Appeal number: TC/2014/05909

INCOME TAX – pension scheme – unauthorised payments charge – s 208 FA 2004 – unauthorised payments surcharge – s 209 FA 2004 – scheme to extract funds from a SIPP and to provide member with access to funds by loans and investment management – whether transfers of funds were unauthorised member payments – s 160(2) FA 2004

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARETH CLARK — **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
MS GILL HUNTER (Tribunal member)

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 12 – 14 July 2016

Michael Jones, instructed by Reynolds Porter Chamberlain LLP, for the Appellant

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

DECISION

1. The Appellant, Mr Clark, appeals against a notice of assessment dated 25 March 2014 issued by HMRC for the year ended 5 April 2010 in relation to an unauthorised payments charge and an unauthorised payments surcharge pursuant to Part 4 of the Finance Act 2004 ("FA 2004"). The assessment, which was a discovery assessment under s 29 of the Taxes Management Act 1970 ("TMA"), is in respect of an alleged unauthorised member payment by a registered pension scheme within the meaning of s 160(2) FA 2004. The alleged unauthorised payment is in the sum of £2,115,049.68; the sum assessed is the aggregate of £846,019.87, being 40% of the alleged unauthorised payment, and a 15% surcharge of £317.257.45.

2. The assessment has arisen in relation to certain transactions which resulted in pension funds which were originally held in Mr Clark's self-invested pension scheme (SIPP) with Suffolk Life being transferred to a new scheme, the Laversham Marketing Limited Pension Scheme, and from there, subject to payment of certain fees, to Laversham Marketing Limited ("LML") and then Cedar Investment Management Limited ("CIM") out of which sums were lent to Mr Clark and funds were placed with an investment management firm, Quilter & Co.

The evidence

3. We had a witness statement and heard oral evidence from Mr Clark, and considered the available documentary evidence. We found Mr Clark to be a truthful witness, although we harboured some doubt as to whether some elements of his witness statement had been entirely the product of his own work. He came across as a man who had been trying to do his honest best to improve the investment performance of his pension funds, but who had had the misfortune to become involved with an organisation, Aston Court Chambers, whose attitude and operation might fairly be described as unprofessional, a circumstance that Mr Clark now deeply regretted.

4. Mr Clark is, we find, someone who appreciates the value of processes being undertaken correctly and according to legal requirements. His evidence was characterised by his sense that, having been advised that certain processes had to be adopted to ensure the success of the scheme that had been devised, he would at all times, and until circumstances dictated otherwise, endeavour to follow those processes. As a result, his evidence was at times inclined to be reflective of what he considered ought to have happened, rather than what actually did happen. His own sense of procedural correctness did not, however, reflect the reality of the scheme he had been sold.

The facts

5. Mr Clark is a retired businessman. He retired from full-time employment in 2000 after having spent 20 years working in publishing. He had, in 1986, co-founded Southnews Plc, a London-based newspaper publisher. He became chairman in 1988.

With the assistance of Mr Ross Wheldon, an independent financial adviser who was a family friend of Mr Clark, and his firm R&S Associates, Southnews Plc set up a conventional group pension fund for the benefit of senior executives, including Mr Clark.

6. In 2000, when there was approximately £3 million in the pension fund, the Southnews Group was sold to Trinity Mirror Group Plc. The pension fund was transferred to Trinity Mirror, but remained a separately identifiable fund. In 2003 or 2004, following certain legislative changes which had resulted in a pensions deficit, Trinity Mirror injected around £4 million into the fund. Its value at that time was some £7 million, of which £3 million was attributable to Mr Clark's own entitlements.

7. In 2004 or 2005, it became apparent that Trinity Mirror was proposing changes to the pension scheme which would eliminate the requirement for it to make further contributions. As a result, and with the assistance of Mr Wheldon, two SIPPs were established for Mr Clark, one with Suffolk Life in the amount of £2,115,000 ("the Suffolk Life SIPP") and another, with Scottish Equitable, in the amount of £600,000 ("the Scottish Equitable SIPP").

8. Subsequently, Mr Clark became concerned at the returns being produced by the SIPPs, and in 2007 he discussed this with Mr Wheldon. Mr Clark's aim was to become more involved in the management of the funds. He particularly wished to have access to the funds in order to invest, principally in the London residential property market. This latter wish was driven by two factors. One was that his son, a chartered surveyor, and another contact in the property business, could introduce him to investment opportunities with significantly higher returns that those expected from the SIPPs; the other was that Mr Clark had, in his individual capacity, a £3 million capital loss which he wished to offset against capital gains. He hoped therefore to be able to borrow the pension funds to invest in his own capacity. He considered that such a loan would have advantages over traditional bank lending in that he was likely to get a faster decision on a loan, and interest on the loan would accrue to the pension fund rather than to a lending bank. Mr Clark understood, however, that in order to access the funds in this way they would first have to be moved into a vehicle that would permit the investment in London residential property.

9. There is a distinction here between access to the funds and involvement in the management of the funds. We accept, and we find, that Mr Clark had both objectives. He appreciated that his desire to offset his capital losses necessarily meant that part of the funds would have to be made available to him, by way of loan, so that he could acquire assets in his own capacity. In addition, however, he was looking to have a closer involvement in the management of funds, short of ownership.

10. A further reason why Mr Clark was looking to borrow from the pension funds rather than seek bank finance was that the type of residential property he was considering would not, he considered, have been suitable for traditional bank lending. The properties were typically on short-term leases of around 15 years. Mr Clark explained, and we accept, that these properties could not represent security for a loan;

they were not mortgageable and were, in his words, "totally unbankable". That would give rise to a higher rate of interest, which would flow back into the pension fund.

11. At this time, and because he was not himself a tax expert, Mr Wheldon introduced Mr Clark to Aston Court Chambers International SA ("Aston Court"). In its Wealth Management Report prepared for Mr Clark and his wife dated 26 November 2008, Aston Court described itself as "a specialist boutique providing innovative commercial, taxation and asset protection solutions to the challenges faced by businesses and business people in today's world". It promised to coordinate an assignment with a number of associated entities and consultants, including legal counsel. It highlighted its low profile and the location of its main office in Switzerland as providing protection and comfort for its clients, referring in particular to legal professional privilege and client confidentiality.

12. The Wealth Management Report referred to a number of "solutions", only one of which, the Pension Transfer Plan, had any relevance to the immediate position of Mr Clark. The Report stated the following as Mr Clark's objectives:

> "5.1 Under UK pension legislation you have a variety of options as to how you take benefits but, once you reach 75 these options change and for the vast majority of people they then are required to purchase an annuity. You are very keen to avoid this requirement.
>
> 5.2 In addition to this you wish to use the value of these assets for one or a number of commercial functions allowed by statute and, incidentally to protect the wealth you have established from potential future creditors, for yourself and future generations. This can be achieved by placing your wealth in a safe environment as recommended in the following solution."

13. The Report then described the Pension Export Plan (although the heading was "Pension Transfer Plan", and we find that it was the Pension Transfer Plan that was being described), as follows:

> "8.71 ACC constructs a bespoke international commercial trust for your situation.
>
> 8.7.2 ACC arranges for the trust to incorporate the underlying Management Company.
>
> 8.7.3 You are installed as director of the Management Company and signatory on the Management Company bank account.
>
> 8.7.4 The Management Company incepts a new qualifying pension plan (NQPP) for the director(s).
>
> 8.7.5 NQPP requests the transfer to it of the Non-Protected Rights value of the UK pension scheme(s) under the European free movement of residency and capital legislation. We cannot apply this approach to Protected Rights funds.
>
> 8.7.6 UK pension scheme assets are transferred to NQPP.
>
> 8.7.7 ACC arranges for assets to be sold back into the Management Company.

8.7.8 Management Company now controls assets and has unrestricted investment choices under the control of the directorship.

8.7.9 Cash can be accessed in a tax efficient manner."

14. Although pressed on this matter by Mr Davey in cross-examination, we accept that Mr Clark's own understanding of what was meant by the reference in the Report to tax efficiency was confined to his original purpose in accessing his capital losses. We find that he was unaware of the steps that were to be taken to extract the funds from the pension scheme without giving rise to unauthorised payments charges. Those steps were notably not explained in the Report, although the Report did refer to "generic QC's opinion(s)" both in respect of pension legislation and taxation legislation, and said that client specific opinions would be obtained for each client. There was no evidence, however, either of the generic opinions or any specific to Mr Clark.

