



[2019] UKFTT 0741 (TC)

**TC07499**

*Income Tax – Pension – unauthorised payments charge and surcharge – whether liable – yes  
- penalty for careless inaccuracy – whether careless – yes - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2016/05148**

**BETWEEN**

**ROBERT ROWLAND**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE DAVID BEDENHAM**

**Sitting in public at Centre City Tower, Birmingham on 2 September 2019**

**The Appellant appeared in person**

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

## DECISION

### INTRODUCTION

1. The Appellant appeals against HMRC's decision, as upheld on review, to amend his tax return for the year ended 5 April 2011 and thereby impose an additional tax charge of £50,367 by way of an unauthorised payments charge and an unauthorised payments surcharge under the provisions of the Finance Act 2004 ("FA 2004") concerning registered pension schemes.

2. The Appellant also appeals against HMRC's decision, as upheld on review, to issue him with a penalty in the sum of £7,555,26 pursuant to Schedule 24 to the Finance Act 2007 ("FA 2007").

3. In summary, HMRC's position is that a loan advanced to the Appellant by G Loans Ltd was a payment made in connection with an investment (specifically, an investment made into KJK Investments Ltd) using sums or assets held for the purposes of a registered pension scheme. HMRC further says that such a payment was unauthorised within the meaning of s160 FA 2004 such as to give rise to an unauthorised payments charge under s208 FA 2004 and an unauthorised payments surcharge under s268 FA 2004.

4. In relation to the Schedule 24 penalty, HMRC's Statement of Case and skeleton argument alleged that the Appellant was careless in completing his tax return giving rise to an inaccuracy, namely he did not record that he had made payments to a registered pension scheme where basic rate tax relief would be claimed by the pension provider. At the hearing, HMRC shifted its position and alleged that the careless inaccuracy relied on was the Appellant's failure to declare that he had received an unauthorised payment, namely the loan from G Loans.

5. I make clear that HMRC does not allege that the Appellant has acted dishonestly in any way.

6. In summary, the Appellant's position is that the loan advanced by G Loans was a commercial loan used for investing in his business. It was not an unauthorised payment or, if it was, it is not just and reasonable for the Appellant to be liable for an unauthorised payments charge or an unauthorised payments surcharge. Further, the Appellant relied on advice that he had received in relation to the arrangement. He was not, then, careless in any way so the penalty should be discharged.

7. I note at the outset that the facts of this appeal are very similar to the those considered by the Tribunal in *Mark Danvers v HMRC* [2016] UKFTT 0003 (TC) (an appeal against which decision was dismissed by the Upper Tribunal in *Danvers v HMRC* [2016] UKUT 569 (TC)).

### EVIDENCE AND FINDINGS OF FACT

8. The Appellant gave the following evidence:

- (1) he was born on February 1963;
- (2) in February 2005, he started his own business;
- (3) in early 2010, aged 47, he had no assets save for money held in a pension scheme arranged through St James's Place ("SJP"). He wanted to raised money to invest in his business;
- (4) he approached a bank and asked to borrow monies by way of personal loan. He offered as security the monies that he understood he would be able to draw down from his pension when he turned 50. The bank declined to make this loan;

(5) shortly thereafter, he approached his financial advisor at SJP and asked whether he could borrow money from his pension fund. The financial advisor informed him that this was not possible “as the scheme rules within a personal pension would not allow it”. The financial advisor also told him that he was no longer able to access monies from his pension at age 50 and, instead, would only be able to access these monies at 55;

(6) shortly thereafter, he searched on the internet for pension loans. He found IQ Business Services who said they were able to arrange loans against pension funds. He completed an online enquiry form and was subsequently contacted by a representative of IQ Business Services, Paul Elliot;

(7) Mr Elliot explained that IQ Business Services had successfully arranged loans for hundreds of other people. Mr Elliot said that his company of solicitors, barristers, accountants, tax experts and financial experts could provide expert advice. The Appellant stated that Mr Elliot told him:

“personal pension scheme rules do not allow for such loans...[but] if I moved my funds into a SIPP then G Loans would provide me a personal loan against the tax free cash element. [Mr Elliot] explained that my investment would need to move to an investment house that was on the lenders panel as the lender needed to ensure the funds were ring-fenced. KJK Investments was promoted to me. It was explained that KJK was an investment house that specialised in payday lender loans, which around that time interest rates for payday loans were exceeding 4000% pa...[Mr] Elliot convinced me to act quickly as he was concerned that the scheme rules could be changed at any time as had happened just before with everyone’s personal pension scheme. He also said that because of the potential significant return of my investment G Loans was prepared to lend me up to 50% of the total invested...I was assured by [Mr] Elliot that this has already worked for so many others and that everything was according to the scheme rules and totally legal.”

