[2018] UKFTT 667 (TC)

TC06815

Appeal number: TC/2017/00995

INCOME TAX – pensions savings lifetime allowance – fixed protection 2012 – additional contributions made after April 2012 – whether payments made under mistake – held yes – whether tribunal jurisdiction supervisory or full appellate – held supervisory – whether additional payments should be treated as rescinded under equitable maxim – held yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARY HYMANSON — **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 5 November 2018

Michael Firth, counsel, for the Appellant

Edward Waldegrave, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal arises from the rules governing fixed protection ("Fixed Protection") in relation to the pensions savings lifetime allowance (the "Lifetime Allowance") which are primarily contained in Sch 18 Finance Act 2011.

2. Mr Hymanson is appealing against a decision by HMRC to revoke a certificate of Fixed Protection which they had previously issued to him in accordance with Reg 3 of the Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 ("the Transitional Regulations").

Preliminary Application

3. Prior to the hearing the appellant made an application for a direction that HMRC should not be not permitted to advance an argument set out in paras 48 to 58 of their Skeleton Argument. This was an allegedly new argument concerning the limitation of the scope of the Equitable Maxim, which was introduced in response to the appellant's ground of appeal that: "The Appellant's position is that the amounts 'paid' were paid by virtue of a mistake and, as such, the payments were void in accordance with the principle in *Pitt v. Holt*"

4. HMRC maintained that this was not a new argument as such because it could be included within the words in their statement of case: "HMRC do not consider that the FTT is an appropriate forum for consideration of mistake-based arguments". Alternatively they requested that if the tribunal found that this argument did not fall within their original statement of case then they should be given permission to amend their statement of case to include the argument.

5. Having considered the application, and in particular having considered the submissions set out in the appellant's skeleton argument, I decided that I would in any case be required to consider the additional arguments which HMRC wished to put forward, since they would be an essential part of my consideration of the arguments to be advanced by the appellant. I therefore decided to dismiss the appellant's application.

The Facts

6. I received a witness statement and oral evidence from Mr Hymanson together with a bundle of correspondence between HMRC and Mr Hymanson's actuary, Michael Field, and between Mr Hymanson and Mr Field.

7. I found Mr Hymanson to be a very honest and open witness who fully acknowledged that he did not understand all the subtleties of the issues involved and that he could not clearly remember his thinking at the time, which was over six years previously. In addition, some of the written correspondence between himself and Mr Field is contradictory, and I discuss this further below.

8. I find the following as matters of fact:

9. Mr Hymanson is the sole director of Lightcredit Limited, which trades as Granmore Ceilings, mainly in the Manchester area. Lightcredit Limited is owned by Lightcredit Holdings Limited, which is owned by Mr Hymanson (75 shares) and Mrs Hymanson (25 shares).

10. Mr Hymanson is a specialist in ceilings. He relies heavily on other people to advise him in respect of financial matters such as pensions and tax. He has no knowledge of these things himself.

11. Mr Hymanson had four pensions:

(1) Light Credit Pension Scheme, which was the main one and was established in 1994. Contributions into that scheme were decided annually based on what funds were available or appropriate at the time.

(2) Standard Life (policy H17998). Contributions into this scheme were made by a continuous standing order of the same amount each month.

(3) Reassure (policy 36652). Again contributions were made by a continuous standing order of the same amount each month.

(4) Reassure (policy 12107244). The only contributions paid into this scheme were national insurance rebates.

12. In 2011/12 Mr Hymanson was advised by Mr Field to apply for Fixed Protection and on 10 January 2012 he received a letter from Mr Field confirming that a certificate of fixed protection had been obtained. Mr Hymanson remembers being very confused by these letters and Fixed Protection and spoke to Mr Field a number of times to try understand what his letters meant.

13. Mr Hymanson's main pension fund was the Light Credit Pension Scheme and he stated that he understood that he could not make any further lump sum contributions to that scheme but did not understand that the direct debits to the two other pension schemes had to stop. He stated that he thought that when Michael Field referred to not making further contributions that meant that he could not decide to add any more to the schemes but did not realise that the existing direct debits could not continue.

14. I found Mr Field's letters on this subject to be admirably clear but Mr Hymanson explained that he was confused by the fact that he/the company could continue to make payments of rent into the Light Credit Pension Scheme (which owned the Granmore business premises) but not apparently the existing standing orders. Mr Hymanson could not understand that there was any difference between continuing the existing arrangement to pay rent and the continuing existing standing orders. As a result, Mr Hymanson did not take any steps to notify the bank to stop making those standing orders, which continued on a monthly basis until April 2015, being £62.50 per month to the Standard Life scheme (a total of £2,312.50) and £125 per month to Reassure (a total of £4,625).

