



**TC06592**

**Appeal number: TC/2017/01833**

*INCOME TAX – registered pension scheme – unauthorised payments comprising loans from scheme to sponsoring employer company – scheme sanction charge on trustee of scheme – application for discharge of liability under s268 Finance Act 2004 refused by HMRC – whether scheme sanction charge ought to have been discharged – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PAUL CROSSFIELD**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ASHLEY GREENBANK**

**Sitting in public at Leeds on 15 May 2018**

**John Parkin of PKN Chartered Accountants for the Appellant**

**Georgina Hirsch, counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

## DECISION

### **Introduction**

1. This is an appeal by the appellant, Mr Paul Crossfield, against a decision of the respondents, the Commissioners of Her Majesty's Revenue and Customs ("HMRC"), contained in a letter dated 30 November 2015 not to discharge two scheme sanction charges made pursuant to s239 of the Finance Act 2004 ("FA 2004") in relation to unauthorised payments made from the Paul Crossfield Construction Pension Scheme (the "Scheme").

2. There are two scheme sanction charges in question: a scheme sanction charge of £30,000 in relation to an unauthorised payment of £75,000 made in the year ended 5 April 2012; and a scheme sanction charge of £18,440 in relation to unauthorised payments totalling £46,100 made in the year ended 5 April 2013.

### **The hearing and the evidence**

3. HMRC produced a bundle of documents for the hearing. I was also provided with two witness statements: a statement made by Mr Crossfield; and a statement made by Miss Rebecca Jane Smith, an officer of HMRC. Mr Crossfield and Miss Smith both gave evidence and were cross-examined on their statements.

### **The facts**

4. Mr Crossfield qualified as a quantity surveyor. He was employed by a company called Henry Boot in Sheffield until 2000.

5. In 2000, he went into business with his brother in the construction business, building mainly residential property.

6. Along with many businesses in the sector, the business encountered difficulties at the time of the financial crisis. The business had to lay off a number of workers, incurring material costs. It also suffered some significant awards in favour of employees at employment tribunals.

7. In 2010, Mr Crossfield set up his own company, Paul Crossfield Construction Limited (the "Company"), and went into business as a sub-contractor. The Company's principal client was Southdale Homes Limited ("Southdale"), a construction company which did a lot of work with Housing Associations in the area. Mr Crossfield had done work for Southdale while working with his brother. Most of work was timber construction – floors, roofs, doors, architraves, skirting boards and then fixtures and fittings.

8. At first business was good. However, after time, the Company began to suffer cash flow problems. These problems began with a development undertaken by Southdale at Bramley near Leeds. It was a large development of over 100 homes (a

mixture of houses, bungalows and apartments) which took over 2 years. The Company's contract was worth over £500,000.

9. Southdale were put under significant pressure regarding the timing of this project by the relevant Housing Association. As a result, various errors were made by Southdale in the sequencing of work on the site in an attempt to speed up progress. These included, for example, requiring timber architraves to be fitted at times when plaster had not dried. These errors in sequencing resulted in variations to the work required of the Company, increasing both the time involved and the cost.

10. The Company's costs increased materially as a result of these variations. It had to bear increased costs of its employees and sub-contractors. At the same time, the Company was experiencing some difficulties in obtaining payment from Southdale for variations to the original contract. This was all at a time when Mr Crossfield also needed funds to meet some of the awards made by the employment tribunal from the time when he was in business with his brother.

11. Around this time, Mr Crossfield saw an advert on-line from PensionPractitioner.com ("PPC") which suggested that owners of small businesses could use pension funds to make loans to their businesses.

12. Mr Crossfield had previously built up a pension fund worth approximately £200,000 with several third party providers.

13. Following advice from PPC, a new registered pension scheme was established (the Scheme) by a deed dated 16 June 2011. On 24 June 2011, the Company registered the Scheme with HMRC. The funds were transferred to the Scheme from the other pension funds that Mr Crossfield previously held.

14. PPC was the scheme practitioner for the Scheme. Mr Crossfield was the trustee and the only member of the Scheme. The Company was the sponsoring employer and scheme administrator of the Scheme from its inception until the Company was dissolved on 7 April 2014.

15. In cross-examination, Mr Crossfield acknowledged that he regarded the pension fund "as [his] own money" and that by using pension funds to fund cash flow "at least it would be [his] own money that was lost".

16. PPC then provided documentation for a loan of £80,000 to be made by the Scheme to the Company. This loan was referred to by the parties as "Loan 1" and I have used the same term in this decision notice.

