IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
IN BANKRUPTCY

HC11C03085

17 December 2014

IN THE MATTER OF MICHAEL GERARD HENRY

Before:
ROBERT ENGLEHART QC
(sitting as a Deputy Judge of the Chancery Division)

B E T W E E N:-

Robert William Leslie Horton

Applicant

- and -

Michael Gerard Henry

Respondent

Simon Passfield (instructed by Edwin Coe LLP) for the Applicant
Laurent Sykes and *Deborah Clark* (directly instructed) for the Respondent

[2014] EWHC 4209 (Ch)

This is the official judgment of the Court and

I direct that no further note or transcript be made

JUDGMENT

INTRODUCTION

1. This is an application by a Trustee in Bankruptcy, Mr Horton, for an income payments order ("IPO") under section 310 of the Insolvency Act 1986. The application concerns the interaction between that section and pension policies which have not yet vested, such as the Self-Invested Pension Policy ("SIPP") and the 3 personal pension policies in the present case. In brief, the principal contention of the Trustee is that an IPO may be founded on such policies even where they are not in payment, whereas Mr Henry, the Respondent and former bankrupt, asserts that unvested policies cannot form the basis for an IPO.

THE BACKGROUND

2. Mr Henry, who was born on 7 October 1954, was adjudged bankrupt on his own petition on 18 December 2012. The evidence before me disclosed the existence of claiming creditors in large amounts. The official receiver's schedule of creditors of 22 March 2013 disclosed creditor claims in excess of £6.5 million. It is nevertheless right to record that Mr Henry, whilst acknowledging an indebtedness of £387,075, disputes the true value of creditors' claims. I am, of course, not in a position to make any ruling on what may or may not have been owed at the date of the bankruptcy order.

3. The assets of Mr Henry on the date of the bankruptcy included 4 pension policies, i.e. the SIPP and 3 further personal pension policies which I have already mentioned. The policies do not form part of the bankruptcy estate. Nevertheless, it is money potentially payable under these policies which the Trustee now seeks to have made the basis for an IPO. The Trustee was

appointed as such on 15 March 2013 and filed the present application on 17 December 2013, the day before Mr Henry's discharge. Mr Henry was then aged 59. The application was adjourned by Chief Registrar Baister for hearing before a Judge because it raises for consideration the correctness of the decision of Mr Bernard Livesey QC, sitting as a Deputy Judge of the Chancery Division, in *Raithatha v Williamson* [2012] 1 WLR 3559.

THE PENSION POLICIES

4. The value of Mr Henry's SIPP will necessarily vary from day to day. It is only when it falls into payment that definite sums become payable. However, it is material to have regard to the contractual terms in order to see the context of the present application.

5. Mr Henry took out the SIPP 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. However, the selected retirement date has no contractual force; it is used for illustrative purposes and ultimately as a trigger for prompting a reminder of retirement from Suffolk Life. Paragraph 4 of the SIPP scheme terms provides for members to make contributions at any time and, as with any SIPP, a member such as Mr Henry will have control over the investments funding the eventual pension. For present purposes Paragraph 12, headed "Pension benefits" is critical. I set out some important extracts from this Paragraph:

> 12.1 You may normally choose to crystallise some or all of the separate units of your SIPP at any time on or after your 55th birthday.
> .....
> 12.3 When you crystallise part or all of your SIPP to draw benefits, you can normally choose 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. ....

12.4 If the value of the benefits crystallised exceeds your personal lifetime allowance, there will be a lifetime allowance charge of 55% on the excess if it is paid as a lump sum ("lifetime allowance excess lump sum") or 25% if you take it as pension income.
12.5 The remainder of the amount crystallised after the payment of any pension commencement lump sum, any lifetime allowance excess lump sum and any lifetime allowance charge will be allocated to provide a pension income for you in the form of:
a. capped drawdown taken from your drawdown pension fund;
b. if you meet the conditions, flexible drawdown in respect of the portion of your drawdown pension fund for non-protected rights benefits;
c. a lifetime annuity bought from an insurance company you choose; or
d. a combination of these.
You do not have to start taking pension income until you choose to.

Paragraph 12 goes on to set out a variety of options available for each of the above types of pension income. In short, there is considerable scope for choice in a scheme member as to when, how, in what amount and in what combination to take pension payments, including a lump sum payment, upon crystallisation of the SIPP. Obviously, the greater the lump sum taken the less will be the amount available to fund continuing payments whether in the form of capped drawdown, flexible drawdown or an annuity from an insurance company. There is an almost infinite variety of possible permutations of payment available under the SIPP.