(8) he asked Mr Elliot for an illustration but Mr Elliot declined to provide one;

(9) he contacted his financial advisor and asked if he could provide advice on the SIPP arrangement proposed by Mr Elliot. The financial advisor said he could not advise because the SIPP was non-regulated;

(10) he was unable to find any professional advisor that was able to advise him on the arrangement proposed by Mr Elliot because “it was a specialist area”;

(11) “[In] February 2011, I entered into the agreement and completed the paperwork put forward by [Mr] Elliot, completed the paperwork he sent to open up a SIPP [with C&P], transferred my [entire] pension fund [totalling £172,000], purchased 172,000 shares [at a costs of £1 per share] with KJK Investments, and subsequently received a personal loan from G Loans”;

(12) by letter dated 31 October 2011, G Loans confirmed that all of the money the Appellant had invested in KJK Investments was still fully invested in KJK Investments and that he had not received any payment or loan connected in any way with the Appellant’s pension fund investment. Included with this letter was a document titled “My Thoughts on HMRC Enquiries into the ‘Pension Loan Scheme’” (authored by Martin Westall of Optimum Tax Solutions Limited). This letter was received after the Appellant had entered into the arrangement but before he had filed his tax return for the year ended 5 April 2011;

(13) in June 2015, KJK Investments and G Loans were wound up for misleading/misadvising their clients. An Insolvency Service investigation found that the

loans made by G Loans were inextricably linked to investments made into KJK Investments;

(14) the appointed insolvency practitioner has said that it is unlikely that the Appellant will recover any of the £172,000 invested in KJK Investments;

(15) he did not know that the investment made from his pension into KJK Investments was in any way connected with the personal loan received from G Loans. The loan he received from G Loans was similar to a “pension mortgage”;

(16) he did not know that KJK Investments were providing any funds to G Loans;

(17) the loan monies advanced to the Appellant by G Loans were used for various business expenses including employee wages and National Insurance contributions;

(18) the unsigned “loan agreement” contained in the bundle of documents is a copy of the loan agreement that the Appellant signed;

(19) the “opinion on Pension-Backed Loan Arrangements” (authored by Martin Westall of Optimum Tax Solutions Limited) contained in the hearing bundle was not something that the Appellant relied on in entering into the loan. He understood this advice to have been provided by Mr Westall to G loans. He only saw this document sometime after he had entered into the arrangement;

(20) the IQ Business Solutions “How does this work?” document contained in the bundle was not received by him until after he had entered into the arrangement; and

(21) in relation to the unauthorised payment surcharge, he did not specifically ask HMRC to agree to discharge the surcharge on the basis that it was not just and reasonable for him to be liable to it but he did say that the charges and penalty were unfair.

9. I found the Appellant to be a straightforward witness. Save in two respects, I accept the evidence that he gave (much of which was not challenged by HMRC in cross examination) and make corresponding findings of fact. I do not, however, accept that the Appellant did not know that the investment in KJK was “in any way connected” with the loan from G Loans. That there was a causal connection between the two was clear from the loan contract. Further, I do not accept that the Appellant could not have found a professional advisor who would have been competent and willing to provide advice on the arrangement proposed by IQ Business Services. There are many competent tax and pensions professionals and I do not accept that the Appellant could not have found one who was willing to provide him with appropriate advice.

10. There was no witness evidence filed on behalf of HMRC. HMRC relied on the documents in the hearing bundle. In particular:

(1) The loan agreement between the Appellant and G Loans, which recorded:

(a) the loan amount was £91,578.95 with an interest rate of 5.5% fixed for 1 year (following which interest was charged at 5% above the Bank of England base rate).

