[2021] UKUT 218 (TCC)

PENSIONS – registered pension scheme – lifetime allowance – late notification of intention to rely on enhanced protection – regulation 12 Registered Pension Schemes (Lifetime Allowance) Regulations 2006 – whether FTT erred in law in finding unreasonable delay in giving notification

PROCEDURE – application to admit new evidence – application to amend grounds of appeal – applications refused

UPPER TRIBUNAL **Appeal number: UT/2020/000351**
TAX AND CHANCERY CHAMBER

BETWEEN

DONALD GRAHAM KETLEY **Appellant**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN
JUDGE ASHLEY GREENBANK

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Strand, London on 4 May 2021

Oliver Hilton, counsel, instructed by Meridian Private Client LLP, for the Appellant

Charles Bradley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Mr Donald Graham Ketley from a decision of the First-tier Tribunal (the "FTT") released on 23 March 2020 (the "FTT Decision"). The respondents are the Commissioners for Her Majesty's Revenue and Customs ("HMRC").

2. The appeal concerns HMRC's decision to refuse to consider Mr Ketley's late notification of his intention to rely on enhanced protection for his pension fund under paragraph 12 Schedule 36 Finance Act 2004 ("FA 2004"). The FTT dismissed Mr Ketley's appeal against that decision.

3. By the FTT Decision, the FTT decided that:

   (1) Mr Ketley had acted reasonably in relying on his professional adviser to notify HMRC of his intention to rely on enhanced protection;

   (2) accordingly, when his adviser failed to notify HMRC by the closing date, Mr Ketley had a reasonable excuse for late notification for the purpose of regulation 12(1)(b) of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 (the "2006 Regulations");

   (3) Mr Ketley had not notified HMRC without unreasonable delay after the reasonable excuse ceased for the purpose of regulation 12(1)(c) of the 2006 Regulations; and

   (4) HMRC were not therefore required to consider Mr Ketley's late notification of his intention to rely upon enhanced protection.

4. The FTT refused permission to appeal. Mr Ketley was granted permission to appeal by this Tribunal (Judge Raghavan) following an oral hearing. We will return to the grounds on which Judge Raghavan granted permission to appeal later in this decision.

5. Mr Ketley has also made an application to this Tribunal dated 15 February 2021 (the "Application") for permission to adduce new evidence and, consequently on that, for permission to amend his grounds of appeal.

THE LEGISLATIVE BACKGROUND

6. It will assist our explanation if we first set out some of the legislative background to this appeal.

7. As explained by the FTT in the FTT Decision (FTT [2]-[5]), substantial reforms were made to the taxation of registered pension schemes by FA 2004. Those reforms took effect from 6 April 2006 (referred to as "A Day"). In particular, the reforms imposed increased tax charges, in certain circumstances, where the value of a taxpayer's pension fund exceeded a lifetime allowance of £1.5m.

8. Some protections from these increased tax charges were offered for existing pension funds where pension benefits in excess of the lifetime allowance had already accrued by A Day. These protections are referred to as primary protection and enhanced protection and were introduced by paragraphs 7 and 12 respectively of Schedule 36 FA 2004.

9. In order to benefit from these protections, the taxpayer was required to give notice to HMRC in the prescribed form on or before the "closing date". The closing date was 5 April 2009. The relevant provisions are found in regulations 3 and 4 of the 2006 Regulations:

3. Reliance on paragraph 7 of Schedule 36 (lifetime allowance enhancement: "primary protection")

(1) This regulation applies if the amount of the relevant pre-commencement pension rights of an individual (determined in accordance with paragraph 7(5) of Schedule 36) exceeds £1,500,000.

(2) The individual may give notice of intention to rely on paragraph 7 of Schedule 36 ("paragraph 7").

(3) If the individual intends to rely on paragraph 7, the individual must give a notification to the Revenue and Customs on or before the closing date.

(4) For the purposes of this regulation the closing date is 5 April 2009.

4. Reliance on paragraph 12 of Schedule 36 (lifetime allowances: "enhanced protection")

(1) This regulation applies in the case of an individual to whom paragraph 12(1) of Schedule 36 has applied at all times on and after 6th April 2006.

(2) The individual may give notice of intention to rely on paragraph 12 of Schedule 36 ("paragraph 12").

(3) If the individual intends to rely on paragraph 12, the individual must give a notification to the Revenue and Customs on or before the closing date.

(4) For the purposes of this regulation the closing date is 5th April 2009.

10. If notification was not given by the closing date, the 2006 Regulations provide that HMRC must consider a late notification if the taxpayer had a reasonable excuse for the late notification and did not delay unreasonably in giving the notification after the reasonable excuse ceased. The relevant provision is in regulation 12 of the 2006 Regulations which also includes appeal rights to the FTT if HMRC refuse to consider a late notification. At all material times, regulation 12 was in the following form:

12. Late submission of notification

(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.

(2) If the Revenue and Customs are satisfied that paragraph (1) applies, they must consider the information provided in the notification.

(3) If there is a dispute as to whether paragraph (1) applies, the individual may require the Revenue and Customs to give notice of their decision to refuse to consider the information provided in the notification.

(4) If the Revenue and Customs gives notice of their decision to refuse to consider the information provided in the notification, the individual may appeal.

(6) The notice of appeal must be given to the Revenue and Customs within 30 days after the day on which notice of their decision is given to the individual.

(7) On an appeal that is notified to the tribunal, the tribunal shall determine whether the individual gave the notification to the Revenue and Customs in the circumstances specified in paragraph (1).

(8) If the tribunal allows the appeal, the tribunal shall direct the Revenue and Customs to consider the information provided in the notification.

11. Following receipt of a notification in the appropriate form, HMRC was required by regulation 13 to issue a certificate confirming the availability of primary protection or enhanced protection to the taxpayer:

13. Procedure on giving of notification: the specified provisions

(1) If an individual gives a notification to the Revenue and Customs under one of the specified provisions, and there are no obvious errors or omissions in the notification (whether errors of principle, arithmetical mistakes or otherwise), the Revenue and Customs must issue a certificate to the individual.

…

FACTS

12. The FTT set out its findings of fact at paragraphs [9] to [68] of the FTT Decision. We summarise the main findings below.

(1) Mr Ketley is a retired businessman. At the time of the FTT Decision, he was 74 and had been retired for about 18 and a half years (FTT [9]).

