

[2019 UKFTT 641 (TC)]



TC07417

Appeal number: TC/2018/05971

INCOME TAX – Registered Pension Scheme - Part 4 Finance Act 2004 - Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ELIZABETH HUGHES

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS SUSAN STOTT FCA CTA**

**Sitting in public at Stoke-on-Trent Combined Court, Bethesda Street, Hanley,
Stoke-on-Trent ST1 3BP on 10 September 2019**

The Appellant appeared in person, assisted by Mr Steven Trigg

**Miss Moira Browne, a Presenting Officer and Litigator of the High Value Team,
HM Revenue and Customs' Solicitor's Office, for the Respondents**

DECISION

1. This is our decision in relation to Miss Hughes' Appeal, made by way of a Notice of Appeal dated 16 September 2018, against the conclusions and amendments in a Closure Notice issued under section 28A of the Taxes Management Act 1970 on 2 May 2018 (and upheld at departmental review on 17 August 2018).

2. The following facts are not in dispute:

(1) The relevant year is the year ended 5 April 2013;

(2) Miss Hughes was not in the self-assessment regime for that year, during that year, and did not file an in-time self-assessment return for that year;

(3) On 22 December 2015, HMRC wrote to Miss Hughes requesting that she file a tax return;

(4) Miss Hughes filed a return on 25 May 2016. That return contained no taxable income or gains, but said:

"I believe that I took equity from my flat of 10,000 in approx 2012/13. I was using a financial adviser at the time. However I recently received correspondence from a loan company, Umbrella Loans (previously Blu Loans) informing me that I owe them 10,000 plus interest as this was a loan using my pension as collateral."

(5) On 8 December 2016, HMRC opened an (in-time) enquiry into Miss Hughes' tax return under section 9A of the Taxes Management Act 1970;

(6) On 1 March 2018, HMRC wrote to Miss Hughes referring to a £10,000 loan received by her on 24 October 2012, and saying (but without any further detail) "*Information we hold suggests that the payment was made in connection with investments made by the scheme*" and that therefore HMRC was proposing to treat that payment as an unauthorised member payment. At this point in our decision we simply note the bald way in which HMRC expressed its conclusion. The generic reference to 'information' does not set out the nature of that information, its source, provenance, and why HMRC considered that information (whatever it was) to be reliable. Nor does that letter seek to draw the connection, in any way, between the loan taken by Miss Hughes and any dealings with her pension;

(7) On 29 March 2018, Miss Hughes responded and said: "... no loan was ever taken from my pension. I disagree and dispute with your unjustified assumptions that a loan was ever taken out from my pension fund and these are two separate transactions ... you haven't given me any proof or ... evidence that the ... loan came from my pension fund";

(8) That enquiry concluded by way of a closure notice on 2 May 2018. HMRC concluded that the £10,000 loan received by Miss Hughes in y.e. 5.4.13 was an unauthorised member payment from her pension scheme, and as such was subject to income tax.

3. The sum in dispute is £5,500, which is made up as follows:

(1) £4,000, by way of tax at 40% on the sum of £10,000, said by HMRC to have been an unauthorised payment from a pension scheme, contrary to section 161 in Part IV of the Finance Act 2004 ('**the Charge**'); and

5 (2) £1,500, by way of a surcharge at 15% of £10,000, pursuant to section 268 of the Finance Act 2004 ('**the Surcharge**').

4. On 19 December 2018, Miss Hughes (prompted by HMRC) applied to HMRC in relation to the Surcharge. She wanted it to be removed. On 3 January 2019, HMRC notified Miss Hughes of its decision to refuse her application in relation to the Surcharge.

10 5. There was no formal appeal against HMRC's decision to refuse to discharge liability in relation to the Surcharge. This was because the Notice of Appeal antedated that decision. However, at the beginning of the hearing, the parties agreed that we could hear and determine both disputed aspects in one hearing. We considered that proposed course of action to be entirely sensible, and we adopted it. Accordingly, we
15 deal with both aspects - the Charge, and the Surcharge - in this decision.

6. Finally, we note HMRC's confirmation, in its letters of 9 April 2018 and 2 May 2018, that it did not intend to charge Miss Hughes any inaccuracy penalty (pursuant to Schedule 41 of the *Finance Act 2008*) in relation to her 2012/13 self-assessment return.

20 **The Evidence**

7. The following facts appear in the documents. These are not in dispute, and we so find:

8. As to the Loan:

25 (1) On 3 July 2012, Blu Funding Corporation Limited of Warrington ('**Blu**'), wrote to Miss Hughes to confirm that a loan of £10,000 over 360 months had been approved in principle;

(2) On 10 August 2012, Blu wrote to Miss Hughes and attached a copy of the proposed loan terms;

30 (3) On 24 October 2012, Blu wrote to Miss Hughes that the agreement had been signed and accepted by Blu. The repayment date was 24 October 2014 (i.e., a loan for 2 years, and not for 30 years);

(4) Blu transferred £10,000 to Miss Hughes on 24 October 2012.

