Appeal number: TC/2013/00239

Income tax – unauthorised payment charge – section 207 FA04 – scheme funds invested at scheme member's direction in preference shares of finance company as part of arrangement providing for loan from a third party lender to pension scheme member – whether loan to scheme member was unauthorised member payment under section 160(2) FA04 – whether loan was a "payment" – held yes – whether the payment was "made… in connection with" the preference shares acquired using scheme assets under section 161(3) FA04 – held yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK DANVERS **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
JANET WILKINS CTA

Sitting in public in the Royal Courts of Justice, Strand, London on 11 March 2015

Frances Ratcliffe of counsel for the Appellant (Direct Access)

Laura Poots of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is concerned with whether a particular set of arrangements which were described as having the purpose of helping "people improve their liquidity positions prior to taking their retirement benefits" achieved their desired result.

2. The arrangements constituted a version of what is commonly known as "pension liberation", i.e. a structure designed to afford a pension scheme member effective access (in this case, by way of loan) to some part of his/her pension fund before the normal qualification age of 50 without incurring the income tax charges designed to deter such access. The question before the Tribunal was whether the particular set of arrangements in this case were effective to achieve that end.

The facts

3. We received a bundle of documents, unsupplemented by any oral testimony. Some of the detail of the relevant facts was therefore not available to us, but the documents provided a reasonably clear outline.

4. We find the following facts.

5. In late 2009 the appellant was a member of two registered pension schemes, a Flexible Pension Plan with Windsor Life Assurance Company ("Windsor") and a Rainbow Plus Personal Pension Scheme with Winterthur Life UK Limited ("Winterthur").

6. As at November 2009, the total value of the appellant's rights within the two schemes was approximately £35,000.

7. The appellant was born on 10 November 1968 and therefore attained the age of 41 in November 2009.

8. By mid-November 2009 the appellant had clearly reached a provisional decision to transfer his existing pension funds from Windsor and Winterthur to HD SIPP, a pension scheme which had been registered by HMRC with effect from 13 December 2006, and had become an "appropriate personal pension scheme" which effect from 1 October 2008, with the Newcastle Building Society as "Provider". We infer this decision was taken specifically with a view to the obtaining of a loan (as subsequently occurred – see below).

9. Included in the documents before us was a document headed "G Loans Questions and Answers", a document which we infer was given to the appellant before he reached his decision. It described a "G Loan" as "a loan whereby the capital is repaid using the proceeds from your personal pension fund". It referred to the fact that a participant's pension fund had to be invested with "a company on an approved panel", in order to "ensure that G Loans Ltd can be as sure as possible that sufficient funds will be available to repay your loan".

10. Also included in the documents before us was a document headed "KJK Investments Limited – Information Memorandum". This document ("the Information Memorandum") was not dated, but it must have been issued at some point shortly before 1 May 2009, as it gave details of a proposed issue of cumulative preference shares of up to £3 million during the period from 1 May 2009 to 30 April 2010 (subject to possible extension). The proposed business of KJK Investments Limited ("KJK") was said to be "taking advantage of the current difficulties in the lending market" by specialising in "wholesale lending, i.e. lending to other lenders". Typical opportunities were said to include (a) "lending to bridging finance companies" in connection with property purchase at a proposed interest rate of 1% per month; and (b) lending (at an expected rate of 1.5% per month) to other companies offering unsecured loans (with which KJK was said to "have connections"). The other companies would then use the money to advance either "payday loans" or "other types of loans where the client can provide evidence that he will be getting monies in the future to repay the loan (e.g. sale of house, car, drawing of pension/tax free cash, bonus, inheritance)".

11. The appellant gave specific instructions, in his application form to become a member of the HD SIPP (see below), for 100% of his fund to be invested in KJK; he also referred to it (including a reference to "IM", which we take to refer to the Information Memorandum) in a risk warning which he signed at the same time. As a result, we infer he had previously seen this Information Memorandum, was aware of its contents and expected the investment of funds in KJK to "unlock" the loan from G Loans Limited ("G Loans") to him. He may or may not have believed that KJK would lend the necessary funds (directly or indirectly) to G Loans to finance the loan; our decision would be the same whether or not this was the case.

12. The appellant contacted Winterthur and Windsor around 16 to 18 November 2009. He requested up to date statements of his fund values, and asked for transfer forms to transfer them to another pension scheme. Windsor confirmed to him that he was too young to receive any benefits under the plan with them. Both companies provided the transfer values requested and the necessary forms to effect the transfers.

