[2018] UKUT 397 (TCC)

Appeal number
UT/2017/0102

Income tax – pension scheme – unauthorised payments charge – scheme to extract funds from SIPP and to provide member with access to funds by loans and investment management – whether transfer to trust which was void for uncertainty was an unauthorised member payment – whether payment was within scope of discovery assessment

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

GARETH CLARK	**Appellant**
- and –	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

Tribunal: The Hon Mr Justice Arnold and Judge Timothy Herrington

Sitting in public in London on 12 and 13 November 2018

Michael Jones, instructed by RPC, for the Appellant

Jonathan Davey QC and Sam Chandler, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal by Gareth Clark from two decisions of the First-Tier Tribunal (Tax) (Judge Roger Berner and Ms Gill Hunter) dated 12 September 2016 ([2016] UKFTT 0630 (TC), "the First Decision") and 12 May 2017 ([2017] UKFTT 0392 (TC), "the Second Decision") dismissing an appeal by Mr Clark against a discovery assessment by the Commissioners of Her Majesty's Revenue and Customs ("HMRC") dated 25 March 2014 which assessed income tax charges for the 2009/10 tax year under sections 208 and 209 of the Finance Act 2004 ("FA 2004") in the sum of £1,163,277.32 plus interest.

Factual background

2. The facts are set out in detail by the FTT in the First Decision at [5] to [56] and in the Second Decision at [6] to [9]. Counsel for Mr Clark provided a helpful summary in his skeleton argument which, with a few small modifications, we gratefully adopt as follows.

3. Mr Clark is a retired businessman, having retired from full-time work in 2000. His pension was originally in a fund established by his employer Southnews plc, of which he was chairman.

4. In 2000 the Southnews Group was acquired by Trinity Mirror Group plc, which also took over the pension fund.

5. In 2004 or 2005 it appeared that Trinity Mirror was proposing to make changes to the pension scheme which would eliminate the requirement for it to make further contributions. Consequently, Mr Clark established two self-invested pension schemes ("SIPPs"), one with Suffolk Life in the amount of £2,115,000 ("the Suffolk Life SIPP") and another, with Scottish Equitable, in the amount of £600,000 ("the Scottish Equitable SIPP").

6. Mr Clark grew concerned at the lack of returns being produced by the SIPPs and wished to become more involved in the management of the funds and also to be able to borrow from the funds in order to invest in his own capacity (since he had a £3m capital loss which he could use to offset against capital gains).

7. In 2007 Ross Wheldon, a financial adviser to and friend of Mr Clark, introduced him to Aston Court Chambers International SA ("Aston Court"). Aston Court prepared a report which set out a number of options for Mr Clark, which included what was called the "Pension Transfer Plan".

8. The report recommended that both the Suffolk Life SIPP and the Scottish Equitable SIPP be the subject of the Pension Transfer Plan, but in the event Mr Clark proceeded with the Suffolk Life SIPP only. Aston Court charged Mr Clark a fee for this, part of which was calculated as 10% of the value of the funds transferred.

9. The implementation of the Pension Transfer Plan involved the following steps:

(1) On 11 February 2009 Laversham Marketing Ltd ("LML") was incorporated in Cyprus. The original shareholder of LML was Centaur (Cyprus) Ltd and the director was Centaur Fiduciaries (Cyprus) Ltd.

(2) Also on 11 February 2009 Cedar Investment Management Ltd ("CIM") was incorporated in the BVI. The owner of CIM was Corporate Factoring Services Ltd, a service company of Aston Court. Mr Clark was appointed as the first director of CIM and was the signatory to the CIM bank account.

(3) On 16 February 2009 the shares in LML were transferred to CIM.

(4) On 18 February 2009 Mr Clark wrote to Malcolm Dorrington of Aston Court to inform him that he had established a new company pension scheme attached to LML and asking Mr Dorrington to arrange for the transfer of the sums held within the Suffolk life SIPP to the new pension plan.

(5) On 19 February 2009 the Laversham Marketing Limited Pension Scheme ("the LML Pension") was established by a deed of trust executed by LML and Equity First Trustees Ltd.

(6) On 20 February 2009 LML and Mr Clark entered into a contract of employment under which the former engaged the latter as its employee on the terms set out in the agreement. Mr Clark was the sole employee of LML, and accordingly the sole beneficiary under the LML Pension.

(7) On 27 February 2009 LML, Mr Clark and CIM entered into a "Deed of Agreement in Relation to the Laversham Marketing Limited Pension Scheme". Under that deed it was provided that, if any cash or other assets were paid to LML from the LML Pension, then a dividend of the full amount of such cash or assets would be paid to CIM as soon as reasonably practicable. It was further provided that CIM would apply the full amount of that dividend to provide benefits for the dependents of LML's employees, such benefits to fall within the definition of the same in section 91(5)(b)(i) of the Pensions Act 1995 ("PA 1995").

(8) On 2 March 2009 the LML Pension was registered with HMRC.

(9) On 21 April 2009 Suffolk Life transferred the SIPP fund, with a value of £2,115,049.68, to the LML Pension.

(10) On 24 April 2009 Mr Clark and the trustees of the LML Pension entered into a "Deed of Waiver and Surrender in Relation to the Laversham Marketing Limited Pension Scheme". Under that deed, Mr Clark, as a member of the LML Pension, surrendered his "Accrued Benefits" (as defined) for the purpose of funding an authorised surplus payment for the reasons set out in section 91(5)(b)(i) PA 1995.

(11) Before any payment of surplus was made, on 24 April 2009 CIM and LML entered into an Estate Annuity Purchase Deed under which CIM agreed to pay an annuity to Mr Clark's widow and dependents. The purchase price of the annuity was £2,115,049.68.