(2) During his career, Mr Ketley built up significant pension investments worth approximately £5.2m at A Day and £8m at the time of the FTT Decision. Mr Ketley's pension investments are held in a self-invested personal pension scheme, which is a registered pension scheme and within the scope of the FA 2004 reforms. It is now operated by AEGON (FTT [9], [10]).

(3) Although Mr Ketley was "financially literate", he relied on his financial adviser in relation to pension matters (FTT [11]). Mr Yelloly acted as Mr Ketley's financial adviser at all material times up to and until November 2014 (FTT [12]). Mr Yelloly was a director of Montpelier Group Europe Ltd ("Montpelier") until 2012 when Montpelier's advisory business was taken over by Merito Financial Services Ltd ("Merito"). Mr Yelloly moved to Merito at that time (FTT [33]).

(4) In 2006, Mr Ketley became aware through the financial press of the A-Day pension changes and the possibility of protection. He instructed Mr Yelloly to apply for protection of his lifetime allowance by sending the relevant form to HMRC. The form was completed, with the exception of the valuation details, and signed by Mr Ketley. Mr Yelloly then delivered the form to AEGON so that AEGON could complete the valuation details and send it to HMRC (FTT [20], [21]).

(5) HMRC had no record of the form having been received and no certificate was issued by HMRC to Mr Ketley (FTT [22]).

(6) Mr Ketley was not aware that he should have received a certificate from HMRC. At a meeting with Mr Yelloly which appears to have been in 2006, Mr Yelloly told him that the notification process had been successfully completed. Mr Ketley was left with the impression that nothing further was required of him (FTT [23], [24]).

(7) Between 2007 and 2009, there was an exchange of correspondence between Mr Yelloly's personal assistant and a representative of AEGON seeking confirmation that the notification had been filed with HMRC. It was not suggested that Mr Ketley was aware of this correspondence at the time (FTT [26]-[32]).

(8) In 2014, Mr Yelloly left Merito. Mr Ketley's account was taken over by Mr Fleet, another financial adviser at Merito (FTT [33]).

(9) In a meeting on 29 June 2015, Mr Fleet raised with Mr Ketley the question of whether he had applied for pension protection. Mr Ketley told Mr Fleet that Mr Yelloly had advised him that everything was in order (FTT [35]).

(10) On 8 July 2015, Mr Fleet wrote to HMRC to check the position and to find out why a certificate had not been issued. On 27 July 2015, HMRC replied confirming that there was no evidence on its systems of the issue of any lifetime allowance certificate (FTT [36], [37]).

(11) Mr Fleet did not tell Mr Ketley about HMRC's letter at the time. Instead, he conducted an internal search for the certificate. It was not until 14 October 2015, at a meeting with Mr Ketley, that Mr Fleet advised Mr Ketley that there was a problem because no certificate had been issued. Mr Fleet did not advise Mr Ketley at this meeting that he might make a late notification because he himself was not aware this was possible (FTT [38]-[40]).

(12) On the same day, Mr Ketley consulted a solicitor, Mr Abrol of The Wilkes Partnership LLP ("Wilkes"), because he was concerned that there had been professional negligence, an area in which Mr Abrol specialised (FTT [41]).

(13) On 16 October 2015, Mr Fleet wrote to Mr Ketley confirming that HMRC claimed not to have received his notification form and advising him to apply for another form of protection which was not as valuable as primary or enhanced protection. Mr Ketley was aware that this was a very expensive error as it would cost him about £1m in additional tax and he was weighing up whether to bring a claim for negligence (FTT [43], [44]).

(14) For various reasons described by the FTT at FTT [44] and [45], Mr Ketley did not discuss matters further with Mr Abrol until a meeting on 26 January 2016 at which he orally instructed Mr Abrol. There is a dispute regarding the precise scope of Mr Abrol's instructions to which we will return later in this decision. The FTT's findings in relation to the instructions were at FTT [46]:

> 46. Having thought the matter over, [Mr Ketley] instructed Mr Abrol at a meeting on 26 January 2016. Mr Abrol's instructions were to investigate what had happened, and amongst other matters, to advise on the prospects of bringing a professional negligence claim. He was not instructed to consider how to remedy the position with HMRC. At this point, [Mr Ketley] still did not know that he could submit a late notification.

(15) As part of his investigations, Mr Abrol met with or contacted Mr Fleet, Mr Yelloly, Mr Yelloly's personal assistant, the liquidator of Montpelier and representatives of AEGON. These meetings occurred over the period 2 February 2016 to 1 July 2016. Mr Fleet carried out further searches for the notification following his meeting with Mr Abrol on 2 February 2016 and reported back on 4 March 2016 that he could not find anything more. Similarly, Mr Yelloly's assistant met with Mr Abrol on 15 March 2016 and agreed to attend Merito's offices to see if the notification had been scanned on to the system. She did so on 2 June 2016 (FTT [47] – [54]).

(16) In April 2016, Mr Abrol became aware that it was possible for a taxpayer to make a late notification under the 2006 Regulations (FTT [51]).

(17) Mr Abrol met Mr Ketley on 13 July 2016, to discuss his findings. The FTT records at FTT [55] that Mr Abrol declined to disclose the outcome of his investigation, retaining privilege over it.

(18) Following that meeting, on 15 August 2016 Mr Abrol wrote to HMRC setting out the history of the matter and seeking to make a late notification under regulation 12 on behalf of Mr Ketley. Mr Abrol did not submit the prescribed form of notification at this time (FTT [56], [57]).

(19) On 24 October 2016, HMRC wrote to Mr Abrol stating that they would need a completed form before they could consider the matter further. Mr Abrol wrote to HMRC on 1 December 2016 enclosing a completed form in which he applied for both primary protection and enhanced protection (FTT [58] and [78]).

(20) Following an exchange of correspondence, HMRC refused to accept the late notification on the basis that there was no reasonable excuse, and if there was the notification had not been made without unreasonable delay after the reasonable excuse ended (FTT [60]-[68]).

THE FTT DECISION

13. There were two broad issues before the FTT:

(1) whether Mr Ketley had a reasonable excuse for not giving the notification on or before the closing date within regulation 12(1)(b) of the 2006 Regulations; and

(2) if Mr Ketley did have a reasonable excuse, whether he gave the notification without unreasonable delay after the reasonable excuse ceased within regulation 12(1)(c) of the 2006 Regulations.