13. On 25 November 2009, the appellant signed:

(1) forms applying to become a member of the HD SIPP (and a co-trustee of his fund held within it), and to request the transfer to that scheme of the value of his pension fund in Windsor (though not, as far as we could see in the bundle, his fund in Winterthur);

(2) a form indicating that he was acting on an "execution only" basis and not seeking any advice from the HD SIPP; and

(3) an instruction to the HD SIPP trustee to invest £34,899 in £1 preference shares KJK. It is not clear how the £34,899 figure was decided, as it bears no direct relationship to either the expected or actual transfer values (other than being roughly equal to their aggregate amount).

14. We were not provided with a copy of the articles of association of KJK and were therefore unable to consider the precise share rights attaching to the preference shares. It is however apparent from the Information Memorandum referred to above that the shares carried a cumulative dividend at the rate of 6% per annum and were redeemable at the option of the holders by giving three months' notice to KJK at any time after 1 January 2014; they were also redeemable at the option of KJK by giving three months' notice at any time after 1 January 2015.

15. The appellant appears to have signed the relevant authority forms issued by Windsor and Winterthur (authorising them to make the relevant transfers) on 28 November 2009. It was not explicitly stated in the documents before us precisely when the appellant became a member of the HD SIPP, but it must have been on or before 3 December 2009, when the first transfer payment to the HD SIPP in respect of the appellant was made (see below). As the deed appointing the appellant as a co-trustee of his fund within the HD SIPP was executed by the existing trustee (HD Trustees Limited) on 1 December 2009, we infer that to have been the date on which he became a member.

16. On 1 December 2009, the administrator of the HD SIPP confirmed it was willing to accept the transfers from Windsor and Winterthur, and that it would make the requested investment in KJK.

17. On or about 3 December 2009, Winterthur made a transfer payment of £9,474.72 to the trustee of the HD SIPP.

18. On 8 December 2009, Windsor made a transfer payment of £25,973 to the trustee of the HD SIPP.

19. On 11 December 2009, the appellant signed a loan agreement with G Loans, under which G Loans agreed to lend £18,656.69 to the appellant ("the Loan"). G Loans signed this agreement on 16 December 2009. The key terms of the Loan were as follows:

(1) it was advanced "on an interest only basis and the capital will be repaid from the proceeds of your pension fund";

(2) interest was payable at the rate of 5.5% for the first year (which was to be paid in advance) and thereafter at "5% above bank base rate", due annually in arrears;

(3) the appellant was required to pay an initial fee of 5% of the amount of the Loan (£932.83);

(4) the "maximum amount the borrower will be required to repay" was fixed at "the amount received, net of tax, from the borrower's pension fund" (another condition in the agreement provided that "the borrower will not have to repay more than the tax free cash and the net income that he receives from his pension");

(5) the "method of repayment" was identified as "From the net proceeds of the borrower's pension";

(6) it was provided that "the borrower will utilise his tax free cash to reduce the loan balance. If the tax free cash is not sufficient to repay the entire loan, the borrower will utilise any net income drawn from the pension benefits";

(7) if the appellant died then the Loan would become immediately repayable, with interest, but the maximum amount to be repaid on death would be "the net death benefits from the borrower's pension";

(8) it was stated that "this loan has been granted due to the fact that the borrower has a total of approximately £35,000 invested in personal pensions with Windsor Life and Winterthur Life", and that "as a condition of the loan being granted, the pension must be transferred within 4 weeks (if not already) of receiving the loan to a Self Invested Pension Plan (SIPP) with HD SIPP and after HD SIPP's fees are paid the remaining monies must be used to buy ordinary shares and cumulative preference shares in KJK Investments Limited";

(9) it was provided that KJK would be liable for any fees subsequently due to HD SIPP, and that if it failed to pay any such fees in respect of the appellant's SIPP, "the loan agreement becomes unenforceable";

(10) it was provided that "the borrower cannot disinvest monies from KJK Investments Ltd or transfer monies away from the HD SIPP without the written permission of G Loans Ltd. or unless the loan is repaid in full. If any dividends or other monies are paid from KJK Investments Ltd into the borrower's SIPP account the lender can insist on where these monies are subsequently invested unless the loan is repaid in full";

(11) it was provided that "if any of the above conditions are not met, the loan will become due to be repaid immediately and interest will immediately accrue at the default rate of 24% per annum".

