[2017] UKUT 87 (TCC)

Appeal number: UT/2016/0188

INCOME TAX – scheme sanction charges – FA 2009 s 269 – whether scheme administrator reasonably believed that no unauthorised payment was being made – s 268(7)(a) – whether FTT erred in its interpretation and application of the test of reasonableness – Mobilx considered – whether FTT made an error of law in its findings of fact – Edwards v Bairstow

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

SIPPCHOICE LIMITED **Respondent**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE JONATHAN CANNAN

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 6 February 2017

Laura Poots, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Rebecca Murray for the Respondent

DECISION

1. This is the appeal of HMRC from the decision of the First-tier Tribunal ("FTT") (Judge John Walters QC and Mr Charles Baker FCA) by which the FTT allowed the appeal of Sippchoice Limited ("Sippchoice") against the decision of HMRC to refuse to discharge the liability of Sippchoice to scheme sanction charges to which Sippchoice had, or was assumed to have, become liable under s 239 of the Finance Act 2004 ("FA 2004"), and granted Sippchoice's application to discharge that liability.

The law

2. In the case of registered pension schemes, only certain payments to or in respect of members of the scheme are authorised. Those are set out in s 164 FA 2004, the detail of which is not material for the purpose of this appeal. Any payment to or in respect of a member which is not authorised by s 164 is an unauthorised member payment, as is anything which is treated as an unauthorised payment to or in respect of a member (s 160 FA 2004).

3. If an unauthorised member payment is made by a pension scheme, s 208 FA 2004 imposes a charge to income tax, known as the unauthorised payments charge, on the person to or in respect of whom the payment has been made. The rate of that charge is 40% of the unauthorised payment.

4. With certain exemptions, none of which is relevant to this appeal, an unauthorised payment is a "scheme chargeable payment" (s 241 FA 2004).

5. Section 239 FA 2004 imposes a charge to income tax, a "scheme sanction charge", where in any tax year one or more scheme chargeable payments are made by a registered pension scheme. The person liable to a scheme sanction charge is the scheme administrator. The amount of the charge is provided by s 240; it is 40% of the scheme chargeable payment, but there is scope for reduction by up to 25% (thus reducing the scheme sanction charge to 15%) if the tax charged under s 208 has been paid. In those circumstances, the aggregate tax charged on the unauthorised payment would be at the rate of 55%.

6. The only condition for the application of the scheme sanction charge under s 239 is that a scheme chargeable payment has been made. But s 268 FA 2004 makes provision for possible relief from that liability. So far as is material to this appeal, s 268 provides:

> "(1) This section applies where—
>
> …
>
> (b) the scheme administrator of a registered pension scheme is liable to the scheme sanction charge in respect of a scheme chargeable 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 … (7).

…

(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.

(10) Regulations made by the Board of Inland Revenue may make provision supplementing this section; and the regulations may in particular make provision as to the time limits for the making of an application."

7. An appeal against a refusal of an application under s 268(5) lies to the FTT under s 269 FA 2004. On such an appeal the tribunal must consider whether the applicant's liability to the scheme sanction charge ought to have been discharged. If the tribunal does not consider that to have been the case, it must dismiss the appeal. If it does consider that the applicant's liability ought to have been discharged, the tribunal must grant the application.

HMRC's appeal

8. The FTT (Judge Walters QC) refused an application by HMRC for permission to appeal, but permission was given by this Tribunal (Judge Sinfield). There were originally three grounds of appeal:

(1) Ground 1. The FTT erred in law in interpreting and applying the "reasonable belief" test at s 268(7)(a) FA 2004.

(2) Ground 2. The FTT erred in law in its interpretation of s 268(7)(b) FA 2004, namely the "just and reasonable" test.

(3) Ground 3. In relation to the period from 7 July 2011 to 4 August 2011, the FTT erred as a matter of law in finding, at [77], that "the evidence does not disclose circumstances which would have indicated to them that a more sophisticated scheme was being operated". It is submitted that the FTT's

conclusion in this regard cannot be justified by, and is inconsistent with, the primary facts.

9. Shortly prior to the hearing, having served their skeleton argument in the usual way, HMRC sought to introduce a supplemental skeleton argument in relation to Ground 2, and to refer, in support of an argument that Sippchoice would be able to meet the scheme sanction charge from funds held for members who participated in the relevant arrangements, to certain evidence, in the form of a Statement of Proposals filed by the administrator of one of the companies concerned, Imperium Enterprises Limited ("Imperium"), in which Sippchoice holds 94.85% of the share capital. That statement had been filed by the administrator on 3 November 2016, after the hearing before the FTT in January 2016 and after the release of the FTT's decision on 30 June 2016.