(b) An arrangement fee of £4,578.95 was payable at the outset by the Appellant as was the first year of interest (totalling £4,762.11) meaning that of the £91,578.95 loan advanced, the Appellant received £82,237.89.

(c) There were numerous “special conditions” including:

“7. This loan has been granted due to the fact that the borrower has a total of approximately £174,000 invested in personal pensions with C&P.

8. 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 C and P and after C and P's fees are paid the remaining monies must be used to buy ordinary shares and cumulative preference shares in KJK Investments Ltd. KJK Investments Ltd will then be liable for any fees subsequently due to C and P. If KJK Investments Ltd fails to pay any fees to C and P in respect of the borrower's SIPP, the loan agreement becomes unenforceable.

9. The borrower cannot disinvest monies from KJK Investments Ltd or transfer monies away from C and P without the written permission of G Loans Ltd or unless the loan is repaid in full.

If any dividends or other monies are paid by KJK Investments Ltd into the borrower's SIPP account, the lender can insist on where these monies are subsequently invested unless the loan is repaid in full.

10. If any of the above conditions are not met, the loan will become due to be repaid immediately and interest will immediately accrue at the default rate of 24% per annum."

(2) The IQ Business Solutions "How does this work" document which stated:

"Your existing pension fund is transferred into a SIPP...you invest part of your pension fund by purchasing Cumulative Preference Shares in a specific investment Company. This company's primary trading purpose is to lend money on a wholesale basis to other lending providers, such as those offering Bridging Finance or high-interest short term loans to customers. One of the lending providers they lend to is the Company which your personal loan will come from.

Once your investment has been made, you will be able to obtain your loan up to a maximum of 50% of the amount you have invested..."

A footnote to this document stated:

"Please note: IQ Business Services DO NOT offer any authorised financial advice to you as an individual and you will need to decide if this fits in with your existing arrangements and plans. We DO guide you fully from an administrative position through the process and the individual steps involved..."

(3) A letter to the Appellant from G Loans dated 31 October 2011 which stated:

"Some of our clients have recently received correspondence from Mark Davies at HMRC in connection with their loan from G Loans Ltd....You have categorically not 'received money out in the form of a loan'. You have not had any money out of your pension whatsoever. Your pension remains fully invested in KJK Investments Shares through the Corporate and Professional Pensions Ltd SIPP. G Loans Ltd is a completely unconnected company to KJK Investments Ltd...Before offering our loan product, G Loans Ltd took advice from Martin Westall of Optimum Tax Solutions Ltd, a Chartered Tax Advisor. We recently asked Martin to revise his opinion in light of the fact that

a small number of historical clients had been contacted by HMRC. I enclose a copy of the advice we received in July 2011...”

- (4) The Martin Westall advice referred to in the 31 October 2011 letter which stated:

“The ‘scheme’ in question refers to arrangement whereby a lending company provides an individual with a loan. At the same time, the individual agrees to transfer some or all of his personal pension funds to a new Self Invested Personal Pension. The SIPP subsequently decided to invest in the share capital of another lending company, which provides loans to other companies, including the lending company that provides the original loan to the pension holder. All loans referred to are on commercial terms...the loan is made by a third party and is merely in conjunction with a pension transfer.

HMRC have begun to raise tax enquiries into the personal tax returns of some of the individuals who have taken advantage of this arrangement...[and] in some instances, decided to levy an unauthorised payment charge...I cannot see from the HMRC correspondence that they have any basis upon which to levy a tax charge...Please note, this is my opinion and it may be that HMRC see this differently or come up with some other reasoning as to why a tax charge should be levied. However, I cannot at this stage see how a tax charge can arise.”

- (5) An Insolvency Service press release published 22 June 2015 recording:

“KJK Investments Ltd and G Loans Ltd...were wound up by the High Court for operating a misleading pension backed loan and investment scheme in which clients invested £11.9m.

The liquidation was ordered following an investigation by the Insolvency Service.

The investigation found that the companies operated what is commonly known as a ‘pension liberation’ scheme. Clients were encouraged to obtain a loan from Windermere-based G Loans Ltd on the condition that they used existing pension funds to purchase shares in the Liverpool-based KJK Investments Ltd.

