

# Pensions and Employment: Pensions Bulletin

10 June, 2016 / Issue 8

Legal and regulatory developments in pensions

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## I. Watch list

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Reduction in annual allowance for high income individuals  <b>Note:</b> Up to £80,000 annual allowance for tax year ending 5th April, 2016	Applies for tax years starting on or after 6th April, 2016	<a href="#">Summer Budget 2015 Supplement</a>
2.	Severance payments and tapered annual allowance pitfall	From 6th April, 2016	<a href="#">Pensions Bulletin 16/06</a>
3.	Reduction in Lifetime Allowance from £1.25 million to £1 million	6th April, 2016	<a href="#">Pensions Bulletin 15/19</a>
4.	Members who intend to apply for Fixed Protection 2016 (“FP 2016”) must have stopped accruing benefits	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>

5.	Abolition of DB contracting-out: practicalities	6 <sup>th</sup> April, 2016	<a href="#">Pensions Bulletin 15/16</a>
5.1	Employers to notify affected employees of change in contracted-out status “at the earliest opportunity” and in any event by 6 <sup>th</sup> May, 2016.		
5.2	Schemes to notify affected members before, or as soon as possible after, 6 <sup>th</sup> April, 2016 and in any event by 6 <sup>th</sup> July, 2016.		
5.3	Change template contracts of employment for new joiners to remove references to contracted-out employment.		
5.4	Update, where applicable, pensions section of employee handbook to cover consequences of contracting-out ending.		

6.	Abolition of DB contracting-out: Rule amendments needed  <b>Note:</b> Statutory power to amend, retrospective to 6 <sup>th</sup> April, 2016, expires on 5 <sup>th</sup> April, 2017	6 <sup>th</sup> April, 2016	If your scheme was contracted-out on 6 <sup>th</sup> April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5 <sup>th</sup> April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6 <sup>th</sup> April, 2016 to prevent the inadvertent addition of an additional underpin to the accrued GMPs of those active members. See further <a href="#">Pensions Bulletin 16/03</a>
7.	Abolition of DB contracting-out: Compliance with auto-enrolment requirements	6 <sup>th</sup> April, 2016	If employer is using COSR as a “qualifying scheme” for auto-enrolment purposes, scheme will need to satisfy either: <ul style="list-style-type: none"> <li>• “test scheme standard”, or</li> <li>• alternative “cost of accruals” quality test</li> </ul> if it is to continue as a “qualifying scheme”. <a href="#">Pensions Bulletin 16/05</a>
8.	Requirement to provide risk warnings when member provided with means of accessing DC benefits	6 <sup>th</sup> April, 2016	<a href="#">Pensions Bulletin 16/04</a>

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9.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 <sup>th</sup> April, 2016	<a href="#">Pensions Bulletin 16/03</a>
10.	Ban on member-borne commissions in DC schemes used for auto-enrolment	6 <sup>th</sup> July, 2016 at the latest	DC scheme trustees must notify “service providers” if the scheme is being used as a “qualifying scheme” for auto-enrolment purposes. <a href="#">Pensions Bulletin 16/04</a>
11.	EU/US Privacy Shield for transfers of personal data to US	May, 2016	To consider if transferring personal data to US. Also review transfers of data outside the EEA for compliance with the EU data protection directive. <a href="#">Pensions Bulletin 16/02</a>
12.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	For example employers with a March 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016.  Publication available to clients on request from usual pensions contact.
13.	First Chair’s annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6 <sup>th</sup> July, 2015)	For example, schemes with a 31st December year end must submit statement by 31st July, 2016.  Client note dated June, 2015 available from <a href="#">Lynsey Richards</a>

14.	Draft DC Code of Practice 13 on governance and administration takes effect	18 <sup>th</sup> June, 2016	Schemes must familiarise themselves with the revised <a href="#">Code</a> .
15.	“Brexit”	Referendum on 23 <sup>rd</sup> June, 2016	Consider potential impact on pension schemes. Client publications available on <a href="#">Slaughter and May website</a>
16.	Data protection: New Regulation	25 <sup>th</sup> May, 2018	<a href="#">Pensions Bulletin 16/05</a>

## New Law

### II. British Steel DWP consultation

#### A. Overview

The DWP has published a [consultation on the British Steel Pension Scheme](#) (BSPS), issued 26 May 2016.

To facilitate the sale of the principal employer (TSUK), a number of options are on the table. The aim of the proposals is to separate the scheme from TSUK.