9. As to the Pension:

35 (1) Miss Hughes was 36 in 2012. She had worked for some years as a ceramics artist at Moorcroft Pottery in Stoke, and had built up an occupational pension with them. It was administered by Scottish Life;

(2) On 2 July 2012, Fast Pensions ('**Fast**'), operating from an address on Trafalgar Square in London, wrote to Miss Hughes about a pension transfer;

(3) On 5 October 2012, her Scottish Life fund was worth £31,267.93. She requested Scottish Life to transfer the whole amount to Fast's FP1 Retirement Plan ('**the Plan**');

5 (4) On 5 October 2012, Scottish Life wrote that it would process a direct credit transaction for that amount;

(5) On 26 October 2012, Fast Pensions wrote to Miss Hughes to confirm that funds had been received into the Plan successfully, and that the Plan had started.

10. The directions in this appeal did not provide that Miss Hughes was to file any witness statement so as to stand as her evidence-in-chief.

10 11. Miss Hughes decided to give evidence. She answered some questions from the Tribunal, and was cross-examined.

12. We read a witness statement, dated 1 July 2019, from Mark Davies, an Officer of HMRC, who has worked as a Compliance Officer for the Pensions Compliance Team since 2012.

15 13. Officer Davies also gave oral evidence. His evidence was detailed and coherent.

14. There is no real conflict of oral evidence between HMRC and Miss Hughes.

The law of unauthorised payments

20 15. There is no dispute as to the relevant legislation, which is set out in Part 4 of the *Finance Act 2004* (FA 2004).

16. Section 150(1) FA 2004 defines “pension scheme” as follows:

“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:

25

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

17. A pension scheme which meets the requirements for registration and is registered is a “registered pension scheme”.

35 18. A registered pension scheme is subject to restrictions on what payments may be made out of the scheme.

19. Section 160 provides:

“(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.

40

(2) In this Part “unauthorised member payment” means—

5 (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.”

20. The meaning of payment is set out in section 161 FA 2004, which provides:

10 (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.

15 (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.

(5) A payment made by a registered pension scheme to or in respect of a person who—

20 (a) is connected with a person who is or has been a member or sponsoring employer (or was connected with such a person at the date of the person's death), and

(b) is not a person who is or has been a member or sponsoring employer, is to be treated as made in respect of the person who is or has been a member or sponsoring employer.

25 (6)

(7)

(8) For the purposes of this section whether a person is connected with another person is determined in accordance with section 993 of ITA 2007.”

30 21. Section 161(3) is particularly relevant. What must be shown is that the payment was "under or in connection with an investment ... acquired using sums or assets held for the purposes of a registered pension scheme."

22. Section 164 provides:

35 (1) 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—

40 (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),

45 (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.

5 23. In its definition of authorised payments, section 164 is inclusive and exhaustive. If a payment from a pension scheme does not fall within section 164, then it is an unauthorised member payment, and subject to charge.

24. Section 171 FA 2004 defines “scheme administration payments” for the purposes of section 164(1)(d), and section 171(4) specifically excludes a loan to a member from being a scheme administration payment.

25. Pursuant to section 208 FA 2004 unauthorised payments that are both unauthorised member payments and made in respect of a member before the member’s death are taxable on members and the income tax charge is 40% of the unauthorised payment.

15 26. In *Danvers v. Commissioners for Revenue and Customs* [2016] UKUT 0569 (TCC) the Upper Tribunal considered payments made from a pension scheme via a loan from a chain of investment vehicles, and whether those constituted unauthorised member payments chargeable to income tax within the proper meaning and effect of the legislation. This involved close consideration of section 161(3). The Tribunal took the view that the scope of the legislation was “*wider [than] merely catching payments made “from” investments acquired for the scheme.*” (Paragraph 51). At paragraph 52 the Upper Tribunal said:

25 “Had the provisions been intended only to catch payments made “from” investments made with the assets of the scheme then the draftsman could quite easily have said so by using the word “from” rather than “in connection with” in s 161(3). If the draftsman had done so, however, then the word “under” used in the same provision would have been superfluous. This indicates that there was a deliberate choice to use a term with wider meaning and the term “in connection with” was intended to be capable of catching payments that went wider than those which were simply made from an investment purchased with the funds of the scheme, such as a dividend or other distribution, or by the company in which the scheme had made such an investment, such as a loan made by such company to a member of the scheme. **It is therefore clear that the legislation does envisage that payments made to a member of a pension scheme by a third party in circumstances where there is a connection between that payment and an investment in the scheme can fall within the scope of the legislation.** The statutory provisions should not be construed by substituting different words from those used in the provision itself” (emphasis added by us).