6. Turning to the personal pension policies, there are 3 policies taken out under the National Provident Association Retirement Plan – With Profit. The policies have now been transferred to Phoenix Life Limited. I refer to them as the Phoenix Life policies. They each provide for an annuity payable on the pension date, being in Mr Henry's case his 70th birthday. This would be in October 2024. However, the plan does provide for the possibility of an annuitant such as Mr Henry giving written notice to vary the date for taking benefits under the

policies provided that the date falls between the annuitant's 60th and 75th birthdays. Paragraph 8 of the plan sets out the various forms of benefit which an annuitant my elect to receive. Thus, there is 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". Furthermore, there are various forms of annuity for which an annuitant may elect. Thus, it may be of level or variable amount, payable at and from different dates, provide for a minimum payment term or provide for a widow's pension as well. All the different options are to be exercised by notice in writing but if the annuitant has not exercised his elections by age 75 he receives a simple annuity of level amount. In this event, the frequency of payment and any minimum guaranteed period of payment are at the discretion of Phoenix Life.

7. The above is based on the terms of the policies and taxation rules as they now are. It is, of course, well known that there are proposals to make sweeping legislative changes in the field of pensions and taxation. I mention this because the Trustee's solicitors have suggested in correspondence that further application may be made during the currency of an IPO if one is made. However, I have to deal with matters as they now stand.

VALUE OF THE POLICIES

8. Inevitably, no precise figures for the value of the policies are possible. The value of the underlying investments is constantly changing. It will only be upon crystallisation of the benefits that there will be realisation of the underlying investments and a value can be ascribed to whatever options a policy holder makes. It is possible nevertheless to provide approximate current figures based on certain assumptions.

9. In the case of the Suffolk Life SIPP, a valuation of the underlying fund as at March 2014 was given as £929,818.23. Based on this figure there could be a potential 25% tax free lump sum of about £232,454 available plus recurring drawdown and/or annuity payments in accordance with elections made. A more recent valuation as at 9 October 2014 gives a lower valuation for the fund of £848,022.76; accordingly, any maximum tax free lump sum would be about £212,005. It is nevertheless fair to say that the investments in the underlying fund do not all consist of readily realisable shares and, therefore, there must be a measure of uncertainty as to what would in fact be available if the SIPP were crystallised.

10. In the case of the Phoenix Life policies, there is no fund value. There is a guaranteed annuity income of £2,450.68 for each policy at the age of 70. But, as I noted above, there would be the opportunity, now that Mr Henry has just 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.

11. Mr Henry's evidence is that he does not yet wish to crystallise his pension policies. As for the SIPP he would prefer to see the fund maintained with the prospect of tax free capital growth over time. He has been in receipt of royalty payments from books he has written, including translation of French classical works and a revision of Volume 15 of the Encyclopaedia of Forms and Precedents. The sums are fairly modest. However, he is otherwise dependent upon, as he put it, friends and family for payment of his living expenses. The future is uncertain, but Henry maintains that he would only crystallise his SIPP or take a lump sum out of his Phoenix Life policies as a last resort. If

eventually he has to take benefit in order to pay his living expenses, he would only take the absolute minimum possible. His ultimate objective is to pass on the value of his SIPP fund to his children in due course.

SECTION 310 OF THE INSOLVENCY ACT

12. Section 310 of the Insolvency Act 1986, as it now stands, provides in material part:

> (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.
>
> ....
>
> (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.
>
> .....
>
> (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) any payment under a pension scheme but excluding any payment to which subsection (8) applies.
>
> (8) This subsection applies to—
>
> (a) payments by way of guaranteed minimum pension
>
> ...

The above is the current wording of section 310. As I shall note in due course, it is right to say that section 310 has been amended from time to time so as to take account of various legislative changes in relation to pensions and bankruptcy.

THE PRESENT APPLICATION

13. The Application Notice of 17 December 2013 is in the following terms:

> Pursuant to section 310 of the Insolvency Act 1986 the Respondent does make such payment to the Applicant of such sums as the court shall determine just in all the circumstances ...

