[2020] UKUT 120 (TCC)

Appeal number: UT/2018/0135
UT/2019/0063

INCOME TAX – unauthorised payments from registered pension scheme – whether HMRC have power to assess scheme sanction charge – yes – whether taxpayer careless – no – whether scheme sanction charge should be set aside – no

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants/Respondents**
-and-	
BELLA FIGURA LIMITED	**Respondent/Appellant**

TRIBUNAL **MR JUSTICE NUGEE**
JUDGE JONATHAN RICHARDS

Sitting in public by way of fully remote video hearing on 24 and 25 March 2020

Charles Bradley, instructed by the General Counsel and Solicitor to Her Majesty's Revenue and Customs, for the Commissioners

Daniel Burton, instructed by Lock & Marlborough solicitors, for Bella Figura Limited

DECISION

1. This is an appeal by the Commissioners for Her Majesty's Revenue & Customs ("HMRC"), and a cross-appeal by Bella Figura Limited ("BFL"), against the decision (the "Decision") of the First-tier Tribunal (the "FTT") released on 20 June 2018. This has been a fully remote video hearing over the "Skype for Business" platform. By the time of the hearing, both parties were content with a hearing in that form.

2. BFL was, at the material times, both the "sponsoring employer" and "scheme administrator" of the Bella Figura Pension Scheme (the "Scheme") which was a registered pension scheme. These proceedings relate to a loan of £200,000 to a company called Falken Ltd. We will refer to this as the "Falken 1" loan to distinguish it from two other loans made by the Scheme that were mentioned in the Decision but are not relevant in this appeal.

3. The Finance Act 2004 ("FA 2004") contains a highly detailed set of provisions that impose tax charges in connection with unauthorised payments out of registered pension schemes. It is now common ground that the Falken 1 loan was an "unauthorised employer payment" within the meaning of s160(4) of FA 2004 and a "scheme chargeable payment" within the meaning of s241 of FA 2004 with the result that BFL was liable (in its capacity as scheme administrator) to a scheme sanction charge under s239(2) and (in its capacity as sponsoring employer) to an "unauthorised payments charge" under s208(2)(c) and an "unauthorised payments surcharge" under s209(3)(c).

4. The issues that arise for determination in these proceedings are as follows:

(1) **Issue 1 -** Whether HMRC had power to assess BFL to the scheme sanction charge. The FTT held that HMRC had no power to assess BFL to the scheme sanction charge under s29 of the Taxes Management Act 1970 ("TMA") and that the assessment should therefore be set aside. This conclusion is the subject of HMRC's appeal.

(2) **Issue 2 -** Whether the assessments on BFL to the unauthorised payments charge and surcharge were in time. The FTT held that the assessments were within the six-year time limit in s36(1) of TMA on the basis that the loss of tax had been brought about carelessly. This conclusion is challenged in BFL's cross appeal.

(3) **Issue 3 -** Whether BFL should have been discharged from liability to the scheme sanction charge and/or unauthorised payments surcharge pursuant to applications made under s268 of FA 2004. The FTT held that it should not have been discharged from either liability. These conclusions are challenged (as to discharge of the scheme sanction charge) in BFL's respondent's notice and (as to discharge of the unauthorised payments surcharge) in BFL's cross-appeal.

The charges provided for by Finance Act 2004

5. FA 2004 identifies a number of "unauthorised" payments which, if made by a registered pension scheme, are subject to income tax charges. One type of "unauthorised payment" is an "unauthorised employer payment" which is defined in

s160(4) of FA 2004. As its name suggests, it includes any "payment" (which includes, by s161(2) of FA 2004, any transfer of assets) by a registered pension scheme to the sponsoring employer (or a connected person – see s161(5)) other than a payment that is authorised.

6. When the Scheme paid Falken Ltd the principal amount of the Falken 1 loan it made a payment to a connected person of the sponsoring employer. The parties now accept that this payment was not "authorised" because it failed the requirements of s179 of FA 2004 necessary to be an "authorised employer loan". Section 179(1) provides, so far as relevant, as follows:

> **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 authorised employer loan if—
>
> (a) the amount loaned does not exceed an amount equal to 50% of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme immediately before the loan is made,
>
> (b) the loan is secured by a charge which is of adequate value, and
>
> (c) the repayment terms comply with subsection (2).
>
> (2) The repayment terms comply with this subsection if-
>
> (a) the rate of interest payable on the loan is not less than the rate prescribed by regulations made by the Board of Inland Revenue,
>
> (b) the loan repayment date is before the end of the period of five years beginning with the date on which the loan is made, or has been postponed to a date after the end of that period under subsection (3), and
>
> (c) the amount payable in each period beginning with the date on which the loan is made, and ending with the last day of a loan year, is not less than the required amount.

7. We do not need to set out in detail how these provisions are amplified by other provisions. It suffices to note that the Falken 1 loan was not secured by <u>any</u> effective charge and so the requirement of s179(1)(b) was not met[1]. Nor did the Falken loan meet the requirement of s179(2)(c) which required (by reference to a formula set out in Schedule 30 of FA 2004) that a loan be repayable in equal instalments[2].

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[1] A security document was executed, but was never registered at Companies House with the result, it was agreed, that it was ineffective.

[2] The FTT made no express finding that the terms of the Falken 1 loan failed the requirements of s179(2)(c). However, it did find at [68] of the Decision that another loan, the BFL loan, failed this requirement. Since the parties were agreed that the BFL loan and Falken 1 loan were in materially identical terms, it was agreed that the same conclusion followed for the Falken 1 loan.

8. The parties agreed that the Falken 1 loan also involved the making of a "scheme chargeable payment" for the purposes of s241 of FA 2004. In those circumstances, FA 2004 provided for the following charges:

(1) Section 208 of FA 2004 imposed an unauthorised payments charge equal to 40% of the unauthorised payment. In the circumstances of this appeal, the person liable to the unauthorised payments charge was BFL in its capacity as employer.

(2) Section 209 of FA 2004 imposed an unauthorised payments surcharge, equal to 15% of the unauthorised payment. In the circumstances of this appeal, the unauthorised surcharge was also imposed on BFL in its capacity as employer.

(3) Section 239 of FA 2004 imposed a "scheme sanction charge" equal to 40% of any "scheme chargeable payment" but this amount is reduced to 15% if the unauthorised payments charge is paid. The scheme sanction charge is imposed on the administrator of the scheme.

9. HMRC have the power to set aside a scheme sanction charge, and an unauthorised payments surcharge (but not an unauthorised payments charge). The relevant power is set out in s268 of FA 2004 which provides as follows:

> **268 Unauthorised payments surcharge and scheme sanction charge**
>
> (1) This section applies where—
>
> (a) a person is liable to the unauthorised payments surcharge in respect of an unauthorised payment, or
>
> (b) the scheme administrator of a registered pension scheme is liable to the scheme sanction charge in respect of a scheme chargeable payment.
>
> (2) The person liable to the unauthorised payments surcharge may apply to the Inland Revenue for the discharge of the person's liability to the unauthorised payments surcharge in respect of the unauthorised payment on the ground mentioned in subsection (3).
>
> (3) The ground is that in all the circumstances of the case, it would be not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment.
>
> (4) On receiving an application by a person under subsection (2) the Inland Revenue must decide whether to discharge the person's liability to the unauthorised payments surcharge in respect of the payment.
>
> (5) The scheme administrator may apply to the Inland Revenue for the discharge of the scheme administrator's liability to the scheme sanction charge in respect of a scheme chargeable payment on the ground mentioned in subsection (6) or (7).
>
> ...
>
> (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.