17. The loan agreement for Loan 1 is dated 25 July 2011. However, funds were advanced under Loan 1 in the following tranches:

- (1) £17,750 on 15 July 2011;
- (2) £42,250 on 25 July 2011;
- (3) £20,000 on 1 August 2011.

18. The loan agreement and related documentation for Loan 1 were designed to meet the requirements for the loan to be treated as an “authorised employer loan” within s179 FA 2004.

19. At the time of the advances under Loan 1, the Company had an overdraft of £25,000 with National Westminster Bank plc (“NatWest”). The overdraft was secured by a charge over the Company’s assets. As part of the arrangement for Loan 1, it was intended that the overdraft would be reduced to £10,000 (using funds from Loan 1) and that the charge in favour of NatWest would be discharged and that a new floating charge would be granted by the Company in favour of the Scheme in order to secure the funds advanced under Loan 1.

20. The evidence as to whether all of the arrangements for the new floating charge were put into effect is not clear. I was provided with a copy of a letter from NatWest dated 29 July 2011 which confirmed that the charge in favour of NatWest had been removed. However, the NatWest debenture remained on the register at Companies House throughout this period (and is referred to in the later liquidator’s report).

21. I was also provided with a copy of a deed of floating charge entered into by the Company and the Scheme on 25 July 2011, which created a floating charge over the Company’s assets in favour of the Scheme. However, the floating charge was not registered at Companies House until 17 December 2011 and the particulars filed at Companies House by PPC record that the floating charge was not created until 13 December 2011. I infer from the evidence that the date on the particulars submitted to Companies House is not correct and that the floating charge was executed on 25 July 2011, but not registered at Companies House until 17 December 2011.

22. Mr Crossfield’s relationship with Southdale continued to deteriorate. Mr Crossfield was unable to speak to his usual contacts as the personnel at Southdale had changed. Southdale began to make only nominal payments for variations in contracts with any discussion on further payments being deferred.

23. On 6 September 2011, a further payment was made from the Scheme to the Company in the sum of £75,000. No loan agreement was drawn up in relation to this payment and the precise terms on which the advance was made are unclear. HMRC was prepared to accept that the payment should be treated as a loan and the parties referred to the payment as “Loan 2”. Once again, I have adopted their terminology in this decision notice.

24. Mr Crossfield said that his intention was that Loan 2 would be made on the same terms as Loan 1. However, none of the formalities was observed. Mr Crossfield did not engage PPC to assist with the documentation for Loan 2. He said that he regarded their fees as excessive. He also accepted that he did not refer to the documents for Loan 1 to identify any of the requirements which a loan would be required to meet in order to be treated as an “authorised employer loan” within the terms of the legislation (see below). No security arrangements were put in place for Loan 2. No assessment was made of the remaining assets of the Scheme. No payments of principal or interest have ever been made in relation to Loan 2.

25. Mr Crossfield maintained that he still believed that the Company would be in a position to repay the loans at the time at which Loan 2 was made.

26. The Company's cash flow continued to deteriorate. Mr Crossfield says he became more concerned when he arranged a meeting with head office staff at Southdale in early 2012. Once again, any agreement on payments for variations to the contract was deferred. However, even following that meeting, Mr Crossfield says that he was confident that the Company would ultimately be paid for the work that was being done. This belief was based on his previous experience of Southdale and his belief that Southdale had several large projects in the pipeline. Mr Crossfield maintained that it was only at a later stage that he became aware that Southdale was in serious difficulty and was in discussion to sell its business to another construction company before winding up its own business.

27. The Scheme made further payments in 2012 as follows:

- (1) £18,000 on 15 June 2012;
- (2) £3,600 on 19 June 2012;
- (3) £11,000 on 13 July 2012;
- (4) £3,000 on 20 July 2012;
- (5) £8,000 on 10 August 2012;
- (6) £2,500 on 7 September 2012.

28. The evidence suggests that these payments were made directly by the Scheme to creditors of the Company. HMRC has again accepted that these payments should be treated as loans made by the Scheme to the Company. The parties referred to these payments collectively as "Loan 3" and I have used the same term in this decision notice.

29. Once again, Mr Crossfield says that these payments were intended to be made on the same basis as Loan 1. But once again, none of the formalities was observed. There was no loan agreement; there were no security arrangements; no assessment was made of the adequacy of the remaining assets of the Scheme; and no payments of principal or interest have ever been made in relation to Loan 3.