20. On 16 December 2009, the appellant received £16,753.71 from G Loans, being the amount of the agreed loan (£18,656.69) less the 5% fee (£932.83) and the first year's interest in advance of £970.15. It was noted in the loan agreement that the interest payable in "year 2" was £1,026.12.

21. On 17 December 2009, HD SIPP (through named individual trustees) applied for 34,899 preference shares of £1 each in KJK at par (an application which had been signed by the appellant by way of prior authorisation on 25 November 2009). The shares were issued and paid for on the same day.

22. The abbreviated balance sheet of KJK, as shown in its abbreviated accounts to 31 March 2010, showed that it had issued share capital of £4,240,030, all but £1,000 of which comprised redeemable preference shares. KJK had net assets of £3,773,964,

made up of £3,365,839 of "debtors" and £422,546 of cash, less creditors of £14,421. It had a carried forward deficit of £466,066 on its profit and loss account.

23. A "snapshot" of KJK's activities was shown in a trading statement dated 16 August 2013. This showed that as at 30 June 2013, it had outstanding loans as follows:

(1) to G Loans of £6,968,221. It was said that "Since G Loans is owed £7.3 million by borrowers, who have invested their pensions with KJK, we believe the vast majority of these monies will be repaid. Interest is being charged at 3.5% per annum";

(2) to a company called Accelerated Bridging Finance Limited ("ABF") of £4,052,908. This loan carried interest at 0.75% per month. ABF was described as having "a diversified book of loans to property developers, most of it secured on land and property";

(3) to a company called Hamilton Grieg Limited ("HG") of £458,368. HG apparently provided "guarantor loans" and was charged interest at 1% per month;

(4) to a company called SKW Investments Limited ("SKW") of £26,093. SKW was said to have a "diversified loan book to individuals" and was being charged interest of 1% per month;

(5) to a company called Real Bridging Finance Limited ("RBF") of £335,760. It was said that "RBF's loan book is diversified and is primarily made up of monies secured by way of first or second charge". RBF was being charged interest of 1.5% per month.

24. In the same trading statement, it was said that in the year to 31 March 2013, KJK had made post-tax profits of £520,503.96.

25. It is apparent therefore that as at 30 June 2013, 58.8% of KJK's total lending was to G Loans, in the sum of £6,968,221. So far as G Loans was concerned, its abbreviated accounts for the year ended 31 January 2013 showed debtors of £7,006,884 and long term creditors of £6,830,115. There was no direct evidence before us, beyond the trading statement of KJK, as to where G Loans obtained its finance.

26. On 13 May 2011 HMRC wrote to the appellant, opening an enquiry into his pension arrangements for the tax year ended 5 April 2010. Ultimately, they closed their enquiry by the issue of a closure notice dated 18 April 2012, making a corresponding amendment to the appellant's self-assessment for the relevant year. The effect of the amendment was to impose an unauthorised payment charge and an unauthorised payment surcharge at the total rate of 55% on the loan of £18,656 advanced to the appellant. The total amount of these charges is £10,260.80 and they are the subject of this appeal. The parties are agreed that the figure is correct if the Tribunal's decision in principle is that the charges should be upheld.

The law

27. The relevant provisions are contained in Part 4 Finance Act 2004 ("FA04").

28. Section 208 FA04 provided (so far as relevant) as follows:

> "**208 Unauthorised payments charge**
>
> (1) A charge to income tax, to be known as the unauthorised payments charge, arises where an unauthorised payment is made by a registered pension scheme.
>
> (2) The person liable to the charge –
>
> (a) in the case of an unauthorised member payment made to or in respect of a person before the person's death, is the person…
>
> …
>
> (5) The rate of the charge is 40% in respect of the unauthorised payment.
>
> …
>
> (7) An unauthorised payment may also be subject to –
>
> (a) the unauthorised payments surcharge under section 209…"

29. Section 209 FA04 provides for an "unauthorised payments surcharge" at the rate of 15% of the relevant unauthorised payment in certain circumstances. As the parties are agreed that this surcharge will apply in the present case if the charge under section 208 FA04 arises, we do not consider it necessary to set out the relevant provisions of section 209.

30. The question of what amounts to an "unauthorised payment" for the purposes of section 208 FA04 is addressed in sections 160 to 181 FA04.

31. There are two sorts of unauthorised payment, an "unauthorised member payment" and an "unauthorised employer payment" (see section 160(5) FA04).

