

PUMP COURT  
TAX CHAMBERS

# **PENSIONS TAXATION**

What can be done about unexpected pensions charges?

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# Pensions taxation: a minefield

- Modern regime introduced in Finance Act 2004, in effect from 2006
- Disputes are now working through the courts
- A system based on deterrence (Henderson LJ, *Clark v HMRC* [2020] EWCA Civ 204 at paragraph 25)

# Possible traps

- Unauthorised payments to members (or in respect of them)
- Cumulative 40%, 15% and 25% charges
- Charges on making the wrong investments (taxable property)
- Failing to claim, or losing, enhanced protection

# Statutory Reliefs – Late Claims for Protection

- Seven different types of protection introduced in four stages (2006, 2012, 2014 and 2016)
- The different protections treat late claims differently
- In some cases, HMRC have a power to accept late claims
- In some of these cases, the exercise of this power can be reviewed by the FTT. In others, the only remedy would be judicial review

# Statutory Reliefs – Late Claims for Protection (2006)

- Both 2006 primary and enhanced protection require that notice of the intention to rely on them is given to HMRC (paras. 7 and 12, Sch. 36, FA 2004).
- Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006/131 set out the requirements for that notice, including that it be given by 5 April 2009.
- Reg. 12(1) provides that HMRC must consider the late notification if the individual had a reasonable excuse for the lateness and acted without unreasonable delay once the reasonable excuse ceased.

# Statutory Reliefs – Late Claims for Protection (2006)

- *Ketley v HMRC* [2021] UKUT 218 (TCC) [2021] STC 1932
  - K had pension investments exceeding the lifetime allowance.
  - K instructed his advisor to claim protection and was told this was done.
  - On 14 October 2015, K was told by a new advisor that HMRC had not been notified.
  - On 26 January 2016, K instructed solicitors to advise, among other things, on a professional negligence claim against his financial adviser.
  - On 13 July 2016, the solicitor provided a report.
  - On 15 August 2016, K wrote to HMRC seeking to make a late claim.
  - HMRC replied on 24 October 2016 saying the claim needed to be made on a particular form and a late claim was made in the proper form on 1 December 2016.

# Statutory Reliefs – Late Claims for Protection (2006)

- *Ketley v HMRC* [2021] UKUT 218 (TCC) [2021] STC 1932
- The appropriate test for unreasonable delay is the one in *Perrin v HMRC* [2018] STC 1302:

“having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

# Statutory Reliefs – Late Claims for Protection (2006)

- *Ketley v HMRC* [2021] UKUT 218 (TCC) [2021] STC 1932
- A stark conclusion at [88]:

“Mr Ketley did not at any stage between 14 October 2015 and 13 July 2016 give express instructions either to [his financial advisor] or [his solicitor] to advise him whether a late notification could be given, or to engage with HMRC to see if they would accept a late notification. We consider that Mr Ketley’s failure to give express instructions to that effect was unreasonable.”
- But better viewed as a burden of proof decision?



# Statutory Reliefs – Late Claims for Protection (2006)

- Other recent cases:
  - *Bateson v HMRC* [2021] UKFTT 26 (TC) – a person did not have a reasonable excuse where they had not taken regular advice (although the reason why they should have taken the advice is less than clear)
  - *Gammell v HMRC* [2021] UKFTT 49 (TC) – a person did have a reasonable excuse and acted without unreasonable delay in circumstances very similar to those in *Ketley* (a moderately extended delay while engaging with former advisor's complaints procedure)

# Statutory Reliefs – Late Claims for Protection (2006)

- Key takeaways:
  - Advisors should address possible routes to remedying late claims – either by expressly excluding responsibility for considering them or by considering them and advising.
  - Clear, detailed evidence is vital when relying on reasonable excuses in the FTT.
  - It will be easier to establish that an individual has a reasonable excuse if they have taken regular legal advice (*Bateson*)
  - But even when a person takes regular legal advice, this may not be sufficient if they do not ask the right questions of their legal advisors (*Ketley*)

# Statutory Reliefs – Late Claims for Protection (FP 2012 and 2014)

- Fixed protection 2012 and 2014 require that notice of the intention to rely on it is given to HMRC (paras. 14, Sch. 18, FA 2011 and para. 1, Sch. 22, FA 2013).
- The regulations governing the giving of that notice require that it be given by a specified time.
- HMRC may refuse to accept the notice if it does not satisfy the requirements.
- The regulations provide that an individual may appeal HMRC's decision and that the tribunal must determine whether HMRC were entitled to take the view that the requirements were not met.

