Neutral Citation Number: [2016] EWCA Civ 989

Case No: A2/2015/0152

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (CHANCERY DIVISION)
Mr Robert Englehart QC sitting as a Deputy High Court Judge
5995/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2016

Before :

LORD JUSTICE MCFARLANE
LADY JUSTICE GLOSTER

and
SIR STANLEY BURNTON

- -

Between :

ROBERT WILLIAM LESLIE HORTON **(as Trustee in Bankruptcy of Michael Gerard Henry)**	**Appellant**
- and -	
MICHAEL GERARD HENRY	**Respondent**

- -
- -

Mr Stephen Davies QC and Mr Simon Passfield (instructed by **Edwin Coe LLP**) for the **Appellant**
Mr Laurent Sykes QC (instructed under the **Bar Direct Access Scheme**) for the **Respondent**

Hearing dates : 21 April 2016

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Further submissions received 16 May and 2 June 2016

Approved Judgment

Lady Justice Gloster:

Introduction

1. This is an appeal against a decision of Mr. Robert Englehart QC, sitting as a deputy judge of the High Court, Chancery Division ("the judge") dated 17 December 2014, whereby he dismissed an application by Robert Horton ("the appellant"), the trustee in bankruptcy of Michael Gerard Henry ("the respondent"), for an income payments order ("IPO") pursuant to section 310 of the Insolvency Act 1986 ("the Insolvency Act") in respect of income which might become payable to the respondent from his personal pension policies, were he to exercise his contractual rights under those policies to draw down a lump sum or other payments. The judgment may be found at [2014] EWHC 4209 (Ch); [2015] 1 WLR 2488 ("the judgment"). The judge gave permission to the appellant to appeal.

2. The appeal raises a question of statutory interpretation of section 310 of the Insolvency Act and section 11 of the Welfare Reform and Pensions Act 1999 ("the WRPA"). The question can be broadly formulated as follows: does a pension entitlement in respect of which a bankrupt has a present right to elect to draw down payment (but which he has not yet exercised) fall 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 when the court is considering whether and, if so, on what terms, to make an IPO under section 310?

3. In *Raithatha v Williamson* (a bankrupt) [2012] EWHC 909 (Ch); [2012] 1 WLR 3559 ("*Raithatha*") - a case which was determined prior to the decision in this case - the court (Mr. Bernard Livesey QC, sitting as a deputy judge of the Chancery Division) held that a bankrupt's present entitlement to compel payment of pension benefits fell to be included in the assessment of his income within the meaning of section 310(7) of the Insolvency Act. In the present case, the judge declined to follow *Raithatha* and reached the contrary conclusion. On this appeal, the appellant contends that the decision in *Raithaitha* was correct; the respondent contends that it was wrong.

4. There are two other decisions of lower courts which support the conclusion reached by the judge in this case. They are:

    i) a decision of a District Judge in *Re X* [2014] BPIR 1081; and

    ii) a decision of a High Court Bankruptcy Registrar in *Hinton v Wotherspoon* [2016] EWHC 623 (Ch).

    None of the decisions is, of course, binding on us but we have considered them with interest.

5. Before us, Mr Stephen Davies QC and Mr Simon Passfield appeared for the appellant and Mr Laurent Sykes QC appeared for the respondent.

Background

6. In the court below and before us, the following headline facts and matters were common ground:

i) the respondent was made bankrupt on his own petition;

ii) the respondent has (to use the language of Ferris J[1]) the "present right to compel [his pension provider] to make payments under the policy in the future";

iii) because of the generosity of his wife and family, he has no current need for that income: he wishes and intends to preserve the entirety of his pensions for his children after his death;

iv) therefore, he does not wish to exercise the right to take income now.

7. The relevant factual background is set out in greater detail at paragraphs 2-11 of the judgment. In summary:

i) the respondent, who was born on 7 October 1954, was adjudged bankrupt on his own petition on 18 December 2012; he is currently 61 years old;

ii) the appellant was appointed as trustee on 15 March 2013;

iii) the official receiver's schedule of creditors of 22 March 2013 disclosed creditor claims in excess of £6.5 million; the respondent, whilst acknowledging an indebtedness of £387,075, disputes the true value of creditors' claims;

iv) the assets of the respondent on the date of the bankruptcy included 4 pension policies; these were:

a) a Self-Invested Pension Policy ("SIPP") which the respondent took out with Suffolk Life on 29 March 2007; in doing so he selected a retirement age of 67 with a retirement date of 7 October 2021; the selected retirement date had no contractual force; it was used for illustrative purposes and ultimately as a trigger for prompting a reminder of retirement from Suffolk Life; as at October 2014 the SIPP had a value of £848,022.76, although the value will have changed since then; the terms of the SIPP entitled the respondent to "crystallise" some or all of the separate units of the SIPP at any time on or after his 55th birthday and to take up to 25% of the amount crystallised (subject to the lifetime allowance) as a pension commencement lump sum without incurring a tax charge; on the basis of a value of £848,022.76, there was potentially a maximum 25% tax free lump sum of about £212,005 available, plus recurring drawdown and/or annuity payments in accordance with elections made; however, given that the investments in the underlying fund did not all consist of readily realisable shares, there was a measure of uncertainty as to what would in fact be available if the SIPP were crystallised; and

b) 3 personal pension policies, taken out under the National Provident Association Retirement Plan which have now been transferred to Phoenix Life Limited ("the Phoenix Life policies"); they each provide