32. In this appeal, we are concerned with a supposed "unauthorised member payment", which is defined in section 160(2) as meaning:

> "(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."

33. Some of the provisions relating to unauthorised employer payments are, as will be seen, also relevant to our decision as they cast some interpretative light on the provisions we are directly concerned with. This is considered further below.

34. It is common ground between the parties that (a) the transaction which (if at all) gives rise to the charge and surcharge in this case is the cash loan from G Loans to the appellant, (b) HD SIPP was at all relevant times a registered pension scheme and (c) if the loan amounted to a "payment", it was made to the appellant at a time when he was a member of the HD SIPP.

35. It is also common ground that this cash loan does not fall within the list of "authorised member payments" set out in section 164 FA04.

36. The key issue under section 160(2)(a) FA04 is therefore whether the loan from G Loans to the appellant was "a payment by" the HD SIPP.

37. At first sight, as the loan was made by G Loans, it would appear that it could not properly be regarded as a "payment" by the HD SIPP. However, two further interpretation provisions need to be borne in mind.

38. First, section 279(2) FA04 provides as follows:

> "In this Part references to payments made, or to benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purpose of the pension scheme."

39. This provision is required mainly because a "pension scheme" is defined in section 150 FA04 as being a "scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide…" benefits for retirement, death, ill-health or similar situations. Clearly a "scheme or other arrangement" is not a legal entity and, as such, is unable to make a payment. Thus section 279(2) FA04 makes it clear that references to payments "by" a pension scheme are to be interpreted as payments "made from sums or assets held for the purpose of the pension scheme", regardless of what legal entity actually makes the payment.

40. This interpretation provision on its own would not "catch" a payment made by a third party out of sums of money invested in it as share capital by a pension scheme, as such a payment would not, on the basis of section 279(2) alone, be treated as having been "made" by the pension scheme. It does however set the scene for the more important second interpretation provision contained in section 161 FA04, and in particular in subsections 161(2), (3) and (4), which read as follows:

> "(2) "Payment" includes a transfer of assets and any other transfer of money's worth.
>
> (3) Subsection (4) applies to a payment made or benefit provided under or in connection with an investment (including an insurance contract or annuity) acquired using sums or assets held for the purposes of a registered pension scheme.

> (4) The payment or benefit is to be treated as made or provided from sums or assets held for the purposes of the pension scheme, even if the pension scheme has been wound up since the investment was acquired."

41. In the present case, it is clear that the preference shares in KJK acquired by the HD SIPP were "an investment acquired using sums or assets held for the purposes of" the HD SIPP, a registered pension scheme. The question for us to determine, therefore, is whether the loan made by G Loans to the appellant was "a payment made under or in connection with" those preference shares. More specifically, as there does not seem to be any basis upon which the loan could be said to have been provided "under" the preference shares, the key question is whether the loan amounts to "a payment made in connection with" the preference shares.

Submissions of the parties

Submissions on behalf of the appellant

42. Ms Ratcliffe, on behalf of the appellant, broadly argued as follows.

43. First, she argued that a loan by a third party (G Loans), unconnected with a registered pension scheme (the HD SIPP) did not fall within the definition of a "payment" within Part 4 FA04. In her submission, the term "payment" connoted an unconditional transfer of money, whereas "loan" connoted a temporary parting with money which was intended to be returned and not permanently surrendered. She referred to sections 175 and 179 FA04, which provided (so far as relevant) as follows:

> "**175 Authorised employer payments**
>
> The only payments which a registered pension scheme that is an occupational pension scheme is authorised to make to or in respect of a person who is or has been a sponsoring employer are –
>
> ….
>
> (d) authorised employer loans (see section 179)…
>
> …
>
> **179 Authorised employer loan**
>
> (1) A loan made to or in respect of a person who is or has been a sponsoring employer is an unauthorised employer loan if –
>
> …."

44. In her submission, the specific inclusion of references to "authorised employer loans" in this context was indicative that, but for such inclusion, a loan would not amount to a "payment" for the purposes of Part 4 FA04.

45. She also pointed to the fact that there is no statutory prohibition in Part 4 FA04 on a registered pension scheme providing a loan to a third party, and submitted this also indicated that a loan is not a "payment" for the purposes of that Part.