40 27. Although those remarks are binding on us, they are explicitly couched as only offering guidance in general terms.

28. At Paragraph 65, the Upper Tribunal went on to consider how the legislation might be applied in circumstances similar to those in this case:

45 “An obvious situation where the necessary link would exist would be if a third party lender was funded entirely by a company in which a pension scheme was invested, loans being made by the investee company to the third party lender only in circumstances where the scheme member was to take up a loan from the third party

5 lender, the amount being lent by the investee company being identical to the amount on-lent to the scheme member. **In such a case, the investee company would be a mere conduit for the making of loans from the scheme to the member and would in our view quite clearly come within the anti-avoidance provisions of s 161 (3) and (4) FA 2004.**" (emphasis added by us).

The parties' positions

10 29. Although the Appellant accepted that she had received a loan, the nature of this appeal does differ from some others which the Tribunal has heard (for example, *Gary West v HMRC* - of which more below) in that Miss Hughes did not accept that her loan was connected to the transfer of her pension.

30. Her position (in common with some other appeals, such as *Gary West*) was that she was completely unaware of any connection between the two.

15 31. HMRC submitted that the loan to the Appellant was an unauthorised payment under the FA 2004.

32. At Paragraph 70 of its Skeleton Argument, HMRC says: "HMRC has been able to obtain sufficient records from Fast Pensions Ltd to be satisfied that the loan advance from Blu Funding had been sourced from Miss Hughes' pension fund".

20 33. However, Paragraph 72 of the Skeleton Argument is suggestive that the situation is not quite so clear-cut. There, HMRC say that the above proposition can be made good or reached along one of two routes; either

(1) *"the payment was a simple payment made to Miss Hughes via the bank accounts of FPI and Blu Funding"* (which we shall call 'the direct route'); or

25 (2) *"FPI paid the money to Blu Funding Corporation Ltd as an investment, and Miss Hughes was paid out from the investment"* (which we shall call 'the indirect route')

34. Hence, HMRC advances an "either/or" analysis.

Discussion

30 35. We accept Miss Hughes' oral evidence. It was given candidly, and honestly. Indeed, no challenge was made to her honesty. Nor was her oral evidence challenged on the footing either (i) that she knew that the Loan was connected to the Pension, or (ii) that she ought reasonably to have known, on the basis of the information and materials available to her at the time, that the Loan was connected to the Pension.

36. This approach was entirely consistent with the very clear stance which HMRC took before us, which was that liability is, in essence, strict, and does not involve any 'behavioural' element.

40 37. Miss Hughes' oral evidence, even under the inevitable pressure of cross-examination, and given the passage of time, was also entirely consistent with what she had said in her Notice of Appeal and in a number of letters written to HMRC.

38. We accept her evidence that she neither knew, nor could have known, that the Loan she received might have had anything to do with her Pension fund. This finding expresses no view as to whether there was such a connection within the sense discussed by the Upper Tribunal in *Danvers*. That is a matter to which we return below.

39. We accept Miss Hughes' evidence that, when she decided to change her pension arrangements, this was done to consolidate three pension pots which she then had (of which the fund built up at Moorcroft Pottery, where she had worked for 6 years as a painter, was the largest). We accept her evidence that she went to Mr Steve Cannon (of whom more below) since he was the man who had set up the occupational scheme at Moorcroft Pottery. We accept her evidence that, when she decided to change her pension arrangements, her purpose was not to release pension funds from her scheme before the age of 55. We accept that her purpose in taking out the Loan was different. It was to give her some financial support whilst undertaking the third year of doctoral studies in urban regeneration at Staffordshire University.

40. The only real point of dispute concerned the following expression, which appeared both on her self-assessment return for the year ending 5 April 2013 (filed on 25 May 2016) and in a hand-written letter which accompanied that return:

"If any of this situation is due to pension changes(?) I have been unaware of this but am now of the understanding that I do have a loan of £10,000 with Umbrella Loans that uses my pension as collateral in the event that I cannot repay it."

41. HMRC sought to place a great deal of weight on this passage, and in particular the word 'collateral'. These were relied upon as a species of admission by Miss Hughes that there was a connection between the Loan and the Pension. We asked Miss Hughes specifically about the use of the word 'collateral'. She said that she did not really know what it meant, and we believed her. She did not strike us as an individual who understood the meaning of 'collateral', other than as a word which sounded impressive when it came to writing letters to HMRC. There was a suggestion that the letter had not even been written or composed by her, but by Mr Trigg. But even if it had been, Miss Hughes adopted it as her own. We must also have in mind that this expression emerges only several years after the event in question, and in the obvious context of HMRC inquiring into Miss Hughes' tax affairs.

