[2017] UKFTT 131 (TC)

TC05625

Appeal number: TC/2013/00338
TC/2013/00372

Income tax – unauthorised payments charge, unauthorised payments surcharge and scheme sanction charge under ss 174A, 208, 209 and 239 FA04 – investment-regulated pension schemes buying large printing presses and plant and machinery from sponsoring employers and leasing them back – whether the printing presses were "tangible moveable property" – whether charges infringed rights under Article 6 or Article 1 of the First Protocol ECHR – whether FA04 should be interpreted to cancel the charges – whether relief from the unauthorised payments charge and scheme sanction charge should be granted under s 268 FA04

FIRST-TIER TRIBUNAL
TAX CHAMBER

MORGAN LLOYD TRUSTEES LIMITED (as administrator of the Wren Press Pension Scheme) (1) — **Appellants**

RAY HALLAM (2)

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Respondents**

TRIBUNAL: JUDGE KEVIN POOLE
IAN MENZIES-CONACHER FCA CTA

Sitting in public in The Royal Courts of Justice, Strand, London on 2 to 4 March 2016

Michael Furness QC instructed by Veale Wasbrough Vizards LLP for the Appellant

Elizabeth Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. These appeals are concerned with the imposition of various tax charges on the administrator of one pension scheme and a member of a different pension scheme in respect of the two schemes' purchase of property which, according to HMRC, was "tangible moveable property", so triggering the tax charges contained in Finance Act 2004 ("FA04") (as amended by Finance Act 2006 ("FA06")). In relation to the first appellant the charges imposed were "scheme sanction charges" and in relation to the second appellant they were an "unauthorised payments charge" and an "unauthorised payments surcharge".

The facts

Introduction

2. There was no dispute about the core facts, which were largely set out in an agreed statement of facts in respect of each appeal. By way of supplement to those core facts (and in addition to a bundle of documents), we received witness statements and heard oral evidence from:

(1) Nigel Rawlence, a majority shareholder and director of Wren Press Stationers Limited ("WPS") until its dissolution on 17 August 2011, a trustee (together with Michael Rawlence and the first appellant) of the Wren Press Pension Scheme established in August 2006 as set out below ("WPPS") and also a member of that scheme (the first appellant being its scheme administrator);

(2) The second appellant, the former managing director of Trent Valley Restoration (UK) Limited ("TVR"), which went into administration in June 2007 and subsequently into liquidation in January 2011. He was also a member (or former member) of the TVR Small Works Limited Pension Scheme, a small self-administered scheme under the regime applying before 6 April 2006 ("A day"). He was also (together with his wife Eve Hallam) a member and trustee of the TVR (UK) Limited Pension Scheme ("TVRPS"), established in June 2006 as set out below.

(3) Anthony Carty, the group financial planning director for the Clifton Asset Management group of companies (which includes the first appellant)[1];

(4) Ellis Organ, the group finance director for the Clifton Asset Management group of companies and a director of the first appellant; and

[1] At the time the transactions the subject of the appeals took place, he was a self-employed senior adviser with a company within the group

(5) John Bhandal, an officer of HMRC who attended on a site visit to inspect some of the printing machinery whose sale had resulted in the scheme sanction charges being imposed on the first appellant.

3. The evidence was largely uncontested though, as can be seen below, some of 5 the less important "agreed facts" were inaccurate.

Agreed statements of facts

4. The following statement of facts had been agreed by the parties to the first appeal (references to "the Appellant" therefore meaning the first appellant):

> "1. The Appellant is the Trustee of the Wren Press Pension Scheme (**Pension Scheme**). The Pension Scheme reference number is 00626754RJ. The Appellant acts as a trustee together with Mr Nigel Rawlence and Mr Michael Rawlence. Mr Nigel Rawlence and Mr Michael Rawlence are members of the Pension Scheme and were directors of the Wren Press Stationers Limited. Nigel Rawlence was also a shareholder.
>
> 2. The company Wren Press Stationers Limited of 1 Chelsea Wharf, 15 Lots Road, London SW10 0QI (also known as "the Wren Press Limited") owned the machinery detailed in the appendix (the **Wren Press Equipment**).[2]
>
> 3. On 27 July 2006 the trustees of the Pension Scheme resolved that the Pension Scheme would purchase the Wren Press Equipment at the price of £109,000 plus VAT from the Wren Press Limited. The Wren Press Equipment was to be leased to the Wren Press Limited at a total monthly lease of £1,991.25 plus VAT over a period of 60 months.
>
> 4. On 14 August 2006 the Wren Press Stationers Limited issued an invoice to the Pension Scheme, Morgan Lloyd Trustees Limited for £109,000 plus VAT being £128,075.
>
> 5. By letter dated 15 August 2006 R Jordan, toolmaker, provided the directors of Wren Press Stationers Limited with a written valuation of the Wren Press Equipment for a commercial lease rate providing for the repayment of capital and interest stating in that letter *"we believe the market rate for leasing such equipment would be in the order of £1,900 plus VAT over 60 months. It is our opinion that these machines will carry a residual value at the end of the proposed lease period (5 years) since if they are properly maintained they should have a workable life of around another 25 years or so"*.[3]

[2] The Appendix did not include one of the six items which, it became apparent at the hearing, should have been included in it (as listed at [8] below)

[3] This valuation referred only to items (1) to (5) of the list set out at [8] below. The discrepancy between the £1,900 figure mentioned here and the £1,991.25 figure mentioned at paragraph 3 of the statement of agreed facts is explained by this – see [9] below.

6. On 27 September 2006 Mr Nigel Rawlence, Mr Michael Rawlence and Morgan Lloyd Trustees Limited as trustees of the Pension Scheme and the Wren Press Limited entered into a lease agreement (**Lease**)[4]. The schedule to the Lease provided that on the date on which the Lease was signed the Pension Scheme agreed to let and the Wren Press Stationers Limited agreed to hire the Wren Press Equipment. The Lease provides for a first payment of £1,991.25 plus VAT on 27 September 2006 followed by 59 monthly payments of the same amount.

7. The Pension Scheme paid £109,000 plus VAT to the Wren Press Stationers Limited in the tax year 2006/07[5]. The Pension Scheme received rental payments of £1,991.25 plus VAT per month for the tax years ending 5 April 2007, 2008, 2009 and 2010.

8. Wren Press Stationers Limited and The Wren Press Limited are unconnected companies with different ownership and do not share any common directors. Wren Press Stationers Limited's registered office is 7-8 Conduit Street, London W1S 2XF. The Wren Press Limited's registered office is at 27A Poland Street, London W1F 8QW.

9. The Wren Press Stationers Limited was dissolved on 19 August 2011.

10. The Pension Scheme is a "registered pension" within the meaning of Sections 160 FA 2004 and "investment regulated pension scheme" within the meaning of Schedule 29A Part 1 paragraph 1.

11. The Appellant was allocated a unique ID reference, namely "A0002473" when it applied to be registered as the Pension Scheme administrator. On 3 August 2006 the Appellant registered the Pension Scheme on the Pension Schemes Online system using the ID reference "A0002473". On registration, the Appellant made the declaration required by section 270 of the Finance Act 2004 in respect of the Pension Scheme.

In respect of the period under appeal 2006/07, the Appellant submitted an online return for the Pension Scheme pursuant to section 250 of the Finance Act 2004 using the ID reference "A0002473", on 8 February 2008. In respect of the period under appeal 2007/08, the Appellant submitted an online return for the

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[4] In fact, Mr Michael Rawlence and Mr Nigel Rawlence had signed the Lease on 26 July 2006.

[5] In fact, payment was received on 26 September 2006.

Pension Scheme pursuant to section 250 of the Finance Act 2004 using the ID reference "A0002473", on 19 January 2009.

The Appellant and Morgan Lloyd Administration Limited are part of a group of companies together with Clifton Asset Management Plc.

5 12. No return was submitted for the periods under appeal 2008/09 and 2009/10.

13. The following were directors of Wren Press Stationers Limited: Nigel John Rawlence, Nicholas Gerrard Hartley, Michael Richard Norris and Daniel Christopher Jones. The following were shareholders 10 of Wren Press Stationers Limited: Nigel John Rawlence (92,308), Nicholas Gerrard Hartley (23,077), GA Pindar & Sons Limited (23,077), Daniel Christopher Jones (7,692) and Carol Rawlence (7,692)."

5. The following statement of facts had been agreed by the parties to the second 15 appeal (references to "the Appellant" therefore meaning the second appellant):

"1. The Appellant is a member of the TVR Small Works Limited Pension Scheme (also known as TVR (UK) Limited Pension Scheme)[6] (the **Pension Scheme**). The Pension Scheme reference is 00619267RS. The Appellant is a Trustee of the Scheme together with Eve Hallam 20 (**Mrs Hallam**) (the Appellant's wife) and Morgan Lloyd Trustees Limited. Mrs Hallam is also a member of the Pension Scheme.

2. The Appellant is the managing director of TVR Group Limited.[7]

3. TVR Group Limited owned the assets listed in the appendix 25 (the **TVR Equipment**).

4. TVR Group Limited instructed David Loach Associates to value the TVR equipment. On or about 28 June 2006 David Loach Associates provided a written valuation of the TVR Equipment in the total sum of £28,960.

30 5. On 16 August 2006 the Appellant, Mrs Hallam and Morgan Lloyd Trustees Limited as trustees of the Pension Scheme (the **Fund**)

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[6] In fact, it appears there were/are two different schemes, one established before A day (the TVR Small Works Limited Pension Scheme) and one established after that day (the TVR (UK) Limited Pension Scheme). The latter scheme is the one under consideration in this appeal. Matters are somewhat confused by the fact that the scheme annual return under reference A619267RS for the year ended 5 April 2007 identified the scheme name as "TVR (UK) Ltd Pension Scheme" and the return for the following year under the same reference identified it as "TVR Small Works Limited Pension Scheme".

[7] No such company appears to have ever existed. This company name did appear (along with the names "TVR Small Works Ltd" and "TVR (Jersey) Ltd") on the invoice issued for the sale of the TVR Equipment referred to in paragraph 7 of the statement of agreed facts, but the company registration number on the invoice was that of Trent Valley Restoration (UK) Limited, which went into Administration in June 2007, and subsequently (in January 2011) into liquidation – see below.

and Trent Valley Restoration (UK) Limited defined as "the Company" entered into a lease agreement which provided that on the date on which the lease is signed by the Fund (16 August 2006) the Fund agreed to let and the Company agreed to hire the TVR Equipment (the **Lease**)[8]. The Lease provides for a first payment of £1,054.99 plus VAT on 17 August 2006 followed by 36 monthly payments of the same amount.

7. VAT invoice number 17477 was issued by TVR Group Limited, TVR Small Works Limited, TVR (Jersey) Limited to the Pension Scheme on 17 August 2006 for the sum of £28,960 plus VAT being £34,028.

8. The Pension Scheme paid £34,028 to TVR Group Limited in the tax year 2006/07.[9]

9. On 21 December 2011 the Pension Scheme sold the TVR Equipment back to the TVR Group Limited for the nominal amount of £100 pursuant to the Lease.

