LLP

Pensions Update

December 2017

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In the news

STOP PRESS: Budget update

Perhaps mercifully for trustees, there has been very little activity on the pensions front in the autumn Budget. The key announcement to note is that the lifetime allowance for pension savings is to increase in line with CPI, rising to £1,030,000 for 2018-19.

We will report further on any Budget-related developments of note in our next quarterly update.

Investment consultants, UKSIF and AMNT back TPR guidance on ESG considerations for trustees

A group of twelve leading investment consultants have joined the UK Sustainable Investment and Finance Association (UKSIF) and the Association of Member-Nominated Trustees (AMNT) in committing to raise awareness among trustees of The Pensions Regulator's (TPR's) recent guidance on environmental and social governance (ESG) factors.

Earlier in the year, TPR released investment guidance stating that *"We expect [trustees] to assess the financial materiality of [ESG] factors and to allow for them accordingly in the development and implementation of your investment strategy".*

The consultants have now each signed a statement beginning: *"(Name of company) is happy to join with the [AMNT] and [UKSIF] in recognising that the recent investment guidance from [TPR] marks a major development in TPR's approach to how trust based DC and DB pension schemes need to address risks around long term sustainability, including environmental, social and governance issues.*

"We agree that this change, reflected in the TPR's statement to trustees...puts trustees and their advisers under an obligation to react."

Comment

TPR's stance on ESG reflects a growing focus on such factors among trustees and their advisers. While the law does not specifically set out that trustees should take ESG factors into account when making investment decisions, where such factors will have a material financial impact on scheme assets, trustees should always take them into account as part of their principal duty to act in their members' best financial interests.

Trustees can expect to see ESG more frequently appearing as a topic on trustee meeting agendas and in training sessions.

Related to that, the European Commission is currently undertaking a consultation on whether institutional investors' fiduciary duties should explicitly include the consideration of material ESG factors and long term sustainability, following recommendations made by the High Level Expert Group on Sustainable Finance.

In the UK, the Principles for Responsible Investment, The United Nations Environment Program Finance Initiative and The Generation Foundation last year launched a roadmap which set out recommendations to fully embed the consideration of ESG factors into investors' fiduciary duties.

January hearing for next bout in Box Clever Pension Scheme saga

The Pensions Regulator ("TPR") has come out on top in the latest round of its legal battle with the ITV Group over its attempts to enforce Financial Support Directions ("FSDs") issued to the television company.

The case followed the collapse of the Box Clever joint venture ("JV") between the television rental businesses Granada (now ITV) and Thorn (now Carmelite). Employees of the companies involved in the JV were enrolled in the Box Clever Group Pension Scheme, in order to replicate their benefits under the members' previous arrangements. The JV, however, subsequently collapsed, and the scheme now has a buy-out deficit of over £90m. TPR argues that the ITV Group has extracted "significant value" from the JV.

The latest judgment – issued by the Court of Appeal – confirms that TPR is permitted to introduce new evidence at the next hearing, which is scheduled to begin in January 2018 before the Upper Tribunal.

It is the first time a substantive hearing brought by TPR in an anti-avoidance case will take place in the Upper Tribunal.

Comment

FSDs are a powerful weapon in TPR's compliance armoury. They can be used to require companies connected or associated with a pension scheme to provide financial support, in cases in which an employer is either insufficiently resourced or a service company.

FSDs have previously been issued in several major cases including in respect of the Nortel Networks UK Pension Plan and the Lehman Brothers Pension Scheme. TPR recently announced that it has ended its anti-avoidance action in the case of the Nortel plan, after a settlement of $7bn was reached with the Nortel group's creditors: it is understood that the pension plan stands to receive over £1bn from the settlement, which is expected to secure benefits above PPF level for the plan's members.

Pensions Regulator Update

Regulator adds new data reporting requirements to scheme returns from 2018

The Pensions Regulator (TPR) has announced that it will be asking some new record-keeping questions as part of the annual Scheme Returns for defined benefit (DB) and defined contribution (DC) pension schemes.

The most notable of these questions concern member data and relate to both 'common' and 'conditional' data.

Common data are basic data items used to identify scheme members which all schemes should hold for members: that includes factors such as national insurance number, surname and address.

Conditional data, or 'scheme specific' data, are data specific to each scheme and which have been determined by the trustees to be necessary in the running of their scheme. That data can include employment records, contribution history, and the value of member benefits.

Scheme trustees and managers are being asked to report on:

1. when they last measured both common and conditional data; and

2. what percentage of their records is complete and accurate.

Measuring the completeness and accuracy of member data is not a new requirement: regulatory guidance has been in place since 2010. However, this is the first time that TPR has required reporting on data records in all Scheme Returns.