10. Sippchoice objected to the supplemental skeleton on the basis that it raised a new argument that had not been raised before the FTT, and had not been referred to in the grounds of appeal for which permission had been given. Sippchoice further objected to the admission of the new evidence.

11. In the event, HMRC withdrew not only its supplemental skeleton but the whole of its Ground 2. It is not necessary, therefore, for us to consider the FTT's approach to the just and reasonable test in s 268(7)(b). It would not be appropriate for us to comment any further in that respect, save to record that HMRC continue to maintain that the FTT erred in law in its approach to and application of that test, and HMRC reserves its position in case the issue arises in another case.

The facts

12. Although it has no statutory meaning, the scheme sanction charges at issue in this case arose out of an alleged "pensions liberation scheme", under which members of a pension scheme were enabled to access their pension funds, in the form of loans, before the age at which members are permitted to obtain such benefits (55 years). The intention of the scheme (which HMRC accepted that Sippchoice did not know was being operated) was to enable those benefits to be accessed without a charge to tax under the unauthorised payments regime.

13. Sippchoice is the scheme administrator of the Sippchoice Bespoke SIPP (the "SB SIPP"). Investments in the SB SIPP were, in the events which happened, used in the alleged pensions liberation scheme.

14. The FTT described the alleged scheme in this case in the following way (FTT, at [12]):

> "Step One: An individual ("the Member") transferred his/her pension savings to the SB SIPP.
>
> Step Two: At the request of the Member, Sippchoice, as scheme administrator of the SB SIPP, invested the Member's pension savings in shares in Imperium Enterprises Limited ("Imperium").

> Step Three: Imperium lent the funds to BOH Investments Limited ("BOH").
>
> Step Four: BOH funded a subsidiary, SKW Investments Limited ("SKW") by way of a share subscription.
>
> Step Five: SKW made a loan ("the Loan") to the Member. The Loan was of an amount up to 25% of the value of the Member's savings with the SB SIPP and was expressed to be repayable out of the Member's pension derived from the SB SIPP."

15. Before the FTT, it was assumed, for the purpose of the appeal only, that the Loans that were made at the relevant time were unauthorised payments, and thus were scheme chargeable payments. As the FTT described the position at [10], that was without prejudice to any appeals by any members of the SB SIPP where that point might be in issue. We are not aware of any appeals by such members, but in *White v Revenue and Customs Commissioners* [2016] UKFTT 0806 (TC), the FTT (Judge Scott) considered a similar scheme, featuring an investment by a different SIPP into Imperium and a loan from SKW to the SIPP member, and concluded that the loan was an unauthorised payment.

16. That cannot be taken as settling the position as regards the individual loans in this case. *White* may be subject to an appeal (we had no information in respect of any application for permission to appeal), and such issues are in any event to some extent fact-sensitive. We proceed therefore, as did the FTT, on the basis of an assumption for the time being that a scheme sanction charge has been validly applied, and that the only issue is whether the FTT erred in law in determining that such a charge should be discharged under s 268(7) FA 2004.

17. The story, so far as Sippchoice is concerned, starts on 17 May 2010 when Sippchoice received an unsolicited email from a Mr William Ross-Jones, who was previously unknown to Sippchoice, enquiring about the policy of Sippchoice with regard to investment in unquoted companies. Shortly afterwards, having completed an initial verification process, which included obtaining confirmation from Mr Ross-Jones that Imperium, which Sippchoice understood was to be engaged in property investment, would not be making loans to SIPP members, a decision in principle was taken on 28 May 2010 to allow the SB SIPP to invest in Imperium. Sippchoice accepted the first transfer of pension funds destined for an investment in Imperium on 7 July 2010 and the first such investment was made on 11 August 2010.

18. Sippchoice received a copy of Imperium's investment memorandum on 16 August 2010. In the accompanying email, a Mr Mark Roberts of Imperium again confirmed that Imperium had not made and would not make loans to individuals. The investment memorandum itself stated that Imperium did not have a consumer credit licence. Further investments were made by the SB SIPP into Imperium.

19. By 19 August 2010, Mr Hyman Wolanski, the managing director of Sippchoice, was raising certain concerns with Mr Michael Posner, a co-founder of Sippchoice. Mr Wolanski expressed the view at that time that although there was nothing explicitly wrong with Imperium, it failed the "smell test".

20. On 17 November 2010, Mr Roberts emailed Mr George Bonello, director of administration at Sippchoice, and a Ms Claire O'Neil (later Ms Claire Cobbold), an administration manager, with a copy of the management accounts of Imperium to 31 October 2010. Those accounts showed interest income of £2,656 and expenses of £225,299 giving a net loss of £222,643. Gross assets were a total of £1,380,341, made up of land at £741,000, cash of £237,592 and debtors of £401,749.