15. Mr Waldegrave, on behalf of HMRC challenged Mr Hymanson's recollections of his motives and Mr Hymanson admitted he was not totally clear, although this was understandable given that these were events over six years ago and concerned matters which he found very confusing. More concerning however was an email from Mr Hymanson to Mr Field dated 24 April 2015 which stated:

> "It should be made absolutely clear to the HMRC that I applied for and received £1,800,000 protection in 2011 on the basis that I would cease any further payments into my plans. After notifying them on your instruction, **I was under the impression that these had been stopped**, however it has only recently come to light that the Standard Life policy continued and also one of the Re Assure policies. Obviously something has gone seriously wrong because only one of the three policies ceased.
>
> **If I had correctly understood that these existing direct debits were also not allowed under the Fixed Protection regime, I would undoubtedly have told the bank to cancel them**, in the same way that I did not make further contributions to the Light Credit Pension Scheme."

16. In other words, Mr Hymanson is saying in the first paragraph that he did realise that the payments should have been stopped but that something went wrong, although in the second paragraph he states that he had not correctly understood this.

17. This belief was also set out in a letter from Mr Field to HMRC dated 26 May 2015, sent with Mr Hymanson's approval, explaining the situation that had arisen and asking for HMRC's agreement for the contributions to be refunded as they were paid in error. That letter referred to the payments as "oversights on [Mr Hymanson's] part as [he] did not intend to continue paying contributions after 5 April 2012".

18. It is important however to put this email and the subsequent letter to HMRC into context.

19. In February 2015 Mr Hymanson was diagnosed with prostate cancer. It was a difficult time for Mr Hymanson and he thought that there was a good chance that he would not live much longer. He had a major operation to try to remove the cancer in March 2015, which prompted him to start getting his affairs in order and going through his papers, in case the worst should happen. It was during this process that he noticed the payments that had continued to be made to Reassure and Standard Life. He mentioned these to Mr Field in a conversation about this time and Mr Field immediately realised that there was a problem with Fixed Protection.

20. Mr Field also asked whether the banks had failed to act on Mr Hymanson's instructions to cancel the payments. Mr Hymanson discussed this with Mr Field on the phone shortly afterwards. Mr Field was confident that he had told Mr Hymanson to stop making any contributions in 2011, which indeed he had. Mr Hymanson stated that he had therefore assumed that this was correct. He has also stated that he relies on his advisers in relation to such things He said that if Mr Field said that he had told him to stop making contributions, then Mr Hymanson would not be in a position to

disagree, especially in March/April 2015 following his cancer diagnosis, operation and recovery. It was at this time therefore that he wrote the email of 24 April which appears to contradict his other statements as to his thinking.

21. On 17 June 2015, HMRC wrote to Mr Field stating that the only situation in which they would agree that a person had not lost fixed protection would be if Mr Hymanson had told the bank to stop the payments but the bank failed to act. They therefore asked if Mr Hymanson had any evidence to this effect, but he did not.

22. Following this exchange of correspondence with HMRC but, importantly, before he had consulted a specialist tax advisor, Mr Hymanson wrote the following letter to Mr Field on 25 August 2015. This stated:

> "Would you please convey to the HMRC, that I have no evidence whatsoever of having instructed anyone to cease contributions. The point is, that **I did not understand that I had to stop existing contributions, when the fund was also receiving rent, I interpreted no further contributions as meaning that I could not open up any further investments for saving funds. I assumed that existing contributions could still apply.** It is patently obvious that I misunderstood [Michael Field's] instructions, and would ask you to [re]consider."

23. Thus, this letter reinforces Mr Hymanson's previous explanation of his thinking.

24. Mr Hymanson may not have been clear as to his precise thinking in 2011 when he failed to stop the direct debit payments, and the evidence is not consistent. However, on the balance of probabilities I find that Mr Hymanson did not cancel the standing order payments because he genuinely did not believe that there was a problem with continuing to make the existing payments. He did not understand and could not see the difference between the rental payments, which the company could continue to make to the scheme, and the contributions being made to the pension schemes by both himself and his company. I therefore find that he had a genuine belief that continuing to make the standing order payments would not prejudice his Fixed Protection.

25. Mr Hymanson subsequently instructed solicitors who continued the correspondence from then on.

26. On 24 August 2016, following various exchanges of correspondence, HMRC informed Mr Hymanson of their decision to revoke the Certificate of Fixed protection.