[1] In *In re Landau (A Bankrupt)* [1998] Ch 223 at 232D-G

for an annuity payable on the pension date, being in the respondent's case his 70th birthday, in in October 2024; however, under the plan the respondent is entitled to give written notice to vary the date for taking benefits under the policies, provided that the date falls between his 60th and 75th birthdays; the various forms of benefit which an annuitant might elect to receive included an option to commute part of an annuity by taking a lump sum, "not exceeding three times the annual amount of the part of that annuity which is not commuted" and various forms of annuity; the various different options were to be exercised by notice in writing but if the annuitant had not exercised his elections by age 75 he received a simple annuity of level amount; the Phoenix Life policies, had no fund value, simply a guaranteed annuity income of £2,450.68 for each policy at the age of 70, but, as noted above, there would be the opportunity, now that the respondent has attained the age of 60, for him to elect to take a lump sum with a consequential reduction in the amount of the annuity ultimately payable;

v) on 17 December 2013, the day before the respondent's discharge, and when he was aged 59, the appellant filed the present application pursuant to section 310 of the Insolvency Act for an IPO requiring the respondent to pay to the appellant a sum equal to: (i) the percentage of the pensions presently available to be drawn down by him as a tax free lump sum; and (ii) such further periodic income as might also be derived from the pensions for the three-year duration permissible by section 310(6)(b) of the Insolvency Act;

vi) as at that date, having reached the age of 55 on 7 October 2009, the respondent was entitled to crystallise part or all of the SIPP, to draw benefits and to take up to 25% of the amount crystallised as a tax free lump sum;

vii) on 7 October 2014 (his 60th birthday), the respondent became entitled to receive benefits from each of the Phoenix Life policies;

viii) the respondent opposed the making of an IPO on the grounds that:

a) the benefits which he was entitled to draw from his pensions did not constitute income to which he had "become entitled" (within the meaning of section 310(7) of the Insolvency Act) by reference to which the court was entitled to make an IPO; and

b) in any event, it was unreasonable in all the circumstances of the case to require the respondent to elect to draw any benefits from his pensions because he wished to "preserve the maximum capital value" of the pensions for "as long as possible" (i.e. until 7 October 2021), with a view to transferring the remaining balance to his children on his death.

The judgment

8. As noted above, contrary to the decision in *Raithatha,* the judge held (at paragraphs 27-32) 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, for the following reasons:

i) the word "entitled" in section310(7) of the Insolvency Act suggested a reference to a pension in payment under which definite amounts had become contractually payable; see paragraph 28;

ii) there was no obvious wording in section 310 of the Insolvency Act which would give the Court power to decide how a bankrupt was to exercise the different elections open to him under an uncrystallised SIPP or personal pension; nor was there any obvious route for a trustee in bankruptcy to be said to have the power; see paragraph 29;

iii) that interpretation was supported by various commentaries, in particular the Report of the Pension Law Review Committee (Cm 2342-I), the Explanatory Notes to the WRPA and the Insolvency Service's guidance notes as they were prior to *Raithatha*; see paragraph 31.

9. Accordingly, the judge dismissed the application for an IPO. He went on to hold (at paragraph 33) that if, contrary to his decision, he had jurisdiction to make an IPO in respect of the pension entitlement, on the somewhat extreme facts of this case, it would have been appropriate to make an IPO to the full extent claimed because, on the respondent's own evidence, none of the moneys were needed for meeting his reasonable domestic needs or those of his family.

The parties' arguments on appeal

10. On behalf of the appellant, Mr Davies QC and Mr Passfield submitted, in summary, that the judge interpreted the words "becomes entitled" in section 310(7) of the Insolvency Act too narrowly by according too much importance to the fact that the respondent was required to elect formally to take the pension income to which he was now entitled; as a matter of ordinary language, the respondent had "become entitled" to receive the relevant benefits because it was now exclusively within his power to compel payment, by exercising the options open to him; there was nothing in the respective policies of the insolvency legislation or the pensions legislation which required a different interpretation. It was a policy of the common law that: "persons must be just before they are generous, and that debts must be paid before gifts can be made"[2]. Moreover, the policy underpinning section 310 was that the bankrupt's surplus future income should be made available to meet his debts. That was clear from recommendations in the Report of the Review Committee: Insolvency Law and Practice ("the Cork Report")[3], which led to the enactment of section 310 of the Insolvency Act: see in particular at [591] and at [1162]. The report emphasised that the court's power to make an income payments order should be widely drawn and relate to all sources of income, with few exceptions such as, for example, certain pension and similar rights specified in a series of statutes[4] leading to the IA ("the Traditional Pension Exemptions").

11. Section 310 of the Insolvency Act was informed by this principle and should not be interpreted so as to frustrate it (by enabling the respondent to ring-fence his surplus

[2] *Freeman v Pope* (1870) LR 5 Ch App 538 at 540 (per Lord Hatherley LC); and *Giles v Rhind (No 2)* [2008] EWCA Civ 118; [2009] Ch 191 at [15] (per Arden LJ).
[3] Cmnd. 8558 (June 1982).
[4] e.g. pensions governed by the Naval and Marine Pay and Pensions Act 1865, the Police Pensions Act 1921, the Army Act 1955 and the Superannuation Act 1972 (and its statutory predecessors)

income from his creditors in order to give it to his family after his death). Mr Davies submitted that the appellant was indeed entitled both to require the respondent to crystallise the pensions and to tell him how to make his election. Support for this proposition could be found in: section 333(1) of the Insolvency Act (under which a bankrupt had a duty to do what a trustee might reasonably require for the carrying out of the trustee's functions); and section 363(2) ibid (under which a bankrupt was obliged to do all such things as he might be directed to do by the court for the purposes of his bankruptcy). Those functions included getting in the estate.

