Neutral Citation: [2024] UKFTT 00926 (TC)

Case Number: TC09322

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2023/00224

INCOME TAX – Pensions – registered pension scheme – revocation of Fixed Protection 2014 ('FP 2014') certificate pursuant to regulation 11(a) of the Registered Pension Schemes (Lifetime Allowance Transitional Protection) (Notification) Regulations 2013 (SI 2013/1741) ('the FP 2014 Regulations') – additional contributions made to the Appellant's Self-Invested Personal Pension ('SIPP') by his former employer after 5 April 2014 – meaning of "contribution" – benefit accrual – whether there was a protection-cessation event under paragraph 1(3) of the FP 2014 Regulations – yes – whether HMRC revoked the Appellant's FP 2014 certificate in accordance with regulation 11 of the FP 2014 Regulations – yes – the First-tier Tribunal's jurisdiction –The Executors of David Harrison (Deceased) & Simon Harrison v HMRC considered and applied – rescission and the doctrine of mistake – Pitt v Holt – the doctrine of laches – whether the First-tier Tribunal has the power to grant the remedy of rescission – no – Appeal dismissed

Heard on: 24 & 25 July 2024
Judgment date: 17 October 2024

Before

JUDGE NATSAI MANYARARA
LESLIE HOWARD

Between

STEVEN ANTHONY LEFORT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Appellant in Person

For the Respondents: Ms Barbara Belgrano and Mr Ben Blades (both of Counsel), instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant (Mr Steven Anthony Lefort) appeals, pursuant to reg. 12 of the Registered Pension Schemes (Lifetime Allowance Transitional Protection) (Notification) Regulations 2013 SI 2013/1741 ("the FP 2014 Regulations"), against HMRC's decision, dated 27 November 2018, to revoke his Fixed Protection 2014 ("FP 2014") certificate pursuant to reg. 11(a) of the FP 2014 Regulations. Regulation 11 provides that HMRC may revoke a certificate if "they have reason to believe that a para. 1(3) event has occurred". A para. 1(3) event is defined in the legislation (which we set out later) as a "benefit accrual" in relation to the individual under an arrangement under a registered pension.

2. HMRC's position is that the Appellant's former employer made a "relevant contribution" into the Appellant's "registered pension scheme" after the cut-off date of 5 April 2014, resulting in a benefit accrual. That payment has never been returned by the Appellant's pension provider. HMRC's case is that, as a consequence, the Appellant has lost his Fixed Protection. Accordingly, HMRC submit that they revoked the Appellant's FP 2014 certificate in accordance with reg. 11 of the FP 2014 Regulations.

3. The Appellant's position is that he had no control over the payment made by his former employers and that HMRC could, and should have, exercised their discretion in his favour.

ISSUE(S)

4. The issue for consideration is whether HMRC correctly revoked the Appellant's FP 2014 certificate in accordance with reg. 11 of the FP 2014 Regulations. This, in turn, requires consideration of whether there was a "protection-cessation" event under para. 1(3) of the FP 2014 Regulations.

BURDEN AND STANDARD OF PROOF

5. The legal burden of proof is on HMRC to show that the relevant condition in reg. 11 of the FP 2014 Regulations is met (i.e., that HMRC had reason to believe that a para. 1(3) event had occurred).

6. Where the Appellant relies on any disputed facts, there is an evidential burden of proof on the Appellant to prove those facts.

7. The standard of proof is the civil standard; that of a balance of probabilities.

DOCUMENTS AND AUTHORITIES

8. The authorities to which we were specifically referred by the parties included:

(1) *Test Claimants in the FII Group Litigation v R & C Comrs (formerly Inland Revenue Comrs)* [2012] UKSC 19; [2012] 2 AC 337;

(2) *Pitt v. Holt* [2013] UKSC 26; [2013] STC 1138 ('*Pitt v Holt*');

(3) *Kennedy v Kennedy* [2014] EWHC 4129 (CH); ('*Kennedy v Kennedy*');

(4) *Lobler v HMRC* [2015] UKUT 0152 (TCC); [2015] STC 1893 ('*Lobler*');

(5) *Van der Merwe v Goldman* [2016] 4 WLR 71 ('*Van der Merwe*')

(6) *Hymanson v HMRC* [2018] UKFTT 667 (TC); [2021] STC 2338 ('*Hymanson*');

(7) *Clark v HMRC* [2020] EWCA Civ 204 ('*Clark*') [2020] STC 596 ('*Clark*');

(8) *Test Claimants in the FII Group Litigation v R & C Comrs (formerly Inland Revenue Comrs)* [2020] UKSC 47; [2022] AC 1 ('*Test Claimants in the FII Group Litigation*');

(9) *The Executors of David Harrison (Deceased) & Simon Harrison v HMRC* [2021] UKUT 273 (TCC) (‘*Harrison*’);

(10) *Fattal v Fattal* [2022] EWHC 950 (Ch) (‘*Fattal v Fattal*’);

(11) *Hoey v HMRC* [2022] EWCA Civ 656 (‘*Hoey*’);

(12) *Caerdav Ltd v HMRC* [2023] UKUT 179 (TCC) (‘*Caerdav*’); and

(13) *HMRC v Dolphin Drilling Ltd* [2024] EWCA Civ 1; [2024] STC 157 (‘*Dolphin Drilling*’).

9. The documents to which we were referred were the: (i) Hearing Bundle consisting of 225 pages; (ii) Amended Authorities Bundle consisting of 1050 pages; (iii) Supplementary Authorities Bundle consisting of 50 pages; (iv) HMRC’s Skeleton Argument dated 10 July 2024; and (v) Appellant’s Case Summary.

BACKGROUND FACTS

10. The Appellant was employed as an airline pilot by Virgin Atlantic Airways Limited (“Virgin”), from June 1991. The Appellant has been unable to provide a copy of his contract of employment, which was issued on 20 June 1991, but he has provided a copy of a contract of employment relevant to the period during which he was employed by Virgin. From the documentation provided by the Appellant, it is clear that Virgin offered its employees pension benefits in one of two forms:

(1) through the company pension scheme with the Sun Alliance Group; or

(2) by way of contributions into the employee’s personal pension plan (which matched contributions made by the employee).

11. The pension contributions formed part of the remuneration to which the Appellant was entitled.

12. Virgin made employer pension contributions into the Appellant’s Self-Invested Personal Pension Scheme (“SIPP”), which was provided by Standard Life (“the Standard Life SIPP”). The Standard Life SIPP was a “registered pension scheme” under Chapter 2, Part 4, of the Finance Act 2004 (‘FA 2004’). The annual employer’s contribution required the Appellant to obtain a Certificate of Contributions (confirming contributions made by him during a 12-month period) from Standard Life and to provide that certificate to Virgin, from which Virgin could calculate the correct sum on to pay into his Standard Life SIPP. These contributions were calculated to match the Appellant’s contributions in any given year. The documentation relating to the Standard Life SIPP is, unfortunately, unavailable.

13. The Appellant originally intended to retire on 30 December 2013, but his employment was extended to 28 February 2014 following a meeting on 3 December 2013. As a result, the Appellant’s pensionable service did not cease until the end of February 2014. The Appellant’s final employee contribution into his SIPP was on 14 March 2014. The Appellant then obtained his FP 2014 certificate on 4 April 2014, granting him Fixed Protection from 6 April 2014. Virgin made their final contribution to the Appellant’s SIPP on 5 May 2014. This was after the cut-off date of 5 April 2014 (as required by the FP 2014 Regulations).

14. On 8 June 2018, the Appellant’s agent notified HMRC that the Appellant had lost his Fixed Protection and explained the circumstances giving rise to the loss.

15. On 9 July 2018, HMRC wrote to the Appellant’s agent to provide clarity on the circumstances which would give rise to a loss of protection. HMRC further sought

confirmation of the date on which the final contribution was paid into the Standard Life SIPP by Virgin.

16. In a letter dated 12 November 2018, the Appellant initially stated that the final contribution by Virgin had been paid on 4 May 2014. The documentation however shows that the contribution by Virgin was, in fact, made on 5 May 2014. The Appellant confirmed that "*the payment seems to have broken the conditions of Fixed Protection 2014*" and he requested that his records be amended to reflect that breach.

17. On 27 November 2018, the Appellant was notified by HMRC that his FP 2014 certificate was revoked as a result of the contribution made by Virgin on 5 May 2014.

18. On 11 January 2023, the Appellant appealed to the First-tier Tribunal ('FtT') against that decision.

19. Having accepted that the Appellant's right of appeal was not explained as clearly as it might have been, in a letter dated 3 March 2023, HMRC offered to reconsider whether or not the revocation should still stand.

PROCEDURAL BACKGROUND

20. On 15 March 2023, the Appellant accepted the offer of reconsideration by HMRC. By consent, the parties sought a direction from the FtT (on 15 March 2023) that the appeal be stayed:

> "*until the Appellant ha[d] been provided with the letter from the Respondents on their analysis of the decision to revoke the Appellant's Fixed Protection 2014*".

21. On 16 March 2023, the Appellant submitted further information to HMRC, in support of his position. The Appellant's letter made the following points:

(1) He was not notified about Virgin's May 2014 contribution possibly because he did not have access to his company emails after 28 February 2014 (the date that he retired).

(2) He could not recall if he submitted a Certificate of Contributions to Virgin before 28 February 2014, but considered that the previous certificate would have covered the contribution that Virgin made in May 2014.

(3) He did not think that Virgin were aware of his intention to rely on FP 2014, or that he had acquired Fixed Protection, as he obtained his FP 2014 certificate on 5 April 2014 (after he had left his employment with Virgin).

(4) He only discovered the circumstances that caused the loss of protection in June 2018.

22. By a letter dated 18 May 2023, HMRC explained that the revocation of the Appellant's FP 2014 certificate was appropriate in all the circumstances and notified the Appellant that they would be applying to the FtT to lift the stay.

23. On 22 May 2023, HMRC wrote to the FtT to lift the stay.

24. The substantive hearing of the Appellant's appeal was originally set for 12 March 2024. The Appellant's original Grounds of Appeal (included in the Notice of Appeal dated 11 January 2023), were predicated on the assertion that Virgin had paid the 5 May 2014 contribution later than they should have (hereinafter referred to as "*the late contribution point*"). HMRC subsequently filed their Statement of Case (dated 13 June 2023), which included the submission that the jurisdiction of the FtT was to consider whether the decision to revoke the Appellant's Fixed Protection was reasonable.

25. By an email dated 16 October 2023, the Appellant indicated his intention to rely on a Wedlake Bell article, dated 29 March 2019 (‘*the Wedlake Bell article*’), which he submitted was materially relevant to his appeal. He added that the letter that he had received from HMRC, dated 9 July 2018, had given him the impression that there was no right of appeal against the decision to revoke his FP 2014 certificate. He further referred to the case of *Hymanson*, which he believed was relevant to his case in the sense that HMRC’s decision was disproportionate to the single, late, contribution made by Virgin on 5 May 2014.

26. By an email dated 16 October 2023, HMRC asked the Appellant to indicate (by 20 October 2023) if he intended to make an application to amend his Grounds of Appeal to include arguments based on *Hymanson.* No application to amend the Grounds of Appeal was made by the Appellant. HMRC subsequently objected to the Appellant’s inclusion of the Wedlake Bell article by a Notice of Objection dated 24 October 2023, in the absence of any clarification from the Appellant as to how the *Hymanson* case related to his appeal.

