



Neutral Citation: [2024] UKFTT 00322 (TC)

Case Number: TC09139

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

North Shields County & Family Court

Appeal reference: TC/2020/00965

*INCOME TAX – pension transfer – Part 4 Finance Act 2004 – whether loan an unauthorised member payment – unauthorised payments surcharge – whether just and reasonable for appellant to be liable*

**Heard on:** 16 January 2024  
**Judgment date:** 10 April 2024

**Before**

**TRIBUNAL JUDGE JONATHAN CANNAN  
MR LESLIE BROWN**

**Between**

**DAVID FOULKES**

**Appellant**

**and**

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

**Respondents**

**Representation:**

The Appellant appeared in person

For the Respondents: Kirsty Harding, litigator of HM Revenue and Customs Solicitor’s Office and Legal Services

## DECISION

### INTRODUCTION

1. In 2017, Mr Foulkes had a pension with the West Midlands Pension Fund (“West Midlands”), a local government pension scheme. The transfer value was £18,309. In the circumstances set out below, on 20 June 2017 he transferred the fund to Alderley Wealth Management Pension Scheme (“Alderley”). On 26 June 2017 he received a payment of £11,819 which was part of a loan from a company called Lendtech Limited (“Lendtech”). The loan was for £13,040 less an administration fee of £1,000 and advance interest of £195.

2. HMRC initially considered that the transfer of £18,309 was an unauthorised member payment from Mr Foulkes’ pension pursuant to the regime for pension tax relief and charges in Part 4 Finance Act 2004 (“FA 2004”). They enquired into his tax return for 2017-18 and issued a closure notice which charged Mr Foulkes to an unauthorised payments charge and an unauthorised payments surcharge totalling £10,069. HMRC now say that the loan of £13,040 was an unauthorised member payment and that £7,172 is due by way of those charges.

3. Mr Foulkes contends that there was no unauthorised member payment. In the alternative, he contends that it is not just and reasonable that he should be liable to the unauthorised payments surcharge.

4. The broad issues which arise in the appeal may be summarised as follows:

(1) Was the sum of £13,040 an unauthorised member payment?

(2) If so, is it just and reasonable for Mr Foulkes to be liable to the unauthorised payments surcharge?

5. We heard evidence from Mr Foulkes and were provided with relevant documentary evidence. We make our findings of fact on the balance of probabilities based on the oral and documentary evidence before us. We are grateful to Mr Foulkes and Ms Harding for their detailed and well-structured submissions on the facts and law.

6. We shall first consider the legal framework pursuant to which unauthorised member payments from pension funds fall to be taxed by way of the unauthorised payments charge and the unauthorised payments surcharge.

### LEGAL FRAMEWORK

7. FA 2004 contains a prescriptive regime in relation to the payments that registered pension schemes are authorised to make and the consequences of unauthorised payments. The rationale is to ensure that the tax reliefs and exemptions in respect of contributions to a registered pension scheme are available only to the extent that the pension scheme genuinely makes provision for the benefit of members on retirement.

8. The only payments which a registered pension scheme is authorised to make to a person who is or has been a member of the scheme are those specified in section 164 FA 2004. Those payments include pensions permitted by the pension rules and lump sum payments on death or retirement:

164(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.
9. Any other payment is defined by section 160 as an “unauthorised member payment”:
- 160(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.
- (2) In this Part ‘unauthorised member payment’ means –
- (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.
10. A “payment” for the purposes of these provisions is a payment made from sums or assets held for the purposes of the scheme:
- 279(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.
11. Section 161 FA 2004 makes provision for certain transactions to be treated as made from sums or assets held for the purposes of the scheme:
- 161(1) This section applies for the interpretation of this Chapter.
- (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.
12. One form of authorised payment is a payment within section 164(1)(d) which is a “scheme administration member payment”. Section 171 provides that such payments include payments to purchase assets to be held for the purposes of the scheme, but not a loan to or in respect of a member of the scheme:
- 171(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.
13. The position in relation to loans to scheme members provided by third parties was considered by the Upper Tribunal in *Danvers v HM Revenue & Customs* [2016] UKUT 0569 (TCC) which we consider in detail below.

14. Another form of authorised payment is a payment within section 164(1)(f) which is of a description prescribed by regulations made by HMRC. We shall return to those regulations when we come to consider one of Mr Foulkes' arguments.

15. Where an unauthorised member payment is made there is a charge to income tax pursuant to section 208 FA 2004 at the rate of 40% on the person to whom the payment is made. This is known as an "unauthorised payments charge". In addition, section 209 makes provision for a charge to income tax known as an "unauthorised payments surcharge". It is payable where the unauthorised payment is 25% or more of the value of the pension fund. The rate of the unauthorised payments surcharge is 15% of the unauthorised payment.

16. Section 268 FA 2004 provides for relief where a person is liable to the unauthorised payments surcharge:

268(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 not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment.

