

# news

## Bankrupt members – what happens to their pensions?

In May 2000 and April 2002, new legislation came into force dealing with the pension rights of a bankrupt member. Orders made before the statutory changes remain embroiled in a minefield of legal uncertainty. Against this background, we consider the still relevant past and the ever-increasing impact of the new law on occupational pension schemes.

### The historical legal position

Are pension rights  
"property"?

- The historical position only applies to members who were both petitioned and made bankrupt before 29 May 2000.
- There was uncertainty over whether pension rights of a bankrupt member constituted "property" (which automatically transfers to the trustee-in-bankruptcy ("TIB")) under the Insolvency Act 1986.

### High Court decision

Jones v Patel (2001)

- This case confirmed that *all* of a member's pension rights earned up to the date of the bankruptcy order (except GMPs and Protected Rights) vest permanently in the member's TIB and can be used to satisfy the member's debts.
- Pension benefits earned after the bankruptcy order are "after acquired property" which the TIB can call upon or seek an Income Payments Order over, thereby diverting some or all of the benefit to the TIB for the duration of the bankruptcy (usually 3 years).

### Trustee in bankruptcy

Rights over pension  
benefits vested in him

- The TIB "sits in the shoes" of the member and has exactly the same pension rights and options (for example, early retirement and the right to a transfer).
- A TIB cannot demand that a transfer payment be paid to him rather than another pension arrangement or that benefits be paid before the appropriate time.
- Death benefits do not vest in the TIB.

## Scheme rules

Can the member's benefits be forfeited?

- Scheme rules often provide for forfeiture of a bankrupt member's benefits. (In *Jones v Patel*, there was no forfeiture clause.)
- Once benefits are forfeited, trustees can use them for the benefit of the member or his family under the terms of the rule.
- It is still not clear if forfeiture rules in occupational pension schemes are legally effective.

## Recent changes

The good and the bad news for members

No approved pension rights vest in the TIB if the member is petitioned and made bankrupt on or after 29 May 2000. But, since 6 April 2002, the pendulum has swung back in creditors' favour in two crucial respects:

- Scheme rules can no longer contain a bankruptcy forfeiture provision (therefore, a creditor can obtain an Income Payments Order over benefits in payment).
- If a Court is satisfied that a member has made "excessive" contributions, it can make an order essentially reversing them.

NB: contributions will be "excessive" if they are made with the intention of putting assets beyond creditors' reach or are excessive generally in the light of the member's circumstances.

## Unapproved pension arrangements

Exclusion orders or agreement with TIB

- There is no automatic legal protection for unapproved pension arrangements (such as UURBS and FURBS), but a member can now apply to the Court for some or all of his unapproved pension rights to be excluded from his TIB (or agree this with the TIB).
- However, the unapproved arrangement must be the member's "sole" or "main" means of pension provision.

## What does this mean for trustees?

Compliance

- Scheme rules which refer to forfeiture upon bankruptcy need to be reviewed and must generally be interpreted in line with the overriding legislation.
- Trustees will have to co-operate with any Court order for the recovery of excessive contributions but will only be able to recover their costs if the order specifically allows them to.