The form of this Notice perhaps highlights one of the difficulties in seeking to apply section 310 to uncrystallised pension policies. The precise sums available cannot be known in advance of crystallisation. No such difficulty arises when a pension is in payment and the amounts receivable will be known. In his first witness statement the Trustee explained that what was being sought was "a sum equal to: i) that 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 the Act". Again, the translation of this claim into a precise order within section 310(3) would be far from straightforward. Ultimately, in the course of his final submissions Mr Passfield formulated the form of Order which he was inviting me to make as follows:

(1) An immediate lump sum equivalent to 25% of the value of the SIPP fund as at the date of crystallisation of the SIPP fund, such crystallisation to take place within 14 days;

(2) 36 monthly payments payable from the SIPP in flexible drawdown; and

(3) The annuity value of the personal pensions, that is net of tax 3 times the annual amount of the annuity.

This refined expression of the form of Order being sought makes it clear that I am effectively being asked to order Mr Henry now to crystallise his SIPP and Phoenix Life policies and to exercise his elections in the way desired by the Trustee.

THE RAITHATHA DECISION

14. *Raithatha* was a case which, it seems to me, cannot properly be distinguished from the present case before me. There, the Trustee sought an IPO in consequence of the disclosure by the bankrupt of various pension policies. As appears from the judgment at [12] there were several pension policies not in payment but which were capable of crystallisation; the amounts available would depend on choices available to the pension holder. At [18] the Deputy Judge said:

> 18 The position now is that, where the bankrupt has, prior to the bankruptcy order, given notice to the pension fund of his election to take up his rights under the pension scheme, the operation of section 310 will present no problem. In the light of any lump sum or periodical payment paid or to be paid pursuant to that election, the sums remain the property of the bankrupt save to the extent that the trustee has applied for and obtained an order pursuant to section 310. On such an application, before making an IPO, the court will evaluate what is fair and just between the competing interests of in particular the bankrupt and his creditors and make an order which is appropriate in all the circumstances of the case.

I am far from clear that it is for a Court on an IPO application to conduct the kind of evaluation suggested by the Deputy Judge. It seems to me that the scheme of section 310 is that there is to be available for the creditors simply the surplus income over what is needed for the reasonable domestic needs of the bankrupt and his family. The Deputy Judge went on to dismiss various arguments put forward on behalf of the bankrupt but the critical passages in his judgment for present purposes are as follows:

> 34 The submission that there is no entitlement to a payment because there has been no express election appeared initially to me to be an attractive argument. I can understand the validity of the technicality illustrated by the example given and which I have quoted at para 25 above.
>
> 35 However, the question has to be asked, whether the intention of the legislature was to preserve the technical difference so that a person whose election had preceded his bankruptcy would be brought into the section 310 regime, whereas the person who had not yet elected to take his pension, would not. I ask myself "why would the legislature want to do that?"
>
> 36 Why they should want to preserve the distinction puzzles me. The distinction would provide an anomaly which is difficult to justify. Why should a person who elected on the day preceding his bankruptcy be in a position where his entitlement to enjoy the fruits of his pension is subject to the right of the trustee to apply for it to go to his creditors under section 310 whereas the person who had not yet done so is immune from the impact of the section and can enjoy the full fruits of his pension to the detriment of his creditors? By using the word "immune" I mean that, such a bankrupt could avoid losing any part of his pension simply by choosing—for whatever reason—not to issue an election until the date of his discharge. I can think of no reason of policy, nor has one been suggested to me in argument, why the legislature should have legislated in order to create such an anomaly. It cannot be to the benefit of the bankrupt's creditors; the creation of such an anomaly would be to discriminate in favour of a class of bankrupts, those who happened not to have made an election, without (so far as I can see) any reason or justification.
>
> 37 In these circumstances I am driven to the conclusion that the trustee's contentions are correct. The proper interpretation in my judgment is that a bankrupt does have an entitlement to a payment under a pension scheme not merely where the scheme is in payment of benefit but also

> where, under the rules of the scheme, he would be entitled to payment merely by asking for payment.

Thus, the Deputy Judge was treating the case before him as one where a bankrupt would be entitled to payment "merely by asking for payment". To an extent this is, of course, correct. However, uncrystallised pensions envisage further steps beyond merely asking for payment. The pension holder has to make elections among a range of potential benefits before he is entitled to receive any specific payment or payments. The Deputy Judge was plainly troubled by what seemed to him to be the anomaly of what he regarded as a technical difference between the position of those who had elected to crystallise a pension before bankruptcy and those who had not done so. It seems to me that one possible reason for a distinction could be that an IPO against a pension in payment is relatively straightforward in that the sums payable will be known. On the other hand, there is no such certainty with an uncrystallised pension which requires various elections before sums certain become payable.