30. Mr Crossfield said that, even at this time, he still believed that the Company would be paid by Southdale. The Company was owed in excess of £200,000 by Southdale, which was more than enough to repay the loans. He accepted that, with hindsight, that faith was misjudged, but, at the time, based on past experience with Southdale, he believed that the Company would be paid and so would be in a position to meet its obligations to the Scheme.

31. I am prepared to accept that this was Mr Crossfield's belief. Whether or not it was a reasonable belief for him to hold is another matter. There must have been serious doubts – particularly towards the end of this period, when the later payments were made under Loan 3 – as to whether or not this was the case. However, this is not an issue that I need to determine for the reasons that I give at [70] below.

31. The Company ceased trading later in September 2012.

32. The Company was put into creditors' voluntary liquidation on 12 October 2012. The liquidator's statement of affairs at the commencement of the liquidation dated 12 October 2012 shows that the Company had assets with a book value of only £27,000, of which only £6,750 was expected to be realizable. The statement refers to a debt of £80,000 to the Scheme (i.e. Loan 1) but does not refer to any amounts due in respect of Loan 2 or Loan 3. As I have noted at [20] above, a NatWest debenture of £10,330 is also referred to in the statement of affairs.

33. The final creditors' meeting was held on 3 January 2014. The liquidator's abstract of receipts and payments shows that only £4,076 was realized from the Company's assets. No amounts were repaid to the Scheme in respect of Loan 1 or to NatWest in respect of the debenture.

34. The Company was dissolved on 7 April 2014.

### **The background to these proceedings**

35. On behalf of the Scheme, PPC submitted an event report to HMRC on 31 January 2013, reporting an amount of £75,000 (i.e. Loan 2) as an unauthorised payment for the tax year ending 5 April 2012 on the basis that it exceeded 50% of the value of the pension fund.

36. On 14 January 2014 HMRC opened an inquiry for the year ending 5 April 2012, into the loans of £155,000 shown on the pension scheme return (i.e. Loan 1 and Loan 2). The inquiry identified Loan 1, Loan 2 and Loan 3 as unauthorised payments from the Scheme.

37. On 4 August 2014, HMRC wrote to Mr Crossfield setting out its view that the payments were unauthorised payments as they did not satisfy the conditions set out in the legislation to be treated as "authorised employer loans" and were subject to scheme sanction charges.

38. On 6 August 2014, HMRC issued two notices of assessment, raising scheme sanction charges of £62,000 for the year ending 5 April 2012 and £18,500 for the year ending 5 April 2013 pursuant to s239 FA2004.

39. On 29 August 2014, Mr Crossfield appealed the assessments. His grounds of appeal were set out in a letter dated 9 September 2014.

40. On 13 July 2015, HMRC (Miss Smith) wrote to Mr Crossfield confirming that the scheme sanction charges were due but that the assessment for the year ended 5 April 2013 should be £18,440 rather than £18,500. The letter offered Mr Crossfield an independent review of the decision.

41. On 12 August 2015, PKN Chartered Accountants ("PKN"), on behalf of Mr Crossfield, requested an independent review of the decision.

42. On 15 September 2015, the reviewing officer (Mr Ian Hughes) contacted Mr Parkin of PKN and suggested that an application might be made under s268 FA 2004 for the discharge of the scheme sanction charges.

5 43. On 29 September 2015, PKN made an application for the discharge of the scheme sanction charges under s268 FA 2004.

44. HMRC (Miss Smith) refused the application to discharge the scheme sanction charges in a letter dated 30 November 2015. The letter was received by Mr Crossfield and PKN on 17 December 2015.

10 45. PKN wrote to HMRC contesting this decision on 5 January 2016. At first, HMRC refused to accept that the appeal had been received within the 30 days allowed in the letter dated 30 November 2015. However, this objection was subsequently withdrawn.

15 46. There followed a series of correspondence between HMRC and PKN on behalf of Mr Crossfield. In a letter dated 12 August 2016, HMRC (Miss Smith) agreed to discharge the scheme sanction charges in respect of Loan 1 on the basis that Mr Crossfield reasonably believed that all paperwork had been correctly completed by PPC. However, Miss Smith refused to discharge the scheme sanction charges in relation to Loan 2 and Loan 3. This was on the grounds that no loan agreements had been produced and none of the conditions set out in s179 FA 2004 had been met.

20 47. On 8 September 2016, PKN wrote to HMRC (Miss Smith). In that letter, accepted that Loan 2 and Loan 3 were not “authorised employer loans” within s179 FA 2004 but requested that the scheme sanction charges should be discharged on the grounds that “it would not be conscionable” for HMRC to pursue the collection of the scheme sanction charges in this case.