10. Therefore, in order to establish that the unauthorised payments surcharge should be set aside, BFL needs to establish just that the single condition set out in s168(3) is satisfied (namely that it is not "just and reasonable" for BFL to be subject to that charge). In order to establish that the scheme sanction charge should be set aside, BFL needs to establish that an additional condition is satisfied, namely that it believed reasonably that the payment was not a scheme chargeable payment.

11. Section 269 of FA 2004 contains a right of appeal to the FTT where HMRC refuse to set aside a scheme sanction charge or unauthorised payments surcharge.

The Decision of the FTT

12. In this section, references in square brackets are to paragraphs of the Decision unless we specify otherwise.

13. The FTT found, at [18], that the Scheme made the Falken 1 loan to Falken Ltd on 15 November 2010, in a principal amount of £200,000. It was common ground that the Falken 1 loan was an unauthorised employer payment because it did not provide for a "charge of adequate value" ([55]). In addition, as we have noted at [7] above, it was common ground before us that the Falken 1 loan also failed the requirements of s179(2)(c).

14. The FTT recorded the following charges that HMRC imposed in respect of the Falken 1 loan:

(1) On 19 October 2015, HMRC assessed BFL, in its capacity as employer, to an unauthorised payments charge and an unauthorised payments surcharge of 40% and 15% respectively of the amount of the Falken 1 loan (i.e. a total charge of £110,000 as set out at [25(1)]).

(2) On 24 March 2015, HMRC assessed BFL, in its capacity as administrator, to a scheme sanction charge of £80,000 in respect of the Falken 1 loan ([25(3)].

15. Before the FTT HMRC did not seek to argue, as they do before this tribunal, that Regulation 4 of the Regulations (for which see paragraph [30] below) gave them a free-standing power to assess. Rather, before the FTT both parties proceeded on the basis that HMRC's power to assess came from s29 of TMA. The FTT noted that, in its generally applicable form, s29 applies only to "income which ought to have been assessed to income tax or chargeable gains which ought to have been assessed to capital gains tax". It concluded, at [39], that s208(8) of FA 2004 provided expressly that an unauthorised payment is not to be treated as income for any purposes of the Tax Acts. Accordingly, it decided at [40] that the charges imposed by FA 2004 were neither "income" nor "chargeable gains" and therefore, the provisions of s29 as generally applicable were not engaged.

16. The FTT accepted (also at [40]) that Regulation 9 of the Regulations, by providing for an expanded scope of s29 in "cases 1, 2 or 3" brought assessments in respect of the unauthorised payments charge and unauthorised payments surcharge within the scope of s29. However, the FTT concluded that s29 of TMA did not have an expanded reach in "case 4" (which dealt with the scheme sanction charge). Accordingly, the FTT decided that, while HMRC could make assessments of the unauthorised payments charge and unauthorised payments surcharge in reliance on Regulation 9, it had no power to make discovery assessments in respect of the scheme sanction charge. That conclusion was itself enough for BFL's appeal against the scheme sanction charge imposed in connection with the Falken 1 loan to succeed.

17. There was no suggestion before the FTT that HMRC lacked power to assess the unauthorised payments charge or the unauthorised payments surcharge. The FTT therefore went on to consider whether HMRC's assessments of these charges were in time. Since HMRC made these assessments of these charges more than four years after the end of the 2010-11 tax year, that involved the question whether the relevant loss of tax was brought about "carelessly or deliberately". At [54], the FTT concluded that the "carelessness" threshold was met (for reasons that it expressed to be similar to the reasons it gave later in the Decision for concluding that the assessment of the unauthorised payments charge was in time and the scheme sanction charge should not be set aside).

18. At [75] to [94], the FTT turned its mind to the question whether the scheme sanction charge or unauthorised payments surcharge should be set aside[3]. At [77] to [80], it recorded BFL's submissions as to why those charges should be set aside. The essence of BFL's submissions was that it was not culpable because it reasonably and honestly believed, having received advice from a firm of pension administrators ("PPCL"), that the Falken 1 loan was an "authorised employer payment". In addition, BFL argued that it was not intentionally seeking to abuse the pension tax regime and that neither the Scheme nor HMRC had suffered any loss.

19. Much of BFL's case on the set aside of the charge centred on the beliefs held by Mr Wightman, the managing director of BFL, and the extent to which those beliefs were reasonable. The FTT made findings on those issues at [81] which we set out in full.

> 81. The majority of the oral evidence at the hearing centred around the skills and qualifications of PPCL; the relationship between BFL and PPCL and the extent of Mr Wightman's reliance on PPCL. Based on the oral and documentary evidence before me, I find the following additional facts:
>
> (1) Mr Wightman did not have any special knowledge of pensions law, but was an experienced businessman and director, with experience of negotiating contracts;

[3] At [76], the FTT noted that strictly it did not need to answer this question in relation to the scheme sanction charge because of its earlier finding that HMRC had not made a valid assessment of that charge.

> (2) BFPS was set up in order to receive transfers of previous pension pots from both Mr and Mrs Wightman from previous employers;
>
> (3) The ability for BFPS to make loans to the employer was one of the reasons that establishing the scheme was appealing to Mr Wightman, but it was not the only reason;
>
> (4) Mr Wightman had read in the financial press about self-administered pension schemes and the flexibility they offered. As a result he went looking for a pension practitioner to assist in establishing and running the scheme;
>
> (5) Mr Wightman researched online for an appropriate practitioner and found 8 practitioners holding themselves out as having the right skill set. He whittled that down to 3 and interviewed them. The managing director of PPCL was very convincing that they were experts in self-administered pensions and would be able to assist BFL. In addition they held themselves out as HMRC-registered, which Mr Wightman found reassuring;
>
> (6) Being an HMRC-registered pension practitioner, at the relevant time, brought with it no assertion of any particular qualifications or approval by HMRC, but was simply a process of registration to use the HMRC website;
>
> (7) Mr Wightman was aware of the concept of an unauthorised payment and that loans made by the pension fund had to meet certain criteria because he had come across it in the course of his research into pension practitioners;
>
> (8) Mr Wightman was also aware that the obligations of scheme administrator remained on BFL and were not delegated or outsourced to PPCL;
>
> (9) PPCL drafted the loan agreements for the BFL and Falken loans and all other accompanying documentation.