27. On 30 August 2016 Mr Hymanson appealed to HMRC against the revocation of the Certificate. HMRC carried out an internal review of their decision to revoke the Certificate but by a letter dated 22 December 2016, they notified Mr Hymanson of the conclusions of their review, which were to the effect that the decision was correct.

28. On 17 January 2017 the Appellant notified his appeal to the Tribunal.

The Law

Background

29. Since 6 April 2006, pension saving using registered pension scheme arrangements has been subject to the Lifetime Allowance rules in part 4 of the Finance Act 2004. In broad terms, the value of benefits paid out of registered pension schemes in excess of an individual's "lifetime allowance" is subject to a "lifetime allowance charge", of 55% if the moneys are taken out as a lump sum.

30. The details of the rules concerning the Lifetime Allowance and the Lifetime Allowance charge are complex and are not of direct relevance to the issues in this appeal. What is important is that the Lifetime Allowance has varied significantly since it was introduced. In 2006-07 (which was the first year in which it applied) the Lifetime Allowance was £1.5 million. It was then gradually increased until 2010 – 2011, when it stood at £1.8 million. It remained unchanged in 2011-12, but was then reduced to £1.5 million with effect from 6 April 2012.

31. The reduction of the Lifetime Allowance with effect from 6 April 2012 could have operated harshly in relation to individuals who had already accrued pension savings of a certain level in the expectation that the Lifetime Allowance would not fall below £1.8 million. In order to mitigate the impact of the reduction of the Lifetime Allowance for such individuals, Fixed Protection was introduced. In broad terms, where Fixed Protection is available, it negates the effect of any reduction in the Lifetime Allowance in relation to the individual concerned. Thus an individual entitled to rely on Fixed Protection would continue to enjoy a Lifetime Allowance of £1.8 million after 5 April 2012, rather than the reduced Lifetime Allowance.

Primary Legislation

32. The rules governing Fixed Protection are set out in para 14 of Sch 18 Finance Act 2011 and provide, as far as is relevant, as follows:

> "(1) This paragraph applies on and after 6 April 2012 in the case of an individual
>
> > (a) who has one or more arrangements under a registered pension scheme on that date,
> >
> > (b) in relation to whom paragraph 7 of Schedule 36 to FA 2004 (primary protection) does not make provision for a lifetime allowance enhancement factor, and
> >
> > (c) in relation to whom paragraph 12 of that Schedule (enhanced protection) does not apply on that date, if notice of intention to rely on it is given to an officer of Revenue and Customs.
>
> (2) The Commissioners for Her Majesty's Revenue and Customs may make regulations specifying how notice is to be given.

(3) Part 4 of FA 2004 has effect in relation to the individual as if the standard lifetime allowance were the greater of the standard lifetime allowance and £1,800,000 (the standard lifetime allowance for the tax year 2011–12).

(4) But this paragraph ceases to apply if on or after 6 April 2012

(a) there is benefit accrual in relation to the individual under an arrangement under a registered pension scheme,

(b) there is an impermissible transfer into any arrangement under a registered pension scheme relating to the individual,

(c) a transfer of sums or assets held for the purposes of, or representing accrued rights under, any such arrangement is made that is not a permitted transfer, or

(d) an arrangement relating to the individual is made under a registered pension scheme otherwise than in permitted circumstances.

(5) For the purposes of sub-paragraph (4)(a) there is benefit accrual in relation to the individual under an arrangement

(a) in the case of a money purchase arrangement that is not a cash balance arrangement, if a relevant contribution is paid under the arrangement on or after 6 April 2012 …

(11) Paragraph 14 of Schedule 36 to FA 2004 (when a relevant contribution is paid under an arrangement) applies for the purposes of sub-paragraph (5)(a).

(15) Regulations under sub-paragraph (2) may include supplementary or incidental provision.

(16) The power to make regulations under sub-paragraph (2) is exercisable by statutory instrument.

(17) A statutory instrument containing regulations under sub-paragraph (2) is subject to annulment in pursuance of a resolution of the House of Commons.

(18) Expressions used in this paragraph and Part 4 of FA 2004 have the same meaning in this paragraph as in that Part."

33. Para 14(1) of Sch 18 identifies the circumstances in which the paragraph applies (so that Fixed Protection is available).

34. Para 14(3) gives the Fixed Protection, by providing that the Lifetime Allowance rules set out in part 4 of the Finance Act 2004 operate in relation to the individual in question as if the Lifetime Allowance was £1.8 million rather than any reduced amount.

35. Para 14(4) then sets out the circumstances (referred to as "Paragraph 14(4) Events") in which the paragraph ceases to apply such that Fixed Protection is lost. In particular, para 14(4)(a) provides that the paragraph ceases to apply if "there is benefit accrual in relation to the individual under an arrangement under a registered pension scheme".

