payment would be available as Income under an IPO. However, s310(7) of the Insolvency Act 1986 states income used for the purposes of an IPO includes any payment under a personal pension to which the Bankrupt is entitled. The Court ruled that entitlement to such payment only occurs once the Bankrupt elects to draw down the pension. The Court went further to rule that the decision when to draw a pension remains with the Bankrupt, not the Trustee in Bankruptcy.

This decision is more consistent with the purpose of the WRPA to protect pensions in Bankruptcy but clearly conflicts with the earlier decision in *Raithatha v Williamson*. The Court recognised the conflict of the decision and granted leave to appeal the decision to the Court of Appeal. However, until such an appeal is made or an amendment is made in statute, Bankrupts and Trustees are faced with two conflicting decisions given at the same level. It would appear that until the position is resolved, insolvent individuals would be best advised to avoid drawing down their pensions prior to Bankruptcy.

Please note that should your clients require any confidential advice regarding this or any other insolvency matter they are welcome to contact one of our Partners. An initial consultation is provided free of charge and without obligation. Also, if you or any of your colleagues require any clarification regarding insolvency law or procedure, please do not hesitate to contact us.