46. She also claimed some support "by analogy" from *Murray Group Holdings Limited v HMRC* [2012] UKFTT 692 (TC), upheld by the Upper Tribunal at [2014] UKUT 0292 (TCC). She referred, amongst other things, to the First-tier Tribunal's statement at [198] that "the acceptance of loans in the circumstances of the present appeal could not amount to payment", contrasted with the holding (on authority) that payment connoted money being "placed unreservedly at the disposal" of the relevant employee. (Whilst the Court of Session's judgment on the appeal, overturning the Upper Tribunal, was not available at the time of the hearing, it is fair to say that the basis on which Court decided that appeal did not have any significant bearing on her submission).

47. Second, even if a loan did amount to a "payment", the payment could not in this case be regarded as having been made "in connection with" an investment acquired using scheme assets (as provided in section 161(3)). She referred to the guidance in this area set out in HMRC's Registered Pension Scheme Manual at paragraph 09100160):

> "The legislation treats payments made under or in connection with (or benefits provided under or in connection with) any annuity or insurance contract purchased using sums or assets held by a registered pension scheme, or any other form of investment vehicle purchased by the scheme, as payments under the originating scheme. Where the purchased item (annuity, insurance contract, investment vehicle etc) remains in the ownership of the scheme, then the payment is already considered a payment under the registered pension scheme under s161(2), so s161(3) and (4) come to the fore when the ownership of the item does not lie with the scheme. This typically arises where an annuity is purchased by the scheme 'in the name of the member', so the annuity contract is then owned by the member and the insurance company is directly liable to the member.
>
> So, for example, where a lifetime annuity is purchased from a money purchase arrangement any payment made by that contract on the death of the annuitant must comply with the pension death benefit rules and lump sum death benefit rule (see RPSM10100050). If the contract provides an unauthorised member payment the payment will be taxed accordingly (see RPSM09100180)."

48. She submitted that it could be inferred from this that the meaning intended to be attributed to the phrase "in connection with" in section 161(3) was, effectively, that the payment should be made "from" the investment. In the present case, the payment (if such it were) took the form of a loan by a company which had itself borrowed the money from another company which had obtained the money by means of a preference share issue, subscribed by the pension scheme by way of investment of pension scheme funds. This was, in her submission, an insufficient connection for the purposes of section 161(3). If it were regarded as sufficient, there would be

potentially wide-ranging implications for other perfectly ordinary arms' length transactions such as pension-backed mortgage arrangements in which a mortgage is intended to be repaid from the proceeds of a pension.

49. Further, this was not a situation in which the appellant was accessing his pension early – his pension remained secure in the HDD SIPP, subject to the rules of that scheme.

Submissions on behalf of HMRC

50. Ms Poots, on behalf of HMRC, did not appear to disagree with Ms Ratcliffe's assessment of what amounted to the two key issues in dispute between the parties (was a loan a "payment", and if so was it "in connection with" the KJK preference shares).

51. On the first issue, in her submission a payment by way of loan was still a "payment", within the ordinary meaning of that word. She argued that *Murray* was irrelevant because the question in that case (whether there had been a payment of earnings/emoluments) was an entirely different question from the one under consideration in the present appeal. And so far as section 175 was concerned, in her submission the only way to interpret it was diametrically opposed to Ms Ratcliffe's interpretation; she argued that an "authorised employer loan" (and, therefore, logically, any other loan) was quite clearly contemplated by that section as being a "payment" – otherwise it would have been quite simply irrelevant for the section to state that such a loan was an authorised employer payment.

52. On the second issue, she referred to the judgement of Lord Nicholls in *Barclays Mercantile Finance Limited v Mawson* [2005] STC 1 at [36], stating that the task to be done was:

> "first to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Limited* [2003] KFCFA 46 at [35]:
>
> > '[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transactions, viewed realistically.'"

53. She referred also to the decision of the Court of Appeal in *Eclipse Partners No 35 LLP v HMRC* [2015] EWCA Civ 95 at [110], where it was noted that viewing the actual transaction realistically "might involve considering the overall effect of a number of different elements intended to operate together".

54. In her submission, the purpose of the legislation in this case was to prevent the abuse of tax reliefs available for investment into a registered pension scheme. The

whole purpose of the reliefs was to encourage saving for retirement. Thus the funds were not intended to be accessible "in any manner" before the statutory minimum retirement age. The purpose of the unauthorised payment charges was to remove the tax benefits which had been given to the fund (or the relevant part of it) if the funds were improperly accessed. She referred to the Explanatory Notes which had been issued with the original draft legislation, referring to the intention of the provisions as being "to prevent abuse".