10. The TVR Equipment is no longer in use by the TVR Group Limited and has been replaced. The TVR Equipment was purchased by the TVR Group Limited for the nominal value of £100 plus VAT as set out in the Lease. An invoice dated 21 December 2011 was issued by the Trustees of the TVR Small Works Limited Pension Scheme to TVR Small Works Limited.[10]

11. The Pension Scheme is a "registered pension" within the meaning of section 160 FA 2004 and "investment regulated pension schemes *[sic]*" within the meaning of Schedule 29A Part 1 paragraph 1.

12. Morgan Lloyd Trustees Limited registered the Pension Scheme on the Pension Schemes Online system using the ID reference "A0002473". On registration, Morgan Lloyd Trustees Limited made the declaration required by section 270 of the Finance Act 2004 in respect of the Pension Scheme.

In respect of the period under appeal 2006/07, Morgan Lloyd Trustees Limited submitted an online return for the Pension Scheme pursuant to section 250 of the Finance Act 2004 on 8 February 2008 using the ID reference "A0002473".

13. Morgan Lloyd Administration Limited and Morgan Lloyd Trustees Limited are part of a group of companies together with Clifton Asset Management PLC.

[8] In fact, it was subsequently established that the second appellant only signed the Lease on 30 August 2006.

[9] In fact, payment was made on 17 August 2006.

[10] TVR Small Works Limited was incorporated on 4 April 2006, went into creditors' voluntary liquidation in October 2009, and was dissolved in April 2013.

14. Raymond Dennis Hallam is a director and 50% shareholder of TVR Smallworks Limited. Faye Hallam is a 50% shareholder of TVR Smallworks Limited.

TVR Smallworks Limited is now known as FRN Steeplejacks Limited. This company has no subsidiaries.[11]"

WPS sale and leaseback

The transaction

6. WPS carried on business as high quality printers, producing such items as Royal Wedding invitations.

7. Mr Nigel Rawlence first dealt with the Clifton Asset Management ("CAM") group of companies in about September 2004, when he received mailshot material from them. Following a meeting with a representative from CAM, he entered into an arrangement under which WPS entered into a sale and lease-back of some printing machinery with Mr Rawlence's small self-administered pension scheme. That transaction had proceeded smoothly and without any problems and had achieved Mr Rawlence's objective of using some of his pension scheme to help the company with its cash flow.

8. In July 2006 therefore, when WPS required further cash, he approached CAM to put in place a further sale and lease back. The printing machinery involved in the transaction was the following:

(1) Three 9×5 Waite and Saville Die Presses (s/n C10904, B10293 & 909029/98) (valued at £10,000 each). These machines weighed between 3.5 and 4 tonnes each.

(2) Two 8×3 Waite and Saville Die Presses (s/n CX11254 & C10914) (valued at £8,500 each). These machines weighed approximately 3 tonnes each.

(3) One 8×3 Auto Waite and Saville Die Press, complete with 6 kilowatt dryer and feeder (s/n C10986) (valued at £17,000). This machine weighed approximately 3 tonnes.

(4) One 13×8 Waite and Saville Die Press (s/n B9204) (valued at £20,000). This machine weighed over 7 tonnes.

(5) One 12×10 Waite and Saville Die Press (s/n B8789) (valued at £20,000). This machine weighed between 6.5 and 7 tonnes.

(6) One Green Machine (valued at £5,000). There was no evidence before us as to the weight or nature of this machine.

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[11] FRN Steeplejacks Limited was incorporated on 23 September 2010, liquidated in August 2013 and dissolved in October 2015.

9. The items listed at (1) to (5) above were valued by R Jordan, Toolmaker, with an aggregate value of £104,000 (in respect of which an estimated open market monthly rental figure for a 60 month lease was given as £1,900 per month). A letter dated 15 August 2006 from that valuer toWPS providing this detail was included in our bundle. Item (6) above was valued at £5,000 by a different valuer Caslon Limited, and an estimated open market monthly rental figure for a 60 month lease of that item was given as £91.25, all in a letter dated 27 July 2006.

10. It appears that the WPPS was established as part of this process. Major changes to the pension scheme tax rules had been introduced with effect from 6 April 2006 ("A day") and clearly CAM had identified the need to establish the WPPS as a new scheme under those new rules (presumably in succession to an earlier small self-administered scheme) as a pre-requisite to putting in place the intended sale and lease back of machinery.

11. Included in the documents before us was a copy of an "Administration Services Agreement" dated 7 August 2006, under which Morgan Lloyd Administration Limited ("MLAL") agreed to supply certain "services in relation to [WPPS] and its registration by HMRC", including "the provision of the Trust Deed" (defined as "the definitive trust deed and rules dated the same date as this Agreement between the Trustees and the Principal Employer and effective from the Commencement Date" – the "Commencement Date" being defined as 6 April 2006, the "Principal Employer" being defined as WPS and "the Trustees" being defined as the first appellant, Michael Rawlence and Nigel Rawlence); MLAL also agreed to conduct the routine administration of the WPPS. In addition, a copy of the first annual return for the WPPS (for the year 6 April 2006 to 5 April 2007) was included in our bundle, and that return shows the WPPS as having received a transfer-in payment of £144,583 during the year, as well as contributions of £100. That return was made by the first appellant, identifying itself as the scheme administrator.

12. The lease agreement in the bundle was signed by Michael and Nigel Rawlence (in their capacities as trustees of the new WPPS and as officers of WPS) on 26 July 2006. A resolution purporting to be a resolution of the trustees of the WPPS was signed by Nigel and Michael Rawlence on 27 July 2006, authorising the purchase of "the attached schedule of plant and equipment at the price of £109,000 plus VAT" (though no schedule was attached to the copy in our bundle). The first appellant was recorded on this resolution as being "absent". The lease agreement was only signed on behalf of the first appellant on 27 September 2006, one day after the date on which the purchase price for the assets was paid to WPS by WPPS (though WPS had issued a VAT invoice for the sale on 14 August 2006).

The printing presses

13. As Mr Furness argued that most of the printing presses were not "tangible moveable property" in any event, it is appropriate to set out our findings on them.

14. As mentioned at [8(6)] above, there was no evidence before us as to the nature of the "green machine".

15. In his evidence, Mr Rawlence emphasised the size and weight of the other machines and the difficulty of moving them. He was not the technical expert on such matters, his involvement was more on the office side. He explained that a team of up to three skilled engineers was required to move them. They would need to be stripped back to their carcasses, dismantling the complex working parts and uncoupling them from the drying and delivery chains. A strong crane would then be required to lift them (after removing any floor fixings) and any obstructions within the building would need to be moved.

16. He thought that at least the lighter (4 tonnes and below) machines needed to be fixed down, in order to avoid any movement which would reduce the quality of the printed output. He thought the larger (7 tonne) machines might, by virtue of their sheer weight, be capable of operating satisfactorily without needing to be fixed down. He said their trading premises had a somewhat unsatisfactory floor, so all the machines had been fixed to railway sleepers which were, in turn, attached to the floor. This also provided better access for cleaning underneath the machines.

17. Mr Bhandal of HMRC gave evidence as to the visit which had taken place at another printing company on 11 March 2015, when two of the lighter presses in issue in this appeal were inspected in situ at the premises of their new owners. These were one each of the presses referred to at [8(1)] and [8(2)] above. On that visit, the new owners said that the presses had been moved four times since they had been purchased. All that was required was a 4-tonne forklift truck and specialist removers. The machines were free-standing on a good quality concrete floor, with sandbags around their bases to soak up any ink spillage.

18. We find that whilst the presses were, in 2006, fixed to railway sleepers which were, in turn, fixed to the floor at the premises of WPS, any such fixing was done mainly in order to ensure the machines were steady and level on a somewhat inferior floor surface, so that they would operate to the optimum standards. A subsidiary purpose of the fixing was to allow better access for cleaning and servicing. The nature of the fixing was such that it would have taken a matter of minutes to undo, without any significant damage to either the machines themselves or the premises. Whilst a degree of dismantling would also have been required in order to move the presses, that would have involved little more than disconnection from feeder and dryer mechanisms and power supply and removal of some of the more fragile and sensitive working parts. Thereafter, we find the smaller presses were quite capable of being moved using a 4 tonne capacity forklift truck. So far as the larger (6.5 - 7 tonne) presses are concerned, we find that whilst the process of moving them would have been more difficult due to their greater size, it would still not have required any significant interference with the premises where they were sited.

TVR sale and leaseback

19. TVR carried on business as steeplejacks and ran a small self-administered pension scheme called the TVR Small Works Limited Pension Scheme under the rules as they stood before A day. The second appellant was TVR's managing director and (together with his wife) a trustee and member of the scheme.

20. Early in 2006, the second appellant received a mailshot from CAM informing him that it was possible to inject cash from his pension fund into his company. He had not been aware of this possibility, and as TVR was suffering some cash flow issues at the time he decided to take it further. Whilst the initial approach from CAM referred to arrangements proposed under the pre-A day regime, things progressed seamlessly, so far as TVR was concerned, after A day.

21. The second appellant was told he would need to obtain an independent valuation of the assets he proposed to sell and lease back, and included in our bundle was a valuation dated 28 June 2006 which listed numerous items of small equipment such as ladders, scaffolding, ropes, tools and two vans. The total value was £28,960 excluding VAT.

22. In the meantime, the documents to establish the TVRPS were signed. Included in our bundle was an "Administration Services Agreement" dated 16 June 2006 in near identical form to that referred to at [10] above. The named trustees of the TVRPS were the first appellant, the second appellant and Eve Hallam (the second appellant's wife).

23. The second appellant was informed by CAM that the paperwork would be completed and TVR would receive the money from the TVRPS in due course. The lease agreement was ultimately signed on 16 August 2006 by the second appellant and his wife (both on behalf of TVR and as trustees of TVRPS) and on 30 August 2006 by the first appellant. TVR issued a VAT invoice for the sale of the assets to TVPS on 17 August 2006 and agreed to make the first rental payment (of £1,054.99 plus VAT) on that date, with 36 further monthly payments of the same amount to follow. The payment to TVR of £34,028 (£28.960 plus VAT) was made at around the same time. The lease payments continued to be made "for a couple of years", then they were reduced and then stopped altogether when TVR went into liquidation (which happened in October 2009). In December 2011, the remaining goods the subject of the lease were apparently sold back to FRN Steeplejacks Limited for £100.

The assessments under appeal

24. There is no dispute about the computation of the assessments under appeal, which are as follows.

The first appellant

25. A notice of assessment dated 15 March 2011 was issued to the first appellant in the amount of £45,941 in respect of the year 2006-07, comprising a scheme sanction charge of £43,600 imposed pursuant to section 239 FA04 in relation to the first appellant's acquisition of tangible moveable property and a scheme sanction charge of £2,341 in relation to its receipt of income from tangible moveable property, in each case in its capacity as scheme administrator of the WPPS.

26. Subsequent notices of assessment dated 22 February 2012 were issued to the first appellant in the same capacity in relation to receipt of income from tangible moveable property during the tax years 2007-08, 2008-09 and 2009-10 in the sums of £4,662, £4,662 and £4,911 respectively.

