



From sex changes to tax dodges

By our legal correspondent John Quarrell, a partner of solicitors Nabarro Nathanson.

This month I cover three separate practical problems which I have had to deal with in recent months.

The first relates to sex changes. In the course of one week some six months or so ago I was asked by two fund managers what the legal position was on this aspect. It appeared that they both had individual male members of their respective schemes who had undergone a sex change operation and who now regarded themselves as women. One had been married and the other had not.

The fund managers were concerned as to how they should treat them — were they still male members with a retirement age of 65 and a potential widow's pension or were they female members? In both cases the female members had a retirement age of 60 and there was no provision for a widower's or a dependant's pension.

The leading authority on whether or not a sex change operation successfully transforms, in law, a man to a woman is the now famous case involving April Ashley entitled *Corbett v. Corbett*. I will not go into the facts of that particular case but essentially it involved the position of nullity of marriage. However, the finding was that in law the sex of an individual is governed by the registration of the individual at birth.

It also appears from that case that with regard to an individual's treatment by his employer and his membership of the pension scheme, it is essentially up to the employer or the trustees. I was therefore able to advise that the pension fund manager could treat the individuals concerned how he wished, ie either men or women.

Fortunately, these particular operations are not widespread but they do

have interesting repercussions on the treatment of an individual under a pension scheme and the consequent actuarial calculation problems.

The second problem relates to polygamous marriages. Whilst English law does not recognise polygamous marriages contracted in this country, the law does nonetheless recognise marriages that are polygamous or potentially polygamous contracted overseas in a legal jurisdiction which itself acknowledges polygamous and potentially polygamous marriages.

In certain areas with a high immigrant population in this country it would be not unnatural for an employer to find that he or she has employed many men who have more than one wife recognised in English law.

Crude method

The Department of Health and Social Security has a very simple and crude method of dealing with these situations and it also applies to the widow's GMP element in any contracted-out scheme.

It appears that where an individual has more than one wife recognised in English law, then the DHSS will provide no State Widows Pension or GMP. There is not even an attempt to carve it up amongst the potential widows or wives. Crude but effective.

However, most trustees and pension fund managers are more sympathetic and in the two or three instances where I have been involved it has been the trustees' desire to split the benefit, be it lump sum or pension or both, amongst the recognised widows.

In one case the individual deceased member on his Statement of Wishes form clearly favoured his youngest and newest wife and his first and

original wife who still lived with him was for varying reasons ignored, or at least was not the subject of his largesse under his Statement of Wishes. Fortunately, the trustees were able to be a little fairer but it did require considerable care and consideration on their part.

The problem is that if the individual annuitment should die shortly before he is due to retire, at say his 65th birthday, it is quite likely that he will have effected 20 or 30 policies, the majority being single premium, with the same number of trusts. The administration of all these separate trusts, even if the trustees in each instance were the same, would be a nightmare.

It is advisable to have the individual trust very widely and properly drawn with maximum flexibility. Unfortunately, most individual insurance company trusts, with a few notable exceptions, are not as widely drawn as they could or indeed should be.

There have been moves in this area and indeed one or two leading firms of consultants have devised and are operating the single trust approach and some more, to my knowledge, will shortly be making this service available to their clients.

Section 226A (life assurance contracts) can also be placed under the single trust and, if operated properly, this device could be a very useful tool in the avoidance of capital transfer tax and the protection of dependants without an over-complication of administration.

In conclusion, may I wish all readers a very happy and peaceful Christmas and a successful and prosperous New Year.

Let us all hope that the New Year will not be marred by too many discussions or consultative documents!