25 48. Further correspondence followed. Mr Crossfield notified his appeal against the scheme sanction charges in relation to Loan 2 and Loan 3 on 27 February 2017.

### **The law**

49. Section 239 FA 2004 sets out the circumstances in which the scheme sanction charge can apply. For the relevant tax years, it provided so far as relevant:

30 **239 Scheme sanction charge**

(1) A charge to income tax, to be known as the scheme sanction charge, arises where in any tax year one or more scheme chargeable payments are made by a registered pension scheme.

35 (2) The person liable to the scheme sanction charge is the scheme administrator.

(3) ...

(4) A person liable to the scheme sanction charge is liable whether or not -

- (a) that person, and
  - (b) any other person who is liable to the scheme sanction charge,
- are resident, ordinarily resident or domiciled in the United Kingdom.

...

5 50. In broad terms, therefore, a scheme administrator may be liable to a charge to  
income tax, known as a “scheme sanction charge”, where a pension scheme makes a  
“scheme chargeable payment”. A “scheme chargeable payment” is defined in  
s241(1)(a) FA 2004 as “an unauthorised payment by the pension scheme, other than  
10 out various circumstances in which a payment may be exempt from being “scheme  
chargeable”, but none of them is relevant in this case.

15 51. The definition of “unauthorised payment” is found in s160(5) FA 2004. It  
includes both an “unauthorised member payment” (s160(2)) and an “unauthorised  
employer payment”. The relevant limb of the definition in the present case is that  
relating to unauthorised employer payments. These are defined in s160(4) as:

(4) In this Part “unauthorised employer payment” means —

- (a) a payment by a registered pension scheme that is an occupational  
pension scheme, to or in respect of a person who is or has been a  
sponsoring employer, which is not authorised by section 175, and
- 20 (b) anything which is to be treated as an unauthorised payment to a  
person who is or has been a sponsoring employer under section 181.

52. Sub-paragraph (a) of sub-section (4) is the relevant limb of the definition in this  
case.

25 53. Section 175(d) FA 2004 allows certain loans (“authorised employer loans”)  
made by a pension scheme to the sponsoring employer to be treated as authorised (and  
so prevents them from being treated as unauthorised payments). Section 179 and  
Schedule 30 FA 2004 contain the requirements for a loan by a pension scheme to a  
sponsoring employer to be treated as an “authorised employer loan”. It is not  
30 necessary to go into the detail of these requirements in this case, however, they  
include:

- (1) the amount of the loan must not exceed 50% of the market value of the  
assets of the scheme,
- (2) the loan must be secured by a charge of adequate value;
- (3) the terms of the loan must provide that: (i) the rate of interest is not less  
35 than a rate prescribed by HMRC, (ii) the loan repayment date is not more than 5  
years after the date on which the loan was made, and (iii) certain minimum  
repayments are made during the period of the loan.

40 54. Mr Crossfield accepts that neither Loan 2 nor Loan 3 met the requirements to be  
treated as an “authorised employer loan”. So Loan 2 and Loan 3 were “unauthorised  
employer payments” (within s160(4)), “unauthorised payments” (within s160(5)) and



“scheme chargeable payments” (within s241(1)(a) FA 2004). As scheme chargeable payments, Loan 2 and Loan 3 gave rise to scheme sanction charges under s239 FA 2004.

55. The scheme sanction charge is levied at a rate of 40% of the relevant scheme chargeable payment (s240 FA 2004). As I have mentioned above, the scheme sanction charge is initially imposed on the scheme administrator (s239 FA 2004). However, in certain circumstances, the trustees of a pension scheme can become liable to the scheme sanction charge. In this respect, s272 FA 2004 provides:

**272 Trustees etc. liable as scheme administrator**

- 10 (1) This section applies in relation to a registered pension scheme if —
- (a) there is no scheme administrator of the pension scheme and no-one who remains subject to the liabilities of the scheme administrator by virtue of section 271(4) (continuation of liability where no scheme administrator),
  - 15 (b) the person who is, or all the persons who are, the scheme administrator of the pension scheme or remain so subject cannot be traced, or
  - (c) the person who is, or all the persons who are, the scheme administrator of the pension scheme or remain so subject are in serious default.
- 20 (2) Any person who assumes liability by reason of this section applying in relation to the pension scheme —
- (a) is liable to pay any tax (and any interest on tax) due from the scheme administrator of the pension scheme by virtue of this Part, and
  - 25 (b) is responsible for the discharge of all other obligations imposed on the scheme administrator of the pension scheme by or under this Part.
- (3) In subsection (2) —
- (a) the references in paragraph (a) to tax, and interest on tax, include any that has become due before this section applied in relation to the pension scheme and remains unpaid, and
  - 30 (b) the reference in paragraph (b) to obligations includes any that have become due before this section applied in relation to the pension scheme and remain unsatisfied, other than any liability to pay a penalty which has become due before this section so applied.
- 35 (4) The following heads specify the persons who assume liability by reason of this section applying in relation to the pension scheme; but if—
- (a) a person assumes, or persons assume, liability by virtue of being specified under one head, and
  - 40 (b) that person, or any of those persons, can be traced and is not in default,
- no-one assumes liability by virtue of being specified under a later head.

