



[2019] UKFTT 555 (TC)

**TC07349**

*INCOME TAX – unauthorised payments charge – Section 208 Finance Act 2004 – scheme funds invested at scheme member's direction in preference shares of finance company as part of a structure involving a loan from a third party lender to a pension scheme member – whether loan to scheme member was an unauthorised member payment under Section 160(2) Finance Act 2004 because it was a “payment...made...in connection with an investment...acquired using sums or assets held for the purposes of a registered pension scheme” – yes – unauthorised payments surcharge – Section 209 Finance Act 2004 – whether it was just and reasonable for the pension scheme member to be liable to the surcharge – yes - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2017/03686**

**BETWEEN**

**ALISON TURNER**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE TONY BEARE**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 21 August 2019**

**The Appellant represented herself**

**Ms Gill Clissold, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This decision relates to an appeal against an unauthorised payments charge and an unauthorised payments surcharge which have been assessed under Part 4 of the Finance Act 2004 (the “FA 2004”) and which amount, in aggregate, to £7,641.70, together with interest thereon. It is one of a number of cases involving the same “pension liberation” structure – that is to say, a structure designed to afford a pension scheme member effective access (in this case, by way of loan) to some part of his/her pension fund before the normal qualification age without incurring the income tax charges designed to deter such access. The questions before me are:

- (1) whether the structure in question was effective to achieve that end;
- (2) if it was not – with the result that an unauthorised payments charge arose – whether the Respondents were entitled to impose an unauthorised payments surcharge in addition to the unauthorised payments charge; and
- (3) if the Respondents were entitled to impose an unauthorised payments surcharge, whether the Appellant is entitled to rely on the provisions in the FA 2004 which allow a taxpayer to have an unauthorised payments surcharge discharged on the basis that it was not just and reasonable to impose the surcharge.

2. Before dealing with the matters in issue, there are three preliminary points which I should make.

3. The first is that, by my calculation, 55% of the loan amount mentioned below of £13,894.74 amounts to £7,642.10 and not £7,641.70. Indeed, the higher figure was the figure that appeared in a letter from the Respondents to the Appellant of 10 November 2014 which set out the Respondents’ view on the tax implications of the structure. For some reason, the lower figure appeared in the subsequent closure notice of 3 December 2015. However, as the difference between those two amounts is negligible and the aggregate amount of tax which is the subject of the appeal in this case is the lower of the two figures, I do not propose to spend any time in dealing with the difference.

4. The second is that I should note that there has been considerable confusion between the parties as to the precise subject matter of the appeal, when the appeal was made and whether the Appellant was entitled to appeal. However, it is now common ground that the subject matter of the appeal is as described in paragraph 1 above and that the Appellant is entitled to make the appeal because the appeal is in response to a closure notice of 3 December 2015 following an enquiry into the relevant tax year of assessment opened on 12 February 2014.

5. In addition, although the Appellant has failed to notify her appeal to both the Respondents and this Tribunal within the respective time limits required by the tax legislation, the Respondents have not taken issue with that and I am content to exercise my discretion to allow the appeal to proceed despite those failures.

6. The final point is that, regrettably, the Appellant failed before the hearing to read either the Respondents’ Statement of Case or the cases to which the Respondents’ Statement of Case referred. Had she done so, she would have realised that the structure which is the subject of the appeal in this case has already been the subject of lengthy and substantial judicial consideration in the cases to which I refer below. Given the content of those prior decisions, and in the interests of brevity, I propose in this decision simply to refer briefly to those decisions without going into inordinate detail. The precise reasoning may be found in the decisions themselves.

## **THE RELEVANT LEGISLATION**

### General

7. As stated in Section 149 of the FA 2004, Part 4 of that Act (comprising Sections 149 to 284) contains tax provisions in relation to pension schemes.

8. Section 150 (1) of the FA 2004 defines a “pension scheme” as follows:

“(1) In this Part “pension scheme” means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons-

- (a) on retirement,
- (b) on death,
- (c) on having reached a particular age,
- (d) on the onset of serious ill-health or incapacity, or
- (e) in similar circumstances.”

9. A pension scheme which meets the requirements for registration under Chapter 2 of Part 4 of the FA 2004 and is duly registered under those provisions is, pursuant to Section 150(2) of the FA 2004, a “registered pension scheme”.