15. The Report recommended that both the Suffolk Life SIPP and the Scottish Equitable SIPP be the subject of the Pension Transfer Plan approach. In the event, Mr Clark, having discussed the matter with Mr Wheldon, decided to proceed with the Suffolk Life SIPP only. In doing so, Mr Clark was aware from the Report that there would not only be a fixed arrangement fee, which the Report put at £35,000, but what was described as a "success fee" calculated at 10% of the value of the pension funds transferred, as well as certain ongoing management costs. Mr Clark took the view that the success fee would, having regard to the property opportunities available to him, be recouped very quickly. We accept that Mr Clark regarded "success" in this context as synonymous with "implementation", and that he did not consider that this connoted successfully avoiding tax charges.

16. During 2007 and 2008, Mr Clark had a series of about 4 to 6 meetings with Aston Court during which the Pension Transfer Plan was discussed. Those meetings were at Mr Wheldon's London office and were attended by a representative of Aston Court, a Mr David Breeze. We accept in this regard that from Mr Clark's point of view what was being discussed was the movement of a fund from one pension to another, more flexible, pension with better investment potential and without the need for an annuity decision when Mr Clark reached the age of 75. He was advised that the Pension Transfer Plan could mitigate inheritance tax and that the funds available for his beneficiaries could be increased by the fact that there would be no UK tax liability on his death. But he believed at that time that the funds would at all times remain in a pension scheme environment.

17. We have already found that Mr Clark's understanding of what was actually being proposed was limited. He was aware that he could take a 25% tax-free cash lump sum from his pension, but did not consider that would meet his objectives. Those objectives, as we have found, were a combination of management influence over the funds and actual access to funds to invest in his own name. We regard the latter as at least as important to Mr Clark as the former. Although he was at some pains to play down the likelihood of his being able to obtain a loan out of the relevant funds, by referring to that as a mere hope, we are satisfied that being able to borrow was a key factor in his decision to proceed, and that although he was keenly aware of

the need for proper governance procedures to be observed, he did not harbour any realistic doubt that he would be able to obtain loans for his personal purposes.

The steps that were taken

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

19. On the same date, Cedar Investment Management Limited ("CIM") was incorporated in the British Virgin Islands. The owner of CIM was Corporate Factoring Services Limited, a service company of Aston Court. Mr Clark was appointed as the first director of CIM and was the signatory to the CIM bank account. Mr Clark was initially the sole signatory to that account. Mr Clark signed all the relevant documents at Mr Wheldon's office.

20. Subsequently, on 13 July 2009, Aston Court became a corporate director of CIM, through resolution signed by Mr Clark. Aston Court was in practice represented by Mr Martin O'Toole, not himself a director, who at the same time became a joint signatory with Mr Clark on the CIM bank account. Mr Clark's understanding of this arrangement was that it was designed to prevent it from being asserted that he was, at the relevant time, in sole control of the funds.

21. On 16 February 2009 the shares in LML held by Centaur (Cyprus) Limited were transferred to CIM. Shortly thereafter, on 18 February 2009, though anticipating events a little, Mr Clark wrote to a Mr Malcolm Dorrington of Aston House to inform Mr Dorrington that Mr Clark had established a new company pension scheme attached to LML, and asking Mr Dorrington to arrange for the transfer of the sums held within the Suffolk Life SIPP to the new pension plan. In that letter Mr Clark also confirmed that he was not seeking any advice and requested that Aston Court operate on an execution only basis, without recourse to Aston Court. The genesis of that statement was a letter, also on 16 February 2009, from Mr Dorrington to Mr Clark, in which Mr Dorrington had advised Mr Clark that an execution basis was necessary to avoid Mr Dorrington having to advise Mr Clark on the scheme as a whole: the transfer of the pension was a mere intermediate step, and if advice were given it would have to include "what will be happening to the pension plan afterwards". Despite Mr Clark having certain misgivings at this stage, he followed Mr Wheldon's advice in proceeding. He signed the letter to Mr Dorrington in the form in which Mr Dorrington had drafted it.

22. On the following day, LML and Equity First Trustees Limited executed a deed of trust establishing the Laversham Marketing Limited Pension Scheme ("the LML Pension").

23. In that deed:

"Scheme Member" is defined to mean any employee of LML who elects to join the Scheme by giving notice to LML;

An "Individual Fund" in relation to a Member means that part of the Fund which the trustees determine is attributable to him having regard, amongst other things, to "any transfers made to the Scheme in respect of him".

The "Primary Pension" means in respect of each Beneficiary (that is, each Scheme Member) the Prescribed Benefit payable to such Beneficiary, computed in accordance with Schedule 1.

Schedule 1 is headed "Prescribed Benefits" and is as follows:

> "1. The benefits under the Scheme for any Scheme Member shall be exclusively the benefits of such kind as are prescribed by Part 4 FA 2004 and shall be computed in accordance with the limits prescribed by Part 4 FA 2004.
>
> 2. The amount of such prescribed benefits shall be 90% (ninety per cent) from time to time of the maximum amount permissible under Part 4 FA 2004."

Clause 2 of the deed of trust declares trusts for the payment of a pension for each Beneficiary, and goes on:

> "2.3 In the event of the failure of any of the trust for Primary Pension, or any other reason, the Trustee shall hold and apply the Fund in accordance with Clause 2.5 hereof.
>
> 2.4 The Trustee shall not make any Unauthorised Payment for the purposes of Part 4 FA 2004.
>
> 2.5 If for any reason there arises by operation of law or the trusts hereof any surplus, then the Principal Employer shall be entitled to such surplus. The trusts and powers contained herein shall in such event have effect such that they comply with The Registered Pensions Scheme (Authorised Payments) Regulations 2006 (SI 2006/574).
>
> 2.6 Any benefit may be assigned, commuted, surrendered or charged and a lien or set-off may be exercised in respect of it only to the extent that it is not prohibited under section 91 of the Pensions Act 1995."

Clause 6 contains a power to amend the deed of trust:

> "6.1 Subject to the provisions of the Pensions Act 1995 and Clause 6.2 hereof, and subject to the prior written consent of the Principal Employer, the Trustee shall have the power at any time by deed to alter or add to all or any of the provisions of this Deed in any respect, whether retrospectively or prospectively.
>
> 6.2 The power granted by Clause 6.1 shall not be exercisable nor exercised so as to cease the Scheme to constitute a registered pension scheme."

24. On 20 February 2009, Mr Clark entered into a contract of employment with LML. Under that contract, the employment commenced on 20 February 2009 and was for a fixed term of one year and terminable thereafter either by LML or Mr Clark on one month's written notice. Mr Clark was to "use his expertise and knowledge of

the newspaper and magazine publishing industry to identify potential investment opportunities for LML within the UK". He was to be paid monthly a sum in respect of reasonable expenses, but otherwise was to be remunerated by entitlement to 5% of the gross profits of any business set up by LML in the UK as a result of research done by Mr Clark.

25. Mr Clark's evidence was that, whilst a number of preliminary meetings were arranged to explore investment opportunities, ultimately no work had resulted from those meetings. In cross-examination by Mr Davey, Mr Clark candidly admitted that he had not come close to introducing any investment opportunities to LML. He referred to two possible opportunities that had been explored, one involving a meeting outside Watford and another concerning a newspaper in the Horsham area. Nothing had come from either. Mr Clark received no remuneration under the contract. He made no reports.

26. Mr Clark was the sole employee of LML, and accordingly the sole Scheme Member and the sole Beneficiary under the LML Pension.

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

28. Recital 4 of that Deed stated that "It is possible that cash or other assets may be paid to the Employer [LML] from the Scheme." Mr Clark accepted that mere possibility was not an appropriate term; he accepted that is was "very likely" that would be the case. We go a little further. We consider that, barring anything unforeseen, the funds were at all times, under the arrangements that had been and were to be put into place, bound to be transferred from the LML Pension to LML.

29. On 2 March 2009, the LML Pension was registered by HMRC with registration number PSTR 0737396RP, and a registration certificate to that effect was issued on that date.

30. On 17 March 2009, one of Aston Court's associate companies, Aston Court Chambers Wealth Management Limited, in the UK, wrote, under the signature of Mr Dorrington, to Suffolk Life to provide them with a letter of authority as Mr Clark's financial adviser, and to seek the assistance of Suffolk Life in arranging the transfer of the funds held in the Suffolk Life SIPP to the LML Pension. Suffolk Life wrote to UBS AG on 8 April 2009 to request the return of all funds held in the Suffolk Life SIPP and on 22 April 2009 Suffolk Life confirmed (to the LML Pension, through Aston Court Chambers IOM Limited) that the SIPP fund, with a value of £2,115,049.68, had been transferred to the LML Pension. With that letter was a

summary of the Suffolk Life SIPP scheme details showing that it was a registered scheme under registration number 00605668RP.