12. Further Mr Davies submitted that it would be entirely illogical if the position were to render the rights of creditors less effective in a collective bankruptcy process than in the period leading to bankruptcy, when a debtor had failed to meet his obligations, despite having the means to do so, but had not yet formally made himself bankrupt. In this context Mr Davies referred to *Blight v Brewster* [2012] 1 WLR 2841[5], where Mr Blight, a judgment creditor, applied for an order requiring Mr Brewster, his judgment debtor, to elect to draw down a lump sum from his pension in order to enable the judgment creditor to obtain a third party debt order against the pension trustees. Mr. Gabriel Moss QC, sitting as a deputy judge of the High Court, held (at [70]):

> "There appears to me to be a strong principle and policy of justice to the effect that non-bankrupt debtors should not be allowed to hide their assets in pension funds when they had a right to withdraw moneys needed to pay their creditors."

13. Accordingly, Mr Moss granted an injunction pursuant to s.37(1) of the Senior Courts Act 1981 compelling Mr Brewster to delegate to the judgment creditor's solicitor the power to elect to receive 25% of his pension as a lump sum, up to the amount needed to pay the balance of the judgment debt. Mr Davies submitted that this "strong principle and policy of justice" applied equally to a bankrupt who wished to "hide" monies which were not needed to meet his reasonable domestic needs in pension funds when he had a right to withdraw the moneys to pay his creditors. Otherwise, if the judge in the current case were correct, Mr Brewster would have been better off presenting his own petition prior to the hearing. Accordingly, Mr Davies submitted, where the court had determined that the payments which a bankrupt was entitled to elect to receive from a pension were not necessary for meeting his reasonable domestic needs and those of his family and ordered the bankrupt to pay an equivalent sum to the trustee pursuant to section 310(3)(a), it was clear that the court might, where appropriate, grant injunctive relief against the bankrupt to enforce that order.

14. On behalf of the respondent, Mr Sykes QC sought to support the judge's decision on the issue of construction and to demonstrate that it was only pensions *in payment* (i.e. where an election had been made by the bankrupt to draw down all or some part of his entitlement) which could be the subject of a section 310 order. He relied upon three principal arguments to support his case: namely: the language of section 310 and the statutory framework of which it formed a part; the need for clear words before possessions can be interfered with; and the changes made to section 310 by the WRPA. He submitted that there was a sharp distinction drawn by the legislation between *rights* under a registered pension scheme, which were protected from

[5] This case was cited in argument to the learned Deputy Judge but was not referred to in his judgment.

creditors and did not form part of the bankrupt estate, and *income*, which was not protected. Income meant an actual receipt of money, or an unqualified right to such a receipt, which was to all intents and purposes the same thing. It did not mean the pension rights themselves as the appellant urged.

15. Further, by a respondent's notice, Mr Sykes submitted, in the alternative, that, in the event that the appeal was allowed the court, in making any IPO, should have regard to tax that would fall due on the payments and also the significant costs incurred by the appellant's representatives which the respondent would have to meet if costs were awarded against him. He also submitted that the respondent's evidence had never been that he had enough to live off for the rest of his life absent the generosity of his family; accordingly, allowance needed to be made for his future expenditure.

The current statutory provisions

16. Before turning to section 310 of the Insolvency Act itself, it is convenient to refer to the provisions in Part IX ("Bankruptcy") of the Insolvency Act relevant to the vesting of property in the trustee in bankruptcy.

17. Section 306 of the Insolvency Act provides for the vesting of the bankrupt's estate in the trustee immediately on the latter's appointment. It is in these terms[6]:

> "306(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.
>
> (2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."

18. In that context the "bankrupt's estate" is defined by section 283(1) of the Insolvency Act:

> "283(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts [Parts VIII to XI of the Insolvency Act] comprises –
>
> (a) **all property belonging to or vested in the bankrupt at the commencement of the bankruptcy**, and
>
> (b) **any property which by virtue of any of the following provisions of this Part** [i.e.Part IX of the Insolvency Act] **is comprised in that estate or is treated as falling within the preceding paragraph.**
>
> (2) Subsection (1) does not apply to—

[6] All emphasis in bold is mine.

> (a)such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;
>
> (b)such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family.
>
> This subsection is subject to section 308 in Chapter IV (certain excluded property reclaimable by trustee).
>
> . . .
>
> (4) **References in any of this Group of Parts to property, in relation to a bankrupt, include references to any power exercisable by him over or in respect of property** . . . and a power exercisable over or in respect of property is deemed for the purpose of any of this Group of Parts to vest in the person entitled to exercise it at the time of the transaction or event by which it is exercisable by that person (whether or not it becomes so exercisable at that time).
>
> . . .
>
> (6) This section has effect **subject to the provisions of any enactment not contained in this Act under which any property is to be excluded from a bankrupt's estate**."

19. "Property" is defined, in section 436 of the Insolvency Act , to include:

> ". . . money, goods, things in action, land and every description of property wherever situated and also obligations **and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;**"

20. The basic provision, therefore, is that all property (including things in action, present or future, vested or contingent) belonging to, or vested in the bankrupt at the date of the bankruptcy order vests in the trustee immediately on his appointment – sections 283(1)(a) and 306(1) of the Insolvency Act. However, as section 283(6) of the Insolvency Act provides, that is subject to provisions of other statutes excluding specific property from a bankrupt's estate.

21. Section 159(5) of the Pension Schemes Act 1993 provided that the rights of a bankrupt who was entitled or prospectively entitled to a guaranteed minimum pension under an occupational pension scheme or to payments giving effect to protected rights under such a scheme, did not vest in his trustee in bankruptcy. Likewise, section 91 of the Pensions Act 1995 provided that rights under an occupational pension scheme were effectively unassignable, and accordingly such rights did not vest in a trustee in

bankruptcy as part of the bankrupt estate. However, this did not prevent the making of an income payments order; see subsection 91(4).