10. A “registered pension scheme” is subject to the restrictions on payments out of the scheme contained in Chapter 3 of Part 4 of the FA 2004 (breach of which can result in tax charges being levied pursuant to Chapter 5 of Part 4 of the FA 2004) but the scheme and its members benefit from the tax reliefs and exemptions set out in Chapter 4 of Part 4 of the FA 2004.

### The unauthorised payments charge

11. Section 208 of the FA 2004 provides (so far as relevant) as follows:

“208 Unauthorised payments charge

(1) A charge to income tax, to be known as the unauthorised payments charge, arises where an unauthorised payment is made by a registered pension scheme.

(2) The person liable to the charge –

(a) in the case of an unauthorised member payment made to or in respect of a person before the person's death, is the person.....

(5) The rate of the charge is 40% in respect of the unauthorised payment....

(7) An unauthorised payment may also be subject to –

(a) the unauthorised payments surcharge under section 209...”

12. The question of what amounts to an “unauthorised payment” for the purposes of Section 208 of the FA 2004 is addressed in Sections 160 to 181 of the FA 2004.

13. Section 160 of the FA 2004 imposes restrictions on what payments can and cannot be made legitimately by a registered pension scheme.

14. Section 160(1) of the FA 2004 provides that:

“(1) The only payments which a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are those specified in section 164.”

15. Consequently, an “unauthorised member payment” is defined in Section 160(2) of the FA 2004 as:

“(a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164, and

(b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part.”

16. The concept of “a payment by a registered pension scheme” is the subject of elaboration in the legislation in two important respects.

17. First, the meaning of the word “payment” is set out in Section 161 of the FA 2004. This provides (so far as relevant) as follows:

“(2) “Payment” includes a transfer of assets and any other transfer of money's worth.

(3) Subsection (4) applies to a payment made or benefit provided under or in connection with an investment (including an insurance contract or annuity) acquired using sums or assets held for the purposes of a registered pension scheme.

(4) The payment or benefit is to be treated as made or provided from sums or assets held for the purposes of the pension scheme, even if the pension scheme has been wound up since the investment was acquired.....”

18. Secondly, as to when a payment is regarded as having been made “by” a registered pension scheme, Section 279(2) of the FA 2004 provides that:

“(2) In this Part references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme.”

29. As noted in paragraph 14 above, authorised member payments are set out in Section 164(1) of the FA 2004. This provides that:

“The only payments a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are—

(a) pensions permitted by the pension rules or the pension death benefit rules to be paid to or in respect of a member (see sections 165 and 167),

(b) lump sums permitted by the lump sum rule or the lump sum death benefit rule to be paid to or in respect of a member (see sections 166 and 168),

(c) recognised transfers (see section 169),

(d) scheme administration member payments (see section 171),

(e) payments pursuant to a pension sharing order or provision, and

(f) payments of a description prescribed by regulations made by the Board of Inland Revenue.”

19. The “scheme administration member payments” referred to in Section 164(1)(d) of the FA 2004 are those set out in Section 171 of the FA 2004. This provides as follows:

“(1) A “scheme administration member payment” is a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is made for the purposes of the administration or management of the pension scheme.

(2) But if a payment falling within subsection (1) exceeds the amount which might be expected to be paid to a person who was at arm's length, the excess is not a scheme administration member payment.

(3) Scheme administration member payments include in particular—

(a) the payment of wages, salaries or fees to persons engaged in administering the pension scheme, and

(b) payments made for the purchase of assets to be held for the purposes of the pension scheme.

(4) A loan to or in respect of a person who is or has been a member of the pension scheme is not a scheme administration member payment.”

#### The unauthorised payments surcharge

20. Section 209(1) of the FA 2004 provides for an “unauthorised payments surcharge”, at the rate of 15% of the relevant “surchargeable unauthorised payment”, on a “surchargeable unauthorised

payment”. Section 209(2) of the FA 2004 provides that a “surchargeable unauthorised member payment” is a “surchargeable unauthorised payment” for the purposes of Section 209(1) of the FA 2004.