14. There was also an issue before the FTT as to the extent to which any delay caused by Mr Ketley's advisers was effectively attributable to Mr Ketley. In the event the FTT did not need to decide this issue.

15. In summary, the FTT found that:

(1) as regards regulation 12(1)(b), Mr Ketley did have a reasonable excuse for not giving the notification on or before the closing date in that he had reasonably relied upon his trusted adviser to complete the notification process in 2006 (FTT [128]);

(2) as regards regulation 12(1)(c):

(a) the reasonable excuse ceased on 14 October 2015, when Mr Ketley's financial adviser, Mr Fleet, informed him that no certificate had been issued by HMRC (FTT [138]);

(b) the delay came to an end when Mr Abrol sought to make a late notification under regulation 12 on 15 August 2016 (FTT [137]);

(c) the period of delay of 10 months from 14 October 2015 to 15 August 2016 was unreasonable (FTT [143]); and

accordingly, Mr Ketley had not given the notification without unreasonable delay after the reasonable excuse ceased (FTT [152]).

16. There is no challenge by HMRC to the FTT's conclusion that Mr Ketley had a reasonable excuse within regulation 12(1)(b) of the 2006 Regulations. The issues before us relate to the FTT's conclusion for the purposes of regulation 12(1)(c) that he did not give the notification without unreasonable delay after the excuse ceased.

17. The FTT's reasoning on this issue is set out at paragraphs [138] to [151] of the FTT Decision. The FTT considered the parties' submissions as to the correct test to be applied in determining whether a delay was unreasonable, and at FTT [142] agreed with HMRC that the correct test was to be found in the Upper Tribunal's decision in *Perrin v HMRC* [2018] UKUT

0156 (TCC) at [81(4)] where the Upper Tribunal in the context of penalties for late filing of returns said this:

> (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). In doing so, 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.

18. Having set out the test in *Perrin*, the FTT then continued:

> 143. However, it is unnecessary for us to decide whether for the purposes of undue delay, the delay caused by advisers should be attributed to the taxpayer as we find the appellant's delay after 14 October 2015 unreasonable without attributing to him the actions of his advisors.
>
> 144. We accept HMRC's argument that as a financially aware retired businessman, conscious of the very significant consequences of not having enhanced protection, he did not take the steps a reasonable taxpayer would have done. Thus he did not contact or instruct his advisors to contact HMRC and/or to look at the pensions legislation and guidance to see if anything could be done. Instructing Mr Abrol to conduct a further investigation with a view to a professional negligence claim may well have been a reasonable but it was unreasonable of the appellant not at the same time to consider approaching HMRC or investigating whether the pensions legislation allowed for a remedy.
>
> 145. Had the appellant approached HMRC at the end of 2015 or early 2016 we would expect he would have been advised by HMRC to put in a late notification, see *Yablon* at [37] and *Radley* at [63]. We do not accept the appellant's argument that it would have been rejected out of hand. In our view there was sufficient information from Mr Fleet's investigation which concluded in October 2015 to justify at least an outline application and further information could have followed.

19. The reference in [145] to a notification being rejected out of hand was to a submission on behalf of Mr Ketley that a late notification without evidence to support a reasonable excuse would have been met with an immediate refusal by HMRC.

20. The FTT then referred at [146] and [147] to arguments raised by Mr Hilton on behalf of Mr Ketley based on the decisions of the FTT in *Yablon v HMRC* [2016] UKFTT 0184 (TC) and *Tipping v HMRC* [2017] UKFTT 0485 (TC). The FTT continued at [148]-[150]):

> 148. In the current appeal the cause of the delay was the appellant directing his advisers solely to the professional negligence question and not asking whether the position could be remedied.
>
> 149. Accordingly, we do not find it necessary to decide whether Mr Abrol, with instructions limited to investigating a potential professional negligence claim and who knew in April 2016 that a late claim could be made, should have advised that the appellant contact HMRC.
>
> 150. We agree with HMRC that had the appellant instructed Mr Abrol, Mr Fleet or another advisor to look at the pensions legislation the ability to make a late notification would have become apparent (*Yablon* at [39]).

21. It can be seen from these extracts from the FTT Decision that the FTT concluded that Mr Ketley had not acted without unreasonable delay in making the notification after the reasonable

excuse had ceased solely by reference to Mr Ketley's own actions. The FTT found that Mr Ketley did not take the actions that a reasonable taxpayer in his position would have taken. In particular, when he became aware of the problem Mr Ketley did not contact HMRC, research the pensions legislation, or instruct his advisers to do so. Instead he instructed his advisers to consider whether a professional negligence claim could be made, but not whether any remedial action could be taken, and this caused the delay. The FTT reached this conclusion without the need to attribute to Mr Ketley any of the actions or inactions of his advisers.

22. We note at this stage that there was no evidence before the FTT as to the precise scope of Mr Abrol's retainer and no evidence as to the outcome of Mr Abrol's investigation, although we know that Mr Abrol discussed his findings with Mr Ketley at a meeting on 13 July 2016 and approached HMRC by letter dated 15 August 2016 asking HMRC to accept a late notification. As for Mr Abrol's investigation as to what had happened, it is clear that the FTT found that this was an investigation as to the merits of a professional negligence action rather than with a view to seeing if there was any other form of remedy.

MATTERS BEFORE THE TRIBUNAL

23. There are various matters which we must address in this decision: Mr Ketley's grounds of appeal, the grounds raised by HMRC in response to the appeal and the Application made by Mr Ketley.

1. The Grounds of Appeal

24. As mentioned above, the FTT refused Mr Ketley's application for permission to appeal. Permission to appeal was also initially refused by the Upper Tribunal on paper. However, Mr Ketley was granted permission to appeal by the Upper Tribunal (Judge Raghavan) in a decision dated 12 October 2020 following an oral hearing.

25. Mr Ketley's application for permission to appeal was extensive and discursive, but the grounds on which Judge Raghavan granted permission were limited. In particular, Mr Ketley was refused permission to appeal on a ground which asserted that the FTT's finding of fact at [46] that Mr Ketley did not expressly instruct Mr Abrol to consider how to remedy the position with HMRC was unsustainable on the evidence.