21. That is the background up to December 2010. Thus far, it has been accepted by HMRC that Sippchoice should be discharged from liability to a scheme sanction charge in relation to payments between 7 July 2010 and 22 December 2010. Although an application by Sippchoice under s 268(5) FA 2004 in respect of the whole period running up to 4 August 2011 was initially refused by HMRC, that was later reviewed by HMRC and on 13 March 2014 the scheme sanction charges for the period up to 22 December 2010 were discharged. The concern of the FTT, and now this Tribunal, relates only to the scheme sanction charges from that date.

22. The FTT records, at [38], that during December 2010 Ms Cobbold had formed suspicions about Imperium as a result of contact with a Mr Mark Bakes. The background, which Mr Bakes' witness statement described but which was not known to Sippchoice, was that Mr Bakes had received an email informing him of the possibility of "unlocking" his pension. Mr Bakes had been in urgent need of funds and had made contact with the sender, which was SKW, and had been told of the possibility of tax-free cash being taken immediately from his pension in the form of a loan. He was provided with the necessary forms to transfer funds from his existing pension into the SB SIPP.

23. Sippchoice received the funds from Mr Bakes' then existing provider on 22 December 2010. Prior to that, however, Mr Bakes had telephoned Sippchoice, speaking to Ms Cobbold, on a number of occasions at least once a day, to enquire whether the funds had been received. In the last conversation, Mr Bakes had told Ms Cobbold that he needed the money. Ms Cobbold had queried with Mr Roberts why there was this degree of urgency; Mr Roberts had not offered any explanation, except to say that he had found Mr Bakes to be "a bit odd". Ms Cobbold regarded this as unusual, and had referred the matter to Mr Bonello. Neither he nor Mr Wolanski thought to speak to Mr Bakes about the matter.

24. The FTT found, at [40], that Sippchoice could not have known why, following that last conversation with Ms Cobbold, Mr Bakes had not contacted Sippchoice again. In fact, as the FTT found at [19] by reference to Mr Bakes' statement, Mr Bakes had himself received a call from SKW warning him not to speak to Sippchoice.

25. Nonetheless, on 22 December 2010 Mr Bonello wrote to Mr Roberts, with reference to Mr Bakes, to express concern that SIPP money was reaching the hands of the underlying client. He referred to the possibility that Imperium could make loans to a company and that company could in turn make loans to individuals. Although Mr Bonello expressed the view that this would not contravene HMRC rules, he said that it was "definitely not within the spirit of the rules" and that he would decline any further business if that were the case. Mr Bonello asked for a breakdown of

Imperium's debtors, confirmation whether the debtor companies had any common directors with Imperium and the type of business of the debtor companies.

26. On the same day Mr Roberts confirmed that there were no common directors and provided certain further information. On the following day, Mr Roberts identified two debtors, BOH and another company, Real Bridging Finance Limited ("RBF"). BOH was said not to lend to individuals, and RBF was said only to provide secured finance to individuals.

27. On 31 January 2011, Mr Roberts sent Mr Bonello information about Imperium's new business process, described by the FTT, at [46], as misleading. Imperium provided management accounts of BOH to 31 December 2010, showing its principal asset as "investments", but without describing the nature of those investments.

28. Through the early part of 2011, because of the level of business flowing into Sippchoice by reference to Imperium, Sippchoice requested a meeting with Imperium. Ultimately, on 4 May 2011, and after certain clients had been chasing about their pension transfers, which Ms Ward of Sippchoice had thought was a bit strange, and she had discussed it with Mr Bonello, Sippchoice made a formal meeting request.

29. The meeting with Imperium took place on 7 July 2011. That is a material date in this appeal. It is the date from which HMRC say, in their Ground 3, that a finding of fact by the FTT is one that could not have been made by a reasonable tribunal. We shall refer to that ground in more detail below, but it is the meeting on 7 July 2010 that gives rise to HMRC's submissions in this regard.

30. The meeting was attended by representatives of Sippchoice, including Mr Wolanski but not Mr Bonello, and by representatives of Imperium, including one Mr Gary Quillan, whose brainchild Imperium was said to be. The full note of the meeting, prepared on behalf of Sippchoice, is set out at [52] of the FTT's decision. We need not repeat it here. The principal point for the purposes of this appeal is that at paragraph 10 of the note:

> "We [Sippchoice] also queried whether a loan facility was being offered to investors in conjunction with an investment in Imperium. We were told that no such loans were made either by Imperium or BOH, although it seems that loans may be being made by an unconnected party."