The second appellant

27. A notice of assessment dated 16 March 2011 was issued to the second appellant in the amount of £5,096, comprising an unauthorised payments charge of £3,706 under section 208 FA04 and an unauthorised payments surcharge of £1,390 under section 209 FA04. The amount was arrived at by apportioning 32% of the total unauthorised payment to the second appellant (that being the proportion of the value of the total fund attributable to him) and then charging him to an unauthorised payments surcharge at the rate of 40% and an unauthorised payments surcharge at the rate of 15% on the amount so apportioned.

The process of introducing the new rules and the appellants' awareness of them

28. The legislation with which we are concerned was new in 2006 – see below. As the appellants were effectively arguing, in part, that they should be relieved of liability under section 268 FA04 (see below) by reason of the way in which the changes were brought in and communicated by HMRC, it is appropriate to consider the process by which the new rules were introduced and the way in which the appellants' awareness of the rules developed over the spring and summer of 2006.

29. The second appellant claimed no direct knowledge of the legislation at all, he was simply relying on apparently competent professional advice from CAM. We accept this.

30. Under the pre-existing regime, small self-administered pension schemes ("SSAS's") were permitted to invest, on arms' length terms, in buying and leasing back plant and machinery belonging to the sponsoring company (as WPS had previously done). Returns of such transactions had to be submitted to HMRC and there was no indication that this was considered by HMRC to be an abuse of the regime. The previous regime did restrict investment in "personal chattels other than choses in action" (by virtue of Regulation 5(1) of the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991). In guidance issued by HMRC (a copy of which, extant at 5 April 2006, was included in our bundles), the following list was given of "examples of personal chattels": Works of art, rare stamps, gem stones, furniture, antiques, rare books, jewellery, oriental rugs, fine wines, vintage cars, yachts, gold bullion, Krugerrands and films. The potential sanction for breaching the restrictions was withdrawal of the scheme's tax approved status.

31. The bulk of the legislation on the new regime for pension schemes from A day was contained in FA04 as originally enacted on 22 July 2004. That afforded all interested parties a significant lead-in time to implementation of the changes on A day (6 April 2006) in order to plan and prepare for them.

32. However, the original FA04 legislation was clearly considered by HMRC to be inadequate in various respects, and during 2005 attention turned to some particular concerns about the perceived scope for abuse of the new "simpler and more accessible environment for pension saving" created by the original FA04, especially by smaller pension schemes equivalent to the then-existing SSAS's. As a result, HMRC published a "Technical Note" as part of the Pre-budget Report on 5 December 2005.

This Technical Note (which was not included in our bundle, but is a publicly available document from the National Archives) included the following text about some proposed changes to the FA04 regime:

> "From A Day, the Government will remove the tax advantages for investing in residential property or certain other assets such as fine wines, classic cars and art & antiques from registered pension schemes which are self-directed. This is to prevent people benefiting from tax relief in relation to contributions made into self-directed pension schemes for the purpose of funding purchases of holiday or second homes and other prohibited assets for their or their family's personal use.
>
> Background
>
> The new pensions tax regime, in Chapter 4 of the Finance Act 2004, takes effect from A-Day and provides a single investment regime for all registered pension schemes. As part of this single set of investment rules registered pension schemes were given the right to invest in residential property and other tangible moveable assets. This rule extended to self-directed pension schemes which are, under the current rules prohibited from investing in certain assets. Details of the current rules are set out in regulations at SI 1991/1614 and 2001/117.
>
> However, to prevent the potential abuse of these rules by people directing the scheme to acquire assets from which a personal benefit will be derived, rather than directing the acquisition of those assets and the associated generous tax reliefs for their intended purpose of building a fund that will ensure a secure income in retirement, the Government has decided to tighten the rules governing allowable investments by certain types of registered pension scheme – notably those where investment can be member-directed – to prohibit tax advantages arising where there is investment in residential property and certain tangible moveable property.
>
> …
>
> The legislation will apply to **direct investment** in residential property and in most forms of tangible moveable property (similar to what are currently called personal chattels in the regulations covering SSAS and SIPP investments…)"

33. No evidence was put before us to suggest that the proposed legislation to implement these changes was published any earlier than as part of the publication of the entire Finance (No. 2) Bill, which took place on 7 April 2006. The "Explanatory Notes on Clauses" published with the bill included extensive commentary on the "residential property" provisions, but gave no commentary on the "tangible moveable property" provisions.

34. There was however some guidance published by HMRC at around that time on the proposed new "taxable property" regime. Included in our bundles were copy extracts, extant as at 12 April 2006, of a 26-page document headed "Taxable Property Guidance". It is marked "DRAFT – 04/06 version", from which we infer it was

published in draft in April 2006, presumably at around the same time as the Finance Bill. That guidance contained the following short section headed "8. Tangible moveable property":

> "8.1 These are things that you can touch and move. Examples are art, antiques, jewellery, fine wine, boats, classic and vintage cars, stamp collections, rare books.
>
> 8.2 Assets used for the purpose of the administration or management of the scheme will not be subject to the tax charge unless, exceptionally, they are held for the purpose of an arrangement relating to a member of the scheme.
>
> 8.2.1 See paragraph 17.5 for details of a similar provision relating to indirect holdings in vehicles that possess assets used solely for the purposes of administration or management of a vehicle.
>
> 8.3 Certain tangible moveable property that is specified in Regulations will not be taxable property so will not be subject to tax charges when held as a scheme investment by an investment regulated pension scheme. See paragraphs 8.3.2 and 17.5.
>
> 8.3.1 Any specified items will be of a type that is normally held as investments and do not provide any possibility of personal use.
>
> 8.3.2 Investment grade gold bullion has been specified. The definition of investment grade gold is gold of a purity not less than 995 thousandths that is in a form of a bar or wafer, of a weight accepted by the bullion markets.
>
> 8.4 Any Regulations that may be made to allow certain tangible moveable property to be held and not count as taxable property may have effect from an earlier date to that on which the Regulation is made."

35. Whilst the specific items mentioned in paragraph 8.1 were only cited as "examples" of "things that you can touch and move", the objective reader would in our view reasonably have read the guidance as meaning that HMRC took the view the provisions were aimed at property of a similar nature to those specified, particularly when compared to the list of "examples of personal chattels" under the previous regime referred to at [30] above, with which there are many parallels.

36. It was also drawn to our attention that the substance of the "tangible moveable property" regime was still under discussion at the Committee stage of the Finance Bill as late as 20 June 2006, including the following statements by the Economic Secretary to the Treasury:

> "[The relevant provisions] provide the basic definitions of taxable assets so that we can prevent people from abusing the generous tax reliefs they are given on pension savings to purchase assets that may benefit them personally. The tax reliefs are given in order to help save the fund that will ensure secure income in retirement. They are not there to provide a means of buying assets for the personal use of pension scheme

members. The taxable assets targeted by the schedule are those where personal use is most likely.

…

…we looked at the previous rules in a number of areas and found that there was imprecision, a lack of clarity and the language was outdated. For example, the term previously used for tangible, moveable property was "personal chattels". It is an outdated term, outside the parameters of the Bill and rarely used in common parlance. Those definitions have worked for a number of years but, over time, there was a considerable need for substantial guidance in order to interpret some of the looseness in the definitions that had arisen. What we are seeking to do in this detailed schedule today is to bring in some precision and to clear up some minor loopholes to make sure that we are as clear as we can be in legislation, rather than having to rely on guidance in how we will apply the regime.

…

[Opposition] Amendment No. 123 seeks to replace the definition of tangible moveable property in the schedule with a definition based on the concept of personal chattels. The alternative definition proposed in the amendment is, as I said, derived from the previous regime. In our view, that old terminology is a bit out of date. The Bill contains simpler definitions that are easier to understand, and that is a better way forward.

… the legislation is aimed at preventing abuse of the tax reliefs given to pension schemes for investment in assets, which may provide the opportunity for private use.

…

A number of points have been made on investments in trading companies, to which the hon. Gentleman referred. First, it is said that the scope of the legislation is too broad, because it will catch genuine commercial investments in trading stock and plant and machinery used in trades for which there is no possibility of private use.

Although that may be true in some circumstances, there are also a number of occasions on which trading stock or plant and machinery used in a trade may be available for personal use; for example, fine wines, cars or residential property development. In such cases, trading stock may well be available for private use. Furthermore, assets held to provide benefit to employees may well be plant and machinery held for the purpose of the trade, but still available for private use. Those are exactly the loopholes that we want to prevent.

…

These are generous reliefs and it is important that they are not abused by some who seek to make them even more so. We have a clear duty to protect the general body of taxpayers. It would be wholly unfair to them

> if an individual were able to receive these generous reliefs on pension saving—on the clear understanding that they were to be accumulated and invested prudently to produce a retirement income—when they were in fact being used to buy a yacht, fine wine or an expensive coastal beach hut."

37. We accept that this illustrates the position in early Summer 2006 was still quite unclear (and indeed Mr Furness came back to that quote when submitting how the legislation should be interpreted).

38. The Finance Act 2006 was passed on 19 July 2006. HMRC proceeded to update its online guidance on the new regime, a large task which was completed over the summer of 2006.

39. There are three relevant passages in the online guidance, all contained in Chapter 7 of the Registered Pension Schemes Manual (which we find was first published online on 25 July 2006 – see [46] below).

40. The first, contained in page RPSM 0710920 was headed "Technical pages: Investments: Taxable property: Meaning of taxable property: Tangible moveable property". Included in our bundles was a document showing that as at 9 October 2006, the text of this page was as follows:

> "These are things that you can touch and move. Examples are art, antiques, jewellery, fine wine, boats, classic and vintage cars, stamp collections, rare books.
>
> Assets used for the purpose of the administration or management of the scheme will not be subject to the tax charge unless, exceptionally, they are held for the purpose of an arrangement relating to a member of the scheme.
>
> See RPSM07109460 for details of a similar provision relating to indirect holdings in vehicles that possess assets used solely for the purposes of administration or management of a vehicle.
>
> Certain tangible moveable property that is specified in Regulations will not be taxable property so will not be subject to tax charges when held as a scheme investment by an investment regulated pension scheme. Such as gold bullion see below and also see RPSM07109460.
>
> Any specified items will be of a type that is normally held as investments and do not provide any possibility of personal use.
>
> Investment grade gold bullion has been specified. The definition of investment grade gold is gold of a purity not less than 995 thousandths that is in a form of a bar or wafer, of a weight accepted by the bullion markets.
>
> Any Regulations that may be made to allow certain tangible moveable property to be held and not count as taxable property may have effect from an earlier date to that on which the Regulation is made."

41. It can readily be seen that, apart from minor contextual changes, the content of this guidance mirrors exactly that issued by HMRC in April 2006 as set out at [34] above.

42. The second piece of relevant guidance was that contained in page RPSM07200200, headed "Members Pages: Investments: What is taxable property?", read as follows:

> "Taxable property includes residential property and what is called tangible moveable property. Tangible moveable property is literally anything that can be touched and moved, it includes personal chattels (such as cars, jewellery and paintings), furnishings, white goods and any machinery. The holding of these types of investment by an investment regulated pension scheme (e.g. a SSAS or a SIPP) will result in the liability of a tax charge."

43. The third piece of relevant guidance was that contained in page RPSM07300170, headed "Scheme Administrator Pages: Investments: What is taxable property?". Its text was exactly the same as that shown on page RPSM07200200, expect that the reference in parentheses to SSAS's and SIPP's was removed.