26. Having reviewed the application for permission to appeal, Judge Raghavan's decision granting limited rights of appeal and the parties' skeleton arguments, we can summarise the grounds on which permission was granted as follows:

> (1) that the FTT erred in law in finding that Mr Abrol was not instructed to consider how to remedy the position with HMRC because, as a matter of law, it was an implied term of Mr Abrol's instructions to advise on the prospects of a professional negligence claim that he would also consider mitigation, including how to remedy the position with HMRC (Ground 1);
>
> (2) that the FTT erred in law in finding that Mr Ketley acted unreasonably after October 2015 in failing to contact HMRC, make his own investigations as to remedy, or instruct his advisers specifically to do so and wrong to find that Mr Ketley's omissions had caused the delay (Ground 2); and
>
> (3) that the FTT was wrong to expect Mr Ketley to have contacted HMRC or asked his advisers to contact HMRC and wrong to rely on certain FTT decisions in support of that conclusion (Ground 3).

27. In his decision on the application for permission to appeal, Judge Raghavan stated that:

(1) the FTT was clearly entitled, on the basis of the evidence before it, to reach the conclusion that the explicit scope of Mr Abrol's instructions did not include instructions to consider how to remedy the position with HMRC;

(2) Ground 1 was a new point not taken in the FTT, but that the Upper Tribunal should hear it on the basis that it was a point of law requiring no further evidence;

(3) The basis on which he granted permission on Grounds 2 and 3 was that they were inter-related to Ground 1. If it was correct that Mr Ketley's instructions to Mr Abrol regarding a professional negligence claim did, as a matter of law, entail instructions to investigate issues which went to remedy, then that could affect the errors alleged in Grounds 2 and 3.

2. HMRC's response

28. In their response to Mr Ketley's grounds of appeal, HMRC opposed the grounds of appeal and also opposed the appeal on the following additional grounds:

(1) the FTT erred in law in holding at [136]-[137] that the "delay" ended on 15 August 2016. The "delay" in regulation 12(1)(c) ends when the taxpayer "gives the notification", which in this case was not until 1 December 2016;

(2) should it be necessary for the Upper Tribunal to decide the point, in assessing whether there was "unreasonable delay" within the meaning of regulation 12(1)(c), any delay caused by advisers should be attributed to the taxpayer.

29. In the event, HMRC did not pursue the first of these additional grounds before us.

3. The Application

30. We must also consider the Application whereby Mr Ketley applies:

(1) for a direction to admit into evidence a letter dated 24 February 2016 (the "Retainer Letter") sent to Mr Ketley by Mr Abrol of behalf of Wilkes. The Retainer Letter sets out the express terms of Mr Abrol's instructions but was not made available to the FTT;

(2) for permission to amend his Grounds of Appeal based on the Retainer Letter to permit a challenge to the FTT's finding of fact at [46] that Mr Ketley did not expressly instruct Mr Abrol to consider how to remedy the position with HMRC;

(3) for permission to appeal on the amended Grounds of Appeal.

31. In this decision we will adopt the approach of the parties, which was to address first Mr Ketley's grounds of appeal without regard to the Application or the Retainer Letter. We will then address issues raised in the Application and its consequences for the appeal and finally HMRC's additional ground opposing the appeal.

THE GROUNDS OF APPEAL

32. We first address whether, as a matter of law, a term is to be implied into Mr Abrol's retainer to the effect that he would consider how to remedy the position with HMRC. We will approach that question on the basis of the FTT's findings of fact as to the facts and circumstances at the time Mr Abrol was instructed and as to the express instructions described by the FTT at [46].

Background

33. As Judge Raghavan noted in granting permission to appeal, this ground is a new point that had not been argued before the FTT. Mr Ketley's case before the FTT was that it was reasonable for Mr Ketley after 14 October 2015 to instruct Mr Abrol to investigate the facts

further and to advise as to the prospects of a professional negligence claim. Mr Ketley did not argue that Mr Abrol was instructed expressly or implicitly to advise how Mr Ketley might remedy the position with HMRC. The Retainer Letter was not in evidence before the FTT. The only evidence as to the scope of Mr Abrol's retainer was the witness evidence of Mr Ketley and Mr Abrol which spoke only of Mr Abrol having been instructed, amongst other matters which were not specified, to investigate what had happened and advise as to the prospects of making a professional negligence claim against Mr Ketley's financial advisers. It was therefore hardly surprising that the FTT made no finding as to the implied scope of Mr Abrol's retainer. In our view the FTT was entitled to infer as a matter of fact that Mr Abrol had not been instructed to advise whether he could remedy the position with HMRC.

34. Mr Hilton submitted that it was an implied term of any solicitor's retainer that advice would be provided on any matter which was "reasonably incidental" to the work on which the solicitor was expressly instructed. He relied on a decision of the Court of Appeal in *Minkin v Landsberg* [2016] EWCA Civ 11 ("*Minkin*") at [38]. He says that it would have been necessary for Mr Abrol to consider the possibility of making a late notification under the 2006 Regulations as part of his consideration of the steps that Mr Ketley might take to mitigate any loss arising from the professional negligence claim. On that basis, he says there must be implied in Mr Abrol's retainer a term that Mr Abrol would also investigate and advise upon the possibility of making a late notification.

35. Mr Bradley challenges that assertion. He says that it is not the case that in all professional negligence cases a solicitor has to consider the possibility of mitigation. It depends on all the facts and circumstances of the case. For example, if it is clear to the solicitor that there is no breach of duty or that causation of loss is not established then there may be no duty to advise on mitigation. He says that there was nothing in the facts and circumstances of this case to suggest such a term should be implied. There was no evidence that Mr Abrol had been asked to do anything other than investigate the possibility of making the professional negligence claim.

Discussion

36. The usual starting point for any enquiry as to whether a term can be implied into a contract is the express terms of that contract. In this case there was no evidence of the express terms of Mr Abrol's retainer other than the witness evidence before the FTT which led the FTT to make its findings of fact at [46]. At this stage we take those findings to be the express terms of the retainer.

37. We were referred to extracts from Chitty on Contracts in relation to the implication of terms and to the Court of Appeal decision in *Minkin*. In that case, following a review of the authorities, Jackson LJ summarised the relevant principles in the following terms:

> 38. Let me now stand back from the authorities and summarise the relevant principles:
>
> i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.
>
> ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.
>
> iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
>
> iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client

> will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.
>
> v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.