21. A “surchargeable unauthorised member payment” is defined in Section 210 of the FA 2004. This provides that, “[if] the surcharge threshold is reached before the end of the period of 12 months beginning with the reference date, each unauthorised member payment made to or in respect of the person in the surcharge period is surchargeable” (see Section 210(2) of the FA 2004). For this purpose:

- (1) the first “reference date” is stated to be the date on which the pension scheme “first makes an unauthorised member payment to or in respect of the person” (see Section 210(4) of the FA 2004);
- (2) the “surcharge period” is “the period... beginning with the first reference date, and ...ending with the day on which the surcharge threshold is reached” (see Section 210(3) of the FA 2004);
- (3) the “surcharge threshold” is reached if the “unauthorised payments percentage” reaches 25% (see Section 210(7) of the FA 2004); and
- (4) the “unauthorised payments percentage” is “the aggregate of the percentages of the pension fund used up by each unauthorised member payment made by the pension scheme to or in respect of the person on or after the reference date” (see Section 210(8) of the FA 2004).

22. Pursuant to Section 268 of the FA 2004, a person liable to the unauthorised payment surcharge may apply to the Respondents for the discharge of liability to the surcharge on the ground that “in all the circumstances of the case, it would not be just and reasonable for [that] person to be liable to the unauthorised payments surcharge in respect of the [unauthorised member payment giving rise to the surcharge]” (see Sections 268(2) and 268(3) of the FA 2004). Where the Respondents refuse an application made to that effect, the applicant is entitled to appeal to the First-tier Tribunal against that decision (see Sections 269(1) and 269(2) of the FA 2004) and, on that appeal, the First-tier Tribunal must consider whether that person’s liability ought to have been discharged (see Sections 269(6) to 269(8) of the FA 2004).

### **THE RELEVANT FACTS**

23. The agreed facts are as follows:

- (1) on 19 July 2011, the Appellant transferred her pension funds from AEGON/Scottish Life to a new self-invested personal pension plan (a “SIPP”) with Corporate and Professional Pensions Limited (the “C&P SIPP”);
- (2) shortly thereafter, on 23 August 2011, the C&P SIPP invested those funds by subscribing for preference shares in a company called KJK Investments Limited (“KJK”);
- (3) the Appellant then entered into a loan agreement with another company called G Loans Limited (“G Loans”) pursuant to which, on 24 August 2011, she borrowed £13,894.74 from G Loans which, after the deduction of certain fees, meant that the sum of £12,477.47 – which was the amount of the loan, minus the initial loan arrangement fee mentioned in paragraph 23(5)(c) below and minus the one year of interest which was required to be paid in advance - was credited to her bank account at HSBC;
- (4) the amount of the loan was more than 25% - and in fact approximately 50% - of the funds which were held in the C&P SIPP;
- (5) the loan agreement provided (inter alia) that:
  - (a) the Appellant would be obliged to pay interest at an annual percentage rate of 10.8%;

(b) the Appellant would not be obliged to repay principal until she received the proceeds of payment out of her pension scheme and that the maximum amount that the Appellant would be obliged to repay was “the amount received, net of tax, from the borrower’s pension fund”;

(c) the Appellant would be obliged to pay an initial fee equal to 5% of the principal amount (£694.74) and default interest if she failed to “repay any monies due within the agreed term”;

(d) it was a condition of the loan that the Appellant would use her pension funds to repay the loan and that the Appellant would not withdraw her funds from the C&P SIPP without the prior written permission of G Loans unless the loan was repaid in full; and

(e) by signing the loan agreement, the Appellant confirmed that she agreed to be bound by the terms and conditions of the loan agreement and that she had “received a copy of the document entitled ‘Professional Advice July 2011’”.

24. In addition to the facts set out above, it was common ground that:

(1) the C&P SIPP met the requirements for registration pursuant to Section 153 of the FA 2004 and was at all relevant times a “registered pension scheme”; and

(2) if the loan from G Loans amounted to a “payment by [the C&P SIPP]” for the purposes of Section 160 of the FA 2004, it was made to the Appellant at a time when she was a member of the C&P SIPP.

25. It was also common ground that the steps described in paragraph 23 above were all part of the same structure which was designed to provide cash to the Appellant out of her pension funds. At the hearing, the Appellant confirmed that she had entered into the structure on the basis of a “cold calling” email from G Loans. That email suggested that it would be possible to liberate her pension funds immediately by receiving a loan from G Loans, which loan would not need to be repaid until she received her pension funds from the C&P SIPP in due course.

