



**TC07916**

*Keywords: failure to notify claim for enhanced protection in time, whether reasonable excuse, whether unreasonable delay after excuse ceased. Appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/00402**

**BETWEEN**

**DR J GIBSON (DECEASED)**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE GETHING**

**The Tribunal determined the appeal on 8 October 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the untimely death of Dr Gibson. The documents to which I was referred are described in the decision.**

## DECISION

### HEAD NOTE

This case concerns late notification of a claim for protection in respect of registered pensions under the Registered Pensions Schemes (Enhanced Lifetime Allowance) Regulations 2006 (SI 2006/131) (“the Regulations”). There are two issues: (1) whether Dr Gibson had a reasonable excuse for failing to notify a claim for protection before 6 April 2009, and (2) whether Dr Gibson notified the claim without unreasonable delay after the reasonable excuse ceased. The guidance issued by the UT in *Perrin v Commissioners for Her Majesty’s Revenue & Customs* [2018] UKUT 0156 is binding on this Tribunal and requires consideration of: (a) the facts relied upon by Dr Gibson for his reasonable excuse and his personal attributes, (b) whether the facts are proved, (c) whether objectively they afford Dr Gibson a reasonable excuse for failing to notify a claim by 6 April 2009, (d) whether objectively having regard to his personal attributes the claim was made without unreasonable delay once the reasonable excuse ceased.

Held: Allowing the appeal that Dr Gibson had a reasonable excuse namely reliance on his advisors (Mr Lowe of Openwork Limited), an expert in the provision of pension advice, who failed to take into account Dr Gibson’s pensions in payment in determining whether to make a claim for enhanced protection by 6 April 2009. Dr Gibson had no more knowledge of pension tax law than the next man and it was reasonable for him to rely on Openwork. His reasonable excuse and his reliance on Openwork ended on 2 December 2016 when Dr Gibson was advised that he needed a specialist to make an application for retrospective protection and was recommended Independent Tax. Independent Tax notified the claim to HMRC on 6 February 2017. The delay of 9 weeks includes the Christmas period, the time for Independent Tax to do client acceptance procedures, obtain papers, verify facts and prepare the claim. Having regard to Dr Gibson’s lack of expertise it was reasonable for Dr Gibson to instruct Independent Tax to notify the claim and the delay in doing so was not unreasonable.

The following cases are referred to in the decision of the Tribunal:

*Perrin v Commissioners for Her Majesty’s Revenue & Customs* [2018] UKUT 0156

*Twait v Commissioners for Her Majesty’s Revenue & Customs* [2017] FTT 0591

*Yablon v Commissioners for Her Majesty’s Revenue & Customs* [2016] UKFTT 814

*Gedir v Commissioners for Her Majesty’s Revenue & Customs* [2016] FTT 04974

*Irby v Commissioners for Her Majesty’s Revenue & Customs* [2012] FTT01979

### Background

1. A charge to income tax, the Lifetime Allowance Charge (“**LTA Charge**”) arises if the value of a taxpayer’s pension funds exceed the Lifetime Allowance (“**LTA**”). The value of the LTA varied but at the relevant time it was £1,500,000. A taxpayer could protect against the LTA charge by claiming Primary Protection or Enhanced Protection. The taxpayer seeking protection had to notify HMRC of the claim for protection.

2. The closing date for notifying HMRC of a claim for protection was originally 6 April 2006 but was extended to 6 April 2009 (“**the revised closing date**”) by Regulation 4 of the Regulations. Regulation 12 permitted a late claim for protection after 6 April 2009 if certain conditions were satisfied.

### The legal test

3. Regulation 12 of the Regulations provides as follows:

“(1) This regulation applies if an individual –

gives a notification to the Revenue & Customs after the closing date,  
had a reasonable excuse for not giving the notification on or before the closing date, and  
gives a notification without unreasonable delay after the reasonable excuse ceased.”

The UT in *Perrin v Commissioners for Her Majesty’s Revenue & Customs* [2018] UKUT 0156 set out some guidance as how these factual issues should be determined. Both parties accept that guidance should be applied. The guidance is as follows:

“(1) First, establish what facts the taxpayer asserts give rise to the reasonable excuse (this may include belief, acts or omissions of the taxpayer or of any other person, the taxpayer’s own experience and relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take 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. It might assist the FTT to ask itself the question ‘was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?’.

(4) Fourth, 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 to exist). In so doing, 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. “

### **The burden of proof**

4. The burden of proof rests with the appellant to show that he had a reasonable excuse for not giving the notification before the revised closing date and that he acted without unreasonable delay once the reasonable excuse ceased. These issues are factual issues and the standard of proof is the normal civil standard of a balance of probabilities.