38. As can be seen from this passage, a solicitor is under an implied duty to consider matters that are "reasonably incidental" to the work that the solicitor is carrying out. In determining what is "reasonably incidental" to the solicitor's express retainer, it is necessary to have regard to all the facts and circumstances of the case.

39. On the evidence before the FTT, Mr Abrol was instructed to investigate what had happened and advise on the prospects of a professional negligence claim. In the context of that retainer, we accept that Mr Abrol's investigation of the prospects of a professional negligence claim would ordinarily involve consideration of the mitigating steps that Mr Ketley may be expected to take in order to mitigate his loss. We say ordinarily, because in a complex area it may be that other professionals would be better placed to consider what could be done to mitigate the loss. Here, one only has to look at regulation 12 of the 2006 Regulations to see that there is provision to give a late notification. This was not a complex procedure. We are satisfied therefore that it would be "reasonably incidental" to the investigation of the potential claim that Mr Abrol would consider and advise on what steps might be required by way of mitigation. Those steps would include considering and advising upon the possibility of making a late notification to HMRC under the 2006 Regulations and the need to do so without unreasonable delay.

40. We must then consider whether the FTT's failure to identify that implied term and to take it into account in deciding whether there had been unreasonable delay in giving the notification amounts to an error of law. In order to characterise that failure as an error of law, it seems to us that the omission must be such as to affect the question of whether there was unreasonable delay. In other words, the implied term must be relevant to that issue.

41. Mr Bradley argued that the implied term was not relevant to the issue. He submitted that there was no evidence and no finding to the effect that Mr Ketley believed that Mr Abrol was looking into the possibility of any remedy. In those circumstances the theoretical scope of Mr Abrol's retainer was at best of tangential relevance. There is some force in that submission, but we are unable to accept it. Part of the FTT's reasoning for its conclusion that the further delay was unreasonable was that Mr Ketley did not instruct his advisers to look at the pensions legislation and guidance to see if anything could be done (FTT [144]). Furthermore, the FTT found at [148] that the cause of the delay was Mr Ketley instructing Mr Abrol solely in relation to the professional negligence question and not asking whether the position could be remedied. In our view it would have been relevant and indeed the FTT would itself have considered it relevant if Mr Ketley had instructed Mr Abrol expressly to consider whether there was a remedy. The position is no different if the instruction was implicit, whether or not Mr Ketley realised the scope of his instructions.

42. We are satisfied therefore that there was an error of law as alleged in Ground 1, although we would not criticise the FTT for its approach. It was the absence of any argument on behalf of Mr Ketley to the effect that Mr Abrol was under a duty to consider the possibility of a remedy that led the FTT into error.

43. Pursuant to s12 Tribunals Courts and Enforcement Act 2007, if we find that the making of the FTT Decision involved the making of an error on a point of law, we may (but need not)

set aside the decision of the FTT, and, if we do, we must either (i) remit the case to the FTT with directions for its reconsideration, or (ii) re-make the decision. We will consider whether or not we should set aside the FTT Decision after we have first considered the issues that arise on the Application.

44. We should also say something about Grounds 2 and 3. Judge Raghavan granted permission for Mr Ketley to appeal on Grounds 2 and 3 on the basis that they were inter-related with Ground 1. If it was correct that Mr Ketley's instructions to Mr Abrol regarding the professional negligence claim did, as a matter of law, entail instructions to investigate issues which went to remedy, then that could affect whether it was arguable that the FTT had erred in its views that Mr Ketley's omissions caused the delay.

45. In their submissions before us, the parties disagreed as to whether these grounds could stand independently of Ground 1. Mr Hilton argued that they stood as independent grounds of appeal, but he did not push the argument strongly and he was right not to do so. In our view, the permission granted by Judge Raghavan on Grounds 2 and 3 was limited to errors arising as a result of the FTT failing to find the existence of the implied term. In any event, as we have found in favour of Mr Ketley on Ground 1, the point is academic.

THE APPLICATION

46. We now consider the Application. There are three aspects to the Application:

(1) permission to rely on new evidence in the form of the Retainer Letter which was not before the FTT;

(2) permission to amend the grounds of appeal to add a new ground challenging the FTT's finding of fact at [46] that Mr Ketley did not expressly instruct Mr Abrol to investigate the possibility of a remedy;

(3) permission to appeal on the amended grounds of appeal.

47. Mr Ketley seeks to rely upon the Retainer Letter to argue that the FTT was wrong as a matter of fact to find that Mr Abrol's express instructions were limited to advising on a potential professional negligence claim and that they included considering whether it was possible to persuade HMRC to accept a late notification. The relevant part of the Retainer Letter provided as follows:

> **Scope of Work**
>
> You have instructed us to act for you in relation to this matter. We have agreed that the scope of our work will be as follows:
>
> • see if it is possible to persuade HMRC to retrospectively allow the protection.
> • pursue a professional negligence claim against Montpelier.

48. The significance of the first bullet point in relation to the issues before the FTT is immediately apparent. It appears that Mr Ketley had expressly instructed Mr Abrol to see if it was possible to persuade HMRC to allow notification to be made retrospectively.

49. We can take the first and second parts of the Application together. The third part of the Application adds nothing to those parts and does not appear to us to be strictly necessary. Permission to amend the grounds of appeal to add a new ground does not require a separate permission to appeal.

50. The Application is supported by a witness statement of Mr Mark Terrar. Mr Terrar is a partner in Meridian Private Client LLP ("Meridian"), the firm of solicitors representing Mr

Ketley in this appeal and which represented him before the FTT. Mr Terrar's statement was not challenged by HMRC and his evidence may be summarised as follows:

> (1) The Retainer Letter was on the file of Wilkes which was provided to Meridian sometime prior to February 2019 when Mr Abrol's witness statement was prepared for the FTT hearing. The Retainer Letter was therefore in the possession of Meridian before Mr Abrol made his witness statement for at least seven months before the FTT hearing.
>
> (2) The Retainer Letter was not referred to in the witness statements of Mr Ketley or Mr Abrol for the proceedings before the FTT. Mr Abrol was not questioned on the scope of his retainer in the proceedings before the FTT.
>
> (3) The Retainer Letter was not referred to in the written applications for permission to appeal to the FTT or the Upper Tribunal or at the oral permission hearing before Judge Raghavan in October 2020.
>
> (4) The file was not reviewed to obtain a copy of the Retainer Letter until 29 January 2021, following a discussion with counsel on 26 January 2021 in connection with documents to be relied on by Mr Ketley in this appeal.