42. Miss Hughes also sought to rely on a letter, dated 3 June 2019, addressed 'To whom it may concern', from Steve Cannon of Quadrant Mortgage Services Limited in Crewe. There is no indication that Mr Cannon was aware that his letter would be placed before the Tribunal by way of evidence. It does not carry a Statement of Truth. Mr Cannon did not attend the hearing before us to give oral evidence, and we were told by Miss Hughes that it had been difficult to contact him. That was perhaps unfortunate given that Mr Cannon could well have had useful evidence to give. But, in any event, the overall position adopted by Mr Cannon in his short letter is to seek to distance himself (we are bound to say, not entirely convincingly) from the events in 2012. His account of the extent and nature of his involvement conflicts with the evidence given by Miss Hughes. Where there is such a conflict, we prefer Miss Hughes' evidence to his. In the circumstances, no weight is added to Miss Hughes' case by Mr Cannon's letter.

43. Miss Hughes also produced a short letter from Sara Moat, a director of Fast Pensions (albeit - at least in the version in the bundle - not on notepaper with the full company details) addressed to her personally and dated 29 January 2018. Criticisms were made by HMRC and Officer Davies of this letter, and especially what could be seen as its rather carefully crafted - even artful - wording:

"I can confirm that Fast Pensions Limited and all associated schemes have not made any direct payment to you from your pension funds. No unauthorised payment has been made and your pension fund is still fully intact."

44. Again, and as with Mr Cannon, it is fair to say that Mrs Moat could well have had useful evidence to give. But, be that as it may, neither party had sought to invite the Tribunal to exercise its powers under Rule 16 to summon any witness to answer questions or produce documents, and neither party sought an adjournment to make such an application. This means that we must do the best that we can on the basis of the evidence and materials which the parties have placed before us.

45. Despite the criticisms which are made by HMRC as to the wording of Sara Moat's letter, it is ostensibly consistent with the annual so-styled 'Pension Plan Statements' dated 31 January 2014 and 31 December 2015, provided by Miss Hughes to HMRC during its enquiry, which each show a fund transfer-in value of £30,267.93. That is to say, neither of these Pension Plan Statements show any diminution in the value of the fund of £10,000. They each - at first blush - seem to support the proposition that the pension fund was always intact and was always £30,000 or thereabouts.

46. However, we accept HMRC's submission that the weight which can be placed on the letter and the pension statements is limited. To our eyes, the statements are in an unusual (and even amateurish) format. They appear to some degree 'home-made'. That is only a matter of impression, and we heard no submissions as to whether the statements did in fact formally comply with any regulations appertaining to the provision of pension information. We accept HMRC's evidence that the statement of 'Fund Value' on the statements may not necessarily refer to cash, but rather could refer to the value of other assets (for example, the benefit of a loan, i.e., a credit balance) held by the fund. There is no breakdown of the composition of the fund value.

47. Alongside this, the detailed analysis of the holdings of FP1 contained in the fund's Report to Trustees dated 7 August 2013 indicates that the fund only held £18,985 at the bank.

48. A large part of Officer Davies' statement is evidence of system: he gives the general background to pension scheme enquiries, wider enquiries, and the 'nudge' letters which were sent to various persons (including Miss Hughes). But evidence of system alone will only take HMRC so far. This appeal is an appeal by this taxpayer, and so must focus intensely on the facts of her appeal.

49. We move to the contemporary third-party documentation.

50. Miss Hughes is known, for sure, to have received a £10,000 loan from Blu on 24 October 2012.

51. An 'institutional' connection (by way of example, commonality of shareholding or directorship, or some other corporate connection) between a creditor and the debtor's pension provider may be a relevant part of the evaluative exercise. However, this is still only part of the evaluative exercise. The existence of an institutional connection of such a kind may not, in and of itself, definitively answer the question as to whether a *particular payment* is to be treated as an unauthorised member payment.

52. It cannot be overlooked that the legislation is clear that the charge to tax attaches to a particular payment received by the taxpayer. As such, the actual provenance and movement of the money received by the taxpayer also needs to be examined with special care to see if those features throw any light on whether the payment is connected within the proper meaning and effect of the legislation or not.

53. We do not consider that anything in the immediately foregoing analysis is inconsistent with what the Upper Tribunal said in *Danvers*; nor indeed, with what other panels of this Tribunal have said as to the purpose of the legislation (for example, the remarks of Judge Cannan in *Willey v HMRC* [2013] UKFTT 328 (TC)).