Head 1

If there are one or more trustees of the pension scheme who are resident in the United Kingdom, that trustee or each of those trustees.

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Head 2

If there are one or more persons who control the management of the pension scheme, that person or each of those persons.

10

Head 3

If alive or still in existence, the person, or any of the persons, who established the pension scheme and any person by whom that person, or any of those persons, has been directly or indirectly succeeded in relation to the provision of benefits under the pension scheme.

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Head 4

If the pension scheme is an occupational pension scheme, any sponsoring employer.

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Head 5

If there are one or more trustees of the pension scheme who are not resident in the United Kingdom, that trustee or each of those trustees.

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(5) Where a person assumes liability by reason of this section applying in relation to the pension scheme, the Inland Revenue must, as soon as is reasonably practicable, notify the person of that fact; but failure to do so does not affect the person's liability.

(6) For the purposes of this section a person is in default if the person

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(a) has failed to pay all or any of the tax (or interest on tax) due from the person by virtue of this Part, or

(b) has failed to discharge any other obligation imposed on the person by or under this Part,

and a person in default is in serious default if the Inland Revenue considers the failure to be of a serious nature.

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56. Mr Crossfield accepts that, as the scheme administrator, the Company, has been dissolved, he is potentially liable to the scheme sanction charge as the trustee of the Scheme under Head 1 in s272(4) FA 2004.

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57. In certain circumstances, a person who is liable to a scheme sanction charge can apply to HMRC for the discharge of his or her liability to the charge. Section 268 FA 2004 provides, so far as relevant, as follows:

**268 Unauthorised payments surcharge and scheme sanction charge**

(1) This section applies where—

(a) ..., or

5 (b) the scheme administrator of a registered pension scheme is liable to the scheme sanction charge in respect of a scheme chargeable payment.

(2) ...

(3) ...

(4) ...

10 (5) The scheme administrator may apply to the Inland Revenue for the discharge of the scheme administrator's liability to the scheme sanction charge in respect of a scheme chargeable payment on the ground mentioned in subsection (6) or (7).

15 (6) ...In the case of a scheme chargeable payment which is treated as being an unauthorised member payment by section 172, 172A, 172B, 172C or 172D, the ground is that, in all the circumstances of the case, it would not be just and reasonable for the scheme administrator to be liable to the scheme sanction charge.

(7) In any other case, the ground is that —

20 (a) the scheme administrator reasonably believed that the unauthorised payment was not a scheme chargeable payment, and

(b) in all the circumstances of the case, it would not be just and reasonable for the scheme administrator to be liable to the scheme sanction charge in respect of the unauthorised payment.

25 (8) On receiving an application under subsection (5), the Inland Revenue must decide whether to discharge the scheme administrator's liability to the scheme sanction charge in respect of the unauthorised payment.

30 (9) The Inland Revenue must notify the applicant of the decision on an application under this section.

(10) ...

58. This is not a case of a scheme chargeable payment which is treated as being an unauthorised member payment under any of the provisions referred to in s268(6). So the relevant ground is that set out in sub-section (7) of s268 FA 2004.

35 59. If HMRC decides to refuse an application for discharge of a scheme sanction charge under s268 FA 2004, s269 FA 2004 provides that the person who is liable to a scheme sanction charge may appeal to the Tribunal. Section 269 provides, so far as relevant, as follows:

**269 Appeal against decision on discharge of liability**

40 (1) This section applies where the Inland Revenue—

- (a) decides to refuse an application under... section 268 (discharge of liability to unauthorised payments surcharge or scheme sanction charge), or
- (b) ...
- 5 (2) The applicant may appeal against the decision.
- ...
- (5) An appeal under this section against a decision must be brought within the period of 30 days beginning with the day on which the applicant was given notification of the decision.
- 10 (6) On an appeal under subsection (1)(a) that is notified to the tribunal, the tribunal must consider whether the applicant's liability to ...the scheme sanction charge ought to have been discharged.
- (7) If the tribunal considers that the applicant's liability ought not to have been discharged, the tribunal must dismiss the appeal.
- 15 (8) If the tribunal considers that the applicant's liability ought to have been discharged, the tribunal must grant the application.
- ...

