

THE HIGH COURT
BANKRUPTCY
IN THE MATTER OF THE BANKRUPTCY ACT 1998
AND IN THE MATTER OF JAMES COADY – A FORMER BANKRUPT

[RECORD NO: 2667]

BETWEEN:

CHRISTOPHER LEHANE
(AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE
OF JAMES COADY, A FORMER BANKRUPT)

APPLICANT

AND

JAMES COADY

RESPONDENT

AND

AVIVA LIFE & PENSIONS LIMITED, TRADING AS AVIVA LIFE AND PENSIONS IRELAND AND THE REVENUE COMMISSIONERS

NOTICE PARTIES

JUDGMENT of Ms. Justice Costello delivered on the 25th day of October, 2017

Introduction

1. Mr. Coady, ("the bankrupt"), entered into a pre-retirement personal pension policy (the "PPP") with Aviva Life & Pensions Limited, trading as Aviva Life and Pensions Ireland. ("Aviva"). He reached Normal Retirement Date in accordance with the contract on the 19th September, 2015, prior to his discharge from bankruptcy.

2. On the 30th June, 2014 he was adjudicated a bankrupt and all his property vested in the Official Assignee pursuant to s.44 of the Bankruptcy Act 1988 (the Act of 1988) on that date. The issue for decision in this judgement is what rights, if any, vested in the Official Assignee in relation to the PPP upon his adjudication as a bankrupt. The bankrupt was automatically discharged from bankruptcy on the 29th July, 2016.

3. Under s.61 (6) of the Bankruptcy Act 1988, the Official Assignee is entitled to seek directions from the court in case of doubt or difficulty in connection with the affairs of any bankrupt. These proceedings have been brought by the Official Assignee in connection with the rights, if any, which vested in the Official Assignee in relation to the bankrupt's PPP. The bankrupt took no part in the proceedings. Aviva and the Revenue Commissioners are notice parties in this case and have made submissions in relation to the issues arising.

The PPP

4. The contract between the bankrupt and Aviva was a: -

"Pension Benefit - Clear Plan Personal Pension

On Grantees survival until 19/09/2015 (age 65) (The Normal Retirement Age), or on Prior death the amount payable will be the Fund Value subject to the Policy Conditions."

5. The policy details are as follows: -

"The single premium invested is €27320.00. Your policy is a unit linked pension. When the premium is paid, units are purchased in the investment fund of your choice."

Regarding the tax aspect of the policy, it states: -

"Under current legislation, you may take up to 25% of the cash value

on retirement as a lump sum tax free. The balance can be used to purchase a pension or other benefits approved by the Revenue Commissioners."

Benefit is defined as: -

"... a payment by us which becomes payable on the happening of an event or contingency described in these conditions. Benefits are set out in your Policy Schedule."

Vesting Date is defined as: -

"means the date on which your policy is encashed to provide your pension or other Benefits permitted by legislation."

The funds section of the policy states the following: -

"Each of our funds is divided into units. When you pay a regular or single premium to this policy, the Investment Content

of that premium is used to allocate units at the unit price in your choice of funds. The allocation of units takes place at the Pricing Point on the next Business Day after we receive the premium or the due date of that premium, if later. The units are allocated solely for the purpose of determining your Benefits. You will not hold the units directly and the assets of each fund will at all times belong to us ... We will value each investment linked fund on each Business Day."

The Benefits at Retirement section of the policy states: -

"You may ask us to change your Normal Retirement Age. The age you choose must be on or after your 60th birthday unless:

(a) the Revenue Commissioners allow an earlier retirement age for your particular occupation or,

(b) you can provide satisfactory evidence that you are suffering from a physical or mental illness which makes you unable to carry out your occupation or any other similar occupation which your education, training and experience would normally allow you to do.

The date you choose must also be on or before your 75th birthday unless the Revenue Commissioners allow a later retirement age for your particular occupation ... At Vesting Date we will calculate a fund value by multiplying the number of units allocated to your policy by the unit price set at the next Pricing Point. The amount achieved when units in the With Profit Fund are cancelled will allow for any market value adjustment factor for any Additional Bonuses added to these units ... You can use the fund value under this policy to avail of any options provided for by legislation."