15. The decision in *Raithatha* has undoubtedly given rise to much comment. It was described by the District Judge in *Re X (Application for Income Payments Order)* [2014] BPIR 1081 at [51] as "controversial". The District Judge went on to say at [52]:

> In para [36] of this judgment, the judge refers to the bankrupt being entitled to payment merely by asking for payment, but that begs the question: payment of what? Where there is more than one option, which option? How, acting under this section [310], would the court determine that? In effect the court is removing the bankrupt's right to decide how to take his pension as well as his right to decide when to take the pension. That interpretation of the decision, in my judgment, does follow logically from the way in which the judgment was given by the deputy High Court Judge, but the judgment nonetheless does not give any assistance whatsoever as to the principles which the court would adopt in making such a decision. I am told there is no other authority on the point; it is entirely novel.

In the event, the District Judge did not need to decide the case on the basis of *Raithatha*. It was held that on the particular facts it would not be right to make an IPO when the effect would be to reduce the bankrupt's future annual income below the figure she required to live on.

16. In *Raithatha* there never was a decision on the amount of the IPO because, I understand, the case was ultimately compromised. For the same reason, although the Deputy Judge gave permission to appeal, the Court of Appeal never had the opportunity of considering the correctness of the decision.

THE ISSUES

17. Against the above background I turn to the issues before me. These were two:

    (1) Does the Court have power under section 310 of the Insolvency Act 1986 to make an Income Payments Order in respect of a pension which is not in payment?

    (2) If there is such power, what amount, if any, out of sums to be drawn from Mr Henry's pensions should be retained by Mr Henry rather than paid to the Trustee?

It will be apparent that the first issue raises a matter of general principle whereas the second issue depends on the facts before me.

THE APPLICANT'S SUBMISSIONS

18. At the forefront of his argument Mr Passfield for Mr Horton put the submission that I should follow the *Raithatha* decision. Although not technically binding on me, it is well-established that a Judge at first instance should in general follow another decision at first instance unless convinced that the decision was wrong. I was referred to *Police Authority for Huddersfield v Watson* [1947] KB

842 especially at 848 and the approach of Gloster J (as she then was) in *Lornamead Acquisitions Limited v Kaupthing Bank HF* [2013] 1 BCLC 73 at [52] – [56]. Mr Passfield emphasised that *Raithatha* was a considered decision on a reserved judgment after full argument. I should reject Mr Henry's arguments, which are to a considerable extent a repeat of arguments unsuccessfully made in *Raithatha*.

19. As a matter of language, Mr Henry was "entitled" to payment under all the possible options under the SIPP and pension policies. The underlying statutory scheme on analysis did not assist Mr Henry. And Mr Passfield submitted that the Trustee was indeed entitled both to require Mr Henry to crystallise the pensions and to tell him how to make his elections. Support for this proposition could be found in section 333(1) of the Insolvency Act 1986 under which a bankrupt has a duty to do what a trustee may reasonably require for the carrying out of the trustee's functions. These functions include getting in the estate.

20. On the facts, Mr Henry made out no case for any reduction of an IPO on account of the reasonable needs of himself or his family. He did not claim that he needed the pensions. He was able to support himself through his family and friends, and his expressed wish was to maintain his SIPP unvested so as to be able in due course to pass on the funds to his children. Accordingly, Mr Passfield submitted, an IPO should be made for the full amount sought by Mr Horton.

THE RESPONDENT'S SUBMISSIONS

21. Mr Sykes on behalf of Mr Henry further developed some, but not all, of the unsuccessful arguments made in *Raithatha*. He did not, however, maintain that

a lump sum payment under a pension scheme could not constitute a "payment in the nature of income" for the purposes of section 310(7). Nor did he rely on an argument based on the Human Rights Act 1998. However, Mr Sykes also made further submissions apart from those specifically addressed by the Deputy Judge in *Raithatha*.

22. Mr Sykes invited my attention to the statutory background and the way in which pensions had attained a privileged status for the purposes of insolvency law. He also referred me to the way in which section 310 had been regarded in the Insolvency Service's guidance notes prior to the *Raithatha* decision, the HMRC Manual on Registered Pension Schemes and the Explanatory Notes to the Welfare Reform and Pensions Act 1999. There is no doubt that until the *Raithatha* decision it had been generally assumed by commentators that it was only a pension in payment which could by the subject of an IPO. The Report of the Pension Law Review Committee (Cm 2342-I) chaired by Professor Sir Roy Goode and the 1998 White Paper "Security, Equality Choice: the Future for Pensions" also proceeded on the basis of a clear distinction between pensions which are in payment and those which have not yet crystallised.