The consultation lists 4 options:

#### B. Options

##### *Option 1 - Regulated apportionment arrangement*

No legislative change would be required although the Regulator would need to approve the arrangement and the PPF must not object.

##### *Option 2 - Payment of employer debt and securing benefits above PPF levels but below full member benefit levels*

This option was discounted as unaffordable.

### ***Option 3 - Changing indexation and revaluation from RPI to CPI***

1. This would require a change to legislation although certain conditions would be imposed, such as closure to accrual. This proposal is supported by the trustees and Tata.
2. Obtaining members' consent would not be practical so regulations would need to be made. Section 67 of the Pensions Act 1995 would be disapplied for these purposes and only for the British Steel scheme.

### ***Option 4 - Bulk transfer to a new scheme without consent***

1. This would be on the basis that the new scheme would pay lower pension increases and lower revaluation. Members would be allowed to opt out of the transfer. The BSPS would then enter the PPF.
2. Section 73 of the Pension Schemes Act 1993 and the Preservation regulations would also need to be amended, to allow a transfer to a scheme offering lower benefits.
3. Regulations allowing a bulk transfer without consent (subject to member opt-outs and certain conditions), would be available

to other schemes meeting the new requirements, not just the BSPS.

4. This option would only be available to very large schemes (over 100,000 members) where obtaining individual consent is impractical.
5. It could only be used in the context of a regulated apportionment arrangement happening immediately afterwards.
6. Approval from the Pensions Regulator would need to be obtained prior to any transfer.
7. The DWP is aware that the requirement for schemes that were contracted-out to transfer only to formerly contracted-out schemes is an issue for several schemes. The DWP is therefore "considering the best way forward". Removing this requirement would require amendments to the Contracting-out (Transfer and Transfer Payment) Regulations 1996.

**Comment (1):** The possible relaxation of legislation on bulk transfers without consent will be welcomed by other large schemes facing a similar situation to the BSPS.

**Comment (2):** Removing the current prohibition on formerly contracted-out schemes transferring to schemes that are

not also formerly contracted-out would be greatly welcomed by other employers and schemes currently wishing to restructure.

## **III. Early exit charges consultations**

### **A. Overview**

1. The DWP and FCA have each issued consultations on exit charge caps on 26 May, 2016. The intention is that any cap should apply across both occupational and personal pension schemes.
2. In both cases, the cap will apply for individuals from age 55 (when the ability to access benefits flexibly becomes possible) until the member's normal retirement age/ expected retirement date.

### **B. DWP consultation**

1. The [DWP consultation](#) states that the cap on exit charges in occupational pension schemes will be implemented in 2017. The DWP acknowledge, however, that it is not always clear which components may make up an early exit charge and is keen to learn more about this.

2. The primary duty to comply with the early exit charge cap would be placed on service providers and/or trustees or managers, depending on who actually applies the charge in practice.
3. Trustees or managers would also be obliged to ensure that no new arrangements in excess of the cap are entered into.
4. The Government is concerned about the possibility that costs may be increased elsewhere in order to compensate for foregone exit charges. In that event, the Government and regulators would consider taking action. The DWP expects trustees or managers to be familiar with and understand the impact of their contract terms with service providers.
5. The cap on exit charges will apply to all occupational pension schemes from which an individual can draw a flexible benefit.
6. Market value adjustments will not be treated as early exit charges for the purpose of the cap. Terminal bonuses will be excluded from the definition of MVAs if the terminal bonus is paid as a result of an express entitlement or where a reasonable expectation has arisen under the scheme.

7. The level of the cap is intended to mirror the FCA's proposed caps for personal pensions. The FCA's cap levels are:
    - 1% for existing personal pension contracts; and
    - 0% for new personal pension contracts.
  8. Responsibility for enforcing the cap will rest with the Pensions Regulator.
  9. The DWP consultation closes on 16 August 2016.
- Comment (1):** The Treasury consulted on pension transfers and early exit charges in July 2015. That consultation explored options to address the possible barriers to people taking money from their pot or switching their pensions to take advantage of the new pension freedoms available since 6 April 2015. These potential barriers included early exit charges.

**Comment (2):** The recent Queen's Speech announced that a new Pensions Bill would include a cap on exit fees charged by trust-based occupational schemes. The DWP consultation states that the Bill will make it clear that the cap can apply with

retrospective effect, so that existing contracts can be covered.