54. Ultimately, it is wholly uncontroversial that this Tribunal is a fact-finding jurisdiction, and, as such, each appeal must be considered on its own facts, and how those facts answer - if at all - to the statutory language.

The direct route

55. As the very fact of HMRC's either/or analysis itself reveals, there are difficulties with the direct route analysis which undermine the integrity of a conclusion that the £10,000 advanced to Miss Hughes on 24 October 2012 was the money which had passed from Scottish Life to Fast, or represented that money so as to have been connected within the proper meaning and effect of the legislation.

56. HMRC's position, in relation to both the direct route, and the indirect route, is that the Scottish Life money did not pass directly to the trustees of the FP1 Fund - the FP Scheme Trustees Limited ('the Trustees'). Instead, HMRC's position is that it first went in the hands of AC Management and Administration Limited ('Acmal'), who were the Scheme administrators. On the basis of the above correspondence, that must have happened on a date between on or after 5 October 2012 and on or before 26 October 2012.

57. However, here the position becomes much less clear. We have not seen Acmal's bank statements. What is known is that on several dates in that period - 9, 15, 16, 24 and 26 October 2012 - there were substantial payments to the Trustees by Acmal as well as by 'Blu' (although the statement does not make clear the identity of this payer, and whether it was the same as the Blu referred to above).

58. The gist of the direct route is that the £10,000 received by Miss Hughes from Blu on 24 October 2012 must have been from the Fund - i.e., Blu was loaning Miss Hughes £10,000 which Blu in turn had received from the Fund.

59. However, this disregards the following important features which, in our view, have bearing on the analysis:

(1) The Fund was not only receiving money from Acmal, on a number of occasions, but also from at least one other entity, which we cannot identify since it is simply described as 'Blu';

5 (2) Whilst the date of the payment to Miss Hughes by Blu can be established with certainty - 24 October 2012 - the best evidence of the date of the receipt of the moneys by the Fund is 26 October 2012: i.e., on the face of it, the Loan antedates the receipt of the moneys by the Fund, albeit by two days. Or, put another way, the Loan was being made before the Pension moneys had arrived.

10 60. That is to say, money was being loaned to Miss Hughes which potentially was not referable to the moneys from Scottish Life via Acmal because those moneys cannot be shown to have been received by the Fund at the date of the payment to Miss Hughes.

15 61. Hence, this is not a case - unlike some others - where, for example, a single payment can be readily and unequivocally identified moving to the pension fund, from the pension fund to the creditor, and from the creditor to the taxpayer, establishing the requisite connection.

20 62. Officer Davies refers to a particular payment of £198,753.64 received by FP1 from Acmal on 15 October 2012 which payment he says he "believes" contained Miss Hughes' funds. But, as can readily be seen from the above description, there is no sure evidential basis for this belief. This engages in two, inter-related, ways: (i) there is no sufficiently sure evidential basis that the 15 October 2012 payment did in fact include Miss Hughes' money; (ii) there is no sufficiently sure evidential basis that any of the other October payments did not include Miss Hughes' money.

63. There is no sufficiently sure chain of evidence of fact which links:

25 (1) the £30,267 payment by Scottish Life, through Acmal Ltd, to the trustees of the Fund; with

(2) the £10,000 loan to Miss Hughes by Blu.

64. Therefore, what has sometimes been described as the 'tracing exercise' breaks down.

30 65. For the above reasons (and keeping firmly in mind that the burden of displacing the assessment rests on the Appellant) we are not satisfied that the direct route can be maintained and we are not satisfied that Miss Hughes received a payment from her pension scheme via a third party.

The indirect route

35 66. This leaves HMRC's secondary argument: the indirect route. The indirect route is the argument that Miss Hughes, instead of receiving a payment from her pension scheme 'simply via a third party (Blu Funding)' instead received the payment 'out of an investment made by FP1 Retirement Fund in Blu Funding'.

40 67. We are bound to observe that the very fact that HMRC itself considered it necessary and appropriate to put its case on two, alternative, footings is itself perhaps

indicative of difficulties with the direct route analysis, some of which we have identified above.

5 68. HMRC argues that "on analysis of the bank statements, Miss Hughes' pension fund is paid into the account of FP1 Trustees, a payment is then made to Blu Funding - the company with which she had a loan agreement - and then a payment was made to Miss Hughes."

69. There are a number of difficulties with this analysis.

70. The principal difficulty is that HMRC relies on bank statements alone, but those are only part of the totality of the evidence assembled and placed before us.