### **The evidence**

5. I have read the Notice of Appeal prepared by Gary Brothers of Independent Tax and Forensic Services Limited (“**Independent Tax**”), HMRC’s statement of case prepared by Mr Alex Turnbull a Solicitor for HMRC, the witness statements of Dr Gibson and of Peter Osmond (a complaints specialist at Openwork Limited “**Openwork**”), subsequent written representations made on behalf of both parties after it became clear the case was to be dealt with on the papers (and not by way of a hearing) owing to the Covid 19 crisis and the sad unexpected death of Dr Gibson. I have also read the documents in the bundle filed at the Tribunal on 3 September 2020 for which I had to chase the tribunal after I realised that the papers I had been sent were incomplete. I received the bundle on Monday 11 October. The

Bundle was supplied to the Tribunal by HMRC together with further submissions made on behalf of HMRC which that Independent Tax may not have received. The bundle includes:

- (a) a copy of a document created by Mr Lowes of Openwork following a meeting with Dr Gibson on 14 July referred to as a Fact-find;
- (b) correspondence between Dr Gibson's and Mr Lowes and others of Openwork, and
- (c) correspondence between Dr Gibson and the pension provider AEGON.

### **The Facts**

6. I find the following facts:

- (a) Dr Gibson was a gastroenterologist who worked in the NHS all his working life until his retirement and was a self-employed consultant with the NHS in 2006.
- (b) Dr Gibson had always appointed a financial advisor to help with his affairs and knew how to check an advisor's credentials. He had no specific pensions knowledge himself.
- (c) Dr Gibson appointed Mr Lowes of Openwork as his financial adviser in late 2005 upon the strong recommendation of a good friend.
- (d) Openwork is a reputable firm of financial and mortgage advisers. Mr Lowes was qualified to give financial and pension advice and was a regulated adviser.
- (e) Dr Gibson had every reason to suspect Mr Lowes was an excellent advisor as he had been recommended and had no reason to suspect he was not.
- (f) Dr Gibson attended a meeting with Mr Lowe on 14 July 2006 about his affairs. From information recorded by Mr Lowes at the meeting in a document entitled "*Pension Planning Fact Find*" which I refer to as the "**Fact Find**" and in his letter of advice dated 21 July ("**the 21 July letter**") it is clear that:
  - (i) Mr Lowe assessed Dr Gibson's knowledge of investing as "*about as much understanding as the next person*", the third of five possible levels of knowledge.
  - (ii) Mr Lowe knew that Dr Gibson was in receipt of a pension from the NHS of £90,000 per annum which would rise to £123,000 by the time he reached the age of 75 and a private pension of £16,800 which was expected to rise to £22,600 by the age of 75. Mr Lowe also recorded that Dr Gibson had income from his NHS consultancy of £80,000 per annum and his need for income was currently £70,000 per annum. Dr Gibson had no immediate need for more income but had a need for a capital sum.
  - (iii) Mr Lowe specifically acknowledges in the section that requires details of all plans (including occupational pension schemes) whether or not they are part of the current recommendation, that they are not to be taken into account in this recommendation (as he ticked the box to that effect) and added a handwritten note "*Benefits already taken*".
  - (iv) Dr Gibson had four other pension plans: two with GE Life, and one with each of Clerical & Medical and Prudential. Mr Lowe recommended that they be transferred to the Scottish Equitable Retirement Control Plan (the "**Retirement Control Plan**").
  - (v) Mr Lowe recorded the value of the four pension plans to be transferred and the transfer value as "£213233". (There is no comma between 213 and 233.)The

total value of the four plans plus the two pensions in payment was in fact £2,120,000.

(vi) There is no indication that Dr Gibson was given a copy of the Fact Find to review and confirm the accuracy of the notes made by Mr Lowe.

(g) I infer that the Fact Find was a working paper prepared by Mr Lowe for Mr Lowe and he records the important facts as he saw them in his letter of advice.

(h) In the 21 July letter Mr Lowe advised Dr Gibson that he should transfer the four private pensions that were not in payment to a Retirement Control Plan. He had “*considered the impact of the Inland Revenue Lifetime allowance of moving your fund to the Retirement Control Plan. Based on the calculation of the value of all your existing pension arrangements your total fund value does not exceed the life time allowance.*” He went on to state that he is basing his calculations and recommendation “*on the estimated transfer value of £213,233 which is not guaranteed and from the information provided by the providers of your current plans.*”

(i) The value of the lifetime allowance at that date is not identified in the 21 July letter.

