



TC01979

Appeal number: TC/2011/02298

*Income tax – pensions – late notification of claim for enhanced protection –
whether reasonable excuse – on the facts, yes – appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHARLES IRBY

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
 SHEILA WONG CHONG FRICS**

Sitting in public at Bedford Square, London on 14 November 2011

Stephen Midwinter, Field Fisher Waterhouse, for the Appellant

Alan Bush, HMRC Pensions Office, for the Respondents

DECISION

1. The appellant, Mr Charles Irby (“Mr Irby”) appeals against the refusal of the Respondent Commissioners (“HMRC”) to consider information provided by Mr Irby in a notification given pursuant to regulation 4 of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 (“the Regulations”) but after the closing date specified in regulation 4(4) of the Regulations, which is 5 April 2009. The notification was given by Mr Irby on 20 September 2010.

2. Although regulation 4(3) of the Regulations requires that a notification under the regulation must be given on or before the specified closing date, regulation 12(2) of the Regulations provides that HMRC must consider information provided in a notification given after the closing date if they are satisfied that regulation 12(1) of the Regulations applies.

3. Regulation 12(1) is as follows:

‘(1) This regulation applies if an individual-

(a) gives a notification to the Revenue and Customs after the closing date,

(b) had a reasonable excuse for not giving the notification on or before the closing date, and

(c) gives the notification without unreasonable delay after the reasonable excuse ceased.’

4. HMRC by a letter to Mr Irby dated 24 September 2010 declined to accept Mr Irby’s late notification dated 20 September 2010. That decision was confirmed (on different or additional grounds) in a letter sent by HMRC to Mr Irby and dated 7 January 2011 and, following an internal review, in a letter sent by HMRC to Mr Irby and dated 21 February 2011.

5. Regulation 12(4) of the Regulations gives a right of appeal to the Tribunal against a refusal to consider information provided in a late notification. Mr Irby appealed pursuant to this provision on 22 March 2011. The Tribunal’s jurisdiction on the appeal is to determine whether the individual (Mr Irby) gave the notification to HMRC in the circumstances specified in regulation 12(1) of the regulations (see above) (regulation 12(7)). If we allow the appeal (as we have) our function is to direct HMRC to consider the information provided in the notification (regulation 12(8)).

6. With regard to the question whether Mr Irby gave the notification to HMRC in the circumstances specified in regulation 12(1), it is of course accepted by HMRC that the notification was given after the closing date (paragraph (1)(a)); it is also accepted by HMRC that if (which they deny) Mr Irby had a reasonable excuse for not giving the notification on or before the closing date, then he gave the notification (on 20 September 2010) without unreasonable delay after the reasonable excuse ceased (paragraph (1)(c)). The only point in issue is whether or not Mr Irby indeed had a

reasonable excuse for not giving the notification on or before the closing date (paragraph (1)(b)).

5 7. Mr Irby made a Witness Statement (dated 29 October 2011) and was cross-examined on it by Mr Bush, for HMRC. Apart from this evidence we also had before us bundles of documents (largely duplicating each other) produced by the parties respectively.

8. From the evidence we find the following facts.

9. Mr Irby was aged 65 when he made his Witness Statement (on 29 October 2011). He is a retired corporate financier. He was Deputy Chairman of Baring Brothers International Limited between 1997 and 1999. In 1999, as he was preparing to leave that position, he decided to seek financial advice about his pension arrangements. He engaged David Scott of Scott Goodman Harris (“SGH”) as his financial adviser. SGH received remuneration for their work. Mr Irby has (and had) no expertise in pensions or personal finance and so relied on Mr Scott’s financial advice, initially as to what arrangements he should enter into and then as to the management of those arrangements.

10. On Mr Scott’s advice Mr Irby set up (a) a self-invested personal pension plan (a “SIPP”) with James Hay Pension Trustees Limited as trustee, and (b) a separate insurance policy which was consolidated into the SIPP in December 2010.

11. As at 6 April 2006 (the day after the closing date specified in regulation 4(4) of the Regulations) the total value of Mr Irby’s pension arrangements was £4,284,409.

12. On 24 March 2004 Mr Scott from SGH wrote to Mr Irby to inform him that SGH was to be acquired by UBS AG Wealth Management (“UBS”) and that UBS’s Terms and Conditions of Business would replace the existing SGH terms and conditions with effect from 6 April 2004. Mr Irby was assured that there were in fact few significant changes and that the basis of the relationship would broadly remain unchanged. Mr Scott wrote that SGH was anticipating continuing its relationship with Mr Irby within the new UBS structure and asked for Mr Irby’s agreement to this. Mr Irby was content that this should happen and thereafter relied on UBS for financial advice accordingly.