10 71. Other important evidence placed before us is the FP1 Retirement Fund Report to Trustees dated 7 August 2013. At the time, as its Balance Sheet shows, FP1 had a total fund of about £3.877m under management. Only a tiny fraction of this - about £19,000 (or less than 0.5%) - was in cash. The rest was invested by FP1 in a series of entities. None of those entities was 'Blu Funding Corporation' or 'Blu Funding Corporation Limited' (or 'Blu Personal Finance Ltd', as it is said to have become).

15 72. Fast Pension's FP1 Fund Income and Expenditure Statement is consistent with this. FP1 was not receiving any return on investment from Blu Funding Corporation. According to the Details of Scheme Investments, the Schemes investing in Blu Funding Corporation Ltd were DM1, EP1, and FP2. FP1 was not an investor in Blu Funding Corporation. On the basis of those documents, taken at face value, there was no investment link between Blu Funding and FP1.

73. Officer Davies acknowledges that Blu Funding Corporation is not one of the investments of the FP1 retirement plan. But, although he mentions FP2, but FP2 is not in issue here. Miss Hughes' pension was in FP1, and not FP2.

25 74. HMRC acknowledges - as it inevitably has to - that the bank statements and the other documents referred to above are inconsistent. That is to say, read together, the documents do not make complete sense. They cannot all be right. We also note that even the Insolvency Service (in its Press Release dated 30 May 2018, referring to the winding up in the public interest of Fast Pensions Ltd, FP Scheme Trustees Ltd, and Blu Debt Management Ltd - "Rogue pension and finance companies closed down after abusing millions of pounds", which was placed before us in evidence by HMRC) itself acknowledged that it had been impossible for Government investigators to determine the full extent of the companies' activities, the nature and value of the investments made, or the value of the members' pension funds.

35 75. When it comes to the indirect route, the documents are a miasma of confusion. They evoke more questions than give answers. The authors of those documents could well have had useful evidence to give as to them, and as to their manifest inconsistencies, but no such evidence was placed before us (whether that evidence had been gathered by HMRC or by some other agency). But in short, it is not our task, in the confines of this appeal, to seek to unravel a documentary tangle which defeated even the Insolvency Service's investigators.

76. It is even unclear - as HMRC accept - as to when Miss Hughes joined the fund. Two dates appear on the documents - 20 August 2012 and 10 October 2012. HMRC focuses its attention and analysis on the latter date, without any good explanation as to why the previous date should be excluded.

5 77. We cannot be satisfied, even on the balance of probabilities, that the £10,000
loaned to Miss Hughes by Blu - as a matter of fact *in this case*, and doing the best that
we can on the information and documents before us *in this case* - was connected to
any of the tranches of money advanced by the Trustees to Blu, within the meaning of
the legislation, and along either the direct or the indirect route postulated by HMRC.
10 We are not satisfied that Miss Hughes received a payment out of an investment made
by FP1 in Blu.

78. To avoid any doubt, we acknowledge that the decision of the Upper Tribunal in
Mark Danvers v HMRC [2016] UKUT 0569 (TC) binds us. Nothing we have found in
this case should be read as detracting from the analysis advanced by the Tribunal in
15 *Danvers*. However, and as the decision in *Danvers* (both at first instance, and on
appeal) each make clear, the scenario in that case was materially different from that
here. That much appears from the headnote: a scheme member was obliged as a
condition of receiving the loan to ensure that scheme assets remained invested in
finance company preference shares: see Para [61] of the FtT's decision and [61] of the
20 UT's decision. Unlike in this appeal, the necessary 'causal link' (see Para [64]) was
satisfactorily forged (so as to cover "an arrangement whereby a scheme member
receives a loan from a third party lender *and it is a condition of him receiving such a
loan that he directs the pension scheme to invest in a particular investment and
remain invested in that investment until the loan is repaid*": emphasis added by us).

25 79. The UT's consideration in *Danvers* of Ground 2 is clear that there was ample
evidence "from which the FTT could properly find that the investment (by the HD
SIPP in the KLK preference shares) was inextricably linked to the Loan".

80. The Upper Tribunal restated this conclusion (at Para [82]) where it remarked
that a loan without a condition that the pension scheme invest in any particular
30 investment would be one where, in its view, the causal link between the loan and the
investments of the registered pension scheme would be absent.

81. Finally, and although we have arrived at a different conclusion from HMRC, we
wish to emphasise that this should not be taken as any suggestion of bad faith or other
wrongdoing by Officer Davies or HMRC. We simply cannot be satisfied that the
35 documents show what he considered them to show when he made his assessment.

The Surcharge

82. FA 2004 Section 268 applies where a person is liable to the unauthorised
payments surcharge in respect of an unauthorised payment. The surcharge engages
40 where the unauthorised payment exceeds 25% of the pension. The surcharge is 15%
of the amount drawn down.