26. Upon receiving that email, the Appellant had contacted G Loans in order to express her interest in participating in the structure and had been referred by G Loans to a Mr Paul Elliott of IQ Business Services Group, who explained in an email of 13 June 2011 that his company would carry out all of the support and administrative work in connection with the proposal. After further exchanges of emails with Mr Elliott on 15, 22 and 23 June 2011, the Appellant sent her completed application documents in relation to the C&P SIPP to Mr Elliott on 8 July 2011.

27. The Appellant also said at the hearing that:

(1) in relation to the tax implications of the proposal, G Loans had referred the Appellant to a company called Optimum Solutions Limited (“Optimum”); and

(2) she had contacted Optimum and communicated by email with someone there called Mr Martin Westall, who had then sent her generic advice to the effect that, although the Respondents were challenging previous users of the structure, they were wrong in doing so. That generic advice is the ‘Professional Advice July 2011’ to which reference was made in the loan agreement as mentioned in paragraph 23(5)(e) above.

28. The Appellant said at the hearing that she would send to me and the Respondents a copy of the communications between her and Mr Westall. However, she did not do so by the deadline set for that purpose. It is therefore a little unclear whether the Appellant actually did have any personal interaction with Optimum, as she claims to have done, or whether she was simply sent (whether by G Loans or by IQ Business Services Group) the generic advice from Optimum to which reference was made in the loan agreement.

29. However, very little turns on whether the Appellant did or did not have any such personal interaction with Optimum. What is clear is that, regardless of the answer to that question:

- (1) the only advice which she received in connection with the tax implications of the structure was the generic advice from Optimum to which reference was made in the loan agreement;
- (2) that advice made it quite clear that the Respondents were challenging earlier users of the structure; and
- (3) that advice was provided to her by the adviser to G Loan, Optimum, which owed a duty of care to G Loans, the marketer of the structure, and was generic in nature (as opposed to being tailored to her specific circumstances).

30. The Appellant said at the hearing that, in relation to the tax implications of the proposal, she had also called the Respondents and spoken to someone called Mr Mark Davies, who had told her that the Respondents were already investigating transactions of the nature described above but, in her words at the hearing, had not told her that such transactions would definitely give rise to tax liabilities.

## **DISCUSSION**

### The unauthorised payments charge

31. It may be seen from the brief description of the facts set out above that the structure which has been implemented in this case is the same structure as the one which was the subject of the decision in *Mark Danvers v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKUT 0569 (TCC) ("*Danvers*"). That case also involved the transfer of funds in an existing pension scheme into a new SIPP with a view to obtaining a loan from G Loans, the subscription by the new SIPP for redeemable preference shares in KJK and a loan from G Loans to the appellant. The decision in *Danvers* is of course binding upon me and therefore, unless there are facts in this case which differ from the facts in *Danvers* in any meaningful way, so that this case can properly be distinguished from *Danvers*, I am bound to conclude that the unauthorised payments charge in this case has been properly imposed.

32. In *Danvers*, the Upper Tribunal held that:

- (1) the advance of the loan by G Loans to Mr Danvers was a "payment" (as defined in Section 161(2) of the FA 2004) because it was a "transfer of assets" – namely, cash;
- (2) that "payment" was "made...under or in connection with an investment...acquired using sums or assets held for the purposes of a registered pension scheme" (for the purposes of Section 161(3) of the FA 2004) because of the causal link between the investment by the relevant pension scheme in the preference shares in KJK and the making of the loan by G Loans;
- (3) therefore, the payment was "to be treated as made or provided from sums or assets held for the purposes of the pension scheme" (for the purposes of Section 161(4) of the FA 2004) and it was accordingly a payment made "by" the pension scheme for the purposes of Section 279(2) of the FA 2004;
- (4) the payment was made to Mr Danvers when he was a member of the relevant pension scheme and it was therefore a payment which needed to be authorised for the purposes of Section 160(1) of the FA 2004 if it was not to be an "unauthorised member payment" (as defined in Section 160(2) of the FA 2004);
- (5) the payment was not authorised for the purposes of Section 160(1) of the FA 2004 because it did not fall within any of the categories of payments set out in Section 164(1) of the FA 2004. In particular, the payment was a loan to the member of the relevant

pension scheme and was accordingly not a “scheme administration payment” falling within Section 164(1)(d) of the FA 2004 (see Section 171(4) of the FA 2004); and

(6) it followed that the loan was an “unauthorised member payment” for the purposes of Section 160(2) of the FA 2004 and an “unauthorised payment” for the purposes of Part 4 of the FA 2004 as a whole (pursuant to Section 160(5) of the FA 2004) and it therefore gave rise to an “unauthorised payments charge” pursuant to Section 208 of the FA 2004.