TPR has confirmed that it will not be taking immediate enforcement action on the basis of scores alone, but it will use these as a means of entering dialogue with a view to improving record keeping management.

TPR has issued a 'Checklist' for DB scheme returns, as well as a 'Quick Guide' to measuring scheme data.

The new requirements are timely, given the onerous provisions of the General Data Protection Regulations that will come into force in May 2018 and which will affect all pension schemes.

Trustees should work with their administrators to ensure that their common and conditional data are in a measurable form, in line with the Regulator's guidance, in time for the issue of the Scheme Returns: defined benefit schemes will see their returns issued in January 2018, and defined contribution returns will be available in the summer.

Regulator fine for trustee's failure to notify of scheme wind-up upheld by tribunal

In its latest quarterly Compliance and Enforcement Bulletin for July to September, TPR has announced that a fine imposed on a trustee for failing to notify it of a DC scheme's wind-up has been upheld by the Upper Tribunal.

TPR attempted to contact the trustee several times about its failure to submit a scheme return on TPR's Exchange portal in time, before issuing a £300 fine and a Determination Notice. The trustee then challenged the decision before the Tribunal, at which point it stated that the scheme had wound up a year before. It had not, however, notified TPR at or around the time of the wind-up.

Failing to notify TPR of a scheme's wind-up as soon as possible after the event attracts a penalty, and so the Tribunal agreed that the £300 fine against the trustee should stand.

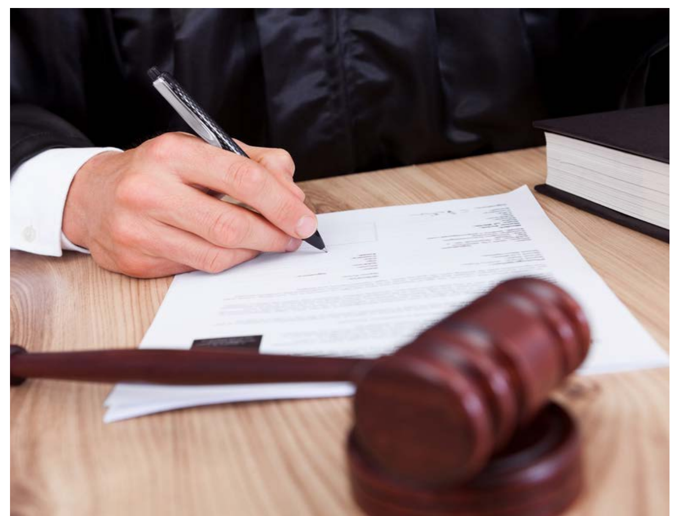
It was the first case to be determined at Tribunal level involving the failure of a trustee to keep a scheme's details up to date on Exchange.

HMRC Update

HMRC extends VAT exemption period for insurers' pension fund management activities

HMRC has again extended the transitional period during which pension fund management activities undertaken by regulated insurers are exempt from VAT.

It was initially understood that the exemption would end on 1 January 2018 in respect of services other than those provided to 'special investment funds' (SIFs); however, HMRC's brief of 20 November has confirmed a further extension to the period of exemption: the new deadline is 1 April 2019.



As HMRC notes, the majority of services provided by insurers to pension schemes related to 'defined contribution' arrangements: such schemes are classed as SIFs and are therefore unaffected by the issue.

HMRC allows input VAT recovery practices for DB schemes to continue indefinitely

Separately, HMRC has updated its VAT Input Tax Manual to confirm that the practices currently permitted in respect of the recovery of VAT on pension scheme services will be retained indefinitely.

Ever since the case of *PPG Holdings BV (C-26/12)* before the European Court of Justice, HMRC has provided schemes and sponsoring employers with the ability to enter into tripartite agreements with the service provider; enter into a commercial agreement regarding the running of the scheme by the trustees for the employer; or use VAT grouping, each as mechanisms for reclaiming input VAT on services provided to schemes.

The guidance also sets out that the practice of recovering up to 30% of the VAT on invoices which include a mix of investment management and administration charges will be allowed to continue.

With the deadline looming for the end of the transitional period by which these arrangements required to be implemented, their indefinite retention will come as a welcome relief to scheme employers and trustees who were having difficulty implementing the necessary changes to their contractual arrangements in time.

HMRC's update to the VAT Input Tax Manual also includes a number of new permitted arrangements, including the employer being able to recharge costs to the pension scheme.