51. Mr Terrar's witness statement also says that "privilege had been expressly maintained and thus not waived in respect of [Wilkes'] file, and as such over the [Retainer Letter], by Mr Abrol's statement".

52. There is no doubt that the Upper Tribunal has power to admit new evidence that was not before the FTT pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). Rule 15(2)(a)(ii) states that the power should be exercised in accordance with the overriding objective to deal with cases "fairly and justly".

53. Both parties referred us to the three-part test for the admission of new evidence on an appeal in the civil courts set out by Denning LJ, as he then was, in *Ladd v Marshall* [1954] 1 WLR 1489 at page 1491:

> "… first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

54. The parties agree that these criteria should be regarded as being of persuasive authority, but should not be applied as strict rules in the exercise of the Tribunal's discretion (see *Anglian Water Services Limited v HMRC* [2018] UKUT 431 ("*Anglian Water*") at [100]).

55. Mr Bradley raised a preliminary point. He submitted that the Upper Tribunal should not exercise its discretion to admit new evidence which was not before the FTT in support of an appeal that a finding of the FTT was not supported by the evidence, unless an error of law can be identified independently of the new evidence. He referred us to what appear to be conflicting decisions reached on this point by the Upper Tribunal in *Bramley Ferry Supplies Limited v HMRC* [2017] UKUT 214 (TCC) ("*Bramley Ferry*") and *Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 255 (TCC) ("*Karoulla*")). The issue and both cases were referred to by the Upper Tribunal in *Anglian Water* at [102]-[105]).

56. Mr Hilton rejected this argument. He says that the only principle which governs the Tribunal's exercise of its discretion is the overriding objective in Rule 2(1), taking into account the *Ladd v Marshall* criteria.

57. It is well established that the Upper Tribunal may only entertain an appeal on a point of law (s11 Tribunals, Courts and Enforcement Act 2007). On appeal, a party is entitled to challenge the FTT's findings of fact where there is an error of law. This will normally be the case only where no tribunal properly instructed could have reached the conclusion that the fact-finding tribunal has reached on the evidence before it (*Edwards v Bairstow* [1956] AC 14).

58. In *Bramley Ferry*, on an application to admit new evidence and an application to rely on a new ground of appeal based on that evidence, the Upper Tribunal took the view that it could not give permission for a new ground of appeal based on *Edwards v Bairstow* principles by reference to fresh evidence that was not before the trial judge. The Upper Tribunal said this:

> 14. Furthermore, to the extent that the new ground of appeal relies upon the evidence of Ms Wallis – as Mr Bedenham suggested that it did – we agree with Mr Pritchard that it would be inappropriate to admit the new ground. The Upper Tribunal has jurisdiction to hear appeals from the FTT only on a point of law arising from the decision of the FTT: section 11(1) of the Tribunals, Courts and Enforcement Act 2007. The decision of the House of Lords in *Edwards v. Bairstow* - to the effect that the courts can overturn on appeal a decision of the fact-finding tribunal on a matter of fact where the facts that are found are such that "no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" (see Lord Radcliffe at page 36) – can only apply to the facts found by the tribunal on the evidence before it. There can be no error of law on the basis of the principles applied in *Edwards v. Bairstow* by reference to evidence that was not in front of the judge.

59. The Upper Tribunal accordingly rejected the application for permission to add a new ground of appeal and the related application to admit the new evidence.

60. The contrary view is arguably expressed by the decision of the Upper Tribunal in *Karoulla*. In that case, HMRC had repeatedly refused requests by the taxpayer prior to the FTT hearing for the return of certain documents, which were required in order to answer HMRC's case that under-declarations of VAT had been made. Following the FTT hearing, the documents were made available and the Upper Tribunal allowed an application by the taxpayer to admit the new evidence in support of its appeal that the FTT made an error of law in finding as a fact that there had been an under-declaration of VAT. That ground of appeal was said to be critically dependent on the new evidence.

61. The Upper Tribunal in *Karoulla* did not directly address the issue raised by Mr Bradley and identified in *Anglian Water*. Indeed, it appears from the Upper Tribunal decision in *Anglian Water* that if Mr Bradley's argument is correct, then it is not clear how the application in *Karoulla* could properly have succeeded.

62. However, as the Upper Tribunal in *Anglian Water* pointed out at [104], a strict application of such a principle could lead to injustice in some cases unless some other remedy is available. For example, in *Karoulla* itself the reason why the taxpayer had not been able to put the relevant evidence before the FTT was that it was in the possession of HMRC and HMRC had refused to return it.

63. Mr Bradley submitted that the potential unfairness in such cases could be addressed if the tribunal were to allow appeals on a point of law in cases of mistake of fact giving rise to unfairness. He referred us to the decision of the Court of Appeal in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 ("*E*"), an asylum law case, in which Carnwath LJ giving the judgment of the court said as follows (at [66], [68] and [69]):

> 66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of

> law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.
>
> …
>
> 68. Assuming the relevance of showing a mistake of fact in the Tribunal's decision, there may need to be evidence to prove it. As has been seen, the Court has a discretion to admit new evidence (CPR 52.11(2)), but it is normally exercised subject to *Ladd v Marshall* principles, raising in particular the issue whether the material could and should have been made available before the decision.
>
> 69. Whether this is a material issue, of course, depends on the nature of the mistake. It may not be relevant if the mistake arises purely from the Tribunal's consideration of the evidence (for example, the misinterpretation of the planning study in *Simplex*). However, it may be material, where (as in the present cases) the complaint is of ignorance of evidence which was available before the decision was made. In such cases, it inevitably overlaps with the question of "unfairness". A claimant who had the opportunity to produce evidence and failed to take it may not be able to say that he has not had "a fair crack of the whip".

64. The Court of Appeal then concluded:

> 91. In summary, we have concluded in relation to the powers of this Court:
>
> i) An appeal to this Court on a question of law is confined to reviewing a particular decision of the Tribunal, and does not encompass a wider power to review the subsequent conduct of the Secretary of State;
>
> ii) Such an appeal may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" (as explained by Lord Slynn in *CICB* and *Alconbury*);
>
> iii) The admission of new evidence on such an appeal is subject to Ladd v Marshall principles, which may be departed from in exceptional circumstances where the interests of justice require.