36. Para 14(5) identifies the circumstances in which "benefit accrual" occurs for these purposes. In relation to a "money purchase arrangement" which is not a "cash balance arrangement" a "benefit accrual" occurs if a "relevant contribution" is paid to the pension in question on or after 6 April 2012.

37. It is agreed between the parties that, applying these definitions, Mr Hymanson's payment of the additional contributions to the pension schemes after 5 April 2012 resulted in "benefit accruals" (within the meaning of that expression in paragraph 14(4) of schedule 18) occurring.

Enabling Powers

38. As originally enacted, para 14(2) Sch 18 empowered HMRC to make regulations "specifying how notice is to be given". These powers were broadened by amendments contained in Finance Act 2013 but HMRC used the powers as originally enacted to make the Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 ("the Transitional Regulations").

39. In Sch 18, as originally enacted, paragraph 14(2) provided that "HMRC may make regulations specifying how notice is to be given". The reference to "notice" was a reference to paragraph 14(1), which requires an individual wishing to rely on Fixed Protection to give notice of that intention to HMRC. Paragraph 14(15) added that regulations made under sub-paragraph (2) "may include supplementary or incidental provision". The Transitional Regulations, when first made therefore, took their legal effect from these provisions.

40. Sch 18 was amended by s47 Finance Act 2013 with effect from 17 July 2013. In so far as is relevant, sub-paragraphs (2) and (15) of paragraph 14 were repealed and in their place new paragraphs 16 and 17 were enacted. Paragraph 16 authorised HMRC to make regulations "specifying how any notice required to be given to HMRC under paragraph 14 is to be given". Paragraph 17 provided that "regulations made under paragraph… 16 may include supplementary or incidental provision".

41. As noted above, the Transitional Regulations when originally made took their legal effect from sub-paragraphs (2) and (15). Section 47(5) Finance Act 2013, however, provides that, following the amendments made to Sch 18 by the Finance Act 2013, the Regulations "are to be treated as if they were made under paragraphs 16 and 17(1) of [schedule 18]". Since 17 July 2013 the Regulations have therefore had legal effect by virtue of paragraphs 16 and 17 of schedule 18 to the Finance Act 2011 rather than sub-paras 14(2) and 14 (15).

The Transitional Regulations

42. In so far as is relevant, the Regulations govern the issuance and revocation of Fixed Protection certificates, and provide rights of appeal against decisions by HMRC concerning the issuance and revocation of Fixed Protection certificates. They specifically provide as follows:

"**Regulation 3.**

(1) Subject to paragraph (2), an individual may rely on paragraph 14 if—

(a) the individual has given a paragraph 14 notice to Her Majesty's Revenue and Customs, and

(b) Her Majesty's Revenue and Customs have accepted that notice by issuing a certificate to the individual.

(2) An individual may not rely on paragraph 14 if—

(a) Her Majesty's Revenue and Customs have refused to accept a paragraph 14 notice in accordance with regulation 6,

(b) Her Majesty's Revenue and Customs have revoked the certificate in accordance with regulation 11, or

(c) a paragraph 14(4) event has occurred.

Regulation 7

(1) The individual may appeal against a refusal by Her Majesty's Revenue and Customs to accept the paragraph 14 notice.

(2) The notice of appeal must be given to Her Majesty's Revenue and Customs before the end of the period of 30 days beginning with the day on which the refusal to accept the paragraph 14 notice was given.

(3) Where an appeal under this regulation is notified to the tribunal, the tribunal must determine whether Her Majesty's Revenue and Customs **were entitled to take the view** that the notice did not satisfy the requirements in regulation 4.

(4) If the tribunal allows the appeal, the tribunal may direct Her Majesty's Revenue and Customs to accept the paragraph 14 notice and issue a certificate to the individual.

Regulation 11.

Her Majesty's Revenue and Customs may revoke a certificate if they—

(a) have reason to believe that a paragraph 14(4) event has occurred,

(b) have reason to believe that any of the conditions in sub-paragraph (1) of paragraph 14 have not been met, or

(c) have given notice to the individual under paragraph 1 of Schedule 36 to the Finance Act 2008(1) in connection with paragraph 14 and the individual does not reply to that notice within the time specified in the notice.

Regulation 12.

(1) The individual may require Her Majesty's Revenue and Customs to provide reasons for revoking or replacing the certificate.

(2) Paragraphs (1) and (2) of regulation 7 apply to a decision to revoke or replace the certificate as they apply to the refusal to accept the paragraph 14 notice.