(12) On 28 April 2009 the Cedar Purpose Trust was established by deed between Corporate Factoring Services Ltd and Equity Trust (BVI) Ltd. The purpose of the trust was to "create" a company to hold shares in another BVI company whose business was to provide benefits for the widow and/or dependants of Mr Clark as contemplated by section 91(5)(b)(i) PA 1995.

(13) On the same day CIM was transferred by Corporate Factoring Services Ltd to Equity Trust (BVI) Ltd as the trustee of the Cedar Purpose Trust.

(14) On or before 14 May 2009 funds were transferred from the LML Pension to LML. The basis for the payment by LML Pension to LML was that, having regard to the Deed of Waiver and Surrender executed by Mr Clark, a scheme surplus had arisen.

(15) On 14 May 2009 LML transferred £1,885,980 to CIM. That sum represented £2,115,000 (the monies originally held in the Suffolk Life SIPP that had been transferred to LML Pension on 21 April 2009), less a fee of £229,000 that was paid to Aston Court. The basis for the payment from LML to CIM is unclear.

(16) From 14 May 2009 to 7 September 2010, the funds remained in CIM's current account.

(17) On 13 July 2009 Aston Court became a corporate director of CIM. Martin O'Toole of Aston Court became a co-signatory of the CIM bank account.

(18) On 7 September 2010 £800,000 was lent to Mr Clark for a five-year term at an annual interest rate of 5%. Mr Clark repaid the loan, with interest (a total of £840,263.11), to CIM on 12 August 2011.

(19) On 7 November 2011 CIM lent £600,000 to Mr Clark for an 11 month term at an interest rate of 7%. On 22 June 2012, CIM lent £380,000 to Mr Clark for a six-month period at an interest rate of 7%. Those two loans, together with interest due on them, remain outstanding.

(20) Mr Clark invested the sums lent to him in properties in Mayfair and Kensington.

(21) As well as the loans, £899,988 was transferred by CIM to an investment management firm, Quilter & Co, on 22 September 2010.

10. HMRC subsequently assessed Mr Clark for the 2009/10 year by means of a discovery assessment under section 29 of the Taxes Management Act 1970 ("TMA 1970"). The notice of assessment was dated 25 March 2014 and issued

by HMRC Officer Sarbjit Sidhu. It set out the amount of the assessment in the sum of £1,163,277.32, and stated that it was made under section 29 TMA 1970. It also stated that Mr Clark was required to pay the sum of £1,273,039.69 including interest. Enclosed with it was a statement of account for Mr Clark showing how the latter sum was made up.

11. In a covering letter of the same date, Officer Sidhu wrote:

> "Our information indicates that a payment made by Laversham Marketing Ltd Pension Scheme to you or in respect of you was not an authorised payment, I am currently liaising with Aston Court Chambers IOM Limited on obtaining further information regarding this matter.
>
> Following a change in legislation brought about by Schedule 39 Finance Act 2008 in relation to HMRC time limits for the issue of assessments and determinations, HMRC has issued an assessment in order to protect its position and ensure that any potential tax due for the year ended 5 April 2010 is not lost. This is in connection with the ongoing enquiry into the transfers into the Laversham Marketing Ltd Pension Scheme, your surrender of benefits under that scheme and the subsequent payment from the scheme to Laversham Marketing Ltd.
>
> The assessment is based on the surplus payment figure that was made to Laversham Marketing Ltd.
>
> | | |
> |---|---|
> | Amount of unauthorised payment | £2,115,049.68 |
> | Tax due at 40% | £846,019.87 |
> | Tax due at 15% (surcharge) | £317,257.45 |
> | Total tax due | £1,163,277.32 |
>
> HMRC will continue with its enquiries in order to establish the correct amount of tax for the year ended 5 April 2010 and you should not, therefore, consider this assessment to signify the closure of HMRC's enquiries.
>
> …"

The key statutory provisions

12. All of the relevant provisions of FA 2004 as it stood in 2009/10 were contained in Part 4 of the Act. Section 208 provided, so far as relevant, as follows:

> "(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,

…

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

...

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

13. Section 209 FA 2004 provided, so far as relevant, as follows:

“(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.

…

(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,

…

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

…

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

14. Section 210 FA 2004 provided, so far as relevant, as follows:

“(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] [2] 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)."

15. Section 160 FA 2004 provided, so far as relevant, as follows:

"(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.

…

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

(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 who is or has been a sponsoring employer under section 181.

(5) In this Part 'unauthorised payment' means –

(a) an unauthorised member payment, or

(b) an unauthorised employer payment"

16. Section 161(2) FA 2004 provided that "'payment' includes a transfer of assets and any other transfer of money's worth".

17. Section 279(2) FA 2004 provided that *"*references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme".

18. Section 29 TMA 1970 provided at the relevant time and so far as relevant to the appeal:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,
>
> the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board."