31. After that meeting new investments by SB SIPP into Imperium continued to be made.

32. In an email not referred to by the FTT in its decision, but which was before the FTT, dated 14 July 2011, as a follow up to the meeting, Mr Wolanski wrote to Imperium. With respect to loans Mr Wolanski raised the following question:

> "Please confirm that potential investors in Imperium are not offered a personal loan facility (whether from a connected party or otherwise) in association with their investment in Imperium?"

33. On 4 August 2011 Ms Ward at Sippchoice received an email from a Mr Peter Orpwood, one of the first members of the SB SIPP to have invested in Imperium. On receipt of his first annual statement, Mr Orpwood had written to express dissatisfaction at the performance of his fund, and said:

> "… the only reason I transferred my pension fund from the Ford Pension fund was to secure a loan with SKW loans, who recommended me, and that I had to transfer my pension in order to secure a loan with them."

34. That led Sippchoice to contact HMRC on 8 August 2010. The FTT records that fact at [56], but does not go on to refer to other documents before it in which more detail is provided of the discussions with HMRC. Thus, on 17 August 2010, at a meeting with HMRC attended by Mr Wolanski and Mr Bonello, it is recorded in the meeting notes (at para 32) that:

> "AB [Mr Alan Bush of HMRC] asked about loans and whether these were mentioned at the meeting? HW [Mr Wolanski] said that he had asked about loans and it was at this point that his suspicions about loans had been aroused because Quillan gave an unconvincing answer."

35. On the following day, 18 August 2010, Mr Wolanski, responding to questions raised by Mr Bush, wrote:

> "We raised the matter of loans to members at our meeting with Imperium Enterprises on 7 July 2011. I was sufficiently concerned by the answer to raise this again in my subsequent email to Imperium Enterprises.
>
> …
>
> Pulling all this together, we have clearly raised concerns on a number of occasions since some date between 28 May 2010 and 16 August 2010 about Imperium Enterprises making loans to members and have, on each occasion, been told that there were no such loans (and this was reinforced by the Investment Memorandum that we received in August 2010). It was not until the meeting on 7 July 2011 that we became concerned that there could have been indirect loans from Imperium Enterprises to members."

Ground 1 – The test of reasonable belief

36. It is clear that, on its terms, s 268(7)(a) FA 2004 requires both that the scheme administrator has formed a belief that an unauthorised payment was not a scheme chargeable payment and that such belief must be reasonably held.

37. It was in addition common ground that it is not necessary that, in order to form a reasonable belief, the scheme administrator must first be aware that an unauthorised payment was being made. That is a possible literal interpretation of the wording, but it would be too narrow a construction, and would give rise to injustice in a case where a scheme administrator acted reasonably both in not knowing about the payments and in believing therefore there were no scheme chargeable payments. It could not have

been the intention of Parliament to exclude such circumstances from discharge, and we consider that, applying a purposive approach, s 268(7)(a) should properly be given the construction which the parties have agreed.

38. The FTT found, first, at [74], that Sippchoice believed that no unauthorised payments were being made, and secondly, at [81] and [86], that between 22 December 2010 and 4 August 2011, that belief was reasonable.

39. The reasonableness of Sippchoice's belief was a value judgment of the FTT. Such a judgment is susceptible to an appeal on a point of law only in limited circumstances. It is well-established that an appeal against such a judgment, on a question of law, needs to be approached with appropriate caution. As Jacob LJ observed in *Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, at [7], it is the FTT which is the primary maker of a value judgment based on primary facts. Unless the FTT has made a legal error, for example by reaching a perverse finding or failing to make a relevant finding or misconstruing the statutory test, it is not for the appeal court or tribunal to interfere. Furthermore, as Lord Hoffmann said in *Biogen v Medeva* [1997] RPC 1, at p 45:

> "Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

40. Lord Hoffmann returned to the same theme in *Designer Guild v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, a case concerning whether one company had infringed another's copyright by copying a fabric design. The judge at first instance had found that there had been such copying. The Court of Appeal conducted its own analysis and came to a different view. The House of Lords reversed the decision of the Court of Appeal, holding that they had adopted the wrong approach. Lord Hoffmann said, at p 2423:

> "… because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle …"

41. That reasonableness falls within the description of a "not altogether precise legal standard" is clear. As Lewison J (as he then was) said in *Davy's of London (Wine Merchants) Ltd v The City of London Corporation and another* [2004] EWHC 2224 (Ch), a case concerning, in part, what notice period for a break clause inserted into a new tenancy of business premises would be reasonable, at [34]:

> "What is reasonable in the circumstances of a particular case is a value judgment on which reasonable people may differ. Since judges are people, their views may differ, but some degree of diversity is an acceptable price to pay for the flexibility enshrined in the statute …"

42. The question for this Tribunal, accordingly, is not whether we would have come to the same conclusion as the FTT, but whether there is an error of law, or errors of law, in the FTT's determination which merits that determination being set aside.