17. We have jurisdiction pursuant to the Taxes Management Act 1970 to determine whether the unauthorised payments charge and the unauthorised payments surcharge were correctly charged to income tax on Mr Foulkes' appeal against the closure notice.

18. We also have full jurisdiction pursuant to section 269(6) to (8) FA 2004 to determine whether liability to the unauthorised payments surcharge ought to have been discharged. If we consider that it ought to have been discharged, then we must grant Mr Foulkes' application for discharge.

#### **FINDINGS OF FACT**

19. We set out in this section our findings of fact relevant to our determination of the issues. We also identify some of the evidence relevant to the findings we make in our consideration of the issues.

20. In late 2016, Mr Foulkes sought advice about his pension arrangements from Mr Ian Dalziel of Quay West Investment Limited. At this time Mr Foulkes was 49 years of age. He had a meeting with Mr Dalziel and was advised that if he transferred his West Midlands pension fund into another scheme then he would have greater flexibility with the investment of the fund. Mr Foulkes' interest in the fund arose from a period of 3 years when he worked in local government as a council clerical officer.

21. Following the meeting and on the advice of Mr Dalziel, Mr Foulkes took the decision to transfer his West Midlands fund to Alderley and to invest it into a company called Gilupi Limited, which later changed its name to Haimachek UK Limited. We shall refer to it throughout as "Haimachek". Mr Foulkes was given brochures and links to websites which indicated that Haimachek was involved in research into medical devices to improve cancer detection, supporting early diagnosis and treatment. He considered that the investment in Haimachek represented a good opportunity for investors, with the prospect of substantial gains on a future sale of the shares.

22. Mr Foulkes also received financial advice from Mr Dalziel about the possibility of entering into a bridging loan at a preferential rate with Lendtech. Mr Foulkes regarded this as a completely separate matter to the transfer and investment of his pension fund.

23. Mr Foulkes produced in evidence an email from Mr Dalziel dated 17 January 2023. We understand that Mr Dalziel presently works as a pension advisor for the Pension Wise advisory

service. In the email, Mr Dalziel describes himself as an “Ex Regulated Financial Adviser 2001 – 2013”. He records that he met Mr Foulkes in 2016 through Mr Davison, who is described as an independent financial adviser. He says that he met the owner of Haimachek and a Mr Rodney Jones, who he described as the promoter of Haimachek and as having an extensive knowledge of high end banking and investments. Mr Dalziel says he was assured by Mr Jones “*that investors could receive a loan, if required, which was totally unconnected to the pension fund*”. Mr Jones would organise a loan if it was required.

24. Mr Foulkes also produced in evidence an email from Mr Michael Davison dated 17 January 2023. Mr Davison is an acquaintance of Mr Foulkes. The email records that Mr Davison had taken advice from Mr Dalziel in connection with a pension transfer and had introduced Mr Foulkes to Mr Dalziel. Mr Davison states that he attended the first meeting between Mr Foulkes and Mr Dalziel and recollects that Mr Dalziel explained the process and the potential for a high level of growth if the investments paid off. It is said that Mr Dalziel “*also offered you the option of obtaining a loan on commercial rates at this time. Ian went to some lengths to explain that this was entirely separate to your pension fund, as he had done with me*”.

25. Mr Foulkes did not call Mr Dalziel or Mr Davison to give evidence, but relied on their emails. HMRC did not object to the emails being adduced in evidence. However, the fact that Mr Dalziel and Mr Davison did not attend to give oral evidence or answer questions does affect the weight we can give to their emails. In fact, Mr Foulkes corrected what Mr Davison said in his email about the loan being discussed at the first meeting. Mr Foulkes maintained that the possibility of a loan was raised at a later meeting. He had an interest only mortgage on his house and mentioned to Mr Dalziel that there was a fair amount of equity in the property which he regarded as equivalent to a pension. However, the property needed some remedial work and that was when Mr Dalziel raised the possibility of a loan to do the repairs. Mr Foulkes regarded that as an investment, which was within the scope of the terms of the loan described below.

26. Mr Foulkes instructed Mr Dalziel to effect the transfer of his West Midlands fund to Alderley. Alderley was an approved pension scheme for tax purposes and was administered by Warwick and Eaton Administrators Limited (“Warwick & Eaton”). It is unclear on the evidence available when Mr Foulkes first discussed the possibility of a loan with Mr Dalziel. Mr Dalziel had specifically discussed with Mr Jones the possibility of investors in Haimachek also obtaining a loan if required. On balance, it seems likely that Mr Dalziel would have raised this possibility with Mr Foulkes when they first discussed investing the fund in Haimachek.

27. On 13 January 2017, West Midlands wrote to Mr Foulkes acknowledging his request to transfer his fund to a new provider, and identifying a transfer value of £18,309.