20. At [82] to [84], the FTT considered BFL's case that it obtained oral advice from PPCL to the effect that the loans would be authorised employer loans. It rejected that evidence, concluding at [84]:

> 84. I did not find Mr Wightman's evidence on this issue very convincing. I find it very unlikely indeed that there was nothing whatsoever written down in email or postal correspondence from PPCL regarding the compliance of the loans with the pensions legislation[4]. However, I do not need to make a final finding on this issue, because I do not think it is determinative of the issues at hand.

[4] This sentence is slightly unusually expressed as, read literally, it seems to be suggesting that some advice was written down. However, when this paragraph is read together with [88], it is clear that the FTT was concluding that Mr Wightman did not receive any advice to the effect that the loans were "authorised employer loans".

21. At [85], the FTT directed itself as follows as to the conditions that need to be met in order for the scheme sanction charge and unauthorised payments surcharge to be set aside. There is no suggestion that this passage contains an error of law:

> 85. The questions to be answered in relation to discharge are:
>
> (1) Whether, in all the circumstances of the case, it would be just and reasonable for BFL to be liable to the UPS [ie the unauthorised payments surcharge] in respect of the payment; and
>
> (2) In respect of the SSC [ie the scheme sanction charge], whether:
>
> (a) BFL 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 BFL to be liable to the scheme sanction charge in respect of the unauthorised payment.

22. At [88], the FTT decided the question it had posed at [85(2)(a)], namely whether BFL reasonably believed that the Falken 1 loan did not involve the making of a "scheme chargeable payment". It concluded that BFL had no such reasonable belief in the following terms:

> 88. I find that Mr Wightman has not discharged the burden of showing, as he must since it is his reasonable belief that is in question, that he actually did receive advice that the Falken 1 loan was not a scheme chargeable payment from PPCL. As noted above, I find that PPCL did provide the necessary documentation to implement the loan and was instructed by BFL to make all necessary returns on behalf of BFPS. However, Mr Wightman's own admissions in evidence were that the ability to lend money from the pension fund was one of the reasons for setting it up, that he had read a number of articles on pension practitioner websites prior to choosing PPCL and that he was aware there were a number of requirements in order for loans made to be compliant. In addition, he is an experienced businessman with knowledge of the importance of both company and director responsibilities and contractual obligations. I therefore find that any belief he held, if he did so hold one, that the payment was not a scheme chargeable payment was not a reasonable one to hold because he should have considered the basis for any advice received and whether it made sense, as was the case in *A Anderson* [2016] UKFTT 335 (TC). I find that if he had applied such a critical mind to the situation, he would have challenged the validity of the loan and sought clarification from PPCL, but he did not (or at least has not discharged the burden of showing that he did).

23. At [89], the FTT reiterated its earlier conclusion that this necessarily meant that the "carelessness" condition of s36 was met saying:

> 89. For the sake of completeness, it is for these same reasons that I find that the loss of tax was brought about carelessly by BFL for the purposes of the discovery assessment, as discussed above.

24. At [90] to [94], the FTT considered the separate question of whether it was just and reasonable for BFL to be liable to the scheme sanction charge or the unauthorised payments surcharge (the issues identified at [85(1)] and [85(2)(b)]). At [92], it directed itself that it had a full appellate jurisdiction to determine whether charges should be set aside and quoted an extract from the decision of the FTT in *O'Mara and another v HMRC* [2017] UKFTT 91 (TC) which indicated that the examination should be made by reference to the all the circumstances. Its conclusion on the "just and reasonable" issue was as follows:

> 93. The Tribunal observed in *O'Mara* that an unauthorised payments surcharge is a "rough and ready" measure to recoup the tax relief on pension contributions and that therefore the circumstances in which it would not be just and reasonable to impose the charges may be limited. In addition, the fact that the taxpayer has taken legal, accounting or tax advice is not sufficient of itself to make it unjust or unreasonable for the charge to remain.
>
> 94. With these principles in mind, I consider the position of BFL and am not satisfied, having regard to all the circumstances, that the imposition of the charges is unjust or unreasonable.

Issue 1

The procedure for assessing the scheme sanction charge and the parties' submissions on that issue

25. Issue 1 concerns only the procedure for assessing the scheme sanction charge. The parties are agreed that HMRC's assessments of the unauthorised payments charge and surcharge were in principle valid, although BFL argues that those assessments were out of time.

26. The scheme sanction charge is expressed to be a charge to income tax (see s239(1) of FA 2004). It was common ground that s9(1A) of TMA takes the scheme sanction charge outside the scope of the self-assessment regime that applies generally for income tax purposes. Accordingly, HMRC could not impose the scheme sanction charge by the mechanism of enquiring into BFL's self-assessment return for the relevant tax year and issuing a closure notice. Rather, it was common ground that HMRC had to issue a free-standing assessment to BFL of the income tax they considered due in respect of a scheme sanction charge. The parties, however, differed as to the statutory provisions (if any) which authorised HMRC to make such an income tax assessment.

27. In the circumstances of this appeal, BFL argues that the wellspring of any power to assess the scheme sanction charge is to be found in s29(1) of TMA which permits HMRC to make "discovery assessments" as follows:

> **29 Assessment where loss of tax discovered**
>
> 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.

28. Section 29 of TMA applies to "income" or "chargeable gains". BFL argues that the scheme sanction charge does not meet this description (by virtue of section 208(8) of FA 2004). Therefore, pausing there, BFL assert that HMRC lack any power to assess the scheme sanction charge under s29. However, as will be seen, BFL argues that the stark effect of this interpretation is, to an extent at least, modified by regulations made under s255 of FA 2004.

29. The relevant regulation-making power is set out in s255 of FA 2004 which provides as follows:

> **255 Assessments under this Part**
>
> (1) The Board of Inland Revenue may by regulations make provision for and in connection with the making of assessments in respect of–
>
> (a) the unauthorised payments charge,
>
> (b) the unauthorised payments surcharge,
>
> ...
>
> (d) the scheme sanction charge...
>
> (2) The provision that may be made by the regulations includes (in particular) provision for the charging of interest on tax due under such assessments which remains unpaid.
>
> (3) The regulations may, in particular–
>
> (a) modify the operation of any provision of the Tax Acts, or
>
> (b) provide for the application of any provision of the Tax Acts (with or without modification).'

30. The Inland Revenue made the Registered Pension Schemes (Accounting and Assessment) Regulations, SI 2005/3454 (the "Regulations") under the power set out above.

31. HMRC rely strongly on Regulation 4 of the Regulations arguing that it, and not s29 of TMA, provides HMRC with a "standalone" power to make an assessment of the scheme sanction charge. Regulation 4 provides as follows:

4 The making of assessments

(1) In the cases listed in column 1 of Table 2 an officer of Revenue and Customs must issue an assessment to tax to the assessable person specified in column 2.

Table 2

Column 1	Column 2: assessable person
Case 1: a charge to tax arises under section 208 of the Act (unauthorised payments charge) and the person liable to the charge is a company.	The person liable to the charge under s 208(8) of the Act.
Case 2: a charge to tax arises under section 209 of the Act (unauthorised payments surcharge) and the person liable to the charge is a company.	The person liable to the charge under s 209(3) of the Act.
…	…
Case 4: a charge to tax arises under section 239 of the Act (scheme sanction charge).	The scheme administrator, or the person or persons liable to the scheme sanction charge under section 239(3) of the Act.