27. By an application notice dated 15 November 2023, HMRC sought to amend their Statement of Case in light of the Upper Tribunal (‘UT’) decision in *Harrison*. On the jurisdictional issue, HMRC’s submission was that the only question before the FtT was whether HMRC had revoked the Appellant’s FP 2014 certificate in accordance with reg. 11 of the FP 2014 Regulations.

28. By a decision notified by email on 18 December 2023, Judge Brooks ruled that the Appellant could rely on the Wedlake Bell article, and that written and oral submissions could be made by the parties in respect of the most recent, relevant, case law.

29. By an application notice dated 1 February 2024, HMRC sought directions from the FtT to amend their Statement of Case and to request the Appellant to provide further and better particulars.

30. Following further exchanges of correspondence between the parties and the FtT, the substantive hearing due to take place on 12 March 2024 was converted into a case management hearing. During the case management hearing, the Appellant submitted that he had not been entitled to the contribution made by Virgin in May 2014 (“*the lack of entitlement point*”). This argument had never been raised prior to the submission of the Appellant’s Notice of Appeal, or indeed prior to the case management hearing.

31. By a Directions Notice issued in March 2024, the Appellant was directed to submit a formal application to amend his Grounds of Appeal and HMRC were directed to indicate whether there was any objection to such an application. The Appellant was further directed to provide a Case Summary setting out the arguments that he would be relying on in his appeal, and to submit any documentary evidence in support of those arguments. HMRC were given permission to amend their Statement of Case in light of any amended Grounds of Appeal. These directions were repeated in an Amended Directions Notice issued in May 2024 as the Appellant had not made an application to amend his Grounds of Appeal by that time. HMRC, nevertheless, stated that they would not object to an amendment of the Appellant’s Grounds of Appeal.

32. Both parties subsequently filed their amended pleadings in preparation for the hearing which is the subject of this decision.

RELEVANT LAW

33. The relevant law, so far as is material to the issues in this appeal, is as follows:

FP 2014: Schedule 22 of the Finance Act 2013

34. FP 2014 is governed by Part 1 of Schedule 22 to the Finance Act 2013 ('Schedule 22'). The protection (i.e., Fixed Protection) is given under para. 1. At the material time, para. 1 provided that:

> "SCHEDULE 22
>
> TRANSITIONAL PROVISION RELATING TO REDUCTION IN STANDARD LIFETIME ALLOWANCE ETC.
>
> **PART 1**
>
> "FIXED PROTECTION 2014"
>
> 1(1) This paragraph applies on or after 6 April 2014 in the case of an individual—
>
> (a) who, on that date, has one or more arrangements under—
>
> (i) a registered pension scheme, or
>
> (ii) a relieved non-UK pension scheme of which the individual is relieved member,
>
> …
>
> (2) 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 £1,500,000

35. Paragraphs 2 to 4 of Schedule 22 permit HMRC to make regulations, as follows:

> "2(1) The Commissioners for Her Majesty's Revenue and Customs may by regulations amend paragraph 1.
> (2) Regulations under this paragraph may (for example) add to the cases in which paragraph 1 is to apply or is to cease to apply.
> (3) Regulations under this paragraph may include provision having effect in relation to a time before the regulations are made; but—
>
> (a) the time must be no earlier than 6 April 2014, and
> (b) the provision must not increase any person's liability to tax.
>
> 3(1) The Commissioners for Her Majesty's Revenue and Customs may by regulations make provision specifying how any notice required to be given to an officer of Revenue and Customs under paragraph 1 is to be given.
> (2) In sub-paragraph (1) the reference to paragraph 1 is to that paragraph as amended from time to time by regulations under paragraph 2.
>
> 4(1) Regulations under paragraph 2 or 3 may include supplementary or incidental provision.
> (2) The powers to make regulations under paragraphs 2 and 3 are exercisable by statutory instrument.
> (3) A statutory instrument containing regulations under paragraph 2 or 3 is subject to annulment in pursuance of a resolution of the House of Commons."

36. HMRC have exercised the power under paras 3 and 4 of Schedule 22 in making the FP 2014 Regulations. Those Regulations are also made under the powers conferred in s 251(1) FA 2004, which allow HMRC to make regulations to require persons to provide specified information relating to pensions and to preserve, for a prescribed period, any documents relating to such information.

Protection-cessation events

37. Paragraph 1(3) of Schedule 22 makes provision for when FP 2014 will cease to apply. Paragraph 1(3) (as in force prior to 6 April 2023) provided that:

> "(3) But this paragraph ceases to apply if on or after 6 April 2014
>
> (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.

38. A "Benefit accrual" is defined in para. 1(4) of Schedule 22, as follows:

> "(4) For the purposes of sub-para. (3)(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 2014, ..."

39. Paragraph 1(10) of Schedule 22, FA 2013 provides that:

> "Paragraph 14 of Schedule 36 to FA 2004 (when a relevant contribution is paid under an arrangement) applies for the purposes of sub-paragraph (4)(a) and (c)(i)"

40. A "contribution paid" in respect of an individual under the arrangement by that individual's employer, or former employer, will be a "relevant contribution", pursuant to para. 14(1)(a) and (b) of Schedule 36, FA 2004, as follows:

> "(1) For the purposes of paragraph 13(a) a relevant contribution is paid under the arrangement if –
>
> > (a) a relievable pension contribution is paid by or on behalf of the individual under the arrangement,
> >
> > (b) a contribution is paid in respect of the individual under the arrangement by an employer of the individual, or
> >
> > (c) a contribution paid otherwise than by or on behalf of the individual or by an employer of the individual in respect of the individual subsequently becomes held for the purposes of the provision under the arrangement of benefits to or in respect of the individual."

41. Section 279 FA 2004, provides that "employer" includes a "former employer". Section 279 applies for the purposes of Part 4 of Schedule 36, as it is introduced by s 283, FA 2004 (which falls within Part 4).

42. "Arrangement" has the meaning given by s 152(1) FA 2004, applicable by virtue of para. 1(22) of Schedule 22, which provides that:

> "Expressions used in this paragraph and Part 4 of FA 2004 (pension schemes) have the same meaning in this paragraph as in that Part."):
>
> "In this Part "arrangement", in relation to a member of a pension scheme, means an arrangement relating to the member under the pension scheme."

43. A "money purchase arrangement" is defined at s 152(2) FA 2004, as was in force prior to 1 August 2022 and applicable by virtue of para. 1(22), Schedule 22, FA 2013:

> "For the purposes of this Part an arrangement is a "money purchase arrangement" at any time if, at that time, all the benefits that may be provided to or in respect of the member under the arrangement are cash balance benefits or other money purchase benefits."

44. "Cash balance benefits" are defined at s 152(5) FA 2004, as was in force prior to 1 August 2022:

> "In this Part "cash balance benefits" means benefits the rate or amount of which is calculated by reference to an amount available for the provision of benefits to or in respect of the member calculated otherwise than wholly by reference to payments made under the arrangement by the member or by any other person in respect of the member (or transfers or other credits)."

45. "Money purchase benefits" are defined at s 152(4) FA 2004:

> "In this Part "money purchase benefits", in relation to a member of a pension scheme, means benefits the rate or amount of which is calculated by reference to an amount available for the provision of benefits to or in respect of the member (whether the amount so available is calculated by reference to payments made under the pension scheme by the member or any other person in respect of the member or any other factor)."

The FP 2014 Regulations

46. Regulation 3(2)(c) of the FP 2014 Regulations precludes a taxpayer from relying on para. 1 of Schedule 22 - which is the paragraph which preserves a higher lifetime allowance for qualifying taxpayers - if there has been a "protection-cessation event".

47. Regulation 3 of the FP 2014 Regulations provides that:

> "(1) Subject to paragraph (2) an individual may rely on paragraph 1 if –
>
> (a) the individual has given a paragraph 1 notice to HMRC, and
>
> (b) HMRC have accepted that notice by issuing a certificate to the individual.
>
> (2) An individual may not rely on paragraph 1 if –

(a) HMRC have refused to accept a paragraph 1 notice in accordance with regulation 6,

(b) HMRC have revoked the certificate in accordance with regulation 11, or

(c) a paragraph 1(3) event has occurred."

48. The Regulations further oblige an individual to give HMRC notice, within 90 days, of any protection-cessation event (reg. 9 of the FP 2014 Regulations), as follows:

"**9.**

Where HMRC have issued a certificate the individual must—
(a) inform HMRC when a paragraph 1(3) event occurs, and
(b) provide that information before the end of the period of 90 days beginning with the day on which the individual could first reasonably be expected to have known that a paragraph 1(3) event had occurred.

49. A para. 1(3) event includes a benefit accrual after a relevant contribution has been made.

50. The circumstances in which HMRC are entitled to revoke a taxpayer's FP 2014 certificate are set out in reg. 11 of the FP 2014 Regulations, which provides that:

"**11.**

HMRC may revoke a certificate if they—
(a) have reason to believe that a paragraph 1(3) event has occurred,
(b) have reason to believe that any of the conditions in paragraph 1(1) of Schedule 22 to the Finance Act 2013 have not been met, or
(c) have given a taxpayer notice to the individual under Part 1 of Schedule 36 to the Finance Act 2008 [1] (power to obtain information and documents from taxpayer) in connection with paragraph 1 and the individual does not reply to that notice within the time specified in the notice.

51. Regulation 12 of the FP 2014 Regulations provides for appeals against replacement or revocation of certificates, as follows:

"(1) The individual may require HMRC to provide reasons for replacing or revoking the certificate.

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

(3) Where an appeal under this regulation is notified to the tribunal, the tribunal must determine whether HMRC replaced or revoked the certificate in accordance with regulations 10(1) or 11.

(4) If the tribunal allows the appeal, the tribunal may direct HMRC to issue a certificate to the individual."

[Emphasis added]

52. Regulation 12(3), therefore, shows that the jurisdiction of the FtT is to determine whether the certificate has been revoked in accordance with the regulations.

APPEAL HEARING

Preliminary discussions

53. At the commencement of the appeal hearing, Ms Belgrano submitted that the issue of whether the Appellant would be granted the remedy of rescission of the payments made by Virgin after 5 April 2014, were he to take his case to the High Court, was potentially relevant in light of the points taken by the Appellant in his amended Grounds of Appeal (i.e., the lack of entitlement point and the doctrine of mistake). She however submitted that the Appellant could not establish a case for rescission (on the facts of his appeal), and that mistake was not possible as a consequence of a presumed resulting trust. In further amplification of these submissions, Ms Belgrano submitted that it was clear from the documentary evidence provided that the payment made by Virgin on 5 May 2014 was correctly due to the Appellant, and that there was no evidence to support a finding that the Appellant was not entitled to that payment.

54. In respect of the FtT's jurisdiction, Ms Belgrano submitted that this was set out in the legislation (FP 2014). In further amplification of this point, she submitted that the case of *Lobler* (which was relied on in *Hymanson*) concerned the effect of the equitable maxim where rescission is sought, and not the doctrine of mistake. Ms Belgrano then took us through the legislation, as set out in her Skeleton Argument and referred to above.