28. On 1 February 2017 Mr Foulkes signed various documents in connection with the pension transfer:

- (1) A Transfer Request Form indicating to West Midlands that he wished to transfer his fund. The new scheme details were left blank.
- (2) Confirmation that he had received appropriate independent advice in relation to the transfer. The identity of the adviser was left blank.
- (3) A form setting out Mr Foulkes’ membership details for the West Midlands fund and intended to set out details of the new scheme. Details of the new scheme were left blank.
- (4) An application to join the Alderley fund.

(5) An acknowledgment that fixed fees payable to Warwick & Eaton would comprise an initial one off membership fee covering the first two years of £1,200 with an annual membership fee of £600 pa thereafter.

(6) An investment options form in which Mr Foulkes indicated that he wished the trustees of Alderley to invest 100% of his fund in Haimachek. There were 7 other options for investment which included specific companies, various named bonds and cash.

(7) A request for transfer form requesting West Midlands to transfer his fund to Alderley.

(8) An indemnity declaration to Warwick & Eaton confirming that Mr Foulkes had *“not been offered, and will not take a loan, savings advance, cash back, cash bonus, or other incentive as a result of this transfer”*. And had *“not been advised that if I proceed with this transfer request that I may be able to access the proceeds from this transfer, before the age of 55”*.

29. In the event, the transfer was not effected until 20 June 2017. An administrator with Warwick & Eaton signed a “Transfer Out Discharge Form” dated 7 June 2017 which confirmed to West Midlands amongst other things that Mr Foulkes was a member of the Alderley scheme. The value transferred was £18,309.09.

30. Mr. Dalziel had instructed Alderley to use the fund to purchase shares in Haimachek. Mr Foulkes was not made aware of the mechanics of this transaction but he understood at the time that the shares were purchased from a company named R & D Marketing Limited (“RDML”). Mr Foulkes understood that RDML had a right to purchase shares in Haimachek at a discount value, which could then be sold to investors at market value, allowing RDML to make a profit. He understood that RDML had introduced the investment to Mr Dalziel. Mr Foulkes understood that RDML was a company belonging to Mr Jones.

31. A statement of share capital of Haimachek lodged at Companies House and dated 23 April 2018 identifies that Alderley was at that time the holder of 106,096 redeemable preference shares in Haimachek.

32. Mr Foulkes received a sum of £11,819.40 into his bank account on 26 June 2017 with the reference *“Faster CR Xtend Trading”*. Mr Foulkes had never heard of Xtend Trading but he was expecting this sum as a loan from Lendtech. He entered into a loan agreement with Lendtech for a loan of £13,040.

33. The loan agreement between Mr Foulkes and Lendtech is dated 29 June 2017 on the front page. It identifies that Lendtech was incorporated in the British Virgin Islands and had agreed to lend £13,040 to Mr Foulkes. There was an administration fee of £1,000 and advance interest of £195 payable by Mr Foulkes. The loan was expressed to be repayable on the fifth anniversary of the agreement, which would have been 29 June 2022. Interest was payable at the rate of 1.25% above Barclays Bank Plc base rate. The following clauses are relevant for present purposes:

#### **1. Definitions and Interpretation**

IFTL: an Irrevocable funds transfer letter in the agreed form under which the Borrower irrevocably undertakes to transfer to the Receiving Agent's account the Borrower's own account balance with R&D of £13,040.00

R&D: R & D Marketing Development Limited (Company Number: 1692188) a limited liability company incorporated in the British Virgin Islands ...

#### **3. Purpose**

3.1 The Borrower shall use all money borrowed under this agreement to fund investments.

## 5. Conditions precedent

5.2 The Borrower may not give notice to draw the Loan, and the Lender is not obliged to lend, until the Lender has confirmed to the Borrower that it has received all the documents and evidence specified in the schedule to this agreement, in the form and containing the information, that it requires.

5.3.5 The Borrower has delivered to Lender the IFTL executed by the Borrower.

34. There is no evidence that Mr Foulkes did execute the IFTL document, although Mr Foulkes recalled in evidence that Mr Dalziel dealt with it. It seems likely that Mr Foulkes' understanding that RDML was involved in the purchase of shares in Haimachek was a reference to R & D Marketing Development Limited, which Mr Foulkes also understood was a company belonging to Mr Jones.

35. It is clear from the loan agreement that Mr Foulkes signed the agreement with a computer generated signature on an electronic version of the document. The signature also bears the date 29 June 2017. However, Mr Foulkes' evidence was that he did not recollect signing the loan agreement 3 days after he had received the funds. He thought the date was most likely an administrative error which he did not notice at the time. Mr Foulkes said that he was "*100% certain*" that he got the funds on the same day that he signed the document and that it was a Monday, which must have been 26 June 2017. His 13 year old son was with him on Mondays and Fridays, but never on Thursdays, and he recalled that he signed the loan agreement on a day when his son was with him. Indeed, he recalled treating him to a day out and going to Wetherspoons for dinner.