31. Confirmation of the transfer of funds is obtained from a statement of National Westminster Bank, Bristol City Office, in respect of the LML Pension showing that on 21 April 2009 there had been a credit of a CHAPS transfer under reference Mr Clark of £2,115,049.68.

32. On 24 April 2009, Mr Clark and the trustee of the LML Pension entered into a Deed of Waiver and Surrender in relation to the LML Pension. This, Mr Clark explained, had been done on the advice of Aston Court. It was at this stage, as Mr Clark described it, where "it started to go wrong". He explained, and we find, that up to this time Mr Clark had been unaware that what had been proposed by Aston Court involved a surrender by him of his rights under the pension scheme. We accept Mr Clark's evidence in this respect; the surrender was not referred to in the Wealth Management Report, and there is no other evidence of it having been brought to Mr Clark's attention prior to the time he executed this deed.

33. Despite his discomfort, Mr Clark signed the deed. He did so having been advised by Mr Wheldon, and because by that time the funds had already been transferred out of the Suffolk Life SIPP. He had by then reached the stage, which with hindsight he clearly regretted, of signing anything that was put in front of him.

34. The deed (which was governed by English law) contained the following provisions:

> "2.1 Pursuant to the provisions of the Scheme the Member hereby surrenders his Accrued Benefits for the sole purpose of funding an authorised surplus payment for the reasons set out in Section 91(5)(b)(i) of the Pensions Act 1995 of England and Wales.
>
> 2.2 The Trustee hereby consents to such surrender and undertakes to hold the value thereof, whether represented by cash or any other rights or property, for the sole purpose of making an authorised surplus payment."

35. Before any payment of surplus was made, on 24 April 2009 CIM and LML entered into an Estate Annuity Purchase Deed under which CIM agreed to pay an annuity to Mr Clark's widow and dependants, commencing on the 75th birthday of the first of the beneficiaries to reach that age. The purchase price for the annuity was expressed as the sum of £2,115,049.68. The mechanics of this deed were not in issue in this appeal, but we should record that in our view its terms were woefully inadequate, and that it was replete with uncertainties as to what, if any, real provision was capable of being made for the beneficiaries.

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

the trust would hold cash and investments in the meantime, but it was no doubt intended that this would be the function of the BVI company. It was envisaged by the deed that CIM would be incorporated by the trust.

37. This deed is also unsatisfactory, in that it referred, on 28 April 2009, to the incorporation of a company, namely CIM, that already existed. What in fact happened was that on the same day CIM was transferred by Corporate Factoring Services Limited to Equity Trust (BVI) Limited as the trustee of the Cedar Purpose Trust.

38. It is not clear on what date funds were transferred from the LML Pension to LML. It was, as appears from the bank statement of the LML Pension, at some time in May 2009. It must have been on or before 14 May 2009, as on that date LML transferred £1,885,980 to CIM. That sum represented £2,115,000 (the monies originally held in the Suffolk Life SIPP that had been transferred to LML Pension on 21 April 2009), less a fee of £229,000 that was paid to Aston Court. Mr Clark signed a letter drafted by Mr Dorrington authorising that deduction, but it was unclear (and Mr Clark was unable to assist in this respect) in what capacity Mr Clark was signing such a letter.

39. The basis for the payment of £2,115,049.68 by LML Pension to LML was that, having regard to the Deed of Waiver and Surrender executed by Mr Clark, a scheme surplus had arisen. A certificate to that effect, dated 12 December 2009, was obtained from Barnabus & Eckley Inc, and signed by a Douglas A Eckley MAAA, a member of the American Academy of Actuaries. The basis for the payment from LML to CIM is unclear. Although Mr Clark's witness statement stated that the payment was made under the Deed of Agreement in Relation to the LML Pension (under which a dividend of funds received by LML from the LML Pension was required to be paid to CIM), there was no evidence of any such dividend or any resolution to pay such a dividend. Nor is it clear how the Estate Annuity Purchase Deed could have co-existed with a requirement to pay such a dividend. The amount received by CIM was, in any event, less than the consideration stated to be payable for the supposed annuity.

40. It is not necessary for us to resolve these discrepancies. We simply find that this was another example of the unsatisfactory nature of the documentation that was entered into. It is clear to us that the promoters of the scheme had very little idea of the detail of what they were doing. The documents give every impression of having been cobbled together from unreliable precedents with little, if any, thought being given to the detail of the individual case at hand.

41. At all events, the proceeds of what had been the Suffolk Life SIPP, less the considerable fee to Aston Court, ended up in CIM. Up to 13 July 2009, Mr Clark was the sole director of CIM. On that date, Aston Court was appointed an additional director. From 14 May 2009 to 7 September 2010, the funds in CIM remained held in its current account. Mr Clark's explanation for this, at least up to the time he ceased to be the sole director of CIM, was that he did not wish to be seen to be moving the cash around without proper authorisation. We accept this, as we find that Mr Clark, having been advised that he should not exercise control over the funds, was astute to

follow that advice. But no explanation was offered for the failure of CIM to invest any of the funds between July 2009 and September 2010.

42. Although Mr Clark's witness statement characterised CIM's role as one of making recommendations to the trustee of the Cedar Purpose Trust (the shareholder of CIM), there was no evidence of the trust having any role in the investment of the funds. We find that it was CIM that was intended to be the investment vehicle, and that although the trust had shareholder control, the control of the funds lay with CIM, and it was CIM that was at least intended as the vehicle for the making of all investment decisions. This was accepted by Mr Clark in cross-examination.

43. In August 2010, Mr Clark identified a property investment opportunity in Mount Street, London W1. He explained, and we find, that this was to be the subject of a "fire sale" with the prospect of a large capital uplift. The property was not mortgageable through traditional sources, meaning that Mr Clark could not obtain ordinary bank finance, as it had a short lease and needed a lease extension.

44. Mr Clark's witness statement was to the effect that he "hoped" to be able to borrow the necessary funds from CIM in order to pursue this investment opportunity. We find that this was more than a hope; it was an expectation, and we do not consider that Mr Clark had any real doubt that the loan would be approved. The ability for Mr Clark in his individual capacity to access finance through the structure that had been created, even though Mr Clark had not been aware of all the steps that would require to be taken, was the reason the scheme had been put in place. This is, we find, an example of Mr Clark being keen to emphasise elements of the structuring that he had been advised were important. But, we find, these nuances were not the reality. The governance structure, under which requests for loans had in form to be made by Mr Clark, was no more than a thin veneer between Mr Clark and the funds.

45. We take the same view of Mr Clark's assertion in his statement that control of the funds lay with the trustee of the Cedar Purpose Trust. We accept that Mr Clark himself might have been told this, and would have regarded it as an important element in what he perceived as a necessary distancing of himself from the funds, but the reality was different. As we have found, the trust was the shareholder of CIM, but no approval of the trustee was required (it was certainly never sought) for any "decisions" of CIM, including decisions to make loans to Mr Clark.

46. Mr Clark himself described the process to request a loan or transfer of funds as relatively straightforward. It was in fact more straightforward than Mr Clark himself supposed, as there was no requirement for the Cedar Purpose Trust to approve the loan or transfer. In practice all that had to be done was for Mr Wheldon to contact Aston Court. There was no real decision-making process, through the Cedar Purpose Trust, CIM or Aston Court. We find that although Mr Clark thought that a more formal process should have been carried out, it was not. His own regard for process was evidently not, we find, shared by Aston Court.

47. In relation to the Mount Street property, Mr Clark borrowed from CIM the sum of £800,000 on 7 September 2010 for a term of approximately five years expiring on

25 August 2015. The loan facility letter from CIM to Mr Clark was dated 20 August 2010 and it was signed by Mr Clark on 26 August 2010. It represented £800,000 out of a £900,000 loan facility notified by Aston Court to Mr Clark by letter dated 25 August 2010, The signed version has an amendment to the interest rate, reducing it from 9% per annum to 5%. This, Mr Clark's witness statement said, was the result of "robust negotiations", and he explained that these had been between Mr Wheldon and Aston Court. The amendment was made in manuscript and initialled by Mr Clark on 26 August 2010. Mr Clark had been sent the document for signature by Mr Wheldon on 25 August 2010. The covering letter contains instructions for its signing and initialling on the relevant pages, but omits any mention of any manuscript amendment requiring initialling, or anything concerning the change in interest rate. There is no evidence of Mr Wheldon having negotiated anything with CIM or Aston Court. We find that there was nothing approaching robust negotiation, or indeed any negotiation at all.