Evidence and Submissions

55. We heard oral evidence from the Appellant, who adopted the contents of his Case Summary as being true and accurate. The Appellant was cross-examined by Ms Belgrano. Under cross-examination, the Appellant accepted that:

> (1) He cannot remember the wording of his contract of employment with Virgin and the contract that he has provided in support of his appeal is that of a former colleague who joined Virgin at a later date. He has not, however, provided a full copy of the contract of employment given to him by his former colleague. He cannot be sure that the contract of employment that he has provided is worded in exactly the same way as his contract was worded. He further cannot remember the exact wording of the Employee Handbook that he was given when he joined Virgin in 1991.
>
> (2) There is nothing in the Employee Handbook that he has provided which supports his position that Virgin made the 5 May 2014 contribution into his SIPP later than they should have. There is also nothing in the Employee Handbook that expressly addresses the Certificate of Contributions that he says was required by Virgin before they made their contributions into the pension, or indeed when Virgin needed to make their contribution, except that Virgin would match any contributions made by him into his SIPP.
>
> (3) When he contacted HMRC by phone to discuss his pension with Virgin, he mentioned a "calendar year" and not a "pension year" in relation to the pension contributions made into his SIPP. However, there is nothing within the documents that confirms when the pension year started and ended. There is also nothing in the documentation that says that the pension year ends when a person retires.
>
> (4) He was entitled to the contributions that Virgin made to his SIPP and the contributions were based on his earnings.
>
> (5) All contributions from 1992 to 2014 formed part of the remuneration package to which he was entitled. There was no requirement for Virgin to make payment into his SIPP before 28 February 2014 and there is no documentary evidence to support his claim that there was a lack of entitlement to the May 2014 contribution from Virgin.

(6) Although his case is that the reason that he did not qualify for the 5 May 2014 contribution made by Virgin was because he had not made any contributions into his SIPP between December 2013 and February 2014, he is not arguing that his own contributions to his SIPP in March 2014 were less than the contribution that was required from him by Virgin (albeit that he stated that his contributions in March 2014 were not employee contributions).

(7) He cannot remember if he provided Virgin with a Certificate of Contributions prior to their final contribution on 5 May 2014 (albeit that he also stated that he went into hospital for an operation on 2 April 2014 and would not have been concerned about writing to Standard Life to provide a Certificate of Contributions).

(8) Virgin had paid him a salary for the months that he had worked for them in 2014, when his retirement date was extended.

(9) Standard Life declined to refund the contribution made by Virgin on 5 May 2014 and Virgin declined to take the payment back. The payment made by Virgin on 5 May 2014 remains in his SIPP.

(10) The Standard Life SIPP is a registered pension scheme.

56. In her submissions, Ms Belgrano relied on her Skeleton Argument. Ms Belgrano's submissions can be summarised as follows:

(1) A para. 1(3) (protection-cessation) event occurred and HMRC have revoked the Appellant's FP 2014 certificate in accordance with reg. 11 of the FP 2014 Regulations. This is because a relevant contribution was paid under an arrangement after 6 April 2014 such that FP 2014 was lost. Virgin paid a contribution into the Appellant's Standard Life SIPP on 5 May 2014 and the money has remained in the Appellant's SIPP. The Appellant's transitional protection was, therefore, lost.

(2) The UT's decision in *Harrison* should be applied such that the sole question for the FtT on an appeal is whether there has been a protection-cessation event within the meaning of para.1(3)(a) of Schedule 22 and the FtT does not have jurisdiction to consider the exercise of HMRC's discretion. To the extent that the exercise of HMRC's discretion is justiciable before the FtT beyond consideration of the simple question of whether there was a para. 1(3) event, the relevant question for the FtT is whether HMRC considered all relevant factors, and whether HMRC reached a decision that a properly directed HMRC officer could have reached.

(3) The legislation does not require an employer to have been "required" or "obliged" to pay the contribution, or for the individual to have been "entitled" to the contribution. Accordingly, the payment on 5 May 2014 is a contribution that was "paid in respect of" the Appellant "under the arrangement" (i.e., the arrangement relating to the Appellant under the Standard Life SIPP). There is no evidence to support a finding that the Appellant was not entitled to the contribution made by Virgin on 5 May 2014. The Appellant states that as 28 February 2014 was his final date of employment, Virgin had an obligation to make final payments to him on that date.

(4) Although the Appellant relies on the argument that Virgin always/usually made their pension contributions within two weeks of receiving a Certificate of Contributions from him, the Appellant cannot remember if he submitted a specific Certificate of Contributions to Virgin for the period 1 December 2013 to 28 February 2014. Given the passage of time since Virgin made the contribution, particular care needs to be taken

with regard to the Appellant's evidence when uncorroborated by documentation since it is clear that the Appellant's recollection is not, at all times, consistent.

(5) The reason that Virgin contributed to the Appellant's Standard Life SIPP was because Virgin was obliged to do so as part of the remuneration to which the Appellant was entitled. In order to obtain a contribution from Virgin, the Appellant had to provide Virgin with a Certificate of Contributions. The Appellant made contributions on 4 March 2014 and 14 March 2014. Virgin then made a contribution on 5 May 2014. The Appellant's 'lack of entitlement' argument is inconsistent with the position previously taken by the Appellant and his advisers (McPhersons Walpole Harding), in the letter dated 8 June 2018, where it was expressly stated that the Appellant was entitled to the contribution. It is also inconsistent with the refusal by Virgin and Standard Life to agree to a refund of the contribution.

(6) Even if the Appellant establishes that he was not contractually entitled to the contribution made by Virgin on 5 May 2014, that contribution nevertheless constituted a protection-cessation event.

(7) Assuming that Virgin was not obliged to make the 5 May 2014 payment, if Virgin could establish that it had made a "mistake", as described in *Pitt v Holt*, it could have made a claim for rescission under the equitable jurisdiction to rescind a transaction under the doctrine of mistake. There is no evidence that Virgin would bring such an action. In any event, HMRC do not accept that Virgin would have a cause of action on the basis of the documents available as there is no evidence that Virgin made a mistake. Virgin would also need to establish that it had not made the payment through "mere ignorance or inadvertence", and that it did not deliberately run the risk, or must be taken to have run the risk, of being wrong. Virgin would also need to establish that any mistake was a "causative mistake" that was sufficiently grave as to make it unconscionable: *Kennedy v Kennedy*.

(8) On the basis of the evidence available, HMRC do not accept that test would be met, not least because HMRC understand the position to be that Virgin were asked to agree to the contribution being reversed and refunded, but Virgin did not agree. Moreover, Virgin's action would be subject to a limitation period (for claims where mistake constitutes an essential element of the cause of action): *Test Claimants in the FII Group*.

(9) Since the contributions into the Standard Life SIPP would have been made pursuant to the Appellant's contractual agreement with Virgin, the 5 May 2014 contribution was supported by consideration and the equitable remedy of rescission is not available. Standard Life also provided valuable consideration in return for the contributions. HMRC have not had sight of the Standard Life SIPP documentation but have assumed that the Appellant's rights under the SIPP were rendered more valuable as a result of Virgin's contribution. That constitutes consideration. There is no requirement that consideration move to the contributing entity.

(10) The High Court may refuse to grant the remedy of rescission on the basis that the doctrine of laches applies given the (unexplained) delay in any putative action being brought. If there was an obligation on Virgin to make the payment by 28 February 2014, that would have been discoverable immediately. It would be for Virgin to prove that full restitution of the payment is possible.

(11) The FtT does not have jurisdiction to consider the exercise of HMRC's discretion. The extent of the FtT's jurisdiction (and, in particular, its jurisdiction to

consider public law arguments) is determined by reference to the statutory language affording the FtT jurisdiction: *Hoey* and *Caerdav*. The FtT, further, does not have jurisdiction to grant the remedy of rescission, nor indeed does the FtT have jurisdiction to apply the tax legislation as if the High Court had ordered rescission.

57. The Appellant's submissions can be summarised as follows:

(1) He was not aware of, and had no control over, the late payment made by Virgin on 5 May 2014. He only discovered that the payment had been made in 2018.

(2) The payment made by Virgin did not meet the requirements of the pension fund rules and he was not entitled to the payment. The pension year ran from the 1 December to 30 November each year. During that period, he was required to pay at least 6% of his salary into his pension fund. After submitting evidence of that payment (i.e., the Certificate of Contributions), Virgin would make their contribution into the same fund.

(3) For the year 1 December 2012 to 30 November 2013, he made a payment of £47,500 on the 20 March 2013. As this satisfied the requirements of the pension fund rules, Virgin made their contribution on 9 January 2014.

(4) 28 February 2014 was his final date of employment. Virgin had an obligation to make final payments to him on that date. Therefore, the payment into his SIPP on the 5 May 2014 should have been made promptly, or not at all. Virgin should have kept him advised of any payment, but they did not.

(5) A new pension year started on 1 December 2013, but he left his employment on 28 February 2014 so would have been entitled to three-month pension contributions, if he met the rules of the pension fund. As no contribution was made by him during that period, he was not entitled to any payment into his pension fund from Virgin for that period.

(6) He understands that a late payment after 5 April 2014 broke the rules of FP 2014, however he believes that HMRC have discretion in this matter. Due to the circumstances of his case, that discretion should have been exercised in his favour.

(7) He made four suggestions to Virgin with a view to getting Virgin to return the payment as Standard Life stated that they were unable to simply return the payment once it had been paid. Virgin did not respond to his suggestions (para. 139 below lists these suggestions).

(8) He has submitted a contract of employment that he obtained from a colleague who was employed by Virgin at around the same time that he was. He has no further documentary evidence that he can submit in support of his appeal.

58. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

59. We derived considerable benefit from hearing the Appellant giving oral evidence. The Appellant gave his evidence in a clear and straightforward manner, although there were some inconsistencies as a result of lapses in his memory given the time that has passed since he was first employed by Virgin. We accept, however, that the Appellant was not attempting to mislead when there were gaps in his memory, but found that he speculated where he did not have evidence to support his assertions.

60. Whilst we found the Appellant to be a truthful witness, there were, however, aspects of his evidence that were based on assumption where documentary evidence was not available to substantiate the assertions being made. We, nevertheless, accept that the Appellant had a substantial amount of experience with Virgin and he had knowledge of how Virgin operated as an employer. We also find that Virgin were equally aware of their obligations under the company pension scheme. For reasons which we will set out below, our findings on the Appellant's credibility are not determinative of the issues in this appeal.

61. The following material facts were either accepted, admitted, or proved:

(1) The Appellant was employed by Virgin from 1991 until 28 February 2014. After six months of service the Appellant had the option to join Virgin's pension scheme, or elect to have contributions paid into his own pension fund by Virgin.

(2) The Appellant elected to have contributions paid into his Standard Life SIPP.

(3) The Appellant has not been able to provide the contract of employment or the Employment Handbook that were given to him when he commenced his employment with Virgin.

(4) Virgin made employer pension contributions into the Appellant's Standard Life SIPP once a year. The Standard Life SIPP was a money purchase arrangement that is not a cash balance arrangement, for the purposes of para. 1(4), Schedule 22.

(5) There was a difference between the timing of the Appellant's contributions into his SIPP and the contributions made by Virgin, despite the Appellant's claim that Virgin usually paid their contribution within two weeks of the Appellant's contribution.