43. By their Ground 1, HMRC submit that the FTT misinterpreted the "reasonable belief" test in s 268(7)(a) FA 2004, and that this was an error of principle entitling this Tribunal to set aside the decision of the FTT in this respect and re-make the decision. HMRC submit that the FTT erred in law in interpreting and applying the "reasonable belief" test by reference to the tests applied to transactions connected with VAT fraud.

44. The FTT's analysis is set out at [82] – [86] of its decision. It is a relatively short passage, and worth setting out in full:

> "[82] The question of how to determine whether an honest belief that transactions are not connected to fraud is reasonable has been addressed in the context of Missing Trader Intra-Community VAT fraud (MTIC fraud) in the landmark decision of the Court of Appeal in *Mobilx Ltd (in administration) and Others v HMRC* [2010] STC 1436. There, the question was as to the indicia of a situation where a trader 'should have known' that its transactions were connected with VAT fraud. At [52] Moses LJ held that a taxpayer is obliged to deploy the means at his disposal of knowing of the connection. Thus, a trader who 'turns a blind eye' can be taken to be in the position of one who should have known of the connection. At [59], Moses LJ considered the extent of knowledge required to satisfy the 'should have known' test. He said:
>
> > 'If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact.'
>
> [83] We consider that the question arising in this case (did Sippchoice reasonably believe that no unauthorised payments were being made?) raises similar evidential issues to the question in MTIC cases of whether a trader should have known that its transactions were connected with fraud.
>
> [84] Following *Mobilx*, we have considered whether Sippchoice realistically had means at its disposal to learn of the connection between the investments by Members of the SB SIPP in Imperium shares and unauthorised payments being made, and have concluded that it did not. It made suitable enquiries of Imperium and was deliberately misinformed by them.
>
> [85] We have also considered whether the circumstances of the case show (on the evidence) that the only reasonable explanation of the investments in Imperium was that they were connected with the making of unauthorised payments and have concluded that such was not the only reasonable explanation. Quite the reverse, it was reasonable for Mr Wolanski and Mr Bonello to have been satisfied that the investments were genuine commercial investments in a company primarily concerned with building up a property business.

> [86] For the reasons given above, we hold that Sippchoice has made out the ground contained in section 268(7)(a) FA 2004 – that is, that it reasonably believed that there was no unauthorised payment being made."

45. As Ms Poots rightly submitted, *Mobilx* was concerned, not with a test of reasonableness as such, but with an element of the test set out by the then Court of Justice of the European Communities ("ECJ") for establishing whether, in the case of a transaction connected with fraudulent evasion of VAT, a taxable person should, in respect of that transaction, be denied the right to deduct input VAT to which that person would otherwise be entitled as a matter of EU law. That test is described by the ECJ in *Kittel v Belgium; Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537, at [56] – [59]:

> "56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 59. Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'."

46. *Mobilx* was concerned with the "should have known" or constructive knowledge element of the *Kittel* principle. As Moses LJ, in giving the only reasoned judgment of the Court of Appeal, said at [4]:

> "Two essential questions arise: firstly, what the ECJ meant by 'should have known' and secondly, as to the extent of the knowledge which it must be established that the taxpayer had or ought to have had: is it sufficient that the taxpayer knew or should have known that it was more likely than not that his purchase was connected to fraud or must it be established that he knew or should have known that the transactions in which he was involved were connected to fraud?"

47. At [52], in the passage cited by the FTT at its [82], Moses LJ was addressing the first of those questions, the meaning of "should have known". He rejected an argument by the traders that mere failure to take reasonable care should not lead to the conclusion that a trader is a participant in the fraud. He reasoned, at [51], that the expression "knew or should have known" used in *Kittel* was intended to have the same meaning as the expression "knowing or having any means of knowing" as had

been employed in the earlier ECJ case of *Optigen Ltd v Revenue and Customs Commissioners (and other cases)* (Case C-354/03) [2006] STC 419. Thus, as Moses LJ said, at [52], there was no scope for the application of domestic law tests of culpability: the objective criteria for a right to deduction of input VAT to arise would not be met if the trader failed to deploy means of knowledge available to him.

