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Enforcing judgments: pensions are not always sacrosanct

Recent findings from an international team of scientists funded by the United Kingdom Medical Research Council and the United States Environmental Protection Agency, reported in the UK press on 22 February 2017, indicate that life expectancy will soon exceed 90 years, upending previous assumptions about human longevity that existed at the beginning of the 20th century.

Predictions of increasing lifespans raise serious questions about the health and social care that will be needed by large numbers of the population living through their 80s and into their 90s, as well as the sustainability of current pension plans. A central purpose of pensions is to allow people to continue to live and consume once they have stopped paid work. Given the tax advantages, pensions often harbour substantial amounts.

Are unexercised pension rights safe harbours against judgment debts? Recent case law in England and Wales indicates maybe not.

Broadly speaking, a bankrupt in England and Wales is afforded protection from creditors to the extent that payments to creditors will only come out of 'surplus income', that is, monies left over after the payment of the bankrupt's living expenses. Approved pension schemes are excluded from a bankrupt's estate by virtue of section 11 of the Welfare Reform and Pensions Act 1999. This can lead to situations where, in order to shield their pensions from judgment creditors, judgment debtors declare themselves bankrupt while at the same time choosing *not* to exercise any pension rights they may be entitled to for the duration of the bankruptcy.

It is important to note that if a bankrupt exercises their pension rights and is receiving pension income, any *payments* received by the bankrupt during the bankruptcy from a pension scheme will be counted as part of their bankrupt estate and available to creditors after the permitted living expenses are paid.

In a litigation context, and for the reasons explained below, it is key that potential claimants strategically assess what pension pot there may be, and when a claim should be made against it. They should do this early on in the litigation process. The recent decision of the Court of Appeal in *Re Henry (A Bankrupt)*[1] provides instructive guidance to judgment creditors in enforcing judgment debts against a debtor's pension.

Gloster LJ delivered the leading judgment in *Re Henry (A Bankrupt)*, confirming that pension rights of a defendant were afforded contrasting treatment depending on whether bankruptcy had been triggered, namely that 'prior to bankruptcy pensions are not protected [against enforcement proceedings], after bankruptcy they are'.[2]

In addition to clarifying and approving the distinction between the treatment of pensions pre and post-bankruptcy as set out in *Blight v Brewster*,[3] the decision of the Court of Appeal also approved the decision at first instance in *Re Henry*, thereby overturning a previous conflicting decision at first instance in the *Raithatha* case[4] (discussed further below).

Re Henry: facts and the decision

Henry was made bankrupt on his own petition, at which point he was 58 years old. At the date of the judgment of the Court of Appeal, he was 61 years old.

His assets included four pension policies: a self-invested personal pension (SIPP) policy and three personal pension policies. While Henry had not elected to exercise any of his rights under these pension policies, it was not disputed that he was eligible to do so. The trustee in the bankruptcy applied to the court for an income payments order under section 310 of the Insolvency Act: that Henry, in effect, draw down and pay towards his estate the percentage of the pensions available to be drawn down as a tax-free lump sum, and also any further periodic income derived from the pensions.

In seeking such an order to include Henry's pension rights – as opposed to pension income – as part of his estate, the trustee sought to rely on two previous first instance cases:

- *Raithatha v Williamson (A Bankrupt)*,[5] in which the court held that a bankrupt's undrawn pension was to be treated as income in bankruptcy on the grounds that the bankrupt was entitled to the pension income even if they had to make an election to become so entitled; and
- *Blight v Brewster*,[6] in which the court granted the judgment creditor an order requiring the judgment debtor, who was not a bankrupt, to elect to draw down a lump sum from his pension; and granted the judgment creditor a third-party debt order ordering the pension trustees to pay the amount in question towards the satisfaction of the judgment debt.

In *Re Henry (A Bankrupt)*, the Court of Appeal rejected the decision of the judge in the *Raithatha* case as incorrect, and approved the decision in *Blight v Brewster* – in particular, the comments from Gabriel Moss QC, sitting as a deputy judge of the Chancery Division, in his judgment that '[w]hilst 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*… A judgment debtor in my view cannot have the benefits of bankruptcy without its burdens' [emphasis added].

What does it mean for judgment creditors?

In summary, if you are a judgment creditor looking to enforce against a judgment debtor who is eligible to draw down or otherwise access their pension, but has not elected to do so or is deliberately refraining from doing so in light of the judgment against them, forcing such a debtor into bankruptcy could now – in light of the Court of Appeal decision in *Re Henry* – backfire in spectacular fashion, as pension rights will be afforded protection within bankruptcy proceedings. That is, they will not be available to the judgment creditor but will be regarded as an asset on which the bankrupt needs to live.

On the other hand, if the debtor petitions their own bankruptcy with a view to triggering bankruptcy protection for the pension, it is open to judgment creditors to challenge such a petition and seek an annulment of the bankruptcy order, and at the same time, a third-party debt order to access the pension funds. This requires judgment creditors to be agile.

For a judgment debtor, they may have to choose between a rock and a hard place. On the one hand, bankruptcy with its reputational, and sometimes professional and financial downsides, or on the other hand, the protection afforded to pension rights as a result of being in bankruptcy.

The key lesson in all of this is that potential judgment creditors, be they claimants in proceedings or defendants with a counterclaim, should make an early assessment of whether a pension pot is a realistic asset in the circumstances, which is an assessment that will be based on, inter alia, the defendant's age.

If it is a relevant consideration, the disclosure of the pension documents should be sought vigorously during proceedings. If freezing orders are appropriate, the full disclosure of pensions should be targeted and the freezing order served on the pension providers. Thus, the judgment creditor minimises the loss of time at the point of judgment, where a clued-up debtor may well be making a run to try to seek sanctuary for their substantial pension in bankruptcy protection.

Notes

1 [2017] 1 WLR 391.
2 *Ibid*, at para 39.
3 [2012] 1 WLR 2841.
4 [2012] 1 WLR 3559.
5 *Ibid.*
6 See n 3 above.