(3) Where an appeal under this regulation is notified to the tribunal, the tribunal must determine whether Her Majesty's Revenue and Customs replaced or revoked the certificate in accordance with regulations 10(1) or 11.

(4) If the tribunal allows the appeal, the tribunal may direct Her Majesty's Revenue and Customs to issue a certificate to the individual."

43. Reg 11 deals with the revocation of Fixed Protection certificates. It provides that HMRC may revoke a fixed protection certificate if they have "reason to believe" that a paragraph 14(4) event has occurred.

44. Regulation 12 gives the taxpayer a right to appeal against a decision made by HMRC pursuant to regulation 11 to revoke a Fixed Protection certificate. Sub-paragraphs (3) and (4) set out the FTT's jurisdiction and powers in relation to any such appeal.

45. Regulation 7, as set out above, is not directly relevant to this appeal because it relates to situations where HMRC have refused to accept a Fixed Protection application in the first place, but I have included it here because I consider that it assists in understanding the proper functioning of the words in Regulations 11 and 12.

46. In addition, I was referred to the following cases:

Pitt v. Holt [2013] UKSC 26

Lobler v. HMRC [2015] UKUT 152 (TCC)

George v. HMRC [2017] UKFTT TC/2017/02485

HR Trustees Limited v. Wembley Plc [2011] EWHC 2974

47.

Discussion

48. There are essentially three elements to be considered in this appeal:

(1) Is the tribunal's jurisdiction merely supervisory or is it a full appellate jurisdiction?

(2) Would Mr Hymanson be granted the remedy of rescission of the payments made after April 2012 were he to take his case to the High Court?

(3) If the tribunal finds that Mr Hymanson would be able to obtain an order for rescission of the additional payments should this tribunal apply the equitable maxim to treat "that which ought to have been done as having been done" and proceed on the basis that the additional payments should be ignored for the purposes of para 14?

Jurisdiction

49. The Transitional Regulations were made by HMRC under the provisions of paras 14(2) and 14(15) Sch 18 Finance Act 2011, before they were amended by Fin ace Act 2013. These provide that these regulations may, under para 14(2), specify how notice is to be given and, under para 14(15), that they may include supplementary or incidental provisions. There is nothing in these permissive provisions which permits these regulations to restrict the actual operation of para 14. They are merely permitted to provide how a para 14 notice may be given.

50. Mr Firth, for Mr Hymanson, submitted that on HMRC's interpretation of these regulations they did have the effect of amending the actual operation of para 14, and therefore he encouraged me to indulge in some conforming construction as regards regulations 3 and 11 to ensure that they did not exceed their vires. However, on questioning by the tribunal, Mr Waldegrave confirmed, on behalf of HMRC, that even if a para 14 certificate were withdrawn, when an individual eventually withdrew funds from his pensions savings the provisions of para 14 would be considered afresh, and the existence or non-existence of a para 14 certificate would not be relevant. On this interpretation the regulations would not have exceeded their vires and therefore no conforming construction would be required.

51. In such a scenario, the purpose of a para 14 certificate would be little more than an "early warning signal" that the individual might have problems with obtaining Fixed Protection but it is not entirely clear to me what the practical effect of this would be.

52. Also of interest in this context is that Regulation 3 uses the words "the individual may not rely on paragraph 14". These words do not say that para 14 shall not apply, merely that he cannot rely on it, but they do not say in which context he cannot rely on it and their impact is therefore unclear to me.

53. Nevertheless, this appeal is concerned with the issuance and subsequent withdrawal of a para 14 certificate, not with whether or not para 14 does or does not apply. I will therefore read the words as they are written.

54. Regulation 11 states that “if HMRC have reason to believe that a paragraph 14(4) event has occurred” then they may revoke a para 14 certificate. Superficially this would seem to be a trivial test. I was therefore concerned that this regulation introduced a new level of reasonableness test, different from, and much less demanding than, the well-known Wednesbury test. In contrast, the words in s16 Finance Act 1994, for example, concerning the reasonableness of an HMRC decision in another context, say: “where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it.” This is a very different form of words from Regulation 11 and is generally interpreted as requiring the application of a Wednesbury reasonable test.

55. Regulation 7 uses the words “were entitled to take the view”, and it seems reasonable to assume that HMRC’s actions with regard to Regulation 7 and Regulation 11 should be judged by the same level of reasonableness.

56. Fortunately Mr Waldegrave, on behalf of HMRC, confirmed that he was not arguing that a weaker form of the Wednesbury test was implied by the words in Regulation 11 and indeed that he believed that a Wednesbury test was the appropriate test against which to judge HMRC’s actions as regards Regulation 11.