22. Subsequently, and critically for present purposes, section 11(1) and (2) of the WRPA made similar provisions in relation to approved personal pensions, thereby effectively reversing the decision of Ferris J in *In re Landau* [1998] Ch 223, who had decided that, on the basis of the legislation as it then stood, and in distinction to the position under occupational pension schemes, rights under a personal pension vested in a trustee in bankruptcy. (That decision was upheld by this court in *Krasner v Dennison and others* [2001] Ch 76 in relation to bankruptcies commencing before the section came into force.)

23. Section 11 of the WRPA is in the following terms:

> "11 Effect of bankruptcy on pension rights: approved arrangements
>
> (1) Where a bankruptcy order is made against a person on a 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; …."

As a consequence, none of the respondent's rights in relation to his SIPP and the Phoenix Life policies vested in the appellant as trustee on the former's bankruptcy as part of the bankrupt estate. These included any rights exercisable by the respondent to require the pension providers to pay him an income or a lump sum under the terms of the respective pensions.

24. Property not belonging to or vested in the bankrupt at the date of the bankruptcy order, but acquired by him subsequently ("after-acquired property"), does not vest in the trustee unless and until it becomes comprised in the bankrupt's estate by virtue of some other provision in Part IX of the Insolvency Act – see section 283(1)(b) of the Insolvency Act.

25. After-acquired property becomes comprised in the bankrupt's estate under the provisions contained in section 307 of the Insolvency Act. The section is in these terms, so far as material:

> "307(1) Subject to this section and section 309, the trustee may by notice in writing claim for the bankrupt's estate any property which has been acquired by, or has devolved upon, the bankrupt since the commencement of the bankruptcy.
>
> (2) A notice under this section shall not be served in respect of—

> (a) any property falling within subsection (2) or (3) of section 283 in Chapter II,
>
> (aa) any property vesting in the bankrupt by virtue of section 283A in Chapter II,
>
> (b) **any property which by virtue of any other enactment is excluded from the bankrupt's estate,** or
>
> (c) without prejudice to section 280(2)(c) (order of court on application for discharge), any property which is acquired by, or devolves upon, the bankrupt after his discharge. . . .
>
> (3) Subject to the next following subsection, upon the service on the bankrupt of a notice under this section the property to which the notice relates shall vest in the trustee as part of the bankrupt's estate; and the trustee's title to that property has relation back to the time at which the property was acquired by, or devolved upon, the bankrupt.
>
> (4) ...
>
> (5) **References in this section to property do not include any property which, as part of the bankrupt's income, may be the subject of an income payments order under section 310**."

26. In other words, any property which by virtue of any other enactment is excluded from the bankrupt's estate cannot be the subject of a notice claiming it as after-acquired property for the benefit of creditors: see section 307(2)(b). Likewise, section 307(5) excludes from the operation of section 307(3) "property which, as part of the bankrupt's income, may be the subject of an income payments order under section 310 of the Insolvency Act ".

27. Section 310, as it currently stands, is in these terms, so far as material:

> "Income payments orders
>
> (1) The court may make an order ("an income payments order") claiming for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order.
>
> (1A) An income payments order may be made only on an application instituted--
>
> (a) by the trustee, and
>
> (b) before the discharge of the bankrupt.

(2) The court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt *when taken together with any payments to which subsection (8) applies* below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family.

(3) An income payments order shall, in respect of any payment of income to which it is to apply, either--

(a) require the bankrupt to pay the trustee an amount equal to so much of that payment as is claimed by the order, or

(b) require the person making the payment to pay so much of it as is so claimed to the trustee, instead of to the bankrupt.

(4) Where the court makes an income payments order it may, if it thinks fit, discharge or vary any attachment of earnings order that is for the time being in force to secure payments by the bankrupt.

(5) Sums received by the trustee under an income payments order form part of the bankrupt's estate.

(6) An income payments order must specify the period during which it is to have effect; and that period--

(a) may end after the discharge of the bankrupt, but

(b) may not end after the period of three years beginning with the date on which the order is made.

(6A) An income payments order may (subject to subsection (6)(b)) be varied on the application of the trustee or the bankrupt (whether before or after discharge).

(7) 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 in respect of the carrying on of any business or in respect of any office or employment *and* (despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999)[7] *any payment under a pension scheme but excluding any payment to which subsection (8) applies*[8].

(8) This subsection applies to--

[7] Words underlined inserted by the WRPA, s18, Sch 2 para 2.
[8] Words in italics inserted by the Pensions Act 1995, s. 122, Sch 3 para 15b.

> *(a) payments by way of guaranteed minimum pension; . . .*
>
> *(b) payments giving effect to the bankrupt's protected rights as a member of a pension scheme.. . ..*
>
> *(9) In this section, "guaranteed minimum pension" has the same meaning as in the Pension Schemes Act 1993.*
>
> *"protected rights" has the meaning given in section 10 of the Pension Schemes Act 1993, as it had effect before the commencement of section 15(1) of the Pensions Act 2007.*"

28. The italicised words in subsections (2), (7), (8) and (9), were added by the Pensions Act 1995. The underlined words in section 310(7) were inserted by the WRPA, section 18, Schedule 2 paragraph 2. It provided as follows:

> "In section 310(7) of the Insolvency Act 1986 (bankrupt's income against which income payments orders may be made includes certain payments under pension schemes), after "employment and" insert "(despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999)".