13. On 9 September 2004 Mr Irby was entertained to lunch by Mr Scott and in the course of conversation Mr Scott mentioned to him some new rules regarding SIPPs. On 23 September 2004 Mr Irby wrote to Mr Scott at UBS, asking (*inter alia*) for a simple explanation of the new rules governing his SIPP.

14. On 1 October 2004 Mr Scott wrote to Mr Irby explaining that the new rules would take effect on 6 April 2006 and that all the relevant regulations had not at the time of writing been published. Relevantly for present purposes, he wrote:

40 ‘The legislation allows for the protection of the current position with regard to the tax-free cash and growth on the pension. We will have to make an election before 6th April 2004 specifying the maximum tax-free cash at that point, which will then be preserved plus indexation. This

election will also ensure that the fund will not be taxed, even though the value exceeds the proposed lifetime limit.’

15. The reference to 6 April 2004 was an obvious error.

5 16. On 7 October 2005, Mr Scott wrote to Mr Irby informing him that due to his own increasing responsibilities he had arranged ‘additional support’ for Mr Irby. He mentioned two individuals who would be able to assist Mr Irby (as well as himself) – Philip Sutton and Zoe Vucicevic (“ZV”). Mr Scott wrote that ZV would ‘be able to assist on all areas that require FSA authorisation’.

10 17. Mr Irby first met ZV in January 2006 at UBS’s offices. On 12 January 2006, ZV wrote to Mr Irby summarising the main points raised in their discussion. This does not appear to have touched on the question of notification¹ to be given by Mr Irby pursuant to regulation 4 of the Regulations. There ensued further correspondence which also did not touch on that question.

15 18. Mr Irby met ZV again at UBS’s offices on 28 June 2006. We had in evidence copies of handwritten notes taken by Mr Irby at that meeting on UBS stationery. During that meeting (as evidenced by the notes) an application for enhanced protection (which can only mean a notification pursuant to regulation 4 of the Regulations, which came into force on 6 April 2006) was discussed. Mr Irby wrote in his notes ‘*Enhanced Protection to be applied by UBS’.

20 19. Mr Irby’s evidence (which we accept) is that when it came to applying for enhanced protection, he understood from his discussion with ZV that an application needed to be made and that UBS would take care of it. He was not aware of the process or that input would be needed from him. He understood that the application could (and would) be made by UBS on his behalf without the need for his
25 involvement.

30 20. Mr Irby accepted that between the time of the meeting with ZV on 28 June 2006 and the closing date for notifications under regulation 4 of the regulations (5 April 2009) he had seen various headlines in the press regarding the need to file an application with HMRC, but he was confident that they referred to the application for enhanced protection which had been mentioned in his meeting with ZV and that UBS would be dealing with it or had already dealt with it. He did not feel the need to enquire as to UBS’s progress in the matter or to take any further action.

35 21. ZV left UBS in 2008. Jennifer Flood (“JF”) became Mr Irby’s primary point of contact. Mr Irby met JF on 8 July 2008. She emailed him later that day saying: ‘I am meeting with our Pension expert tomorrow and will come back to you with the answers to your SIPP questions’. However Mr Irby has no record of JF coming back to him with the answers to these questions.

¹ Notification under regulation 4 of the Regulations is notification of an individual’s intention to rely on paragraph 12, Schedule 36, Finance Act 2004, which provides for ‘enhanced protection’ in certain cases.

22. The next relevant event was a meeting between Mr Irby and Philip Swallow (“PS”) of UBS. This happened on 16 January 2009. During this meeting PS raised the issue of enhanced protection of Mr Irby’s SIPP and Mr Irby said that ZV had said that UBS would apply for and obtain enhanced protection for him. PS said that he would check that UBS had indeed done so. In an email sent by PS to Mr Irby later that day, PS said: ‘I will double check the position on ‘pension protection’ and get back to you on this shortly’.

23. Mr Irby’s evidence (which we accept) is that it was his understanding that if there had been an issue in relation to the position on his pension protection, then PS would get back to him. He did not do so. Mr Irby remained fully confident that UBS could make the relevant application to HMRC on his behalf and without any involvement of his. He was not aware that there was a closing date for applications for pension protection or that it was 5 April 2009.