**Comment (3):** The application of the cap on exit charges to all occupational pension schemes containing flexible benefits is in contrast to the ban on member-borne commission, which applies only to auto-enrolment 'qualifying schemes'.

**Comment (4):** Trustees should take particular note of the Government's expectation that trustees should understand the impact of the terms and conditions of contracts with service providers. In this regard, the Government's aim is to reduce the likelihood of costs being increased elsewhere in response to the new cap.

**Comment (5):** The Minister of State for Pensions says that schemes and providers currently imposing early exit charges should be starting to plan for these changes now.

## C. FCA consultation

1. The [FCA consultation](#) (CP16/15) examines the application and level of an exit charge cap on personal pensions and stakeholder pensions. The consultation also sets out proposed changes to the FCA Handbook.

2. The FCA is proposing a cap of 1% of the member's policy value on existing personal pensions and stakeholder pensions. Exit charges will not be permitted for personal pension contracts entered into after the changes are in force.
3. The FCA is aiming to publish a Policy Statement confirming final FCA Handbook rules in Autumn 2016, with a view to the rules coming into force on 31 March 2017.
4. The deadline for responses to the FCA consultation is 18 August, 2016.

**Comment:** Legislation regarding the establishment of the cap for personal pension schemes is set out in Section 137FBB, Financial Services and Markets Act 2000. That Section is not yet in force.

#### IV. LGPS Fair Deal consultation

##### A. Overview

1. The Department for Communities and Local Government (DCLG) has issued for [consultation](#) draft regulations which amend the:
  - Local Government Pension Scheme Regulations 2013, and

- Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014.
2. The consultation opened on 27 May and closes on 20 August, 2016.
  3. The consultation includes:
    - Fair Deal proposals and
    - proposals regarding the 2013 and 2014 regulations above.

##### B. Fair Deal proposals

1. The draft Local Government Pension Scheme (Amendment) Regulations 2016 introduce the 'Fair Deal for staff pensions' for people in the local government pension scheme (LGPS) who are compulsorily transferred to another service provider.
2. The Treasury 'Fair Deal for staff pensions' policy was issued in October 2013. That policy applies to central Government staff and sets out pension protections for staff transferring out of the public sector.
3. The consultation proposals aim to ensure that local government and employers participating

in the LGPS provide pensions in accordance with the Fair Deal guidance.

4. To be covered by Fair Deal the individual must be an employee of a current LGPS employer and compulsorily transferred. The transfer must be to an independent service provider who does not offer a public service pension scheme. This category of member will be a 'protected transferee'.
5. The regulations would introduce a new category of scheme employer. A 'protected transferee employer' would be obliged to participate in the LGPS under the 2013 LGPS Regulations for those staff they receive that are 'protected transferees'.
6. Independent service providers would be obliged to enter into an admission agreement so that the protected transferees can retain their eligibility for the LGPS. The costs of providing a local government pension to transferring staff would need to be set out clearly in the tender documentation.

##### C. Proposed amendments to the 2013 regulations

1. A number of the proposed changes relate to the day-to-day operation of the LGPS.

For instance, one amendment is intended to put beyond doubt that administering authorities may agree that an admission agreement is to have retrospective effect.

2. The draft regulations are also intended to give members greater freedom in how they use their AVCs.

## V. Pensions guidance regulations

### A. Overview

1. The Financial Services and Markets Act 2000 (Pensions Guidance) Regulations 2016 have been laid and will come into force on 15th June 2016.
2. Section 333A of the FSMA requires that guidance be given to help individuals deciding whether to transfer or otherwise deal with a relevant interest in a relevant annuity. These regulations define those terms.
3. The guidance would have to be provided by Pension Wise or by a regulated financial adviser.

### B. Guidance regulations

1. Under the regulations, an annuity is a “relevant annuity” if:
  - 1.1 it was purchased out of funds from a pension scheme; and
  - 1.2 it is not an asset of a pension scheme.
2. The regulations define a “relevant interest” as the:
  - 2.1 receipt of payments under an annuity;
  - 2.2 right of the primary beneficiary to payments at a future date under an annuity; or
  - 2.3 right of a secondary beneficiary to payments under an annuity, contingent on the death of the primary beneficiary

**Comment (1):** A number of amendments to the Financial Services and Markets Act 2000 (FSMA) are contained in the Bank of England and Financial Services Act 2016. Section 32 (pensions guidance) of that Act came into force on 13th May, 2016. That Section amends Section 333A

of FSMA so that financial advice will need to be provided before a consumer with a higher value annuity sells the income stream.