Mr Clark's appeal to the FTT

19. Mr Clark appealed to the FTT against the assessment dated 25 March 2014 by a notice of appeal dated 28 October 2014. In Mr Clark's Statement of Case dated 1 October 2015, which was settled by counsel, Mr Clark contended that the transfer by the LML Pension to LML on 21 April 2009 ("the LML Transfer") was not an unauthorised member payment for the purposes of Part 4 of FA 2004 because it was not "a payment … to or in respect of Mr Clark" within section 160(2) FA 2004. Counsel for Mr Clark's skeleton argument dated 21 June 2016 advanced the same contention. As the FTT explained in the First Decision at [64]-[70], however, as result of counsel for HMRC referring in his skeleton

argument dated 30 June 2016 to the decision of Rose J in *Re LPA Umbrella Trust* [2014] EWHC 1378 (Ch), [2014] Pens LR 319, counsel for Mr Clark raised two additional contentions shortly before the first hearing before the FTT. These were that (i) the LML Pension was not a pension scheme, and hence was not a registered pension scheme, because the trusts constituting the LML Pension were void for uncertainty and (ii) the LML Transfer was not a "payment" by the LML Pension. HMRC did not object to Mr Clark raising these additional contentions at that late stage; but HMRC argued that, if the LML Transfer was not an unauthorised member payment, the transfer of funds from the Suffolk Life SIPP to the LML Pension on or before 14 May 2009 ("the Suffolk Life Transfer") was an unauthorised member payment.

20. It was, and remains, common ground that, if the relevant transfer was an unauthorised member payment within section 208 FA 2004, then it will also be surchargeable under section 209 FA 2004.

The First Decision

21. In the First Decision the FTT decided that:

(1) The trusts of the LML Pension were void for uncertainty. Accordingly, it was not a pension scheme. It followed that it was not a registered pension scheme and Mr Clark was not a member of a registered pension scheme so far as the LML Pension was concerned. The LML Transfer could not therefore be an unauthorised member payment within section 160(2) FA 2004.

(2) The Suffolk Life Transfer gave rise to a resulting trust in favour of the Suffolk Life SIPP, and thus was ineffective to transfer beneficial ownership of the sums in question. Nevertheless, it was a "payment" by a registered pension scheme in respect of a person who was or had been a member of the pension scheme, and was not authorised by section 164 FA 2004. Accordingly, that payment was an unauthorised member payment within section 160(2) FA 2004.

The Second Decision

22. The second conclusion of the FTT gave rise to an issue as to whether the scope of the discovery assessment dated 25 March 2014 encompassed the Suffolk Life Transfer being an unauthorised member payment. Having heard further argument on that issue, the FTT held in the Second Decision that it did.

Mr Clark's grounds of appeal

23. Mr Clark appeals against the FTT's Decisions on two grounds:

(1) The FTT erred in law in concluding that the Suffolk Life Transfer was a "payment" within the meaning of section 160(2) FA 2004 because it did not transfer the beneficial title to the sums in question.

(2) The FTT erred in law in concluding that the scope of the assessment dated 25 March 2014 encompassed the Suffolk Life Transfer being an unauthorised member payment.

Ground 1: Was the Suffolk Life Transfer a "payment"?

24. The FTT held, and HMRC does not now dispute, that, because the LML Pension trusts were void for uncertainty, the Suffolk Life Transfer gave rise to a resulting trust in favour of the Suffolk Life SIPP. Accordingly, the Suffolk Life Transfer was not effective to transfer beneficial ownership of the sums in question. The FTT held that a transfer of funds which, by reason of a breach of trust, gives rise to a constructive trust or which, due to recipient trust being void for uncertainty, gives rise to a resulting trust, was sufficient to constitute a "payment" within the meaning of section 160(2) FA 2004. Mr Clark contends that the FTT was wrong on this point.

25. It is common ground that the word "payment" can have different meanings depending on the context in which it is used. It is also common ground that, given that FA 2004 only provides a non-exhaustive definition of "payment" in section 161(2), it is necessary to have regard to the other indications provided by the statutory language, together with the purpose of the relevant provisions, in order to determine its meaning.

Previous case law

26. There have been three previous cases in which the meaning of "payment" in related contexts has been considered by the courts. The first was *Hillsdown Holdings plc v Inland Revenue Commissioners* [1999] STC 561. In that case a pension scheme which was in surplus paid surplus assets to the employer and paid tax under section 601 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), which applied where a "payment" was made to an employer out of funds held for the purposes of an exempt approved scheme. A complaint was made to the Pensions Ombudsman that the payment of the surplus was in breach of trust and invalid. The complaint was upheld by the Ombudsman and his decision was affirmed by Knox J. The employer was directed to return to the pension scheme the net amount of the payments, plus the tax on the payments to the extent that tax was recovered from the Revenue. The employer brought a claim against the Revenue for repayment of the tax on the ground that the fundamental quality of a "payment" under section 601 was that it had to be a real transfer of worth and that the section did not apply to a payment to an employer in breach of trust, which the employer was liable to repay. The Revenue conceded that, if the tax had not been due under section 601, it would repay it. Arden J (as she then was) decided that the tax had not been due.

27. In her judgment, Arden J applied a purposive approach to the construction of section 601. She held at 571- 572:

> "In my judgment there is no reason in the present case why Parliament should seek in s 601 to tax a payment which was not effectively made, and indeed the policy of the sections would … suggest otherwise. So

I turn to the wording of the section to see if there is anything in that section or the group of sections of which it forms part to indicate that when Parliament used the term ‘payment’ in s601 it was intending to catch not merely effective payments but also a payment which, to use Lord Macmillan's words in *Paton* (1938] AC 341 at 356 …), was a fiction and not a fact. That construction is not dictated by the term ‘payment’ on its own; as a matter of the ordinary use of language, *Hillsdown* did not receive ‘payment’ from the pension fund. But, even apart from that, there are in my judgment indications in the sections that the payment had to be a real payment. For instance, tax is calculated on the amount of the payment if it is in cash. If the payment is in kind it is paid on the value of the asset transferred. There is no reason to suppose that, save for some possible exceptions, the two types of payments are to bear different rates of tax, and on that basis the payment, if in cash, would have to be a real payment. There may be some exceptions where, for instance, a loan is made which is not of the specified description. The Revenue says that in those circumstances tax is charged on the nominal amount of the loan, even if the nominal amount of the loan has to be repaid. I will assume that this construction is correct but express no view on it.