**The issue in this appeal**

60. As I mentioned above, Mr Crossfield accepts that Loan 2 and Loan 3 are  
20 scheme chargeable payments and gave rise to scheme sanction charges under s239 FA 2004. Furthermore, he does not dispute that he is potentially liable to the scheme sanction charges as the trustee of the Scheme. He does not seek to argue that the scheme sanction charges for Loan 2 and Loan 3 have been calculated incorrectly.

61. Mr Crossfield's appeal is against HMRC's decision to refuse his application for  
25 the discharge of his liability under s268 FA 2004. The question for the Tribunal is whether Mr Crossfield's liability to the scheme sanction charge ought to have been discharged on the grounds that (i) he reasonably believed that the unauthorised payment was not a scheme chargeable payment, and (ii) in all the circumstances of the case, it would not be just and reasonable for Mr Crossfield to be liable to the  
30 scheme sanction charge in respect of Loan 2 and Loan 3.

**The parties' submissions**

62. For Mr Crossfield, Mr Parkin makes the following points.

(1) Mr Crossfield has been a builder all of his working life. He set up in  
35 business on his own at a time of great difficulty in the building sector. His business suffered cashflow difficulties. He contacted PPC as a means of securing funds to meet those difficulties. PPC provided all the documentation for the loans.

(2) It is not credible that Mr Crossfield would have made the loans from the Scheme to the Company if he had thought that the Company would become

insolvent. At all material times, Mr Crossfield believed that the Company would be in a position to repay the loans.

5 (3) Even at the time at which Mr Crossfield met with Southdale in Spring 2012, he maintained a reasonable belief that the loans would be repaid. Whilst the discussions with Southdale did involve negotiation over payments for variations to the projects, this was nothing unusual in the construction sector and was not something which would have put Mr Crossfield reasonably on notice that Southdale would default on its debts due to the Company.

10 (4) Mr Crossfield is not a financially sophisticated person. He is 57 years old and has one GCSE and a qualification in building. The relevant pensions legislation is very complicated. Mr Crossfield could not reasonably be expected to understand all of the complexities of the legislation.

15 (5) The cases in which the First-tier Tribunal (“FTT”) has refused to exercise its discretion to mitigate the scheme sanction charge, all deal with circumstances in which the taxpayer involved has made an informed judgment in an attempt to obtain an unauthorised benefit from the scheme (see *O’Mara and O’Mara v. HMRC* [2017] UKFTT 091(TC), *AIM (Perth) Limited v. HMRC* [2017] UKFTT 0533(TC) or where a sophisticated financial person has breached the rules because of lack of adequate financial controls (*Willey v. HMRC* [2013] UKFTT 328 (TC)). This was not such a case.

20 (6) In other cases, the FTT had been prepared to mitigate the charge. These cases included cases where the FTT accepted that a trustee which had made payments to a company could not have been reasonably aware that the payments were connected with a scheme to frustrate the purposes of the legislation (*Sippchoice Limited v. HMRC* [2016] UKFTT 0464 (TC)) and cases where the FTT accepted that there had been no intention on the part of the taxpayer to benefit from a breach of the rules (*Browne v. HMRC* [2016] UKFTT 595 (TC)).

25 (7) This was just such a case. Mr Crossfield may have been foolish. However, he had no intention to frustrate the purpose of the legislation. He did not benefit from the breach of the rules. The FTT had exercised its discretion in favour of the taxpayers in *Sippchoice* and *Browne*, who were both sophisticated taxpayers. Mr Crossfield is not a sophisticated taxpayer and he should be given the benefit of the doubt in this case.

30 63. For HMRC, Ms Hirsch made the following points.

35 (1) Ms Hirsch referred me to the purposes of the scheme sanction charge as identified in *O’Mara* (at [166]), namely to recoup the tax relief that was given on the contribution of funds to the scheme rather than to punish the unauthorised payment.

40 (2) The appellant accepted that Loan 2 and Loan 3 were unauthorised payments. In such circumstances, the scheme sanction charges could only be discharged if the conditions in section 268(7) FA2004 were met.