Background

6. The bankrupt was born on the 19th September, 1950. The applicable tax legislation, reflected in the PPP, provides for a number of available options to be exercised between the ages of 60 and 75. The bankrupt reached his 60th birthday on the 19th September, 2010, but had not chosen to exercise any of the options available at the date of adjudication.

7. The policy provides that, at the Vesting Date, Aviva will calculate a fund value by multiplying the number of units allocated to the policyholder's policy by the unit price set at the relevant Pricing Point. The policyholder may then use the fund value under the policy to avail of the options under the applicable tax legislation. After the policy proceeds have been applied to the relevant options selected by the policyholder, the policy has no further value and no further benefits will be payable from it. The policyholder is not entitled to an income from the policy, but must exercise one of his available options.

8. On the 18th September, 2015, the day before the Normal Retirement Date provided in the policy, the bankrupt's fund was valued at €34,530.32. This would give the bankrupt a tax free cash payment of €8,632.58 if he chose to exercise the option to take the maximum tax free allowable lump sum upon encashment of the policy. Aviva wrote to the bankrupt by letter dated the 18th November, 2015 setting out five options which were available to him in respect of the balance of the funds not taken as tax-free cash. These were to: -

- (1) Provide an annuity
- (2) Invest in AMRF/ARF
- (3) Take as taxable cash
- (4) Take as trivial pension payment (taxable cash option for smaller pension funds)
- (5) Transfer to another provider subject to certain conditions.

9. As the bankrupt was adjudicated on the 30th June, 2014, prior to his 65th birthday, and was automatically discharged from bankruptcy on the 29th July, 2016, his PPP is subject to the provisions of Part 30, Chapter 2 of the Taxes Consolidation Act 1997 (the Act of 1997).

10. Section 784 (1) and (2) of the Act of 1997 requires that the standard terms upon which certain insurance contracts, such as the Aviva PPP the subject matter of these proceedings are based, must be approved by the Revenue Commissioners.

11. The PPP cannot provide for any payments to the policy holder of any sums except sums payable by way of annuity to the individual (subject to provisions for dependants). The annuity that is paid to the policy holder cannot commence before the individual has attained the age of 60 or after the individual has attained the age of 75. The annuity cannot be payable for any period other than for the period of the life of that individual. An annuity may be paid to the individual's widow, widower or surviving civil partner provided that any such annuity cannot be of a greater annual amount than that paid or payable to the policy holder.

12. A policy holder is prohibited from surrendering, commuting or assigning the PPP or the benefits under the PPP. There is one exception to this prohibition which relates to the entitlement to a tax free lump sum at the point in time at which the annuity to the policy holder becomes payable or if the policy holder elects to transfer in accordance with their approved retirement fund ("ARF") options. At that point in time a lump sum up to the maximum of 25% of the value of the contract may be taken, subject to the maximum tax free lump sum entitlement of the policy holder.

13. There are an additional range of options that may be included in a PPP at the discretion of the Revenue Commissioners which are included in most personal pension policies, but which are not directly relevant to the issues in these proceedings.

14. Under s.784 (2A) of the Act of 1997 an individual has the option to transfer the entire value of his or her pension fund either to the individual him or herself or to an ARF. In either case, the individual can take up to a maximum of 25% of the fund as a tax free lump sum (subject to the maximum tax free lump sum entitlement of the policy holder). The amount the individual can transfer either to himself as taxable cash or to an ARF is restricted if his specified income does not exceed €12,700 per annum. In that case he is required to transfer the value of the pension fund up to a maximum of €63,500 to an approved minimum retirement fund ("AMRF").

15. Before a transfer to an ARF can occur it must be certified by the institution currently holding the funds. In this case this is Aviva. In addition the policy holder, in this case the bankrupt, must complete a declaration indicating his name, address and tax number. The

declaration indicates that the funds are derived solely in the current case from a PPP.

16. All personal pension annuities are liable to PAYE under schedule E.

17. The provisions of the Act of 1997 are and are required to be reflected in the Aviva PPP. Under the Aviva PPP the bankrupt had no income entitlement directly from the Aviva PPP. He had no contractual right to any income payments directly from the Aviva PPP. The Aviva PPP had a value at the vesting date which was available to the bankrupt (or as is considered below, to the Official Assignee) to be applied towards the selected contractual options. There was no obligation upon the bankrupt to elect for, and no contractual obligation on Aviva to provide, an income stream at all (even via a separate annuity contract).