(j) The mention of information having been obtained from the providers of all Dr Gibson’s pension providers implies that the actual value is larger than the £213,233.

(k) I consider that Mr Lowe’s statement would have rendered unnecessary any follow up question by any intelligent client without specialist tax and pensions knowledge, such as Dr Gibson.

(l) I also consider that an appropriately qualified and regulated adviser should be able to receive information about a potential clients’ pension and financial affairs and provide appropriate and accurate financial and tax advice in six months, the timeframe available to Mr Lowes and that a taxpayer such as Dr Gibson is entitled to reply on that advice.

(m) Dr Gibson received a welcome pack and letter from AEGON on 8 December 2006, which he was expecting. At the foot of one page of the letter it states that “*the standard lifetime allowance is £1,500,000*”.

(n) Given Mr Lowe’s advice in the 21 July letter that the life-time allowance had not been exceeded I consider that Dr Gibson had no need to question and did not question Mr Lowe’s advice at that time. The value of the pensions in payment would have had to be ascertained actuarially.

(o) Dr Gibson consulted Mr Lowe regularly up to Mr Lowe’s retirement in 2011. He consulted Mr Lowe in 2009 shortly before the revised closing date for making notifications to HMRC. Mr Lowe did not revise his advice or raise the issue of enhanced protection with Dr Gibson.

(p) The advice given by Mr Lowe was incorrect. The internal investigation by Openwork confirmed that Mr Lowe had all the information he needed to provide accurate advice in 2006 and that Mr Lowe had ignored the effect of the pensions in payment which would have led him to the conclusion that protection was required.

(q) Dr Gibson first became aware that his pensions ought to have been protected as a result of letters he received from AEGON.

(r) The first was dated September 2013 (but I consider that is an error – the date should have read 13 September 2015 as the letter of 29 December 2015 indicates

that AEGON expected to receive back the questionnaire included with the 13 September letter as they needed the information to assess whether there would be an LTA Charge on Dr Gibson's 75 birthday.

(s) On 2 February 2016 after reviewing his papers, Dr Gibson supplied the questionnaire duly completed to AEGON and contacted Openwork in writing stating only that "I believe I have been disadvantaged and I would like to register a compliant."

(t) Dr Gibson followed up with a telephone call on 8 February 2016 where he identified issues with the performance of the Retirement Control Plan to which he had transferred his four policies. When Openwork acknowledged the compliant in writing they gave him an opportunity to complete a complaint form and in that form he made four points:

(u) Did the advice provided to Dr Gibson take into account his NHS pension of £85,352 per annum and his pension from with Reassure of £16,777 per annum when he was advised about the life-time allowance.

(v) In taking out the Scottish Equitable Control Plan was there any tax liability Dr Gibson was not advised about

(i) If there was, would it have been possible to protect against it and if so why wasn't this done?

(ii) The resolution Dr Gibson required was for Openwork to put him in the position he would have been in if the correct advice been given at the time.

(w) A complaints handler on behalf of Openwork opened an enquiry and there were several rounds of correspondence. Initially the complaints handler was obtaining information from Dr Gibson. The last piece of information was provided on 15 May 2016 and from then until 11 November Dr Gibson received monthly updates, the last one being on 28 September 2016, advising him that they had all the information they needed but could not yet undertake the review owing to other, older, complaints that had to be attended to first.

(x) I consider it reasonable for Dr Gibson to await the advice from Openwork about any tax liability he may have had and any redress he may have been entitled to, rather than appoint a second adviser to do so at this stage.

(y) By their letter of 11 November 2016 the complaints handler on behalf of Openwork advised Dr Gibson that he had now concluded the review and having reviewed Openwork's file and information obtained from the pensions providers, there "*was a mistake made in your advisor applying for pension protection. The advice you received did not appear to take the pensions in payment into account and their potential impact on your life-time allowance.*"..." As such, there may be a charge, a liability which could have been protected against. However the extent of this liability is at present unknown."

*"If you have not already done so may I suggest that you make the appropriate submissions to HMRC such that any charge resulting from the absence of protection on the RCP funds is known."* Openwork then advises Dr Gibson that Openwork will engage Independent Tax & Forensic Services LLP ("**Independent Tax**") to attempt to mitigate such tax liability via a representation to HMRC for retrospective claim. Openwork will fully cover the costs of such representation.

(z) By letter of 25 November 2016 Dr Gibson asked how he might make a retrospective claim for protection.