5 (3) Mr Crossfield could not say that he reasonably believed that the payments were not unauthorised payments. Even if he did believe that the payments were not unauthorised payments that belief was not a reasonable one. Mr Crossfield had undertaken responsibilities as a trustee of the scheme. He was aware of the formalities that were put in place in relation to Loan 1. In relation to Loan 2 and Loan 3, he took no advice as to the requirements that needed to be fulfilled. He did not put in place a loan agreement in relation to the two loans. He did not ensure that the company put in place security for the loans. Mr Crossfield's approach may not have been malicious, but it was cavalier. His approach was reflected in the fact that the loans were not represented in the statement of affairs of the Company when it went into liquidation.

15 (4) Even if Mr Crossfield could show that he had a reasonable belief, in all the circumstances of the case, it would still be just and reasonable for Mr Crossfield to be liable to the scheme sanction charge in respect of Loan 2 and Loan 3. The purpose of the additional requirement in section 268(7) was to protect scheme administrators from the imposition of a scheme sanction charge due to circumstances beyond their control. That was not the present case. Mr Crossfield was in control of all of the payments.

20 (5) In any event, it would not be just and reasonable to discharge the scheme sanction charges. The circumstances in which a loan could be made by a registered pension scheme to a company were narrowly defined in the legislation to protect pension funds. They were specifically designed to protect against cases such as this where funds were used to support an ailing business. This was just such a case.

25 (6) It is not true to say that Mr Crossfield did not benefit from the payments. Although the payments were not made to Mr Crossfield directly, the funds were used to support a business in which he was the sole shareholder. In Mr Crossfield's own words, he regarded the funds in the pension scheme "as his own money" and accordingly paid no regard to the safeguards that were in place in the legislation designed to protect pension schemes.

30 (7) The case law authorities did not assist Mr Crossfield.

35 (a) As regards the test in s268(7)(a), in *Sippchoice*, the taxpayer made active enquiries to confirm that the payments were not unauthorised payments. Accordingly, the taxpayer's belief was regarded by the FTT as reasonable in the circumstances (see *Sippchoice* [87]). Mr Crossfield could not make the same argument in this case. In *Willey*, the FTT refused to discharge the scheme sanction charge even though there was little risk that the relevant loan in that case would not be repaid (see *Willey* [40]) and it was in fact repaid. The fact that the loan was likely to be repaid was irrelevant. It did not affect the question as to whether or not the taxpayer's belief that the loan was not a scheme chargeable payment was reasonable.

40 (b) As regards the test in s268(7)(b), in *Browne*, the funds were not used for another purpose. They were reinvested in another registered

pension scheme. As a result, in all of the circumstances, it was not just and reasonable to impose the scheme sanction charge.

### **Discussion**

5 64. The only issue before the Tribunal is whether the scheme sanction charges ought to be discharged.

65. Scheme sanction charges can only be discharged on the ground in section 268(7) FA 2004. There are two limbs to the ground. They must both be met. The first limb is that Mr Crossfield must show that he reasonably believed that the unauthorised payment was not a scheme chargeable payment (section 268(7)(a)). The  
10 second limb is that Mr Crossfield must show that, in all the circumstances of the case, it would not be just and reasonable for him to be liable to the scheme sanction charge in respect of the unauthorised payment (section 268(7)(b)).

#### *Reasonable belief that the payment was not a scheme chargeable payment*

15 66. As regards the first limb (that Mr Crossfield reasonably believed that the loan payments were not scheme chargeable payments), it is implicit in the wording of section 268(7)(a) that the relevant belief must be held at the time at which the relevant payment was made.

67. On this point, I agree with Ms Hirsch. Even if Mr Crossfield's honest belief was that Loan 2 and Loan 3 were not "unauthorised payments" that was not a  
20 reasonable belief for him to have held at the time.

68. Mr Crossfield made no enquiry into the requirements that needed to be met in order for a loan from the Scheme to the Company to be treated as an "authorised employer loan" for the purposes of the legislation. Even though he had the precedent of the payments made under Loan 1 in respect of which a loan agreement had been  
25 put in place on specific terms, and even though he was aware of the arrangements that had been entered into in order to put in place security for Loan 1, he took no steps to replicate those arrangements in relation to Loan 2 and Loan 3.

69. It is no answer to this point for Mr Crossfield to say that the legislation is complicated and he could not reasonably be expected to understand the legislation.  
30 When he was appointed as a trustee of the Scheme, he took on certain obligations and responsibilities. It was incumbent upon him to take reasonable steps to ensure that the relevant requirements for payments to be made from the Scheme were met. He took no such steps.