...

(2) Subject to paragraph (3), tax assessed under this regulation is payable within 30 days after the issue of the notice of assessment.

(3) Tax assessed under cases 1 and 2 is payable on the day following the expiry of nine months after the end of the accounting period in which the unauthorised payment was made or, if later, within 30 days after the issue of the notice of assessment...

(5) Any tax assessable under one or more cases of Table 1 may be included in one assessment if the tax so included is all due on the same date.

32. BFL denies that Regulation 4 is a "standalone" provision authorising HMRC to make assessments, whether of the scheme sanction charge or any other charge. Rather, in BFL's submission, Regulation 4 is simply a direction to HMRC that they are obliged to use other powers of assessment that they possess in cases set out in the Table. Alternatively, BFL argues that Regulation 4 provides a "standalone" power to assess the scheme sanction charge only in situations where a scheme administrator notifies the existence of the charge in an event report submitted under s254 of FA 2004.

33. BFL relies on Regulation 9 of the Regulations which provides for a modified application of s29 as follows:

> 9 (1) Section 29(1)(a) of TMA (assessment where loss of tax discovered) applies with the following modification in relation to an assessment to tax under case 1, 2 or 3.
>
> (2) After "any income" insert–
>
> ", unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act".

34. On BFL's case Regulation 9 applies s29 of TMA with modifications in relation to the unauthorised payments charge and surcharge (cases 1 and 2 referred to in Regulation 4). In respect of those charges, Regulation 9 overcomes the issue identified at [28] above and permits HMRC to make assessments of the unauthorised payments charge and surcharge, under the modified version of s29. However, in BFL's submission, Regulation 9 does not apply in "case 4" (the scheme sanction charge) and therefore, on BFL's case, at least in the circumstances of this appeal, HMRC have no power to assess the scheme sanction charge under s29 of TMA even as that provision is modified by Regulation 9.

Discussion

35. It seems to us that Regulation 4 either does, or does not, permit a standalone assessment of a scheme sanction charge. We see no justification in the provisions for the "middle ground" for which BFL argues namely that Regulation 4 permits a standalone assessment to be made only where the charge is mentioned in an event report. By regulation 3 of the Registered Pension Schemes (Provision of Information) Regulations, SI 2006/567, a scheme administrator is required to provide to HMRC an event report in respect of all the reportable events which have occurred in respect of the scheme during the reporting year, and this includes unauthorised payments. We accept that if the scheme administrator complies with this requirement, it will usually be the trigger for HMRC to make an assessment of a scheme sanction charge under Regulation 4 of the Accounting and Assessment Regulations. But we do not see that it follows that if the scheme administrator fails to comply with this requirement, HMRC has no power to make such an assessment: Regulation 4 makes no distinction between cases where an event report is submitted and cases where it is not. Moreover, the logical consequence of BFL's position is that HMRC has no power whatsoever to make an assessment of a scheme sanction charge if a scheme administrator simply chooses not to alert HMRC that the charge is due. We see no reason why Parliament should have enacted a scheme which contains such an obvious reward for avoidance and, indeed, evasion.

36. We consider that the natural and obvious reading of Regulation 4 is that it provides a standalone power to make assessments. That impression is reinforced by the heading "The making of assessments" and by Regulations 4(2) and 5(1)(b) which refer to tax

that is "assessed under [Regulation 4]"[5]. The overall effect of BFL's case is that the Regulations should be read as a direction to HMRC, in the case of a scheme sanction charge, to use a non-existent power to assess set out in the (unmodified) provisions of s29 generally applicable to discovery assessments. Clear words indeed would be needed to provide for such an unlikely intention. Yet, such clarity as there is in Regulation 4 points in the opposite direction and in favour of the proposition that Regulation 4 contains a free-standing power to assess.

37. Nevertheless, if Regulation 4 does contain a standalone power to assess that gives rise to some related difficulties of interpretation. Most obviously, as we explored with the parties during the hearing, if Regulation 4 sets out a standalone power to assess a scheme sanction charge (Case 4), it might be wondered why Regulation 9 appears to proceed on the basis that a modified version of s29 is needed to enable HMRC to make an assessment in Cases 1 to 3.

38. Despite those difficulties, we do not consider that our interpretation deprives Regulation 9 of any effect. As we note at [26], it is only the scheme sanction charge (imposed on a scheme administrator) that is, by s9(1A)(a) of TMA taken outside the scope of the general self-assessment provisions applicable to income tax. The lifetime allowance charge arising on receipt of a lump-sum death benefit (Case 3) is in principle imposed on an individual and is within the scope of the self-assessment regime applicable to individuals. We can, therefore, understand why Regulation 9 might wish to make a provision for discovery assessments to be made under s29 of TMA on individuals who fail to include Case 3 receipts in their tax returns. Less understandable is why Regulation 9 makes provision for Case 1 and Case 2 which, as the table in Regulation 4 makes clear, relate to charges imposed on companies specifically. These charges might not be expected to feature on any tax return sent under the provisions of TMA (since companies are not typically required to submit self-assessment returns under TMA) and so it is not obvious why Regulation 9 entitles HMRC to make discovery assessments under TMA in respect of charges to be imposed on companies. Mr Bradley frankly accepted in his submissions on behalf of HMRC that there was no obvious reason why Regulation 9 makes provision in Cases 1 and 2 and speculated that there might simply be an error in the drafting of Regulation 9.

39. Regulation 9 does, therefore, give rise to some difficulties for HMRC's interpretation of Regulation 4. However, our task is to construe Regulation 4 and not to provide a comprehensive explanation for why Regulation 9 is drafted as it is. Our overall conclusion is that Regulation 4 provides a free-standing power to assess the scheme sanction charge arising in these proceedings. We express our conclusion in this limited way since we do not need to decide whether Regulation 4 sets out a free-standing power to assess in all cases (and indeed, as we have noted, determining the

[5] Mr Burton was correct to note that the Explanatory Notes that accompanied the Regulations described Regulation 4 in more neutral terms as "[specifying] the cases in which HMRC may make assessments", but the Explanatory Notes are expressly stated not to form part of the Regulations and therefore offer a more limited guide to their interpretation.

source of the power to assess in Cases 1 to 3 is not straightforward given the provisions of Regulation 9).

40. Our conclusion accords with the ordinary meaning of Regulation 4, as applied to the scheme sanction charge, and avoids what we regard as the illogical outcome for which BFL argues under which, despite Parliament having legislated to impose a scheme sanction charge, HMRC would lack a practical power to assess that charge in many cases. As Lord Dunedin observed in *Whitney v Inland Revenue Commissioners* [1926] AC 37 (at p52):

> My Lords, I shall now permit myself a general observation. Once that it is fixed that there is a liability, it is antecedently highly improbable that the statute should not go on to make it effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.