36. We cannot accept Mr Foulkes' evidence in this regard. We are satisfied that he has a genuine recollection that he signed the agreement on a Monday. However, we do not consider his recollection going back some 7 years is reliable. We consider that the documentary evidence is more reliable as to the date of signing and we find on the balance of probabilities that Mr Foulkes did not sign the loan agreement until 29 June 2017. It is not disputed that Mr Foulkes received the loan money on 26 June 2017, some three days earlier. This finding is relevant to both the issues we have to determine.

37. A schedule of member investments, apparently provided by the Alderley trustees, shows that Mr Foulkes' fund had an investment in Haimachek of £16,300 with cash of £1,039 in the scheme bank account and a total investment of £17,339. It is undated, and Mr Foulkes says that it is at least evidence that his fund remained intact, although he did not understand why he was shown as having cash in the scheme bank account. We agree with Mr Foulkes that it does indicate that the fund was intact after the loan payment was received from Lendtech. The value of the shares in Haimachek is a different matter.

38. On 30 August 2017, Independent Trustee Services ("ITS") were appointed by the Pensions Regulator as trustees of the Alderley scheme. This was part of an investigation by the Pensions Regulator in which concerns were raised about the management of the scheme.

39. Mr Foulkes was contacted by Devon and Cornwall Police in November 2017. They were investigating whether Mr Foulkes and others may have been victims of fraud. Mr Foulkes fully co-operated with the police investigation. He understands that the investigation lasted some 2 years. No charges were made following the investigation.

40. HMRC wrote to Mr Foulkes on 30 January 2018 indicating that they had information to suggest that he had received an unauthorised payment in connection with the transfer of his

pension from West Midlands to Alderley. He was told that he should include the payment on his 2017-18 self-assessment return.

41. Mr Foulkes submitted a self-assessment return for 2017-18 on 31 January 2019. He did not declare any unauthorised member payment, but used the white space on the return to say that he disagreed with HMRC's view that he had received an unauthorised member payment. HMRC then opened an enquiry into the return. Mr Foulkes co-operated with that enquiry and provided what information and documents he could. He attempted to get information from ITS but without much success. HMRC also obtained information and documents from third party sources using their information powers. They concluded that the whole transfer of £18,309 from West Midlands to Alderley was an unauthorised member payment and subject to the unauthorised payments charge and the unauthorised payments surcharge. The tax due at 40% and 15% respectively amounted in total to £10,069. In the alternative, HMRC contended that the loan from Lendtech of £13,040 was an unauthorised member payment.

42. HMRC's case before the Tribunal does not rely on an allegation that the pension transfer was itself an unauthorised member payment. Their case is that the loan amounted to an unauthorised member payment.

43. Mr Foulkes appealed against the conclusions in the closure notice. HMRC confirmed their view of the matter in a letter dated 22 November 2019 and in a statutory review dated 24 January 2020. Mr Foulkes notified his appeal to the Tribunal on 19 February 2020. He subsequently applied to HMRC on 6 September 2021 for the unauthorised payments surcharge to be discharged on the ground that it was not just and reasonable for him to be liable to the surcharge. HMRC refused the application and Mr Foulkes subsequently appealed against the refusal decision. He notified his appeal to the Tribunal against that decision on 20 August 2022.

44. Mr Foulkes was not aware of any money flows in relation to the pension transfer or the loan, save that his fund was transferred to Alderley and he received the sum of £11,819 which he was expecting by way of loan into his bank account on 26 June 2017. The documentary evidence subsequently obtained by HMRC paints a more detailed picture and we are satisfied that:

(1) In June 2017, Alderley's bank account had been frozen. The scheme trustees entered into a Settlement Services Agreement on 4 June 2017 with Platinum Pyramid Limited ("PPL") whereby PPL would receive and make payments on behalf of Alderley. PPL had an account with Nat West Bank.

(2) On 20 June 2017, an amount of £18,309 was paid into PPL's account by West Midlands which was the transfer of Mr Foulkes' pension fund.

(3) On 22 June 2017, Alderley's trustees authorised a payment of "investment amounts" of £335,000 in connection with an investment in Haimachek. This is described as "*Request No. 03*". A handwritten notation on the authorisation form shows "*Foulkes – 1,039.09 held*". This is consistent with the schedule of member payments showing that Mr Foulkes' fund had an investment in Haimachek of £16,300 with cash of £1,039 in the scheme bank account. It is not clear why £1,039 was purportedly retained as cash.

(4) A chaps transfer of £335,000 was made from PPL's account on 22 June 2017 to an account in the name of Xtend Trading Limited ("Xtend"). A reconciliation provided by PPL to HMRC shows that the receipt from West Midlands and the payment to Xtend both related to instruction "*3 of 22<sup>nd</sup> June 2017*".

(5) Xtend also had a bank account with Nat West Bank into which it received the sum of £335,000 with a reference "*Alderley Wealth*" on 22 June 2017.