44. There is some doubt as to when the guidance referred to at [42] and [43] above was actually published online in that form by HMRC. Mr Carty believed it was on 30 August 2006. As part of the evidence to show us how extensive the ongoing changes to the relevant manuals were during the summer of 2006, the appellants had included in our bundles copies of two documents printed off from HMRC's website on 12 February 2007, showing (according to their respective headings) "details of the amendments that were published on" 25 July 2006 and 30 August 2006 respectively, and running to 16 and 36 pages respectively. These clearly demonstrated that HMRC's guidance was being amended extensively during the summer of 2006, and in particular both documents, under the heading "RPSM07", reported as follows:

> "RPSM07109000 New chapter on taxable property
>
> RPSM07200200 New page
>
> RPSM07300170 New page"

45. HMRC brought forward no evidence as to how the relevant content on their website had changed over the relevant period, and in the absence of evidence to the contrary we might have been prepared to accept that these two new pieces of guidance (i.e. those referred to at [42] and [43] above) only appeared on 30 August 2006. However, on a brief examination of the two "amendment details" documents published on 25 July and 30 August 2006, it appears that all of the content of the former document was also included in the latter. Effectively, despite its title, it is apparent that the 30 August 2006 document also included all the earlier changes on a cumulative basis.

46. Whilst it is not impossible that there were separate changes to the text of relevant parts of the underlying guidance between its first issue and 25 July and then

again between 25 July and 30 August 2006, we consider that unlikely, and we find on a balance of probabilities that the amendments referred to at [42] and [43] above were made and published by HMRC on 25 July 2006, less than a week after the passing of the Finance Act 2006, along with the guidance set out at [40] above. It can readily be seen, therefore, that even at this stage HMRC's guidance did, to a certain extent, blow hot and cold by continuing to hark back (on its more detailed "technical pages") to the previous regime whilst introducing for the first time a reference to "machinery".

47. Mr Carty had not apparently read the Act or the bill that preceded it, and was unclear as to precisely what steps had been taken by CAM to keep up to date with the law.

48. Mr Organ had not read the legislation either, but said CAM had a small technical team at the time (the Technical Director at the time was no longer with the group), who had "reviewed the legislation at the time" and decided it "wasn't meant to change things". Through their contacts in the Association of Member-directed Pension Schemes ("AMPS") they were also aware of other providers in the market place still promoting arrangements involving the sale and lease back of plant and machinery at the time (and for some time after).

49. He said they were essentially overwhelmed by the sheer speed and volume of the changes to the manuals as they were published by HMRC, and in view of the apparently slight changes (and continuing references to the previous "personal chattels" items in the new guidance) they did not begin to suspect things might have changed fundamentally until rumours started to circulated in the industry over the late summer. There was an AMPS conference arranged for 3 October 2006 at which HMRC were providing a speaker, so Mr Carty attended and asked the HMRC representative directly about sale and leaseback of plant and machinery (quoting the specific example of a printing press) and was told this fell foul of the new legislation.

The legislation

50. There were fundamental changes to the tax rules surrounding pension schemes which took effect from A day. Those rules were mainly set out in FA04 (as amended).

51. The new rules, as originally enacted in 2004, introduced for the first time a series of tax charges in respect of any payments by a registered scheme that were not "authorised payments".

52. Amendments made to FA04 by Finance Act 2006 ("FA06") created an extra regime for "investment-regulated pension schemes" (schemes with many similarities to the previous SSAS's). FA06 was only passed on 19 July 2006, but the changes it made were retrospective to A day. The regime effectively imposed restrictions on such schemes investing in "taxable property", by creating a deemed unauthorised payment (and consequential tax charge) when they did so. "Taxable property" was defined as including "tangible moveable property".

53. These are the provisions involved in these appeals. In broad terms, HMRC have imposed:

(1) a "scheme sanction charge" on the first appellant under section 239 FA04 in respect of the "unauthorised member payment" the WPPS was supposedly deemed to have made by virtue of section 174A FA04 as a result of acquiring the relevant assets;

(2) a "scheme sanction charge" on the first appellant in respect of the "scheme chargeable payment" the WPPS was supposedly deemed to have made by virtue of section 185A FA04 in each relevant tax year in which it owned and received profits from the relevant assets;

(3) an "unauthorised payments charge" on the second appellant under section 208 FA04 in respect of his share of the unauthorised member payment the TVRPS was supposedly deemed to have made as a result of acquiring the relevant assets; and

(4) an "unauthorised payments surcharge" on the second appellant under section 209 FA04 in respect of the same deemed unauthorised member payment, due to its large relative size.

54. Extracts from the relevant statutory provisions are set out in an appendix to this decision.

The issues

55. The appellants had initially argued that the assessments were out of time, and that the assessments issued to the first appellant were invalid as having been issued to the wrong person. These grounds of appeal were not pursued before us. Three issues remained in dispute, broadly as follows:

(1) whether the equipment in each case was "tangible moveable property";

(2) whether the various tax charges imposed could survive the application of the Human Rights Act 1998 ("HRA"), in particular section 3 of that Act; and

(3) whether the appellants were entitled to relief under section 268 FA04 in respect of the scheme sanction charge and the unauthorised payments surcharge.

Summary of the arguments

For the appellants

Background

56. Mr Furness argued it was instructive first to understand the basic scheme of the unauthorised member payments provisions before overlaying the "taxable property" rules.

57. In his submission, the essence of the scheme was that member contributions to a registered pension scheme qualified for tax relief on the strict basis that in return he/she may only receive authorised payments. If unauthorised payments were made,

then it was appropriate to recoup the initial tax relief; this was done by imposing tax charges, largely on the member concerned, at the time of the payments.

58. The first tax charge levied in that situation was the "unauthorised payments charge", under section 208 FA04. In a straightforward case, this would operate to impose a 40% tax liability on the member in relation to the amount he/she received. There was clearly some correlation between this charge and the earlier tax relief which might have been given for the original member's contribution.

59. The second charge levied was the "unauthorised payments surcharge" under section 209 FA04. Where the amount of an unauthorised payment exceeded a stated proportion (in a simple case, 25%) of a member's total fund, a further 15% tax liability would be imposed on the member. Relief from this charge was potentially available under section 268 FA04 if "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".

60. The third charge levied was the "scheme sanction charge" under section 239 FA04. Whilst this was imposed (at the rate of 40% of the unauthorised payment) on the scheme administrator, it was reduced (down to a minimum of 15%) by crediting the amount of the unauthorised payments charge actually paid by the member in respect of the same unauthorised payment. Relief from this charge was also potentially available under section 268 FA04.

61. In summary, therefore, an unauthorised member payment gave rise to (i) a 40% tax liability for the member to whom it was paid, (ii) if the member paid that liability in full, a further 15% liability for the scheme administrator and (iii) if the amount of the unauthorised payment was more than 25% of his fund, a further 15% tax liability for the member. In broad terms, these charges could be seen as consistent with a general aim of clawing back the original tax relief given on the member's contribution and any tax exemption attributable to the growth in the fund, together with surcharges (potentially relievable if "just and reasonable" to do so) to deter unauthorised payments.

62. However, in his submission, when this same set of tax charges was applied to a deemed unauthorised member payment (taking the form of a simple acquisition of offending assets by an investment-regulated pension scheme), the result was immediately and obviously inappropriate and unjust. The member was receiving no payment or other benefit, yet would be taxed and surcharged as if he had. The unfairness went further. It was quite possible for an investment-regulated pension scheme to acquire taxable property without any of its members even being aware of the decision to do so (and certainly not benefiting from it). The resultant tax charge on the members was "a penalty for someone else's wrongdoing", without any right of appeal for mitigation or relief on grounds of its unjustness. If the acquisition was sufficiently valuable (compared to the size of the member's interest in the fund), the member could easily suffer 55% tax on it directly, along with a further 15% indirectly due to the scheme sanction charge.

63. According to Mr Furness, there were in effect a number of opportunities for this obviously unjust result to be avoided. In broad terms, he argued that the effect of

the charges in the present cases was so disproportionate to any possible mischief that every effort should be made, either under general principles or under section 3 HRA to interpret the provisions so as not to apply – and/or to afford relief under section 268 FA04.

5 64. Against that background, he made the following submissions in relation to the three issues in dispute.

Should the assets be regarded as "tangible moveable property"?

65. In essence, he had two lines of argument under this heading.

66. First he submitted that "Parliament could only ever realistically have intended 10 to impose tax charges on the scale which are levied on taxable property when it was property which was capable of being used by the members. In other words, property from which members could benefit without it ever being paid out of the scheme." Essentially he was arguing that in all the circumstances, it was appropriate to interpret the phrase "tangible moveable property" in a way which would not "produce a wholly 15 unreasonable result" (per Lord Reid in *Luke v IRC* [1963] AC 557).

67. He referred to the pre-A day regime, under which small self-administered schemes were not permitted to invest in "personal chattels" or "residential property" (on pain of losing their tax-advantaged status). He referred to HMRC's pre-A day guidance on such matters (see [30] above). He said it was clear that ownership of 20 such articles could easily be abused by allowing scheme members to enjoy them even while they were technically owned by the pension scheme. He invited us to infer that Parliament must have intended some similar interpretation for the phrase "tangible moveable property", otherwise the result would be self-evidently inappropriate and unjust.

25 68. In his submission, his HRA arguments (see below) also lent support to this approach; an interpretation of the phrase "tangible moveable property" that clearly limited it to items where the scope for abuse was clear should be preferred. Thus the charges should only apply in the case of assets which were reasonably capable either (a) of being used personally by a member of the relevant scheme or (b) of being used 30 or applied for the benefit of such a person.

69. Second, he argued that at least some of the heavy printing equipment acquired by the WPPS ought properly to be regarded as fixtures under the general law; accordingly, though it was clearly "tangible", it could not be "moveable property". Here, the parties were agreed that the general law of fixtures applied, so as to require 35 a consideration of the case law on where the dividing line lay between chattels and fixtures.

70. Mr Furness referred to the long-established two-pronged test to be applied when considering whether an item is a fixture or a chattel – the degree of annexation and the object of annexation. He referred to the well-known passage by Blackburn J 40 in *Holland v Hodgson* 91871-1872) LR 7 CP 328 at 335:

> "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

71. That case was concerned with machinery in a mill, attached to the land by fixings which were easily removed; nonetheless the machinery was held to form part of the land. By way of contrast, Mr Furness referred to *Hulme v Brigham* [1943] KB 152, in which printing presses were not attached to the land but were attached to electric motors which were so attached. The degree of attachment was insufficient to make the presses fixtures, in contrast to the mill machinery in *Holland v Hodgson*.

72. In his submission, the printing presses in the present case, having been fixed to the floor of the factory, should be regarded as fixtures (and therefore not moveable property) in line with the decision in *Holland v Hodgson*.

<u>Should any charges be avoided by operation of the Human Rights Act?</u>

73. Mr Furness sought to argue that the liabilities in these appeals fell foul of two provisions of the ECHR, Article 6 and Article 1 of the First Protocol ("A1P1"), essentially on similar grounds.