Clients were led to believe that their investment in KJK Investments Ltd would increase in value by 6% each year and that these returns would be sufficient to enable the client to repay their loan from the proceeds of their pension upon retirement...

The loans made to clients by G Loans were typically in the region of 50% of the amount invested by the client in KJK Investments Ltd shares...”

- (6) HMRC’s review conclusion letter dated 25 August 2016 which set out HMRC’s position as follows:

- (a) “Section 208 Finance Act 2004 provides for a standalone charge of 40% of an unauthorised payment. Although the charge is made through self-assessment, the legislation does not provide for personal allowances, relief or different rates of charge. Consequently, I confirm the amount charged in the revenue amendment has been calculated correctly based on the full amount advanced [by way of loan from G Loans]: £91,578 @40% = £36.631,20”;

(b) “Section 209 Finance Act 2004 provides that the member will be charged a surcharge of 15% of an unauthorised payment that represents 25% or more of the member’s rights under the scheme (section 210 Finance Act 2004). The amount that you received from the Pension Scheme was more than 25% of your fund and again the surcharge has been applied and calculated correctly. £91,578 @ 15% = £13, 736.70”

(c) “There is legislation at Section 268 FA04 which allows for the person liable to an unauthorised payments surcharge to apply for it to be discharged if, in all the circumstances of the case, it would not be ‘just and reasonable’ for the person to be liable. The time limit for making an application is 5 years after 31 January following the year of assessment to which the application relates. If you wish to proceed with an application it must be made in writing to HMRC Pension Scheme Services office by 31 January 2017. If HMRC do not agree to discharge the surcharges, Section 269 FA04 gives you the right to appeal against that decision.”

(d) “The omission from your tax return of information relating to the transfer of your pension fund and the subsequent transactions is regarded by HMRC as an inaccuracy [for the purpose of Schedule 24 FA 2007]...the penalty range for careless inaccuracy is from 15% to 30% and it is charged against the potential lost revenue. I agree that you gave full cooperation and this has been recognised by HMRC as the minimum charge of 15% has been assessed.”

(e) “In some circumstances a penalty for careless inaccuracy can be suspended but as you are now an employee and are no longer required to make returns no suspension conditions could be set.”

(f) “HMRC can make a special reduction [of a penalty] where there are special circumstances...Special circumstances are either uncommon or exceptional, or occur where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law...the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation...[HMRC do] not consider there to be any special circumstances [in this case]”.

11. I further find as fact:

(1) the Appellant knew that there were restrictions in relation to accessing (including by way of loan) monies held in a pension fund prior to reaching pension age;

(2) the Appellant borrowed from G Loans £91,578.95 albeit he only received £82,237.89 of this;

(3) £91,578.95 was more than 25% of the Appellant’s pension funds (which totalled £172,000);

(4) it was a condition of the loan that the Appellant invested (and kept invested) his pension funds in KJK Investments Ltd;

(5) from the loan agreement, the Appellant knew of the causal link between the investment in KJK and the loan; he knew that if he did not authorise the investment in KJK, no loan would be advanced to him to by G Loans and that if the investment in KJK was not maintained, the loan from G Loans was immediately repayable;

(6) by 31 October 2011 at the latest, the Appellant knew that HMRC had concerns in relation to the G Loans and knew that HMRC might take a different view in relation to

whether the loans constituted an unauthorised payment. This was before he filed his tax return for the period ended 5 April 2011;

(7) G Loans and KJK Investments were operating an unlawful pension liberation scheme; and

(8) no application was made by the Appellant to HMRC pursuant to s268 FA 2004.

## THE LAW

12. The relevant provisions are contained in Part 4 FA 2004.

13. Sections 160-181 FA 2004 set out what amounts to an “unauthorised payment” by a registered pension scheme. In this appeal, we are concerned with an “unauthorised member payment”, which is defined in s160(2) 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.”

14. Section 161 FA 2004 provides:

“(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.”

15. Section 164 FA 2004 provides:

“(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—

(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.”

16. Section 279(2) FA 2004 provides:

“(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.”



17. Section 208 FA 2004 provides that in specified circumstances a charge to income tax known as an “unauthorised payments charge” may be made:

“(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

...”