# Statutory Reliefs – Late Claims for Protection

- *Harrison v HMRC* [2021] UKUT 273 (TCC) considered the scope for the Tribunal to review HMRC's decision not to accept late notice in relation to Fixed Protection 2012.
- The Upper Tribunal concluded that the FTT's sole jurisdiction is to consider whether the requirements of Regulation 4 are met.
- This means the only challenge to HMRC's decision not to accept late notice is judicial review.

# Statutory Reliefs – Late Claims for Protection

- Individual protection 2014 requires that notice is given before 6 April 2017.
- There is no provision allowing HMRC to accept late notification.
- The method for claiming fixed protection and individual protection 2016 is different. Individuals who want to rely on them will only be required to make a claim at the time they draw their benefits.

# Statutory Reliefs – Just and reasonable defences

- Sections 267 and 268 FA 2004 allow for HMRC to discharge certain charges where it would be just and reasonable in all the circumstances
- Applies to, among other things, lifetime allowance charge on scheme administrators, unauthorised payments surcharges and scheme sanction charges
- Right of appeal in s. 269 FA 2004, under which the tribunal must consider whether the applicant's liability ought to have been discharged

# Statutory Reliefs – Just and reasonable defences

- *Bella Figura Ltd v HMRC* [2020] UKUT 120 (TCC); [2020] STC 922
  - BFL was the sponsoring employer and scheme administrator of a registered pension scheme (BFPS).
  - BFPS made a loan to a company connected to BFL that was not secured by an adequate charge and was therefore an unauthorised payment.
  - HMRC assessed BFL, in its capacity as employer, to an unauthorised payments charge (of 40%) and an unauthorised payments surcharge (of 15%) and, in its capacity as scheme administrator, to a scheme administrator sanction charge (of 40%).

# Statutory Reliefs – Just and reasonable defences

- The UT approved a statement in *O'Mara v HMRC* [2017] UKFTT 91 (TC) that the test does not benefit from unnecessary gloss and requires consideration of all the circumstances.
- It was important to consider the entire statutory scheme of which the charges form part and noted that Parliament was content for the Exchequer to suffer the costs of the statutory scheme only where the entire bargain is respected.



# Statutory Reliefs – Just and reasonable defences

- In circumstances where BFL had attempted to adhere to the scheme and the loan had been repaid, the UT would “*in all likelihood*” have concluded that it was not just and reasonable to impose the scheme sanction charge or the unauthorised payment surcharge.
- However, having concluded that the assessments to the unauthorised payments charge and the unauthorised payments surcharge were out of time, the UT upheld the scheme sanction charge.

# Undoing mistakes

- *Lobler v HMRC* [2015] UKUT 152 (TCC); [2015] STC 1893
- Not a pensions case – concerned with the surrender of life insurance policies.
- Mr Lobler did not take tax advice before surrendering the policies, surrendered them in the wrong way and incurred an effective tax rate of 779% on the actual income generated by the policy, which was likely to bankrupt him.

# Undoing mistakes

- The UT considered that this was not concerned with the doctrine of mistake because the party receiving the benefit of the mistake is not the life insurance provider but a third party to the policy contract, HMRC.
- The UT held that although the FTT did not itself have power to order rectification, it could determine that rectification would be granted by a court that does have jurisdiction to grant it.
- It could then hold that Mr Lobler's tax position would follow as if such rectification had been granted.

# Undoing mistakes

- *Hymanson v HMRC* [2018] UKFTT 667 (TC)
- Facts:
  - Mr Hymanson applied for and received Fixed Protection 2012. To remain entitled to this, he could not make any more pension contributions.
  - He had two direct debits making small contributions to pension schemes. His understanding was that these direct debits did not have to stop.
  - HMRC withdrew his entitlement to Fixed Protection 2012 resulting in a tax loss estimated at £50,000.
  - Mr Hymanson appealed to the FTT saying that the payments were made by mistake and relying on *Lobler*.