41. We have already dealt with Regulation 9, which was the most significant objection that Mr Burton raised to HMRC's interpretation of Regulation 4. Other objections can be dealt with more briefly:

(1) We do not accept that the interpretation of Regulation 4 which we favour is outside the scope of the regulation making power set out in s255 of FA 2004. On our interpretation, Regulation 4 sets out a "provision for and in connection with the making of assessments" and is within the scope of the power set out in s255(1)(d). The way that the Regulations are referred to in non-statutory material such as explanatory notes or HMRC's published guidance does not alter that.

(2) We do not accept that our interpretation of Regulation 4 means that there are no time limits for the making of an assessment under Regulation 4 beyond the specific time limits (not applicable to an assessment of the scheme sanction charge) set out in Regulation 4(4). A "standalone" assessment of the scheme sanction charge under Regulation 4 remains an "assessment" for the purposes of s34 and s36 of TMA and so remains subject to the time limits set out in those provisions.

(3) We do not consider that any particular conclusion flows from the fact that before the FTT HMRC approached matters on the basis that their power to assess the scheme sanction charge did derive from s29. Of course, this is to be regretted and it does mean that the FTT cannot be faulted for having reached a conclusion on Issue 1 which we now respectfully consider to be incorrect. However, the Upper Tribunal granted HMRC permission to appeal on Issue 1 in the full knowledge that HMRC would thereby be pursuing a point not advanced at first instance. Moreover, BFL confirmed to the Upper Tribunal, before permission to appeal was granted, that it was not seeking to object to the grant of permission on the basis that it involved HMRC pursuing a new point.

(4) We do not accept that, even if HMRC had power to make a free-standing assessment under Regulation 4, HMRC nevertheless purported to use a power to assess set out in s29 of TMA. We were shown the assessments in issue which specified that they were made "under" s255 of FA 2004. Mr Burton rightly

pointed out that s255 sets out only a power to make regulations (not a power to make assessments), but we regard the overall meaning as clear: HMRC were intending to use their power to issue assessments under powers set out in regulations made under s255.

42. Having reached our conclusion set out at [40], we do not need to consider HMRC's alternative argument to the effect that, if s29 of TMA is the relevant provision permitting an assessment, the scheme sanction charge remains, despite s208(8) of FA 2004, capable of being assessed under that provision.

Issue 2

Time limits for making assessments

43. Although the parties differed as to the provisions (if any) that entitled HMRC to make assessments, they were both agreed that the applicable time limits for making any permitted assessments were set out in s34 and s36 of TMA.

44. The normal time limit is set out in s34 of TMA which provides that:

> [s]ubject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period of assessment in any class of case, an assessment to income tax...may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

45. The parties are agreed that the relevant "year of assessment" in relation to all of the charges was the 2010-11 tax year, which ended on 5 April 2011. Therefore, if the applicable time limit is to be found in s34, the assessments of the unauthorised payments charge and the unauthorised payments surcharge (both of which were made on 19 October 2015) would be out of time, whereas the scheme sanction charge (which was assessed on 24 March 2015) would be in-time by reference to this time limit.

46. Section 36 of TMA contains an extended time limit of six years applicable to cases involving carelessness. So far as material, s36(1) of TMA provides as follows:

> [a]n assessment on a person in a case involving a loss of income tax...brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates[6].

Discussion

47. Issue 2 arises from the Upper Tribunal's grant of permission to appeal in the following terms:

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[6] Section 36(1B) of TMA deals with situations where a person acting on behalf of another acts "carelessly". However, Mr Bradley confirmed that HMRC are not seeking to defend the Decision on the basis that s36(1B) was satisfied by reference to the carelessness of PPCL and therefore we do not refer to s36(1B) any further in this decision.

> The FTT erred in law in concluding, from the primary facts that it found that relevant loss of tax was brought about "carelessly" for the purposes of s36(1) of the Taxes Management Act 1970.

48. In its grant of permission, the Upper Tribunal observed that it had deliberately circumscribed the grant of permission by reference to the "primary facts that [the FTT] found" given that BFL had stated it was not seeking to challenge primary facts, but only the inferences and conclusions drawn from those primary facts.

49. Before us, the parties were agreed (i) that by virtue of s11 of the Tribunals, Courts and Enforcement Act 2007, there is a right of appeal against the Decision to this tribunal only on a point of law and (ii) that the FTT's finding of "carelessness" involved a mixed question of fact and law: the question of law being what it means for a loss of tax to be brought about carelessly for the purposes of s36(1) of TMA and the question of fact being whether BFL's behaviour met the legal definition.

50. It follows, therefore, that if the FTT failed to direct itself properly as to the requirements of s36(1), that would amount to an error of law with which this tribunal is free to interfere. By contrast, if the FTT directed itself properly on the legal question, this tribunal has very limited rights to interfere with the FTT's factual conclusion that the requirements of s36(1) were met.

51. BFL submitted that the FTT failed properly to identify the correct scope of the concept of "carelessness" and that this of itself amounted to an error of law. In support of that argument, it pointed out that s118(5) of TMA contains an express definition in the following terms which is not referred to in the Decision:

> (5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

52. We reject BFL's submission as we are quite satisfied that, even though it did not refer to s118(5) in the Decision, the FTT followed the approach mandated by that section. At [88] it expressly considers the steps that BFL, through Mr Wightman, took to check whether the Falken 1 loan gave rise to an unauthorised payment and compared those to the steps that would have been taken by a reasonable taxpayer in the same position. The FTT's conclusion was that the steps Mr Wightman took fell short of those that a reasonable taxpayer would have taken. That was clearly the application of a test of a failure to take reasonable care.

53. Once that point is disposed of, as Mr Burton quite rightly acknowledged in his submissions, BFL has to get over the high hurdle that exists for a successful challenge to be made, on appeal, to a factual finding of the FTT. In *Begum v Tower Hamlets LBC* [2003] 2 AC 430, Lord Millett summarised the principle articulated in *Edwards v Bairstow* [1956] AC 14 as meaning that factual conclusions could only be challenged as involving an error of law where:

> [the findings of fact were] perverse or irrational; or there was no evidence to support [them]; or [they] were made by reference to irrelevant factors or without regard to relevant factors.

54. The core of the FTT's findings on "carelessness" are set out at [88] and [89] of the Decision. In those paragraphs, the FTT reasons as follows:

> (1) One of the reasons for setting up the Scheme was so that it could make loans to BFL and related companies. Mr Wightman knew that loans the Scheme made needed to satisfy certain conditions if there was to be no unauthorised payment.
>
> (2) PPCL was instructed to provide necessary documentation, including a loan agreement and to make necessary returns on behalf of the Scheme.
>
> (3) Mr Wightman, an experienced businessman, obtained no advice from PPCL that the loan they had drafted satisfied the requirements necessary to be an authorised employer loan. By contrast, a reasonable taxpayer would have obtained such advice.
>
> (4) Since he had not received any advice, he was in no position to determine whether there was a reasonable basis for the conclusion that the loan was an authorised employer loan.
>
> (5) In failing to establish such a reasonable basis, Mr Wightman failed to take reasonable care to prevent a loss of tax that would be consequent if the loan involved the making of an unauthorised payment. That amounted to carelessness.