18. Section 209 FA 2004 provides that in specified circumstances a charge to income tax known as an “unauthorised payments surcharge” may arise:

“A charge to income tax, to be known as the unauthorised payments surcharge, arises where a surchargeable unauthorised payment is made by a registered pension scheme.

(2) “Surchargeable unauthorised payments” means—

(a) surchargeable unauthorised member payments (see section 210)

...

(6) The rate of the charge is 15% in respect of the surchargeable unauthorised payment.

...”

19. Section 210 FA 2004 provides that a surchargeable unauthorised member payment will arise if the unauthorised payment percentage reaches 25%.

20. Section 268 FA 2004 provides:

“...

(2) The person liable to the unauthorised payments surcharge may apply to the Inland Revenue for the discharge of the person's liability to the unauthorised payments surcharge in respect of the unauthorised payment on the ground mentioned in subsection (3).

(3) The ground is that in all the circumstances of the case, it would be not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment.

(4) On receiving an application by a person under subsection (2) the Inland Revenue must decide whether to discharge the person's liability to the unauthorised payments surcharge in respect of the payment.

...”

21. Section 269 FA 2004 provides:

“(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) on an application under section 267(5), decides to refuse the application or to discharge the applicant's liability to the lifetime allowance charge in respect of part only of the excess amount.

(2) The applicant may appeal against the decision.”

22. Paragraph 1 of Schedule 24 FA 2007 provides:

“(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.”

23. Paragraph 3 of Schedule 24 FA 2007 provides:

“(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

‘careless’ if the inaccuracy is due to failure by P to take reasonable care,

...”

24. Paragraph 4 of Schedule 24 FA 2007 sets out the standard amounts of penalty for the behaviours that are the subject of the Schedule 24 regime. I am concerned only with paragraph 4(1)(a) which imposes a penalty for careless action of 30% of the potential lost revenue (the definition of which is provided by paragraphs 5-8).

25. Paragraphs 9 and 10 of Schedule 24 FA 2007 provide for reductions in the penalty where a person provides disclosure in relation to an inaccuracy. Paragraph 9(2) distinguishes between disclosure that is “unprompted” and “prompted”. In a prompted disclosure case, a penalty can be reduced from 30% down to 15%.

26. Paragraph 11 of Schedule 24 FA 2007 provides that a penalty can be further reduced in “special circumstances”. Paragraph 17 provides that the Tribunal’s power to substitute its own decision for that of HMRC may include a reduction on account of special circumstances but this reduction may only differ from that applied by HMRC if the Tribunal thinks that HMRC’s decision in respect of the application of paragraph 11 was flawed when considered in the light of the principles applicable in judicial review proceedings.

27. Paragraph 14 of Schedule 24 FA 2007 provides HMRC with a power to suspend all or part of a penalty for a careless inaccuracy, but only if this would help a person to avoid becoming liable to similar such penalties in future.

#### SUBMISSIONS ON BEHALF OF HMRC

28. HMRC submitted as follows:

- (1) The loan made to the Appellant by G Loans was inextricably linked to the investment made by the Appellant's pension fund into KJK. The loan is, therefore, an unauthorised payment (*Danvers* cited);
- (2) The unauthorised payment (the loan) was for more than 25% of the monies held in the Appellant's pension meaning that payment was a surchargeable unauthorised payment;
- (3) No application was made by the Appellant to HMRC pursuant to s 268 FA 2004. Therefore, the Appellant has no valid appeal under s 269 FA 2004. Accordingly, the Tribunal should not consider whether it would not be just and reasonable for the Appellant to be liable to the surcharge;
- (4) In any event, this is not a case where it would not be just and reasonable for the Appellant to be liable to the surcharge. The purpose of the arrangement was to circumvent the restrictions imposed on the use of pension funds. There is no need for the Appellant to have acted dishonestly or negligently (*O'Mara v HMRC* [2017] UKFTT 91 (TC) at [153] cited);
- (5) The Appellant's tax return contained an inaccuracy because there was no reference to the Appellant receiving the unauthorised payment. That inaccuracy was the result of carelessness on the part of the Appellant in that he took no, or no adequate, steps to check whether the loan did constitute an unauthorised payment;
- (6) The unauthorised payments charge, the unauthorised payments surcharge and the penalty were all calculated correctly according to the applicable legislative provisions.