48. Moses LJ then went on to consider the second question, namely whether the right to deduct could be denied on the basis that the trader knew or should have known that it was more likely than not that the transactions were connected to fraud. He found, at [55], that this would infringe the principle of legal certainty. His conclusion is stated at [59] – [60]:

> "[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.
>
> [60] The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

49. Ms Poots submitted that the question whether a belief is reasonable, which is the question posed by s 268(7)(a), is not the same as the question whether a person should have known that there was a connection to fraud. We agree. Reasonableness is an element of the test set out by Moses LJ in *Mobilx*, but the test is not whether the trader's belief was reasonable. It is whether there was no reasonable explanation for the transaction other than that it was connected with fraud. A belief that something is the case may be unreasonable in circumstances other than when the contrary is the only reasonable explanation. Doubts that ought reasonably to have been entertained or unexplained circumstances may render a belief unreasonable even where there are a number of possible reasonable explanations. The "only reasonable explanation" test does not equate to a test of reasonable belief.

50. We do not accept Ms Murray's submission that to ask whether a person should have known of something is just another way of asking whether they acted reasonably in not knowing. Such a question may properly be posed as part of an enquiry as to reasonableness, but it is not the same test, particularly when viewed through the prism of the *Kittel* principle and *Mobilx*. In that context, which was the way in which it was described by the FTT, the test is whether the trader should have known that there was no reasonable explanation other than connection to VAT fraud. There is in our

judgment no scope for the application of a "no reasonable explanation" test in assessing the reasonableness of a belief for the purpose of s 268(7)(a). Consequently, we consider the FTT's reference to *Mobilx*, which was made without any submission in that respect from either party, to have been inapt.

51. If the FTT had applied the "no reasonable explanation test" as the determining principle on which it based its decision on the question of the reasonableness of Sippchoice's belief, we would find that this would have been an error of law. But there is a difference between the making of an inapt reference to a particular authority and the making of an error of law. It is necessary to examine the extent to which the FTT applied the wrong principles in reaching its decision.

52. Ms Poots submitted that where the FTT, at [84], considered the "only reasonable explanation" test it was clearly applying the *Mobilx* test, and that this was an error of law which affected its conclusion on reasonable belief. However, we do not consider that to be a fair reading of what the FTT in fact did. It is necessary to consider the FTT's decision as a whole.

53. First, as Ms Murray argued, the FTT's reference to *Mobilx* appears for the first time at paragraph [82] of its decision. Before that, at [73] – [81], the FTT had directed itself to the issue for decision, and had done so purely in terms of reasonable belief, and not by reference to *Mobilx*. It had considered the evidence before it and had on that basis concluded, at [81], that Sippchoice's belief between 22 December 2010 and 4 August 2011 that no unauthorised payments were being made was reasonable. In particular, the FTT found that it had been reasonable for Mr Wolanski and Mr Bonello to have been satisfied with the responses received in respect of their proportionate enquiries of Imperium, which had reasonably appeared to them to be genuine and reassuring. The FTT also found that, having received those reassuring responses, Mr Wolanski and Mr Bonello had acted reasonably in not consulting the members of the SB SIPP individually. That conclusion was one reached before any resort to *Mobilx*.

54. Secondly, a careful examination of how the FTT employed *Mobilx* reveals that the test was not applied as some sort of proxy for the test of reasonableness. The FTT was not setting out a test or principle to be applied in the context of s 268(7)(a). It confined its reference to *Mobilx* to evidential issues. Its consideration, at [84], of the question whether Sippchoice realistically had means at its disposal to learn of the connection between the investments in the SB SIPP and the unauthorised payments was in our view, irrespective of *Mobilx*, a question that it was legitimate to ask as a factor in an overall consideration of the reasonableness of Sippchoice's belief. The FTT was doing nothing there that it had not already done in concluding that the enquiries made of Imperium had been reasonable and that it had been reasonable for Sippchoice to have been reassured by the responses, which turned out to have been misleading.

55. More troubling, however, is the particular focus placed by the FTT, at [85], on the "only reasonable explanation" test. That enquiry was not, for the reasons we have explained, an appropriate one, and if the FTT had placed any weight upon such a

factor it would have been an error of law to have done so. But we are satisfied that it did not do so. Whilst finding – inappropriately in this context – that the making of unauthorised payments was not the only reasonable explanation for the making of the investments in Imperium, the FTT did not conclude from that that Sippchoice's belief was reasonable. Rather it re-affirmed, independently of its conclusion on the "only reasonable explanation" test, its earlier finding that it had been reasonable for Mr Wolanski and Mr Bonello (and consequently for Sippchoice) to have been satisfied that the investments were genuine commercial investments.