48. We should also say, although as Mr Clark was not taken to these documents we make no finding in this respect, that the manuscript marking in the facility letter refers to an email from one Silvia Soldati of Aston Court dated 26 November 2010 as the justification for the amended interest rate. However, that email was in a chain which included Mr Clark having been sent a schedule of the loan facility which referred to a drawdown of £900,000 and an annual interest rate of 9%. Mr Clark, in an email dated 25 November 2010, had queried the amount drawn down and noted that this would alter the interest calculations, but did not question the interest rate. Ms Soldati's reply, in the email referred to in the manuscript note on the facility letter, explains with apparent reference to the unused £100,000 facility that the interest rate is 5% above Bank of England base lending rate, but does not refer to the original interest rate for the £800,000 drawdown being anything other than that set out in the schedule.

49. By a fax from CIM, recording its BVI address, but sent from the personal fax of Mr and Mrs Clark, and signed by Mr Clark as director of CIM, Bank Sarasin & C. SA in Lugano, Switzerland was provided with a letter of authorisation to transfer £800,000 from CIM's account to the "GPA Clark Property Investment Account" with HSBC, representing the first drawdown in accordance with the facility letter dated 25 August 2010. Mr Clark's evidence was that he did not know if any board meetings had been held to authorise this loan. There is no evidence that any board meetings took place, and we find that there were none. The amount of the loan, less what appears to have been a small banking charge, was received into Mr Clark's account on 10 September 2010.

50. The £800,000 loan was repaid on 12 August 2011, with interest of £40,000. As this was a prepayment, under the terms of the facility letter interest was payable up to 6 September 2011, and represented an interest rate of 5% per annum. By email from Laura Bolt of Aston Court to Mr Wheldon dated 6 September 2011, it was confirmed that the payment of £800,000 and interest of £40,000 represented repayment in full and there was nothing further to be paid in accordance with the terms of the loan.

51. In November 2011, Mr Clark was made aware of a second investment opportunity in relation to a property in Kersley Street, London which again was

unsuitable for bank or mortgage lending. Mr Clark applied for a loan of £600,000. He wrote on 7 November 2011 by email to Ms Bolt saying that the loan had to be in place by the end of business on that day, and suggested that the terms be the same as for the £800,000 loan. Ms Bolt replied within half an hour to say that "our policy for taking loans" had changed, but requested details of the required loan. Those Mr Clark provided: £600,000 up to one year, bullet repayment, interest due on repayment.

52. Ms Bolt then wrote to Mr Clark with some advice concerning the terms of the loan. The advice dealt with matters such as the term of the loan being less than 12 months (to avoid, so it was said, withholding tax on interest), it being advised that interest should be paid monthly and not rolled up, and that all loans should be secured. The aim, it was said, was to ensure that the payment would be treated as a loan and not an outright payment "which could give rise to an income tax charge", and that "the loan is being provided on a strictly commercial basis". Mr Clark acknowledged this advice, and sought a short-term loan, unsecured and at 1.5% over base. Following further advice that the interest should be 7% "to reflect the commercial rates available for unsecured loans in the general market", Mr Clark, in an email shortly afterwards, accepted those terms. The documentation was provided, that afternoon, by email, and signed by Mr Clark on 8 November 2011, both in his own capacity and as director of CIM (although it appears that the latter may only have been completed on 14 November 2011), along with the drawdown notice. On the same day Mr Clark also signed, this time as director of CIM, a faxed letter to Bank Sarasin, authorising the transfer to his solicitors' client account.

53. Mr Clark explained, and we find, that his motivation in seeking to access the funds of CIM on this occasion was due to the breakdown in the relationship between Mr Wheldon and Aston Court. It was believed that Aston Court was under investigation, and Mr Wheldon believed it was in trouble. The urgency expressed was in order to attempt to protect the funds from Aston Court. But we also find that no formal process for approval of the loan was undertaken by CIM or anyone else. There was no board meeting of CIM, and no approval of the loan by the Cedar Purpose Trust. The funds were transferred essentially on Mr Clark's instructions alone.

54. A further loan was made on 14 June 2012. It was in the sum of £380,000, unsecured and for a six-month term. The facility agreement was signed by Mr Clark, in his own capacity and as a director of CIM. Although the facility did not express any particular purpose, Mr Clark had sought the loan in order to carry out improvements at the Kersley Street property. Once again, Mr Clark's approach was designed to ensure a speedy transfer of funds. So, on 18 June 2012, he wrote to Ms Bolt by email asking her to advise Bank Sarasin that the loan had board approval through someone called James Rutherford of Aston Court (even though it had not). Mr Clark accepted in evidence that this was a complete pretext, designed solely to extract the funds from any connection with Aston Court. It was Mr Clark, on behalf of CIM, who on 22 June 2012 made the faxed transfer request to Bank Sarasin. Those funds were received into Mr Clark's bank account on 26 June 2012.

55. Neither the £600,000 loan nor the £380,000 loan have been repaid, and no interest on those loans has been paid to CIM. Mr Clark has since invested in a joint venture concerning a property in Argyll Street, Kensington. He has maintained accounts which show the debt due to CIM.

56. As well as the loans, certain monies were transferred by CIM to an investment management firm, Quilter & Co. A transfer of £899,988 was made to Quilter out of CIM on 22 September 2010. Mr Clark said, and we find, that the purpose of this transfer was to give him access to fund managers, access which he had not had when the funds were in the Suffolk Life SIPP. Those funds remain with Quilter, on a segregated basis in a "Cedar Purpose Trust portfolio", and it is Mr Clark who has the relationship with them.

The law

57. The assessment raises tax charges under s 208 and s 209 FA 2004. Section 208 imposes a charge to income tax, known as the unauthorised payments charge, where an unauthorised payment is made by a registered pension scheme. In a case where the unauthorised payment is an unauthorised member payment, the charge is on the person to whom, or in respect of whom, the payment is made. Section 209 also imposes a charge to income tax, the unauthorised payments surcharge, where a surchargeable unauthorised payment is made. That expression is defined by s 210. It is common ground in this case that if a relevant payment is an unauthorised member payment, then it will also be surchargeable.

58. The principal provision with which we are concerned in this appeal is s 160 FA 2004. It defines "unauthorised member payment". So far as material, s 160 provides:

> "(1) The only payments which a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are those specified in section 164.
>
> (2) In this Part 'unauthorised member payment' means—
>
> > (a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164, and
> >
> > (b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part…"

59. Section 161(2) provides that "payment" includes a transfer of assets and any other transfer of money's worth.

60. Section 150 FA 2004 sets out the meaning of "pension scheme". So far as is material to this appeal, s 150 provides:

> "(1) In this Part 'pension scheme' means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons—

(a) on retirement,

(b) on death,

(c) on having reached a particular age,

(d) on the onset of serious ill-health or incapacity, or

(e) in similar circumstances.

(2) A pension scheme is a registered pension scheme for the purposes of this Part at any time if it is at that time registered under Chapter 2…"

61. As noted in s 160(1), s 164 sets out what are authorised member payments. It is no part of Mr Clark's case that it is s 164 that precludes the tax charges in this case. But s 164(1)(c) is material to certain of the arguments: that is the provision which authorises a registered pension scheme to make payments which are recognised transfers within s 169. Section 169(1), in turn, defines a "recognised transfer" as follows:

"A 'recognised transfer' is a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become held for the purposes of, or to represent rights under—

(a) another registered pension scheme, or

(b) a qualifying recognised overseas pension scheme,

in connection with a member of that pension scheme."

62. Section 279 provides certain definitions for the purpose of Part 4. Section 279(2) provides that references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme.

63. The only non-tax provision to which we shall need to refer, in relation to the surrender, or purported surrender by Mr Clark of his rights under the LML Pension, is s 91 of the Pensions Act 1995 which, as our description of the facts will have demonstrated, featured in a number of the documents prepared for the purpose of the arrangements made by Aston Court. Section 91 relevantly provides:

"**91 Inalienability of occupational pension**

(1) Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme —

(a) the entitlement or right cannot be assigned, commuted or surrendered,

(b) the entitlement or right cannot be charged or a lien exercised in respect of it, and

(c) no set-off can be exercised in respect of it,

and an agreement to effect any of those things is unenforceable.