#### SUBMISSIONS ON BEHALF OF THE APPELLANT

29. The Appellant's skeleton argument set out the Appellant's position as follows:

- “4. There is no argument on the facts as they have been presented by [HMRC]...
5. The appellant has received a loan from GLOANS Ltd. One of the conditions of receiving this loan was that the appellant was instructed to transfer his pension to a SIPP and instruct them to invest in KJK Limited.
6. The appellant does not disagree that the loan received by GLOANS could be considered an unauthorised payment on the basis that the loan was dependent on his transferring his pension funds to KJK.
7. The appellant agrees the circumstances are identical in MARK DANVERS...as they both enter into identical contracts.
8. It is impossible to comment on the circumstances that induced DANVERS to enter into a contact with GLOANS as there has been no correspondence between the appellant and DANVERS.
9. In relation to the first two issues of whether an unauthorised payment charge and surcharge are due, the appellant wishes to make an application under s.268 Financial Act 2004 (herein known as FA 04) that it would not be just and reasonable to apply the unauthorised payments charge or surcharge on the basis of the following:
  - (i) Although the appellant does not deny an unauthorised payment could be construed from the contractual terms, the statements made by GLOANS

before and after entering into contract are clearly known to be false by them as found by the Insolvency Service...

(ii) The appellant stands to lose a significant amount as an unsecured creditor already. Any further charges would surely put the appellant into unnecessary hardship and would be in conflict with the argument presented by HMRC that unauthorised payments [charges] serve to balance the tax relief that has been given.

...

In relation to the third issue...whether the Respondents were correct to charge a penalty for a careless inaccuracy in completing the tax return, the appellant is of the firm opinion that although he is aware of the link between his pension and the loan as found in DANVERS, he was not aware of this at the time...the appellant...filled his tax return on the belief as stated by GLOANS that the loan was in no way related to his pension with KJK Ltd. This has left the appellant with little choice but to fill it in as he had..."

30. During the hearing, the Appellant made submissions consistent with the skeleton argument he had filed – focusing on the perceived unfairness of the situation and the fact that he was misled into believing that the loan did not constitute an unauthorised payment.

#### DISCUSSION AND DECISION

##### **The unauthorised payments charge**

31. In *Danvers*, the FTT held that a loan was clearly a “payment” for the purposes of the legislation. The FTT reasoned that there would otherwise be no need for “authorised employer loans” to be included within the class of “authorised employer payments” in s175 FA 2004. The FTT also referred to the approach adopted by Bean J in *Dalriada Trustees Limited v Faulds and Others* [2011] EWHC 3391 (Ch). I agree with the FTT’s analysis and agree that a loan is clearly a payment for the purposes of the relevant statutory provisions.

32. The FTT in *Danvers* held on the facts (which were very similar to those in the present appeal):

“...the investment by the HD SIPP in the KJK preference shares (including the issue made to the HD SIPP in respect of the appellant’s fund) for its purposes generally and did not specifically allocate the money received from any particular investor for lending to any particular borrower; nonetheless it is quite clear that the entire arrangement was orchestrated from beginning to end to ensure that the appellant received his expected loan as a result of transferring his pension funds to the HD SIPP and instructing it to invest them in the KJK preference shares. In the absence of fraud (i.e. theft of the appellant’s pension funds) there was in our view never any realistic likelihood that the transfer of his pension funds to the HD SIPP would not result in those funds being invested in the KJK preference shares and the appellant receiving a loan of an agreed amount from G Loans. That, we find was certainly the appellant’s expectation.”

33. In *Danvers, v HMRC* [2016] UKUT 569 (TC), the Upper Tribunal stated: at [64] – [67]:

“64. ...the question is whether there is a link between a specific investment made by the scheme and a payment received by a member of the scheme. In our view the wording is consistent with it being necessary that there is a casual link between the investment and the payment.

65. 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 lender, the amount being lent by the investee company being identical to the amount on-lent to the scheme member...

66. However, in our view, the connection can go further than that and would 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. In our view, that gives rise to a sufficient causal link between the payment to the member under the loan and the investment made by the pension scheme.