56. It follows from our own analysis of the FTT's decision that we do not accept Ms Poots' submission that the FTT carried out its evaluation with an incorrect legal principle in mind, and that the error in applying *Mobilx* to the extent it did cannot be separated out from that evaluation. It is certainly the case that an error of principle, such as that made by the FTT in this case by referring to the "only reasonable explanation" test in *Mobilx* in the way that it did, may be found to have played a part in the evaluation such as to render that evaluation erroneous in law, even if the tribunal does not expressly apply that principle. But that will depend on consideration of the decision as a whole. In this case, as we have described, we are satisfied that the FTT did apply the correct principles in making its findings as to reasonableness and that its references to *Mobilx* and the tests derived from that judgment did not colour the FTT's decision in that respect.

57. In support of her submission, Ms Poots referred us to the decision of the FTT (Judge Walters QC) refusing HMRC's application to the FTT for permission to appeal on this Ground 1. Responding to the argument of HMRC under that ground that the concept of reasonableness equates with concepts of carelessness or negligence, and does not equate with concepts of fraud or recklessness, Judge Walters said, at [6] of that decision:

> "We [sic] consider that it is sufficiently clear that the concept of 'reasonableness of a belief' that an authorised payment *was not* a scheme chargeable payment equates in all material respects to the concept of whether a person 'should have known' that an unauthorised payment *was* a scheme chargeable payment. I do not regard the contrary proposition, sought to be raised by HMRC, as being reasonably arguable."

58. Were it to have been the case that this was the principle that was applied by the FTT in reaching its conclusion on the question of Sippchoice's reasonable belief, we would agree with HMRC that this would have been an error of law that would have made the FTT's conclusion unsustainable. But, for the reasons we have explained, that was not in our judgment the basis for the FTT's conclusion. The making by the FTT of an erroneous statement of law in refusing permission to appeal in response to a particular line of challenge to the FTT's decision does not alter our assessment of the position having regard to the FTT's decision as a whole.

59. Although, therefore, we agree with HMRC that the reference by the FTT to *Mobilx*, and the application of the "only reasonable explanation" test was an error of principle, it was not one that in our judgment affected the FTT's conclusion on the

issue of Sippchoice's reasonable belief. In those circumstances, it would not be right to set aside the decision of the FTT on Ground 1, and we dismiss HMRC's appeal on that ground.

Ground 3 – Period 7 July 2011 to 4 August 2011; the *Edwards v Bairstow* challenge

60. By this ground, HMRC seek to impugn as an error of law the finding by the FTT, at [77], that the evidence did not disclose circumstances which would have indicated to Mr Wolanski and Mr Bonello that a more sophisticated scheme than a simple one involving loans made to SIPP members by Imperium or by one of Imperium's debtors was being operated.

Jurisdiction

61. Before moving to the substantive appeal on Ground 3, we should say a few words about jurisdiction. In refusing permission to appeal for this ground at the level of the FTT, Judge Walters took the view that Ground 3, which related to only the latter part of the period at issue before the FTT, was for that reason a new case which it was not open to HMRC to make on an appeal.

62. We do not agree. It is clear that the case made by HMRC was in respect of all parts of the period between 22 December 2010 and 4 August 2011, including therefore the shorter period from 7 July 2011 to the end of the period. It is not a new case for HMRC to seek to appeal a finding by reference to facts that arose during the latter period, and to confine that appeal to that shorter period. As Ms Poots submitted, the scheme sanction charge relates to each unauthorised payment, and it is necessary to apply the requirements of s 268(7) in respect of each payment. It is quite clear that the FTT could decide that those requirements were met in respect of some payments and not others, and that the scheme sanction charge could be discharged in relation only to those payments for which s 268(7) was satisfied. In the same way, an appeal to this Tribunal which relates to only certain payments, such as those after a certain date within the period at issue in the appeal before the FTT, is not a new case.

The Ground 3 appeal

63. At [77], the FTT said:

> "The reality was, we find, that both Mr Wolanski and Mr Bonello were concerned to satisfy themselves that there was no 'simple' pensions liberation scheme being operated through Imperium by which money was lent to Members by Imperium or by one of Imperium's debtors. They did not appreciate that a more sophisticated scheme might be being implemented whereby Imperium's apparently innocent financial assets (loans to BOH) were in fact a mask for an investment by BOH in a subsidiary (SKW) which would be the vehicle for lending funds to Members. We consider that in adopting this approach Mr Wolanski and Mr Bonello were behaving reasonably. In our judgment the

> evidence does not disclose circumstances which would have indicated to them that a more sophisticated scheme was being operated."