Likewise, s 601(6)(a) throws some light on the present problem. It uses the word ‘transfer’ in relation to transfer of assets. This provision is not talking about a transfer of legal title. Not all assets require to be transferred by transfer of legal title and the subsection is dealing with all assets, whether or not falling within the description of assets that can only be transferred by following some special formality (like shares). Rather this provision is referring to a real transfer of an asset and the use of the word ‘other’ before ‘transfer of money's worth’ supports this conclusion.

Likewise, one of the ways in which a surplus in an approved scheme can be reduced is by ‘making payments to an employer’ (see para 3(3)(a) of Sch 22). A surplus could not be reduced by a payment which did not have the effect of transferring the equitable interest in the monies paid to the employer. This is also some indication that a payment under that schedule is a transaction which has substance, and the same meaning should apply to s 601. This point is not affected by the fact that s 601 applies to other payments as well as the reduction of surplus under Sch 22 because it is still the same word ‘payment’ which is being used and one is entitled to start from the basis that it is being used consistently.

Further support for [Hillsdown’s] approach to ‘payment’ is to be found in s 601(1) itself: the payment must be ‘out of’ the fund. In my judgment, these words indicate that the payment must result in funds effectively leaving the fund as intended by the transaction (whether absolutely or for a period, as in the case of a loan). The words ‘out of’ are not apt to describe a payment which, contrary to the stated effect of the transaction, does not have the effect of changing the ownership of the monies paid and is in fact reversed. Likewise, under s 601, the payment must be made ‘to the employer’ and this must mean in the employer's capacity as such and exclude the case where the employer merely receives the monies as a trustee arising under operation of law for the fund.

Section 6(2) of the 1988 Act provides that the charge to income does not apply to income of a company. There is an exception for income arising to it in ‘a fiduciary representative capacity’. [The

> Revenue] placed reliance on this but I do not consider that the absence of a similar provision in s 601 is significant because the word 'payment' in s 601 of itself entails a payment of substance and not where the beneficial ownership remains with the payer. Moreover, in this case the trust is merely a legal mechanism to describe the obligations which are imposed on the recipient.
>
> For all these reasons, in my judgment, the plaintiffs succeed on the construction point. I do not consider that the court should attempt to find a comprehensive definition of 'payment' for this purpose. It is enough to say that the purported payments were, on the facts of this case, without substance. No beneficial interest passed and they had to be returned to the HF trustee. In those circumstances, applying the principle in *Paton* and similar cases, they were not really payments at all in the eyes of the law."

28. The second case is *Venables v Hornby*. That case concerned payments out of a pension scheme that were authorised to be made if a member had retired early in normal health. Mr Venables retired as an executive director, but remained an unpaid non-executive director. He was assessed under section 600(1) ICTA 1988 on the basis that he had not retired for the purposes of the pension scheme rules. The special commissioner held that Mr Venables had retired, but had not been in normal health. Lawrence Collins J allowed Mr Venables' appeal on the basis that the special commissioner had been wrong to decide that Mr Venables had not been in normal health. The Court of Appeal allowed the Crown's appeal, holding that Mr Venables had not retired. That conclusion was itself reversed by a majority of the House of Lords.

29. In addition to the arguments concerning his retirement and state of health, Mr Venables also argued that, if the payments to him had attracted tax under section 600, they would have been in breach of the terms of the pension scheme's trust deed and that, as he was one of the trustees, he would have continued to hold the money as such and could not be said to have received anything in his personal capacity. Lawrence Collins J concluded ([2001] STC 1221 at [37]):

> "In this case, if the taxpayer, who was not only a member of the scheme, but also a trustee, had known, or should have known, that the payment was unauthorised by the terms of the trust, then he would have been accountable as a trustee. In such circumstances, the funds would have been recoverable by the trustees, and if they had been recovered, there would have been no effective payment to the taxpayer. I am of the view that if each and every one of the following conditions is fulfilled, then there is no taxable payment for the purposes of s 600: that the payment is in breach of trust, that the recipient is accountable to the trustees as an actual or constructive trustee, and that the recipient is able and prepared to account to the trustees. In those circumstances, I would accept that the rationale of the *Hillsdown* case applies, and I would follow it."

30. In the Court of Appeal, Chadwick LJ (with whom Peter Gibson and Potter LJJ agreed) said ([2002] EWCA Civ 1277, [2002] STC 1248):

“27. In my view, [Mr Venables’ argument before Lawrence Collins J] was plainly untenable. Section 600 of the 1988 Act imposes a charge to tax in circumstances where (i) a payment to or for the benefit of an employee (otherwise than in course of payment of a pension) is made out of funds which are held for the purposes of an approved scheme and (ii) the payment is not expressly authorised by the rules of the scheme. In those circumstances the employee is chargeable to tax on the amount of the payment (whether or not he was the recipient of the payment). It is axiomatic that moneys or property transferred in breach of trust out of funds subject to a trust will, for so long as they are identifiable, continue to be subject to that trust until they come into the hands of a bona fide purchaser for value without notice of the equity to trace (see *Snell's Equity* (30th edn, 2000) para 13-41, p 340–341). To hold that there had been no payment because the moneys paid remained subject to the trusts of the scheme would be to defeat the obvious purpose of the taxing provision. It could not have been the intention of the legislature that the question whether or not a charge to tax arose under s 600(2) of the 1988 Act would turn upon an investigation whether or not there remained out of the moneys or property transferred some moneys or property which (into whoever's hands they might have come) were still subject to the trusts of the scheme.