Section 44 of the Bankruptcy Act 1988

18. Section 44 (1) of the Bankruptcy Act 1988 provides for the vesting of the property of the bankrupt in the Official Assignee subject to the provisions of the Act. It states: -

"Where a person is adjudicated bankrupt, then, subject to the provisions of this Act, all property belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt."

Section 44A of the Bankruptcy Act 1988

19. Section 44A of the Bankruptcy Act 1988 was inserted by s.150 of the Personal Insolvency Act 2012. The argument before the court concerned the effect of the section and so I quote it in full. It states: -

"44A.— (1) Subject to subsection (2), where a person is adjudicated bankrupt, and he or she is, or may become entitled to, payments under a relevant pension arrangement, assets relating to the arrangement (other than payments already received by the bankrupt, or that the bankrupt was entitled to receive, under the arrangement) shall not vest in the Official Assignee for the benefit of the creditors of the bankrupt.

(2) Where a bankrupt has an interest in or entitlement under a relevant pension arrangement which would, if the bankrupt performed an act or exercised an option, cause that debtor to receive from or at the request of the person administering that relevant pension arrangement-

(a) an income, or

(b) an amount of money other than income,

in accordance with the relevant provisions of the Taxes Consolidation Act 1997, that bankrupt shall be considered as being in receipt of such income, and such amount of money shall vest in the Official Assignee or the trustee in bankruptcy.

(3) Subsection (2) applies where-

(a) the bankrupt is entitled at the date of being adjudicated a bankrupt to perform the act or exercise the option referred to in subsection (2),

(b) was entitled at any time before the date of the adjudication, to perform the act or exercise the option referred to in subsection (2), but had not performed the act or exercised the option, or

(c) will become entitled within 5 years of the date of the adjudication to perform the act or exercise the option referred to in subsection (2).

(4) Where subsection (2) applies, the Official Assignee or the trustee in bankruptcy may where he or she considers that it would be beneficial to the creditors of the bankrupt to do so, perform an act or exercise an option referred to in subsection (2) in place of the bankrupt.

(5) In this section and in sections 44B and 85D a reference to a relevant pension arrangement means:

(a) a retirement benefits scheme, within the meaning of section 771 of the Taxes Consolidation Act 1997, for the time being approved by the Revenue Commissioners for the purposes of Chapter 1 of Part 30 of that Act;

(b) an annuity contract or a trust scheme or part of a trust scheme for the time being approved by the Revenue Commissioners under section 784 of the Taxes Consolidation Act 1997;

(c) a PRSA contract, within the meaning of section 787A of the Taxes Consolidation Act 1997, in respect of a PRSA product, within the meaning of that section;

(d) a qualifying overseas pension plan within the meaning of section 787M of the Taxes Consolidation Act 1997;

e) a public service pension scheme within the meaning of section 1 of the Public Service Superannuation (Miscellaneous Provisions) Act 2004;

(f) a statutory scheme, within the meaning of section 770(1) of the Taxes Consolidation Act 1997, other than a public service pension scheme referred to in paragraph (e);

(g) such other pension arrangement as may be prescribed by the Minister, following consultation with the Ministers for Finance, Social Protection and Public Expenditure and Reform."

Construction of Section 44A

20. Section 44A follows s.44 which deals with the vesting of the property of the bankrupt in the Official Assignee. Section 44A (1) provides, that subject to subs. (2), certain property shall not vest in the Official Assignee for the benefit of creditors. It is an exception to s.44 (1) which vests the property of the bankrupt in the Official Assignee.

21. Section 44A (1) provides that where a person is adjudicated bankrupt, and he or she either is, or may become entitled to payments under a relevant pension arrangement, then the assets relating to the pension arrangement do not vest in the Official Assignee. I take the reference to "the arrangement" within the brackets in subs. (1) to refer to the relevant pension arrangement preceding the brackets. Relevant pension arrangement refers to each of the seven types of pension arrangements set out in subsection (5).