> (2) Where by virtue of this section a person's entitlement to a pension under an occupational pension scheme or right to a future pension under such a scheme, cannot, apart from subsection (5), be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension.
>
> (3) …
>
> (4) Subsection (2) does not prevent the making of—
>
> (a) an attachment of earnings order under the Attachment of Earnings Act 1971, or
>
> (b) an income payments order under the Insolvency Act 1986.
>
> (5) In the case of a person ("the person in question") who is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme, subsection (1) does not apply to any of the following, or any agreement to effect any of the following—
>
> (a) an assignment in favour of the person in question's widow, widower or dependant,
>
> (b) a surrender, at the option of the person in question, for the purpose of—
>
> (i) providing benefits for that person's widow, widower, surviving civil partner or dependant, or
>
> (ii) acquiring for the person in question entitlement to further benefits under the scheme,
>
> (c) a commutation—
>
> (i) of the person in question's benefit on or after retirement or in exceptional circumstances of serious ill health,
>
> (ii) in prescribed circumstances, of any benefit for that person's widow, widower, surviving civil partner or dependant, or
>
> (iii) in other prescribed circumstances, …"

The issues

64. It is apparent that, for there to be an unauthorised member payment, s 160(2) FA 2004 requires a number of conditions to be satisfied. Until just before the hearing of Mr Clark's appeal, it appeared that the only issue was whether the payment made by the LML Pension to LML was "in respect of" Mr Clark. By the time of the hearing, however, the position had changed. Mr Clark's case had transformed into a series of submissions going to each of the conditions under s 160(2); it was argued (i) that the LML Pension Scheme was not a "registered pension scheme", (ii) that Mr Clark was not a member of a registered pension scheme, (iii) that in any event the transfer of funds from the LML Pension to LML was not a "payment" by the LML Pension, and (iv) finally, that if it were a payment it was not one to or in respect of Mr Clark.

65. Were certain of those arguments to succeed, so that the transfer of funds from LML Pension to LML could not be regarded as an unauthorised member payment,

that then would open the question concerning the transfer of funds from Suffolk Life SIPP to the LML Pension. There could be no serious dispute but that the Suffolk Life SIPP was a registered pension scheme, and we have found that it was. Nor therefore could there be any argument that Mr Clark was not a member of it. But, in a case where it might be decided that the LML Pension was not a valid trust, the argument for Mr Clark was that the transfer of the funds from the Suffolk Life SIPP to the LML Pension was not a "payment". There was no argument that in that case, if it were a payment, it would not have been in respect of Mr Clark, as the member.

66. No objection was taken to the expansion of the arguments in this way. Although therefore of historic interest, we should say a few words about how the case developed into the one we are to determine.

67. The principal issue in this case has always been whether Mr Clark was liable to an unauthorised payments charge and an unauthorised payments surcharge in respect of an unauthorised payment made by the LML Pension. That issue was set out in those terms in HMRC's statement of case. The statement of case went on to address what it described as Mr Clark's contentions. Those contentions included that no unauthorised member payment had been made, but that Mr Clark had surrendered his interests in the LML Pension to fund the making of an authorised surplus payment. HMRC's stated case focused both on their contention that the payment of the surplus from the LML Pension to LML was in respect of Mr Clark, and was thus an unauthorised member payment, and the contention that the payment was not an authorised surplus payment.

68. Following Tribunal directions, Mr Clark served a statement of his case. In it he referred to HMRC's case both with respect to the authorised surplus payment issue and the unauthorised member payment. Whilst questioning the relevance of the authorised surplus payment issue to the assessment on him, Mr Clark addressed both those issues in his statement of case. His skeleton argument, prepared by Mr Jones and served on 21 June 2016, adopted the same approach.

69. HMRC served their skeleton argument on 30 June 2016. In that, Mr Davey set out the argument for HMRC's "overarching contention" that Mr Clark was liable in respect of an unauthorised member payment. He addressed a number of points said to have been made by Mr Clark in opposition to HMRC's contention in that respect, including in particular the contention that there had been an authorised surplus payment "as opposed to" an unauthorised member payment. Mr Davey's skeleton argument in that respect drew attention to the pensions liberation case of *Re LPA Umbrella Trust and others, Pensions Regulator v A Admin Limited and others* [2014] EWHC 1378 (a case we shall return to) in arguing that, having regard to the terms of the trust establishing the LML Pension and the construction of s 91(5) of the Pensions Act 1995 determined in the *LPA Umbrella Trust* case, the purported surrender by Mr Clark of his rights under the LML pension was prohibited and there was accordingly no surplus that could have been the subject of an authorised surplus payment.

70. It is the *LPA Umbrella Trust* case that has given rise to the further submissions for Mr Clark in this case, which had not been foreshadowed in the earlier pleaded

case. By contrast, it was accepted by both Mr Jones and Mr Davey that the question whether the payment from LML Pension to LML was an authorised surplus payment was irrelevant to the determination in this case whether there had been an unauthorised member payment. It was recognised that, in contrast to the definition of unauthorised employer payment in s 160(4) FA 2004, which is subject to s 175 which expressly authorises authorised surplus payments, there is no equivalent carve-out from unauthorised member payments in s 164. It is therefore possible for a payment to be, at one and the same time, both an authorised surplus payment and an unauthorised member payment. In that regard, alongside the other issues that fall for determination, the real question in this case is not whether the payment was an authorised surplus payment, but whether it was a payment at all within the meaning of that term in s 160(2) FA 2004.

Discussion

71. As we have described, the question whether there has been an unauthorised member payment falls to be determined, according to s 160(2) FA 2004, by whether four conditions have been met. There has to have been 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.

Was LML Pension a "registered pension scheme"?

72. Central to this is the status of the payer. That must be a registered pension scheme. In this case, as we have found, LML Pension was registered as a pension scheme. But that is not conclusive of its status as a pension scheme as such. Mr Jones' first argument is that LML Pension was not such a scheme.

73. In support of this argument, Mr Jones relies on the judgment of Rose J in the High Court in the *LPA Umbrella Trust* case. That case concerned a claim by the Pensions Regulator against certain persons ("the defendants") who were involved in arrangements set up to receive funds transferred by pension scheme members from those members' occupational or personal pension schemes. It was alleged that the transfers to certain trusts and corporate entities constituted misuse or appropriation by the defendants of assets of the original pension schemes.

74. The case before Rose J concerned a number of preliminary issues. One, described as the "certainty issue", was whether on the true construction of the trust deeds governing the recipient schemes the beneficial interests of the members were void for uncertainty. In considering that issue, Rose J examined the terms of the trust deeds in question. A comparison of those terms with those of the LML Pension trust deed shows that in all material respects they are either identical or so similar as to be of the same effect. Mr Davey did not seek to distinguish the two.

75. In both, the "Prescribed Benefits" are defined as "the benefits prescribed by Schedule 1 to this Deed" and the "Primary Pension" as meaning in respect of each Beneficiary the Prescribed Benefit payable to such Beneficiary under the deed "which Prescribed Benefit shall be computed in accordance with the provisions of Schedule 1

to this Deed". Schedule 1 of the trust deeds in question in the *LPA Umbrella Trust* case defined the Prescribed Benefits as follows:

> "1. The benefits under the Scheme for any Member shall be exclusively the benefits of such kinds as are prescribed by Part 4 FA 2004 and shall be computed in accordance with the limits prescribed by Part 4 FA 2004.
>
> 2. The amount of such prescribed benefits shall be 90% (ninety per cent) from time to time of the maximum amount permissible under Part 4 FA 2004."

This is in all material respects identical to Schedule 1 of the LML Pension trust deed.

76. As Rose J explained, at [14], both the definition of Prescribed Benefits and Schedule 1 to the relevant deeds directed the reader to Part 4 FA 2004 for details of how to compute the Primary Pension in respect of any Scheme Member. She continued:

> "However, there is nothing in Part 4 which sets out a method of computing pension benefits or gives any other assistance in working out what the benefits should be. The only possibly relevant provision is section 218 which, as from 6 April 2014, stipulates that the individual's maximum lifetime allowance is £1.25 million. That section sets out a way of computing the effect on the lifetime allowance of various 'lifetime allowance enhancement factors' described in the Act but it does not set out a way of computing someone's pension."