HMRC to receive new powers on registration for occupational pension schemes

HMRC is to be given new powers to help in the fight against fraudulent pension arrangements. The new powers which are expected to be outlined in the Winter Finance Bill 2017 are:

- the power to refuse tax registration of an occupational pension scheme in circumstances in which a scheme's sponsoring employer has been dormant for one continuous month in the year leading up to the date of HMRC's decision regarding registration (likewise, it will have the power to de-register any scheme whose employer has been dormant for one continuous month in the year prior to the date on which the decision is taken to de-register the scheme); and
- the power to refuse registration (or to de-register) an unauthorised Master Trust, thereby bringing HMRC's rules in line with TPR's supervisory and authorisation powers regarding master trusts, as introduced by the Pension Schemes Act 2017.

The introduction of these new powers follows a consultation on pension scams which included a commitment by the government to ban cold-calling in relation to pensions.

PPF Update

A bridge too far? PPF consults on draft regulations to take account of bridging pensions

The government has been consulting over the last quarter on draft regulations which will allow the Pension Protection Fund (PPF) to take account of 'bridging pensions' offered by schemes which are then assumed by the PPF.

Bridging pensions are designed to 'bridge the gap' between a member's retirement under the scheme rules before they reach their State Pension Age (SPA). Once they do reach SPA, the bridging pension 'steps down' to reflect the fact that the member is now also receiving their state pension.

At present, PPF regulations effectively provide a windfall for members who are receiving the 'stepped up' pension rate at the point at which their scheme enters the PPF assessment period, as the regulations require that higher rate to be maintained for the rest of the member's life.

An initial consultation to address the anomaly was run from 31 August until 1 October, at the start of which period the government's preferred solution was to seek to correct the anomaly by 'smoothing' out the value of the bridging pension across the member's life. However, a follow-up technical consultation confirms that the alternative approach mooted in the first paper - moving members to a lower rate of PPF compensation once they reach the age at which their bridging pension would have been 'stepped down' under the scheme rules - is now the preferred option.

The change will primarily affect pensioner members and spouses who are in receipt of a bridging pension, and also a small proportion of deferred members in schemes which provide an automatic bridging pension at their retirement date.

The consultation on the draft regulations is open until 3 December 2017.

PPF consults on wording of contingent asset agreements

The PPF has concluded a technical consultation on the clarification of wording in its standard form 'Type A' and 'Type B' contingent asset agreements relating to the fixed cap.

The PPF notes that, arguably, the current provisions in those agreements mean that any payments made in respect of an employer's guaranteed obligations would erode the fixed cap, contrary to its intention. Unsurprisingly, the PPF disagrees with such an interpretation: however, it considers clarification to be appropriate to ensure that the matter is beyond doubt.

The consultation also seeks views on the current operation of the cap system, including whether there is any value in continuing to offer the full range of available types of cap.

We will report further on the outcome of the consultation in our next quarterly update.

Guest Blog: A View from the Courts

A review of the latest decision affecting the law of prescription in Scotland, by MacRoberts dispute resolution solicitor Rebecca Barrass.

On 15 November 2017, the Supreme Court issued its decision in *Gordon and others, as the Trustees of the Inter Vivos of the late William Strathdee Gordon (Appellants) v Campbell Riddell Breeze Paterson LLP (Respondent) (Scotland)* ("Gordon v Campbell Riddell") and made important comments in relation to the time limits imposed on parties in Scotland looking to raise a claim for breach of contract.

The law of prescription in Scotland is governed by the Prescription and Limitation (Scotland) Act 1973 (the "1973 Act"). The 1973 Act provides that the time limit for bringing a claim for breach of contract is 5 years from the "appropriate date". In normal circumstances the "appropriate date" will be the date when the loss, injury or damage, arising from a breach of contract, occurred, or in the case where the claimant was not aware of their loss, injury or damage, the date on which the claimant first became, or could with reasonable diligence have become, aware of the loss, injury or damage.

The concept of when a claimant first became aware, or could with reasonable diligence have become, aware of loss has long been the subject of legal debate. The matter came to a head in the 2014 Supreme Court case of David T Morrison and Co Limited (t/a Gael Home Interiors) v ICL Plastics Limited and Others ("Morrison v ICL") (see MacRoberts' e-update on the case). The court found that the appropriate date was simply the date which the claimant became aware of the loss, injury or damage. There was no requirement for the claimant to be aware of the cause of that loss.