83. Sections 268(2) and (3) provide that a person liable to the unauthorised
payments surcharge may apply to HMRC for the discharge of that person's liability to
the unauthorised payments 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'.

84. Miss Hughes - at HMRC's prompting - applied for her surcharge to be discharged. That application was refused.

5 85. Our jurisdiction in relation to that decision is fully appellate and not supervisory. As the statutory wording makes clear, we can consider the matter, in all the circumstances, afresh.

86. There is little law as to the meaning of this provision. We were referred to decisions of the First-tier Tribunal in which appeals against the surcharge were dismissed. One such case (being three conjoined appeals) is *McCormack and others v HMRC* [2018] UKFTT 0620 (TC) (Judge John Brooks) which in turn refers to *O'Mara v HMRC* [2017] UKFTT 91 (TC) (Judge Rupert Jones and Mr Farooq). We have given those decisions due regard, but they do not bind us.

15 87. We have decided that we do not need to decide whether the Surcharge is a penalty (the effect being not only to engage the procedural safeguards of Article 6 of the ECHR, but to impose the burden on HMRC rather than the taxpayer).

88. Here, for the reasons already set out above, we have found that the payment was not an unauthorised payment. In and of itself, that finding means that the Surcharge must also, inevitably, fall away.

20 89. However, and even if our conclusion in relation to the unauthorised payment were wrong, we would nonetheless have found, in all the circumstances of the case, that it would not have been just and reasonable for Miss Hughes to have been liable to the Surcharge. We wish to set out a summary of our reasons for this.

25 90. In our view, the right approach is to consider the Surcharge separately from any underlying unauthorised payment. Parliament has separated the two, and so should we. It must be possible for someone to be liable to the 40% (in relation to which there is no relieving provision) but not to the 15% (in relation to which there is).

30 91. In relation to the Surcharge, the taxpayer's state of knowledge or belief has to be (at least potentially, and depending on the facts of the individual case) a relevant circumstance when it comes to the assessment of what is "just and reasonable". We would not have accepted HMRC's submission that section 268 is very limited, and engages only where there is "some extreme vulnerability, e.g. low mental age." We were not referred to any HMRC guidance which sets out such a high threshold. But the point here is otiose since want of capacity was not the basis upon which HMRC
35 refused to discharge the Surcharge.

92. Assessment of what is just and reasonable must be a fact-sensitive and multi-factorial assessment. Here, and even if it had been shown that the Pension and the Loan were connected, so that the Loan was an unauthorised member payment, we are nonetheless entirely satisfied, for the reasons already set out, that Miss Hughes neither
40 knew, nor (on the basis of the information and materials then available to her) ought reasonably to have known, that the Loan was related to the Pension. That finding in this case would remain even if the payment were an unauthorised one.

93. We accept Miss Hughes' evidence that, when she decided to change her pension arrangements, her purpose was not to release pension funds from her scheme before the age of 55. In its letter of 3 January 2019, HMRC asserts the contrary, and as a fact. That was wrong. HMRC was also wrong to have asserted, as a fact, that 'as a result of
5 changing your pension arrangements you were offered a payment/loan'. That appears to conclusively presume, but without any evidence, that this is what happened. It is not what happened.

94. That letter places reliance on the decision of the Tribunal (Judge Rupert Jones and Mr Farooq) in *O'Mara v HMRC* [2017] UKFTT 091 (TC), but materially
10 misreads and mis-states the discussion (at Para [160] and onwards). It ignores the Tribunal's finding there (at Para [163]) that the appellants "knowingly took part in a scheme whereby they accessed the value of (their) pensions prior to normal retirement age". That is not what happened here. Miss Hughes did not knowingly take part in any
15 *scheme*, in the sense that she did not knowingly take part in one transaction consisting of two elements, but took part in two transactions considered by her, reasonably, to have been unconnected.

95. The latter, albeit put in different words, is what Miss Hughes said in her letter of 2 February 2019:

20 "I did decide to change my pension arrangements in the tax year 2012/13 but this was certainly not for the purpose to transfer of any money before the age of 55. I have worked hard for this pension and had no intention or even knowledge that a pension scheme could be touched before the retirement age specified. I was totally under the impression that the money received was actually from a loan with Blu loans which I was going to use to continue funding for
25 completion of my PhD... There was never any knowledge that my loan had anything to do with my pension"

96. This was subject to an HMRC 'View of the Matter' on 6 February 2019, by Officer Davies, which restated his view that the Surcharge should stand. That letter reposes
30 extensively on the use of the word 'collateral', which we have already considered and discussed.