67. Viewed realistically, the anti-avoidance provisions are wide enough to bring such a payment within their scope. Despite the scheme's assets remaining intact, the scheme member has received a benefit from the scheme prior to his normal retirement date. In our view, we see no difference between this and a direct loan made from the scheme to the member where it is also the case that one of the scheme assets is now represented by a debt owed by the member to the scheme."

34. On the basis of the facts that I have found in this appeal, I conclude that the investment by the Appellant's SIPP in the KJK shares was inextricably linked to the loan made to the Appellant by G Loans. The entire arrangement was structured such that in return for investing pension moneys in KJK, the Appellant received a loan from G Loans. Had the monies not been invested in KJK, no loan would have been advanced. Further, in the absence of the KJK investment being maintained, the loan became immediately repayable. There was, then, a sufficient causal link between the investment and the loan. I am of the view that whether or not the payment was made in connection with an investment made using pension funds is a matter for objective determination and is not dependent on the state of knowledge of the relevant taxpayer. However, for the avoidance of doubt, as found above, the Appellant did know of the causal link between the investment in KJK and the loan; he knew that if he did not authorise the investment in KJK, no loan would be advanced to him by G Loans and that if the investment in KJK was not maintained, the loan from G Loans was immediately repayable.

35. In *Danvers*, the FTT stated:

"It is true...that there is nothing objectionable about a loan being advanced to a pension scheme member on the basis that he or she is expected to repay that loan out of, for example, an anticipated tax-free lump sum arising under the pension arrangements. This case, however, included extra features not included in normal arrangements, namely the requirement to transfer the borrower's pension fund into a new scheme and authorise the investment of that fund in specified investments as a condition of accessing the loan."

36. I agree with the FTT's observations. The same "extra features" as were in *Danvers* appear in the present case. This was not a situation where the loan was advanced simply on the basis of an expectation of repayment in due course from the pension funds. Rather, as I have already held, the loan and the pension investment were inextricably linked and, as in *Danvers*, had extra features which would not be expected in a standard loan arrangement.

37. The payment from G Loans was, then, an unauthorised payment which gave rise to a liability in the part of the Appellant to an unauthorised payments charge. The amount of that charge has been correctly calculated (indeed, the Appellant did not suggest otherwise).

38. There is no ability to discharge an unauthorised payments charge on the basis that it would be not be just and reasonable for the person to be liable to that charge. Sections 268 and 269 FA 2004 apply only to surcharges. In any event, for the reasons explained below, even if there was such a power, this is not a case where it would be appropriate to exercise it.

### **The unauthorised payments surcharge**

39. I accept HMRC's submission that in circumstances where the Appellant did not apply to HMRC under s268 FA 2004 for a discharge of the surcharge on the not just and reasonable basis, the Tribunal has no power to discharge the surcharge on the not just and reasonable basis. For the Tribunal's jurisdiction under section s269 FA 2004 to arise, HMRC must have made a decision under s268 FA 2004. HMRC must make such a decision if an application is made by the taxpayer within the applicable time limits. On the present facts, no such application was made (despite the Review conclusion letter making clear that if the Appellant wanted to ask for the surcharge to be discharged on the not just and reasonable basis, he needed to make an application by no later than 31 January 2017).

40. In any event, I do not think the facts of this case support a discharge of the surcharge on the not just and reasonable basis.

41. I agree with the FTT's observations in *O'Mara* :

“the surcharge is a tax charge designed to recoup tax relief on contributions and tax free growth...because the policy objective [is] to recoup tax rather than punish the circumstances in which the payment was made, the circumstances in which it would not be just and reasonable to impose a surcharge may be limited.”

42. In circumstances where:

(a) the Appellant knew of the causal link between the loan from G Loans and the investment in KJK;

(b) whilst the Appellant may not have known that the loan constituted an unauthorised payment, he did not take the steps that would be expected of a prudent taxpayer in his position to satisfy himself that the loan did not constitute an unauthorised payment (see further below in relation to the Appellant's liability to the penalty); and

(c) the Appellant secured a significant benefit from the unauthorised payment in that he obtained access to a large sum of money that he should not have been able to access until he reached pensionable age.