28. The judge did not, I think, accept the argument in the stark terms in which it was advanced. But he would have been prepared to hold (had the point arisen) that there was no payment for the purposes of s 600 of the 1988 Act if three conditions were fulfilled: (i) that the payment was in breach of trust, (ii) that the recipient is accountable to the trustees as an actual or constructive trustee, and (iii) that the recipient is able and prepared to account to the trustees. … He found support for that formulation in the decision of Arden J in *Hillsdown Holdings plc v IRC* [1999] STC 561.

…

31. The kernel of Arden J’s reasoning in the *Hillsdown Holdings* case—at least for present purposes—is to be found, I think, in a passage at [1999] STC 561, 571h-j. After expressing the view … that ‘there is no reason in the present case why Parliament should seek in s 601 to tax a payment which was not effectively made’ and that the policy of the sections would suggest otherwise, she said:

> ‘Further support … is to be found in s 601(1) itself: the payment must be ‘out of’ the fund. In my judgment, these words indicate that the payment must result in funds effectively leaving the fund as intended by the transaction (whether absolutely or for a period, as in the case of a loan). The words ‘out of’ are not apt to describe a payment which, contrary to the stated effect of the transaction, does not have the effect of changing the ownership of the moneys paid

> and is in fact reversed. Likewise, under s 601, the payment must be made 'to an employer' and this must mean in the employer's capacity as such and exclude the case where the employer merely receives the moneys as a trustee under a trust arising under operation of law for the fund.'

32. If it were necessary to do so, the Revenue would contend that the *Hillsdown Holdings* case was wrongly decided and invite this court to overrule that decision. But their primary submission is that that is not necessary; the present case can be distinguished. In my view they are correct in that submission. The charge to tax under s 601 of the 1988 Act arises whenever a payment is made to an employer out of funds which are or have been held for the purposes of an exempt approved scheme. The object of that taxing provision—as counsel for Hillsdown had submitted and Arden J, I think, accepted—is 'in a rough-and-ready way' to reverse the tax advantage which an employer would otherwise obtain if there were repaid to it, free of tax, moneys derived from contributions which it had made into an exempt approved scheme: see [1999] STC 561, 567a–b. It must be kept in mind that the employer will have obtained tax relief in respect of its contributions; and that (as the law then stood) the investment income generated in the pension fund would be exempt from tax. So, if surplus assets are repaid to the employer, there must be a tax charge. It is also necessary to keep in mind that an employer's scheme may be expected to contain provision for the return of surplus assets (after actuarial certification) and that s 603 of the 1988 Act, and Sch 22, provide for the making of regulations in relation to the reduction or repayment of surpluses. It is to be expected that payments which attract tax under s 601 of the Act will be payments which are authorised by the scheme rules and comply with Sch 22 and the regulations. The unauthorised payment is likely to be the exception. Effect can be given to s 601 of the 1988 Act on the basis that unauthorised payments are not to be treated as payments at all—as Arden J decided.

33. By contrast, the charge to tax under s 600 of the 1988 Act arises only where the payment is unauthorised and in breach of trust. If an unauthorised payment is to be treated as no payment at all, the section is self-defeating. That cannot have been Parliament's intention. The judge in the present case sought to avoid that difficulty by identifying the three conditions which I have set out. But, to my mind, those conditions do not meet the difficulty. The first of those conditions—(i) that the payment was in breach of trust—is a restatement of the premise upon which a charge to tax under s 600 arises. The second condition—(ii) that the recipient is accountable to the trustees as an actual or constructive trustee—is likely to be satisfied in any case in which the recipient has not disposed of all the moneys paid to him before the breach of trust is brought to his knowledge; and it leads to the conclusion that he is not taxable in respect of the moneys

> of which he had disposed, but (potentially) is taxable in respect of those which he had retained. The third condition—(iii) that the recipient is able and prepared to account to the trustees—leads to the conclusion that the question whether or not a payment has been made depends on the state of mind (and the financial position) of the recipient after the event."

31. In the House of Lords this issue was rendered academic by the House's decision on the retirement issue. Lord Walker of Gestingthorpe, who dissented on the latter issue, stated that he considered that the Court of Appeal was correct in its interpretation of section 600: [2003] UKHL 65, [2004] STC 84 at [50]. Lord Millett observed at [34] that "it may depend on whether the determining factor is the payment or the receipt".

32. The third case is *Thorpe v Revenue and Customs Commissioners* [2009] STC 2108. In that case Mr Thorpe, who at the relevant time was the only surviving member of a pension scheme and one of the trustees of the scheme, withdrew the whole of the fund from the scheme by three payments to himself. He was assessed to tax under section 600(1) ICTA 1988 on the basis that his withdrawals from the fund were in each case a "payment to or for the benefit of an employee, otherwise than in course of payment of a pension, being a payment made out of funds which are … held for the purposes of [an approved scheme]". HMRC also withdrew approval of the scheme, and Mr Thorpe was assessed under section 596A ICTA 1988 on benefits received under a non-approved scheme.

33. On Mr Thorpe's appeal from the special commissioner, there were three issues before Sir Edward Evans-Lombe. The first was whether the rule in *Saunders v Vautier* applied, and if so its effect. The second was whether, under the rule in *Re Hastings Bass*, the fund could be reconstituted by Mr Thorpe returning the moneys he had received with accrued interest to the control of the trustees. The third was whether, if Mr Thorpe failed on the first two issues, the tax charges amounted to double taxation, contrary to principle and Article 1 of the First Protocol of the European Convention on Human Rights.