29. Sections 342A to 342C of the Insolvency Act (introduced by s.15 of the WRPA) provide for recovery by the trustee of excessive pension contributions where the bankrupt has attempted to abuse the protection of s.11 of the WRPA by making excessive pension contributions and such contributions have unfairly prejudiced the bankrupt's creditors. I quote the material provisions of section 342A:

> "342A Recovery of excessive pension contributions."
>
> (1) Where an individual who is adjudged bankrupt—
>
> (a) has rights under an approved pension arrangement, or
>
> (b) has excluded rights under an unapproved pension arrangement,
>
> the trustee of the bankrupt's estate may apply to the court for an order under this section.
>
> (2) If the court is satisfied—
>
> (a) that the rights under the arrangement are to any extent, and whether directly or indirectly, the fruits of relevant contributions, and
>
> (b) that the making of any of the relevant contributions ("the excessive contributions") has unfairly prejudiced the individual's creditors,

> the court may make such order as it thinks fit for restoring the position to what it would have been had the excessive contributions not been made.
>
> (5 In subsections (2) to (4) "relevant contributions" means contributions to the arrangement or any other pension arrangement—
>
> (a) which the individual has at any time made on his own behalf, or
>
> (b) which have at any time been made on his behalf.
>
> (6) The court shall, in determining whether it is satisfied under subsection (2)(b), consider in particular—
>
> (a) whether any of the contributions were made for the purpose of putting assets beyond the reach of the individual's creditors or any of them, and
>
> (b) whether the total amount of any contributions—
>
> (i) made by or on behalf of the individual to pension arrangements, and
>
> (ii) represented (whether directly or indirectly) by rights under approved pension arrangements or excluded rights under unapproved pension arrangements,
>
> is an amount which is excessive in view of the individual's circumstances when those contributions were made."

30. I can do no better than quote the judge's summary of the statutory position as set out at paragraph 26 of the judgment:

> "In short, the position since 1999 has been that rights under personal pension arrangements do not in general vest in a trustee in bankruptcy. Nevertheless, as has always been the case with occupational pensions, provision has been maintained for an IPO to be made in certain circumstances. It may be thought that the parenthetical words in section 310(7) were required in order to ensure that the position under personal pension policies did not diverge from that applicable to occupational pension schemes. There was to be no question of the 1999 Act going so far as to protect from creditors all income of a bankrupt even where such income stems from a pension. This was also the case as regards occupational pensions under the 1995 Act: see section 91(4)."

31. It is also pertinent to note that the Explanatory Notes to section 11 of the WRPA, which extended the protection from bankruptcy for occupational pensions to all approved pensions, state as follows:

> "This section provides statutory protection on bankruptcy for pension rights in approved schemes.
>
> Where a person becomes bankrupt, his assets usually vest in the trustee in bankruptcy. However, the position of pensions on bankruptcy was considered by the Pensions Law Review Committee (PLRC), set up under the chairmanship of Professor Goode. **The Committee's report, published in 1993, recommended that pension rights (as opposed to the pension payments themselves) should not be counted as an asset in bankruptcy.** (The report was published as Pension Law Reform: The Report of the Pensions Law Review Committee – Cmd 2342-1.) The recommendations on pensions and bankruptcy in the Report were accepted by the Government (Security, Equality, Choice: The Future for Pensions – Cmd 2594). The Committee's recommendations formed the basis for sections 91 to 95 of the Pensions Act 1995. However, the provisions on bankruptcy in the Pensions Act only apply to occupational pension schemes. No equivalent protection for other types of pension, for example personal pensions, was included in that Act. **The measures here provide statutory protection on bankruptcy for pension rights in approved schemes, as defined. Subsection (1) provides that where a bankruptcy order is made against a person, any rights that he has in an approved pension arrangement are to be excluded from his estate for the purposes of the bankruptcy proceedings.** Subsections (2) and (3) define the expression "approved pension arrangement".

32. The Explanatory Notes to paragraph 2 of Schedule 1 of the WRPA (which insert the reference to WRPA in section 310(7) of the Insolvency Act) state what those words are intended to do:

> "These paragraphs provide that income payments order can still be made despite anything in section 11 and 12, by amending section 32(2) of the Bankruptcy (Scotland) Act 1985 and section 310(7) of the Insolvency Act . Income payments orders are made by a Court against a bankrupt and stipulate that a percentage of his income must be surrendered and paid to his creditors. **Pension income actually in payment is included in the calculation of the bankrupt's income**. **The revised wording makes it clear that pension "rights" in approved schemes, and in those unapproved schemes that would be protected on bankruptcy, do not extend to pension 'income'. This ensures that income payments orders can still be made in respect of pension income".**

33. As Lord Steyn said in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at paragraph 5, relevant Explanatory Notes can be a useful aid to construction of a statutory provision:

> "In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cross, Statutory Interpretation, 3rd ed (1995), pp 160-161."

34. Finally, section 333(1) of the Insolvency Act is in the following terms:

> "Duties of bankrupt in relation to trustee.
>
> (1) The bankrupt shall—
>
> (a) give to the trustee such information as to his affairs,
>
> (b) attend on the trustee at such times, and
>
> (c) do all such other things,
>
> as the trustee may for the purposes of carrying out his functions under any of this Group of Parts reasonably require.
>
> (2) Where at any time after the commencement of the bankruptcy any property is acquired by, or devolves upon, the bankrupt or there is an increase of the bankrupt's income, the bankrupt shall, within the prescribed period, give the trustee notice of the property or, as the case may be, of the increase.
>
> (3) Subsection (1) applies to a bankrupt after his discharge.
>
> (4) If the bankrupt without reasonable excuse fails to comply with any obligation imposed by this section, he is guilty of a contempt of court and liable to be punished accordingly (in addition to any other punishment to which he may be subject)."