(6) On 26 June 2017, Xtend made a payment of £11,819 to Mr Foulkes and Mr Foulkes received it in his bank account on the same date.

45. In June 2021, ITS made an announcement to members of the Alderley scheme. They stated that they had been investigating purported scheme investments. In relation to Haimachek, ITS stated that it was unable to comment on the legitimacy of the company and had doubts as to whether it was legitimate. Mr Foulkes was told in late 2022 by ITS that investments in Haimachek were likely to result in losses to members of the Alderley scheme, but that there was a possibility that the Financial Compensation Fund would cover those losses. In the event, no criminal charges were brought against those associated with the arrangements.

46. No-one has ever asked Mr Foulkes to repay the loan, and understandably he has not volunteered to do so. He remains uncertain as to whether he will receive any compensation.

47. We record at this stage that it is not part of HMRC's case that there is any identified connection between the shareholders or directors of Xtend, Haimachek, RDML and Lendtech.

#### CONSIDERATION OF THE ISSUES

48. We shall consider first whether there was an unauthorised member payment to Mr Foulkes. We shall then consider whether it is just and reasonable for Mr Foulkes to be liable to the unauthorised payments surcharge.

#### **(1) Was there an unauthorised member payment?**

49. Section 160(2) FA 2004 defines an unauthorised member payment as a payment made in respect of a member of the scheme which is not authorised by section 164.

50. It is first necessary to identify whether there has been a payment made or benefit provided which according to section 279(2) means a payment made or benefit provided from sums or assets held for the for the purposes of the pension scheme. Section 161(3) and (4) provide that payments made or benefits provided "*in connection with*" an investment acquired using fund assets are treated as made from sums or assets held for the purposes of the scheme. The issue which arises on this appeal is whether the loan from Lendtech was made in connection with the fund's investment in Haimachek.

51. The scope of section 161(3) was considered by the Upper Tribunal in *Danvers*. In that case, Mr Danvers transferred his pension fund to a SIPP with a view to obtaining a loan of those funds. A lending company made a loan to Mr Danvers. The loan was conditional upon the SIPP investing in preference shares of a finance company which substantially funded the lending company.

52. The Upper Tribunal was concerned with the construction of section 161(3) FA 2004. The question for the Upper Tribunal was whether the loan fell within section 161(3) as a payment made in connection with an investment, namely the investment by the SIPP in the finance company preference shares. The Upper Tribunal held that it was a payment made in connection with the investment:

51. In our judgment, it is clear from the language of the relevant provisions of Part 4 FA 2004 that it is intended that their scope goes wider [than] merely catching payments made "from" investments acquired for the scheme.

52. ... 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.

...

64. As we have said above, 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 causal 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. 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.

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 the investments in the scheme remain intact; in that situation it is simply the case that one of the scheme assets is now represented by a debt owed by the member to the scheme.

53. The decision of the Upper Tribunal is clear authority for the proposition that the connection required for section 161(3) includes a situation where a condition of the loan is that the taxpayer directs the fund to make a particular investment. In those circumstances, the scheme assets remained intact, but the taxpayer had received a benefit from the scheme. It is not authority for the proposition that a condition in the loan from a third party is a necessary element in establishing sufficient connection.

54. The Upper Tribunal went on to deal at [80] – [83] with an argument by the taxpayer that if an indirect connection between a loan and a pension was sufficient to engage section 161(3), then it could have unintended consequences. For example, in relation to pension mortgages where a lender may be content to rely on an expectation that the borrower will repay the loan from a pension lump sum. The Upper Tribunal did not accept this submission:

82. In those circumstances, we cannot see how it could be said that the loan would be connected to any particular investment of the scheme. There is no stipulation that it is a condition of the loan that the pension scheme invest in any particular investment so there is no causal link between the loan and the investments of the registered pension scheme.

83. Likewise, no causal link would in our view arise simply because the lender stipulated that the pension fund be held with a particular pension provider, or that the borrower undertake to draw down his pension on his specified retirement date and use the proceeds to repay the loan. Again, there is no causal link between the loan and any particular investment made by the registered pension scheme.

55. In our view the Upper Tribunal was stating here that there must be a causal link between the loan and a particular investment made by the pension scheme. It was not laying down any rule as to what might amount to a sufficient causal link in any particular circumstances. The answer to that question will involve a fact-specific assessment. In that case the FTT had found that the loan and the investment were “inextricably linked” and the Upper Tribunal held that there was ample evidence from which the FTT could properly reach that conclusion.