55. BFL submits that the FTT's conclusions were both perverse and vitiated by a failure to take into account relevant considerations.

56. In support of BFL's argument that the FTT's conclusions were perverse, Mr Burton submitted that the real problem, at least from HMRC's perspective, was that the charge securing the Falken 1 loan was not registered. No amount of advice, he submitted, could have cured PPCL's fundamental failure to register that charge. Moreover, he argued that it was manifestly perverse to hold BFL to a standard which required it to check whether its professional adviser had performed the task of registering the charge. Indeed, neither BFL nor Mr Wightman could be expected to know that some kind of perfection of security was needed as that was a technical legal issue outside their expertise.

57. We do not accept that aspect of BFL's submissions. Section 36 of TMA invites an examination of whether BFL took reasonable care to prevent a "loss of tax". Here the loss of tax arose because the Falken 1 loan was not an authorised employer loan. That was for two reasons: first, its repayment terms did not meet the requirements of s179(2)(c) of FA 2004; second the charge securing that loan was not registered. There was no reason why the FTT had to focus its examination of BFL's conduct only on the failure to register the charge. It was entitled to consider whether BFL took reasonable care to check that <u>all</u> necessary requirements were met.

58. Also on the question of perversity, BFL argues that the FTT set an objective standard for "reasonable care" which would have required BFL, having engaged PPCL, to pay another professional to review PPCL's documentation. We do not accept that submission. The FTT was not saying that a reasonable taxpayer would have obtained <u>additional</u> advice. Rather, its finding was that carelessness was established because BFL obtained <u>no</u> advice.

59. BFL also argues that the FTT's conclusion was perverse because it resulted from an undue fixation with the presence or absence of express advice to the effect that the Falken 1 loan was a qualifying employer loan. The FTT had already found that BFL had selected PPCL to prepare documentation relating to loans by the Scheme in full knowledge that those loans had to meet particular requirements in order to be authorised employer loans. In those circumstances, even if BFL had asked PPCL to confirm in formal "advice" that the loans met the requirements, it was reasonable to expect that PPCL would have given that confirmation since they would scarcely suggest that their own documentation was defective.

60. We would not go so far as to say the FTT's conclusion was perverse for this reason. It was rationally based as the extent, if any, of the reassurance that BFL obtained that the loans were qualifying employer loans was plainly relevant to the conclusion of "carelessness". The FTT's conclusion, that the absence of formal advice demonstrated a failure to take reasonable care, was certainly a tough one. As we will go on to explain, we do not ourselves share the FTT's view. However, this alone does not make the FTT's conclusion "perverse".

61. We do, however, consider that in reaching its conclusions on carelessness, the FTT ignored two relevant considerations:

> (1) The FTT had made detailed findings at [81] as to the care that Mr Wightman took to select an appropriate practitioner to prepare documentation in full knowledge that the documentation would need to meet specific requirements. The FTT should have gone on to consider, when formulating its conclusions at [88], whether even in the absence of specific advice, BFL obtained implicit reassurance that the loans would qualify which was enough to amount to the taking of reasonable care. By analogy, a person who instructs a lawyer to act on the purchase of a house might be said to obtain implicit advice to the effect that the documents will operate to convey title simply from the fact that the lawyer prepares those documents and identifies no problem with them.
>
> (2) Second, it did not take into account the fact that s36 of TMA is concerned with the question of whether a failure to take reasonable care causes a loss of tax. The FTT identified the failure to obtain advice as a careless omission. However, it did not go on to consider what would have happened if BFL had asked PPCL if the Falken 1 loan qualified. That was a relevant consideration because, if PPCL would have replied that it believed the documentation it had drafted would be effective, that might well have demonstrated that BFL's carelessness did not cause the loss of tax[7].

62. In urging us to a different conclusion from that set out at [61], Mr Bradley submitted that the FTT's finding that BFL obtained no advice should be understood as a finding that it obtained neither explicit nor implicit advice. We do not, however, read the Decision in that way and consider that the question of whether there was an implicit reassurance was simply not considered. We are fortified in that conclusion by the FTT's

[7] Noting that HMRC are not seeking to argue in this appeal that the carelessness or otherwise of PPCL is relevant.

finding of fact at [84] which seems to indicate that the FTT concluded that no advice was given because it had not been shown any written advice.

63. Mr Bradley also submitted that there was no sufficient evidential basis for the FTT to conclude that PPCL would have confirmed that the Falken 1 loan was a qualifying employer loan if asked. BFL had not, for example, put in evidence of the terms of its retainer with PPCL. It was, Mr Bradley argued, perfectly possible that, if asked, PPCL would have told BFL that they were just providing administrative support and that if BFL needed advice, it would need to consult a lawyer separately.

64. However, that submission overlooks the fact that the burden is on HMRC to show that BFL was careless for the purposes of s36 of TMA. HMRC had certainly shown a prima facie case of carelessness since the Falken 1 loan was not a qualifying employer loan. However, BFL had produced evidence to rebut the prima facie case of carelessness by showing that at least some steps had been taken to ensure that the Falken 1 loan met the relevant statutory requirements. In our view, had the FTT turned its mind to the question of causation, it would have been open to it to conclude, even without knowing the terms of the retainer with PPCL, that BFL had done enough to rebut the allegation of carelessness on which HMRC bore the burden of proof.

65. We therefore conclude that the FTT's conclusion on carelessness was vitiated by an error of law consisting of a failure to take into account relevant considerations. Later in this decision, we will explain what should happen to the Decision in the light of the errors we identify.

Issue 3

66. Issue 3 arises in the context of (i) BFL's Response to HMRC's appeal (in which BFL argues in a Respondent's Notice that, even if HMRC successfully establish that they had power to assess the scheme sanction charge, the FTT should have exercised its power to set that charge aside under s269 of FA 2004) and (ii) in the context of BFL's cross appeal in which it has permission to appeal against the FTT's refusal to set aside the unauthorised payments surcharge in the following terms:

> The FTT erred in law in concluding, from the primary facts that it found, … that the FTT would not exercise its power pursuant to s269 of the Finance Act 2004 to discharge the scheme sanction charge or the unauthorised payment surcharge imposed on BFL in relation to the Falken 1 Loan.

67. Therefore, as discussed in more detail below, it is possible for there to be different constraints on BFL's ability to argue these points, with its arguments in its response to HMRC's appeal being constrained by the terms of its Respondent's Notice, and its arguments in its own cross-appeal being constrained by the terms on which it was granted permission.

68. Issue 3 gives rise to two distinct sub-issues:

(1) Whether the FTT was wrong to conclude (for the purposes of s268(7)(a) FA 2004 in the context of the scheme sanction charge) that BFL had no reasonable belief that the Falken 1 loan was an authorised employer loan.