65. It seems to us that tax law, as with asylum law is a statutory context "where the parties share an interest in co-operating to achieve the correct result". Indeed, in the context of tax law there is a "venerable principle" which recognises that there is a public interest in taxpayers paying the correct amount of tax. In our view, accepting an appeal on a point of law arising from a mistake of fact giving rise to unfairness would provide a basis for addressing the issue that arose in *Karoulla*, whilst otherwise respecting the classic formulation of the *Edwards v Bairstow* principle and the limitation of appeals to errors of law. Having said that, we should only express a concluded view if it is necessary for our decision. In the event it is not necessary because the Application can properly be decided on the basis of established principles.

66. Mr Hilton submits that the Retainer Letter should be admitted into evidence having regard to the overriding objective. He accepts that the *Ladd v Marshall* criteria would not be met in this case because the evidence was available to Mr Ketley before the FTT hearing.

However, Mr Hilton submits that the overriding objective requires the Retainer Letter to be admitted in evidence. It is of central importance to the case and critical to demonstrating that the FTT's finding as to the express scope of Mr Abrol's instructions was wrong as a matter of fact. The Retainer Letter contains the express terms and establishes that there is no need to rely on any implied term. The only reason that the Retainer Letter was not put in evidence before the FTT was that the scope of Mr Abrol's instructions was not at issue in the hearing before the FTT.

67. We do not accept Mr Hilton's submissions.

68. It is common ground that, whilst the second and third of the *Ladd v Marshall* criteria are met, the first of those criteria is not met. The Retainer Letter was available to Mr Ketley and his advisers at all material times prior to the FTT hearing. It cannot be said that the Retainer Letter "could not have been obtained with reasonable diligence" prior to the FTT hearing.

69. Even accepting, as we do, that the *Ladd v Marshall* criteria should not be applied as strict rules and that we must exercise our discretion in accordance with the overriding objective to deal with cases "fairly and justly", in this case we consider that the application of the overriding objective requires us to refuse the application.

70. Mr Hilton says that the Retainer Letter was not produced to the FTT because there was no issue at the hearing as to the scope of the retainer. However, Mr Ketley was on notice that the Retainer Letter would be relevant to the issues before the FTT. It was HMRC's case put forward at [70] – [73] of their Statement of Case that there had been unreasonable delay in giving the notification because Mr Ketley had taken no action to contact HMRC or to ask his advisers to do so following the meeting in October 2015. HMRC's skeleton argument before the FTT also clearly asserted HMRC's case that it was unreasonable of Mr Ketley to instruct Mr Abrol to investigate and advise on the merits of a professional negligence action rather than engage with HMRC. The onus was clearly on Mr Ketley to show that he had taken steps to ask his advisers to persuade HMRC to allow retrospective notification and the Retainer Letter was clearly relevant to that issue.

71. Instead, Mr Ketley's case before the FTT rested on an argument that once he became aware of problems with the notification, it was reasonable for him and his advisers to conduct a further investigation before contacting HMRC. Mr Ketley's case did not focus on the scope of Mr Abrol's instructions or on his advice. Mr Ketley did not say that he had instructed Mr Abrol to do anything other than investigate what had happened and advise on the prospects of a professional negligence claim. That was a choice of Mr Ketley and his advisers.

72. Mr Ketley and his advisers chose not to disclose the Retainer Letter containing the express terms of Mr Abrol's instructions. The evidence of Mr Terrar was that privilege over the Wilkes file was expressly maintained and not waived and that claim to privilege extended to the Retainer Letter. But any privilege belonged to Mr Ketley and it was therefore Mr Ketley's choice not to make the file including the Retainer Letter available to the FTT.

73. Further, the application to adduce the Retainer Letter in evidence is made to support what would be a new ground of appeal if permission is granted. The new ground of appeal seeks to challenge the FTT's finding of fact as to the express terms of the retainer. The principles to be applied in such an application were described by the Upper Tribunal in *Eynsham Cricket Club v HMRC* [2019] UKUT 286 (TCC) and are to be derived from the judgment of Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18]:

> 15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29]).

74. The new ground is not a pure point of law. It involves new evidence which was not available to the FTT. We are satisfied that if the Retainer Letter had been available at the hearing before the FTT then it would have affected the evidence and questioning of Mr Ketley and Mr Abrol. The following issues at least would have likely been canvassed in their oral evidence:

> (1) Why did Mr Ketley and Mr Abrol make no mention in their witness statements as to the express terms of the Retainer Letter?
>
> (2) Why did it take Mr Abrol until April 2016 to identify that a late notification could be made and in what circumstances did he identify the possibility of making a late notification?
>
> (3) Why did Mr Abrol not contact HMRC prior to 15 August 2016?
>
> (4) What was Mr Ketley's understanding of what Mr Abrol was doing in relation to persuading HMRC to retrospectively allow protection in the period February 2016 to July 2016?

75. In our view the effect of granting the application to adduce the Retainer Letter and to amend the grounds of appeal in reliance on the Retainer Letter would be to allow Mr Ketley to re-open issues which should have been litigated before the FTT on the basis of evidence which should have been put before the FTT.

76. We also take into account that Mr Ketley has applied on three previous occasions for permission to appeal on the ground that the FTT was not entitled to make the finding at [46] as to the express terms of the retainer. Those applications have been rejected by the FTT when refusing permission to appeal, by the Upper Tribunal when refusing permission to appeal on paper and by the Upper Tribunal when granting limited permission to appeal on other grounds following an oral hearing.

77. In the light of all these factors it would not be fair or just at this stage in the proceedings to permit Mr Ketley to introduce fresh evidence in order to re-litigate on a different basis the issues which were before the FTT. We therefore refuse the application to admit the Retainer Letter in evidence and to amend the grounds of appeal to introduce a new ground.

WHETHER TO SET ASIDE AND RE-MAKE THE DECISION

78. We have found that there was an error of law in the decision as alleged in Ground 1. We must now consider whether we should set aside the FTT Decision and, if so, whether we should remit the appeal to the FTT or re-make the decision.

We do so on the basis of all the facts found by the FTT. We also take into account that it was an implied term of Mr Abrol's retainer that he should consider and advise upon steps Mr Ketley should take to mitigate his losses arising from any negligence on the part of his financial advisers.