34. Sir Edward Evans-Lombe held that the rule in *Saunders v Vautier* did not entitle Mr Thorpe to call upon the trustees of the scheme to hand the fund over to him. It followed that his withdrawal of the fund was unauthorised. Nor was the rule in *Re Hastings Bass* applicable. Sir Edward Evans-Lombe concluded, however, that, when acting a trustee, Mr Thorpe had committed a breach of trust in sanctioning the withdrawals. Accordingly, when Mr Thorpe had received the payments, he received them with notice of his own breach of trust and held them as a constructive trustee for the fund. Accordingly, property in the money comprising the fund never left the trusts of the scheme. That raised the question of whether section 596A or section 600(1) of ICTA 1988 applied to the payments in those circumstances.

35. Having concluded that the judgment of the Court of Appeal in *Venables v Hornby* on the section 600 issue was not binding on him due to the reversal of

the Court of Appeal's decision on the retirement issue, Sir Edward Evans-Lombe decided not to follow the approach of the Court of Appeal in *Venables v Hornby*, but instead to follow that of Lawrence Collins J for the following reasons:

> "34. For my part, and with great respect, I do not think that such a construction is necessary in order to comply with the demonstrable intention of Parliament in enacting ss 596A and 600. It seems to me consistent with the legislative intention that where a payee has not disposed of the proceeds of the unauthorised payments to him and has indicated his willingness to return them to the scheme, or, better still, has actually done so by the time the issue falls to be dealt with in a court, that he should escape tax under those sections but should be taxed on the proceeds of unauthorised payments which he is not in a position to return. With great respect I do not think that this construction of s 600 leads to the conclusion that the recipient is 'not taxable in respect of the monies of which he had disposed' but potentially 'taxable in respect of those which he had retained' (see [2002] STC 1248 at [33]). The reverse is the construction which was favoured by Lawrence Collins J and that with which I respectfully agree. It seems to me that the purpose of the group of sections of ICTA with which this appeal is concerned is to ensure that income, which, once consigned to a pension scheme has the benefit thereafter of very favourable tax treatment, should surrender those benefits where funds are removed from the Scheme other than for its approved purpose. In my view both ss 596A and 600 have this purpose.
>
> 35. That purpose is achieved where the funds wrongfully removed can be returned to the Scheme with interest, but to the extent that they cannot be so returned, the recipient is charged to tax as if the funds received were part of his income. In the present case Mr Thorpe intended to extract the assets of the Scheme for his own benefit and not for the purpose of providing himself with an annuity by way of pension 45 under rule 4(ii) of the Scheme. On the construction of s 596A favoured by the Revenue, he is liable to tax under Sch E but at the same time bound to account to the Scheme Trustees for the fund which he holds but with no right of recourse to it to recoup himself for the tax he must pay. On this view, the result would have been the same if the building society had paid over the fund to Mr Thorpe, not at his request, but as a result of a mistake for which he was not responsible.
>
> …
>
> 42. After anxious consideration and no little hesitation, I have come to the conclusion that I should not follow the approach of the Court of Appeal in the *Venables* case but should follow the approach of Lawrence Collins J … in that case ….. The *Venables* case was concerned with s 600. I have held that the same considerations as arose in the *Venables* case in relation

> to s 600 apply where the section in issue is s 596A. It follows that I must allow Mr Thorpe's appeal against the dismissal by the Special Commissioner of his appeal against the Revenue's assessment under s 596A subject to being able to satisfy myself by means of undertakings or otherwise, that the fund held by Mr Thorpe has been returned into the control of the original trustees of the Scheme including the pensioneer trustee. I will hear submissions as to how I can be satisfied on that question."

36. On Mr Thorpe's appeal to the Court of Appeal, HMRC chose not to pursue their cross-appeal with respect to the payment issue: see [2010] EWCA Civ 339, [2010] STC 964 at [6].

37. It is common ground that none of these decisions is binding upon us, but only persuasive. Counsel for Mr Clark relied on the reasoning of Arden J in *Hillsdown*, Lawrence Collins J in *Venables* and Sir Edward Evans-Lombe in *Thorpe*, while counsel for HMRC relied on the reasoning of Chadwick LJ in *Venables*. The FTT regarded the reasoning of Chadwick LJ in *Venables* as most persuasive. We will return to this question below.

The statutory language

38. Counsel for Mr Clark relied upon a number of aspects of the statutory language in Part 4 of FA 2004 as supporting the conclusion that a transfer which did not effect a change in beneficial ownership was not a "payment" within section 160(2). Although he drew analogies with the reasoning of Arden J in *Hillsdown* with respect to similar statutory language, the language of the provisions with which we are concerned is not identical to that considered by Arden J and the context is different. Accordingly, we shall consider his submissions on their own merits.

39. First, counsel for Mr Clark pointed out that the charges on "unauthorised payments" in sections 208 and 209 FA 2004 were silent as to their subject matter, but each prescribed a rate to be applied "in respect of" the "payment" (sections 208(5) and 209(6)). Given that "payment" included the transfer of an asset (section 161(2)), and that it was clear that payments in cash and in kind were to be treated equally for the purpose of Part 4, he submitted that the charge must be on the value of the payment in question and that this was a strong indication that the charge was concerned only with transactions which transferred value.

40. Furthermore, he submitted that this indication was reinforced by section 210 FA 2004, which provided the basis for determining whether an unauthorised payment was surchargeable under section 209. It operated by reference to the "percentage of the pension fund used up on the occasion of an unauthorised member payment" (section 210(8)); and this was worked out by means of a formula which compared the amount of the unauthorised member payment to the value of the member's rights in the fund (section 210(9)). Both this formula

and the concept of a pension fund being "used up" by a "payment" indicated that the focus of the sections was on transfers of value out of the fund.

