Technical CONNECTION

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LANDMARK CASE REMOVES RESTRICTIONS ON PENSION DEATH BENEFITS

The Supreme Court has ruled that the Equality Act 2010 is incompatible with the EU Directive (2000/78/EC) prohibiting discrimination on the grounds of sexual orientation

The Supreme Court has overturned the decision of the Court of Appeal in Walker (Appellant) v Innospec Limited and others (Respondents).

The case concerned Mr Walker who had entered into a civil partnership and then, when legislation permitted, a marriage with his same-sex partner. The pension death benefits payable on Mr Walker's death to his spouse were significantly less than would have been payable to an opposite-sex spouse and he claimed that this was discriminatory.

The Supreme Court concluded that although the Equality Act 2010 did extend rights to same-sex couples, which included pension death benefits, there was an exemption within the Act that allowed trustees to exclude pension benefits payable in respect of service accrued prior to December 2005, when the EU Directive (2000/78/EC) was originally incorporated into UK law. The Supreme Court decided that the exemption should be disapplied as it was incompatible with EU law and that Mr Walker's spouse is entitled on his death to a spouse's pension, provided they remain married.

COMMENT

The Government will have to consider whether a change in law is appropriate. It does, however, raise the question of retrospective legislation. It's a case of one battle won, war not over yet.

FINANCE BILL (NO. 2) 2017

The Treasury has issued a brief note on the contents of the summer (sic) Finance Bill.

With the House of Commons now on its holidays, the Treasury has issued "Notes on Finance Bill Resolutions" giving 'a brief description of each of the Finance Bill resolutions'. Helpfully, it confirms which of the 49 measures listed are to have retrospective effect. Among the more notable measures made retrospective are:

- £500 employment-related exemption for pension advice;
- Reduction in the money purchase annual allowance;
- No pre-arranged exits for EIS and SEIS;
- Social investment tax relief;
- £1,000 trading and property allowances;
- Corporate interest relief restriction;
- Changes to the domicile rules; and
- IHT treatment of overseas-owned UK residential property.

COMMENT

Note that the forthcoming Bill will be Finance Bill (No. 2) 2017, as opposed to the post-Budget version which was Finance (No. 2) Bill 2017.

THE STATE PENSION AGE REVIEW

The government has announced when it intends to start phasing in a State Pension Age of 68. More surprising is its plans to legislate for the change.

David Gauke, the Secretary of State for Work and Pensions, appears to have chosen the timing of his announcement of the government's plans on raising the State Pension Age (SPA) with care. By opting to make a parliamentary statement on 19 July he picked a date when:

- The news headlines were awash with details of the pay of BBC's top earners; and

- Parliament was preparing to go into recess the following day, not to return until 5 September.

The statement was prompted by the simultaneous publication of the DWP's State Pension Age review. As was widely expected, the DWP followed the recommendation of John Cridland that the phasing in of a SPA increase to age 68 should be brought forward by seven years to between 6 April 2037 and 5 April 2039, rather than 2044-2046, as currently provided for in the Pensions Act 2007.

If you are having a feeling of déjà vu at this stage it is understandable as the DWP was statutorily due to publish the results of its review by 6 May 2017. However, the government opted to ignore the provisions of section 27 of the Pensions Act 2014 on the dubious grounds that pre-election 'purdah' rules (that have no legislative existence) prevented any announcement from being made.

A further twist to this story is the forthcoming legislation for this change: there is none. As Mr Gauke told parliament, "We will carry out a further review before legislating to bring forward the rise in state pension age to 68, to enable consideration of the latest life expectancy projections and to allow us to evaluate the effects of rises in State Pension Age already under way."

That next review is due by July 2023, which is at least one election away. The government has some cover in arguing that it is giving those affected (currently aged between 39 and 47) 20 years' notice of change when it had set a minimum target of 10 years.

COMMENT

The lack of any legislation is probably down to the parliamentary arithmetic (and timetable). Given the Women Against State Pension Inequality (WASPI) agitation and a wafer-thin majority, an announcement and nothing more was the safe option. It also slightly spikes the guns of the Labour Party, which in their manifesto rejected 'the Conservatives' proposal to increase SPA' beyond 66 and stated a Labour government would 'commission a new review of the pension age, specifically tasked with developing a flexible retirement policy to reflect both the contributions made by people, the wide variations in life expectancy, and the arduous conditions of some work'.

CLIENT NOTIFICATION LETTERS

The deadline is fast approaching for client notification letters to be issued.

The International Tax Compliance (Client Notification) Regulations 2016 (SI 2016/899) came into force on 30 September 2016.

The regulations created an 11-month window during which financial institutions and tax advisers (including financial advisers and solicitors) are required to issue any UK resident client to whom they provide financial advice, or services about overseas income or assets, with an HMRC branded "notification letter". That window closes on Thursday 31 August 2017. In theory, failure to comply with the regulations could result in a penalty of £3,000.