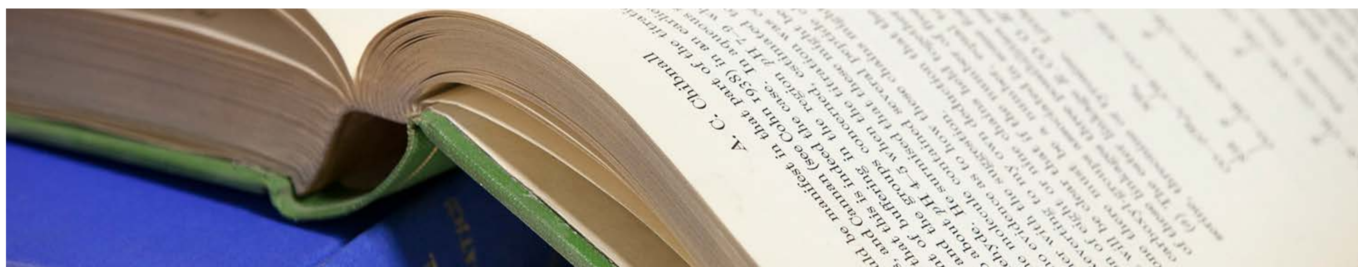
Gordon v Campbell Riddell: The Facts

The case was an appeal from the Inner House of the Court of Session involving a claim arising from a solicitor's negligence. The Defenders (Campbell Riddell) had been instructed by the Appellants (the Trustees) to serve notices to quit on the tenants of three pieces of agricultural land. The land had been acquired by the Trustees because of its potential for residential development. The notices to quit were served in November 2004. Had the notices been effective, the tenants would have had to leave by 10 November 2005. Campbell Riddell then withdrew from acting.

In February 2006, the Trustees instructed a new firm of solicitors to raise proceedings in the Land Court to enforce the notices to quit. In a decision dated 24 July 2008, the Land Court found that two of the notices to quit were ineffective. As such the land was still subject to the leases and the Trustees were prevented from developing the land.

On 17 May 2012, the Trustees commenced legal proceedings against Campbell Riddell for breach of an implied term of the contract that they would exercise the degree of knowledge, skill and care expected of a reasonably competent solicitor. They sued for the loss of not being able to develop the land, along with the cost of instructing a new solicitor to raise proceedings in the Land Court.

It was accepted that the loss suffered by Trustees had occurred because of the breach of contract. However, Campbell Riddell argued that any obligation to pay the Trustees damages had prescribed (i.e. was out of time) because the Trustees failed to raise court proceedings against them within 5 years of the date on which they had suffered a loss. They argued that the date of loss was when Campbell Riddell issued a defective notice (November 2004) or at least when the tenant failed to leave (November 2005). The Trustees argued that the time limit should start running from the Land Court's decision that two of the notices to quit were ineffective (July 2008).



The Decision

The Supreme Court ultimately followed the decision of Morrison v ICL and came to the following conclusions:

• The 5 year period will start to run from the date the claimant "is aware actually or constructively" that he or she has suffered a detriment or that he or she has incurred expenditure;

• It was irrelevant that when the Trustees instructed their new solicitor, they were unaware that the Land Court would not enforce the notice to quit;

• Objectively the Trustees suffered the detriment on the date the tenant failed to vacate the land (November 2005) and in any event they knew they had incurred expense in respect of the detriment in February 2006 when they instructed their new solicitor;

• Accordingly, when the claim was eventually raised in 2012 the claim had expired.

Conclusions

The decision affirms the previous position that the prescription clock will start running when a claimant's loss occurs, regardless of whether the claimant knew or ought to have known that loss was caused by another.

In this case the court concluded that loss occurred when the tenants failed to vacate the land. However, the court also commented that the clock started in any event when the Trustees incurred the expense of instructing the second solicitor to obtain vacant possession of the land. Such a finding possibly complicates the issue. Arguably, it follows that the appropriate date could be the date on which the claimant incurs expense to rectify the detriment. With two competing dates referred to by the court, it might be said that the court has further confused an already difficult area.

It has long been accepted that the law of prescription in Scotland is in need of reform. The Scottish Law Commission recently published a report recommending a number of changes designed to clarify the rules as to the time limits within which claims can be brought. However, until reforms are put in place, potential claimants should take a cautious approach when determining their time limits for bringing a claim, and assume that the clock starts running as soon as they knew, or ought to have known, they had suffered loss, injury or damage.

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"They understand and have a breadth of experience of the 'real world' issues facing companies."

"The are very practical and cost-efficient."

Martyn Shaw "has huge knowledge of pensions law and our schemes, and is very responsive to our needs."

James Keith was ranked as next generation lawyer in legal 500.

Season's Greetings from all at MacRoberts.

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MacRoberts occupies a position of leadership and prestige in the Scottish legal sector and beyond. This position has been maintained through the delivery of high-quality, innovative and practical solutions for clients, by a firm with an impressive ability to adapt to the contemporary commercial landscape.

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