41. Secondly, counsel for Mr Clark submitted that a similar indication was to be found in the wording of section 161(2) FA 2004. It was apparent from that provision that, for a transfer of an asset to amount to a "payment" for the purposes of the extended definition of that term, it must be a transfer of "money's worth". He argued that the word "other" showed that the "transfer of assets" referred to in section 161(2) was intended to be a subset of "transfer[s] of money's worth". Furthermore, he argued that a transfer in kind that did not transfer money's worth would not amount to a "payment" under section 161(2). Given the clear intention that payments in kind and payments in cash be treated equally within these provisions, he submitted that it followed that a transfer of cash must also be one that transferred money's worth if it was to be considered a "payment".

42. Thirdly, counsel for Mr Clark relied on section 279(2) FA 2004. He submitted that, like the reference in section 210 to the fund being "used up" on the making of an unauthorised payment, this indicated that a "payment" required sums or assets effectively to leave the pension fund as intended by the transaction. Likewise, the relevant "payment" must be "to or in respect of" a member of the pension scheme (in the case of an "unauthorised member payment") and "to or in respect of" a sponsoring employer (in the case of an "unauthorised employer payment") (section 160(4) FA 2004). He argued that this must mean "to or in respect of" that person in their capacity as member or employer, not in their capacity as trustee under a trust arising by operation of law for the fund.

43. We do not consider that any of these arguments compel the conclusion that a "payment" within the meaning of section 160(2) FA 2004 must transfer beneficial ownership. So far as the first argument is concerned, there is nothing in the formulae for the quantification of the charge and surcharge in sections 208 and 209 FA 2004 to show that they only operate in respect of payments which transfer beneficial ownership. Section 208(5) FA 2004 provides that the rate for the unauthorised payment charge is 40% of the unauthorised payment. Section 209(6) FA 2004 provides that the rate for the unauthorised payment surcharge is 15% of the surchargeable unauthorised payment. The wording neither refers to, nor necessitates, passing of beneficial title.

44. As for section 210 FA 2004, the words "used up" in section 210(9) do not require a transfer of beneficial interest either. As counsel for HMRC submitted, if A's wallet contains a single £10 note, and B steals that note from A's wallet and spends it, then the money in A's wallet can be said to have been "used up".

45. Turning to the second argument, as is common ground, the definition in section 161(2) FA 2004 is non-exhaustive. As such, we agree with the FTT that the provision cannot be interpreted as limiting the meaning of the word "payment". Furthermore, we consider that counsel for Mr Clark's argument places more weight upon the word "other" than it can properly bear.

46. As for the third argument, we agree with the FTT that section 279(2) FA 2004 merely describes the source of the payments and sheds little light on their quality. Nor does the language of section 160(2) lead to the conclusion that a payment must transfer beneficial ownership.

47. Just as the statutory language does not compel the conclusion that "payment" requires a transfer of beneficial ownership, however, neither does it compel the opposite conclusion. Accordingly, the key consideration is the purpose of the relevant provisions.

The purpose of the relevant provisions

48. The parties were divided as to the purpose of the relevant provisions. Counsel for Mr Clark submitted that their purpose was to ensure that income, which once consigned to a pension scheme had the benefit thereafter of very favourable tax treatment, should surrender those benefits where funds were removed from the pension scheme other than in one of the approved ways. It followed, he argued that, if the beneficial interest in funds never left the pension, such as when they were held on resulting trust, there was no basis for imposing a charge to tax. He made it clear, however, that it was no part of his argument that the incidence of the charge depended on events subsequent to the transfer in question. In particular, the incidence of the charge did not depend on the willingness or ability of the recipient of (the legal title to) the funds to repay the funds, still less upon whether the beneficial owner could trace the funds in the hands of subsequent recipients. Consistently with his submission as to the purpose of the provisions, counsel for Mr Clark argued that it could not be right for a person in the position of Mr Clark to be exposed to a 55% tax charge on a transfer from a pension scheme which was ineffective in the sense that the beneficial title was not transferred.

49. Counsel for HMRC submitted that the purpose of the relevant provisions was to preserve pension funds by discouraging unauthorised transfers from them. Furthermore, he argued that the construction of section 160(2) contended for by Mr Clark undermined that purpose, and was therefore unlikely to have been intended by Parliament, because a transfer of bare legal title could have significant real world economic effects even though beneficial ownership remained with the pension scheme. In this regard, he relied on the acceptance by counsel for Mr Clark that the latter's argument did not depend on the recipient of the transfer, let alone a person further downstream, being willing and able to repay the funds.

50. We agree with counsel for HMRC's characterisation of the purpose of the legislation. We also agree that the construction of section 160(2) contended for by Mr Clark undermines that purpose, and is therefore unlikely to have been intended by Parliament. This conclusion is not affected by the point made by counsel for Mr Clark that an unauthorised transfer need not necessarily constitute a breach of trust, firstly because the pension scheme must be constituted by a contractual arrangement and secondly because, even if it was

constituted by a trust, it might not be in contravention of the terms of the trust. Most pension schemes are constituted as trusts, and we share the view of the FTT that an unauthorised transfer is likely to involve a breach of trust. In any event, we are concerned with a case in which it appears that the transfer did involve a breach of trust.