77. Rose J accepted the submission of counsel for the Regulator that, on the basis of the test set out by the House of Lords in *Whishaw and another v Stephens and others, In Re Gulbenkian's Settlement* [1970] AC 508, the trust purportedly set up by the deeds establishing the umbrella schemes was void for uncertainty. She set out, at [15], the guidance given by Lord Upjohn in *Re Gulbenkian*, at p 552:

> "There is no doubt that the first task is to try to ascertain the settlor's intention, so to speak, without regard to the consequences and then, having construed the document, apply the test. The court, whose task it is to discover that intention, starts by applying the usual canons of construction; words must be given their usual meaning, the clause should be read literally and in accordance with the ordinary rules of grammar. But very frequently, whether it be in wills, settlements or commercial agreements, the application of such fundamental canons leads nowhere, the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling. It is then the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlor's or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it."

78. Applying that test, Rose J held, at [16], that it was impossible to work out what pension the Scheme Members could expect to receive under the trust. No method of

computation was set out in Part 4 FA 2004; in particular, a computation could not be based on a percentage of the lifetime allowance provided for by s 218 FA 2004. No amount of judicial knowledge or innate common sense could arrive at a useful answer. Rose J rejected submissions directed towards an argument that the computation was at the discretion of the trustee, along with an argument that because a pension scheme did not have to be written as a trust so the question whether it met the test of certainty was irrelevant. The judge held, at [25], that the certainty issue had to be answered by saying that, on the true construction of the relevant trust deeds, the beneficial interests of the Members were void for uncertainty.

79. Although that finding, referable as it was to the facts of the *LPA Umbrella Trust* case, is not binding as such on this Tribunal, the applicable law is binding, and in the absence of anything to distinguish that case from this appeal we consider that we should adopt the same reasoning and arrive at the same conclusion. There is nothing to distinguish, in any material degree, the facts of the two cases so far as they relate to the provisions of the trust deeds in question. It follows that we find that the trusts of the LML Pension, and the beneficial interest of the beneficiaries, are void for uncertainty. Mr Davey accepted that this was the only conclusion that could be reached by this Tribunal, though he reserved HMRC's position were this case to go further.

80. Whilst accepting that the question of the validity of the trust, and whether the LML Pension was a registered pension scheme was properly before the Tribunal, Mr Davey submitted that the proposition was a deeply unattractive one. The whole basis of the arrangements was premised on the LML Pension being such a scheme; it had been put forward to HMRC for registration as such and had been registered. The argument appeared to be that because the drafting had been faulty the tax charges which would otherwise apply under the legislation would simply fall away.

81. Mr Davey's more technical argument was that what was a registered pension scheme was simply a matter of applying the relevant legislation to the relevant facts. He referred to s 150(1) FA 2004 and to the definition of a "pension scheme". He pointed to the fact that elements that would be expected to be in place were in place in the LML Pension. There was a trustee, an employer, a beneficiary or a person who is employed by the employer, and an instrument, namely the trust deed. There was, however, on the basis of the *LPA Umbrella Trust* case, a flaw in the drafting which rendered the trusts void.

82. However, Mr Davey submitted that the fact that the trust establishing the LML Pension was void did not entail that the LML Pension was not a "pension scheme" within s 150(1). Although that fact would mean that the scheme did not have effect, s 150(1) applied equally to a scheme that was "capable of having effect" so as to provide relevant benefits. In order to give meaning to that expression it should, argued Mr Davey, be construed to apply where a scheme, although not having effect at a relevant time, could be amended so as to have effect. In that regard, Mr Davey pointed to the express power in clause 6.1 of the LML Pension trust deed for the trustee to amend the trust. By reference to clause 6.2, he submitted that what the exercise of that power would be designed to achieve was that the LML Pension would

either remain, or be, a registered pension scheme, rather than cease to be one. He argued that the reference in s 150(1) to a scheme being capable of having effect could readily be understood as referring to the amendment or perfecting of a trust.

83. We do not agree with Mr Davey. In our judgment it is not possible for a power of amendment to eliminate the effect of a trust being void for uncertainty. What s 150(1) is concerned with is the effectiveness of the scheme to provide relevant benefits. A scheme that is purportedly constituted by a trust that is void cannot have, nor is it capable of having, effect for that purpose. If the trust is void, it cannot be rescued by a provision for amendment which is itself contained in an instrument that is void.

84. We accept instead the submission of Mr Jones that the proper construction of the words in s 150(1), "… having or capable of having effect so as to provide benefits to or in respect of persons …", is that the terms as drafted either have the effect of providing the relevant benefits or will do so on the happening of a certain event, such as the triggering of a contingency or the exercise of a discretion. An example provided by Mr Jones, with which we concur, would be the case where a scheme is established for the time being with no members but with provision for members to be added. Although, absent members for the time being, such a scheme would not have immediate effect, provided a process was in place whereby persons were capable of becoming members, and assuming the scheme was not otherwise void, it would be capable of having effect for the relevant purpose, within the meaning of s 150(1).

85. Our conclusion, therefore, is that the LML Pension was not a "pension scheme" within s 150(1), and consequently could not be a registered pension scheme for the purpose of s 160(2). We also conclude that Mr Clark could not, on that account, be a member of such a scheme. Any payment by the LML Pension could not therefore be an unauthorised member payment within the terms of s 160(2).

86. In case we are wrong in that conclusion, we turn to the alternative submissions presented to us in relation to the transfer of funds out of the LML Pension to LML, assuming it is a registered pension scheme. We shall consider a little later arguments whether that transfer was a "payment" for the purpose of s 160(2), but we shall do so in conjunction with a corresponding argument concerning the transfer of funds by the Suffolk Life LLP to LML Pension. Both questions turn on the meaning to be ascribed to "payment" in that context.

"In respect of"

87. We now consider, on the assumption that the LML Pension is a registered pension scheme and Mr Clark was a member of that scheme, and also on the assumption that the transfer of funds by LML Pension to LML was a "payment", whether, as s 160(2) requires, that payment was "in respect of" Mr Clark.

88. In approaching the case as a whole, but with particular reference to this question, Mr Davey submitted that the steps which had taken place in early 2009 were all part of a "pre-ordained plan" and that accordingly, having regard to the principles

expounded in *W T Ramsay v Inland Revenue Commissioners* [1982] AC 300 and, more recently, in *UBS AG v Revenue and Customs Commissioners; Deutsche Bank Group Services (UK) Ltd v Revenue and Customs Commissioners* [2016] STC 934, we should consider particular steps in the plan, not in a vacuum, but in their proper context, as elements within a composite whole.

89. We accept that, in considering whether something was done "in respect of" a person, regard must be had to all the circumstances, including the overall context in which, in this case, the relevant payment was made. In doing so, we do not consider that it is necessary for reliance to be placed on the *Ramsay* principle or for us to find that all the steps were pre-ordained. Pre-ordination is not necessary in order to find that something is done in respect of something else, or a particular person. Even without two events or actions being pre-ordained, there may be a sufficient connection between the two to find that one was in respect of the other. It depends on the context and the circumstances of the individual case.

90. Section 160(2) applies where a payment has been made by a registered pension scheme either to or in respect of a member. Mr Davey did not seek to rely on pre-ordination to argue that, in reality, it had been Mr Clark and not LML who had been the recipient of the payment. He submitted that, on the evidence, that payment had clearly been in respect of Mr Clark, although it had not been made to him. To answer that question, in our view, all that is necessary is to have regard to all the circumstances.

91. For what is meant by "in respect of", Mr Davey took us to *The Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110, a case in the Supreme Court of Victoria, and to the judgment of Mann CJ, at p 111:

> "The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer."

92. That formulation was approved by Lightman J in *Albon (trading as N A Carriage Co) v Naza Motor Trading Sdn Bhd and another* [2007] EWHC 9 (Ch), at [27]. He held, also relying on *Tatum v Reeve* [1893] 1 QB 44, that "in respect of a contract" did not require the claim to arise under the contract; it requires only that the claim relates to or is connected with the contract.

93. The expression is not, as Mr Jones submitted, without limit. But the authorities make clear generally that the limitation is only in the requirement for some relationship or connection between the two subject-matters. The extent of the required relationship or connection depends on the context and the circumstances of the individual case.

94. The context in this case is the definition of unauthorised member payment in s 160(2) FA 2004. That was also the context, albeit of construction of a trust deed and not in relation to an assessment to tax, of *Dalriada Trustees Ltd v Faulds and others* [2012] 2 All ER 734, on which Mr Jones relied in arguing that the payment from

LML Pension to LML was not in respect of Mr Clark. In that case there was a challenge to the validity of certain beneficial loans made by a registered pension scheme on the basis that they constituted unauthorised member payments. The loans had been made under a "pensions reciprocation plan" (the PRP) operated by six pension schemes the purpose of which was to enable members to access their pension capital prior to retirement. A loan would be made by one Scheme (Scheme Y) to a member of another (Scheme Z), and the member of Scheme Y would receive a loan from another Scheme, not necessarily Scheme Z. Although there was reciprocation, in that the member of Scheme Y would receive a loan, neither the members nor the Schemes were "twinned" for this purpose.