22. Section 44A makes a distinction between the assets relating to the relevant pension arrangement on the one hand, and the entitlement to receive payments under the relevant pension arrangement on the other hand. Section 44A (1) provides that the assets relating to the arrangement shall not vest in the Official Assignee. In this case, these are the units held by Aviva allocated to the bankrupt's policy. They do not therefore vest in the Official Assignee. That being so, when they are then used to purchase an annuity they do not thereby become assets of the bankrupt which then vest in the Official Assignee. This is contrary to the nature of an annuity, which is a contract to provide an income stream to an annuitant. The approach harmonises the treatment of assets used to purchase an annuity with the treatment of pensions where the assets are held by the pension trustees and the beneficiaries have rights to certain benefits under the pension policy and the other types of pensions set out in s.44A (5).

23. The provision in s.44A (1) is itself subject to an exception: payments already received by the bankrupt or which he is entitled to receive under the relevant pension arrangement are not stated not to vest in the Official Assignee. The double negative results in a positive: the provisions of s.44 are not disapplied and so apply. There is no difficulty with the payments already received by the bankrupt: they vest in the Official Assignee in the normal way pursuant to s.44 (1) of the Act of 1988 insofar as they remain in the hands of the bankrupt.

24. The reference to payments "the bankrupt was entitled to receive" could mean either (1) payments due to the bankrupt at the date of adjudication but not yet received by him or (2) a present entitlement to receive payments due in the future. In my opinion, the former construction of this section is more consistent with the overall scheme of s.44A and is the construction of the exclusion I prefer. "Was entitled" is not the same as "will be entitled". The use of the phrase "was entitled" indicates to my mind that the right or entitlement must be a present – not a future – right of the bankrupt on the date of adjudication to come within the exception.

25. On the date of adjudication, it is necessary to identify what payments the bankrupt has already received and was entitled at that date to receive under the arrangement. If he had not yet received them on the date of adjudication, nonetheless they are to be treated in the same way as payments actually received: the right to receive the payment in respect of pre-existing pre-adjudication right vests in the Official Assignee. The right to receive payments in the future does not vest in the Official Assignee.

26. Section 44A (1) is subject to subs. (2). Subsection (2) concerns the situation where a bankrupt has an interest in or an entitlement under a relevant pension arrangement as opposed to a right to receive payment under a relevant pension arrangement which is covered by subsection (1)

27. Subsection (2) deals with a situation where the bankrupt has a right to perform an act or exercise an option under the relevant pension arrangement, but until the act is performed and the option is exercised, the bankrupt is not entitled to receive a payment from the relevant pension arrangement. Thus, if a bankrupt were to do nothing, no payment would be made.

28. Subsection (4) provides that where subs. (2) applies, the Official Assignee (or the trustee in bankruptcy) may where he or she considers that it would be beneficial to the creditors of the bankrupt to do so, perform an act or exercise an option referred to in subs. (2) in place of the bankrupt.

29. Thus, by virtue of subs (2) and (4), the Official Assignee may exercise an option available to the bankrupt under the relevant pension arrangement. It expressly must be in accordance with the relevant provisions of the Taxes Consolidation Act 1997.

30. Depending on the particulars of the relevant pension arrangement, there may be different options open to the Official Assignee. Subsection (2) states that where the exercised option causes the debtor to receive an income in accordance with the relevant provisions of the Taxes Consolidation Act 1997, the bankrupt will be considered in receipt of such income. It would appear that the reference to the debtor must be to the bankrupt but otherwise the intent of the subsection is clear: if the exercise of the option of the relevant pension entitlement results in the payment of income, the bankrupt and not the Official Assignee is considered as being in receipt of the income.

31. But, the exercised option may also cause the bankrupt to receive an amount of money other than income in accordance with the relevant provisions of the Act of 1997. In the present case I take this to refer to the entitlement of the bankrupt to receive up to 25% of the value of the assets in a tax-free lump sum, up to a maximum of €200,000. The issue here is how to construe the second part of subs. (2), which states that

"that bankrupt shall be considered as being in receipt of such income, and such amount of money shall vest in the Official Assignee or the trustee in bankruptcy".

I believe the reference to "such income" is to option (a) in the subsection and therefore the bankrupt shall be considered as receiving the income and it does not vest in the Official Assignee. Option (b) refers to an amount of money other than income and cannot be included in the phrase "such income". If the two options are not treated differently, then there is no reason to distinguish between (a) and (b). So (b) is treated differently to (a).