57. I therefore decided to decline Mr Firth’s invitation to indulge in some conforming construction, and came to the conclusion that the tribunal’s jurisdiction as regards Regulation 11 was merely supervisory.

Would Mr Hymanson obtain a rescission order from the High Court?

58. Mr Firth’s argument on behalf of Mr Hymanson is essentially that Mr Hymanson made a mistake when he paid the additional contributions and that therefore those payments may be set aside and treated as if they had not happened.

59. More importantly it should be noted that Mr Hymanson did not make a mistake as to the actual nature of the transaction, ie the payment of contributions to a pension provider. He understood precisely what was happening as regards the transaction itself, additional monies were being paid into his pension fund. He did however, Mr Firth submits, make a mistake as to the tax consequences of these transactions and it is on these grounds that Mr Firth submits that the transactions should be set aside.

60. It is clear from *Pitt v Holt* that a voluntary disposition (such as the additional contributions to the pension schemes) may be set aside on the grounds of mistake. However it is necessary to examine the nature and seriousness of the mistake in order to establish if it is appropriate to set aside the transactions in question.

61. In *Pitt v. Holt* the test for mistake was restated as one of seriousness and unconscionability. As Lord Walker said at [126],

> “The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition….

The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus…on the facts of the particular case."

62. At [128] he said,

"More generally, the apparent suggestion that the court ought not to form a view about the merits of a claim seems to me to go wide of the mark…

…The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case."

63. Earlier in the judgement, at [108], Lord Walker said:

"I would hold that mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference."

64. At [122] Lord Walker says:

"But I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. If the *Gibbon v Mitchell* test is further widened in that way it is questionable whether it adds anything significant to the *Ogilvie v Littleboy* test. I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction."

65. The mistake must be causative of the disposition (i.e. but for the mistake, the disposition would not have been made) and sufficiently serious, which means that the gravity of the mistake must be assessed by a close examination of the facts including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.

66. At [129] to [132] Lord Walker states:

"In this court Mr Jones applied for and obtained permission to raise two points which had not been raised below. The first (to be found in paras 80 to 95 of the Revenue's case) was that a mistake which relates exclusively to tax cannot in any circumstances be relieved. This submission, for which no direct authority was cited, was said to be based on Parliament's general intention, in enacting tax statutes, that tax should be paid on some transaction of a specified type, whether or not the taxpayer is aware of the tax liability. Mistake of law is not a defence, Mr Jones submitted, to tax lawfully due and payable.

In my opinion that submission begs the question, since if a transaction is set aside the Court is in effect deciding that a transaction of the specified description is not to be treated as having occurred. In the case of inheritance tax, this is expressly provided by section 150 of the Inheritance Tax Act 1984. That section is expressed in general terms as applying where a transfer "has by virtue of any enactment or rule of law been set aside as voidable or otherwise defeasible", and the effect is that tax which would not have been paid or payable "if the relevant transfer had been void ab initio" is to be repaid, or cease to be payable. There is no exception in section 150 for avoidance on the ground of a mistake about tax. More generally, Mr Jones's submission that tax is somehow in a different category is at odds with the approach of the House of Lords in *Deutsche Morgan Grenfell* [2007] 1 AC 558: see the speech of Lord Hope at para 44 and my own observations at paras 133 and 140.

So far as Mr Jones cites any authority for his submission, he has referred, but only as an aside, to the decision of the Court of Appeal in *Racal Group Services Ltd v Ashmore* [1995] STC 1151. That was a claim to rectification. Rectification is a closely guarded remedy, strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences. So far as anything in *Racal* is relevant to the different equitable remedy of rescission on the ground of mistake, it is relevant, not to establishing the existence of a mistake, but to the court's discretion to withhold relief in cases where it would be inappropriate for the court to grant it. That is Mr Jones's second new point and it is considered below.

I would therefore reject the first new point as much too wide, and unsupported by principle or authority. But it is still necessary to consider whether there are some types of mistake about tax which should not attract relief. Tax mitigation or tax avoidance was the motive behind almost all of the Hastings-Bass cases that were concerned with family trusts (as opposed to pensions trusts). In *Gibbon v Mitchell* there was a mistake as to the legal effect of the transaction, which was to plunge the family into the trap of forfeiture under the protective trusts, rather than to achieve the immediate acceleration of the adult children's interests. But the seriousness of the consequences of the mistake was greatly enhanced by the inheritance tax implications. On the test proposed above, consequences (including tax consequences) are relevant to the gravity of a mistake, whether or not they are (in Lloyd LJ's phrase) basic to the transaction."