**Comment (2):** The Bank of England and Financial Services Act 2016 does not explain what sort of value the annuity would need to have in order for the financial advice requirement to be triggered. However, Section 33(4) refers to regulations specifying criteria based on the proportion of the individual’s financial resources represented by the payments under the annuity, or the value of the annuity.

**Comment (3):** Since 6<sup>th</sup> April, 2015 members wishing to transfer benefits other than money purchase or cash balance benefits (safeguarded benefits) to a flexible benefits arrangement (or to convert them into flexible benefits within the scheme) must receive independent advice if the transfer value (before any reduction for under funding) exceeds £30,000. It may be that a similar threshold could be imposed in relation to the guidance requirement applying to the sale of annuity income streams.

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## VI. Data protection

### A. Overview

There are two data protection developments of note, regarding:

1. the latest position on the EU-US Privacy Shield and
2. when more guidance is expected on the General Data and Protection Regulation (GDPR), which comes into effect on 25 May 2018.

### B. EU-US Privacy Shield

The Article 31 Committee of data protection representatives from EU Member State governments has failed to agree on whether the Privacy Shield is 'adequate' for the purposes of EU-US data transfers. The Committee's Opinion is the next stage in the passage of the Privacy Shield. This follows the Article 29 Working Party's Opinion.

Please click [here](#) to see the European Parliament press release.

**Comment:** The ICO is clear that organisations can use other tools for transfers to the US. Organisations should continue to take stock of the transfers they make and have a proper

understanding of the legal basis, so that they are in a good position to act should they need to. The ICO says it may be useful to contact organisations in the US to which personal data is transferred, to highlight the possibility that the Shield may need to be considered in future. The ICO will not be seeking to expedite complaints about transfers to the US while the process to finalise its replacement remains ongoing. The ICO's [blog](#), and its [guidance note](#), dated 10 February 2016, are available on the ICO website.

### C. General Data Protection Regulation

1. The Information Commissioner's Office (ICO) has given new guidance on when organisations can expect to receive advice on implementing the GDPR.
2. The [guidance](#) reveals that in the next 6 months, the Article 29 Working Party will produce documents on:
  - identifying an organisation's main establishment and lead supervisory authority
  - data portability
  - data protection officers

- risky processing
- data protection impact assessments and
- certification.

**Comment (1):** The General Data Protection Regulation (GDPR - (EU) 2016/679) will apply directly in all Member States from 25 May 2018.

**Comment (2):** Guidance published by the Information Commissioners Office on 14 March, 2016, is expected to be formally adopted in Summer 2016 and to take effect two years later when the GDPR comes into effect on 25<sup>th</sup> May, 2018.

## Cases

### VII. Contractual estoppel - Ombudsman ruling in relation to Butterworth

#### A. Overview

The Pensions Ombudsman has ruled that the doctrine of contractual estoppel applies to a promise in a compromise agreement that the employer would allow the complainant to retire early on an unreduced pension.



## B. Facts

1. Regulations (SI 2007/1166) governing the Local Government Pension Scheme allowed early retirement for deferred members from age 55 with employer consent. The regulations also stated that the employer “may determine on compassionate grounds” that the pension should be unreduced.
2. The complainant’s (B’s) offer letter stated:  
  
*“...the force will use its ‘best endeavours’ to allow you to retire early with maximum augmentation to your pensionable service in so far as the pension regulations...allow the force to do so.”*
3. Three years later, however, a compromise agreement was entered into regarding the termination of B’s employment. The agreement stated:  
  
*“... the Employer will allow the Employee to access her ... pension without reduction or abatement when she reaches 55 years of age ...”*
4. On reaching age 55, B applied for an unreduced pension but her request was refused. Her employer decided that there were no ‘compassionate grounds’.