32. The intent of the draughtsman is that income should be treated in one way so that the bankrupt shall be considered as being in receipt of such income, and on the other hand, an amount of money other than income, is to be treated differently. It follows that "such amount of money" in the second part of subs. (2) refers to option (b) in the subsection. The sum referred to at (b) therefore vests in the Official Assignee under the subsection.

33. This construction ties in with s.44A (1) to which subs. (2) is an exception. Subsection (1) states that certain assets of the bankrupt shall not vest in the Official Assignee. The exception to this subsection, subs. (2)(b), states that an amount of money other

than income does vest in the Official Assignee, while subs. (2)(a), consistent with the scheme of the Act of 1988, excludes income of the bankrupt from assets that vest in the Official Assignee.

34. In summary, payments received or payments which a bankrupt was entitled to receive at the date of adjudication under a relevant pension arrangement vest in the Official Assignee. The underlying assets relating to the relevant pension arrangement do not. If a bankrupt has an entitlement to perform an act or exercise an option under the relevant pension arrangement the Official Assignee may perform the act or exercise the option in place of the bankrupt. If the act or option would cause the bankrupt to receive an income the bankrupt is considered to be in receipt of the income. If, on the other hand, the act or option would cause the bankrupt to receive an amount of money other than income, the money, that is the lump sum but not the assets from which the lump sum is paid, vests in the Official Assignee.

35. On the facts in this case, the bankrupt had not exercised the options available to him under his PPP. It is open to the Official Assignee to exercise one of the options pursuant to s.44A (4) in the exercise of his discretion if he considers that to do so would be beneficial to the creditors of the bankrupt.

The Necessity for a Bankruptcy Payment Order

36. There was a dispute between Aviva on the one hand and the Official Assignee on the other as to whether the Official Assignee was entitled to have income paid directly to him relating directly to the bankrupt's PPP or whether he required an order pursuant to s.85D of the Bankruptcy Act 1988 before he could receive any payment. In the latter case, it was accepted that the bankrupt had been discharged from bankruptcy and it was now no longer open to the Official Assignee to apply for a bankruptcy payment order.

37. The argument of the Official Assignee was based upon the construction of s.44A (1). He argued that s.44 (1) provides for the vesting of assets of the bankrupt in the Official Assignee. Section 44A (1) excludes certain assets from this provision. But, there is an exception to this exception: the words in brackets: -

"(other than payments already received by the bankrupt, or that the bankrupt was entitled to receive, under the arrangement)"

The Official Assignee submitted that payments in the future made pursuant to an annuity are payments that the bankrupt was entitled to receive under the relevant policy arrangement at the date of adjudication and therefore vested in him for the benefit of the creditors of the bankrupt. If that is correct, they are not precluded from vesting in the Official Assignee by virtue of s.44A (1). Therefore, s.44 (1) applies and the right to receive the annuity payments vests automatically in the Official Assignee. He is entitled to receive the payments and he does not require a bankruptcy payment order pursuant to s.85D of the Act of 1988.

38. Section 85D provides: -

"85D.— (1) The Court may, on application being made to it by the Official Assignee or the trustee in bankruptcy, make an order requiring a bankrupt to make payments to the Official Assignee or the trustee in bankruptcy from his income or other assets for the benefit of his creditors (a 'bankruptcy payment order')."

(2) An application for a bankruptcy payment order may not be made after the bankrupt has been discharged from bankruptcy, but where an application for such an order is made before the discharge of the bankrupt, the Court may make a bankruptcy payment order after the date of discharge as if the bankrupt had not been so discharged.

(3) Subject to subsections (3A) and (3B), an order made under subsection (1) shall have effect for no longer than 5 years from the date of the order coming into operation, and where, during the order's validity, the court has varied the order under subsection (5) such variation shall not cause the order to have effect for a period of more than 5 years, and in any event, any order made under subsection (1) or varied under subsection (5) shall cease to have effect on the 8th anniversary of the date on which the bankrupt was adjudicated bankrupt.

(3A) (a) Where a bankruptcy payment order would, but for section 12 of the Bankruptcy (Amendment) Act 2015, expire on any day during the period of 6 months from the commencement of that section, the bankruptcy payment order concerned shall, subject to subsection (3B), stand discharged on that day unless it has otherwise been discharged or annulled.