I am not of the view that it can properly be said that it would not be just and reasonable for the Appellant to be liable to the surcharge.

### **The Schedule 24 penalty**

43. The Appellant's tax return made no mention of the unauthorised payment that he had received. That was an inaccuracy for the purposes of Schedule 24 FA 2007. I next need to consider whether that inaccuracy was careless.

44. In *David Collis v HMRC* [2011] UKFTT 588 (TC), Judge Berner stated that in deciding whether a given taxpayer has been careless within the meaning of paragraph 3(1)(a) of Schedule 24 to the FA 2007, the standard to be applied is that of a prudent and reasonable taxpayer in the position of the taxpayer in question. I agree that is the correct approach.

45. In my view, the Appellant was careless within the meaning of paragraph 3(1)(a) of Schedule 24 to the FA 2007. I have reached this conclusion for the following reasons:

(1) the Appellant knew that there were restrictions on accessing (including by way of loan) pension monies prior to pensionable age. He had made enquiries with his financial advisor and had been told as much;

(2) the Appellant conducted an online search and found IQ Business Services. IQ Business Services, through Mr Ellis, told the Appellant about an arrangement that would allow him access to a personal loan provided that his pension was invested in certain funds. Mr Ellis further said that the arrangement was compliant with the “scheme rules and totally legal”. Mr Ellis also made reference to “his company of solicitors, barristers, accountants, tax experts and financial experts [who] could provide expert advice”;

(3) Mr Ellis was trying to sell the Appellant a product that would achieve an aim (a personal loan related to investments made by his pension fund), that the Appellant knew (from the advice he has received from his financial advisor) was subject to restrictions. In these circumstances, a prudent taxpayer would not have accepted the word of Mr Ellis. Instead, a prudent taxpayer would have asked to see the “expert advice” provided by the “solicitors, barristers, accountants, tax experts and financial experts” and would then have taken independent advice from an appropriate professional; and

(4) further, prior to filing his tax return, the Appellant knew (from the letter received from G Loans on 31 October 2011) that HMRC had raised concerns about the G Loans arrangement. Whilst it is correct that G Loans asserted in that letter that the arrangement did not lead to an unauthorised payment (which assertion was supported by the opinion by Mr Westall), a reasonable taxpayer would have taken independent professional advice as to whether the loan needed to be included in the tax return given that (1) HMRC obviously held a different view to G Loans/Martin Westall (2) G Loans was the provider of the loan now being called into question by HMRC (and was certainly not impartial/independent) (3) Martin Westall was advising G Loans (not the Appellant) and expressly stated that HMRC may see the arrangements differently and be of the view that the loans do constitute an unauthorised payment.

46. Whilst no submissions were made by the Appellant as to the amount of the penalty, I have nonetheless considered whether it was correctly and reasonably calculated. I find it was. HMRC has given full credit for the (prompted) disclosure and has applied the minimum penalty of 15%.

47. Whilst no submissions were made by the Appellant in relation to whether the penalty should be suspended, I have nonetheless considered whether this would be appropriate. However, as reasoned by HMRC, the Appellant no longer files tax returns and so suspension would not serve the purpose of assisting the Appellant to avoid becoming liable to similar such penalties in future.

48. In relation to whether a reduction should be made to the penalty amount pursuant to paragraph 11 of Schedule 24 FA 2007, HMRC’s decision (as summarised at paragraph 10(6)(f) above) cannot be impeached.

49. I have also considered whether paragraph 12(2) of Schedule 24 to the FA 2007 applies to this case (despite neither party making submissions on this point). I have concluded it does not. That paragraph provides:

“(2) The amount of a penalty for which P is liable under paragraph 1 or 2 in respect of a document relating to a tax period shall be reduced by the amount of any other penalty incurred by P, or any surcharge for

late payment of tax imposed on P, if the amount of the penalty or surcharge is determined by reference to the same tax liability.”

The surcharge applied in this case cannot properly be said to be a “surcharge for late payment of tax”.

50. Accordingly, this appeal is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

51. 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.

**DAVID BEDENHAM  
TRIBUNAL JUDGE**

**RELEASE DATE: 09 DECEMBER 2019**