24. Subsequently Mr Irby’s affairs at UBS were taken over by Alexander Wood (“AW”).

25. In 2010 Mr Irby decided to change the trustee of his SIPP from James Hay Pension Trustees Limited to Michael J. Field. In the course of discussions with Michael J. Field the fact that Mr Irby should have a certificate in relation to enhanced protection was mentioned to him. Again, Mr Irby told Michael J. Field that he understood that UBS had dealt with this. He emailed JF on 17 May 2010 as follows:

‘A while ago, maybe 2 years, at a meeting with you and your pension man, whose name escapes me, you (he) checked out my situation and applied for enhanced protection for my funds. Can you confirm that you did so and that you hold a protection certificate? James Hay, my SIPP provider, has no record of one.’

26. Mr Irby did not receive a response to this email (perhaps because it was sent to JF, not AW).

27. In July 2010 Mr Irby chased UBS. On 16 July 2010, AW emailed Mr Irby informing him that UBS had been ‘unable to uncover anything yet’ and suggesting that Mr Irby himself contact HMRC ‘and request that they advise you as to whether the certificates were ever produced’.

28. Mr Irby contacted HMRC on 2 August 2010, who told him that no certificate had been produced. Mr Irby explained to the man with whom he spoke at HMRC (whose name he did not note) that this had been an oversight on the part of his advisers and asked what he should do. He was advised to send a form APSS 200 (Protection of Existing Pension Rights) with an explanation of what had happened, to obtain a certificate. Mr Irby understood from the conversation that there would be no problem obtaining a certificate.

29. On 3 August 2010 Mr Irby asked Michael J. Field to obtain the necessary information to allow an application to be completed. Michael J. Field provided Mr Irby with a draft form and advice by letter dated 14 September 2010, after having obtained the necessary information. This letter was sent to Mr Irby while he was in

New Zealand on business. He returned from New Zealand on 18 September 2010 and on 20 September 2010 he sent a letter to HMRC enclosing the completed form APSS 200 and explaining the circumstances in which he did not have the relevant certificate and asking for a certificate to be issued.

5 30. HMRC replied on 24 September 2010 refusing to accept late notification (see: paragraph 4 above).

31. To give a flavour of the significance of the matter in issue, Mr Irby states that he has been advised by Michael J. Field that if he obtains enhanced protection he will be able to take a tax-free lump sum of £1,265,000 and have a fund of £4,235,000 with
10 which to purchase an annuity. Whereas without enhanced protection, if he used the same amount of the fund to purchase an annuity he would only be able to take a tax-free lump sum of £340,000 - £925,000 less than would be the position if he had enhanced protection.

32. Mr Irby has made a formal complaint to UBS about their conduct in the matter.
15 UBS have not accepted liability and the matter is ongoing.

33. Mr Midwinter, for Mr Irby, submitted that Mr Irby reasonably relied on his understanding that UBS would make the necessary application to HMRC in time. He referred to a decision of Special Commissioner Shipwright, *Rowland v HMRC* SPC00548 (14 June 2006), and two decisions of the Tribunal, *Scurfield v HMRC*
20 (Judge Tildesley and Mr Adams) (TC01379)(5 August 2011) and *Platt v HMRC* (Judge Berner and Mr Adams) (TC/2011/0841)(15 September 2011).

34. In *Rowland*, the Special Commissioner found that the taxpayer had a reasonable excuse for her failure to pay tax on the due date because she had been advised by reputable specialist accountants who had prepared her tax return that she only had to
25 pay a lower amount. Her reliance on the accountants was reasonable and that reliance had led to the underpayment.

35. In *Scurfield*, the Tribunal found that the appellant's ignorance of the legal provisions dealing with protection of pension benefits had no rational basis and did not constitute a reasonable excuse for his late application for lifetime allowance
30 protection. The appellant had argued that it was reasonable for him not to have had the services of a financial adviser at the time of the changes to tax relief on pension benefits but the Tribunal found that in the special circumstances of the case the appellant without financial advice could reasonably have been expected to discover the need to apply for protection of his benefits on or before 5 April 2009.

36. In *Platt*, which was another appeal about a late notification of a claim for enhanced protection, the Tribunal found that the appellant, who relied on his ignorance of a novel and transitional requirement, affecting only a limited number of people (the requirement to make a notification on or before 5 April 2009), did not
35 have a reasonable excuse because the cause of that ignorance was that it was unreasonable of him not to have sought independent advice as a relevant article
40 published in December 2008 had suggested. The Tribunal commented that it was

reasonable to assume that such advice would have enabled ‘the reasonable individual’ to have made an informed decision whether to make a claim, and if a claim was to have been made, then to have done so before the closing date.