(b) Where a bankruptcy payment order would, but for section 12 of the Bankruptcy (Amendment) Act 2015, expire at any time after the expiration of 6 months from the commencement of that section, the bankruptcy payment order concerned shall, subject to subsection (3B), stand discharged on the later of—

(i) 6 months after that commencement, or

(ii) 3 years from the date that bankruptcy payment order was made,

unless it has otherwise been discharged or annulled.

(3B) Where the Court has made an order under section 85A(4), the bankruptcy payment order made under subsection (1) shall have effect for no longer than 5 years from the date of that bankruptcy payment order coming into operation, and where, during that bankruptcy payment order's validity, the court has varied that order under subsection (5) such variation shall not cause that order to have effect for a period of more than 5 years, and in any event, any bankruptcy payment order made under subsection (1) or varied under subsection (5) shall cease to have effect on the 8th anniversary of the date on which the bankrupt was adjudicated bankrupt.

(4) In making an order under subsection (1) the Court shall have regard to the reasonable living expenses of the bankrupt and his or her dependants and the Court may also have regard to any guidelines on reasonable living expenses issued by the Insolvency Service under the Personal Insolvency Act 2012 or by the Official Assignee.

(5) The Court, on the application of the bankrupt or the Official Assignee or the trustee in bankruptcy, may vary a bankruptcy payment order granted under subsection (1) where there has been a material change in the circumstances of the bankrupt.

(6) The court in granting an application under subsection (1) may order any person from whom the bankrupt is entitled

to receive any salary, income, emolument, pension or other payment to make payments to the Official Assignee or trustee.

(7) For the purposes of this section, where a bankrupt is, or may become entitled to, payments under a relevant pension arrangement, an asset relating to the arrangement (other than payments already received by the bankrupt, or that the bankrupt was entitled to receive, under the arrangement) shall not be regarded as an asset."

39. Section 85D (6) contemplates an order of court directing a person from whom the bankrupt is entitled to receive "any ...income... pension or other payment to make payments to the Official Assignee or trustee." This includes payments a bankrupt would be entitled to receive under an annuity. As payments to be made from an annuity fall within the scope of subsection (6), then it follows that the Official Assignee requires an Order pursuant to s.85D before the provider of the annuity may pay the sums due, or any part of the sums, directly to the Official Assignee.

40. This construction of s.85D (6) is reinforced by and consistent with the construction of subss. 85D (7) and 44A (1). I have held that the proper construction of s.44A (1) is that the right of a bankrupt to receive future payments made pursuant to an annuity are not payments that the bankrupt was entitled to receive under the relevant policy arrangement within the meaning of the exception in the subsection and therefore the right to receive the payments did not vest in the Official Assignee. Section 85D (7) -in which the identical exception is repeated- applies for the purposes of s.85D which of course includes subs. (6). Section 85D (6) refers to the bankrupt's entitlement to receive any salary, income, emolument, pension or other payment. To construe this section as meaning that a bankruptcy payment order was not required in the case of the income payable in the future to the bankrupt under an annuity would be inconsistent with the fact that the right to receive the payment was not vested in the Official Assignee by virtue of the provisions of s.44A (1). There is no reason to believe that there should be a different construction of the same words in the same statute where they appear in different sections. It is expressly stated that the right in question is not to be regarded as an **asset** of the bankrupt (as opposed to income or payment under subs. (6)) for the purposes of determining whether, and in what amount, a court should make a bankruptcy payment order.

41. Further, any other construction of s.85D would not permit pension providers to administer annuity payments in accordance with the requirements of the taxation of benefits payable pursuant to annuities. Annuity payments are taxable as earned income. The tax an individual pays is based on their personal circumstances. A deduction for Universal Social Charge may also be made depending on the level of the annuitant's income and their age. Pension providers deduct income tax and other payments (such as PRSI and USC) from the monthly payments and remit these directly to the Revenue Commissioners on the annuitant's behalf. When establishing an annuity, pension providers require to be provided with a Notice of Determination of Tax Credits and Standard Cut-Off Point with the pension provider stated as the employer. Until it receives a tax credit certificate from the Revenue Commissioners specifying what rate of tax to apply, it is obliged to deduct income tax at the highest rate, in addition to the PRSI and USC from the annuitant's annuity payment. In essence, the entity paying the annuity is treated as the "employer" for PAYE/PRSI/USC purposes and the annuity is subjected to the usual deductions that apply to salary.