74. As to Article 6 (the right to a fair trial), he acknowledged that tax liabilities generally were not covered by it (see, for example, *Ferrazzini v Italy* [2002] 34 EHRR 1068 at [29] – [33]) as they were not regarded as "civil obligations". However, he argued (initially) that the liabilities the subject of these appeals ought properly to be regarded as "criminal" in nature for the purposes of Article 6 (see *Jussila v Finland* [2006] App. 73053/01), due to their "deterrent and punitive" nature, thus engaging the protections of Article 6.[12]

75. In consequence of this, relying on *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2003] QB 728 at [47], he submitted that what amounted to a "fixed penalty cannot stand unless it can be adjudged proportionate in all cases having regard to the culpability involved". Applying the four-part proportionality test set out in *Bank Mellat v HM Treasury* [2013] UKSC 39 (see below), in his submission the tax charges at issue in these appeals were all entirely disproportionate and accordingly they (or, at the very least, the surcharges) must be in breach of Article 6 under the principle set out in *Roth*.

76. Second, he argued that all the disputed liabilities would, if enforced, breach A1P1(the right to peaceful enjoyment of possessions). As had been observed in *Roth*, Article 6 and A1P1 raised "closely interlocking considerations" and effectively the

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[12] In fact he later appeared to accept, "if put on the spot" that the unauthorised payment charge ought not to be regarded as "criminal" for Article 6 purposes.

arguments under A1P1 as to lack of proportionality were the same as those which applied to Article 6. Here, on the question of assessing proportionality, he referred first to Lord Reed's summary in *Mellat* at [74]:

> "… it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

77. He also referred us to what he called "the latest ruling from the Supreme Court on this article" – *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, which contained a slight restatement of the four part test set out in *Bank Mellat* (as set out by Lord Mance at [45]):

> "There are four stages, which I can summarise as involving consideration of (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right, (ii) whether the measure adopted is rationally connected to that aim, (iii) whether the aim could have been achieved by a less intrusive measure and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right."

78. Whichever formulation was used, he accepted that in principle there was a legitimate aim (i.e. preventing abuse of the available reliefs) which could justify the restriction of a protected right. In his submission, however, there was no rational connection between the legislation (as interpreted by HMRC) and the underlying objective, because the provisions imposed an arbitrary liability, regardless of fault on the member's part, any receipt of money by him/her, or any loss to the treasury. In addition, a less intrusive measure would clearly have been available to secure the underlying objective – by limiting it to the previous "personal use chattels", amongst other things. Finally, given that the result of HMRC's interpretation was to impose a heavy tax charge on members who had accrued no benefit and where there was no loss of tax, he submitted the legislation (as interpreted by HMRC) did not strike a fair balance between the state and the A1P1 rights of the appellants.

79. He acknowledged there was some "margin of appreciation" allowed to the legislature when considering whether any particular legislation fell foul of Convention rights, though the margin of appreciation allowed was narrower when domestic courts are considering legislation than when the European Court of Human Rights is considering them, as reflected in the following passage, cited with approval by Simon Brown LJ in *Roth* at [26]:

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as

> a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary areas of judgment accorded to those bodies…"

He submitted that the provisions in issue in this case fell outside that restricted margin of appreciation.

80. He therefore argued that the relevant provisions could, and should, be interpreted as not applying to the facts of these appeals, either on the normal rules of construction or by reference to s 3 HRA.

81. As to the legal mechanism to be adopted by the Tribunal in giving relief from the charges, on the basis of the strong interpretative obligation in s 3 HRA, he submitted we should:

> (1) interpret the phrase "tangible moveable property" so as to include only "pride in possession" or similar articles, such as were covered by the previous regime; and/or
>
> (2) follow *Willey v HMRC* [2013] UKFTT 328 (TC), and find that the assessments "overcharged" the appellants within the meaning of section 50(6)(c) Taxes Management Act 1970 ("TMA") by reason of their disproportionality, entitling us to reduce them to nil.

<u>Should relief be granted under section 268 FA04?</u>

82. The tests applying to the two appellants were slightly different. Overall, however, given the evidence about the timing of the (extensive) changes to the guidance on HMRC's website and the entry into of the two sale and leaseback transactions, Mr Furness submitted we should find:

> (1) that the first appellant reasonably believed that the (deemed) unauthorised payment was not a scheme chargeable payment, and in all the circumstances of the case it would not be just and reasonable for it to be liable to the scheme sanction charge; and
>
> (2) that the second appellant was wholly ignorant, after taking advice from CAM, that the transactions would give rise to a tax charge and surcharge, that he obtained no personal use or benefit from the equipment at all and therefore it would not be just and reasonable for him to bear the surcharge.

For HMRC

<u>Should the assets be regarded as "tangible moveable property"?</u>

83. Ms Wilson referred to more recent cases such as *Elitestone Limited v Morris and another* [1997] 1 WLR 687 (in which the House of Lords considered that a wooden bungalow, resting on concrete pillars and incapable of removal except by destruction, could not have been intended to remain a chattel and must have been intended to form part of the realty), *Tristmire Limited v Mew and others* [2011] EWCA Civ 912 (in which the Court of Appeal considered the position of somewhat

unusual houseboats, finding them not to be part of the realty comprised in the harbourside plots upon which they stood) and, most pertinently, *Peel Land and Property (Ports No. 3) Limited v TS Sheerness Steel* [2013] EWCH 1658 (Ch) (in which Morgan J considered the extent to which large parts of a steel works could be regarded as having "acceded to the realty, and, if so, whether [the tenant] was entitled to sever that plant and machinery and take it away.")

84. In *Peel Land*, Morgan J said that "to a large extent, counsel for both parties were content to take the law from the relevant textbooks and, in particular, from Woodfall on Landlord and Tenant, Looseleaf Edition. I am happy to follow their example." In the light of this, he did not consider it "necessary for me to attempt my own statement of the relevant principles".

85. In accepting that there is a twofold legal distinction between a chattel and a fixture (which is part of the realty), it is (according to Morgan J) "sometimes useful when analysing individual items to adopt a threefold classification", namely (i) chattel, (ii) fixture and (iii) "part and parcel of the land itself". There is no suggestion in the present case that the printing presses were "part and parcel of the land itself", the question is whether they were chattels or fixtures. The test for distinguishing between those two heads was explained in a quotation from *Woodfall*, as follows:

> "The maxim of the common law was *quicquid solo plantatur, solo cedit*. Thus whatever was attached to the land became part of the land. Whether there has been a sufficient annexation to the land is a question of fact in each case. It depends on all the circumstances of the case, and in particular the degree of annexation and the object of the annexation. In considering the degree of annexation, the question is whether the article "can easily be removed, *integer, sale et commode*, or not, without injury to itself or the fabric of the building." In considering the purpose of the annexation, all the circumstances are to be considered, the question being whether the article was affixed "for the permanent and substantial improvement of the dwelling" or "merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel." The early law attached great importance to the first test, namely the degree of annexation. It proved harsh and unjust both to limited owners who had affixed valuable chattels of their own to settled land and to tenants for years. The second test was evolved to take care primarily of the limited owner, for example a tenant for life. So a degree of annexation which in earlier times the law would have treated as conclusive may now prove nothing. Today so great are the technical skills of affixing and removing objects to and from land that the second test is more likely than the first to be decisive. The intention of the parties as to the ownership of a chattel fixed to land is only material so far as such intention can be presumed from the degree and purpose of the annexation. The intention is therefore to be objectively ascertained. The terms agreed between the fixer of the chattel and the owner of the land cannot affect the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil."

86. Perhaps the most crucial passage was the further explanation set out in Woodfall, as follows:

> "Although the early law attached great importance to the degree of annexation of any particular article, the modern law attaches more importance to the purpose of the annexation. If the purpose of the annexation was the better enjoyment of the chattel as a chattel, then it will not normally be held to be a fixture… The test is whether the article has been affixed to the property for a temporary purpose and the better enjoyment of it as a chattel or with a view to effecting a permanent improvement of the property."

87. In Ms Wilson's submission, the evidence showed that the presses, if attached to the floor at all (which we have found that they were, except the "Green Machine", about which we heard no evidence), were only so attached in order to facilitate their proper functioning as presses, and not so as to improve the property in which they were housed; as such, she submitted, they should clearly be regarded as chattels under the law of fixtures and, accordingly, as "moveable property" for the purposes of this appeal.

88. As to Mr Furness's alternative line of argument, that the phrase "tangible moveable property" should be interpreted so as to apply only to items similar to the previous list of proscribed "pride of possession" articles, she could see no valid basis for such a submission. The words as they stood, in her submission, clearly covered any property which was both "tangible" and "moveable", which the printing presses (and indeed all the other equipment involved in the appeals) clearly were.

Should any charges be avoided by operation of the Human Rights Act?

89. Whilst accepting that section 3 of HRA required that "so far as it is possible to do so", the legislation "must be read and given effect to in a way which is compatible with the Convention rights", Ms Wilson argued it was important to start with the legislation and not with HRA. As was said by Warren J in *HMRC v Anthony Bosher* [2013] UKUT 0579 (TCC):

> "… The correct approach is to interpret the legislation according to ordinary canons of construction, bearing in mind the Convention as one would bear in mind any treaty, but not having regard to the powerful interpretative direction found in s 3. Where the legislation is ambiguous, then an interpretation which better reflects the Convention rights is clearly to be preferred. It is only where the unambiguous meaning (or each of a set of ambiguous meanings) is clearly incompatible with Convention rights that section 3 comes into play. In other words, there is a two stage process: construe the legislation and, if that construction is not compatible with the Convention rights, find a construction which is compatible "so far as it is possible to do so". This, it seems to us, was the approach adopted in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557."

90. By way of background, she argued that the post-A day rules provided a particular set of reliefs which were circumscribed by a particular set of restrictions. For investment-regulated schemes (which, by their very nature, were more open to abuse than other schemes), the restrictions were tighter. By choosing to establish an investment-regulated scheme, the participants were effectively walking into those restrictions (and the associated sanctions for breach of them) entirely voluntarily.

91. She submitted that the "plain vanilla" interpretation of the relevant provisions gave a quite clear result in favour of HMRC's position.

92. As to Article 6, she submitted that even if the appellants' rights under that Article were engaged (which she submitted they were not), they were not infringed. She argued that the charges were not "punitive in nature", it was more accurate to describe them (as the FTT had in *Willey v HMRC* [2013] UKFTT 328) as "a broad measure by which the tax relief on contributions and tax free growth are recovered"; and even if this were incorrect, the appellants had full appeal rights to the Tribunal in any event.

93. As to A1P1, she submitted the provisions at issue in this appeal were in any event compliant with A1P1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

94. Whilst she accepted it was clear that the State did not, by reason of the second paragraph of A1P1, have unfettered discretion in the area of taxation, she argued it was equally clear that the discretion allowed to it was broad.

95. As to the first two stages of the process referred to in *Mellat* and *Asbestosis* at [76] and [77] above, she submitted they were clearly satisfied – tax charges and penalties were justified by the need to ensure that the relevant tax reliefs were not abused, and these particular tax charges were clearly directed to that end.

96. As to the third stage of the process, she pointed to the comments of Lord Reed in *Mellat* (at [75]), approving an earlier judicial statement that the courts are "not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line", and that "a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down". She submitted we should not fall into the trap of substituting our own view for the provisions decided by Parliament.