The deadline of the end of August reflects the timing of the implementation of the Common Reporting Standard (CRS). "Early Adopters" of the CRS, which in total number over 50 jurisdictions including the UK, are due to release their first batch of automatic information by 30

September 2017. The remaining CRS jurisdictions, which will take the total to over 100, are a year further down the line.

Given HMRC's resourcing issues, it would far better that tax evaders voluntarily come forward, sparing HMRC the investigation work. It is for this reason that, alongside the notification letters, the Worldwide Disclosure Facility has been kept open until 30 September 2018. Once that facility is closed, the penalty cost of correcting matters will generally be higher.

COMMENT

The latest HMRC guidance on notification letters makes clear that the letter must be sent to each client with a covering personalised letter containing prescribed text. It is not sufficient to just send out the HMRC notification letter in isolation or rely on its inclusion in a general newsletter.

PENSION SCHEMES NEWSLETTER 89

HMRC has recently published Newsletter 89 which covers:

- Pension flexibility statistics
- Relief at source for Scottish income tax
- Annual returns of individual information
- QROPS transfer statistics
- Lifetime allowance look up service
- Reporting of taxable death benefits
- New Pensions Online Service

Of notable interest:

- The Scottish rate of income tax test environment update for the look up residency service.
- In 2016-2017 there were 9,700 (rounded) transfers to QROPS valued at £1,220m (rounded).
- The launch of the lifetime allowance look up service, scheduled to be introduced in the Summer, has been delayed.
- Reporting of non-taxable death benefits and the problems with P6 coding – continue to follow guidance in Newsletter 78.
- The new Pensions Online Service will operate from a new digital platform from 2018. It will be rolled out in 2 phases:

Phase One - April 2018 - will affect:

- new scheme administrator registrations
- new pension scheme registrations
- existing scheme administrators registering new pension schemes
- scheme administrators associating other administrators to old and new pension schemes
- new practitioners registering as a practitioner and applying for a practitioner ID
- scheme administrators authorising a practitioner for old and new pension schemes

So, if you want to register as a new scheme administrator from April 2018, you'll do this through the new service. You'll also use the new service to submit applications to register new pension schemes.

Phase Two will affect pension scheme administrators and registered pension schemes that were registered with HMRC before April 2018.

During Phase Two – April 2019:

- online reporting through the new service will be introduced
- all notifications and notices from HMRC will be sent through the new service
- penalties and assessments will be issued through the new service
- existing pension schemes from the Pension Schemes Online Service will be migrated to the new platform
- the Pensions Online Service will be decommissioned once the new service has been delivered

IHT RECEIPTS ON THE RISE

According to a recent report in the press the amount of money paid to HMRC in inheritance tax (IHT) has reached its highest level since 1986.

In 2016/17 inheritance tax receipts were £4.84bn – 4% higher than the previous year and the highest level since the current system was introduced.

The current rules mean that a deceased's estate will suffer a 40% tax charge on all chargeable transfers that exceed the nil rate band – currently £325,000. Chargeable transfers made within the last 7 years are taken into account for this purpose. In addition, since April 2017, a residence nil rate band is available, which allows a further £100,000 to be passed on, tax free, if the main residential property is left to a lineal descendant. The residence nil rate band will increase by £25,000 over each of the next three tax years until it reaches £175,000 for the 2020/21 tax year.

HMRC said the increase in IHT receipts is primarily being driven by rising asset values, with residential property making up around a third of the total value of taxpaying estates. Given this, and the fact that the nil rate band has been frozen at £325,000 since 2009, we are now seeing an increase in the tax take.

TOP-SLICING RELIEF AND NON-UK LIFE POLICIES

A query was recently raised which required clarification of the top-slicing relief position on non-UK life policies, with particular reference to excesses.

An excess arises under a non-qualifying life policy, such as a single premium bond, when withdrawals in a policy year exceed the cumulative unused 5% allowances for that year.

Top-slicing relief involves dividing the resulting chargeable event gain (CEG) by the number of complete years the policy has run before the CEG arises. The resulting fractional gain is used to determine whether the CEG is subject to higher and/or additional rate income tax.

Under non-UK policies, for all CEGs occurring before 6 April 2013, the number of complete years for top-slicing relief could be counted from inception to the date of the CEG. With an excess the CEG is treated as arising on the last day of the policy year.

This position changed for non-UK policies issued on or after 6 April 2013, and for non-UK policies issued before 6 April 2013 which are varied, assigned or used as security (see details below) on or after that date. For the first excess arising, the number of complete years for top-slicing relief is still measured from inception to the date of the CEG. However, for second and subsequent excesses only the number of complete years since the last excess are used. This mirrors the position that has always applied for UK (onshore) policies.