42. The Official Assignee can only exercise an option in place of the bankrupt in accordance with the provisions of the Act of 1997. Accordingly, any subsequent annuity contract must be set up in the name of the Policyholder and be subject to tax based on his Notice of Determination of Tax Credits and Standard Rate Cut-Off Point under the Act of 1997. This is inconsistent with the argument that the right to receive the monthly annuity vests directly in the Official Assignee.

43. The submissions of the Revenue Commissioners further highlights the individual assessment that must be made in respect of each policyholder's rights and entitlements and the limitations on the exercise of those options. They argued:-

"While Revenue are not aware of the [bankrupt's] current financial circumstances it may be the case that investing the balance [of the fund] in a (sic) AMRF or ARF are not viable options. ... [T]he option in question must have been one available to the bankrupt in order for the Official Assignee to be able to exercise it. If, however, the ARF option was chosen by the Official Assignee then unless the [bankrupt] had the required level of specified income of €12,700 per year, which is a pension or annuity guaranteed for life, the balance of the fund after the payment of a lump sum must be transferred to an AMRF which is managed by qualifying fund manager (sic). This amount must remain in the AMRF until the [bankrupt] reaches the age of 75 or acquires the required level of specified income. If either of these events occur, then the AMRF automatically becomes an ARF. In the event of his death before the age of 75, the AMRF automatically becomes an ARF."

44. In addition, this construction is consistent with the overall scheme of the Bankruptcy Act 1988. On the one hand, the provisions of the Act of 1988 preclude the automatic vesting of certain rights under relevant pension arrangements in the Official Assignee while on the other hand the Official Assignee is entitled to apply to the court for a bankruptcy payment order which may encompass payments from the income derived from those rights and entitlements.

45. It follows for these reasons that direct payments by Aviva in respect of the bankrupt's PPP (or any annuity purchased with the assets of the PPP) to the Official Assignee in the absence of a bankruptcy payment order are precluded. If the Official Assignee wishes to receive such payments for the benefit of creditors of the bankrupt, he must obtain an order pursuant to s.85D in the usual way. To hold otherwise could result in the Official Assignee bypassing the minimum income requirements under the ARF/taxable cash option by seeking the annuity option without affording the bankrupt the protection afforded in respect of income payments by section 85D.

Conclusion

46. Following the hearing of the application the Official Assignee submitted amended issues on which directions were sought of the court pursuant to s.61 (6) of the Bankruptcy Act 1988. The first question was:

"Whether the reference in s. 44A (1) of the 1988 Act to 'assets relating to the arrangement' as used should be interpreted as a reference to that part of the proceeds of the fund which are in turn used for purchase of an annuity or the provision of a lump sum payment pursuant to the relevant pension arrangement?"

For the reasons set out above the answer to this question is no.

47. The second question was:

"Whether the reference in s. 44A (2) of the 1988 Act to 'such amount of money' should be interpreted as referring to income from a relevant pension entitlement or as referring to 'an amount of money other than income?'"

For the reasons already explained this refers to an amount of money other than income.

48. The third question was:

"Whether income which might accrue due under a relevant pension arrangement, i.e. an annuity contract, after the adjudication of the former bankrupt by virtue of the performance of an act where the exercise of an option by the Official Assignee pursuant to s.44A (4) of the 1988 Act, automatically vests in the Official Assignee pursuant to the provisions of s.44 (1) of the 1988 Act, or must the Official Assignee seek an [sic] bankruptcy payment order from this honourable court pursuant to the provisions of s.85D of the 1988 Act before the annuity contract provider can pay any such income to the Official Assignee for the benefit of the former bankrupt's creditors?"

49. As set out above, the income which might accrue under a relevant pension arrangement does not automatically vest in the Official Assignee and the Official Assignee must seek a bankruptcy payment order pursuant to the provisions of s.85D of the Act of 1988 before the annuity contract provider can pay any such income to the Official Assignee for the benefit of the bankrupt's creditors.