97. Both in relation to that third stage and the fourth stage, she also submitted that we should regard the provisions decided by Parliament as falling well within the margin of appreciation which should be afforded to the legislature, even if the Tribunal (as a domestic tribunal) were to take a more restrictive view of that margin than, for example, the European Court of Human Rights might.

98. She went on to submit that whether one considered the scheme of the charges as a whole or their effect in the present cases, they were entirely reasonable in the

light of (a) the objectives of the legislation to ensure that the very valuable tax reliefs were not abused and (b) the entirely voluntary nature of the transactions undertaken.

99. Finally, even if the Tribunal found the charges to be in breach of HRA, she submitted that there was no mechanism available to the Tribunal to strike them down, even in the light of the "strong interpretative direction" in s 3(1) HRA. She submitted that the interpretation proposed by Mr Furness would run completely against the grain of the legislation; and the approach of the Tribunal mentioned in *Willey* (relying on section 50(6) TMA as sufficient authority for the Tribunal to strike down the charges) was incorrect – the views of Proudman J in *Lobler v HMRC* [2015] UKUT 152 (TCC) at [106] to [109] being preferable, summed up in the comment "it would be surprising if s 50(6) left it to the FTT to decide whether or not a particular charge to tax were reasonable".

Should relief be granted under section 268 FA04?

100. So far as the first appellant was concerned, their defence was founded on the premise that it was reasonable for a professional scheme administrator, carrying out the role for payment, not to know the up to date law. They were very well aware that the law had been changing rapidly and that there were a great many changes to be considered, but they had effectively relied on what they regarded as the "mood music" from HMRC and their perceptions of what their competitors were doing as a substitute for finding out what the law was.

101. So far as the second appellant was concerned, his reliance on the first appellant was irrelevant. He was culpable in that he had procured the unauthorised payment, there was (as a matter of fact) a loss to the fund and he received a personal benefit from the transaction through the provision of working capital to his company. It could not be "just and reasonable" for him to be exonerated from the surcharge in those circumstances.

Discussion and decision

Were the printing presses "tangible movable property" under normal rules of interpretation?

102. We essentially agree with Ms Wilson's submissions on this point. Whilst it is clear the older authorities on fixtures were more concerned with the question of physical attachment to the land, it is equally clear from the recent authorities that the purpose of attachment is more important. Following the test from *Woodfall* referred to at [86] above, we find that the printing presses were affixed to the property in order to facilitate their more effective operation as printing presses, and not in order to make a permanent improvement to the property where they were housed. The degree of affixation was, in our view, slight. It would also follow from Mr Furness's argument that the presses formed part of the land; as such, they would need to have been severed from it in order to enable the sale and leaseback to have any effect in law, and there was no evidence that any such severance had taken place.

103. We therefore consider that, under general principles of interpretation, the presses were quite clearly "tangible moveable property". We see no ambiguity in the

phrase when applied in the present case, and no scope for interpreting it under the general rules of construction to include only the types of chattels covered by the previous legislation. This is not a situation where, in the words of Lord Reid in *Luke* (at p.577), "to apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result"; if Parliament had intended to leave unchanged the class of "offending" chattels, there would have been no reason to use entirely different language from that used in the previous legislation (notwithstanding the Economic Secretary's apparent failure to understand that point in Committee).

104. The question of an alternative interpretation of "tangible moveable property" based on section 3 HRA, should such an interpretation be appropriate, is considered below at [129].

Is Article 6 engaged?

105. We should say at the outset that we consider the argument in relation to Article 6 to be something of a red herring. Article 6 is essentially concerned with procedural fairness. Mr Furness argued that disproportionality was at the heart of his argument in relation to Article 6, as it was in relation to A1P1. There was no suggestion that any of the specific procedural rights set out in Article 6(2) or (3) were being violated, therefore we take his argument to amount to a claim that the overall effect of the legislation was such as to deprive the appellants of their Article 6 right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

106. It is settled law that tax liabilities are not, in general, "civil obligations" for the purposes of Article 6 (see *Ferrazini*).

107. It is however settled that tax surcharges whose purpose is "deterrent and punitive" (*Jussila*) are "criminal" in nature, and accordingly fall within Article 6.

108. Bearing in mind that the unauthorised payments charge is fixed at a level which is broadly consistent with the clawing back of the maximum tax relief that might have been given on the original contributions to the scheme, we do not consider it to be "deterrent and punitive"; accordingly we consider such liability not to be criminal in nature for the purposes of Article 6; therefore we consider that Article 6 is not engaged at all in relation to it.

109. There has been some suggestion (see, for example, *Willey v HMRC* [2013] UKFTT 328 (TC) at [56]) that the scheme sanction charges might in some way be intended to claw back the benefit of the tax exemption for income and capital growth within the pension fund, however we consider any such connection to be entirely speculative and we consider that the scheme sanction charges (as well as the surcharges) are sufficiently "deterrent and punitive" to be criminal in nature, such that Article 6 is engaged in relation to them.

110. In the absence of any supposed breach of the specific requirements of Article 6(2) or 6(3), we therefore take Mr Furness to be arguing that, as in *Roth*, the whole scheme of the liabilities was "not merely harsh but plainly unfair", thus rendering

them entirely inconsistent with Article 6; an argument similar to that which he was advancing in relation to A1P1 (see below).

111. We consider this to be a very different case from *Roth*, however. It should not be forgotten that *Roth* was a case in which a declaration of incompatibility was being sought from the Courts. In that context, the offending features which rendered the scheme of substantial fixed penalties incompatible with Article 6 were its failure to observe "the hallowed principle that the punishment must fit the crime" (per Simon Brown LJ at [47]) and "the simple yet fundamental reason that the scheme makes the Secretary of State judge in his own cause" (per Jonathan Parker LJ at [157]).

112. It should also not be forgotten that the exercise this Tribunal is being asked to undertake is a very different exercise from that in *Roth*; this Tribunal has no jurisdiction to declare any aspect of the legislation incompatible with either Article 6 or A1P1; the exercise we are required to undertake is to establish whether, if a "normal" interpretation of the relevant legislation would produce a result which breaches Article 6 or A1P1, there is an alternative interpretation which can legitimately be adopted pursuant to section 3 HRA which will produce a Convention-compliant result. It is somewhat ironic to note that in *Roth* it was specifically decided that the legislation there under review could not be "saved" by a section 3 HRA "re-interpretation" – see Simon Brown LJ at [66] and Jonathan Parker LJ at [184].

113. As we consider Article 6 is only engaged in relation to the surcharge and scheme sanction charges (see [108] and [109] above), we consider it has no application in relation to the unauthorised payment charge. We therefore reject at the outset any suggestion that the Tribunal should interpret the unauthorised payment charge provisions with the objective of making them compliant with Article 6.

114. So far as the surcharge and scheme sanction charges are concerned, we note there is specific provision in section 268 FA04, with a right of appeal in section 269 FA04; thus we see no procedural unfairness which could fall foul of Article 6 (contrasting the lack of any effective rights of appeal in *Roth*). To the extent Mr Furness is arguing that the essential disproportionality of the surcharge and scheme sanction charges (rather than matters of procedural unfairness) renders them incompatible with Article 6, we consider that argument is more appropriately considered as part of a wider enquiry into compatibility with A1P1. That wider enquiry follows below.

Do any of the charges (disregarding section 3 HRA) offend against A1P1 or Article 6?

115. We consider the arguments under A1P1 to be essentially the same as the residual arguments under Article 6 (founded, as they are, on the concept of proportionality).

116. Turning to those arguments, the first observation we would make is that A1P1, after reciting the general right to peaceful enjoyment of possessions, contains a specific qualification in relation to tax:

> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary… to secure the payment of taxes…"

117. With that in mind, it is necessary to assess the proportionality of each of the disputed liabilities by reference to the process set out in *Mellat* and restated in *Asbestosis.*

118. As to the first stage of that process (existence of a legitimate objective sufficiently important to justify the limitation of a protected right), both parties agree it is satisfied here. We concur; and we consider it worth expressly stating that the "objective" for these purposes to our mind is, in summary, the circumscribing of the valuable tax reliefs for investment-regulated pension schemes to prevent their abuse – whether by passing value out of the scheme without payment of appropriate tax or by investing scheme funds in assets considered by Parliament to be unsuitable for such schemes due to the scope for potential abuse and/or risk of loss to the scheme.

119. As to the second stage (rational connection between the objective and the measures under consideration), we cannot agree with Mr Furness (see [78] above). Given that the "objective" as summarised at [118] above is, in our view, somewhat broader than that for which Mr Furness would argue, we see a clear and rational connection between that objective and the liabilities which are disputed in this appeal.

120. As to the third stage (whether the aim could have been achieved by a less intrusive measure), we are acutely aware of the comment of Blackmun J in the US, endorsed by Lord Reed JSC in *Mellat* at [75] that "a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down". This comment highlights the degree of deference that the judiciary ought properly to accord to the legislature in considering both this and the fourth stage of the test. As was said by Lord Mance JSC in *Asbestosis* at [54]:

> "At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at a national level… **However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage of the Convention analysis**…" *[emphasis added]*

121. Given the level of deference to be shown to the judgment of the legislature, we do not consider it appropriate to find that the aim (of preventing abuse of the relevant reliefs) could have been achieved by a less intrusive measure or measures than the various charges at issue in these appeals. To make such a finding, we would have to consider and evaluate areas of policy which, in our view, lie properly within the remit of Parliament and upon which this Tribunal would have no relevant experience or knowledge to adjudicate.

122. This brings us to what we consider to be the heart of the matter, namely the balancing exercise referred to at stage 4 of the *Mellat* and *Asbestosis* processes.

123. Again, we must show due deference to the views of Parliament in deciding whether (adopting Lord Reed's shorthand in *Mellat* at [76]) the impact of the "impugned measure" on these appellants is disproportionate to the likely benefits accruing from it. The benefits accruing from the "impugned measure" (i.e. the various tax charges and surcharges) are, in our view, the protection of the valuable tax reliefs available to registered pension schemes (and contributions to them) from what Parliament considers to be potential abuse (see [118] above).

124. It seems to us that the importance of such protection (and accordingly the permissible severity of measures designed to secure it) are matters of policy judgment which this Tribunal is ill-equipped to second guess.

125. Whilst situations can arise in the tax sphere in which it is quite plain that a particular sanction is clearly disproportionate to the "offence" (the extreme VAT surcharges considered in *Enersys Holdings UK Limited v HMRC* [2010] UKFTT 20 (TC) spring to mind), we do not consider this to be one of those situations. Whilst we accept that the liabilities the subject of these appeals are harsh, we do not consider them to be "plainly unfair" (see *Roth*, cited in *Enersys*). In relation to the unauthorised payments charge, the liability is broadly referable to the claw back of relief previously given rather than being a simple confiscation. In relation to the scheme sanction charges and the unauthorised payments surcharges, they are tempered by the existence of the "good faith" exemptions contained in section 268 – and any consideration of proportionality must take into account the existence of those exemptions.

126. For these reasons, we do not consider that the liabilities the subject of these appeals are in breach of Article 6 or A1P1.

Even if the liabilities, interpreted without reference to section 3 HRA, do not comply with A1P1 and/or Article 6, what are the consequences?