23. Against the above background, Mr Sykes made the following submissions. The statutory reference to "becomes entitled" is more naturally as a matter of ordinary language to be read as comprising a case where an actual right to payment had arisen. This accorded with the observations of Neuberger J (as he then was) in *Barclays Bank plc v Holmes & Ors* [2000] Pensions L.R. 339 at [129]. On the Trustee's approach, it could not be said that a bankrupt "becomes" entitled because he would always have been entitled. Section 310 provides no power for a court to decide when and how the holder of a pension is

to exercise the various different possibilities open to him under a pension scheme. Clear words, which do not exist here, would be required before possessions such as the bundle of contractual rights under a pension scheme could be interfered with. I should not follow the decision in *Raithatha*. It had been wongly decided and had been criticised in both the *Re X (Application for Income Payments Order)* decision mentioned above and in several critical articles to which I was referred.

24. Finally, Mr Sykes referred me to Mr Henry's statement of monthly income and expenditure in the insolvency. If I were minded to follow the *Raithatha* decision, then I should at least make some deduction for Mr Henry's continuing living expenses.

DISCUSSION

25. Before turning to the language of section 310, I should first set out the statutory background against which the section has to be considered. Although following section 91 of the Pensions Act 1995 rights under most occupational pension schemes may have been inalienable, the decision in *Re Landau* [1996] Ch 223 established that rights under a personal pension vested in a trustee in bankruptcy. Section 11(1) of the Welfare Reform and Pensions Act 1999 then took all rights under any approved pension arrangement out of a bankrupt's estate. Section 11(1) provides;

> 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.

Section 11(2) prescribes what are "approved pension arrangements". Broadly, this will be most types of pension. In any event, section 12(1) provides for the

possibility of exclusion from the bankruptcy estate also being extended to unapproved pension arrangements. In order to prevent abuse the 1999 Act also made provision for excessive pension contributions to be recoverable for the benefit of creditors.

26. 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).

27. Against the above background I turn to the language of section 310 itself. The critical sub-section is section 310(7). Payments made to a bankrupt under a pension in payment are plainly within the first part of the sub-section. The second part of the sub-section then deals with payments to which the bankrupt "from time to time becomes entitled". The dichotomy between the two parts of the sub-section is perhaps explicable by the two possibilities under section 310(3). A payment actually made to a bankrupt may have to be handed over to the trustee by the bankrupt. But for future payments an IPO can require payment directly to the trustee and thus by-pass the bankrupt.

28. The essential question is whether a bankrupt "becomes entitled" to a payment under an uncrystallised pension even though (leaving aside all questions of bankruptcy) he would not be receiving any payments from the pension trustees and would have no enforceable claim for payment against them. I am of the view that the word "entitled" suggests a reference to a pension in payment under which definite amounts have become contractually payable. Some support for this approach is to be found in the judgment of Neuberger J (as he then was) in *Barclays Bank plc v Holmes* [2000] Pensions L.R. 339 at [129]:

> .... it appears to me that, when using the word 'entitlement' in section 67(2), the legislature had in mind a case where the right to payment had arisen, in other words, to take the normal case, it covers a pension in payment. As a matter of ordinary language that is what 'entitlement' means ...

It is right to bear in mind that Neuberger J was construing a different statute and the context of his observations was a contrast between 'entitlement' and 'accrued right'. Nevertheless, it seems to have been his view that as a matter of ordinary language someone has an "entitlement" to a payment which arises under a pension in payment.

29. There is for Mr Horton the formidable problem to which the District Judge referred in the *Re X* case cited above. There is no obvious wording in section 310 of the 1986 Act which would give the Court power to decide how a bankrupt is to exercise the different elections open to him under an uncrystallised SIPP or personal pension. Nor is there any obvious route for a trustee in bankruptcy to be said to have the power. Indeed, to say that a trustee in bankruptcy can decide how the bundle of contractual rights inherent in a SIPP or personal pension is to be exercised is not easy to reconcile with the evident primary intention of the Welfare Reform and Pensions Act 1999 to remove pensions in general from a bankruptcy estate. It is difficult to accept

that the parenthetical words in section 310(7) of the 1986 Act are intended in large measure to reverse in practical effect what section 11(1) of the 1999 Act provides. If these parenthetical words are merely intended to ensure that there is no obstacle to actual payments from pension trustees being temporarily available for creditors, no such difficulty arises.