(2) Whether the FTT was wrong to conclude that it would not be just and reasonable to set aside the scheme sanction charge or the unauthorised payments surcharge (applying the provisions of s268(3) and s268(7)(b) respectively).

69. We consider that our conclusion at [61(1)] determines the first of these sub-issues. The question whether BFL obtained implicit reassurance from PPCL was as relevant to the question of BFL's "reasonable belief" as it was to the issue of its carelessness. It follows that, in failing to take into account the factors identified at [61(1)] in deciding whether BFL had a reasonable belief for the purposes of s268(7)(a) of FA 2004, the FTT made an error of law.

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

> 152. The statutory test will not benefit from unnecessary gloss. It requires the Tribunal to examine all the circumstances and decide whether it would be just and reasonable for the appellants to be liable to surcharges.
>
> 153. It does not require any finding of dishonesty or negligence on part of the appellants. It allows the Tribunal to examine all the circumstances surrounding the making and receipt of the unauthorised payments in each appellant's case. This in turn allows the Tribunal to examine an appellant's conduct or any other relevant mitigating circumstances pertaining to the payments or the appellant's circumstances. It also allows the Tribunal to take account of the statutory scheme and mischief the surcharge is designed to prevent.

71. Having been shown a number of FTT decisions in this area, we detect that there has been some difficulty in formulating precisely the "nature of the statutory scheme and the mischief that the surcharge is designed to prevent". Having rightly acknowledged an important point, namely that the aggregate of the three charges that HMRC can impose in connection with a scheme chargeable payment is either 70% or 95% of that payment[8] and in either case more than the aggregate tax relief that an individual might be expected to obtain on a contribution to a registered pension scheme, tribunals have gone on to consider why that is the case. In some cases, they have posed the question whether the charges are "penal" or intended simply to recover tax reliefs and exemptions previously given.

[8] 95% if the unauthorised payment charge is not paid and 70% if the unauthorised payment charge is paid, so reducing the scheme sanction charge from 40% to 15%.

72. We do not ourselves consider that whether the charges are described as "penal" or not will serve as much of a guide to how to decide, in a particular case, whether it is "just and reasonable" for a charge to be imposed[9]. More important, in our view, is to consider the entire statutory scheme of which these charges form part. In essence, that scheme provides: (i) for contributions made by employers and employees to benefit from tax relief at the point of payment; (ii) for the funds contributed to be held securely to provide pension benefits that can, at least in usual cases, only be taken once an individual reaches the age of 55; (iii) for most income and gains received by the registered pension scheme in connection with the investments of contributions not to be subject to tax; but (iv) for amounts payable to an individual taking benefits to be subject, in most cases, to income tax (with the most important exception of the ability to take a tax-free lump sum equal to 25% of the accumulated fund).

73. While conceptually it might be said that tax relief granted to individuals and employers at stage (i) is counteracted by the taxability of pension benefits at stage (iv), the overall scheme clearly involves a material cost to the Exchequer. First, the Exchequer suffers an obvious timing disbenefit as it gives relief at stage (i) a long time before it obtains tax at stage (iv). That timing benefit is not counteracted by a charge on income and gains of the pension scheme– see stage (iii). Second, a person's income in retirement will tend to be lower than income when working, so even in absolute terms the tax charged at stage (iv) will tend to be lower than the tax relief given at stage (i).

74. Parliament is content for the Exchequer to suffer these costs given the social utility of individuals saving for their retirement, but only where the entire bargain set out at [72] is respected. It is for this reason that different aspects of the unauthorised payments regime apply to different potential breaches of the bargain. For example, if a registered scheme impermissibly pays benefits to a member before he or she reaches 55, there is an unauthorised payment because the Exchequer has suffered the costs we have outlined, but since the funds have been drawn before retirement age, the social utility of funding retirement is not present. In a similar vein, if pension funds are lent by way of risky loans to an employer, the Exchequer is exposed to the risk that, even though it has given tax relief, and exempted income and gains of the scheme from tax, the funds are not ultimately available to pay pension benefits.

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

[9] We acknowledge that the question of whether the charges are "penal" may be relevant to whether they involve "criminal charges" for the purposes of Article 6 of the European Convention on Human Rights, but we do not need to decide that issue in the context of these appeals.

loss) is ultimately repaid in full with a market rate of interest so that the Exchequer suffers no actual cost and the social utility of the provision of retirement benefits is preserved.

76. With that background, it can be seen that the FTT, in focusing almost exclusively on what it considered to be BFL's "carelessness" ignored two considerations that were relevant to the "just and reasonable" question. First, it did not take into account the fact that, even though it had not succeeded, BFL had at least tried to ensure that the Falken 1 loan met the requirements necessary to be an authorised employer loan. Second, it did not take into account BFL's case to the effect that the Falken 1 loan had ultimately been repaid so that there was ultimately no loss to the Exchequer. Both of these factors were relevant to the seriousness of BFL's behaviour.

77. In arguing that the failure to take account of the factors at [76] involved no error of law, Mr Bradley did not seek to argue that those factors were in principle irrelevant. Rather, he submitted that BFL bore the burden of proving those matters to the satisfaction of the FTT and explaining why their presence meant it was not just and reasonable to impose the charges. He argued that BFL had not discharged that burden before the FTT (not least since the FTT had made no findings as to whether the Falken 1 loan was actually repaid or not) and should not be given a second chance in these proceedings.

78. We do not accept that submission. BFL had clearly submitted, as recorded at [78] of the Decision, that the absence of "tax abuse, intention or recklessness" on BFL's part indicated that it was not just and reasonable to impose the charges. Since those matters were relevant, the FTT should have engaged with BFL's submissions, made appropriate findings and considered whether, in the light of its findings it was just and reasonable for the scheme sanction charge and unauthorised payments surcharge to be imposed.

79. HMRC make the specific point that the FTT made no finding as to whether the Falken 1 loan was repaid. Since BFL's permission to appeal permits it only to challenge the FTT's conclusion that was based on the "primary facts that [the FTT found]", HMRC submit that BFL is not entitled to argue that the FTT should have found additional facts. Logically, that point could only be relevant to BFL's cross-appeal (and not the arguments it raises in its Respondent's Notice which are not constrained by the terms of any permission to appeal). However, that distinction does not matter greatly since we reject the submission. The terms of BFL's permission certainly do not permit it to argue that the FTT's findings of primary fact were incorrect. However, we see no reason why they should be read as precluding it from arguing that an important aspect of its case, which HMRC accept to be relevant, was not taken into account. We are reinforced in that conclusion by the fact that Mr Wightman's witness statement of 20 January 2017 stated that the Falken 1 loan was repaid in March 2016 and that HMRC's response to that evidence, set out at paragraph 82 of their skeleton argument before the FTT, was not to deny that the loan had been repaid but only to assert that it did not support a "discharge on just and equitable grounds".

80. Our analysis of Issue 3, therefore, demonstrates that there are errors of law in the Decision and we now turn to consider how we should approach the Decision in the light of the errors of law we have identified.