51. Although we reach that conclusion having regard to the context and content of sections 208 and 209 FA 2004 viewed on their own merits, we agree with the FTT that the reasoning of Chadwick LJ in *Venables*, although not directly applicable, is persuasive by analogy. We do not find the reasoning of Lawrence Collins J in *Venables* and Sir Edward Evans-Lombe in *Thorpe* persuasive because both judges proceeded on the basis that the funds could and would be restored to the pension fund, whereas counsel for Mr Clark expressly disclaimed reliance upon that factor. As for *Hillsdown*, we consider that it is distinguishable from the present case for similar reasons to those given by Chadwick LJ. Moreover, as counsel for HMRC pointed out, there is no equivalent in the present context to the language about reducing a surplus considered by Arden J.

Conclusion

52. For the reasons given above, which are much the same as those given by the FTT, we dismiss the appeal against the First Decision.

Ground 2: Did the assessment encompass the Suffolk Life Transfer being an unauthorised member payment?

53. In considering ground 2, it is necessary to begin by setting out four points which are common ground. First, although the assessment is contained with the notice dated 25 March 2014, it is necessary to read the notice together with the letter of the same date. Secondly, there is no challenge to the validity of the assessment. Thirdly, the scope of the assessment is to be distinguished from the validity of the assessment. Fourthly, the scope of the assessment goes to the scope of the appeal, and hence the jurisdiction of the FTT.

54. Although the scope of the assessment is to be distinguished from its validity, there is no dispute that, in considering the scope of the assessment, it is relevant to bear in mind what is required for a valid discovery assessment. There is more than a century of case law on that question, which was thoroughly reviewed by this Tribunal in *Charlton v Revenue and Customs Commissioners* [2012] UKUT 770 (TC), [2013] STC 866 at [17]-[44] (Norris J and Judge Berner) and again in *Anderson v Revenue and Customs Commissioners* [2018] UKUT 159 (TCC), [2018] STC 1210 at [10]-[30] (Morgan J and Judge Berner). As the Tribunal explained in the former case, in order for there to be a discovery, there must be something new, but this does not mean that new information, of fact or law, is required. All that is required is that it has newly appeared to an officer that there is an insufficiency of tax. As the Tribunal explained in the latter case, this involves the application of a subjective test as to the officer's state of mind and

an objective test as to whether it is open to the officer to have that state of mind. The subjective requirement is that the officer must believe that the information available to him at the time when the discovery assessment is made points in the direction of there being an insufficiency of tax. The objective requirement is that the officer's belief must be one which a reasonable officer could form. It is clear from the Tribunal's exposition in *Anderson* that a discovery assessment may have a provisional quality to it.

55. Nor is it in dispute that an analogy can be drawn between the scope of a discovery assessment and the scope of a closure notice. The scope of appeals to the FTT against closure notices, and the ability of HMRC to raise new points on such appeals, were considered by the Supreme Court in *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] UKSC 19, [2012] 2 AC 457. In that case the conclusion set out in the closure notice was that a claim for capital allowances was excessive. HMRC sought to rely on a different reason for coming to that same conclusion and making the same amendments. The Supreme Court held that it was open to HMRC to do so.

56. The principles established by that decision were summarised by Kitchin LJ (as he then was), with whom Arden LJ (as she then was) and Sir Stephen Richards agreed, in *Fidex Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 385, [2016] STC 1920 at [45]:

> "In my judgment the principles to be applied are those set out by Henderson J [in *Tower MCashback LLP 1]* as approved by and elaborated upon by the Supreme Court. So far as material to this appeal, they may be summarised in the following propositions:
>
> (i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> (ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> (iii) The closure notice must be read in context in order properly to understand its meaning.
>
> (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

57. In that case HMRC had issued a closure notice to Fidex Ltd which denied the taxpayer the benefit of a loss, giving as the reason one particular statutory provision in the Finance Act 1996. HMRC subsequently sought to rely on a different statutory provision to the same computational effect. Kitchin LJ rejected the taxpayer's challenge to HMRC's reliance on the new provision in the following terms at [61]:

> "The scope and subject matter of the appeal to the FTT were defined by the conclusions stated in the closure notice and the amendments required to give effect to them. HMRC were not,

> however, restricted on appeal to the process of reasoning by which they had reached those conclusions and they were free to deploy new arguments in support of them, subject to the exercise by the FTT of its case management powers to ensure that Fidex was not ambushed."

58. Turning to the present case, counsel for Mr Clark submitted that the scope of assessment was confined to the LML Transfer. Like the FTT, we do not accept this. We can state our reasons quite shortly. The discovery asserted in the letter dated 25 March 2014 was of an insufficiency of tax in the 2009/2010 tax year in respect of an unauthorised payment from a pension scheme. The letter made it clear that the assessment was a provisional one and it stated that the assessment was made in connection with "the ongoing enquiry into the transfers *into* [the LML Pension] … and the subsequent payment *from* the scheme to [LML] [emphases added]". It is true that the assessment focussed upon the LML Transfer, but we consider that its scope extended to the Suffolk Life Transfer. We would reach this conclusion in any event, but we consider that it is reinforced by the facts that, at that time, it was common ground that the LML Pension was a registered scheme and that it was Mr Clark who later challenged the status of the LMP Pension, leading to the issue over the Suffolk Life Transfer. We note that, rightly, no complaint of procedural unfairness is made by Mr Clark.

59. Given that we agree with the FTT's conclusion for the reasons we have given, there is nothing to be gained by considering various detailed criticisms made by counsel for Mr Clark of aspects of the FTT's reasoning.

Conclusion

60. For the reasons given above, the appeal is dismissed.

MR JUSTICE ARNOLD AND JUDGE HERRINGTON

Release date: 26 November 2018