70. It is also no answer to the point that he believed that Loan 2 and Loan 3 would  
35 be repaid. The fact that he believed that the loans would be repaid is not relevant to the question of whether Mr Crossfield held a reasonable belief that the loans met the relevant requirements to be treated as "authorised employer loans" within the terms of the legislation. Even if he did believe that the loans would be repaid, it was not reasonable for Mr Crossfield to believe that the legislative requirements were met  
40 having taken no steps to ensure that that was the case.

*Not just and reasonable to impose the scheme sanction charge*

71. As I have mentioned above, the “ground” in s268(7) FA 2004 has two limbs. My decision on the first limb decides this appeal in favour of HMRC. However, as I have heard the evidence, and in case this appeal proceeds further, I have set out below my conclusion on the second limb.

72. The second limb is that, in all the circumstances, it would not be just and reasonable for Mr Crossfield to be liable to the scheme sanction charge (s268(7)(b)).

73. As an initial point, I accept Ms Hirsch’s submission that the second limb must impose some additional requirement before a scheme sanction charge can be discharged over and above the appellant’s demonstrating that he or she had a reasonable belief that the payment was not a scheme chargeable payment. The existence of the second limb presupposes that there must be cases in which, even though the appellant reasonably believed that the payment was not a scheme chargeable payment, it would be just and reasonable for the appellant to be liable for the charge.

74. Ms Hirsch invited me to conclude that the second limb was intended to limit the circumstances in which a scheme sanction charge ought to be discharged to those in which an unauthorised payment had been made due to factors which were outside the control of the appellant. I would not go so far. Whilst I accept that the appellant must be able to show a good reason why the scheme sanction charge ought not be imposed beyond a reasonable belief that the payment was not a scheme chargeable payment, the wording of s 268(7)(b) is broad, and, in my view, deliberately so, in order to allow the Tribunal to take into account all of the circumstances of the case. It would not be appropriate to limit the factors which the Tribunal may take into account by reference to a principle which is not justified by the plain words of the sub-section.

75. That having been said, I agree with Ms Hirsch that Mr Crossfield has not demonstrated that it would not be just and reasonable for him to be liable to the scheme sanction charge in this case.

76. In this respect, I take into account the purpose of the scheme sanction charge as identified in *O’Mara* (at [166]). That was a case concerning an unauthorised payment surcharge under s209 FA 2004, but the principle is the broadly the same. The purpose of the scheme sanction charge is, in crude terms, to recoup the tax relief that was given on the contribution of funds to a pension scheme in circumstances where funds within the scheme are used for a purpose other than that for which the tax relief was given (i.e. to fund pension benefits). The circumstances in which it is not just and reasonable to impose a scheme sanction charge in a case (such as this), where funds have been used for some other purpose, must therefore be limited.

77. The other factors that I have taken into account in reaching my conclusion are as follows.

(1) The circumstances in which a loan can be made from a registered pension scheme to a sponsoring employer are deliberately narrowly defined in the



legislation. In particular, the conditions which are set out in the legislation for a loan to be an “authorised employer loan” and so not an unauthorised payment are specifically designed to guard against the use of the funds in a registered pension scheme to fund ailing businesses. Notwithstanding Mr Crossfield’s stated belief that the Company would ultimately be in a position to repay Loan 2 and Loan 3, as I have described above, there must be serious doubts as to whether that was a reasonable belief for him to hold at least in relation to the later payments under Loan 3. At that stage, it must have been clear to Mr Crossfield that his business was in serious difficulty. The facts of Mr Crossfield’s case clearly fall within the circumstances that the legislation was seeking to address by incorporating these conditions.

(2) As I have described in relation to the first limb, Mr Crossfield showed a cavalier disregard for the requirements of the legislation. Those requirements are designed to protect funds in a registered pension scheme so that they are available to provide for pension benefits. In his own words, he treated the funds in the Scheme as “[his] own money”.

(3) Mr Crossfield says that he did not benefit personally from the making of the unauthorised payments. I acknowledge that he did not receive the funds directly. He did, however, benefit indirectly in that the funds were used to meet the costs and expenses of the business of the Company, a company in which he was the sole shareholder.

**Decision**

78. For the reasons that I have given above, in my view, Mr Crossfield’s liability to the scheme sanction charge ought not to have been discharged. In reaching this conclusion, it is not difficult to feel some sympathy for Mr Crossfield; he is a hard-working man and took the actions that he took in order to preserve his floundering business. However, that is not sufficient to justify the discharge of the scheme sanction charge under the terms of the legislation.

79. I dismiss this appeal.

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**Rights to appeal**

80. 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.

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**ASHLEY GREENBANK  
TRIBUNAL JUDGE**

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