95. It was held, by Bean J in the High Court, that the loans were unauthorised member payments as defined by s 160(2). But this was not because the loan made by Scheme Y was "in respect of" the member of Scheme Y. It was because s 173 FA 2004 treated an unauthorised payment as having been made to a member if an asset held for the purposes of the scheme was "used to provide a benefit" to the member. It was held, at [47], that this expression indicated that indirect causation was sufficient and that when Scheme Y (of which A is a member) made a loan to a member (B) of Scheme Z it did so:

> "… in the sure and certain hope that a corresponding payment is going to be made by scheme Z to A; the payment to B is 'used to provide' a benefit to A; and, on receiving that benefit in the form of the loan from scheme Z, A is to be treated as having received an unauthorised payment."

96. In determining that a loan made from Scheme Y to the member of Scheme Z was neither "to" nor "in respect of" the member of Scheme Z, Bean J accepted the submissions of counsel for one of the scheme members that, because of the absence of twinning, the making of a loan from one scheme was not a payment in order to "buy" a reciprocal loan in respect of a particular member of that scheme. The making of the loan could not be a payment in respect of an identifiable person. That, as Bean J recorded at [40], had been submitted to be significant because, in referring to a payment "in respect of a person", the FA 2004 requires there to be "a person" who can be identified to be made subject to the unauthorised payments charge (see s 160(6)(a) and s 208(2)(a) FA 2004). Since the loan only ever involved a payment to a person who was a member of a different scheme, it did not constitute an unauthorised payment.

97. We do not consider that *Dalriada* can assist Mr Jones. The essential point in *Dalriada* was that, absent twinning, the making of a loan under the PRP by one scheme could not be regarded as being "in respect of" an identifiable member of that scheme. In *Dalriada* there were six schemes with numerous members, each one limited to no more than 98. The essential degree of connection between the loan made to a member of another scheme and an identifiable member of the scheme making the loan was missing. In this case there is a single scheme for a single employee of LML. In this case there is a clear arrangement whereby, through planned stages, funds were extracted from the LML Pension Scheme, of which Mr Clark was a member or former member, into LML, of which Mr Clark was the sole employee,

moved by arranged means, whether by agreed dividend or an agreement for the purchase of a deferred annuity, to CIM of which Mr Clark was a director (and at the time both of the payment by LML Pension to LML and that from LML to CIM, the sole director), and from CIM, as had always been envisaged, and with little or no, or no genuine, formality, to Mr Clark by way of loan for his personal use, or to an investment firm that reported directly to Mr Clark.

98. Mr Jones argued that, notwithstanding this, the payment by LML Pension to LML was not in respect of Mr Clark: Mr Clark received no benefit from it, nor were the funds immediately under his control and able to be used for his own purposes. He submitted that the loans which Mr Clark received from CIM were not beneficial loans in the sense that they were made at a rate of interest which exceeded HMRC's official rate of interest at the relevant time. Mr Clark has to repay the loans in full, with interest, and now that the initial term of each loan has expired, a higher rate of interest has to be paid.

99. In support of this argument, Mr Jones referred us to *Billingham v Cooper* [2001] STC 1177, a case concerning loans made, interest-free and repayable on demand, by a non-resident trust to the settlor, and whether the fact of those loans being interest-free rendered the settlor liable, to the extent of interest at a commercial rate not paid, to capital gains tax on trust gains on the basis that, as provided by s 97(2) of the Taxation of Chargeable Gains Act 1992 ("TCGA"), the conferring of a "benefit" was treated as a payment, and thus as a capital payment to the settlor.

100. Mr Jones pointed to the fact that, in *Billingham v Cooper*, HMRC did not take any point that the receipt of the principal amount of the loan was a benefit. He argued that the case demonstrates that, as a general principle, the making of a loan at an arm's length rate of interest confers no benefit on the borrower.

101. We do not consider that any absence of benefit to Mr Clark by reference to the interest rate payable on the loans can assist the analysis. It is not necessary for there to be any benefit to the member of the scheme for a payment to be made "in respect of" that member, although if there is a benefit that would be a relevant circumstance. The question whether there is, or is not, a benefit becomes decisive, as it did in *Dalriada*, only in circumstances where something is done that would not be an unauthorised payment under s 160(2) FA 2004, and where reliance on the deeming provision of s 173 is required.

102. In any event, in considering whether Mr Clark benefited from the arrangements that were made, we do not consider that the question of benefit should be considered in the narrow sense of whether an arm's length or commercial rate of interest was payable. Although that might be the correct approach when construing a statutory provision, such as s 79(2) TCGA, which requires there to be a "benefit", consideration of the wider question whether a payment is in respect of a person demands a broader perspective on the impact of the payment on that person. That is a matter of consideration of all the circumstances and not interest rate comparisons.

103. We take the view that Mr Clark did benefit from the loans and from his access to the management of the funds. He benefited from no longer being subject to what he regarded were the investment constraints of the Suffolk Life SIPP. He benefited, as was one of his primary aims, from having direct access to the cash with which to make gains in his own name offsettable by his existing individual capital losses. He benefited from being able to borrow, on an unsecured basis, for the purpose of undertaking projects which, on his evidence, were unmortgageable and unbankable.

104. Nor, although we heard argument on the point, is it determinative whether or not Mr Clark had control over the funds in question. That is not a requirement of s 160(2). But we find that in practice he did have control. The corporate structure, including the Cedar Purpose Trust and the presence of Aston Court as a director of CIM, provided no more than a thin veneer of independent governance. The reality, as was demonstrated by the ease with which Mr Clark was able to extract funds from CIM by way of loan and to an investment manager reporting to him directly, was that Mr Clark could get what he wanted, when he wanted it.

105. We agree with Mr Davey when he submitted that the common thread running through all these arrangements, both as they were conceived and more particularly in the way they operated in practice, was Mr Clark himself. For the reasons we have given, we conclude that, were the LML Pension, contrary to our view, to have been a registered pension scheme and on the assumption that the transfer of funds from LML Pension to LML was a "payment", that payment was in respect of Mr Clark for the purpose of s 160(2) FA 2004.

"Payment"

106. That leads on to the question whether there was a "payment" in respect of Mr Clark. This question arises in two respects.

107. First, it arises if it is assumed that the LML Pension was a registered pension scheme. To the extent it was, and to the extent there was a payment by it to LML, we have found that the payment was in respect of Mr Clark. Leaving aside our conclusion that the LML Pension was not a pension scheme, and thus not a registered pension scheme, if the transfer of funds by the LML Pension to LML were a "payment", the conditions in s 160(2) FA 2004 would be satisfied, and the payment would be an unauthorised member payment.

108. In relation to the LML Pension, the issue arises in the following way. It assumes that the LML Pension is a registered pension scheme, and that the funds were properly held within that scheme, with no question of the trusts being void for uncertainty. Reliance is then placed on what is said to be the invalidity under s 91 of the Pensions Act 1995 of the surrender, in April 2009, by Mr Clark of his benefits under the LML Pension. That invalidity, it is argued, had the effect that the purported payment by the LML Pension to LML was in breach of the trust, and could not therefore have passed beneficial ownership to LML.

109. The basis on which the surrender was said to be invalid, which in the event was common to both Mr Jones (though we should note that he reserved his position should this case go further) and Mr Davey, was another aspect of the *LPA Umbrella Trust* case (to which we have referred earlier), an aspect which is binding on us. The judgment of Rose J concerned three preliminary issues. One, the Certainty Issue, we have considered above, in the context of the issue in this case of whether the LML Pension was void for uncertainty. Another was the Same Scheme Issue, described by Rose J, at [3], in the following way:

> "Does s. 91(5) of the Pensions Act 1995 (as amended) limit the exclusion from the general prohibition of s. 91(1) of surrenders for the purpose of providing benefits for the relevant person's widow, widower, surviving civil partner or dependants to surrenders where the new benefits are to be provided under the same scheme as the scheme providing the surrendered benefits?"

110. Put shortly, Rose J held that the answer to this question was: yes. By reference to the statutory history, Rose J concluded that the correct construction of s 91(5)(b)(i) of the Pensions Act 1995 is that the benefits to which that sub-paragraph refers (benefits for the surrendering person's widow, widower, surviving civil partner or dependant) must be benefits under the scheme, notwithstanding the absence in sub-paragraph (i) of express words "under the scheme" which appear in s 91(5)(b)(ii) (acquisition of further benefits for the surrendering person).