Discussion and determination

35. In my judgment, the issues which (at least theoretically) arise on this appeal may be articulated as follows:

    i) whether section 333(1), read in conjunction with section 310, of the Insolvency Act enables a trustee in bankruptcy *to require* a bankrupt, who has reached the age at which he is contractually entitled to draw down or "crystallise" his pension (but has not done so), to elect to do so, so that the trustee may apply for an IPO under section 310 in relation to the funds drawn, or to be drawn, down;

    ii) if so, what criteria apply to determine the manner in which, and the extent to which, the bankrupt may be required by the trustee to draw down his pension;

    iii) how, if such a power exists, it should be exercised in the present case, having regard to the appellant's reasonable domestic needs.

36. Analytically there are two ways, from the trustee's perspective, of approaching the first issue:

    i) The first is to argue that, even on the assumption that the bankrupt's contractual rights to draw down or crystallise his pension after he has reached a certain age do *not* fall within the description of any "*payment* in the nature of income ……. to which he from time to time *becomes entitled"* for the purposes of section 310(7), nonetheless the trustee is entitled under section 333(1) to require the bankrupt to exercise such rights and elect to receive payment. The argument would run that, since one of the functions of the trustee is to obtain an IPO in respect of income that is potentially receivable by the bankrupt during the three-year period so as to satisfy creditors' claims, the trustee is entitled to require the bankrupt to draw down income from his pension for the *purpose* of enabling the trustee to carry out his functions under section 310(7) in relation to the income payments under the pension once drawn down.

    ii) The second approach (and this was the way in which Mr Davies principally presented his argument before us, and indeed how the judge dealt with the case at first instance) is to argue that the italicised wording in section 310(7):

    > "For the purposes of this section the income of the bankrupt comprises *every payment in the nature of income …… to which he from time to time becomes entitled*,"

    meant that, once a bankrupt pension holder had reached the required age, and was accordingly entitled to draw down his pension on request, his vested right to elect to do so, and the subsequent payments which would be made to him by the pension provider, were within section 310(7) and therefore were subject to the IPO procedure. It accordingly followed that,

> either under section 363(2), section 333 or the general jurisdiction of the court, the bankrupt could be compelled to elect to draw down his pension.

37. In my judgment neither of these arguments is correct.

38. As to the first argument (and on the hypothesis that the bankrupt's contractual rights to draw down his pension do *not* fall within the description of "payments in the nature of income ……. to which he from time to time becomes entitled" in section 310(7)), in my judgment it cannot be said that the trustee has "functions" in relation to property which is expressly excluded from the estate which vests in him on the bankruptcy of the bankrupt and likewise expressly excluded from the after-acquired property provisions. It would drive a coach and horses through the protection afforded to a bankrupt's pension rights by the Insolvency Act and pension legislation if a trustee were able, in effect, to require a bankrupt to make the entirety of his pension available for satisfaction of his creditors' claims, by the simple expedient of a request under section 333 or a court order under section 363(2), thereby converting excluded property into "income".

39. Contrary to Mr Davies' submissions, the fact that, prior to bankruptcy, a judgment creditor may, by injunction, compel a judgment debtor to make an election to draw down his pension, as Mr Gabriel Moss QC held in *Blight v Brewster*[9], in order to satisfy the former's judgment, does not support the argument that post-bankruptcy a trustee can require a bankrupt to make such an election. As Mr Moss himself pointed out, there is a meaningful distinction between the position prior to and after bankruptcy – prior to bankruptcy pensions are not protected, after bankruptcy they are. In giving judgment, Mr Moss said:

> "70. …… There appears to me to be a strong principle and policy of justice to the effect that debtors should not be allowed to hide their assets in pension funds when they had a right to withdraw monies needed to pay their creditors.
>
> 71. Whilst Parliament has seen fit in the area of bankruptcy to create special statutory protections for pensions, no such intervention has taken place in the area of the enforcement of judgments. Mr. Weale for the Defendant nevertheless suggested that public policy requires pensions to be treated as exceptional when it comes to the execution of judgments on the basis of the special treatment under bankruptcy law.
>
> 72. In my judgment, that suggestion is erroneous. A person who files successfully for bankruptcy surrenders all his assets, save those protected by law, to a trustee in bankruptcy for the payment of his debts. Filing for bankruptcy is a relief from the ability of creditors individually to execute upon the debtor's assets, in favour of collective execution. But this relief comes at a significant price. Bankruptcy carries very important disadvantages in terms of obtaining credit and acting as a

[9] I assume for the purposes of this judgment (without deciding) that the decision in *Blight v Brewster* was correct. No argument to the contrary was presented in this case.

> director of a limited liability company, such restrictions being designed to protect the public. A judgment debtor in my view cannot have the benefits of bankruptcy without its burdens. If he chooses the advantage of not being bankrupt, for example because he considers himself to be solvent, then he must pay his debts or his assets (including contingent assets subject to some act on his part) will be amenable to the enforcement of judgments by individual creditors."

40. We were not referred to any authority which supported the proposition that a bankrupt could be required by a demand made by the trustee under section 333 to take steps to obtain property excluded from the estate, and convert it into income receivable by him, so that it could be subject to an IPO on the application of the trustee. Indeed, it was common ground, for example, that a trustee could not require a bankrupt to work so as to receive a salary that might be subject to an IPO. Nor did Mr Davies suggest that a trustee could compel a bankrupt, for example, to request a payment from a discretionary trust of which he was a discretionary beneficiary.