55. She went on to argue that on a realistic view of the facts, all of the persons and entities involved in the investment and the payment were connected by virtue of the plan to implement the arrangements, as set out in the appellant's representative's "Opinion on Pension-backed Loan Arrangements" which had been issued at some time after 10 March 2010. She referred to the steps in the overall arrangements as having been "pre-arranged", with the connection between them being demonstrated by some links between the people involved, by interdependency of the various transactions, by the flow of money and by the simple fact that no loan would have been made to the appellant if the HD SIPP had not committed to invest its money by way of preference shares in KJK.

Dalriada Trustees Limited

56. At first sight, the case of *Dalriada Trustees Limited v Faulds and others* [2011] EWHC 3391 (Ch) could be regarded as having some relevance, and that case had been referred to in correspondence at some length on behalf of the appellant. At the hearing, however, neither counsel placed a great deal of reliance on it. For the appellant, Ms Ratcliffe simply referred to it as confirming (at [41]) that payments could be made by a registered pension scheme which were neither "authorised" nor "unauthorised", and that accordingly payments that were not "authorised" were not necessarily "unauthorised". For HMRC, Ms Poots pointed out that Bean J was considering the application to an entirely different structure of the "benefit" provisions in section 173 FA04 rather than the "payment" provisions with which we are concerned, so his judgment had no particular relevance.

Discussion and decision

57. As the parties have identified two issues for our determination which they have agreed will decide the appeal, we address the two issues in turn.

Is a loan a "payment"?

58. We can dispose of this point quite shortly. Essentially, we agree with Ms Poots. If a loan were not a payment, there would be no need for "authorised employer loans" to be included within the class of "authorised employer payments" in section 175 FA04. In *Willey v HMRC* [2013] UKFTT 328 (TCC), the First-tier Tribunal was not even asked to adjudicate on the question, it being agreed between the parties (as recorded at [24]) that the underlying loan in that case was an unauthorised member payment. Furthermore, in *Dalriada*, Bean J considered the point so obvious that he simply said (at [31]) when summarising the statutory regime that "any payment,

including a loan, [emphasis added] by a registered scheme to a member which is not within the list at s 164(1) would be an unauthorised member payment".

Was the loan made "in connection with an investment acquired using" scheme assets?

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

60. As to the purpose of the various tax charges, we agree with the short summary given by the First-tier Tribunal (Judge Cannan) in *Willey* at [6]:

> "FA 2004 contains a prescriptive regime in relation to the payments that registered pension schemes are authorised to make and the consequences of unauthorised payments. The rationale is to ensure that the tax reliefs and exemptions in respect of contributions to registered pension schemes are available only to the extent that the pension schemes genuinely make provision for the benefit of members on retirement, subject to various statutory limits. The compliance regime and reporting requirements set out in FA 2004 are directed towards the same end."

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

62. It is also true that, as Ms Ratcliffe said, the appellant continues to have his rights in his pension fund under the Trust Deed and Rules of the HDD SIPP. That does not seem to us however to be a relevant point. The unauthorised payment charge is not levied by reference to any change in value of the underlying fund as the result of an unauthorised payment, it is levied by reference to the amount of the payment.

63. Ultimately we did not find it helpful to consider whether the arrangements which are the subject of the appeal should be regarded as an "abuse" of the registered pension scheme reliefs, as this would have required us to judge what Parliament's reaction would have been if these specific arrangements had been considered by it when enacting the relevant provisions. With no particular guidance to go on, that would have reduced us to reliance on our own views as to whether the arrangements were "abusive". Faced with that situation, we consider the better approach is simply to interpret the words used by Parliament as best we can in their context, applied to the facts of this case.

64. In the circumstances outlined above in this decision, in particular given that:

(1) the appellant transferred his pension funds to HD SIPP with a specific instruction to invest those funds in preference shares of KJK; and

(2) he did so specifically in order to obtain the Loan from G Loans,

we have no hesitation in finding that the loan to the appellant was made "in connection with" the KJK preference shares, an investment acquired using sums held for the purposes of a registered pension scheme.

Summary and conclusion

65. We have found that the loan to the appellant was a "payment" for the purposes of the relevant charging provisions (see [58] above).

66. We have found that such payment was made in connection with the KJK preference shares, an investment acquired using sums held for the purposes of a registered pension scheme (see [64] above).

67. These were the only two issues between the parties and it follows therefore that the appeal must be DISMISSED.

68. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 5 JANUARY 2015