(aa) By a letter of 2 December 2016 Openwork advised Dr Gibson that making a retrospective claim was out of Openwork's competence and advised that Dr Gibson should use the services of Independent Tax.

(bb) I consider that Openwork continued to provide advice to Dr Gibson in connection with his ability to claim enhanced protection up until 2 December 2016 even though he had contacted them in February 2016 to make a compliant and was also seeking redress if he had suffered loss as a result of incorrect advice. He relied upon their advice that a retrospective claim could be made and in identifying Independent Tax to assist him to make the claim.

(cc) Dr Gibson became a client of Independent Tax who undertook the usual new client acceptance procedures, prepared the application for retrospective protection dated 23 January 2017 and submitted it to HMRC by letter of 6 February 2017.

(dd) HMRC gave their decision on the information available to them by letter dated 28th December 2018 that there was no reasonable excuse for the delay and if there had been such an excuse Dr Gibson had not acted without unreasonable delay after the excuse had ceased.

(ee) The Appellant appealed against that decision.

The facts identified at paragraphs e, g, j, k, l, n, r, v and z above are inferences I have drawn from the undisputed facts presented to me by the parties.

### **The Appellant's case**

#### ***Appellant's submissions on Reasonable excuse - reliance on a third party***

7. Dr Gibson had a reasonable excuse for the delay in notifying a claim for enhanced protection before 6 April 2009, notably reliance on his advisor Mr Lowe of Openwork a specialist pensions advisor who failed to take into account the value of Dr Gibson's pensions in payment. The following facts and inferences can be drawn to demonstrate reliance and the reasonableness of the reliance on Mr Lowe:

(a) That Mr Lowe had all the information he needed can be seen from the notes he made in the Fact Find. When he prepared his letter on 20 July 2006 he failed to take into account the value of Dr Gibson's pensions in payment. There is a specific record of the NHS pension in payment but had valued Dr Gibson's pensions at £213,633 which omitted the value of pensions in payment before 2006. He also had ticked a box showing that Dr Gibson had not used or planned to use primary or enhanced protection. Mr Lowe in ticking the box indicates that he has overlooked the need to include pensions in payment in his calculation.

(b) The terms of the letter of advice of 20 July 2006 (see extracts at [7] above) would reasonably lead Dr Gibson to conclude that Mr Lowe had taken the value of all of his pensions into account.

(c) As Mr Lowe was qualified and regulated and highly recommended it was reasonable for Dr Gibson to assume he had taken all of the relevant facts into account in providing the advice. The error was of such a nature it was outside the expected capabilities of Dr Gibson.

(d) Despite consulting Mr Lowe regularly and in 2009 shortly before the extended time limit for applying for enhanced protection Mr Lowe still failed to raise the issue of protection.

(e) Objectively Dr Gibson had no indication of any need to make a claim for enhanced protection before he reviewed the letter from **AEGON** dated 29 December 2015.

8. It is reasonable for Dr Gibson to have relied upon Openwork as it was reasonable for the taxpayer in the FTT in *Tipping v HMRC*. [2017] TC 05939 at [50].

9. The Appellant also relies on the decision of the FTT in *Gedir v HMRC* [TC2016/04974] ...

“[108] A taxpayer who consults an advisor he reasonably believes to be competent and experienced in the relevant field and who is advised that his return may properly be completed on the basis of a particular view of the legislation would normally be regarded as having taken reasonable care..

[109] We do not consider that a taxpayer is obliged to take advice from another advisor in this situation. ....

[110] Nor is a taxpayer obliged to seek advice from HMRC. ...”

10. In response to HMRC’s first assertion that as Dr Lowe was present at the meeting at which the Fact Find was completed and should have been expected to know the Fact Find was incorrectly completed, the Appellant says that Dr Gibson was a medical practitioner and not a tax and pensions expert. He had given Mr Lowe all the relevant information to enable Mr Lowe to come to a correct view of the technical issues which was within his area of expertise and not Dr Gibson’s which Mr Lowe had assessed as middle of the road. The Fact Find was an internal working paper of Mr Lowe’s and was not shared with Dr Gibson. Openwork accept that Mr Lowe had made an error.