127. If we were wrong in our view that the liabilities which arise in accordance with the legislation (construed "normally") are A1P1 and Article 6 compliant, the next step would be to assess whether the legislation is properly capable of being interpreted under the special interpretative rule in section 3 HRA in a way which would render them so compliant.

128. Here, we consider the guidance given in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 as the most helpful, especially that contained in the speech of Lord Nicholls of Birkenhead (at [32]-[33]):

> "Section 3 enables language to be interpreted restrictively or expensively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation….

> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

129. Mr Furness's main suggestion as to how a section 3 interpretation could be applied in the present case (see [81(1)] above) was by limiting the effect of the charging provisions to tangible moveable property which would have fallen foul of the "pride in possession articles" rules under the pre-existing regime. The difficulty with this suggestion, as we see it, is that Parliament could very easily have retained the previous wording if it had wished to limit the new provisions to the same articles as before. Instead, it chose to adopt new wording which has a wider scope. In that situation, it seems to us that we would be going very much "against the grain of the legislation" if we were to interpret the phrase "tangible moveable property" as having precisely the same meaning as "personal chattels" (the relevant restricted property under Regulation 5 of The Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991). For this reason, we do not feel able to accept Mr Furness's main suggestion.

130. His alternative suggestion (see [81(2)] above) was to follow the line adopted in *Willey* and strike down the relevant assessments on the basis that they "overcharged" the Appellants within the meaning of section 50(6)(c) TMA by reason of their disproportionality.

131. Even if we accepted that the liabilities were disproportionate, we do not consider the approach adopted in *Willey* to be legitimate. As Proudman J said in *Lobler v HMRC* [2015] UKUT 152 (TCC) at [107] - [109]:

> "It seems to me that… the word 'overcharged' in s 50(6)(a) of the TMA 1970 primarily refers to being overcharged by reference to the tax legislation. Mr Lobler has incurred the tax charge that was envisaged under the legislation and there is no element of 'overcharge', as that term is usually understood.
>
> … It would be surprising if s 50(6) left it to the FTT to decide whether or not a particular charge to tax were reasonable.
>
> … Mr Lobler's right of appeal is limited to the situation where the charge was an overcharge under the provisions of the legislation. It was not."

132. We consider ourselves bound to accept, by reason of the above comments, that the approach in *Willey* was wrong. Even if we were not so bound, we would still reach the same view and for the same reasons.

133. We cannot see any other way in which section 3 HRA could assist the Appellants. It follows that in our view there is no interpretation legitimately available under that section which could assist the Appellants, even if we are wrong in our view that there is no breach of Article 6 or A1P1 arising from the liabilities in these appeals. As has been made clear in a number of cases, Parliament has reserved to itself the right to enact legislation which breaches the ECHR, the ultimate remedy being a declaration of incompatibility.

Should relief be granted under section 268 FA04?

134. Neither side referred us to any particular authority on how sections 268 and 269 FA04 should be applied. It is simply a question of applying the statutory test to each appellant. There are however slightly different tests to be applied to the two appellants, and we therefore consider it appropriate to address them separately.

135. Under section 269 FA04, we are required to "consider whether [each appellant's] liability to the unauthorised payments surcharge or scheme sanction charge ought to have been discharged" by HMRC under section 268 FA04.

136. That requires us to assess whether HMRC's refusal to discharge those liabilities was justified, which in turn requires us to make our own assessment of whether the grounds for discharge respectively set out in sections 268 (3) and (7) FA04 are made out.

<u>The first appellant</u>

137. Here, the relevant provision is section 268(7) FA04, which provides the following as grounds for discharge of a scheme sanction charge:

> "(a) the scheme administrator reasonably believed that the unauthorised payment was not a scheme chargeable payment, and
>
> (b) in all the circumstances of the case, it would not be just and reasonable for the scheme administrator to be liable to the scheme sanction charge in respect of the unauthorised payment."

138. The first question is whether the first appellant "reasonably believed that the unauthorised payment was not a scheme chargeable payment". We accept the evidence that the first appellant in fact held that belief. The only question therefore is whether it was reasonable for it to do so.

139. It is a time-hallowed principle that "ignorance of the law is no excuse". Particularly where a professional operates in a specialist area of law, it would not in general be reasonable for that professional to hold an erroneous belief as to the actual law applying to that area. However, the terms of section 268(7)(a) FA04 specifically contemplate that there may be circumstances in which a scheme administrator had a reasonable (though erroneous) belief that a scheme chargeable payment would not

arise, even though one in fact did. For that reason, we do not consider that Ms Wilson's argument (to the effect that the first appellant was acting as a professional adviser for profit in this field and therefore was under an absolute obligation to inform itself of the applicable law) can be accepted without qualification.

140. We therefore consider it appropriate to address the arguments put forward by Mr Furness. Those arguments could be summarised as follows: where the law in a highly complex and specialist area is in a state of considerable flux over a short period of time, and there are indications that not even Parliament itself has fully understood the full implications of the changes it has made, it is not unreasonable for an adviser to rely on apparently reassuring signals in HMRC published guidance until those signals are clearly changed, particularly where the legislative changes which were made were retrospective in effect and represented a significant change to the previous regime.

141. To summarise the history of the changes in this case:

(1) On 5 December 2005, HMRC published a "Technical Note" as part of the Pre-Budge Report papers which proceeded on the tacit assumption that the restrictions then applicable to SSAS's investments would be carried over to the new investment-directed schemes. This Note showed an apparent intention for the new restrictions to be aligned to the previous "personal chattel" rules, whilst using the phrase "most forms of tangible moveable property", thus providing a link between the previous regime and the wording of the new provision as it subsequently appeared.

(2) When the draft legislation was published on 7 April 2006, the guidance published with it continued to refer explicitly to types of assets which were known to be offensive under the previous SSAS regime, and gave no indication that the legislation was intended to introduce a major tightening of the previous rules.

(3) When the draft legislation was considered in Parliament at the Committee stage on 20 June 2006, no indication was given that a major tightening of the previous rules was intended; indeed, a proposal to revert to the previous "personal chattels" wording was resisted on the basis that the change of terminology was simply intended to bring the language up to date (not to change the underlying meaning). Furthermore, the Economic Secretary to the Treasury, whilst dancing around the point somewhat, gave a clear indication that the Government's concern was with abuse of the reliefs through purchase of assets meant for private use, indicating a preoccupation with the sorts of assets that were subject to the previous "personal chattels" rules.

(4) The guidance referred to at [42] and [43] above was published for the first time on 25 July 2006 (nearly a week after FA06 became law). This was the first occasion on which any hint was given that HMRC might, contrary to previous indications, be interpreting the legislation more widely than the previous regime; however at the same time, the guidance at [40] above was republished in HMRC's technical manual (and remained there until at least 9

October 2006), perpetuating the reference to specific assets which had been "offensive" under the previous SSAS regime.

(5) We heard no evidence of any attempt by HMRC to publicise their views to the effect that a whole class of transactions which would have been entirely uncontroversial under the pre-existing regime would now suffer severe tax penalties, notwithstanding the various indications that all they were seeking to do was replicate the previous restrictions.

142. It is asserted that on the basis of emerging market rumours, the first appellant in fact began to have doubts about a possible change in the law during the month of September 2006, and took the opportunity to ask an HMRC officer about it specifically at an industry-organised conference on 3 October 2006. The crucial question, it seems to us, is whether the first appellant, as a paid professional adviser in this particular field, should have recognised the existence of a potential problem at an earlier time and delayed the proposed transactions until matters had been clarified, and/or should have approached HMRC or a legal adviser earlier with a specific enquiry to ascertain whether the proposed transactions were of a type that now fell foul of the new rules. Given that the first (albeit ambiguous and, to some extent, contradictory) indications of a potential problem appeared on HMRC's website on 25 July 2006, we consider that even allowing for the time of year, the ambiguity of the information published and the large volume of material being published by HMRC in a very short space of time, the first appellant ought to have been put on enquiry by no later than two weeks after that time, i.e. by 8 August 2006.

143. The relevant transactions were finally entered into on 27 September 2006.[13]

144. It is clear we must apply the statutory test at the time when the relevant legal obligations were entered into which triggered the various charges. In the circumstances of the case as summarised above, we find that at that time (27 September 2006):

(1) either (a) the first appellant had some suspicions about the changes and their possible application to the proposed transactions but failed to follow up those suspicions by taking expert advice or approaching HMRC, or (b) if it actually believed the transactions would not give rise to deemed scheme chargeable payments, it was not reasonable in the circumstances for it to hold that belief; in either case, it could not fairly be said that it "reasonably believed that the unauthorised payment was not a scheme chargeable payment"[14], and

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[13] The evidence showed that payment for the machinery had actually been made on 26 September 2006 (see footnote to paragraph 7 of the agreed statement of facts at [4] above). It was however only on the later date that the scheme acquired the interest in the presses which actually triggered the scheme sanction charge.

[14] If the evidence had shown (which it did not) that the first appellant was simply totally unaware of the potential changes, our view on this point would be the same; we mention this point only because we are aware a number of other appeals, in which that may be a relevant point, are awaiting the outcome of this appeal.

(2) the first appellant cannot fairly say it would not be just and reasonable for it to be liable to the scheme sanction charge in respect of the deemed payments.

145. It follows that we do not consider the grounds have been made out to justify the discharge of the scheme sanction charge imposed on the first appellant.

The second appellant

146. In relation to the unauthorised payments surcharge imposed on the second appellant, we must decide the single question of whether it is "just and reasonable" for him to be liable for it.

147. As set out above, we are of the view that the second appellant is liable for the unauthorised payments charge, and it should be remembered that the unauthorised payments surcharge is intended to penalise (and accordingly deter) unauthorised payments which represent a large part (over 25%) of a member's existing fund.

148. It is self-evident that the scheme of legislation for pensions remains immensely complicated, in spite of the Government's stated aim of simplifying it. Under the regime in force up to April 2006, the transactions the subject of this appeal would have been entirely uncontroversial, and (as we have found above) the way in which the rules were changed was unclear even to professionals operating in the field. The second appellant relied on advice from an apparently competent professional adviser in what he did. He was in our view entitled to do so in the circumstances of the case. We would observe that HMRC themselves only published any indication that such transactions might (contrary to previous indications) give rise to a problem in late July 2006, when the provisions themselves were expressed to come into force on 6 April 2006; and even then, their published commentary blew "hot and cold" (see [46] above). We have no hesitation in finding that it would not be just and reasonable for him to be subject to the unauthorised payments surcharge.

Conclusion and summary

149. We find that the various printing presses the subject of the first appellant's appeal were "tangible moveable property" for the purposes of paragraph 6 of schedule 29A FA04 under normal rules of interpretation – see [103] above.

150. We find that none of the charges involved in these appeals breach the appellants' rights under Article 6 or A1P1 – see [126] above.

151. Even if we are wrong in that view, we do not consider that we would have power to interpret the FA04 provisions under section 3 HRA in such a way as would disapply any of the charges the subject of these appeals – see [133] above.

152. We therefore consider the scheme sanction charges to have been validly imposed on the first appellant, subject to relief under section 268 FA04.

153. Similarly, we also consider the unauthorised payments surcharge to have been validly imposed on the second appellant, subject to relief under section 268 FA04.