64. It is the final sentence of that paragraph that HMRC submit is an error of law. They do so on the basis that, as they argue, the FTT's finding in that respect, for the period from 7 July 2011, was "such that no person judicially and properly instructed as to the relevant law" could have made (see *Edwards v Bairstow and another* [1956] AC 14, per Lord Radcliffe at p 36). HMRC say that such a finding was from that date inconsistent with the documentary evidence which had been placed before the FTT.

65. The significance of the date of 7 July 2011 was that it was the date on which representatives of Sippchoice, including Mr Wolanski but not Mr Bonello, met representatives of Imperium. We have referred to that meeting earlier, and to the important point in the notes of the meeting, which we repeat here:

> "We [Sippchoice] also queried whether a loan facility was being offered to investors in conjunction with an investment in Imperium. We were told that no such loans were made either by Imperium or BOH, although it seems that loans may be being made by an unconnected party."

66. We have also referred to Mr Wolanski's follow-up email of 14 July 2011, when he said:

> "Please confirm that potential investors in Imperium are not offered a personal loan facility (whether from a connected party or otherwise) in association with their investment in Imperium?"

67. Ms Poots submitted that it was clear from this evidence that, at this stage, Mr Wolanski had a concern that a more sophisticated scheme might be operated, including one involving the making of loans by an unconnected party.

68. Ms Poots referred us to evidence that had been before the FTT but which was not referred to in the FTT's decision. We have summarised the relevant points at [34] and [35] above. Essentially, the evidence was that Mr Wolanski had confirmed to HMRC that it had been from the 7 July 2011 meeting that he had had suspicions about the use of indirect loans from Imperium.

69. Ms Poots argued that this evidence made it clear that the meeting on 7 July 2011 had specifically indicated to Mr Wolanski that a more sophisticated scheme might be being operated and that loans might be reaching members indirectly. She submitted that the FTT's decision as to the reasonableness of Sippchoice's belief rested both on Sippchoice being unaware of the loans to members and on them believing and being satisfied by the responses given by Imperium. The finding of fact at [77] forms, it is submitted, a fundamental plank of both elements of the FTT's analysis. Ms Poots argues that it is abundantly clear that those two elements cannot be maintained in respect of the period from 7 July 2011.

70. In examining those issues, it is important to have regard to the logic of the FTT's findings. Those findings were, of course, made with respect to the whole period at issue. At [77], the FTT was addressing, not what Mr Wolanski and Mr

Bonello might have been concerned about, but what they actually knew at the relevant times. The finding was essentially that they did not know that there was a more sophisticated indirect loan scheme being operated by Imperium, and that the evidence was not such that would have provided them with that knowledge. The language used by the FTT "… the evidence does not disclose circumstances which would have indicated to them that a more sophisticated scheme *was* being operated [our emphasis]" is consistent with the FTT dealing here with actual knowledge.

71. Ms Poots' submissions, by contrast, are framed in terms of possibility. It is argued that Mr Wolanski had received indications that a more sophisticated scheme *might* be being operated. That, in our judgment, is not inconsistent with what the FTT found at [77]. It is the same as saying that Mr Wolanski had been alerted to matters which raised concerns for him as to the possibility that indirect loans might be being made. That was not the focus of the FTT's findings at [77], which addressed knowledge and not concern.

72. The question of Mr Wolanski's concerns was not ignored by the FTT. With respect to the earlier period, the FTT referred, at [75], to the concerns that had been expressed by Mr Bonello about direct loans from Imperium, or loans from Imperium's debtors. At [78] – [79], the FTT addressed the concerns that had been raised by the meeting of 7 July 2011, and found that those concerns had been laid to rest by the false assurances and misinformation promulgated by Imperium and Mr Quillan.

73. We are not concerned to re-examine the FTT's analysis of the reasonableness of Sippchoice being satisfied by the responses it obtained when concerns were raised. This ground of appeal is directed exclusively at whether the FTT's finding in the last sentence of its paragraph [77] was one that no reasonable tribunal could have reached. We do not consider that it was. The FTT clearly accepted, at [78], that the circumstances of the 7 July 2011 meeting were such as to have given rise to a concern on the part of Sippchoice as to the making of loans to members. But we do not consider that the evidence which gave rise to such a concern disclosed circumstances which would necessarily have indicated to Sippchoice that a more sophisticated scheme was being operated, as opposed to that such a scheme might be being operated. The finding of the FTT at [77] was accordingly one that it was entitled to make on the evidence, and there is no error of law in that finding.

74. We dismiss HMRC's appeal on Ground 3.

Decision

75. For the reasons we have given, we dismiss HMRC's appeal.

ROGER BERNER

JONATHAN CANNAN
UPPER TRIBUNAL JUDGES

RELEASE DATE: 01 March 2017