(6) The Appellant made his last contribution into his SIPP on 14 March 2014. There is no documentary evidence to support a finding that Virgin were obliged to pay their contribution into the Appellant's pension by 28 February 2014 (i.e., the date that the Appellant retired from his employment).

(7) The Appellant applied for a FP 2014 certificate, which is dated 4 April 2014. The final contribution by Virgin was paid on 5 May 2014 and that payment has never been reversed (and remains in the Appellant's Standard Life SIPP). Standard Life have refused to refund the contribution made by Virgin and Virgin have declined to take the contribution back. That contribution, therefore, remains in the Appellant's Standard Life SIPP.

62. We, therefore, make these findings of fact.

DISCUSSION

63. The Appellant appeals against HMRC's decision to revoke his FP 2014 certificate. The Appellant submits that: (i) Virgin made its last contribution into his Standard Life SIPP later than it should have done ("the late contribution point"); and/or (ii) he was not entitled to the contribution made into the Standard Life SIPP by Virgin on 5 May 2014 ("the lack of entitlement point"). Therefore, the Appellant submits that HMRC should have exercised their discretion in his favour and should not have withdrawn his FP 2014 certificate. He further submits that the pension rules are grossly unfair.

64. Ms Belgrano submits that: (i) there is no evidence that Virgin's contribution was made later than it should have been, or later than it was expected to be made, and that even if Virgin's contribution was paid later than it should have been/later than expected, that is irrelevant for the purposes of the legislation; and (ii) the FtT does not have jurisdiction to consider the exercise of HMRC's discretion and/or the FtT does not have the power to grant rescission, or proceed as if the High Court had ordered rescission (for mistaken payments).

65. It is helpful to set out the history to the legislation leading up to FP 2014, in order to set the scene.

66. Pensions tax simplification took effect from 6 April 2006 following a policy announced by the government in 2004. This date (6 April 2006) is commonly referred to as "A-Day". The intention was to simplify the previous eight tax regimes into one single regime for individual and occupational pensions. The changes to the legislation introduced a threshold for pensions savings. From 6 April 2006, every individual would have a "lifetime allowance" (the threshold). The lifetime allowance represents the total capital value of all pension benefits - except the State pension - before extra tax is chargeable. There are complex rules for the calculation of the value of pension scheme benefits for the purposes of the lifetime allowance.

67. The new rules were based on deterrence, as described by Henderson LJ in *Clark*. The case concerned the meaning of "payment" in the context of the tax regime applicable to unauthorised member payments out of registered pension schemes. Lord Justice Henderson said this, at [25]:

> "25…In very general terms, the underlying policy of the legislation, in common with much predecessor legislation in the same field, was to provide fiscal incentives for the establishment and investment of occupational pension schemes, so as to provide retirement pensions and associated benefits for employees and their dependants, but coupled with strict provisions designed to ensure that the schemes would be properly administered, and that payments made out of them to beneficiaries or sponsoring employers would be confined to certain authorised categories of payment. <u>If unauthorised payments were made, they would be taxed at high rates intended to have a deterrent effect and to compensate the State, in a rough and ready way, for the fiscal benefits previously enjoyed by the relevant funds</u>."

<u>[Emphasis added]</u>

68. The changes to the lifetime allowance over time are set out in the following Table:

Tax Year	**Amount**
2006-07	£1,500,000
2007-08	£1,600,000
2008-09	£1,650,000
2009-10	£1,750,000
2010-11	£1,800,000
2011-12	£1,800,000
2012-13	£1,500,000
2013-14	£1,500,000
2014-15	£1,250,000

69. The primary legislation was enacted as Part 4 FA 2004. Part 4 introduced a comprehensive new regime for the taxation of pensions schemes, running from ss. 149 to 284. Part 4 further merged eight or so different sets of rules for different types of pension scheme into one and introduced a "charge to tax" designed to prevent exploitation of what

were perceived as generous reliefs. This charge is called the "lifetime allowance charge" and is set out in ss. 214 to 226 FA 2004.

70. Section 214 FA 2004 (which came into force in 2006) imposed the lifetime allowance charge if an individual's pensions savings exceeded the lifetime allowance/threshold. The charge was imposed on a member of one or more registered pension schemes in respect of certain "benefit crystallisations events", where the amount crystallised when added to any previous such events exceeded the individual's lifetime allowance (i.e., benefits are taken, or start to be taken, by the person for whose benefit a pension scheme was established and the amount crystallised exceeds the person's lifetime allowance). The charge was dealt with under s 215 FA 2004.

71. Section 215 establishes that the rate of tax on the charge can be 55%, or 25%. The rate of tax varies according to the type of benefit which exceeds the allowance. The rules applied to calculate the amount of the lifetime allowance, and where it has been exceeded, in any individual case.

72. The charges to tax included: (i) the unauthorised payments charge and surcharge (ss 208 to 210); (ii) the lifetime allowance charges (where an individual's annual contribution limits or lifetime pension allowance were exceeded); (iii) the charge on authorised employer payments; (iv) the scheme sanction charge (levied on the scheme administrator where an unauthorised payment was made by the pension scheme); and (v) a de-registration charge, also levied on the scheme administrator when the registration of a registered pension scheme was withdrawn.

73. Schedule 36 FA 2004 was introduced by s 283 FA 2004. Schedule 36 provided for transitional provisions and savings to protect against the lifetime allowance charge. This was on the condition that the taxpayer gave notice to HMRC of his/her intention to rely on para. 12(3) of Schedule 36, in accordance with regulations made.

74. Numerous statutory instruments (regulations) were made under the powers in FA 2004, and later Acts. The regulations govern the issuance and revocation of protection.

75. The Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 SI 2006/131 ('the 2006 Regulations') dealt with notifications electing for "Enhanced Protection" and "Primary Protection". Primary Protection, broadly, treated the value of the pension pot as it stood on A-Day as the lifetime allowance. Enhanced Protection offered full protection against the tax charge on the condition that all contributions, or other benefit accrual, ceased before A-Day. The date by which eligible taxpayers were required to give notice of their intention to rely on para. 12 of Schedule 36 was 5 April 2009 (the "closing date" or cut-off date"). As long as the protection was not lost, or revoked, there would be no tax charge.

76. Part 4 FA 2004 was amended and supplemented in subsequent Finance Acts, including the Finance Act 2011 ('FA 2011'). Paragraph 2 of Schedule 18 FA 2011 substituted a new s 218(2) FA 2004, which provided that:

> "(2) The standard lifetime allowance for the tax year 2012-13 and, subject to subsection (3), subsequent tax years is £1,500,000."

77. Thus, there was, for the first time, a reduction in the allowance from £1,800,000 to £1,500,000.

78. The government recognised that people who had not sought the protections given by the 2006 Regulations could find that their pension pots were worth more than the new lifetime allowance of £1,500,000, making them liable to the lifetime allowance charge when

benefits crystallised. Part 2 of Schedule 18, therefore, provided for transitional provisions. Recognising that taxpayers may have made decisions based on their expectation that the lifetime allowance would continue at £1,800,000, para. 14 of Schedule 18 entitled taxpayers, by notice to HMRC, to elect for "Fixed Protection" 2012 ('FP 2012'), to distinguish it from other types of protection. A taxpayer making an election for FP 2012 would continue to benefit from a lifetime allowance equal to the higher of £1,800,000 and the allowance prevailing from time to time. The deadline for submitting a notice electing for FP 2012 was 5 April 2012.

79. Paragraph 14, therefore, preserved the previous allowance of £1,800,000 for those who gave a notice of intention to HMRC to rely on it. Provisions regulating the exercise of that right are set out in The Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 SI 2011/1752 ("the FP 2012 Regulations").

80. From 6 April 2014, the lifetime allowance was further reduced from £1,500,000 to £1,250,000. In order to protect the position of taxpayers who had, or expected to have, a certain level of savings before the reduction, various protections were introduced for the 2014-15 decrease. Pension savers who gave notice of their intention to rely on FP 2014 were advised that they would be entitled to this continued protection provided that they ceased accruing benefits (the FP 2014 Regulations).

81. The purpose behind FP 2014 (which is relevant to this appeal) is to provide transitional relief to taxpayers who had built up pensions savings before the lifetime allowance decreased from £1,500,000 to £1,250,000. This was on the basis of an expectation that the lifetime allowance was £1,500,000 prior to the reduction in the lifetime allowance to £1,250,000 in 2014-15. Where taxpayers stopped building up their pensions before the new reduced allowance took effect, Parliament allowed them to continue to rely on the previous higher allowance (subject to meeting the other conditions for FP 2014).

82. However, that purpose ceases to apply where (as in the present case) the taxpayer's pension is built up (in ways identified in the legislation as being "protection-cessation" events) in the 2014-15 tax year, when the standard lifetime allowance was £1,250,000. If that occurs, the taxpayer would be subject to the standard lifetime allowance. In other words, where, after that date (i.e., 5 April 2014), there is further "benefit accrual" as described in the legislation, including where a contribution is paid in respect of the individual under the arrangement by an employer (or former employer) of the individual, FP 2014 is lost.

83. FP 2014 is governed by Schedule 22 (supra). Paragraph 1(2) provides that where the conditions in para. 1(1) are met, Part 4 FA 2004 has effect in relation to the individual as if their lifetime allowance were the greater of the standard lifetime allowance, being £1,500,000. Paragraph 1 ceases to apply where any of the conditions in para. 1(3) are met. Paragraph 1(3)(a) provides that one such condition is where, on or after 6 April 2014, there is "benefit accrual" in relation to the individual under a registered pension scheme. If there has been benefit accrual, the effect is that FP 2014 ceases to apply, regardless of whether HMRC revoke the FP 2014 certificate. Accordingly, if there has been a protection-cessation event, a taxpayer's lifetime allowance will revert to the standard lifetime allowance then in force (i.e., £1,250,000) (para. 1(3)).

84. Paragraph 11(a) of the FP 2014 Regulations provides that HMRC *may* revoke an FP 2014 certificate if they have reason to believe that a para. 1(3) event has occurred. As the word "*may*" in reg. 11 of the FP 2014 Regulations indicates, HMRC are not obliged to revoke the FP 2014 certificate if a protection-cessation event occurs. However, the point is largely academic since reg. 3(2)(c) of the FP 2014 Regulations precludes a taxpayer from relying on para. 1 of Schedule 22 (which preserves a higher lifetime allowance for qualifying taxpayers)

if there has been a protection-cessation event. As set out above, if there has been a protection-cessation event, a taxpayer's lifetime allowance will revert to the standard lifetime allowance then in force.

85. The triggers to losing Fixed Protection are:

(1) Contributions made to a defined contribution scheme;

(2) A benefit accrual in respect of the member under a registered pension scheme;

(3) An impermissible transfer from the member's arrangement;

(4) A transfer of sums and assets that is not a permitted transfer; or

(5) The member has made a new arrangement other than in permitted circumstances.

86. Regulation 12 of the FP 2014 Regulations provides for appeals against replacement or revocation of certificates. Regulation 12(3) of the FP 2014 Regulations provides that:

> "(3) Where an appeal under this regulation is notified to the tribunal, the tribunal must determine whether HMRC replaced or revoked the certificate in accordance with regulations 10(1) or 11."