33. In *Danvers*, the terms of the loan agreement were more or less identical to the terms of the loan agreement in this case, with the exception of the fact that the loan agreement in *Danvers* expressly stated that “this loan has been granted due to the fact that the borrower has a total of approximately £35,000 invested in personal pensions with Windsor Life and Winterthur Life”, and that “as a condition of the loan being granted, the pension must be transferred within 4 weeks (if not already) of receiving the loan to a Self Invested Pension Plan (SIPP) with HD SIPP and after HD SIPP’s fees are paid the remaining monies must be used to buy ordinary shares and cumulative preference shares in KJK Investments Limited”, whereas there was no such express provision in the loan agreement in this case. Having said that, this was probably because, in this case, by the time that the loan agreement was executed, the Appellant had already transferred her pension funds to the C&P SIPP and the C&P SIPP had already invested in the preference shares in KJK. Even if that was not the case, it is quite clear both from the submissions which the Appellant has made during the course of the proceedings and at the hearing and from the other terms of the loan agreement in this case that the various steps that were taken were all inter-connected parts of a single structure and therefore that, in this case, there was a clear causal link, in the same way as there was in *Danvers*, between, on the one hand, the subscription for the preference shares in KJK by the relevant pension scheme and, on the other hand, the making of the loan by G Loans to the relevant taxpayer.

34. It follows from the above that, in my view, the facts in this case are not distinguishable from the facts in *Danvers* in any meaningful way and therefore that I am bound to find (against the Appellant) that the unauthorised payments charge in this case has been properly imposed .

#### The unauthorised payments surcharge

35. Given that the loan advanced by G Loans to the Appellant was an “unauthorised member payment” (as defined in Section 160(2) of the FA 2004), it is necessary to consider whether it was a “surchargeable unauthorised member payment” for the purposes of Section 209(2) of the FA 2004 and therefore a “surchargeable unauthorised payment” for the purposes of Section 209(1) of the FA 2004.

36. As noted in paragraph 21 above, a “surchargeable unauthorised member payment” is defined in Section 210 of the FA 2004. Applying the various definitions set out in that provision in the present case, it can be seen that the “first reference date” was the date on which the loan was made by G Loans to the Appellant and that, on that date, which was the first day of the “surcharge period”, the “unauthorised payments percentage” exceeded 25% (because the loan made by G Loans was more than 25% of the value of the Appellant’s pension scheme). It follows that the loan made by G Loans was, in addition to being an “unauthorised member payment”, a “surchargeable unauthorised member payment”. Accordingly, subject to the discussion which follows, the Appellant was properly subject to the unauthorised payments surcharge pursuant to Section 209 of the FA 2004.

37. As noted in paragraph 22 above, Section 268 of the FA 2004 allows a person who is liable to the unauthorised payments surcharge to apply to the Respondents for the discharge of that liability to the surcharge on the ground that “in all the circumstances of the case it would not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment”. Upon receipt of any such application, the Respondents must decide whether or not to discharge the relevant surcharge on that ground and, if they decide that they do not agree to do so, that decision is subject to appeal to the First-tier Tribunal, which has full appellate



jurisdiction in the matter (see Sections 269(1), 269(2), 269(6), 269(7) and 269(8) of the FA 2004).

38. In this case, it would be generous in the extreme to conclude that, on the basis of the correspondence which has passed between the Appellant and the Respondents in this case:

- (1) the Appellant has made an application under Section 268 of the FA 2004 for the surcharge to be discharged on the ground described above;
- (2) that application has been refused by the Respondents; and
- (3) the Appellant has appealed against that refusal to the First-tier Tribunal pursuant to Section 269 of the FA 2004.

So, on that basis alone, I do not think that the unauthorised payments surcharge in this case can be disturbed on the basis of the just and reasonable test in Section 268 of the FA 2004.