Remaking the Decision

81. Since we have identified errors of law in the Decision, s12 of the Tribunals, Courts and Enforcement Act 2007 provides that:

> (1) We may, but need not, set aside the decision of the FTT; and
>
> (2) If we do set aside the decision, we must either:
>
> > (a) remit the case to the FTT with directions for its reconsideration or
> >
> > (b) re-make the decision.

82. Since the errors of law we have identified were all material to the Decision, we are in no doubt that the decision must be set aside.

83. It is straightforward to remake the Decision to correct the error identified in our discussion of Issue 1. We accordingly do so and conclude that HMRC made a valid assessment in respect of the scheme sanction charge, that assessment being made under Regulation 4 of the Regulations.

84. The question whether we should remake the Decision in the light of the errors identified in our consideration of Issue 2 and Issue 3 is less straightforward and we invited written submissions from the parties on that issue after the hearing. We are grateful to both Mr Bradley and Mr Burton for drawing our attention to the decision of the Upper Tribunal in *Synectiv Limited v HMRC* [2017] UKUT 99 (TCC) which explained why, in the circumstances of that case, the Upper Tribunal decided to remit a decision to the FTT and not to remake it. By contrast with the circumstances of that case, remaking the Decision will not involve any assessment of witness credibility. Given that the FTT has made detailed findings of primary fact, we consider that we are able to remake the Decision and that this is the more proportionate course to follow.

85. We remind ourselves that HMRC have the burden of proving that BFL's failure to take reasonable care caused an insufficiency of tax. Once the additional relevant considerations that we have identified in our discussion of Issue 2 are taken into account, we conclude that HMRC have not discharged that burden for the following reasons:

> (1) The FTT's findings of fact at [81] demonstrate to us that Mr Wightman realised that the Scheme could lend funds to Falken 1, without any tax charge arising, provided that the loan in question met certain criteria. He took reasonable care to engage an adviser who could help BFL to navigate the various constraints.
>
> (2) Although Mr Wightman did not obtain express advice from PPCL that the Falken 1 loan was an authorised employer loan (see [89] of the Decision), BFL did rely on PPCL to produce documentation and make necessary filings to

achieve that outcome. When PPCL produced loan documentation that was reasonably detailed, in the absence of any suggestion that it was defective, Mr Wightman concluded that the documentation would achieve the desired result[10].

(3) It was reasonable for Mr Wightman to derive that reassurance in the circumstances.[11]

(4) On a related point, HMRC have not discharged their burden of proving that the "carelessness" on which they rely (BFL's failure to obtain express advice) caused the insufficiency of tax. In our judgment, given the FTT's finding as to the background to PPCL's appointment, it is reasonable to infer that, if PPCL had been asked whether the documentation they were producing would produce the desired result, they would have given that confirmation.

86. Our conclusion at [85] means that HMRC's assessments of both the unauthorised payments charge and the unauthorised payments surcharge were out of time and those assessments are accordingly set aside. We therefore only need to consider the effect of our conclusion on Issue 3 on the scheme sanction charge which HMRC assessed within the applicable time limit.

87. As regards the scheme sanction charge, we conclude first that BFL did reasonably believe, for the purposes of s268(7)(a) of FA 2004 that the Falken 1 loan was an authorised employer loan. We reach that conclusion for essentially the same reasons as are set out at [85]. We acknowledge, of course, that in the context of s268(7)(a), BFL bore the burden of proving the presence of a "reasonable belief". We also accept that it is theoretically possible that PPCL's terms and conditions excluded any obligation to confirm that the Falken 1 loan was an authorised employer loan and, by failing to put those terms and conditions in evidence, BFL has not demonstrated the absence of such an exclusion. However, we nevertheless consider that BFL has discharged its burden of proving a "reasonable belief" as the FTT's finding at [81(5)] of the Decision was that PPCL held themselves out as "having the right skill set" and being "able to assist BFL" with, we infer, the task of making authorised employer loans. They could not hold themselves out in that way without giving Mr Wightman to understand they were offering reassurance that the loan agreements they prepared would satisfy the necessary requirements.

88. If we had decided (contrary to our conclusion at [86] above) that HMRC had made an in-time assessment of the unauthorised payments charge, we would in all likelihood have concluded that it would not be just and reasonable for BFL to be subject to the scheme sanction charge or the unauthorised payments surcharge. BFL was not deliberately seeking to circumvent the regime set out in FA 2004 and had made a

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[10] The FTT made no finding to this effect, but we regard this as clear from Mr Wightman's evidence that he and BFL relied on PPCL.

[11] The FTT made no finding to this effect either, but we consider that it follows from its findings that Mr Wightman engaged PPCL, who appeared to have the requisite expertise, to achieve the outcome. We acknowledge Mr Bradley's point that we have not been shown a copy of PPCL's terms of engagement. However, if HMRC wished to assert that the terms agreed with PPCL made it unreasonable for Mr Wightman to derive reassurance from PPCL's implicit advice, the burden was on them to provide an evidential basis for that assertion.

genuine and good-faith attempt to comply with the statutory provisions relating to authorised employer loans. Moreover, the damage to both the Exchequer and the Scheme itself was slight: the Falken 1 loan was repaid (admittedly a few months later than the 5 year permitted maximum term of the loan) and so the funds represented by those loans remain available to provide retirement benefits. Ultimately therefore, admittedly with a degree of good fortune given that Falken 1 was able to repay the loan, the Scheme has suffered no loss and the Exchequer has not given excessive tax relief. Those factors would, had we upheld the assessment of the unauthorised payments charge, have led us to conclude that a just and reasonable outcome was for BFL to be subject only to the 40% unauthorised payments charge (which neither we nor the FTT have any power to set aside on "just and reasonable" grounds).

89. However, our conclusion at [85] is that BFL has not been validly assessed to the unauthorised payments charge (or the unauthorised payments surcharge). If we set aside the scheme sanction charge, the consequence of our decision would be that BFL suffers no charge whatsoever as a consequence of the making of a significant scheme chargeable payment. We do not consider that would be an appropriate outcome in circumstances where Parliament has decided that an unauthorised payments charge (equal to 40% of the unauthorised payment) is to be assessed with no power for HMRC or a Tribunal to set that payment aside on "just and reasonable" grounds. In short, Parliament has decided that the minimum income tax charge to be imposed in the case of an unauthorised payment is 40% of that payment. While BFL has escaped the unauthorised payments charge because HMRC failed to assess it in time, we do not consider it would be appropriate for us to exercise our discretion to set aside the scheme sanction charge which would leave BFL liable to no charge at all.

Disposition

90. HMRC's appeal is allowed. BFL's cross-appeal is allowed in part. We remake the Decision so that:

(1) The assessments of the unauthorised payments charge and surcharge are set aside on the basis that they were made out of time.

(2) The scheme sanction charge stands as a valid assessment under Regulation 4 of the Regulations and is not set aside under s268 and s269 of FA 2004.

MR JUSTICE NUGEE
JUDGE JONATHAN RICHARDS

RELEASE DATE: 20 April 2020