67. In *Lobler* Proudman J said, summarising the points made by Lord Walker set out above:

> "In *Pitt v. Holt* the Supreme Court disapproved the distinction between the effect (in the sense of legal effect, the legal character or nature) and the consequences of a transaction, replacing it … with the test of causative mistake of sufficient gravity. The Court also considered whether there was a distinction between on the one hand mere causative ignorance and on the other a mistaken conscious belief or a mistaken tacit assumption."

68. Proudman J went on to say in *Lobler*, at [68]:

> "It is clear from *Pitt v. Holt* at [129]-[132] that a mistake as to the tax consequences of a transaction may, in an appropriate case, be sufficiently serious to warrant rescission and thus rectification. There is no justification for a different approach to mistakes about tax and other types of mistake."

69. In considering Mr Hymanson's motivation for continuing to make payments into the Standard Life and Reassure pension schemes I found that he was not simply ignorant, or that he knew what should have been done but failed to do it. He was genuinely confused as to why the company should be permitted to continue to pay rental to the pension scheme but that neither he nor the company could pay further contributions. He could not see any difference between the two and he therefore rationalised the position by concluding that it was acceptable to continue making payments which had already been arranged but that he could not make any new decisions to pay additional amounts into the schemes.

70. His mistake was not therefore a question of ignorance it was a genuine conscious belief that it would be acceptable to continue making the standing order payments to the pension schemes.

71. I should then address the question as to whether the consequences of the mistake were sufficiently serious as to merit the remedy of rescission.

72. In this case Mr Hymanson has continued to make payments totalling approximately £7,000 and has lost tax estimated at £50,000. I assume that this loss has been calculated as the reduction in Lifetime Allowance which Mr Hymanson would suffer, from £1,800,000 to £1,500,000, ie £300,000, multiplied by the difference between the Lifetime Allowance charge rate of 55% and the normal income tax charges, being a mixture of 20% and 40%, which Mr Hymanson would suffer if he were to withdraw funds from his pension schemes in the normal way, ie £300,000 x 15% or 35%.

73. It can even be said that the first payment after April 2012, of £62.50, was sufficient for Mr Hymanson to lose this benefit.

74. This is clearly a totally disproportionate loss of tax and the question I must ask is: if Mr Hymanson had understood the tax consequences of his making the additional contributions would he have done so? Undoubtedly the answer must be that he would not.

75. I therefore find that if Mr Hymanson were to take his case to the High Court then they would issue an order for rescission of these additional contributions because of his mistaken belief as to the tax consequences of the payments.

The Equitable Maxim

76. The principle of the equitable maxim can be summarised as "that which should be done should be treated as having been done", or, in this case, "that which should not have been done should be treated as not having been done."

77. I also note that Mr Waldegrave, on behalf of HMRC, stated that if Mr Hymanson were to go to the High Court and obtain an order for rescission of the additional payments then HMRC would reissue the para 14 certificate.

78. The question before me therefore is, having found that Mr Hymanson would be granted an order of rescission from the High Court were he to go to the High Court, should I then force him to go through that process, at the cost of significant expense and time, or should I attempt to short-cut the process.

79. Proudman J summarises the position in *Lobler*, at [47] and [48] as:

> "Thus although the FTT did not itself have power to order rectification, it could determine that if rectification would be granted by a court who does have jurisdiction to grant it, Mr Lobler's tax position would follow as if such rectification had been granted.
>
> It has never been suggested that before the effect of the availability of specific performance can be taken into account by the FTT, the appellant must go to court and actually obtain the remedy of specific performance. On the contrary, the cases show that this is not the case: see *Oughtred v. IRC* [1960] AC 206, *Jerome v. Kelly* [2004] UKHL 25, *BMBF (No 24) Limited v. IRC* [2002] STC 1450 and *HSP Financial Planning Limited v. HMRC* [2011] UKFTT 106 (TC). A tribunal such as the FTT must however take into account all the factors that the Court would in deciding whether specific performance would be available, such as whether damages would be inadequate, whether specific performance would require constant supervision, whether the appellant is ready, willing and able to perform, hardship and so on."

80. In this case we are not of course talking about rectification. Rectification would not be an appropriate remedy in this case because that would leave the essential elements of the transaction, ie the additional payments, intact. Nor are we considering the remedies of damages or specific performance, neither of which would be appropriate. In this case the only effective remedy would be rescission.

81. Mr Waldegrave, for HMRC, said that HMRC believe that *Lobler* was wrongly decided. This may be so, but it is binding on me unless I can find sufficient distinguishing features that would lead me to a different conclusion.

