



Specialist Debt Advice Service

Spotlight

January 2021

Shelter

The impact of pension pot lump sums on accessing insolvency remedies

Introduction

Since April 2015 those with a [defined contribution personal pension](#) have enjoyed a broad range of options for accessing their pension pots from age 55. This includes taking their entire personal pension pot in a lump sum. Those with a [workplace or occupational pension scheme](#) may also be able to access a limited cash lump sum and an income. Gov.uk confirms under [Workplaces Pensions](#): ‘Most pension schemes set an age when you can take your pension, usually between 60 and 65. In some circumstances you can [take your pension early](#). The earliest is usually 55.’

This Spotlight will consider how a debtor’s ability to access lump sums from their pension might impact on their eligibility for various insolvency remedies, even where they have not yet chosen to draw down their pension.

Only ‘personal’ pension potential lump sums are considered for the insolvency test

For bankruptcy and debt relief orders (DROs) there is a requirement within the Insolvency Act 1986 (IA 1986) that debtor’s must be unable to pay their debts. This

is often referred to as ‘the insolvency test’ and is discussed in more detail below. Importantly, Insolvency Service policy only states that *personal* pension lump sum facilities should be considered when assessing whether the insolvency test is met.

Chapter 57 of the Insolvency Service [Official Receiver’s guidance](#) (March 2020) confirms at para 57.24 under the subheading *Establishing whether the bankrupt has abused the protection given to pensions in bankruptcy*:

“Where the bankrupt is aged 55 or over and holds an undrawn personal pension fund, the official receiver should obtain the current fund value¹. Where the pension fund value exceeds the total unsecured liabilities and, in a debtor’s application case, the bankrupt might have elected to draw the pension before applying for bankruptcy, official receivers are asked to consider whether the bankrupt met the insolvency test. Where they did not, the official receiver should consider making an application for annulment on the grounds that the order ought not to have been made. 1. PENSIONP5254”

The DRO Team has a similar policy position on how pension lump sum facilities are to be treated with regards to the insolvency test. The Insolvency Service News Item [Undrawn pension entitlements in insolvency: summary of new guidance](#) (referenced on page 53 of the DRO A-Z Guidance (Feb 2019) confirms policy for DROs on the insolvency test as follows at paragraph 3:

“Where the debtor is over 55 and has access to an undrawn personal pension fund both the official receivers and intermediaries are asked to consider whether the insolvency test has been met and, at the date of the application or petition the debtor is unable to meet their debts.”

In summary, where a debtor has the facility to access a lump sum from an *occupational* rather than a *personal* pension this will be ignored by the Insolvency Service for the purposes of the bankruptcy and DRO insolvency tests.

The bankruptcy insolvency test

Section 263K(1)(b) IA 1986 provides (amongst other things):

“(1) After receiving a bankruptcy application, an adjudicator must determine whether the following requirements are met—

...

(b) the debtor is unable to pay his or her debts at the date of the determination,

(2) (If the adjudicator is satisfied that each of the requirements in subsection (1) are met, the adjudicator must make a bankruptcy order against the debtor.”

The Insolvency Service Bankruptcy Adjudicator’s Team Manager recently confirmed in correspondence with the Specialist Debt Advice Service (SDAS) that they examine peoples’ pensions prior to making an order to see if someone is truly insolvent. They will ask for details of the pension such as its value and whether it can be cashed in. At present this is the extent of the information we have available on the adjudicator’s approach.

The implications of s263K(1)(b) IA 1986 for those with the facility to access a pension pot is discussed in the Lexis Nexis commentary text *Tolley’s Insolvency Law Service (Issue 135 December 2020)* at [D2016] which also notes “...*This contrasts to the position in a bankruptcy where a Trustee in Bankruptcy would not normally be able to access a pension that has not been drawn down (Horton v Henry [2016] BPIR 1426).*”

Disclosing details of the pension pot

The debtor applying for bankruptcy is obliged to provide specific details of their pension on section 4 the application form (See the [CPAG Debt Advice Handbook 13th Edition at chapter 15, section 5](#)). This will include any lump sum facility available to them.

Reviews, appeals and creditor challenges

A debtor has a right to request a review of an adjudicator’s refusal to make a bankruptcy order within 14 days of receiving notice of the refusal ([Rule 10.43\(2\) Insolvency Rules \(England and Wales\) 2016](#)) (IR 2016)).

If the adjudicator still refuses to make a bankruptcy order following a review the debtor then has 28 days from the date of receiving notice of the review decision to appeal to the court ([Rule 10.44 IR 2016](#)).