41. As to the second argument, it is likewise in my judgment wrong. My reasons for this conclusion are as follows.

42. As a matter of construction of section 310 of the Insolvency Act, there is no basis for concluding that a bankrupt's contractual rights to draw down or "crystallise" his pension come within the definition of "income of the bankrupt" within section 310(7). The language of that sub-section, when construed in the context of the statutory framework and the various changes effected by the pension legislation, simply does not support a construction which characterises a pension holder's contractual rights under his pension to elect, after reaching a certain age, to draw down, or "crystallise" his pension, in the form of a lump sum or income payments, as "*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*" for the purposes of section 310(7). Such a construction is wholly unrealistic. The contractual *right* to elect, by service of a notice on the pension provider, to receive a lump sum or income payment, in the pension context is very different in character from an actual *payment* or the right to receive that actual *payment*, once the relevant election has been made. Indeed, normally, until well after the relevant election has been made, there will be no legal right as such to receive any specific payment, particularly in the case of a SIPP, where the fund may comprise assets which are not readily marketable. In the context of section 310, *payment* and *payment to which he from time to time becomes entitled* mean just that; *payment* does not mean a chose in action or a bundle of rights which, if and when exercised, and only then, give rise to the making of a payment or the entitlement to a payment. The language of section 310 is addressed to capturing income; there is no suggestion in the language that it is conferring a power on the court to require the bankrupt to exercise a power - in relation to property expressly excluded from the bankruptcy estate - to generate income.

43. That approach is supported by the fact that, when specific reference is made in section 310(7) itself to pension income, such income is described as "any *payment* under a pension scheme". Whilst this necessarily includes any payment "from time to time made to him or to which he from time to time becomes entitled", it seems to me to be a wholly inapt description to cover the bundle of rights enjoyed by the pension holder

under his scheme to elect to draw down his pension, to choose the amount and manner of drawdown and to enforce the choice which he has made against his pension provider.

44. The Insolvency Act, and the relevant provisions of the Pensions Act 1995 and the WRPA, 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 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).

45. As with the first argument referred to above, it would drive a coach and horses through the protection afforded to private pensions and rights thereunder by virtue of section 11 of the WRPA, if, by the simple expedient of an application for an IPO, a trustee (subject to satisfying the court that the amount drawn down could be characterised as income and that the IPO did not reduce the bankrupt's income below what appeared to the court to be necessary for meeting his and his family's reasonable domestic needs) could in effect obtain payment of the entirety (or almost the entirety) of a bankrupt's pension fund into the bankrupt's estate so as to meet the claims of his creditors, notwithstanding that the pension was not in payment. In my judgment, Parliament has decided to draw the balance between, on the one hand, the interests of the State in encouraging people to save through the medium of private pensions (so that in old age or infirmity they will not be a burden on the resources of the State), and, on the other, the interests of creditors in receiving payment of their debts, by the mechanism of sections 342A to 342C of the Insolvency Act which enable a trustee to claw back excessive pension contributions made by the bankrupt where such contributions have unfairly prejudiced the bankrupt's creditors.

46. Mr Davies submitted that this is an unsatisfactory, and largely unused, remedy because (or so he asserted) it is extremely difficult for a trustee to establish to the satisfaction of the court for the purposes of section 342A that any pension contributions made by the bankrupt were made for the purpose of putting assets beyond the reach of the individual's creditors, or were amounts which were excessive in view of the individual's circumstances when those contributions were made. But, in fact, those two considerations are merely matters which the court is required to *consider* for the purpose of deciding whether payment of the contributions has unfairly prejudiced the bankrupt's creditors: see subsections 342A(2)(b) and (6). Even if they are not established, the court may nonetheless be entitled to conclude that the excessive contributions have unfairly prejudiced the bankrupt's creditors, and make an appropriate order restoring the position to what it would have been had the excessive contributions not been made. The surprising conclusion, if Mr Davies' submissions were correct, is that a trustee in bankruptcy by seeking an IPO under section 310 can effectively side-step the hurdles of section 342A in order to scoop the bankrupt's un-crystallised pension fund. In my judgment it is a matter for Parliament to decide where the line should be drawn between protecting the interests of creditors on the one hand and safeguarding the savings of private pension holders on the other.

47. Moreover, if the trustee's arguments were correct (either under the first head or the second), and an IPO could be made in circumstances such as the present case (where the bankrupt has a vested right to elect to draw down or crystallise the entirety of his pension fund, but has no intention of doing so), then necessarily the court, on an application by the trustee either under section 310 or under section 363 would have to conduct an exercise to determine the precise nature of the election which it would require the bankrupt to make. This would involve the court determining, not merely the amount of the drawdown from the pension fund, but also the manner in which it was to be paid: namely whether it should be a tax-free lump sum or one attracting tax; whether it should be an annuity or other income payment; or a combination of the foregoing. I ask rhetorically by what criteria would the court determine these matters? None are specified in the relevant provisions of the Insolvency Act or the WRPA, other than the requirement in section 310(2) that the income of the bankrupt must not be reduced below what appears to the court to be necessary for meeting his reasonable domestic needs and those of his family. But, as Mr Sykes submitted, the appellant's construction sits uneasily with section 310(2). Does this mean that, when the trustee, as here, seeks drawdown and payment of the entirety of the bankrupt's pension fund, the court is limited to considering the income needs of the bankrupt and his family over the next three years (the maximum period over which an IPO can extend under section 310(6)) or is it entitled to look to the potential income and health-care needs of the bankrupt throughout his lifetime and in his old age? Is the court to have regard to the type of statutory considerations in play in a determination under section 342A? The judge regarded the absence of any statutory criteria informing the court as to how it should direct the bankrupt to exercise the relevant options available to him as a formidable obstacle to the trustee's arguments[10]. I agree.

48. The language of section 310(7) itself does not sit happily with the appellant's argument to the effect that income includes pension rights under pension plans which are not yet in payment and where to date no election has been made. The subsection defines income as comprising "every payment in the nature of income which is from time to time made to him or which he from time to time becomes entitled". The words "*becomes entitled*" are hardly apt to describe rights under a pension which is not yet in payment, since the individual may, as in the present case, have had those rights *before and throughout* their bankruptcy, where, as here, the pension holder had already, prior to bankruptcy, reached pensionable age under the terms of the relevant scheme. In those circumstances it is difficult to see how can it be said that he "from time to time *becomes* entitled" to the "payment", if indeed "payment" is to be equated with a vested right. The respondent's construction that section 310 only applies to pensions in payment sits far more easily with the statutory language.