5 37. Mr Midwinter submitted that these 3 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 *Scurfield* and *Platt* decided that a reasonable man ought to have taken – he sought advice.

10 38. Mr Midwinter also cited *Smith v Eric S Bush* [1990] 1 AC 831, a case about a surveyor’s negligence, for the proposition that in deciding the question of whether Mr Irby had a reasonable excuse for the late notification, the Tribunal should consider the practical consequences of its decision on Mr Irby and the public purse respectively. He made the point that the consequence to Mr Irby of the late notification not being accepted would be much more serious than the consequence to the public purse of
15 allowing the appeal.

39. Mr Bush, for HMRC, focussed on the meeting between Mr Irby and PS of UBS on 16 January 2009, when PS raised the issue of enhanced protection of Mr Irby’s SIPP and Mr Irby said that ZV had said that UBS would apply for and obtain enhanced protection for him. As stated above, PS said that he would check that UBS
20 had indeed done so. In an email sent by PS to Mr Irby later that day, PS said: ‘I will double check the position on ‘pension protection’ and get back to you on this shortly’. In particular, Mr Bush focussed on the fact that PS did not get back to Mr Irby on this point and Mr Irby did not go back to UBS to check the position before the closing date (5 April 2009).

25 40. Mr Bush submitted that a reasonable person would have gone back to UBS much sooner than Mr Irby did, or at least agreed with UBS a deadline for establishing the position about enhanced protection and then followed the matter up when the deadline had passed. He submitted that Mr Irby was aware of an unresolved issue in respect of enhanced protection and did not go back to check the position with UBS within a
30 reasonable timescale. In these circumstances Mr Irby’s assumption that UBS had established that enhanced protection was in place does not, in Mr Bush’s submission, afford him a reasonable excuse for his late notification.

35 41. Mr Bush submitted, in particular, that a reasonable person in Mr Irby’s position, even if placing reliance on UBS to ‘take care of anything without checking that they had’ done so, could and should have made himself aware of the closing date for notification from publicly available sources. Mr Bush prayed in aid the decisions in *Scurfield* and *Platt* in which no reasonable excuse was found, and invited the Tribunal not to follow the decision in *Rowland*, because although Mrs Rowland had relied on her advisers, her tax affairs in relation to which she had been advised were
40 technically complex, unlike the position here where the matter in relation to which Mr Irby relies on UBS’s advice is not complicated – being simply the need to submit the relevant notification on or before 5 April 2009.

42. We announced at the end of the hearing on 14 November 2011 that we would allow Mr Irby's appeal. Pursuant to regulation 12(8) of the Regulations, we direct HMRC to consider the information provided in Mr Irby's late notification.

5 43. Our reason for allowing Mr Irby's appeal is that we find that he relied on UBS to make the necessary notification in time on his behalf and that such reliance was reasonable. Therefore he has a reasonable excuse for the late notification within regulation 12(1)(b) of the Regulations.

10 44. We accept that a more prudent person could (and would) have made himself aware of the closing date after the meeting with UBS on 16 January 2009 and chased up UBS for the result of PS's 'double check' on the position on pension protection. We also accept that such would have been reasonable conduct.

15 45. But the categories of reasonable conduct encompass more than one course of action. Our task is not to identify a reasonable course of action which Mr Irby did *not* take and deduce from the fact that he did not take it that he had no reasonable excuse for the course of action that he *did* take. Our task is to examine what Mr Irby did and determine whether what he did was the action of a reasonable person. We consider it was, and that our approach is entirely consistent with the reasoning of the Tribunal in *Platt*, which is the decision in which (of the decisions cited to us) the concept of reasonable excuse in this context is most fully explored.

20 46. With respect to Mr Midwinter, we consider that it is not relevant to the question of whether or not Mr Irby had a reasonable excuse for his late notification to consider the consequences of a decision one way or the other. This is, in our view, likely to lead to confusion. The closing date for notifications had been laid down officially well in advance and advertised widely. Late notifications can only be considered if a reasonable excuse for the notification being late is shown. There is no warrant for an approach which might regard an excuse as reasonable if the consequences of non-consideration of the notification were more severe to the taxpayer and as not being reasonable if the consequences were less severe to the taxpayer.

30 47. 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.

JOHN WALTERS QC

TRIBUNAL JUDGE

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RELEASE DATE: 23 April 2012