Under paragraph 7(2) Schedule 8 Finance Act 2013, a non-UK policy issued before 6 April 2013 will be treated for top-slicing relief purposes as if it was issued on or after 6 April 2013 where:

(a) it is varied so as to increase the benefits payable (which includes being varied by exercise of an option conferred in the policy); or

(b) there has been an assignment, by way of gift or for consideration, of the whole or part of the rights under the policy to the individual liable for the tax on the excess, or the deceased in cases where personal representatives or trustees are liable for tax on a gain which had arisen to the deceased. Assignment here includes an assignment into or out of trust; or

(c) the whole or part of the rights under the policy become held as security for a debt of the individual or the deceased (see (b) above).

In respect of other chargeable events, such as death giving rise to the payment of benefits and full surrenders, the number of complete years for top-slicing relief purposes is always counted from inception to the date of the chargeable event for all non-UK policies.

AN ADVISER'S DUTY OF CARE WHEN GIVING FINANCIAL ADVICE ON HISTORIC MATTERS

In the case of *Denning v Greenhalgh Financial Services Ltd* [2017] EWHC 143 (QB) the Court decided that a financial adviser did not owe a duty to review advice given by a previous adviser unless specifically asked to do so.

In the *Denning v Greenhalgh Financial Services* case the Judge considered in detail the principles governing the circumstances in which a professional is obliged to advise outside the scope of their retainer, and how those principles apply in the context of financial professionals.

The key facts of the case were as follows:

In 2000 Mr Denning (Mr D) instructed Alexander Forbes Financial Services Ltd (AF) to provide pensions advice. AF advised him to transfer his occupational pension to another provider (the 2000 Transfer).

In 2008 Mr D, who had become dissatisfied with the service provided by AF, instructed Greenhalgh Financial Services Limited (GFS) to provide advice as to the management of his investments. GFS's retainer was limited to advising on and arranging deals in investments and contracts of insurance. GFS also made it clear that it was not authorised or qualified to give legal advice.

In 2009 and 2010 Mr D made complaints to the Ombudsman regarding AF's advice. The Ombudsman found that Mr D was out of time in respect of the complaint regarding the 2000 Transfer.

In 2013 Mr D pursued a claim against AF which was eventually abandoned on the grounds that it was out of time. Mr D then issued a claim against GFS, alleging that GFS had failed to: (i) review the advice given by AF concerning the 2000 Transfer and (ii) advise on a potential claim against AF in respect of that advice. Mr D also alleged that, but for GFS's negligence, he would have issued a claim against AF in 2008 and would have received substantial damages.

GFS denied the allegations on the grounds that it owed no duty to advise on the 2000 Transfer, which had no bearing on the advice it had been instructed to provide and, further, it owed no duty to advise Mr D about a potential claim against AF.

Mr D's claim was struck out, after full consideration was given by the Judge of the extent to which a professional owes a duty of care to their client outside the scope of their retainer.

The Judge observed that at no point in correspondence was GFS asked by Mr D to provide advice as to the merits of the advice given by the previous financial adviser in 2000 which had led to the first transfer. The retainer with GFS made no mention of such advice either.

The Judge considered the extent to which a professional is obliged to advise outside the scope of their retainer, and to what extent that would apply to financial professionals. He concluded that only in limited circumstances will a Court extend a professional adviser's duty and liability beyond the scope of their retainer.

It appears that whilst Mr D knew something had gone wrong in 2008 and was complaining to the adviser and also asking for some help from his new adviser, he did not ask the right questions. This may well not be an entirely satisfactory situation for clients who do not have the experience or

knowledge to ask the right questions of their financial adviser. However, clearly an adviser will not be able to react to a question they did not know they were being asked.

COMMENT

This is a significant decision on the responsibilities of IFAs and it is clearly relevant to all financial advisers. The judgment is a useful reminder of how important it is for the terms of a professional's retainer to be clear, especially in circumstances where there is a risk that a professional may be expected to advise on historic matters.

All issues on which a client requires advice should be clearly set out by the client, whether in the initial contract between the client and adviser or as subsequently requested.

The case is also a reminder of the necessity to pursue a claim in professional negligence in good time, before limitation periods expire.

£4BN COLLECTED FROM ACCELERATED PAYMENT NOTICES

HMRC has collected more than £4billion through accelerated payment notices (APNs).

As a reminder, APNs enable tax avoidance scheme users to pay disputed tax 90 days before HMRC challenges the individual's scheme in Court.

APNs were introduced in 2014 and, to date, more than 75,000 notices have been issued to people under enquiry for using alleged tax avoidance schemes. HMRC has issued notices on all schemes that were already under investigation at that stage.

It would appear that the average bill for large companies is £6 million while for individuals and small corporates it is £74,000.

INCOME WITHDRAWAL RATE FOR AUGUST 2017

The appropriate gilt yield, used to determine the 'relevant annuity rate' from HMRC's tables for an adult member commencing income withdrawals (or reaching an income withdrawal review date), in August 2017 is 1.75%.