49. Mr Davies sought to support his argument by giving an example of a self-employed builder who, during the course of his bankruptcy, became entitled to receive payment from his customers during the three-year period of an IPO. He submitted that the builder would, on the judge's analysis (viz. that a bankrupt only becomes "entitled" to payment when that payment has become "contractually payable"), be able to avoid his income forming part of an assessment under section 310 by contracting with his customers on the basis that payment fell due only after receipt of his final invoice, and

[10] See paragraph 29 of the judgment and also, to similar effect, the decision of the District Judge *in Re X (Application for Income Payments Order)* [2014] BPIR 1081 at [51] and [52].

then waiting until after his discharge to render invoices for work completed during the first year of his bankruptcy.

50. I do not consider that such an analogy is of any assistance to the appellant's case. The submission of an invoice under a building contract in the hypothetical example postulated by Mr Davies is of a totally different character from the exercise of a particular option under a pension plan. I have little doubt that in such circumstances a trustee could require the bankrupt pursuant to section 333 to submit the final invoice. Moreover, the contractual right or chose in action comprised in the bankrupt builder's right to submit an invoice itself could theoretically be subject to a notice by the trustee claiming it as after-acquired property under section 307, even though the payment itself, being income, would fall outside the section. Unlike pension rights, contractual rights are not excluded property. The respondent, however, is in a wholly different position from the hypothetical builder. If the respondent were to issue a demand for payment to his pension provider, he would be told that he must first turn his pension rights to account, with permanent consequences, foregoing some possibilities in favour of others, and taking steps to sell the SIPP investments, in order for a payment to become due which would depend on the amounts available and capable of being realised.

51. The legislative history of the pensions legislation and the amendments to the Insolvency Act strongly support the respondent's arguments on construction, and not those of the appellant. However, I would have reached the conclusion which I have in relation to the construction of section 310(7), even in the absence of the Explanatory Notes to which I have already referred. I should also say that, contrary to Mr Davies' submission, I do not consider that, in the light of the subsequent legislative developments, the recommendations in the 1982 Cork report that "the Court's power to make an Income Payments Order should be widely drawn and relate to all sources of income, other than certain pensions and other payments which by statute do not vest in the trustee" supports the appellant's construction in the present case. That recommendation predates the relevant amendments made both by the Pensions Act 1995 and the WRPA.

52. As referred to above, prior to the coming into effect of section 11 of the WRPA, rights under a personal pension plan (as opposed to under an occupational pension scheme) vested in the trustee on the making of a bankruptcy order: see *Krasner v Dennison and others, supra,* upholding the decision of Ferris J in *In re Landau, supra*. According to the decision of a district judge in *Carmon v Baron* [1996] Pens. L.R. 229, that enabled the trustee to exercise "the options in the manner he considers most beneficial to creditors". However, given that rights under registered personal pension schemes no longer form part of the bankrupt's estate which vests in the trustee, in the absence of express statutory language conferring such a power, there is, in my judgment, no basis for concluding that the court has power to require a bankrupt to exercise his options in any particular way.

53. Even prior to the introduction of the amendments made by the WRPA, it was clear that, in the case of occupational pensions, section 310 could only apply to enable a trustee in bankruptcy to obtain an IPO in circumstances where the occupational pension was "in payment". The point was specifically made in the extracts from the Report of the Pension Law Review Committee under chairmanship of Professor Roy Goode which were cited by Chadwick LJ in *Krasner* at [57]. An extension to all

registered pension schemes was proposed by the Government in its 1998 White Paper: "Security, Equality Choice: The Future for Pensions". The aim of the WRPA which followed was accordingly to extend the protection in relation to occupational schemes to all registered pension schemes. This was set out in the Explanatory Notes to section 11 of the WRPA which I have quoted above. Those explanatory notes are a legitimate aid to construction. Even if the position had not been clear, which I consider that it is, those notes emphasise that section 310 of the Insolvency Act does not apply to pension rights under private pension plans.

54. My conclusion that, in the context of section 310, and as a matter of ordinary language the phrase "payment in the nature of income …… to which he from time to time becomes entitled" refers to a pension in payment is supported by decisions such as that of Neuberger J (as he was then) in *Barclays Bank plc v Holmes & Ors* [2000] Pens L.R. 339 and *In the Estate of Borger Deceased* [1912] VLR 310 at 313, albeit those decisions were reached in a different statutory context. However, I would have reached the same conclusion irrespective of those decisions.

55. It follows that, like the judge, I cannot accept the reasoning of. Mr Bernard Livesey QC sitting as a Deputy Judge of the Chancery Decision in *Raithatha, supra.* It seems to me that he failed to appreciate the effect of the fundamental changes brought about by section 11 of the WRPA with regard to the protection of rights under private pension plans in bankruptcy or the alignment of such protection to that which had previously been afforded to rights under occupational pension schemes. Moreover, it appears that Mr Livesey did not have the advantage of being referred to the Explanatory Notes to the relevant provisions of the WRPA, which necessarily provide a useful aid to the context and interpretation of the relevant sections of the Insolvency Act which the former amended.

56. For all the above reasons, which largely reflect those of the judge, I would reject the appellant's suggested construction of section 310(7).

57. It follows that the second and third issues which I have articulated above do not arise for consideration.

Disposition

58. Accordingly, I would dismiss the trustee's appeal.

Sir Stanley Burton:

59. I agree.

Lord Justice McFarlane

60. I also agree.