87. With effect from 6 April 2023, the lifetime allowance charge was abolished: s 18, Finance (No 2) Act 2023. Revocation of a certificate could, however, continue to affect the Appellant's position since revocation would affect the available "Lump Sum Allowance" and the "Death Benefit Allowance".

88. Turning to the circumstances of this appeal:

The Appellant's pensions arrangements

89. The Appellant was employed by Virgin in 1991. After six months of service the Appellant had the option to join Virgin's pension scheme, or elect to have contributions paid into his own pension fund by Virgin. The Appellant has not been able to provide a copy of his contract of employment, but he has provided a contract which he says he obtained from a former colleague who joined Virgin at a later date (but relates to the same era). The contract was accompanied by an "Employee Handbook". From the documentation provided, it appears to be the case that the pension benefits offered by Virgin to its employees were in one of two forms: (i) through the company pension scheme (with the Sun Alliance Group); or (ii) by way of contributions into the employee's personal pension plan (which matched contributions made by the employee).

90. The document entitled "Employment Contract 5" provided by the Appellant states, *inter alia*, that:

> "VIRGIN WILL CONTRIBUTE UP TO 5% OF YOUR SALARY TO MATCH YOUR CONTRIBUTION"

91. The contract provides, at clause 7 under the Heading "Pension", that the employee should "Refer to Employee Handbook". The Appellant has provided three pages from a Handbook, the third of which provides that:

> "COMPANY PENSION SCHEME
>
> The Company contributes to a personal voluntary pension plan which all permanent, full-time employees are invited to take out after they have been employed for a period of at least six months and are 25 years of age or over.
>
> The recognised Personal Pension Plan is with the Sun Alliance Group and Company contribution is paid by direct debit on a monthly basis. The Personnel Manager of VAA

administers the arrangements and invites by letter eligible employees to consider their pension planning arrangements at the appropriate time.

Alternative Personal Pension Plans may be eligible to attract Company contributions. However, payment can then only be made once a year on sight of the certificate, issued by the insurance company managing their plan, confirming payment of premiums under an approved pension plan (LAPC). The procedure for claiming this benefit is as follows: -

(a) The employee must notify the Personnel Department in writing, of the plan details and his/her intention to claim the benefit. This will be acknowledged in writing by the Personnel Department.

(b) The employee, having paid 12 months premium may forward the relevant information to the Personnel Department for reimbursement.

Note:

Employees making their own arrangements should be aware that they will be responsible for all aspects of their pensions, including annual reviews and any tax or National Insurance implications."

92. Virgin made employer pension contributions into the Appellant's Standard Life SIPP, which is accepted as having been a "money purchase arrangement", as defined at s 152(2) FA 2004 (in force prior to 1 August 2022 and applicable by virtue of para. 1(22) of Schedule 22 FA 2013). The pension contributions formed part of the remuneration to which the Appellant was entitled. This matter is not in issue between the parties. Albeit that there was no documentation to substantiate this point, the Appellant's case is that he was required to pay at least 6% of his salary into his SIPP and Virgin would match that with their contribution of 15%. If the Appellant paid less than 6%, Virgin would reduce their contribution. The Appellant gave evidence that, over time, Virgin improved their original 5% contribution to the more generous contribution of 15%, in later years.

93. The Appellant was originally due to retire on 30 December 2013 (his 65th birthday). In 2011, the Appellant went to his financial administrator to tidy up his pension fund. The Appellant then, unfortunately, injured his back in mid-July 2013. He also unfortunately received a diagnosis of cancer. The rules that applied to the Appellant's employment meant that he lost his medical certificate (which was required in order for him to fly for Virgin). He then decided to obtain further qualifications and began delivering training to pilots in flight simulators.

94. On 3 December 2013, the Appellant was called to a meeting with two managers at Virgin, which he described as a "*trumped-up disciplinary hearing*", where he was accused of working outside of the terms of his contract of employment. When a human resources manager discovered that the meeting was taking place, and that the Appellant was due to retire in December 2013, the human resources manager immediately terminated the meeting.

95. The Appellant's employment was subsequently extended to 28 February 2014 by Virgin and the Appellant was informed that he did not have to perform any duties, but would be paid until 28 February 2014. A letter provided by the Appellant is set out in the following terms:

"Dear Steven,

I am writing to confirm that I have received notification from your Manager that you will be taking retirement from the Company with effect from 28th February 2014.

Final Payment and P45

You will receive a final payment on 20th February 2014, which will include your salary up until 28th February 2014.

...

Pension

If you are in the Company Pension scheme you will automatically be written to within 6 to 8 weeks of leaving with your options and Leaving Statement. If you have any queries please contact the Pensions Helpline on 0845 7234235."

96. The Appellant has not shed any further light on the "options" he was provided with, or the "Leaving Statement".

97. The Appellant's case is that his final pension year started on 1 December 2013. This is, however, inconsistent with the letter from McPhersons Walpole Harding, dated 8 June 2018, which states that:

> "*annual contributions were based on his earnings in each calendar year*".

98. It is also inconsistent with the note of the telephone call of 10 May 2023, in which the Appellant said that the alternative pension plan worked by obliging contributions to be matched "*at the end of the calendar year*". The note of the telephone call also records that:

> *"...To explain what the Certificate of Contribution was, it was a certificate confirming contributions during a 12-month period which Mr Lefort requested from Standard Life. He then sent this on to Virgin Atlantic so that they could arrange their employer contribution based on the value of contributions paid by Mr Lefort..."*

99. The Appellant stated that he submitted a Certificate of Contributions to Virgin in December 2013, and that Virgin paid their contribution into his SIPP on 8 January 2014. Alternatively, he stated that he could not recall whether he submitted a Certificate of Contributions to Virgin for the pension year which was said to have begun on 1 December 2013. The Appellant subsequently made two payments into his SIPP in March 2014, but says that these payments were not related to his employment. He accepts, however, that Virgin had paid him a salary for the period December 2013 to 28 February 2014.

100. Despite the inconsistencies identified above, we have accepted that the Appellant was familiar with the manner in which his pension fund operated, and the procedure required in order for Virgin to make contributions into his pension fund.

101. The Appellant then applied for an FP 2014 certificate on 4 April 2014. The application form referred to the guidance contained in a document entitled '*Protection of your lifetime allowance – fixed protection 2014*', which explained that further benefit accrual would be inconsistent with the retention of FP 2014, as follows:

> *"If you want to rely on fixed protection 2014, there are restrictions on what you will be able to do with your pension savings. For example, after 5 April 2014 you will normally need to stop building up benefits in every registered pension scheme that you belong to. So make sure you tell your employer or pension scheme in good time if you want to stop building up benefits into your scheme, and remember to stop any direct debits.*
>
> *If you make any contributions or have benefit accrual on or after 6 April 2014 you will normally lose fixed protection 2014."*

102. HMRC's guidance explained that HMRC will not regard mistaken payments as constituting contributions, and so Fixed Protection will not be lost, as follows:

> **"PTM093800 – Protection from the lifetime allowance charge: fixed protection, fixed protection 2014 and fixed protection 2016: making contributions to an arrangement once a member has any of the protections**
>
> **Failure to stop an automatic payment from a bank and building society**
>
> If the member has told their bank or building society in good time that they want to stop the payment but the bank or building society have failed to act on this then the member will not lose their fixed protection.
>
> Here, the payment(s) made by the bank or building society were beyond their control and the member never intended that the payment(s) should be contributions. HMRC will not consider such payments as contributions and so fixed protection will not be lost.
>
> The payments should be returned to the member although they will have to repay any tax relief they have received in relation to them."

103. The Appellant accepts that Virgin made a contribution into his Standard Life SIPP on 5 May 2014, and that this payment has never been returned to Virgin. Furthermore, despite stating that he could not recall whether he submitted a Certificate of Contributions to Virgin for 2013-14, by the Appellant's own evidence, Virgin only made one annual payment into his SIPP when a Certificate of Contributions was submitted by him. There was no suggestion in this appeal that Virgin ever made additional payments into an employee's personal pension, over and above the annual contribution which was based on a Certificate of Contributions.

The "late contribution" point

104. The Appellant's original Grounds of Appeal were predicated on the assertion that Virgin paid its 5 May 2014 contribution later than it should have. The grounds assert that payment by Virgin of its contribution into the Appellant's SIPP should have been made by 5 April 2014. By contrast, in his submission of 10 June 2024, the Appellant states that:

> "*with the 28th Feb. 2014 being my final date of employment* *the company had an obligation to make final payments to me on that date*".

105. The claim in the submission of 10 June 2024 does not, however, sit well with the Appellant's alternative claim that Virgin made their final contribution on 8 January 2014. This further does not sit well with the Appellant's evidence that he did not recall providing Virgin with a Certificate of Contributions for the period December 2013 to 28 February 2014 (which in itself is at odds with the alternative evidence that he submitted a Certificate of Contributions to Virgin in December 2013).

106. Furthermore, we have found that by the Appellant's own oral evidence, a Certificate of Contributions was required by Virgin in order for them to make a contribution into the Appellant's SIPP, which would set out the contributions that had been made by the Appellant in the given pension year before Virgin paid their annual contribution. We find, therefore, that Virgin could not have made a contribution without first seeing the Appellant's Certificate of Contributions. We have further found that there is no documentary evidence to support the finding that there was a specified date by which Virgin had to make their contribution. We shall return to this issue later.

107. The Appellant's evidence was also that Virgin always (or usually) made contributions into his SIPP within two weeks of receiving the Certificate of Contributions from Standard Life. Indeed, the letter from McPhersons Walpole Harding, dated 8 June 2018 (on behalf of the Appellant) also states that:

> "*[t]hese annual contributions were based on his earnings <u>in each calendar year and were always paid within two weeks of the end of each year</u>.*"

108. That explanation is, however, at odds with position adopted by the Appellant in the phone call to HMRC on 10 May 2023, in which the Appellant explained that:

> *"…Virgin Atlantic <u>always</u> completed their pension remittance <u>within 20 days of receiving the Certificate of Contribution</u>…"*

109. That explanation is also at odds with the alternative position adopted; that being that the contributions were based on a "pension year" which began on 1 December (in Year 1) and ended on 30 November (in Year 2). It is, therefore, unclear whether Virgin paid their contributions within two weeks, or 20 days of having sight of the Certificate of Contributions. Indeed, from the documentation which we have had the benefit of seeing, the position does not appear to sit well with the evidence since some contributions were made other than within 20 days (or even two weeks), as shown by the Schedule of Contributions provided by the Appellant.

110. The Schedule of Contributions shows that between 2011 and 2014, the Appellant made the following contributions on the following dates:

Date of Contribution	**Amount**
23 November 2011	£8,750
14 November 2012	£8,750
20 March 2013	£47,500
4 March 2014	£12,500
14 March 2014	£25,000

111. The Schedule of Contributions also shows that between 2011 and 2014, Virgin made the following contributions on the following dates:

Date of Contribution	**Amount**
4 January 2012	£17,184.45
1 December 2012	£19,471.43
22 March 2013	£25,000.00
9 January 2014	£19,471.43
5 May 2014	£4,061.75

112. It is clear from the Schedule of Contributions that the gap between the Appellant's contributions and Virgin's contributions varied substantially, as follows:

Appellant's contribution	**Virgin's contribution**	**Time lapsed**
23 November 2011	4 January 2012	42 days
14 November 2012	1 December 2012	48 days
20 March 2013	9 January 2014	295 days
4 March 2014	5 May 2014	52 days
14 March 2014	5 May 2014	62 days

113. The tables above further show that Appellant made contributions on 4 March 2014 and 14 March 2014, and that Virgin then made a contribution on 5 May 2014. We have found that Virgin could not have made a contribution without first seeing the Appellant's Certificate of Contributions. We have further found that there were inconsistencies about whether, or not, the Appellant gave a Certificate of Contributions to Virgin.