11. In response to HMRC’s second assertion that, as Dr Gibson had instructed Mr Lowe only 6 months prior to his providing advice on his pensions in July 2016, it was insufficient time to for Mr Lowe to get a proper understanding of his affairs and it was unreasonable for Dr Gibson to rely on Mr Lowe’s advice, the Appellant says that Mr Lowe was a qualified regulated and apparently experienced advisor and was recommended by a friend. He was more likely than not to be competent and that 6 months is more than ample time to become sufficiently acquainted with Dr Gibson’s affairs to advise on what is a binary issue of whether to apply for protection. It was Mr Lowe’s oversight of the NHS pension that lead him into error. Mr Lowe had recorded the existence of the NHS pension. Mr Lowe succumbed to a technical error. However, it is the case that the lifetime allowance window was still open for a further three years into the retainer and ample time for Mr Lowe to realise his error.

12. In response to HMRC’s third assertion that it was not reasonable for Dr Gibson to agree figures provided to him by his agent and should have taken steps to confirm the values, the Appellant considers this is a reiteration of the first assertion. Dr Gibson acted reasonably. He is not an expert, he appointed a highly recommended and suitably qualified and regulated adviser. The correspondence with AEGON did not alert him to any issue. He was expecting the communications and the terms of the statements chimed with the advice he had received from Mr Lowe. He acted reasonably in relying on Mr Lowe’s advice. The conclusion of the Review conducted by Openwork and the opinion of experts brought in by Openwork was that Mr Lowe had erred in reaching his conclusion in failing to take into account pensions in payment. None of the organisations placed any blame at Dr Gibson’s door. HMRC’s view is



unrealistic, it imposes too high a standard on lay clients and would bar any lay intelligent person from relying on an expert advisor. The failure of Mr Lowe to provide sound advice affords Dr Gibson a reasonable excuse. The case of *Irby v HMRC TC/2012/01979* supports Dr Gibson's reliance on his professional advisor. The judge remarked at [37] :

“Mr Midwinter submitted that these three decisions made it clear that Mr Irby's appeal ought to be allowed. It was perfectly reasonable for Mr Irby to rely on UBS advice in relation to his pension (see Rowland) and he took the very step which the Tribunals in Sculfield and Platt decided that a reasonable man ought to have taken- he sought advice.”

13. Further support can be found in the FTT decision of *Twaite v HMRC 2017/TC/06033*. The case was similar as the taxpayer's advisor failed to apply for protection. The Tribunal accepted as a reasonable excuse the taxpayer's reliance on a third party:

[34] “I find that Mr Twait did have a reasonable excuse for failure to apply for enhanced protection prior to the closing date. This is for the following reasons.”

[35] “...[T]his was a specialised area of law and Mr Twait went to a specialist advisor to deal with his pensions. The starting point is that it was reasonable to seek out and rely on that specialist advice.”

14. Mr Lowe was a specialist, it was objectively reasonable for Dr Gibson a man of ordinary knowledge in the area to seek out and rely on Mr Lowe's advice. Mr Lowe's failings were the cause of the failure to claim protection before the 6 April 2009.

#### **Appellant's case on when the Reasonable Excuse ceased**

15. The Appellant contends that the reasonable excuse ended on either:

(a) 25<sup>th</sup> November 2016 when Dr Gibson asked for further guidance on how to make a claim for retrospective protection. By this date there is objective evidence he was then aware of the need for protection and that steps could have been taken. Or

(b) 11 November 2016 when Openwork upheld the complaint against Mr Lowe that Mr Lowe had made a mistake in failing to advise Dr Gibson to apply for pension protection and advised Dr Gibson to mitigate the tax impact of the failure by claiming retrospective protection.

#### **Appellant's case on the reasonableness of any delay**

16. The late notification of claim was dated 23 January 2017 and was submitted by Independent Tax to HMRC on 6 February 2017. That resulted in either:

(a) a delay of 9 weeks between 25 November 2016 and 6 February 2017. However Dr Gibson required further advice on how to make the claim and to whom, and was provided with that information on 2 December 2016.

(b) The delay of 11 weeks between 11 November 2016 and the application for retrospective protection

Having regard to the formalities necessary for Independent Tax to engage Dr Gibson as a new client and the intervening Christmas break, the actual delay not unreasonable.

17. Dr Gibson continued to rely on the advice of Openwork until the appointment of Independent Tax. This is clear from the correspondence as Dr Gibson seeks guidance on how he can apply for retrospective protection by his letter to Openwork on 25 November 2016.

18. Delay by an advisor cannot be attributed to Dr Gibson as was the case in Tipping at [63] where the Tribunal said;

“Significant portions of that time as we have outlined above were taken up by the delay on the part of SJP which cannot be attributed to Mr Tipping.”

19. Dr Gibson’s reliance on Openwork is apparent as he had no knowledge that a claim had to be made nor could be made retrospectively until advised by Openwork in the 11 November letter. This is a specialist area and specialist knowledge is needed.