A Postscript

97. In the course of submissions, and in response to a question from the Tribunal,
35 Miss Browne made us aware of a decision of a different panel of the Tribunal. That case was *Gary West v HMRC* (TC/2017/05836) which heard by Judge Rupert Jones and Mr Charles Baker FCA in May 2019. That decision was not in the authorities bundle. We have obtained a copy subsequently. It deals with Fast Pensions, FP1, and Blu. Miss Browne represented HMRC, then as now, and the appeal concerned a
40 decision made by Officer Davies.

98. We were told - accurately - that this decision was not in the bundle because it was a summary decision, which allowed the appeal. However, we were not told that the decision - even though described as summary - is far from summary in content. On the contrary: it is 17 pages and 132 paragraphs long. It contains a detailed

discussion of the legislation and background. Much of this involves the same parties and entities as this appeal.

5 99. We acknowledge that summary decisions are not often included in the authorities bundles. They are generally not even reported on the Tribunal's own website. But a summary decision is still a decision. Even if it is not binding, it may still be of relevance or interest, especially if it happens to be as lengthy and detailed as *Gary West* was and/or it happens to deal with a strikingly similar (albeit not identical) factual matrix, with some (if not all) of the same participants.

10 100. In our view, taking account of the above, there were two good reasons why this decision should have been placed by HMRC before the Appellant and the Tribunal. The first is that the decision sets out, in a useful and accessible way, the issues with which an Appellant has to engage. That would potentially have been of use to the Appellant in this case in assisting her.

101. Secondly, as a "Postscript", the Tribunal in *Gary West* said:

15 "This was a very sad case. The Tribunal is satisfied that the Appellant and his wife were the victims of exploitative and untoward behaviour by the promoters and orchestrators of a pension liberation scheme. They were misled and taken advantage of by these individuals at a vulnerable point in their life when they faced difficult financial circumstances. They had no intention to misuse or
20 liberate the Appellant's pension. They did not know of the connection between the pension transfer and receipt of the loan at the relevant time. They did not benefit from receipt of the unauthorised payment. In fact, the very reverse. They have suffered serious financial consequences: the loss of the majority of the Appellant's pension, the repayment of a loan at twice the amount borrowed and a tax assessment from HMRC on top. They have also suffered the stress and
25 distress of HMRC's investigations, assessment and litigation. They made two complaints to the Pensions Ombudsman in respect of Fast Pensions, both of which were upheld on the basis they had been mistreated.

The Tribunal recognises that HMRC are required to enforce the law ...

30 Further, the Tribunal understands that HMRC must target their resources. Part of their duty is to address and investigate unlawful pension liberation schemes, both the members who benefit from them, but also their orchestrators and promoters – such as those referred to in *O'Mara and O'Mara v HMRC* [2017] UKFTT 091 (TC). The Tribunal very much hopes that HMRC prioritise their
35 actions according to factors such as the potential culpability of the individuals and companies and tax at risk. The Tribunal hopes that HMRC's priority is to investigate and assess the major beneficiaries, orchestrators and promoters of unlawful schemes rather than individuals in the position of the Appellant and his wife (those with low or no level of culpability, no knowledge of the link
40 between pension transfer and loan received, no benefit but rather financial loss caused by the unauthorised payment, a relatively low level of tax at risk and insecure finances)."

102. As matters unfolded before us, these remarks were echoed by the broad thrust of the evidence given by Miss Hughes, and the submissions made to us on her behalf.

Those submissions were made by Mr Trigg in the belief that Miss Hughes was a lone voice articulating concerns. But, as is clear from the above, that is far from the case.

5 103. Part of the Tribunal's task, in dealing with cases fairly and justly, includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings: Rule 2(2)(c).

10 104. HMRC's Press Release (to which we have already referred) says that 520 people were encouraged to transfer their pension savings from existing providers into schemes (including FP1) with Fast Pensions acting as the sponsoring employer. At least some of these cases have reached this Tribunal. We do not know whether there are others, but, on the numbers, there is a real likelihood that there are.

15 105. We limit ourselves to simply observing that there is at least potentially a risk of the appearance of unfairness when HMRC (which, as a party to most cases before the Tribunal, knows what decisions are made by the Tribunal, whether those are short, summary or full, and knows the reasons for them) does not alert the Tribunal and Appellants to other decisions made in cases which are strongly similar, involving the same law, and some of the same parties.

20 106. We would have been assisted in hearing and deciding this case had we been told that the Tribunal, even if in a summary decision, had grappled with some of the issues in the careful and comprehensive way that the Tribunal did in *Gary West* and had that decision been put before us. The Appellant might have been similarly assisted.

25 107. 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.

30 **JUDGE CHRISTOPHER MCNALL**
TRIBUNAL JUDGE

RELEASE DATE: 23 OCTOBER 2019

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