114. These findings are not to suggest that the Appellant has deliberately sought to mislead, but are a balanced appraisal of the evidence before us. It is correct that a significant amount of time has lapsed since the circumstances giving rise to this appeal took place and it is not unusual for memories to fade. We accept that the Appellant has tried his best to fill in any gaps in information. This has, unfortunately, led to some significant (and material) inconsistencies.

115. Returning to the issue of when Virgin were required to make their last contribution, we find that there is no documentary evidence to substantiate any assertion that Virgin were obliged to pay the final contribution by 28 February 2014, and we have found that any contribution made by Virgin was based upon the submission of a Certificate of Contributions.

116. Whilst the Appellant had already left his employment with Virgin when Virgin made its contribution to his SIPP on 5 May 2014, the fact that the Appellant had already left his employment with Virgin when the last contribution was made by them is not determinative of the late contribution point. This is because s 279 FA 2004 (as currently in force) provides than "employer" includes a "former employer", as follows:

> "**279 Other definitions**
> **…**
> *"employee"* and *"employer"* have the same meaning as in the employment income Parts of ITEPA 2003 (see sections 4 and 5 of that Act) but include (respectively) a former employee and a former employer (and "employment" is to be read accordingly), …"

117. Section 279 FA 2004 applies for the purposes of Part 4 of Schedule 36 as it is introduced by s 283 FA 2004, which falls within Part 4. Bennion, Bailey and Norbury on Statutory Interpretation ('Bennion') explains, at [2.8], that:

> "...a Schedule takes its location from the section introducing it...it is regarded as being in the same Part or Chapter as the section introducing it."

118. Bennion further explains, at para. 18.1, that:

> "Where a definition is expressed to apply to a Chapter or Part, that includes any Schedules introduced by sections in the Chapter or Part."

119. We, therefore, find that the definition in s 279 FA 2004 applies for the purposes of para 14(1)(a) of Schedule 36. Paragraph 14(1)(a) of Schedule 36 provides that:

> "(1) For the purposes of paragraph 13(a) a relevant contribution is paid under the arrangement if –
>
> > (a) a relievable pension contribution is paid by or on behalf of the individual under the arrangement,
> >
> > (b) a contribution is paid in respect of the individual under the arrangement by an employer of the individual, or
> >
> > (c) a contribution paid otherwise than by or on behalf of the individual or by an employer of the individual in respect of the individual subsequently becomes held for

> the purposes of the provision under the arrangement of benefits to or in respect of the individual."

120. Furthermore, "contribution" is defined in the Oxford Dictionary as:

> "The action of contributing or giving as one's part to a common fund or stock; the action of lending aid or agency to bring about a result."

121. Consequently, we are satisfied that the contribution made by Virgin on 5 May 2014 was a contribution by the Appellant's former employer in respect of the Appellant under the Standard Life SIPP, and it was a "relevant contribution" within the meaning of para. 14(1)(b), Schedule 36, FA 2004. The legislation shows that a contribution paid in respect of an individual under the arrangement by that individual's employer, or former employer, will be a "relevant contribution": FA 2004, Schedule 36, paras. 14(1)(a) and (b)).

122. Accordingly, therefore, we are satisfied that there was "benefit accrual" on, or after, 6 April 2014 (para. 1(4)(a), Schedule 22, FA 2013) and, thus, a para. 1(3) event. Where, after 6 April 2014, there is a benefit accrual as described in the legislation, including where "*a contribution is paid in respect of the individual under the arrangement by an employer of the individual*", FP 2014 is lost. Parliament has chosen those words (read in context) to express the purpose of the legislation and the words themselves are:

> "the primary source by which meaning is ascertained"

see *R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, at [29].

123. Regulation 11 of the FP 2014 Regulations provides that:

> ""**11.**
>
> HMRC may revoke a certificate if they—
> (a) have reason to believe that a paragraph 1(3) event has occurred, …"

124. In accordance with reg. 11(a) of the FP 2014 Regulations, HMRC were, thus, entitled to revoke the Appellant's FP 2014 certificate. Regulation 12(3) of the FP 2014 Regulations (supra) provides that it is sufficient that a para. 1(3) event has occurred. This means that, irrespective of the wider facts, HMRC's decision in respect of the FP 2014 certificate cannot be challenged. This is because the contribution constituted a "protection-cessation event" and was a "benefit accrual". We shall consider this in greater detail in the "lack of entitlement" point.

125. As set out earlier, the purpose behind FP 2014 is to provide transitional relief to taxpayers who had built up pensions on the basis of an expectation that the lifetime allowance was £1,500,000 prior to the reduction in the lifetime allowance to £1,250,000 in 2014-15. Where taxpayers stopped building up their pensions before the new reduced allowance took effect, Parliament allowed them to continue to rely on the previous higher allowance (subject to meeting the other conditions for FP 2014). That purpose, however, ceases to apply where the taxpayer's pension is built up in ways identified in the legislation as being protection-cessation events. If those events occur, the taxpayer should be subject to the standard lifetime allowance.

126. The Appellant refers to HMRC's discretion. As to the FtT's jurisdiction, this is determined by reference to the statutory language affording the FtT jurisdiction. In *Hoey*, at [132] (Simler and Phillips LJJ and Sir Launcelot Henderson), the Court of Appeal held that:

"132. …The attraction of the First-tier Tribunal as a "one stop shop" for all issues concerning the amount taxpayers should be required to pay to HMRC cannot alter the meaning and effect of a legislative scheme that, properly construed, requires certain issues to be litigated in the tax tribunal, others to be litigated by way of judicial review in the High Court and in specific circumstances the Upper Tribunal; and disputes about the amount to be collected by HMRC dealt with as a matter of enforcement in the civil courts (the County Court or High Court). The courts and tribunals cannot confer jurisdiction on a statutory tribunal any more than the parties can agree to do so. The question of jurisdiction can only be determined by reference to the particular statutory scheme in question that governs the tax tribunal's jurisdiction…"

127. The FtT's jurisdiction was also considered in *Caerdav* (Rajah J and Judge Rupert Jones), at [152]:

"152. The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration."

128. In *Harrison* (Judges Jonathan Richards and Ashley Greenbank), the UT was considering whether the FtT had jurisdiction to hear an appeal against HMRC's exercise of discretion in relation to an appeal brought under reg. 7 of the FP 2012 Regulations, which provides that:

"**7 Appeal against refusal to accept notice**

(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."

129. The UT held, at [44] to [47], that:

"44. First, the natural reading of Regulation 7(3) is that it is imposing some limitation on the scope of an appeal. If the true position is that a broad appeal right is conferred by Regulation 7(1) alone, the obvious question is what function Regulation 7(3) serves.

45.The Appellants meet this challenge by saying that failure of the Regulation 4 requirements is a necessary precondition to HMRC refusing to accept a Paragraph 14 notice. Therefore, they argue, there is nothing unusual about Regulation 7(3) directing the FTT to consider whether that necessary precondition is satisfied. Specifying this factor does not preclude the FTT from considering other issues, and indeed Regulation 7(1) directs it to do so. However, the Appellants have not provided us with a convincing explanation of why, if all aspects of HMRC's decision are put in issue by Regulation 7(1), Regulation 7(3) singles out for special mention only the requirements of Regulation 4. Why, for example, does Regulation 7(3) not direct the FTT to consider whether HMRC exercised any discretion in a reasonable way in the same way as s16(4) of the Finance Act 1994 directs the FTT's attention to that issue in the context of decisions on excise duty "ancillary matters"? In our judgment, the Appellants' construction gives Regulation 7(3) little or no meaning, whereas HMRC's construction at least gives it some meaning, even if it does lead to a relatively narrow right of appeal as we have explained at [40(3)] above.

> 46. We are reinforced in this conclusion by the fact that the FTT's sole power, in allowing an appeal, is its discretionary power to direct HMRC to accept a Paragraph 14 notice and issue a certificate. A taxpayer complaining about HMRC's exercise of discretion might make a wide category of argument. It might be said that HMRC's decision-making process was unfair, that HMRC ignored relevant considerations or took into account irrelevant considerations. If such challenges succeeded, it is not obvious that the FTT would be able to make its own decision on the issue. It might wish to remit the matter back to HMRC with directions for reconsideration. Yet Regulation 7(4) gives the FTT no such power (again by contrast with s16(4) of the Finance Act 1994).
>
> 47. The force of that point is increased by a consideration of the nature of discretion that HMRC need to exercise in the context of late Paragraph 14 notices. An HMRC official exercising that discretion may wish to take into account the fact that the Regulations set out a time limit and that, by permitting that time limit to be exceeded, the Appellants would be put in a better position than other taxpayers. The official could reasonably be expected to take into account considerations relating to the public finances and the desirability of taxpayers generally meeting deadlines imposed on them. An FTT judge will not always be well-placed to weigh up such administrative considerations, yet Regulation 7 gives the FTT no power to remit the decision back to HMRC, who will frequently be better placed."

130. The UT concluded, at [49], that the FtT's sole jurisdiction was to consider whether the requirements of reg. 4 were met:

> "49. Having weighed up the competing indications, in respectful disagreement with the FTT, we consider that HMRC's construction of Regulation 7 is to be preferred. <u>On an appeal notified to the FTT, the FTT's sole jurisdiction is to consider whether the requirements of Regulation 4 are met</u>."

131. We find that there is considerable force in Ms Belgrano's submission that the fact that the FtT's sole power in allowing the appeal in *Harrison* was that it "*...may direct HMRC to issue a certificate to the individual*" is a strong indication that the FtT does not have jurisdiction to review the exercise of HMRC's discretion because, if it did, one would have expected the FtT in *Harrison* to have the power to remit the matter back to HMRC for reconsideration.

132. In the context of the appeal before us, reg. 12(3) of the FP 2014 Regulations provides that:

> "(3) Where an appeal under this regulation is notified to the tribunal, <u>the tribunal must determine whether HMRC replaced or revoked the certificate in accordance with regulations 10(1) or 11</u>."

133. It is common ground that the 5 May 2014 payment was paid by the Appellant's former employer to the Standard Life SIPP trustees. It is also common ground that the payment has never been reversed and remains in the Appellant's SIPP. Accordingly, therefore, the late contribution point must fail as there has been a protection-cessation event in the circumstances of this appeal.

134. We proceed to consider the Appellant's alternative argument; that concerning a lack of entitlement to the contribution made by Virgin on 5 May 2014.