## C. Decision

1. The Ombudsman decided that the offer letter promise was a single augmentation of benefits at a future date and was not an accrued right. The offer letter could be compromised by agreement without breaching section 91, Pensions Act 1995 (*IMG* and *IBM* cases referred to). The compromise agreement therefore prevented a claim under the offer letter promise.
2. The compromise agreement fettered the employer’s discretion under statute because it required the employer to find compassionate grounds without evidence, ahead of receipt of an application for an unreduced pension. The clause was outside of the employer’s powers and making the promise amounted to maladministration.
3. The Ombudsman ruled, however, that the doctrine of contractual estoppel applied. Where the parties to a contract agree that the contract should be based upon “a certain state of affairs”, including a future state of affairs, the contract itself gives rise to the estoppel. The future state of affairs in this case were:
  - the application for an unreduced pension,

- B reaching age 55 and
  - the law not changing so as to prevent payment from age 55.
4. The employer was directed to pay B an amount equal to an unreduced pension, backdated to age 55 and continuing until she started to receive benefits directly from the scheme.

### **Butterworth (PO-6773)**

**Comment (1):** The Court of Appeal looked at contractual estoppel in *JP Morgan v Springwell*. In *Springwell*, it was noted that parties to a contract can even agree on a factual background which is not true. The exception to this is where the contractual agreement as to the state of affairs contradicts some other rule of English public policy.

**Comment (2):** This case is notable chiefly because the doctrine of contractual estoppel was applied to override the fact that the relevant clause in the compromise agreement was outside of the employer’s powers.

**Comment (3):** Had the parties realised that the employer did not have power to make that promise, the agreement would not have

contained the offending clause and the claim would not have succeeded.

## VIII. Employer duty to inform - Ombudsman ruling in relation to Bennett

### A. Overview

The Ombudsman has found that the Department of Health had breached its duty to take reasonable steps to tell employees about contractual terms in line with the *Scally* House of Lords decision.

### B. Facts

1. The complainant (B) had worked for both the NHS and for local government alternately over a number of years. As a result, B had transferred her pension benefits between the NHS Pension Scheme and Local Government Pension Scheme on two occasions, in 1995 and 1999. Each time, the transfer was carried out under the terms of the Transfer Club. Under the Transfer Club, participating schemes sign up reciprocally to give effect to transfers on more generous terms than would otherwise be the case. To benefit from Transfer Club arrangements, the member's application for a Club transfer must be made in writing to the receiving scheme within 12 months of becoming eligible to join or re-join the scheme.

2. B complained that she did not know about the 12-month deadline for Transfer Club applications. The deadline had been mentioned in the scheme booklet in 1994. B's complaint related to a transfer some years later, however.
3. B re-joined the NHS scheme in 2000 and did not apply for her LGPS benefits to be transferred-in until 2011. The scheme manager used its discretion to allow the transfer to go ahead, but not under the generous Transfer Club terms. The employment pack sent to B in 2000 by her former employer did not tell B about transfer options and therefore B was not warned about the 12-month deadline.

### C. Decision

1. The Ombudsman decided that the scheme manager did not have a duty to tell B about the time limit. The Ombudsman also decided that the scheme manager had properly exercised its discretion to allow the transfer.
2. However, the Ombudsman found that the Department of Health had breached its duty to take reasonable steps to tell employees about contractual terms in line with the *Scally* House of Lords decision.

3. For the *Scally* contractual duty to arise, the:
  - terms of the contract must not have been negotiated with the individual
  - term in question makes available a valuable right contingent upon the individual taking action to avail himself of it; and
  - employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.
4. The Ombudsman concluded that the requirements under *Scally* had been met and therefore the duty arose in this case. Although the Transfer Club terms were not contractual, the Ombudsman considered that there was a sufficient contractual link because the scheme was an occupational pension scheme applicable to NHS employees. The Transfer Club terms were valuable, thus meeting the second condition under *Scally*. Concluding that it was arguable whether B could reasonably be expected to be aware of the transfer terms in 2000 unless they were then drawn to her attention, the Ombudsman felt that the third *Scally* requirement had been met.

5. The scheme manager was ordered to offer B a transfer credit calculated on Transfer Club terms. The Department of Health was therefore required to make up any extra cost exceeding the cash equivalent transfer cost.

#### **Bennett (PO-7182)**

**Comment (1):** Several Pensions Ombudsman rulings have looked at the *Sally* duty. Often, the complaint will not succeed. The test in *Sally* could not be met in *Farrimond* (PO-680) because the employee did not have a contract of employment. But the Deputy Ombudsman went on to rule that the availability on request of the scheme booklet, which contained the relevant information, would have prevented a *Sally* claim from succeeding.

**Comment (2):** To avoid this type of claim, if any employee has a valuable right, the employer should put in place appropriate procedures to provide information about that right to the employee.

**Comment (3):** It may also be sensible to remind the employee of that right in the circumstances relevant to the exercise of that right.