56. We consider that on the facts of the present appeal there is a sufficient causal link between the loan from Lendtech and the fund’s investment in Haimachek. In reaching that conclusion we rely in particular on the following facts and matters:

- (1) The investment in Haimachek and the possibility of a loan were first discussed by Mr Foulkes and Mr Dalziel at the same meeting.
- (2) The funds were made available to Mr Foulkes after he had given instructions for Alderley to invest his pension fund in Haimachek, but before he had signed the loan agreement.
- (3) There was clearly some link between the investment in Haimachek and the loan from Lendtech. The loan agreement itself identified that Mr Foulkes had an account balance with RDML, which was Mr Jones’ company and Mr Jones was promoting investment in Haimachek.
- (4) Mr Dalziel’s email identifies that Mr Jones had assured him that investors in Haimachek could receive a loan, if required. The fact that Mr Jones also told Mr Dalziel that any such loan would be totally unconnected to the pension fund does not make it so.
- (5) Alderley transferred a sum of £355,000, including Mr Foulkes’ fund, to an account in the name of Xtend. This was by way of investment in Haimachek. The loan payment to Mr Foulkes 4 days later came from an account of Xtend.

57. Whilst the loan agreement was not expressly conditional on any investment in Haimachek, we are satisfied that there was a causal link, and that without the investment in Haimachek no loan would have been made available to Mr Foulkes. It is not relevant that Mr Foulkes was unaware of any connection between the investment of his fund in Haimachek and the loan which he received from Lendtech.

58. Mr Foulkes relied on a decision of the FTT in *Hughes v HM Revenue & Customs* [2019] UKFTT 0641 (TC) where the FTT was not satisfied that a pension fund was the source of a loan. The FTT considered the Upper Tribunal decision in *Danvers*. It observed that the Upper Tribunal had found that there was ample evidence from which the FTT could find that the investment was inextricably linked to the loan. It then commented on the Upper Tribunal’s finding at [82]:

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 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.

59. It is not necessary for us to consider the correctness of the decision in *Hughes*. However, we consider that the FTT was wrong if it was suggesting at [80] that to establish a causal link in these circumstances it must be a condition of the loan that the pension scheme must invest in a certain investment. For the reasons given above, that is not what the Upper Tribunal was

saying in *Danvers*. We agree with the approach of the FTT in *Turner v HM Revenue & Customs* [2019] UKFTT 0555 (TC) at [33]:

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 ...“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* ...

60. For the reasons given above we are satisfied that the payment of £13,040 received by Mr Foulkes was an unauthorised member payment. Viewed realistically, the provisions are wide enough to bring such a payment within their scope despite the scheme assets remaining intact. This is subject to Mr Foulkes' argument based on section 164(1)(f) that the payment was an authorised payment. We turn now to consider that argument and the *Registered Pension Scheme (Authorised Payments) Regulations 2009* (“the Regulations”).

61. Regulation 4 provides that a payment described in Part 3 of the Regulations shall be a payment of a prescribed description for the purposes of 164(1)(f) FA 2003, in other words an authorised payment:

4 A payment by a registered pension scheme that is described in Part 3 of these Regulations, to the extent specified in the regulation concerned –

(a) is a payment of a prescribed description for the purposes of section 164(1)(f) of the Finance Act 2004;

(b) shall be treated as pension paid to the recipient under a registered pension scheme for the purposes of Part 9 of ITEPA 2003; and

(c) shall be treated for those purposes as pension accruing in the tax year in which it is paid.

62. Part 3 refers to “Pension Errors”, and regulation 13 provides as follows:

13(1) A payment made in error which is intended to represent a payment permitted by the pension rules or the pension death benefit rules to or in respect of a member, if the scheme administrator or insurance company making the payment (in either case, “the payer”) believed that -

(a) the recipient was entitled to the payment, and

(b) the recipient was entitled to it in that amount.

(2) A payment is not within paragraph (1) if the error is that the recipient is no longer alive (as to which see regulation 15).

(3) Regulation 4 applies to –

(a) the whole of the payment; or

(b) if the recipient was entitled to an authorised payment apart from under this regulation, the amount by which the payment exceeds the amount of the authorised payment.

63. The reference to “pension rules” in regulation 13(1) must be to the five pension rules described in section 165 FA 2003 as follows:

165(1) These are the rules relating to the payment of pensions by a registered pension scheme to a member of the pension scheme (“the pension rules”).

*Pension rule 1*

No payment of pension may be made before the day on which the member reaches normal minimum pension age, unless the ill-health condition was met immediately before the member became entitled to a pension under the pension scheme.

*Pension rule 2*

If the member dies before the end of the period of ten years beginning with the day on which the member became entitled to a scheme pension or an annuity, and if in the case of an annuity that day was before 6 April 2015, payment of the scheme pension or annuity may continue to be made (to any person) until the end of that period.

If the member becomes entitled to an annuity on or after 6 April 2015 and the annuity is payable until the later of the member's death and the end of a term certain, payment of the annuity may continue to be made (to any person) until the end of that term.

Except as provided by the preceding provisions of this rule, no payment of the member's pension may be made after the member's death.

*Pension rule 3*

No payment of pension other than a scheme pension may be made in respect of a defined benefits arrangement.