The "lack of entitlement" point

135. The Appellant further, and alternatively, submits that because he did not make a contribution amounting to 6% of his salary between 1 December 2013 and 28 February 2014, he was not entitled to the contribution that Virgin made on 5 May 2014. Ms Belgrano, on the contrary, submits that the reason that Virgin contributed to the Appellant's Standard Life

SIPP on 5 May 2014 was because it was obliged to do that as part of the remuneration to which the Appellant was entitled.

136. Whilst we have found that the Appellant had detailed knowledge of how his pension with Virgin operated, we also find that Virgin would have been equally familiar with the terms of the pension scheme(s) that they offered to their own employees. Moreover, Virgin had been making contributions into the Appellant's SIPP for a period of over ten years between 1992 and 2014 (by the time that the 5 May 2014 contribution was paid by Virgin). Virgin knew that they could only pay their percentage based on the contributions made by the Appellant. Furthermore, the Appellant was clearly remunerated by Virgin between December 2013 and 28 February 2014. We have also found that in order to obtain a contribution from Virgin, the Appellant had to provide Virgin with a Certificate of Contributions.

137. Having considered all of the evidence, we find that the Appellant's lack of entitlement argument is inconsistent with the position previously taken by the Appellant and his advisers. The letter, dated 8 June 2018, from McPhersons Walpole Harding stated, unequivocally, that the Appellant was entitled to the contribution made by Virgin. The letter states, *inter alia*, that:

> *"Mr Lefort has contacted both Standard Life and Virgin Atlantic and requested that Standard Life refund the final pension contribution, but he has been told that this is not possible.*
>
> *We understand that refunds are only usually allowed in circumstances where there was no intention to make a contribution, or where the member was not entitled- to the contribution in the first place. In this case the member was certainly entitled to the contribution, but the unnecessary and unprecedented delay in payment meant that the contribution was paid after the cut-off date for Fixed Protection 2014. This was completely outside of our client's control."*

138. The Appellant's lack of entitlement point is also inconsistent with the refusal by Virgin and Standard Life to agree to a refund of the contribution on 5 May 2014. Both Standard Life and Virgin were, specifically, requested to unwind the contribution and refused to do so.

139. The Appellant submits that he made suggestions to Virgin in respect of the payment made on 5 May 2014. The suggestions were for Virgin to:

(1) take the money back; or

(2) donate the money to a charity; of

(3) put the money "behind the counter"; or

(4) give the money to a manager who had terminal cancer.

140. When asked why Virgin would have refused to take the payment back if he was not, as suggested, entitled to it, the Appellant stated that the payment may have been a charitable act on the part of Virgin as they may have realised that they had "*overstepped the mark*" during the December 2013 meeting. We find, however, that the suggestion that Virgin were being charitable does not sit well with the refusal by Virgin to take the payment back, if the payment had the effect of causing the Appellant to lose his Fixed Protection.

141. In *Fattal v Fattal*, the claimant's case was that he was the sole owner, in equity, of a property from the date of acquisition but that there came a time, in or about 1990, when he orally agreed to transfer the property to his brother for £400,000. His case was that he transferred the property to the defendant in 2014 in the mistaken belief that the defendant had paid him the agreed figure of £400,000 and he sought relief from the consequences of his mistake in equity and other relief. The court was concerned with the issue of whether the elements of a trust were made out (for the purposes of beneficial ownership). The applicable

law in relation to constructive trusts is found, primarily, in *Stack v Dowden* [2007] 2 AC 432 and *Jones v Kernott* [2012] 1 AC 776.

142. The court held, at [120] of the decision in *Fattal v Fattal*, that:

> "120. I have not included in that citation the passages where Morgan J focused particularly on a mistake about the tax consequences of a transaction, this not being such a case. In *Van der Merwe* there was disagreement between the parties as to whether, on the facts, the case was governed by the common law rules for declaring a contract to be void by reason of mistake or the equitable rules for setting aside a gift for mistake. Having found against Elias on the issue of consideration, I consider that the latter principles do apply. As Morgan J held in *Van der Merwe* at §31, "*the difference between the cases where the equitable rules apply and those where they do not turns on whether consideration has been given for the benefit conferred by the transaction*". In the present case, I have found that Elias did not provide any consideration for the transfer. He did not pay the figure of £400,000 or any sum pursuant to the Proposal and he did not provide the consideration (or any part of it) for the original transfer to William. Accordingly, applying the principles set out above to the facts of this case, I find that the 2014 Transfer was directly caused by a sufficiently serious mistake on the part of William so as to mean it would be unconscionable for Elias to remain the owner of the Property. In doing so, I explicitly reject the submission made by Mr Winn-Smith that the circumstances are such as to show that William deliberately ran the risk, or must be taken to have run the risk, of being wrong. On that basis the 2014 Transfer is liable to rescission and William is entitled to an order that Elias transfer the Property back to him."

143. Applying the approach in *Fattal v Fattal*, we are satisfied that if Virgin were able to establish that the beneficial ownership did not pass due to a lack of intention to gift, and lack of obligation to pay; and that the payment may be held on resulting trust for Virgin (that Virgin may be in time to recover), the reality of the situation is that Virgin did make the payment into the Standard Life SIPP and the payment (and interest, and associated tax relief) has not been returned.

144. Furthermore, we are satisfied that there is nothing on the face of the legislation that states that the Appellant needs to be "entitled" to the payment. In *Dolphin Drilling*, Nugee LJ (with whom Peter Jackson and Newey LJJ agreed), said this, at [41]:

> "**THE ORDINARY MEANING OF THE WORDS**
>
> [41] …<u>Where ordinary words are used in legislation it is well recognised that seeking to provide definitions of them can be a dangerous exercise, as glossing the statutory language by using other words runs the risk of those (non-statutory) words being treated as a substitute for the statutory words when they may not have quite the same meaning</u>. Most English words have nuances of meaning and shades of usage that are not precisely captured by substituting other words. So one should be wary of trying to lay down a definition of ordinary words; the meaning of an ordinary word is to be found not so much in a dictionary but in how it is in fact ordinarily used, and I think it is generally more helpful to tease out the meaning of ordinary words by providing illustrative examples of how they are used in everyday contexts."

145. The ordinary use of the words in the legislation does not, therefore, import a need for "entitlement" to be established.

146. The case of *Clark* dealt concerned an unauthorised payment, and the meaning of "payment". The Court of Appeal held that the meaning of everyday words such as "payment" should not turn on legal niceties (at [40]). Henderson LJ (with whom Nicola Davies and Bean LJJ agreed) went on to note at [86] that:

> "...I recognise that different considerations may arguably arise in cases where an unauthorised payment is inadvertently or carelessly made, and the member concerned takes prompt and effective steps to restore it to the fund before any assessment is made by HMRC..."

147. Mr Clark had wanted to release funds from his SIPP to invest in property (pensions liberation scheme). Transfer to the LML Pension Scheme was void. Mr Clark argued that there was nothing of value left his SIPP, so there was no payment. Henderson LJ disagreed, stating that the transfer of bare legal title is enough, at [82]:

> "If the intended purpose and effect of the transactions is that money leaves the scheme and is placed at the free disposal of the member, the mere fact that the money may be subject to an equitable obligation to restore it to the scheme will not prevent it from being a "payment" in the ordinary sense of that word."

148. Henderson LJ went on to say this, at [79]:

> "The concept of a charge to tax which can vary in amount, or even be negated, depending on the happening of events subsequent to those which gave rise to the assessment, seems to me a very strange one which Parliament is most unlikely to have contemplated. The validity and amount of an assessment to tax should normally be determined by reference to the facts as they stood at the date of assessment, not by reference to steps later taken by the taxpayer in an effort to retrieve the situation which led to the charge being incurred."

149. In the appeal before us, the 5 May 2014 payment by Virgin has not been returned to Virgin over ten years since the payment was made. We find that there is considerable force in Ms Belgrano's submission that if Virgin brought a claim and recovered the funds on the basis that the funds never became "held" for the purposes of providing benefits to the Appellant, the position would be that a benefit accrual had not occurred (a position that HMRC have expressly stated they would be in agreement with). This is not the position in the appeal before us and there is no evidence before us to support a finding that the Appellant was not entitled to the payment made by Virgin on 5 May 2014, or that Virgin were willing to recover the funds.

150. The fact of the matter is that the payment was made by Virgin into the Appellant's SIPP and that payment remains there. This was the position at the time of the decision to revoke the Appellant's FP 2014 certificate, and is still the position to date. Having considered all of the documentary and oral evidence, cumulatively, we find that the lack of entitlement argument must also fail. For completeness, we have considered the issue of rescission and the doctrine of mistake.

Rescission and the application of Hymanson and/or Lobler

151. Ms Belgrano acknowledges that mistaken payments may, in certain circumstances, be the subject of an order for rescission. Whilst the Appellant has, expressly, stated that he is not relying on any case law, including *Hymanson*, Ms Belgrano has set out HMRC's position in response to the possible application of that case to the facts of this appeal (on the basis that the payment by HMRC on 5 May 2014 was a mistake). HMRC consider that the most likely formulation of an argument based on *Hymanson* is that this appeal should be determined as if the 5 May 2014 contribution by Virgin had been rescinded.

152. The principles to be applied when asking if the High Court should exercise its equitable jurisdiction to rescind a voluntary disposition are set out in the decision of the Supreme Court in *Pitt v Holt*. There, Lord Walker indicated that equitable defences may be invoked in a claim to rescind a contract. The appeals in *Pitt v Holt* raised important issues in the field of equity and trusts law. Both appeals raised issues concerning the so-called rule in *Hastings-Bass.* The rule in *Hastings-Bass* gives the court discretion to set aside an exercise of power if a trustee failed to take into account relevant considerations which the trustee ought to have taken into account when exercising the power, or took into account considerations which should properly have been disregarded. The appeal in Pitt also raised issues as to the court's jurisdiction to set aside a voluntary disposition on the ground of mistake.

153. The facts of the case were that as receiver under the Mental Health Act 1983 (old equivalent to deputy under the Mental Capacity Act 2005) for her husband, Mrs Pitt had set up a settlement trust which overlooked the impact of inheritance tax. The court considered the test for setting aside a voluntary disposition on the ground of mistake and allowed Mrs Pitt's appeal on this point. The court held, at [130], that:

> "130 …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.

154. A summary of the principles in *Pitt v Holt* was set out by Etherton C in *Kennedy v Kennedy*, at [36], as follows:

> "36. The principles applicable to rescission of a non-contractual voluntary disposition for mistake were comprehensively set out in the judgment of Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, with which the other members of the Supreme Court agreed. They may be summarised as follows
>
> > (1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, 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.
> >
> > (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
> >
> > (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That 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. 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.
> >
> > (4) 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. The court must consider in the round the existence of a distinct mistake, 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."

155. The principles in *Pitt v Holt* were also set out by Morgan J in *Van der Merwe*, at [26] (the paragraph references are to *Pitt v Holt*):

> "(1) a donor can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift: para 101 quoting *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400
>
> (2) a mistake is to be distinguished from mere inadvertence or misprediction: para104;

(3) forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake: para 105;

(4) it does not matter that the mistake was due to carelessness on the part of the person making the voluntary disposition unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong: para 114;

(5) equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability: para 124;

(6) the evaluation of unconscionability is objective: para 125;

(7) the gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequences for the party making the mistaken disposition: para 126;

(8) the court needs to focus intensely on the facts of the particular case: para 126;"

156. A claim for rescission or rectification is not within the Limitation Act 1980, but it is subject to the equitable "doctrine of laches". The doctrine of laches applies to a party seeking relief "where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted". Lapse of time and delay are most material.