## **IX. Rectification by summary judgment - Girls' Day School Trust**

### **A. Overview**

Rectification of a definitive deed was granted by summary judgment of the High Court.

### **B. Facts**

1. GDST had been a participating employer in the Independent Schools Pension Scheme ("the Old Scheme"). GDST established a new occupational defined benefit pension scheme ("the New Scheme") to be open to new members. It was intended that the New Scheme should receive a bulk transfer from the Old Scheme.
2. A draft definitive deed and rules were prepared for the New Scheme. More than one version of the draft was prepared during that process. A conference call took place during which a decision was taken to sign a later version of the definitive deed. That later version was sent to the scheme actuary for his certification. The actuary's certificate therefore related to that later version of the deed. However, an engrossment of an

earlier version of the deed had mistakenly been executed. This mistake became apparent when a decision to amend the scheme revealed that the wrong version had been signed.

### **C. Decision**

1. Norris J ruled that for rectification to become available, GDST must demonstrate, by cogent evidence, that it and the Trustee had a common, continuing, objectively established intention (*IBM* followed).
2. As this was an application for summary judgment, the court confined itself to considering whether any apparent defence to the claim to rectification would be considered fanciful and without any real prospect of success.
3. The court ruled that the claim for rectification should be allowed.
4. The judge decided that it would be fanciful to suggest that the intention of the Trustee in any way departed from the decision taken in the conference call. It was plain that the signature of the deed was a mistake and

what the intended terms were. The case was therefore fit for disposal by way of summary judgment.

### [Girls' Day School Trust v GDST Pension Trustees Ltd and Another](#)

**Comment:** Many of the key facts were beyond dispute. There have been several cases where rectification has been granted by summary judgment. Most recently, this was achieved in the *St Modwen* case to correct a rule amendment intended to reflect the introduction of limited price indexation in the Pensions Act 1995. The mistaken amendment had made the members' entire period of pensionable service subject to LPI increases.

## X. SIPP drawdown and bankruptcy - [Hinton v Wotherspoon](#)

### A. Overview

The court held that the bankrupt was "entitled" to a payment once he had elected to receive an income or lump sum from the drawdown fund.

### B. Facts

1. A trustee in bankruptcy applied for an income payments order against a bankrupt. Income

payments orders ensure that surplus income is used to meet creditors' claims.

2. The bankrupt had a self-invested personal pension (SIPP). The SIPP was in capped drawdown.
3. Section 310, Insolvency Act 1986 states that a bankrupt's income includes:

*"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"*.

### C. Decision

1. The High Court noted that a bankrupt is not "entitled" to a payment if there are elections still to be made. Examples of elections would whether to purchase an annuity, take income or leave the fund in drawdown. Those elections cannot be made by the court because it does not have the power to order how a fund will be crystallised.
2. The court held that the bankrupt was "entitled" to a payment once he had elected to receive an income or lump sum from the drawdown fund. In this case the member had used his fund to receive drawdown payments

in previous years. An income payments order could therefore be made.

3. Subject to leaving the bankrupt enough to meet the "reasonable domestic needs of the bankrupt and his family" (Section 310, Insolvency Act 1986), the court could then go on to make the income payments order.
4. However, if an election had **not** been made, the mere existence of a drawdown fund, whether invested or in cash, was not enough to establish an "entitlement". A fund can be kept "safe" for future use by inaction, whether to provide a retirement for life or to leave it untouched (in whole or in part) for inheritance. This point is subject to what the Court of Appeal rule in *Horton v Henry* (please see below).

### [Hinton v Wotherspoon](#)

**Comment (1):** Members electing to drawdown an income or lump sum from their fund or to purchase an annuity have an entitlement to a payment which can then become subject to an income payments order. By not taking any of these actions a member will be considered to not have an entitlement, thus protecting the member's

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fund, in the event of bankruptcy, from an income payments order.

**Comment (2):** In 2014 the High Court decided in *Horton v Henry* that the bankrupt's undrawn pensions could not be the subject of an income payments order. Until the bankrupt made certain decisions and elections, his pension rights were uncrystallised and not contractually payable. This case has gone to the Court of Appeal. The Court of Appeal has given *Horton* a reserved judgment on 21 April 2016.

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If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn [jonathan.fenn@slaughterandmay.com](mailto:jonathan.fenn@slaughterandmay.com) or your usual Slaughter and May adviser.

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