In addition to Chapter 57 of the Official Receiver's guidance, the [Insolvency Service Guide to Bankruptcy \(updated 10th March 2020\)](#) at paragraph 5.3 also discusses pensions and the insolvency test in the context of annulment:

'If you are able to take money from your pension following changes to the law in April 2015, but have chosen not to do so, the trustee may look at the value of your available pension fund. If this would give you access to enough money to make a different arrangement to pay your creditors, the trustee can ask the court to cancel (annul) the bankruptcy.'

It is also possible for an aggrieved creditor to apply to annul a debtor's bankruptcy (*Forder v Forder & Anor* [\[2002\] EWCA Civ 1527](#) at para 10) on the basis that they could pay debts when they fell due and therefore the order ought not to have been made (*Re Coney* [\[1998\] BPIR 333, CA](#)).

The DRO Insolvency test

[Section 251C\(5\)\(a\)](#) IA 1986 provides that, to qualify for a DRO a debtor must be 'unable to pay his debts'. If the Official Receiver (OR) is not satisfied of this s/he must refuse to make the DRO.

The [September 2020 Enquiry of the Month](#) discusses the DRO Team's approach on this issue in some detail. It confirms the DRO Team require that all such cases involving pension funds should continue to be referred to them for consideration on a case-by- case basis, until such time as they have assessed a sufficient number of cases in order to be able to establish a protocol going forward.

Since the EOTM was published, SDAS has advised on another case where the DRO Team again applied the same approach. They approved a DRO where the 'uplift' (the percentage of the total indebtedness by which the pension pot after deductions exceeds that indebtedness) on the client's liabilities was 69%.

Disclosing details of the pension pot

The DRO Team require debtors contact them: *‘with full details **before** making the application in all cases where the value of the fund is more than the total amount of debt, to see if a DRO is likely to be made.’*

Reviews, appeals and creditor challenges

The fact that a debtor may not meet the requirement that s/he is unable to pay his/her debts is not a prescribed ground for DRO objection under [Rule 9.15\(3\) IR 2016](#). However, a creditor could still challenge the OR’s decision to make a DRO on this ground and request that the court revokes the DRO under [s251M\(1\) IA 1986](#). Such an application and order could be made during the moratorium or at any time after the DRO has been discharged (s251M(7) IA 1986).

The potential impact of pension pots on creditor approval in an Individual Voluntary Arrangement (IVA)

Whilst there is not a formal ‘insolvency test’ in legislation for a debtor to be eligible qualify for an IVA in the same way as for bankruptcy and DROs, a client’s accessible pension pot could still potentially impact on them securing an IVA. Unlike for bankruptcy and DROs, this is the case whether or not the lump sum facility relates to a ‘personal’ or occupational pension.

Importantly, each proposal for an IVA is tailored to the individual. It might therefore be possible to agree an IVA proposal with creditors which excludes a client’s pension lump sum as an asset. According to the current protocol at page 4 paragraph 1(f) ‘excluded assets’ in an IVA and in bankruptcy are treated in the same way (provided IVA creditors agree assets are excluded).

[Rule 8.3 IR 2016](#) provides the requirements for the IVA proposal contents as follows: *“The proposal must set out the following so far as known to the debtor—*

- (1) in relation to assets:*
 - (a) the debtor’s assets, with an estimate of their respective values;*
 - (b) which assets are charged and the extent of the charge;*
 - (c) which assets are to be excluded from the IVA; and*

(d) particulars of any property to be included in the IVA which is not owned by the debtor including details of who owns such property and the terms on which it will be available for inclusion;

In addition, [the Straightforward Consumer IVA Protocol 2016 \(the protocol\)](#) - likely to be updated in 2021 - confirms at paragraph 7.1:

“Assets’

As required in any IVA, steps should be taken to ensure that the value of all realisable assets is appropriately reflected in the statement of affairs. This may require independent evidence of valuation to be obtained in the case of material assets.”

It follows that the right to access a pension lump sum will be viewed as an asset to which the debtor must disclose in the proposal accordance with Rule 8.3 IR 2016. As the National Debtline Fact sheet '[Pension Freedom's and Debt](#)' and Debt Camel's article '[Is your pension safe in an IVA?](#)' respectively acknowledge, the value of such a pension pot may lead to a creditor voting against acceptance of the IVA. Creditors might be particularly reluctant to accept if they consider that the debtor would not meet the bankruptcy insolvency test.

Tracing Lost pensions

Some clients may be unclear on the details of their pension or even whether they even have a policy. This information will be important to advise them properly whether they pursue insolvency or not. There is information on the [Pension Service webpage](#) under 'Lost Pensions' for help locating both personal and occupational pensions.