# Undoing mistakes

- The FTT held that:
  - if Mr Hymanson were to take his case to the High Court then it would order rescission of the additional contributions;
  - the FTT's jurisdiction was purely supervisory; and
  - HMRC did not take into account any possibility that the contracts under which Mr Hymanson made payments were void as a result of mistake.
- The FTT went on to direct that HMRC issue a new Fixed Protection 2012 certificate to Mr Hymanson.

# Undoing mistakes

- HMRC applied for permission to appeal but the appeal was discontinued when Mr Hymanson obtained an order from the High Court (*Gough v HMRC* [2021] UKFTT 0273 (TC) at [37])
- The Tribunal's relaxed attitude to the effects on third parties.
- Was the Tribunal correct to apply *Pitt v Holt*?

# Seeking rescission in the High Court

- Avoid the risk of Lobler being overturned
- High Court has power to deal with consequences of rescission
- Filing a claim: what remedy are you seeking?
- Who is the defendant?
  - The pension fund?
  - The employer?
  - The taxpayer?
- Witness statements

# Differences from the FTT

- Rules on evidence much stricter
- Identifying the mistake: is this a voluntary disposition or a contract?
- Contractual mistake:
  - Parties share a mistake of law or fact
  - Neither party adopted the risk of being wrong
  - Neither party is at fault
  - Mistake fundamental to the agreement
- Misrepresentation, duress, undue influence – unlikely but not impossible



# HMRC in High Court proceedings

- Need to notify HMRC
- HMRC may dispute the claim: *Dukeries Healthcare* [2021] EWHC 2086
- Costs implications

# Clark v HMRC [2020] EWCA Civ 204

- Mr Clark wanted to release funds from his SIPP to invest in property
- Pensions liberation scheme
- Transfer to LML Pension Scheme void: *The Pensions Regulator v A Admin Ltd & Ors* [2014] EWHC 1378 (Ch)

# Unauthorised payment?

- Mr Clark argued that nothing of value left his SIPP: so no payment
- Henderson LJ disagreed – transfer of bare legal title is enough
  - “If the intended purpose and effect of the transactions is that money leaves the scheme and is placed at the free disposal of the member, the mere fact that the money may be subject to an equitable obligation to restore it to the scheme will not prevent it from being a "payment" in the ordinary sense of that word.” (paragraph 82)

# Does rescission matter?

- Henderson LJ at paragraph 79:

“The concept of a charge to tax which can vary in amount, or even be negated, depending on the happening of events subsequent to those which gave rise to the assessment, seems to me a very strange one which Parliament is most unlikely to have contemplated. The validity and amount of an assessment to tax should normally be determined by reference to the facts as they stood at the date of assessment, not by reference to steps later taken by the taxpayer in an effort to retrieve the situation which led to the charge being incurred.”

- But *Pitt v Holt* [2013] UKSC 36

# Does it depend on the context?

- In *Hymanson*, was a relevant contribution paid? FA 2004 Sch. 36 para. 13
- *Clark* at 86: where do “different considerations apply”?
- Paragraphs 40 and 51 – is this a matter of common sense?
- Does it depend on which part of the pensions regime is at issue?

# Are payments to employers different?

- *Hilldown Holdings* [1999] STC 561
  - Pension fund A is prohibited from returning surplus to employer
  - Pension fund B is not
  - Pension fund A transfers assets to fund B, which returns surplus to employer
  - Employer pays 40% tax
  - Courts order employer and fund B to return sums
  - Employer successfully claims tax from Inland Revenue: not “paid” “out of” the funds.
- Defective employer loans cases? *Bella Figura* [2020] UKUT 120

# HMRC make mistakes too

- Disputed assessment powers: *Bella Figura, Monaghan* [2018] UKFTT 156
  - Scope of s 29 TMA
- *Bayonet Ventures* [2018] UKFTT 156
  - Who is the scheme administrator?
  - Who is the borrower when money is lent to an LLP?

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## **Any questions?**

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