157. Rectification - unlike rescission - is not concerned with the consequences that flow from the remedy being granted. In *Pitt v Holt*, the court held, at [131], that:

> "131. …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."

158. If a court rectifies the terms in a contract, the contract would - once rectification has been granted - operate by reference to the "new" words, without the court needing to concern itself with the consequences. By contrast, in granting rescission, the court would be required not only to decide whether to grant rescission; but if it decided to grant rescission, on what terms it should be granted.

159. The case of *Lobler* concerned the issue of rectification and the effect of the equitable maxim (namely that equity looks on that as done which ought to be done) where restitution is sought. Mr Lobler had withdrawn £1,300,000 from a number of life insurance policies. He did not take tax advice before surrendering the policies, surrendered them in the wrong way and incurred an effective tax rate of 779% on the actual income generated by the policy (which was likely to bankrupt him). He had not understood that the withdrawal would be taxed as income under the Income Tax (Trading and Other Income) Act 2005, even though the amount withdrawn was less than the amount invested, so that there was no profit. He had failed to realise that had he surrendered sufficient individual policies, rather than withdrawing money evenly from each policy, there would have been no liability. HMRC then assessed Mr Lobler to tax.

160. The FtT (Judge Helier and Member Hussain) said, at [1], that this "remarkably unfair result" arose "as a result of a combination of prescriptive legislation and Mr Lobler's ill-advised actions. The FtT, nevertheless, held that:

"the jurisdiction given to this tribunal in a case such as this does not extend to making orders to overturn (or review) the administrative process of HMRC…The power to review HMRC's decision rests with the High Court (see e.g. paragraphs [39ff] *HMRC v Hok Ltd* [2012] UKUT 363 (TCC)."

161. Mr Lobler appealed to the UT. He argued that *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) ('*Hok*') had been wrongly decided, and that the FtT did have the power to determine whether the tax assessment, and resulting charge, were valid. The UT in *Lobler* (Proudman J) decided that *Hok* was correctly decided. At [47] to [50], Proudman J said this:

> "47. 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.
>
> 48. 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 11 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.
>
> 49. I am told that the cases in this context are all specific performance cases; equity treats a specifically enforceable contract to do a thing as if it were already done: see Walsh v. Lonsdale (1882) 21 Ch D 9 at 14, Oughtred at 227, Neville v. Wilson [1997] Ch 144 at 157.
> 50. One issue is therefore whether the same principle applies to rectification as it does to specific performance, although the FTT made no direct reference to specific performance. Mr Davey said that it does not, but without to my mind giving any convincing or principled reason as to why not. As specific performance is also a discretionary remedy I agree with Mr Firth that there is no relevant distinction between specific performance and rectification for present purposes."

162. The UT in *Lobler* considered that this was not, however, concerned with the doctrine of mistake because the party receiving the benefit of the mistake is not the life insurance provider, but a third party to the policy contract (HMRC). As shown above, the UT held that although the FtT did not, itself, have the power to order rectification, it could determine that rectification would be granted by a court that does have jurisdiction to grant it. It could then hold that Mr Lobler's tax position would follow as if such rectification had been granted.

163. Whilst *Lobler* is a decision of the UT, we are satisfied that *Lobler* is not relevant to the circumstances of this appeal as it was concerned with the issue of rectification, and not rescission.

164. The FtT in *Hymanson* extended the result in *Lobler*.

165. In *Hymanson* (Judge Phillip Gillett), the FtT was considering Mr Hymanson's appeal against a decision by HMRC to revoke a certificate of Fixed Protection, which they had previously issued to him. Reg 11 was relevant in *Hymanson*. Regulation 11 deals with the revocation of FP 2012 certificates. It, similarly, provides that HMRC may revoke a Fixed Protection certificate if they have "reason to believe" that a para. 14(4) (Schedule 18) event has occurred. A para. 14 event had occurred in the sense that there was a benefit accrual after 6 April 2012. The appellant's position in *Hymanson* was that 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. HMRC argued that the FtT was not the appropriate forum for consideration of "mistake-based" arguments.

166. The FtT decided that the payments were made by mistake because the appellant accidentally failed to stop a direct debit. In reliance on *Lobler*, the FtT found that HMRC's decision was unreasonable and the appeal was allowed, in accordance with reg. 12 of the FP 2012 Regulations. HMRC were then directed to issue a new certificate. HMRC appealed against that decision, but the appeal was discontinued when Mr Hymanson obtained an Order from the High Court.

167. The decision in *Hymanson* is a decision of the FtT and, accordingly, is not binding on us. As explained later, we have chosen not to follow its conclusion. In any event, we are satisfied that the evidence presently before us does not support a finding that rescission would be granted by the High Court, or a court of similar jurisdiction.

<u>*Rescission and the lack of entitlement point*</u>

168. In respect of rescission in the context of the Appellant's "lack of entitlement" ground, we find that we are in agreement with Ms Belgrano's submissions that:

(1) Any action on the grounds that Virgin had made a "mistake" in making the 5 May 2014 contribution would be for Virgin to bring and there is no evidence that Virgin would bring such an action. Virgin would need to establish that it had not made the payment through "mere ignorance or inadvertence" and that it did not deliberately run the risk, or must be taken to have run the risk, of being wrong. Virgin would also need to establish that any mistake was a "causative mistake" that was sufficiently grave as to make it unconscionable on the part of the donee to retain the property: *Kennedy v Kennedy*.

(2) Virgin's action would be subject to a limitation period for claims where "mistake" constitutes an essential element of the cause of action: *Test Claimants in the FII Group Litigation*, at [19].

(3) Virgin could have discovered any mistake as soon as the payment was made as the Appellant's argument is that Virgin only had to make a contribution if the Appellant had made a contribution of 6% of his salary between 1 December 2013 and 28 February 2014.

(4) Virgin would need to establish that there could be restitution of the payment, which is not supported by the evidence provided by the Appellant.

(5) On the basis of the documents provided by the Appellant, there is no evidence that Virgin made a mistake in making the payment that it did on 5 May 2014. Furthermore, Virgin was asked to agree to the contribution being reversed and decline to agree to a refund.

169. Accordingly, therefore, rescission would not, in any event, be granted on the evidence presently before us.

<u>*Rescission and the late payment point*</u>

170. The analysis on this ground would be that Virgin was obliged to make payment pursuant to its contract of employment with the Appellant, but Virgin made the payment later than it should have. In respect of rescission in the context of the Appellant's "late payment" ground, we are in agreement with Ms Belgrano's submissions that:

(1) Since the contribution would have been made pursuant to the Appellant's contractual agreement with Virgin, the contribution was supported by consideration and

the equitable remedy of rescission is not available. Standard Life also provided consideration in return for the contributions and the Appellant's rights under the SIPP were rendered more valuable as a result of Virgin's contribution.

(2) In *Van der Merwe*, at [30] to [31], Morgan J held that there is no equitable jurisdiction to order rescission if the effect of rescission (or a declaration that a transaction is void) would deprive a party of the benefit for which he gave consideration. This distinction was subsequently applied in *Fattal v Fattal* (supra).

171. Once again, rescission would not be granted on the evidence available.

172. These findings are based on a balanced appraisal of the evidence.

173. We are, nevertheless, satisfied that the FtT does not have the jurisdiction to grant the remedy of rescission, nor indeed does the FtT have jurisdiction to apply the tax legislation as if the High Court had ordered rescission. Only a court with equitable jurisdiction (i.e., the High Court) has the power to order rescission. Whether the High Court would order rescission was not a relevant consideration at the time when the Appellant's FP 2014 certificate was revoked as no such Order had been made and reg. 12 focuses on the situation as at the date of revocation. It follows that the FtT cannot treat the 5 May 2014 contribution as if it had been rescinded by the High Court since, until rescission is ordered by the High Court, it is open to the parties to the transaction to affirm that transaction.

174. Were it open to us to treat the contribution as if it were rescinded, it would be open to the Appellant to avoid tax consequences flowing from Virgin's payment despite the payment never being removed from the Appellant's Standard Life SIPP. We find that there is considerable force in Ms Belgrano's submission that such a result would be inconsistent with the purpose of the FP 2014 legislation. The legislation requires a practical meaning to be given to "*payment*", "*contribution...paid in respect of the individual under the arrangement by an employer...*", which tests whether there has been benefit accrual. Irrespective of any possibility of rescission, the 5 May 2014 payment by Virgin meets the statutory test and it remains in the Appellant's SIPP. Furthermore, Virgin has declined a refund.

175. Moreover, we accept that even if the payment could be rescinded, the payment will stand unless and until relief is granted. In the case of *In re Griffiths, dec'd* [2008] EWHC 118 (Ch); [2009] Ch 162, at [34], the court held that:

> "34. … If the exercise of the jurisdiction is discretionary (as Kay LJ undoubtedly said it was) it must follow that if as a matter of discretion relief is refused the impugned transaction will stand. If it stands it will have the effect it purports to have. I do not see how such a result is possible unless the impugned transaction is voidable rather than void ab initio."

176. Rescission has not been granted by the High Court in this appeal and we are satisfied that we should not proceed as if rescission had been granted. The FtT was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". It follows that its jurisdiction is wholly derived from statute.

177. As the UT held in *HMRC v Woodstream Europe Ltd* [2018] UKUT 398 (TCC) (Zacaroli J and Judge Thomas Scott), at [14]:

> "14…the Tribunal is a creature of statute law and its jurisdiction is circumscribed by that law."

178. The issue before us in this appeal is whether HMRC correctly revoked the Appellant's FP 2014 certificate in accordance with reg. 11 of the FP 2014 Regulations (and whether there

was a “protection-cessation” event under para. 1(3) of the FP 2014 Regulations). In this respect, the FtT’s jurisdiction is, exhaustively, set out in the FP 2014 Regulations.

CONCLUSION

179. We hold that:

(1) The contribution made by Virgin into the Appellant’s Standard Life SIPP was a contribution by the Appellant’s former employer and it was a “relevant contribution” within the meaning of para. 14(1)(b), Schedule 36, FA 2004.

(2) There was “benefit accrual” on, or after, 6 April 2014 and, thus, a para. 1(3) event.

(3) In accordance with reg. 11(a) of the FP 2014 Regulations, HMRC were entitled to revoke the Appellant’s FP 2014 certificate.

(4) Regulation 12(3) of the FP 2014 Regulations provides that it is sufficient that a para. 1(3) event has occurred. This seems to mean that, irrespective of the wider facts, HMRC’s decision in respect of the FP 2014 certificate cannot be challenged.

(5) Consequently, therefore, even if HMRC had not revoked the certificate, a para. 1(3) event occurred and the Appellant cannot rely on para. 1 of Schedule 22

(6) The FtT’s jurisdiction, this is determined by reference to the statutory language affording the FtT jurisdiction.

(7) The FtT does not have supervisory jurisdiction over HMRC.

(8) The FtT further does not have jurisdiction to grant rescission. That is for the High Court or the UT to grant.

180. Accordingly, therefore, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

181. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 17th OCTOBER 2024