Limitation again: accrual, the running of time, and 'Round the World' tax schemes

Sir Christopher and Lady Evans v PricewaterhouseCoopers LLP [2019] EWHC 1505 (Ch)

In 1623 James I was king, his son Charles and the Duke of Buckingham travelled *incognito* to Spain in search of a Spanish bride, and the First Folio of Shakespeare's plays was published.

1623 also saw the first Statute of Limitations. It provided for a general limitation period requiring all common law actions to be commenced within 6 years of their accrual.

396 years later English law still finds it hard to say precisely when causes of action accrue.

The latest instance is *Sir Christopher and Lady Evans v PricewaterhouseCoopers LLP*.

The facts

Sir Christopher ("Sir Christopher") and Lady Evans (together "the claimants") were the trustees and beneficiaries of the Solidum Trust ("the Trust"). The defendant ("PwC") was their accountant and tax adviser. Earlier trustees had wanted to sell a shareholding held by the Trust in order to release cash for Sir Christopher. The sale would give rise to a large charge to Capital Gains Tax ("CGT") falling upon Sir Christopher as settlor. PwC advised the adoption of a 'Round the World' scheme ("the Scheme"), the essence of which was that the Trust would become resident for part of the tax year in a jurisdiction that did not tax capital gains, later in the year it would move back to the UK, and the effect of the relevant double taxation treaty between the two jurisdictions would be that no, or very little, CGT would be payable.

PwC initially proposed Mauritius for the tax-friendly jurisdiction to be visited on this world tour, a suggestion endorsed by tax counsel, but then substituted Canada, one reason being that it would reduce the "*smell factor*". And so Canada it was. The existing trustees resigned as the journey began, Canadian trustees were appointed *en route*, with the claimants taking their place as the Trust returned home, taking the duty-free channel as it were, later in the year.

The Scheme failed. The double taxation treaty with Canada had the effect that the competent tax authorities of each country would determine <u>by mutual agreement</u> where the Trust was resident and any gain would be taxed accordingly, the decision being challengeable only on public law grounds. The authorities consulted and plumped for the UK. So CGT was payable, yielding a bill, when ultimately paid, of £3,331,364 inclusive of interest and penalties.

The claimants alleged that the advice to substitute Canada for Mauritius was negligent and a breach of PwC's statutory duties under the Financial Services and Markets Act 2000. They maintained that if PwC had stuck with Mauritius a different form of double taxation treaty would have applied, the effect of which was that where a trust was resident during a tax year in both the UK and Mauritius then as long as its 'place of effective management' was in

Mauritius, that being objectively ascertainable, the capital gain would be liable to tax in Mauritius, which would have meant no tax was payable.

PwC had various defences but sought a summary disposal alleging the claim was time-barred.

The arguments and the decision

The limitation arguments were somewhat involved, not least because of additional points deriving from sections 14A and 14B of the Limitation Act 1980. Shorn of such features a critical question was when the causes of action in negligence and breach of statutory duty accrued, which depended on when there was both a breach of duty and actionable damage.

PwC maintained that damage had been done when the shares had been sold, because from that point onwards the die was cast, the Scheme had been adopted, and the position of the Trust and the claimants had been changed in reliance upon PwC's advice, even though it might then have been difficult to quantify the damage.

If correct, that submission would have meant the entire claim was time-barred, whereas to the extent that the claimants could say that damage had been sustained at a later stage, from the point just before they were appointed as trustees onwards, then, (and if need be with the assistance of section 14A of the Limitation Act 1980), they were arguably within time.

The judge, HHJ Elizabeth Cooke sitting as a High Court judge, found first of all that as PwC's retainer had continued for many years after the implementation of the Scheme it was arguable that there was a continuing breach of duty in not alerting the claimants to the poor decision that had been made and the unwarranted exposure to tax, whereupon the tax could have been paid earlier (thereby reducing the exposure to penalties and interest and professional fees). However, that point alone would not have enabled the claimants to maintain the meat of their claim, the claim in respect of the tax liability itself.

More significantly, the court had to address two further arguments by the claimants: (1) that breaches of duty after the initial share sale had caused the tax liability, and (2) that no damage was suffered until the Canadian tax authorities informed HMRC that it agreed the gain was chargeable in the UK or when HMRC issued a closure notice identifying the CGT payable.