79. The issue to be addressed is whether Mr Ketley gave notification to HMRC without unreasonable delay after 14 October 2015, when he was advised that no certificate had been issued by HMRC. We are concerned with the period of 10 months between 14 October 2015 and 15 August 2016 and we shall initially focus on the actions and omissions of Mr Ketley and not those of Mr Fleet or Mr Abrol.

80. It was common ground that the test to be applied in deciding whether there was unreasonable delay is that described by the Upper Tribunal in *Perrin*. It is an objective test taking into account the experience and other relevant attributes of Mr Ketley and the situation in which he found himself.

81. We do not need to recite Mr Ketley's experience, or the situation in which Mr Ketley found himself on 14 October 2015. On that date he was aware that HMRC were saying that they had not received any notification and that Montpelier may have been negligent in failing to give the notification to HMRC. As a result, Mr Ketley consulted Mr Abrol about the possibility of a professional negligence claim. He was not aware that it was possible to give a late notification in certain circumstances.

82. Mr Fleet's letter to Mr Ketley dated 16 October 2015 was referred to but not quoted by the FTT. In so far as relevant it was in the following terms:

> **Your SIPP/ Lifetime Allowance -** I informed you that HMRC claim not to have received your Protection Form. We discussed Lifetime Allowance rules and how they may change in future but you are seeking legal advice on this rather than waiting. At present, there is no protection of your pension fund in place at all. In order to protect your Lifetime Allowance at £1.5 million (via Individual Protection 2014), a form needs to be completed before 5th April 2017. Obviously, action is required here but time is on our side and we should speak further when you have taken legal advice.

83. It is not clear to us from that letter whether the reference to legal advice was to legal advice about the lifetime allowance rules, about a professional negligence claim or both. However, it is apparent from the FTT's findings of fact that Mr Ketley was intending to obtain legal advice as to a professional negligence claim. The reference to time being on our side was clearly to the 2014 form of protection where the time limit was 5 April 2017.

84. Nothing further happened until 26 January 2016 when Mr Ketley had a further meeting with Mr Abrol at which he orally instructed Mr Abrol to investigate what had happened with a view to advising on the prospects of bringing a claim for professional negligence. The reasons for this time lapse were described at FTT [44] and [45] and may be summarised as follows:

> (1) Mr Ketley thought that Mr Fleet was looking for the notification form and reflecting on what to do next. He was weighing up whether to bring a professional negligence claim;
>
> (2) Mr Ketley was away from home for 10 days in the middle of December 2015 which was followed by the Christmas period and then his partner's daughter's wedding.

85. There is no finding as to why Mr Ketley believed that Mr Fleet was still looking for the notification. The suggestion is that in fact Mr Fleet was not looking for the form and there is no finding as to when if at all Mr Ketley realised that was the case. The findings as to

Mr Fleet's involvement at this stage do not offer any explanation for the time lapse until 26 January 2016. We accept that Mr Ketley would want to consider carefully whether to instruct Mr Abrol to investigate a professional negligence claim. Also, domestic matters might interfere with that consideration to some extent. However, this does not explain why a late notification was not given to HMRC. The explanation for that, we infer, is that Mr Ketley was not aware that a late notification could be given.

86. Mr Ketley orally instructed Mr Abrol at the meeting on 26 January 2016 to investigate what had happened with a view to advising on the prospects of bringing a professional negligence claim. We infer that Mr Ketley did not appreciate that Mr Abrol would also be under a duty to consider and advise on questions of mitigation of loss, in particular whether anything could be done to remedy the position with HMRC.

87. There are no findings of fact as to any contact between Mr Ketley and Mr Abrol between 26 January 2016 and 13 July 2016. That may be because Mr Ketley's case before the FTT was that the conduct of Mr Abrol was irrelevant. However, the conduct and understanding of Mr Ketley was highly relevant. We are led to infer that during this period:

(1) Mr Ketley was simply awaiting Mr Abrol's advice as to the merits of a professional negligence claim.

(2) Mr Abrol informed Mr Ketley at the meeting on 13 July 2016 that it was possible to give a late notification to HMRC in the circumstances set out in regulation 12 of the 2006 Regulations.

(3) Mr Ketley at that stage or shortly thereafter gave express instructions to Mr Abrol to engage with HMRC with a view to giving a late notification.

88. Mr Ketley did not at any stage between 14 October 2015 and 13 July 2016 give express instructions either to Mr Fleet or Mr Abrol to advise him whether a late notification could be given, or to engage with HMRC to see if they would accept a late notification. We consider that Mr Ketley's failure to give express instructions to that effect was unreasonable.

89. The burden was on Mr Ketley to satisfy the FTT that there was no unreasonable delay in giving the notification to HMRC after 14 October 2015. It is not suggested by either party that the FTT's findings of fact are somehow incomplete or do not reflect all the relevant evidence before the FTT. We are in the position of having to consider whether to set aside and, if so, re-make the decision of the FTT taking into the account the FTT's findings of fact. We cannot be satisfied on the basis of the FTT's findings of fact that there was no unreasonable delay.

90. It may be, having been advised by Mr Fleet on 16 October 2015 to apply for another less valuable form of protection, that Mr Ketley assumed there was no other remedy and no possibility of HMRC accepting a late notification. However, there is no finding to that effect and it would not be appropriate for us to hear further evidence and conduct a further trial of the issues.

91. In the circumstances, on the basis of the facts as found by the FTT and taking into account the implied scope of Mr Abrol's retainer, we would have reached the same conclusion as the FTT. We will therefore not set aside the FTT Decision and we will dismiss the appeal.

92. In doing so, it is not necessary for us to reach any conclusion as to HMRC's additional grounds of opposition, namely the extent to which delays caused by Mr Ketley's advisers should be attributed to Mr Ketley. In any event, Mr Ketley did not seek to blame Mr Abrol for the delay and the FTT made no findings of fact that any of the delay was caused by Mr Abrol. As far as Mr Fleet is concerned, the FTT records at [91] Mr Ketley's argument that he did not know he could make a late notification because of Mr Fleet's failure to advise him, but that Mr

Fleet's failure should not be attributed to Mr Ketley. The FTT did not make any finding to the effect that Mr Fleet was at fault or contributed to the delay. It would not be appropriate for us to make any finding to that effect.

CONCLUSION

93. For all the reasons given above we dismiss the appeal.

Signed on Original

JONATHAN CANNAN **ASHLEY GREENBANK**

UPPER TRIBUNAL JUDGES

Release date: 1 September 2021