20. When Dr Gibson received a letter from AEGON on 29 December 2015 indicating that the LA Charge may apply on his 75<sup>th</sup> birthday which was only weeks away, he checked his paperwork and wrote a letter to Openwork on 2 February 2016, followed it up with a call on 8 February and then replied to a questionnaire. He assisted in replying to each of Openwork’s letters of 12, and 29 February, 23 March, and 18 April. On 20<sup>th</sup> April Openwork advise that they were waiting for information from AEGON and then again in May to say they and all the information they needed and now needed time to assess it. It was reasonable for Dr Gibson to wait for the advice from his advisor. Objectively the very first time when Dr Gibson is aware of the possibility of making a retrospective claim is his letter to Openwork of 20<sup>th</sup> November 2016. But even then it is reasonable to expect he needs assistance as to how to do so. Openwork had indicated it was beyond its capability. If it were beyond Openwork’s capability it must objectively have been beyond Dr Gibson’s capability. He needed to appoint a specialist in this field. That advice was received by Dr Gibson in a letter dated 2 December 2016.

#### **HMRC’S CASE**

21. HMRC consider there was no reasonable excuse for failure to apply for protection before 6 April 2009 and, even if there were a reasonable excuse, the delay in doing so was unreasonable once the excuse ceased. The burden of proof is on the Appellant to prove both elements.

#### ***HMRC’s submissions on Reasonable Excuse***

##### ***Reliance on 3<sup>rd</sup> Party***

22. Reliance on a third party to do something can constitute a reasonable excuse as was the case in *Irby v Commissioners for HMRC* 2012 UK FTT 291. That case also concerned Enhanced Protection, the taxpayer was advised that he could take advantage of the protection and that the advisor would do so on the taxpayers behalf. The issue of obtaining protection had been raised at a later meeting and the adviser assured Mr Irby he would check the position. Mr Irby was not advised there was a time limit. The FTT considered it may have been more prudent to chase the advisor but did not cause his actions to be unreasonable. But the present case can be distinguished from *Irby* because:

- (i) Although Dr Gibson had relied on his newly appointed advisor for advice in relation to all aspects of his pension, the error arose out of the facts recorded at the Fact Find meeting with Mr Lowe. The Fact-Find document had been completed in the presence of Dr Gibson and it records his pensions as having a value of £213,000 whereas it had a value of £2.120m. Dr Gibson could be expected to know his pensions had a greater value than £213,000 and ought to have queried it unless he was told in no uncertain terms that the amount should not include pensions in drawdown. HMRC suggest that Dr Gibson did not provide his adviser with all the information he needed and that is the reason that protection had not been applied for.

(ii) There is a reference to the lifetime allowance of £1.5m in a 2006 letter from Scottish Equitable, Dr Gibson would have been aware that his pension value exceeded that amount.

(iii) As Mr Lowe had been recently appointed as his adviser (only 6 months into the retainer when advice was given) it would have been reasonable to expect Dr Gibson to subject the advice to some scrutiny although not to expect Dr Gibson to be an expert himself.

(iv) Although HMRC has not had sight of the correspondence between Dr Gibson and AEGON, his pension administrator, about an incident in August 2006 concerning a crystallisation event for which tax liability the taxpayer and AEGON were jointly responsible, and so HMRC cannot know if Dr Gibson was aware of the issues, HMRC consider that a reasonable and prudent person would not simply have accepted the figures of the value of his pensions recorded by his advisor, Mr Lowe, which was substantially lower than the actual figure. (This correspondence was not before the Tribunal.)

***HMRC's submissions on date the reasonable excuse ceased***

23. HMRC say that the reasonable excuse ended on one of a number of dates.

(a) The first date is in July 2006 when the Fact Find was completed by Mr Lowes.

(b) The second date is 13 September 2015. HMRC say Dr Gibson could reasonably be considered to have been aware of the charge as early as 13 September 2015, the date of letter between AEGON and Dr Gibson which is entitled "Confirmation of a change to your income limits" and under the heading "Benefits to be taken" it sets out a discussion about protecting large pension pots. It makes clear that Dr Gibson's pension funds may be subject to a special charge and that this would include existing pensions in payment at 2006. HMRC say the 13 September 2015 letter is more explicit than the letter of Openwork on 11 November 2016 and this is the date when objectively any reasonable excuse would have come to an end.