The judge upheld both of these arguments.

On the first point the judge thought it was arguable there was a continuing duty, up to the time the claimants were appointed as trustees (completing the implementation of the Scheme), to advise that the Scheme would not work, such that the arrangements could have been aborted before the claimants were appointed as trustees, and different arrangements put in place instead, and hence the loss could still have been avoided at a later date than the share sale. If established at trial, that could mean damage had been done and the causes of action accrued within time.

The second point was more troublesome. The claimants relied upon *Law Society v Sephton & Co (a firm)* [2006] 2 AC 543 to argue that that this was a case of a purely contingent loss as

until there was a joint decision that the Trust was resident in the UK, there was merely a risk of damage, that is, a risk of the UK and Canadian tax authorities agreeing that the UK could treat the gain as chargeable to tax in the UK.

PwC accepted that a purely contingent liability was not enough but argued that there was damage where that was coupled with some other change in a claimant's position. PwC argued that this was a 'wrong transaction' case, and that in such a case damage is sustained where a claimant has acquired the wrong package of rights or an asset that did not match what was wanted, or where it had lost commercial flexibility or changed its legal position as a result of the advice given, even if damages were not easily quantifiable at that stage. PwC relied on a line of authority including failed tax avoidance cases such as *Pegasus Management Holdings SCA v Ernst & Young* [2011] EWCA Civ 181 and *Halsall v Champion Consulting Ltd* [2017] EWHC 1079 (QB) in support of this submission.

The judge was not convinced. She thought it arguable this case was different. She emphasised that in this case nothing was acquired when the shares were sold and it had not been shown that there had been a loss of commercial flexibility in that the sale of shares and the corresponding receipt of cash restricted commercial options for the future. All the claimants had taken on was a risk tax might be charged depending on whatever the agreement of the two revenue authorities might turn out to be, which was arguably a pure contingency as in the *Sephton* case. Up until the date when the Canadian tax authorities agreed that the Trust was resident in the UK and so could be taxed there, the point could have gone either way and the Scheme might have worked.

Comment

A first moral is that claimants can sometimes save their limitation bacon if they can point to a continuing retainer and an arguable obligation to alert a client to a defective tax avoidance scheme (or other transaction) while it is still being implemented or even after it has been implemented. If and to the extent that some or all of the loss would have been avoided by remedial action at that later stage then a claim based upon such a continuing breach of duty and consequent damage may be in time even though a claim referable to the initiation of the scheme (or other transaction) may be time-barred.

The second moral is that the question of what is a 'purely contingent' loss remains a delicate one. The judge's decision that damage was arguably not sustained when the Scheme was implemented and that this could be a case of a purely contingent loss with damage only being done when the competent authorities agreed that it was chargeable to tax in the UK was in some ways surprising. After all, the Trust had not just sold shares but had also entered into arrangements whereby the existing trustees had resigned and new, Canadian, trustees had been appointed with a view to rendering the Trust resident in Canada for part of the tax year, with a further appointment of the claimants as trustees when the Trust returned home. One might have thought that all that had not just created a contingent exposure to the CGT liability, but that it had also involved the taking of steps, at some cost presumably, affecting the legal position of the Trust, which had deprived the claimants of the ability to put in place

a more effective tax avoidance scheme. Furthermore, whilst the question of whether or not CGT was ultimately payable would depend on the joint decision of the UK and Canada tax authorities one would have thought that there would always have had to be an objective element to that decision, such that it would be to a considerable extent at least be pre-determined by the position at the time the Scheme was implemented, as opposed to being driven by collateral factors, or mere caprice. The ultimate decision, and the consequent tax loss, may not have been inevitable when the Scheme had been implemented, but one is at some remove from the multiple contingencies of a collateral nature which would have governed the eventual incidence of any loss that were in issue on the facts of the *Sephton* case.

Finally, and although only a decision on an interlocutory application, this is a reminder that the question of when damage is done and a cause of action for negligence or breach of statutory duty accrues remains an acutely fact-sensitive one, concerning which parties would be well advised to give very careful thought to how their cases are pleaded, and as to what evidence needs to be adduced to make good any contention that a claim is or is not time-barred.

If that is done then, after 396 years, limitation statutes might cause *a little* less anxiety, although they will perhaps not become the 'statutes of repose' they were originally intended to be.

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