*Pension rule 4*

No payment of pension other than —

- (a) a scheme pension,
- (b) a lifetime annuity, or
- (c) drawdown pension

may be made in respect of a money purchase arrangement; but a scheme pension may only be paid if the member had an opportunity to select a lifetime annuity instead.

*Pension rule 5*

The total amount of drawdown pension paid in each drawdown pension year from, or under a short-term annuity purchased using sums or assets out of, the member's drawdown pension fund in respect of a money purchase arrangement must not exceed 150% of the basis amount for the drawdown pension.

64. Mr Foulkes says that the payment to him was intended to represent a payment permitted by the pension rules falling within regulation 13 and was therefore an authorised payment within section 164(1)(f) FA 2004. He says that he and Mr Dalziel and the administrators of the Alderley scheme were of the genuine belief that he was entitled to receive the payment by way of loan.

65. We accept that Mr Foulkes, if not others involved in the arrangements, genuinely believed that he could receive the payment by way of loan and that it was not in any way

unauthorised. However, we do not accept Mr Foulkes' submission that the payment therefore fell within regulation 13 and section 164(1)(f) FA 2004. Regulation 13 only applies to payments by the registered pension scheme which were intended to represent a payment permitted by the pension rules. The pension rules all relate to payments of pension benefits. They do not relate to payments which were not intended to be payments of pension benefits. It was never intended that the payment of £11,819 represented a pension benefit. It was intended to represent a loan.

66. We are satisfied therefore that the loan was an unauthorised member payment and that Mr Foulkes became liable to the unauthorised payments charge at 40% pursuant to section 208 FA 2004.

67. HMRC's closure notice charged an unauthorised payments charge of £7,323 and an unauthorised payments surcharge of £2,746 giving a total charge to income tax of £10,069. HMRC now accept that Mr Foulkes is overcharged by the closure notice because the charges were based on the pension transfer and not on the amount of the loan. To that extent we must allow the appeal against those charges in part, and reduce them accordingly. The amount of the unauthorised payments charge at 40% should be reduced to £5,216. The unauthorised member payment reached the threshold of 25% of the value of the fund and Mr Foulkes therefore became liable to the unauthorised payments surcharge at 15% pursuant to section 209 FA 2004. The amount of the unauthorised payments surcharge should be reduced to £1,956. The total charge to income tax is therefore reduced to £7,172.

**(3) Is it just and reasonable for Mr Foulkes to be liable to the unauthorised payments surcharge?**

68. The burden is on Mr Foulkes to establish that it is not just and reasonable for him to be liable to the surcharge.

69. The approach to this question was considered by the Upper Tribunal in *HM Revenue & Customs v Bella Figura* [2016] 569 (TCC) where it said as follows:

70. As to the considerations that should be taken into account in evaluating the question whether it is just and reasonable to set aside a scheme sanction charge or unauthorised payments surcharge, we would respectfully endorse what the First-tier Tribunal (Judge Rupert Jones and Mohammed Farooq) said in *O'Mara v HMRC* [2017] UKFTT 91 (TC):

152. The statutory test will not benefit from unnecessary gloss. It requires the Tribunal to examine all the circumstances and decide whether it would be just and reasonable for the appellants to be liable to surcharges.

153. It does not require any finding of dishonesty or negligence on part of the appellants. It allows the Tribunal to examine all the circumstances surrounding the making and receipt of the unauthorised payments in each appellant's case. This in turn allows the Tribunal to examine an appellant's conduct or any other relevant mitigating circumstances pertaining to the payments or the appellant's circumstances. It also allows the Tribunal to take account of the statutory scheme and mischief the surcharge is designed to prevent.

70. We take into account all our findings of fact as to the circumstances in which the unauthorised member payment came to be made. We also take into account the statutory scheme for pension tax relief and the various charges and surcharges that may be imposed which were described at [72] – [75] of *Bella Figura* as follows:

72. We do not ourselves consider that whether the charges are described as "penal" or not will serve as much of a guide to how to decide, in a particular case, whether it is "just and reasonable" for a charge to be imposed. More important, in our view, is to consider the entire statutory scheme

of which these charges form part. In essence, that scheme provides: (i) for contributions made by employers and employees to benefit from tax relief at the point of payment; (ii) for the funds contributed to be held securely to provide pension benefits that can, at least in usual cases, only be taken once an individual reaches the age of 55; (iii) for most income and gains received by the registered pension scheme in connection with the investments of contributions not to be subject to tax; but (iv) for amounts payable to an individual taking benefits to be subject, in most cases, to income tax (with the most important exception of the ability to take a tax-free lump sum equal to 25% of the accumulated fund).

73. While conceptually it might be said that tax relief granted to individuals and employers at stage (i) is counteracted by the taxability of pension benefits at stage (iv), the overall scheme clearly involves a material cost to the Exchequer...