(c) The third date was 2 February 2016 when Dr Gibson completed a declaration dated 2 February 2016 which he submitted to AEGON which includes his pensions in payment on 6 April 2006. This is the same date Dr Gibson complains to Openwork. The questionnaire completed by Dr Gibson for Openwork as part of the complaints procedure Dr Gibson asks a number of questions:

(i) whether the advice Openwork had provided him took account of his NHS pension when he was advised about the lifetime allowance,

(ii) was there a tax liability he had not been advised about, and

(iii) would it have been possible to protect against it and why wasn't it done,

(iv) he asks to be put in the position he ought to have been if he had been properly advised.

24. HMRC do not accept that that Dr Gibson only became fully aware of the situation by a letter from Openwork to Dr Gibson of 11 November 2016 which letter does not explicitly discuss the issue of enhanced protection only of minimising tax liabilities. HMRC suggest that Dr Gibson received the declaration from AEGON prior to December 2015 as there is a reference to an earlier letter having been sent in the letter dated December 2015 and Dr Gibson should have been aware at that date.

**HMRC’s submissions on whether the delay unreasonable after the reasonable excuse ceased** (if there had been a reasonable excuse.)

25. As to whether the delay was unreasonable after the reasonable excuse ceased, HMRC rely on the FTT decision in *Twait v Commissioners of HMRC* 2017 FTT 0591 at [52] where Judge Chapman states:

“I find that the consideration of whether or not the delay is unreasonable is not limited to the conduct of Mr Twaite, requires a consideration of all the circumstances. and does not exclude consideration of Close [the advisers]. ...The wording of Regulation 12(c) focuses on the length of the delay.”

Judge Chapman goes on to explain it does not matter whose delay is responsible. It can be caused by a person other than the person giving the notice.

26. HMRC also rely on the statement of Judge Chapman at [49] where he discusses the impact of lack of knowledge of ability to apply for retrospective protection which he says is not a reasonable excuse but can be considered in determining the reasonableness of the delay.

27. HMRC also rely on *Yablon v HMRC* 2016 UK FTT 814 a case in which the taxpayer believed his advisors had made an application for enhanced protection but found out in September 2013 that this was not the case. The Tribunal held that the reasonable excuse ceased when My Yablon became aware that he did not have protection rather than when he became aware that he could make a late application.

28. HMRC note that the application for retrospective protection was made on 6 February 2017.

29. HMRC say the application for retrospective protection was actually dated on 23 January 2017, which HMRC say is more than 3 years after the reasonable excuse came to an end.

30. HMRC say Independent Tax explained that the delay between January 2016 and January 2017 was due to Openwork ascertaining the reasons for their error. HMRC say that it is not necessary to know all the facts before making the application for retrospective protection and that it is not reasonable for Dr Gibson to have waited a further 12 months before making the application. The application was not made without reasonable delay after the reasonable excuse ended and the appeal should be dismissed.

31. HMRC assert that Openwork knew of the error in May 2016 when they had all the information they needed. The delay in assessing the information was unreasonable and their delay is to be treated as the Appellant’s delay.

32. HMRC did not receive the notification until February 2017 which is at least 13 months after Dr Gibson received a letter from AEGON. That delay is objectively unreasonable.

33. HMRC say that complaining to Openwork was a reasonable step but the delay on the part of Openwork was not. Dr Gibson should have sought advice elsewhere.

34. HMRC say that Dr Gibson could have asked HMRC about what to do in relation to next steps.

35. HMRC ask for the appeal to be dismissed.

**Discussion**

36. Both parties agree that the factual disputes in this case have to be resolved in the manner suggested by the Upper Tribunal in *Perrin* and I follow the structure of the useful

guidance of the Upper Tribunal in Perrin. Both parties site a number of FTT decisions in support of their contentions. I do not consider them as they are not binding and are decisions on the facts.

**(1) establish the facts the taxpayer asserts gives rise to a reasonable excuse which includes the attributes of the taxpayer**

37. Dr Gibson had no specialist knowledge of pensions and appointed an advisor upon recommendation of a friend. The advisor Mr Lowe of Openwork was qualified and regulated to advise on pensions.

38. Dr Gibson had been a client for nearly 6 months before Mr Lowe wrote the advice on 21 July 2006. That is more than enough time to enable Mr Lowe to provide full advice on what is a binary issue of whether to apply for protection.

39. Dr Gibson had informed Mr Lowe of his NHS pension as its value in payment was recorded in the Fact Find that was completed by Mr Lowe at their meeting in 2006. The Fact Find was not shared with Dr Gibson.

40. In his letter of 21 July 2006 Mr Lowe failed to take into account the value of the pensions in payment in providing his advice. Mr Lowe failed to provide advice to Dr Gibson about the need for protection.