82. Mr Waldegrave suggested that the key distinguishing feature was that *Lobler* concerned rectification whereas this case related to rescission. However Proudman J is at pains to point out in her judgement in *Lobler* that her approach could be applied to any equitable remedy, and in fact implied that she was exploring the boundaries of what was permitted by applying rectification rather than one of the more conventional remedies such as specific performance or rescission. She referred to rescission specifically, at [68], when she said:

> "the tax consequences of a transaction may, in an appropriate case, be sufficiently serious to warrant rescission and thus rectification."

83. She was clearly referring there to the possibility of rescission as almost a necessary precursor to her decision to apply the, in that case more appropriate, remedy of rectification. I cannot therefore find that this difference between rescission and rectification is sufficient reason for me to depart from the decision of Proudman J

84. Mr Waldegrave also submitted that it would be inappropriate for a First-tier Tribunal to use the equitable maxim in this way because it would give rise to very significant difficulties in relation to the administration by HMRC of the Fixed Protection rules. He suggested that the problem was that even if the First-tier Tribunal were able to treat the payments as not having been made they could not make any orders as to any related and ancillary matters, which would be necessary in order to rescind all the related implications of rescinding the payments themselves.

85. It would also, he submitted, mean that HMRC were effectively being given the task of deciding when they should apply the equitable maxim and when they should not.

86. Both these facts may be true, but I note that at an earlier stage of discussions with Mr Hymanson and Mr Field, before they had decided to revoke Mr Hymanson's para 14 certificate, HMRC suggested that if Mr Hymanson could prove that he had given instructions to his bank to stop the payments but that the bank had failed to do so then they would be prepared to reverse the additional payments. They presumably considered therefore that at that stage these practical difficulties were not insurmountable.

87. Standard Life, for their part, have said that they would be prepared to return the contributions to Mr Hymanson as long as HMRC would give them assurance that such a repayment would not be treated as an unauthorised payment. This would seem to be a fairly simple agreement, well within HMRC's gift. Some of the payments were actually made by Lightcredit Ltd and presumably it claimed a corporation tax deduction for those payments. Any return of those contributions to the company would therefore be regarded as a taxable receipt in the hands of the company, but Mr Hymanson indicated that this would be an acceptable solution for him.

88. It would seem therefore that the practical difficulties are not insurmountable.

89. Mr Waldegrave also referred me to *HR Trustees Ltd v Wembley Plc* and the judgement of Vos J, specifically at paras [55] and [56] where he was quoting from

Meagher, Gummow and Lehane 2002 on Equity Doctrines and Remedies. This states that the application of the equitable maxim is limited to five main instances, which he lists at [55]. This list includes the fifth instance, which is equity's attitude to contracts, "where the maxim means that often equity treats a contract to do a thing as if the thing were already done."

90. Vos J continues to quote from Meagher, Gummow and Lehane at [56] as follows:

> "It is to be noted that the applicability of the maxim is limited to circumstances where that which ought to be done can be done; the maxim does not require one to believe that equity will regard as done that which no court (of law or equity) would ever order to be done. Therefore, it can be availed of, not by everybody, but only by those who would have the right to seek in equity the enforcement of the contract. This is often expressed by saying with approximate accuracy that in cases of contract the maxim depends on the specific enforceability of the contract."

91. I cannot read anything in these quotes which states that the equitable maxim cannot be applied in the current circumstances.

92. I therefore come to the conclusion that Mr Hymanson would be entitled to rescission if he were to take his case to the High Court and that his tax position should therefore to be determined as if that remedy had been granted.

Summary

93. However, I am faced with the problem that I have already decided that my jurisdiction in this case is purely supervisory. I can only interfere with HMRC's decision to revoke the para 14 certificate under Regulation 11 if I can find that their decision did not take into account relevant factors, or did take into account irrelevant factors, or was otherwise such that no properly directed officer could come to that conclusion.

94. In this case it is quite clear that when they made their decision to revoke Mr Hymanson's certificate HMRC did not take into account any possibility that the contracts under which Mr Hymanson continued to make payments to the pension schemes might be void as a result of mistake, even though the relevant arguments had been put to them at that stage. They were prepared to rescind the payments if they had been made by a bank in contravention of an instruction from Mr Hymanson but they did not consider the possibility that the payments could be rescinded because of Mr Hymanson's mistake. This in my opinion was a very relevant factor which they did not take into account.

Decision

95. I therefore find that HMRC's decision was unreasonable and I therefore ALLOW Mr Hymanson's appeal in accordance with Regulation 12 of the Transitional Regulations appeal.

96. In addition, I DIRECT Her Majesty's Revenue and Customs to issue a new certificate to Mr Hymanson in accordance with Regulation 12(4) of the Transitional Regulations.

97. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 13 November 2018