30. Mr Passfield's ingeniously suggests that it is section 333(1)(c) of the Insolvency Act 1986 which entitles a trustee in bankruptcy to decide how the elections under a bankrupt's SIPP or personal pension policy are to be exercised. Under section 310(5) of the 1986 Act "sums received by the trustee under an income payments order form part of the bankrupt's estate" and under section 305 it is the function of a trustee to get in the estate. Section 331(1) provides:

> (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.

Mr Passfield submits that it is under this provision that a trustee may direct a bankrupt how to exercise the elections open to him. The problem with this argument is that it is circular. It assumes that any sums potentially payable under an uncrystallised pension may be covered by an IPO under section 310. I cannot accept that section 333(1) can have such far reaching effect as Mr Passfield submits.

31. I am fortified in my view that section 310 of the 1986 Act does not provide a basis for an IPO in respect of an uncrystallised pension by the various commentaries to which Mr Sykes has referred. They are, of course, not an aid

to construction, but they are of some assistance in understanding the scheme of the legislation. Thus, for example, the Explanatory Notes to the Welfare Reform and Pensions Act 1999 state at page 4:

> 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.

And at page 9 in relation to an IPO the Explanatory Notes specifically state: "Pension income actually in payment is included in the calculation of the bankrupt's income". A distinction between an uncrystallised pension and a pension in payment was also evidently made in the Insolvency Service's guidance notes as they were prior to *Raithatha*. Thus, paragraph 61.7 stated:

> Once the official receiver is satisfied that a pension is an approved pension arrangement he/she should send form PNB2 to the bankrupt confirming that the pension does not form part of the bankruptcy estate. If the pension comes into payment during the bankruptcy (i.e. before discharge) the official receiver may take the pension payments into account in making an application for an income payments order or reaching an income payments agreement.

And at 61.10(a) under the heading Income payments agreement/order the guidance notes stated:

> Where a pension which is not part of the bankruptcy estate comes into payment and the individual is undischarged from the bankruptcy proceedings, the pension should be included in any calculation for an income payments order. The income of the bankrupt includes any payment under a pension despite anything in sections 11 or 12 of the welfare Reform and Pensions Act 1999.

This distinction between an uncrystallised pension and a pension in payment is also apparent in other commentaries to which Mr Sykes referred, including the passages from the 1993 report of the Committee chaired by Professor Goode cited in *Krasner v Dennison* [2001] Ch 76 at [57].

32. I entirely accept Mr Passfield's submission that I should be most wary of differing from another decision of a judge at first instance. He was right to remind me that I should only come to a different conclusion if I were persuaded that the earlier decision was wrongly decided. I have most anxiously considered the decision in *Raithatha* but I have, albeit with considerable reluctance, come to a different conclusion. Mr Henry is not entitled to payment under his pensions "merely by asking for payment". There is a considerable variety of options open to him. It would only be after he had made elections that any payment would be due to him. Only then would he become entitled to any payment. I do not consider that there is any power in the court under section 310 or in the trustee to require Mr Henry to elect in any particular way.

33. Finally, I should say that, if I had thought there was power to make an IPO effectively requiring Mr Henry to elect how, when, in what amounts and on what terms to take his pensions, I would agree with Mr Passfield that this is not a case for any reduction on account of section 310(2). Mr Henry's evidence is not that he needs any of his pensions in order to meet the reasonable domestic needs of himself or his family. On the contrary, his aim is to preserve the underlying pension funds intact for as long as possible. In particular, his evidence is that he would ideally like to pass on his SIPP to his children in due course. On the evidence as it is, despite the fact that it is not easy to see how Mr Henry is currently able to fund his living expenses, I agree with Mr Passfield that section 310(2) is not engaged. If it were open to me to make an IPO, the payments should be available in full for Mr Henry's creditors.

CONCLUSION

34. In the result I dismiss the present application. I regret having had to reach a different conclusion from that reached in *Raithatha*. But it is to be hoped that the Court of Appeal will soon have the opportunity of considering which of these two first instance decisions is correct. I will, of course, hear the parties on any matters consequential upon this judgment.