39. Nevertheless, for completeness, I would add that, even if the Appellant's explanation of how she came to participate in the structure and request to the Respondents for clemency, the manner in which the Respondents have dealt with that, and the Appellant's approach to this appeal could conceivably be construed as satisfying the language in Sections 268 and 269 of the FA 2004 and therefore requiring me to make a decision as to whether the surcharge in this case is just and reasonable, I agree with the Respondents that this is not a case where it would be just and reasonable for the surcharge to be discharged.

40. Thus, to the extent that it might properly be said that the Appellant has made an application under Section 268 of the FA 2004 for relief from the unauthorised payments surcharge on the ground that, in all the circumstances of this case, it would not be just and reasonable for the surcharge to be imposed, that that application has been refused by the Respondents and that the Appellant has appealed against that refusal under Section 269 of the FA 2004, I hold that the surcharge in this case is just and reasonable.

41. I say this essentially for the same reasons as those which are set out in an earlier decision of the First-tier Tribunal in *Franklin v The Commissioners for Her Majesty's Revenue and Customs Commissioners* [2019] UKFTT 232 (TC). Like *Danvers*, that case related to precisely the same structure as the one which was implemented in this case. Whilst, unlike *Danvers*, the decision is technically not binding on me because it is a first instance decision, I agree with the approach adopted by Judge Connell in that case.

42. In brief, Judge Connell referred to the earlier decision of the First-tier Tribunal in *O'Mara v The Commissioners for Her Majesty's Revenue and Customs Commissioners* UKFTT 091 (TC) ("*O'Mara*") as setting out a number of principles to be applied in considering whether an unauthorised payments surcharge was just and reasonable. That involved taking into account the fact that the purpose of the pension scheme rules in relation to unauthorised payments was to ensure that, because of the tax advantages which were associated with making contributions to a pension scheme and with the accretion of income within a pension scheme, the relevant member of the pension scheme should not be able to gain access to his or her pension funds prematurely without a clawback to reflect the value of the tax benefits previously enjoyed. In effect, the purpose of the surcharge was primarily to recoup those tax advantages and not to punish the taxpayer for allowing the circumstances in which the unauthorised payment was made to arise. Thus, even if the appellant in that case had taken independent advice (which was specific to her) to the effect that the structure in question would not give rise to an unauthorised payment, the surcharge would still have been just and reasonable.

43. Moreover, in that case, as in the case of this appeal:

- (1) the taxpayer in question had not sought independent advice in relation to the efficacy of the structure or done any due diligence of her own. Instead, she had relied on a generic view provided by Optimum, the advisers to G Loans; and

(2) that view had made it clear that the Respondents did not share the view expressed by Optimum and had in fact begun to raise enquiries in relation to earlier users of the structure.

44. To the above, I would add that the Appellant in this case said that she had called the Respondents to enquire about the structure before participating in it and had been told the same thing as she had been told by Optimum – namely, that the Respondents were seeking to challenge previous users of structures like the one involved in the present case.

45. In the light of the above information, I think that a reasonable person should have known that entering into the structure in question carried a considerable risk and that she should not participate in it.

46. Finally, because the issue has been raised in relation to earlier cases on the unauthorised payments surcharge, I should say that I agree with the reasoning adopted by the First-tier Tribunal in *O'Mara* at paragraphs [154] et seq., referring to an earlier First-tier Tribunal decision in *Stephen Willey v The Commissioners for Her Majesty's Revenue and Customs [2013] UKFTT 328 (TC)* at paragraphs [56] et seq., that the unauthorised payments surcharge regime is not disproportionate and is within the wide margin of appreciation enjoyed by Parliament for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights. Accordingly, there is in my view no basis for disapplying it in this case on the grounds that it is disproportionate or confiscatory in nature.

47. For the reasons set out above, even if the Appellant could be seen as having made an appeal to the First-tier Tribunal under Section 269 of the FA 2004, I consider that it would not be just and reasonable for the unauthorised payments surcharge in this case to be discharged.

## **CONCLUSION**

48. For the reasons set out above, I consider that both the unauthorised payments charge and the unauthorised payments surcharge have been properly imposed in this case and that the latter should not be discharged on the ground that it was not just and reasonable for it to be imposed. I therefore dismiss this appeal.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

49. 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.

**TONY BEARE  
TRIBUNAL JUDGE**

**RELEASE DATE: 30 AUGUST 2019**