41. Mr Lowe indicates in his 21 July 2006 letter of advice that he has been in touch with Dr Gibson's pension providers to ascertain the values of his pensions. Dr Gibson would expect that would have included his NHS pension as it was not excluded.

42. The information pack provided by the insurer following the transfer of his four private pensions in 2006 mentioned the life time allowance but without an actuarial valuation of his NHS pension in payment Dr Gibson would not be aware of the significance of the lifetime allowance limit referred to as £1.5m.

43. Mr Lowes met Dr Gibson several times including shortly before the revised closing date of 6 April 2009 for notifying a claim for protection. Mr Lowes failed to realise his error.

44. It was reasonable for Dr Gibson to have relied on the advice of Mr Lowe and Openwork.

**(2) Which of these facts are proven?**

45. I consider all of the facts and inferences from the facts relied upon by Dr Gibson are proved.

**(3) Consider whether when viewed objectively those facts amount to a reasonable excuse for the default and the time when it ceased?**

46. I consider the objective facts are that it was reasonable for Dr Gibson to rely on advice provided by Mr Lowes as a lay person with no expertise in tax and pensions. Dr Gibson reasonably relied on Openwork's advice and had a reasonable excuse for failing to apply for protection on or before 6 April 2009. The reasonable excuse did not cease before that date.

**When did the reasonable excuse cease?**

47. Objectively Dr Gibson became aware that potential liabilities could arise on his 75 birthday in respect of his pension when he deals with letters he received from AEGON in 2015. The letter of September 2015 enclosed a questionnaire but did not indicate that it had to be returned. The letter of 29 December 2015 corrected this oversight and asked that the questionnaire be completed and returned. 48. Objectively, Dr Gibson had some awareness of a potential liability on 2 February 2016 when he returned the questionnaire to AEGON and sent a letter of complaint to Openwork. His letter of 2 February to Openwork

and the details of a call he made on 8<sup>th</sup> February 2016 do not indicate he had a true understanding of the issue.

48. When he completed a questionnaire provided by the complaint handler for Openwork he was able to articulate the issue by raising the four questions that are listed in the complaint handler's final report. The complaint handler's witness statement indicates that Dr Gibson provided the list of issues in a letter to the complaint handler dated 24 February 2016.

49. Dr Gibson corresponds with Openwork between 24 February and May 2016 when Openwork indicate they have all the information they need to assess the his compliant but must process claims in the order of receipt. Dr Gibson waits patiently for Openwork to conclude their review. It is not unreasonable for Dr Gibson to have done so, and to require him to appoint another adviser as HMRC suggests is not reasonable. The costs of doing may well have been significant and might well have delayed the process further. As advisors were in place it is not unreasonable that Dr Gibson did not approach HMRC for advice.

50. Openwork report monthly on progress and finally respond on 11 November 2016 when they confirm that Openwork through Mr Lowes had made an error and that an application for enhanced protection ought to have been made before 6 April 2009. Further that an application could be made for retrospective protection.

51. Objectively Dr Gibson was no longer relying on the original advice of 2006 but he was still relying on Openwork when he asks how he should go about making an application for retrospective protection. It is not unreasonable for him to have done so as even an experienced pensions advisory group like Openwork considered this step to be beyond their capability. They advise that Dr Gibson appoint Independent Tax to do so.

52. Objectively the reliance on Openwork ceased on 2 December 2016.

**(4) Objectively did the taxpayer remedy any failure without unreasonable delay after that time? This requires the Tribunal to consider the attributes of the taxpayer and consider whether what the taxpayer did or did not do was objectively reasonable for this taxpayer in these circumstances.**

53. Dr Gibson appointed Independent Tax to remedy the failure and make the retrospective claim for protection. This was reasonable as Dr Gibson did not have the skills to do so.

54. Independent Tax obtained the information they required from Openwork which was reasonable. They undertook their client acceptance procedure which would have been necessary. They prepared and submitted the application for retrospective protection on 6 February 2017.

55. From 2 December 2016 to 6 February 2017 is a period of 9 weeks. The Christmas holiday period intervened and a period of time would have been needed to take on Dr Gibson as a new client. Even if those periods are disregarded a delay of two months would not be unreasonable. I find there was no unreasonable delay by Dr Gibson or his advisors Independent Tax in making the claim for retrospective protection.

56. I allow the appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**JUDGE HEATHER GETHING**

**TRIBUNAL JUDGE**

**RELEASE DATE: 3 NOVEMBER 2020**