74. Parliament is content for the Exchequer to suffer these costs given the social utility of individuals saving for their retirement, but only where the entire bargain set out at [72] is respected. It is for this reason that different aspects of the unauthorised payments regime apply to different potential breaches of the bargain. For example, if a registered scheme impermissibly pays benefits to a member before he or she reaches 55, there is an unauthorised payment because the Exchequer has suffered the costs we have outlined, but since the funds have been drawn before retirement age, the social utility of funding retirement is not present...

75. These observations also explain how the making of unauthorised payments can be more, or less, serious. For example, an extreme form of "pensions liberation" might involve a co-ordinated attempt by an individual to access a pension fund held in a registered scheme before he or she reaches the age of 55 in a manner that escapes tax altogether. Such a scheme seeks to impose on the Exchequer the cost of deductions at stage (i) and exemptions at stage (iii) even though no retirement benefits are ultimately provided. In addition, were such a scheme successful the Exchequer would not even obtain tax at stage (iv) when the funds leave the scheme. Considerably less serious would be the making of a loan to an employer which, while it fails the requirements necessary to be an "authorised employer loan" (so exposing the Exchequer to a risk of loss) is ultimately repaid in full with a market rate of interest so that the Exchequer suffers no actual cost and the social utility of the provision of retirement benefits is preserved.

71. There is no suggestion that Mr Foulkes was deliberately attempting to access his fund before reaching the age of 55. He says that he did not know and could not reasonably have known that there was any connection between the investment in Haimachek and the loan. He also says that there is no evidence that the value of his pension fund was diminished by the loan.

72. We are prepared to accept that Mr Foulkes did not know that the loan was connected with the investment of his funds in Haimachek. Further, it was not put to Mr Foulkes that he should have known that the loan was connected to the investment in Haimachek. We shall proceed on the basis that Mr Foulkes could not reasonably have known that there was a link between the investment in Haimachek and the loan. However, it is clear from *Bella Figura* that the presence or absence of negligence is not determinative of this issue. We do note the following factors:

(1) The investment in Haimachek and the possibility of a loan were first discussed by Mr Foulkes and Mr Dalziel at the same meeting.

(2) The funds were made available to Mr Foulkes after the pension transfer took place with instructions to invest the fund in Haimachek, but before he had signed the loan agreement.

(3) The loan agreement itself referred to Mr Foulkes as having an account balance with RDML, which Mr Foulkes knew was a company connected with the investment in Haimachek.

73. There were therefore some factors from which Mr Foulkes might have been able to identify that there was a connection between the investment and the loan. Having said that, Mr Foulkes took professional advice at the time of the transactions. He has lost a significant proportion of the fund, effectively the difference between the £18,309 transfer value and the loan of £13,040, subject to any recovery he might make from the Financial Compensation Fund. He has also co-operated with HMRC in their enquiry.

74. Mr Foulkes argued that in his case the unauthorised payments surcharge went beyond recovering the tax relief he had obtained on contributions to the West Midlands fund and tax-free growth in the fund. He has always been a basic rate taxpayer and the unauthorised payments charge would cover any loss of tax. His contributions to West Midlands were £2,469. By 2017 it had grown to £18,309. He had intended to use the trivial commutation rules when he was 55 in 2023. If by then the fund had grown to 20,000, he would obtain £5,000 tax free, and pay basic rate tax on the balance of £15,000, which would amount to tax of £3,000. Tax relief at source on the original contributions would have been a few hundred pounds. In other words, the tax benefits associated with the pension were less than the unauthorised payments charge. The surcharge could only be viewed as a punitive measure in his case.

75. We do not consider that it is appropriate to calculate whether the charges equate to the benefit of the tax relief obtained by Mr Foulkes. The charges are intended as a broad measure of the tax relief. As such, the circumstances in which it will be just and reasonable to discharge liability to the surcharge are likely to be limited. The charge and the surcharge are also intended to act as a deterrent against unauthorised member payments.

76. Mr Foulkes chose to take part in the arrangements, and the arrangements gave rise to an unauthorised member payment. The unauthorised member payment amounted to a significant proportion of the fund. Even accepting that he could not reasonably have known of a connection between the investment in Haimachek and the loan, he did sign an indemnity to Warwick & Eaton which stated that he would not take a loan as a result of the pension transfer. It was unwise to negotiate a loan at the same time as dealing with the pension transfer.

77. We take into account all the circumstances, including the statutory scheme for charges and surcharges described above. Overall, Mr Foulkes has not satisfied us that it is not just and reasonable for him to be liable for the unauthorised payments surcharge.

#### **CONCLUSION**

78. For the reasons given above, we allow the appeal in part and reduce the unauthorised payments charge to £5,216 and the unauthorised payments surcharge to £1,956.

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

79. 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.

**JONATHAN CANNAN  
TRIBUNAL JUDGE**

**Release date: 10<sup>th</sup> April 2024**