154. We also consider the unauthorised payments charge to have been validly imposed on the second appellant. No relief being available under section 268 FA04 for this liability, we must uphold it.

155. We consider the first appellant should not be relieved from liability for the scheme sanction charges under section 268(7) FA04 – see [145] above

156. We consider the second appellant should be relieved from liability for the unauthorised payments surcharge under section 268(3) – see [148] above.

157. Accordingly the appeals are DISMISSED insofar as they relate to the scheme sanction charges imposed on the first appellant referred to at [25] and [26] above and the unauthorised payments charge of £3,706 imposed on the second appellant but they are ALLOWED in respect of the unauthorised payments surcharge of £1,390 imposed on the second appellant.

158. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 1 FEBRUARY 2017

Appendix

Relevant provisions from FA04 (as amended)

149 Overview of Part 4

(1) This Part contains tax provision about pension schemes and other similar schemes.

(2) This Chapter defines some basic concepts.

(3) As for the rest of this Part—

Chapter 2 is about the registration and de-registration of pension schemes,

Chapter 3 is about the payments that may be made by registered pension schemes and related matters,

Chapter 4 deals with tax reliefs and exemptions in connection with registered pension schemes,

Chapter 5 imposes tax charges in connection with registered pension schemes,

Chapter 6 is about some schemes that are not registered pension schemes,

Chapter 7 makes provision about compliance, and

Chapter 8 contains interpretation and other supplementary provisions.

…..

CHAPTER 3
PAYMENTS BY REGISTERED PENSION SCHEMES

INTRODUCTORY

160 Payments by registered pension schemes

(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.

5 (3) The only payments which a registered pension scheme that is an occupational pension scheme is authorised to make to or in respect of a person who is or has been a sponsoring employer are those specified in section 175.

(4) In this Part "unauthorised employer payment" means—

10

(a) a payment by a registered pension scheme that is an occupational pension scheme, to or in respect of a person who is or has been a sponsoring employer, which is not authorised by section 175, and

(b) anything which is to be treated as an unauthorised payment to a person
15 who is or has been a sponsoring employer under section 181.

(5) In this Part "unauthorised payment" means—

(a) an unauthorised member payment, or

20 (b) an unauthorised employer payment.

(6) As well as section 157 (de-registration), the following provisions—

(a) section 208 (unauthorised payments charge),

25 (b) section 209 (unauthorised payments surcharge),

(c) section 239 (scheme sanction charge), and

(d) section 242 (de-registration charge),

specify consequences of making unauthorised payments.

30

(7) Sections 182 to 185 contain provision about amounts that a registered pension scheme is not authorised to borrow.

(7A) Sections 185A to 185I contain provision about the receipt of income and gains
35 from taxable property.

(8) As well as section 157, sections 239 and 242 specify consequences of unauthorised borrowing and the receipt of income and gains from taxable property.

40 ….

AUTHORISED MEMBER PAYMENTS

164 Authorised member payments

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.

….

UNAUTHORISED MEMBER PAYMENTS

….

174A Taxable property held by investment-regulated pension schemes

(1) An investment-regulated pension scheme is to be treated as making an unauthorised payment to a member of the pension scheme if—

(a) the pension scheme acquires an interest in taxable property, and

(b) the interest is held by the pension scheme for the purposes of an arrangement under the pension scheme relating to the member.

…

(4) Schedule 29A makes provision supplementing this section; and in that Schedule

(a) Part 1 defines “investment-regulated pension scheme”,

(b) Part 2 defines “taxable property” (and “residential property”),

(c) Part 3 explains what it means to acquire, and to hold, an interest in taxable property, and

(d) Part 4 contains provision for calculating the amounts of unauthorised payments treated as made by this section and explains when the unauthorised payments are treated as made.

….

INCOME AND GAINS FROM TAXABLE PROPERTY

185A Income from taxable property

(1) An investment-regulated pension scheme is to be treated as having made a scheme chargeable payment if the pension scheme holds an interest in taxable property in a tax year.

(2) The amount of the scheme chargeable payment depends on whether a person who holds the interest in the property directly receives profits arising from the interest in the tax year.

(3) If a person who holds the interest in the property directly receives such profits in the tax year, the amount of the scheme chargeable payment is the greater of—

(a) an amount equal to the amount of the annual profits from the interest in the property (see section 185B(1)), and

(b) the amount of the deemed profits from the interest in the property for the year (see sections 185B(2) and 185C).

(4) If no person who holds the interest in the property directly receives such profits in the tax year, the amount of the scheme chargeable payment is the amount of the deemed profits from the interest in the property for the year (see sections 185B(2) and 185C).

(5) But where section 185D applies, the amount of the scheme chargeable payment is the amount found under subsection (3) or (4) as apportioned to the pension scheme in accordance with that section.

(6) Section 185E makes provision for credits against income tax charged under section 239 (scheme sanction charge) in respect of a scheme chargeable payment treated as made by virtue of this section.

….

UNAUTHORISED PAYMENTS CHARGE

208 Unauthorised payments charge

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

(2) The person liable to the charge—

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

(b) in the case of an unauthorised member payment made in respect of a person after the person's death, is the recipient, and

(c) in the case of an unauthorised employer payment, is the person to or in respect of whom the payment is made.

5 (3) If more than one person is liable to the unauthorised payments charge in respect of an unauthorised payment, those persons are jointly and severally liable to the charge in respect of the payment.

…

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

10 …

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

(a) the unauthorised payments surcharge under section 209, and

(b) the scheme sanction charge under section 239.

…

15 **209 Unauthorised payments surcharge**

(1) 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—

20 (a) surchargeable unauthorised member payments (see section 210), and

(b) surchargeable unauthorised employer payments (see section 213).

(3) The person liable to the charge—

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

25 …

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

…

210 Surchargeable unauthorised member payments

(1) This section identifies which unauthorised member payments made by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme are surchargeable.

(2) If the surcharge threshold is reached before the end of the period of 12 months beginning with a reference date, each unauthorised member payment made to or in respect of the person in the surcharge period is surchargeable.

(3) The surcharge period is the period—

(a) beginning with the reference date, and

(b) ending with the day on which the surcharge threshold is reached.

(4) The first reference date is the date on which the pension scheme first makes an unauthorised member payment to or in respect of the person.

(5) Each subsequent reference date is the date, after the end of the previous reference period, on which the pension scheme next makes an unauthorised member payment to or in respect of the person.

(6) The previous reference period is the period of 12 months beginning with the previous reference date or, if the surcharge threshold is reached in that period, is the surcharge period ending with the date on which it was reached.

(7) The surcharge threshold is reached if the unauthorised payments percentage reaches 25%.

(8) The unauthorised payments percentage is the aggregate of the percentages of the pension fund used up by each unauthorised member payment made by the pension scheme [to or in respect of the person]1 on or after the reference date.

(9) The percentage of the pension fund used up on the occasion of an unauthorised member payment is—

$$\frac{UMP}{VR} \times 100$$

where—

UMP is the amount of the unauthorised member payment, and

VR is an amount equal to the aggregate of the value of the member's rights under arrangements relating to the member under the pension scheme when the unauthorised payment is made (or, if the unauthorised member payment is made after the member has died or has otherwise ceased to be a member of the pension scheme, at the date when the member died or otherwise ceased to be a member).

(10) The value of the member's rights under an arrangement on any date is the aggregate of—

(a) the value of the member's crystallised rights under the arrangement on that date, calculated in accordance with section 211, and

(b) the value of the member's uncrystallised rights under the arrangement on that date, calculated in accordance with section 212.

….

SCHEME SANCTION CHARGE

239 Scheme sanction charge

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

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

….

(5) The following sections make further provision about the scheme sanction charge—

section 240 (amount of charge), and

section 241 (scheme chargeable payment).

….

240 Amount of charge

(1) The scheme sanction charge for any tax year is a charge at the rate of 40% in respect of the scheme chargeable payment, or the aggregate of the scheme chargeable payments, made by the pension scheme in the tax year.

(2) But if—

(a) the scheme chargeable payment is an unauthorised payment, or any of the scheme chargeable payments are unauthorised payments, and

(b) tax charged in relation to that payment, or any of those payments, under section 208 (unauthorised payments charge) has been paid,

a deduction is to be made from the amount of tax that would otherwise be chargeable for the tax year by virtue of subsection (1).

(3) The amount of the deduction is the lesser of—

(a) 25% of the amount of the scheme chargeable payment, or of the aggregate amount of such of the scheme chargeable payments as are tax-paid, and

(b) the amount of the tax which has been paid under section 208 in relation to the scheme chargeable payment, or in relation to such of the scheme chargeable payments as are tax-paid.

(4) A scheme chargeable payment is "tax-paid" if the whole or any part of the tax chargeable in relation to it under section 208 has been paid.

241 Scheme chargeable payment

(1) In this Part "scheme chargeable payment", in relation to a registered pension scheme, means—

(a) an unauthorised payment by the pension scheme, other than one which is exempt from being scheme chargeable,

(b) a scheme chargeable payment which the pension scheme is to be treated as having made by section 183 or 185 (unauthorised borrowing), and

(c) a scheme chargeable payment which the pension scheme is to be treated as having made by section 185A (income from taxable property) or 185F (gains from taxable property).

….

DISCHARGE OF TAX LIABILITY: GOOD FAITH

….

268 Unauthorised payments surcharge and scheme sanction charge

(1) This section applies where—

(a) a person is liable to the unauthorised payments surcharge in respect of an unauthorised payment, or

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

(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.

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

(6) In the case of a scheme chargeable payment which is treated as being an unauthorised member payment by section 172[, 172A, 172B, 172BA, 172C or 172D or arises under section 181A]1, the ground is that, in all the circumstances of the case, it would not be just and reasonable for the scheme administrator to be liable to the scheme sanction charge.

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

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

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

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

….

269 Appeal against decision on discharge of liability

(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) ….

(2) The applicant may appeal against the decision.

….

(6) On an appeal under subsection (1)(*a*) that is notified to the tribunal, the tribunal must consider whether the applicant's liability to the … unauthorised payments surcharge or scheme sanction charge ought to have been discharged.

(7) If the tribunal considers that the applicant's liability ought not to have been discharged, the tribunal must dismiss the appeal.

(8) If the tribunal considers that the applicant's liability ought to have been discharged, the tribunal must grant the application.

SCHEDULE 29A

TAXABLE PROPERTY HELD BY INVESTMENT-REGULATED PENSION SCHEMES

5 **2—**

(1) For the purposes of the taxable property provisions a registered pension scheme which is an occupational pension scheme is an investment-regulated pension scheme if—

(a) there are 50 or fewer members of the pension scheme, and one or more of
10 those members meets the condition in sub-paragraph (2), or

(b) at least 10% of the members of the pension scheme meet that condition.

(2) The condition is that either—

(a) the member, or

(b) a person related to the member,

15 is or has been able (directly or indirectly) to direct, influence or advise on the manner of investment of any of the sums and assets held for the purposes of the pension scheme.

….

20 **6—**

For the purposes of the taxable property provisions property is taxable property if—

(a) it is residential property (see paragraphs 7 to 10), or

(b) it is tangible moveable property (but subject to paragraph 11).