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Unauthorised member payments out of registered pension schemes (Court of Appeal—Clark v HMRC)

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Pensions analysis: In the Court of Appeal decision of Clark v HMRC, the court held that in considering whether the tax charge imposed on unauthorised member payments under sections 208 to 210 of the Finance Act 2004 (FA 2004) applied, the question of whether a 'payment' had been made was to be answered by looking at the practical, business reality of the transaction. Applying that approach, on the facts of the case, a transfer of legal title without beneficial title did constitute a 'payment'. The Court of Appeal also provided important guidance as to the operation of the discovery provisions within section 29 of the Taxes Management Act 1970 (TMA 1970), including the question of how the scope of a discovery assessment is to be delimited. Written by Jonathan Davey QC of Wilberforce Chambers and Sam Chandler of 5 Stone Buildings, who acted for HMRC.

Clark v HMRC [2020] EWCA Civ 204, [2020] All ER (D) 140 (Feb)

What are the practical implications of this case?

The decision has important practical implications for pension schemes and members, as well as for taxpayers more generally.

In relation to pensions, the decision means that an unauthorised member payment out of a registered pension scheme will not escape the unauthorised member payment tax charge simply on the basis that no beneficial title is conveyed. The construction of the legislation contended for by the taxpayer would have substantially cut down the circumstances in which the tax charge was applicable, including in the majority of cases where such a payment was made in breach of trust. In rejecting that construction, the Court of Appeal's decision confirms that such transfers do fall within the charging regime. More broadly, the decision may be of relevance in understanding the meaning of 'payment' in other statutory contexts.

As regards the Court of Appeal's analysis of the discovery assessment machinery within TMA 1970, s 29, this is of significance because the issue between the parties, namely how the scope of a discovery assessment is to be delimited, is one which arises in practice and on which the law reports have hitherto provided limited assistance.

What was the background?

The arrangements entered into by Mr Clark, the purpose of which was to enable him to access his pension monies for personal investment, were complex and international in nature. They constituted a composite transaction designed to generate an authorised surplus payment that (it was intended) would not be subject to tax on the basis that the scheme administrator was a Manx company thought to be outside the charge to UK corporation tax. The monies would then be made available to Mr Clark via a British Virgin Islands company known as Cedar Investment Management Limited (CIM).

The scheme involved a number of steps. Two particularly important steps were as follows: first, the transfer of £2.115m (the Suffolk Life transfer) from Mr Clark's Suffolk Life self-invested personal pension (SIPP) into what was purported to be a registered pension scheme known as the Laversham Marketing Limited pension scheme (the LML pension)—secondly, the transfer of £2.115m (the LML transfer) by the LML pension to Laversham Marketing Limited (the company incorporated in Cyprus which had established the LML pension) (LML). As a result of the remaining steps within the scheme, which included the receipt by CIM of the monies (minus fees), and the provision of loans to Mr Clark thereafter, Mr Clark was able to invest the monies profitably in the London property market.

The parties' pleaded cases had focused on whether or not the LML transfer constituted an unauthorised member payment within the meaning of FA 2004, s 160, and was therefore subject to a charge and surcharge. However, following the first instance hearing, the First-tier Tribunal (FTT) found that the instrument establishing the LML pension was so uncertain as to render the trusts of the scheme void, the result of which was that, while the remaining steps of the scheme were in fact implemented as planned, the Suffolk Life transfer into the purported scheme gave rise to a resulting trust in favour of the Suffolk Life SIPP. Thus, the Suffolk Life transfer had been ineffective to convey beneficial title, which stayed with Suffolk Life.

Although Mr Clark argued that the charging provisions within FA 2004 were only apt to include transfers of beneficial ownership, the FTT nonetheless held that the Suffolk Life transfer was a 'payment' for the purposes of the legislation. It also held, notwithstanding Mr Clark's submission to the contrary, that the discovery assessment of 2014, while made on the basis that the LML pension was a registered pension scheme and therefore predominantly focusing on the Suffolk Life transfer, was broad enough to encompass the Suffolk Life transfer. The Upper Tribunal (UT) agreed with the FTT on both of these points, and the taxpayer appealed. The Court of Appeal (Henderson LJ, Bean LJ, Nicola Davies LJ) handed down its decision on 21 February 2020.

What did the court decide?

The Court of Appeal upheld the decisions of the FTT and the UT, finding that the Suffolk Life transfer did give rise to an unauthorised payment charge, and that the discovery assessment, being broad enough to encompass this element of the scheme, should be confirmed. The lead judgment was delivered by Henderson LJ, with a short concurring judgment from Bean LJ.

At the core of Henderson LJ's analysis of the question of whether or not the Suffolk Life transfer was a 'payment', notwithstanding the fact that it transferred legal title without beneficial title, was the unrealism of the submission for the taxpayer to the contrary. Henderson LJ stated (at [40]): '…the natural reaction of anybody to the question whether there had been a payment of the £2.115m by Suffolk Life to the LML Pension would surely be that of course there had…From a practical and common-sense perspective, why should it make any difference to this analysis if it later transpired that, unknown to everybody at the time, the transfer was in fact defective and gave rise to a resulting trust? In the context of the carefully designed scheme of the 2004 Act, one would not expect the meaning of an everyday word like "payment" to depend on legal niceties of that kind.'

Another key element of Henderson LJ's reasoning was the fact that, if the charging provision excluded transfers where no beneficial interest had transferred, then, given that its underlying purpose included the deterring of transfers out of pension schemes, the legislation would be self-defeating. An unauthorised payment out of a pension scheme would 'in most cases' ([82])

constitute a breach of trust, the effect of which was that beneficial title to the property would not pass to the transferee, save where it ended up in the hands of a bona fide purchaser for value without notice. Accordingly, the Court of Appeal held (at [82]) that Mr Clark's construction 'would deprive the charge to tax of effect in many of the most egregious cases where it is most needed'.

As to the separate question of the scope of the discovery assessment, Henderson LJ held that it was inescapably to be inferred from HMRC's letter which accompanied the assessment that the Suffolk Life transfer, as part of the composite series of transactions being investigated by HMRC, was in the officer's mind when she had made the assessment. Therefore, while the scope of a discovery assessment was, according to Henderson LJ, delimited by the loss of tax subjectively identified by HMRC, in the instant case that included the Suffolk Life transfer (see [108]).

Case details:

- Court: Court of Appeal, Civil Division
- Judges: Bean, Henderson and Nicola Davies LJJ
- Date of judgment: 21 February 2020

Jonathan Davey QC of Wilberforce Chambers and Sam Chandler of 5 Stone Buildings acted for HMRC in this case. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

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