111. In this case no benefits were to be provided to Mr Clark's widow and dependants under the LML Pension. The funds were extracted from that scheme. Any benefits were to be provided by way of annuity through CIM, subject to the Estate Annuity Purchase Deed. On the basis of the *LPA Umbrella Trust* case, we find that the surrender by Mr Clark of his benefits under the LML Pension was invalid, with the consequence that the purported payment by the LML Pension to LML was in breach of trust.

112. The effect of that, in the absence of a bona fide purchaser for value or other equitable defences, is that the equitable, or beneficial, interest would remain in the LML Pension. We were provided with a copy of relevant passages of *Underhill and Hayton: Law of Trusts and Trustees* (from an online edition which we were told was the 19th edition). That confirmed at paras 99.13 and 99.14 that, in such a circumstance, the beneficiary could assert a subsisting equitable interest against property in the hands of even an innocent volunteer acting in good faith. However, as Lloyd LJ explained in *Independent Trustee Services Ltd v G P Noble Trustees Ltd* [2012] EWCA Civ 195, at [77] – [80], before he has notice of the trust interest an innocent volunteer recipient of trust assets transferred in breach of trust may mix the trust assets with his own and dispose of them freely despite the beneficiaries' continuing interest. The beneficiaries may then be able to trace the property or its proceeds through successive owners, subject to that not being contrary to equitable principles. Once an innocent volunteer has notice of the beneficiaries' adverse interest there is from that time no conceptual difficulty in calling him a constructive trustee. It is in those circumstances that the question arises whether the transfer of funds by LML Pension to LML is a "payment" for the purpose of s 160(2) FA 2004.

113. The second respect in which the "payment" question arises, having regard to our decision that the LML Pension is void for uncertainty and not a registered pension scheme, is in relation to the transfer of funds by the Suffolk Life SIPP to the LML Pension. There is no dispute as to the status of the Suffolk Life SIPP: it was at the material time a registered pension scheme. Mr Clark was a member of that scheme. Mr Jones also accepted that, to the extent there was a payment by the Suffolk Life SIPP to the LML Pension, that payment would have been in respect of Mr Clark. He acknowledged that the implication of s 164(1)(c) FA 2004, which excludes recognised transfers, and thus a transfer between pension schemes, was that such transfers were in respect of a member. It is also clear, in our view, that as a matter of fact the transfer of the fund was in respect of Mr Clark. As we have found, the trust deed establishing the LML Pension defined Mr Clark's interest in that fund as amounts which the trustees were to determine were attributable to him having regard, amongst other things, to "any transfers made to the Scheme *in respect of him*".

114. What is said in this regard, and subject to one point this was common ground, is that the consequence of the LML Pension being void for uncertainty is that the sums transferred by the Suffolk Life SIPP to the LML Pension were held on resulting trust for the Suffolk Life SIPP. The one point is that Mr Davey was disposed to submit that it was not possible, without findings as to the constitution of the Suffolk Life SIPP, to determine whether a resulting trust had arisen. We do not agree. It seems to us that the only requirement for a resulting trust to be established where a trust is void for uncertainty as to beneficiaries or as to the way in which the property is to be dealt with is that there should be no intention that the transferee should take the entire beneficial interest (*Underhill & Hayton*, para 8.34). That is not dependent on the transferor, if a trust, being in breach of trust.

115. Mr Jones' submission was that, in a case where a resulting or constructive trust had arisen on the transfer of funds or assets, that transfer could not be a "payment" within s 160(2) FA 2004. He submitted that to be a payment the transfer had to be a transfer of value; the transfer of a legal title was not sufficient. His argument was that the transfer had to be a beneficial transfer.

116. Although accepting that it was not an exhaustive definition, but merely an inclusive one, Mr Jones drew support from s 161(2) and the inclusion within the meaning of "payment" of "a transfer of assets and any other transfer of money's worth". By reference to case law which we will consider in a moment, he submitted that this was indicative that what is required for "payment" is a transfer of value. Mr Jones also referred us to s 279(2) FA 2004, which provides that in Part 4 references to payments made are to payments provided from sums or assets held for the purposes of the pension scheme.

117. The meaning of "payment" in a pensions context was considered by Arden J in the High Court in *Hillsdown Holdings plc v Inland Revenue Commissioners* [1999] STC 561. In that case, a pension scheme paid surplus assets to the employer subject to payment to the Revenue of tax under s 601 of the Income and Corporation Taxes Act 1988 ("ICTA") on a "payment" made to an employer out of funds held for the purposes of an exempt approved scheme. A complaint was made to the Pensions

Ombudsman by certain scheme members that the payment was in breach of trust and invalid. The complaint having been upheld, that decision had been affirmed by Knox J in separate proceedings. The employer company was directed to return to the pension scheme the net amount of the payments plus the tax on the payments, to the extent that tax was recovered from the Revenue.

118. The question arose whether, in those circumstances, the tax should be repaid on the ground that the fundamental quality of a "payment" under s 601 was that it had to be a real transfer of worth and that the section did not apply to a payment to an employer in breach of trust, which the employer was liable to repay. Mrs Justice Arden decided that the tax was repayable.

119. In her judgment, Arden J applied a purposive approach to the construction of s 601. She held, at p 571, that there was no reason in the case before her why Parliament should seek in s 601 to tax a payment which was not effectively made, and that the policy of the sections suggested otherwise. As counsel for the company had submitted, the purpose of the relevant provisions was to impose a tax on the employer if it received any benefit from funds which had been extracted from a pension fund. Those tax provisions assisted in the building up of a pension scheme, and the income was tax-free. When moneys were taken out of the scheme, s 601 in a rough and ready way reversed the benefit which the employer had received when the moneys were paid into the scheme. In the *Hillsdown* case, however, the employer received no such benefit.

120. In considering the wording of s 601, Arden J's reasoning may be summarised as follows:

(1) Tax was calculated on the amount if the payment was in cash. If the payment was in kind, it was paid on the value of the asset transferred. Subject to certain exceptions, there was no reason why the two types of payment should bear different rates of tax, and on that basis the payment would have to be a real payment.

(2) Section 606(6)(a) ICTA, which (we interpose) was in the same terms as s 161(2) FA 2004, used the word "transfer" in relation to a transfer of assets. The provision was not talking about a transfer of legal title, but to a real transfer of an asset. The use of the word "other" before "transfer of money's worth" supported this conclusion.

(3) One of the ways in which a surplus in an approved scheme could be reduced was by "making payments to an employer" (ICTA, Sch 22, para 3(3)(a)). A surplus could not be reduced by a payment which did not have the effect of transferring the equitable interest in the moneys to the employer. That indicated that such a payment was a transaction of substance, and the same meaning should apply to s 601.

(4) Further support was to be found in s 601(1) itself: the payment had to be "out of" the fund. Those words indicated that the payment must result in funds effectively leaving the fund as intended by the transaction (whether absolutely or for a period, as in the case of a loan). The words "out of" are not apt to

describe a payment which, contrary to the stated effect of the transaction, does not have the effect of changing the ownership of the monies paid and is in fact reversed.

121. Mrs Justice Arden did not consider that the court should attempt to find a comprehensive definition of "payment" for this purpose. As she held, at p 572, it was enough to say that the purported payments were, on the facts of the *Hillsdown* case, without substance. No beneficial interest passed and they had to be returned to the pension scheme. In those circumstances the purported payments were not really payments at all in the eyes of the law. In reaching that conclusion, Arden J referred to *Paton v IRC* [1938] AC 341, a case concerning whether interest had been paid by a borrower when it had been debited by his bank to a debit balance on his account. In that case Lord Macmillan had, at p 356, drawn a distinction between real and notional payments:

> "My Lords, it is a condition of a claim for repayment of tax on bank interest under s 36, sub-s 1 [of the Income Tax Act 1918], that the taxpayer shall have 'paid' to his bank the interest in respect of which he claims repayment of tax. In my opinion this means that the taxpayer must really, and not merely notionally, have paid the interest; there must be payment such as to discharge the debt; the payment must be a fact not a fiction."

122. Mr Jones placed reliance on both the conclusion and the reasoning in *Hillsdown*. He submitted that although *Hillsdown* was concerned with different legislation, it was essentially the precursor to the provisions at issue in this case, and the context was strongly analogous. He submitted that the legislative signposts and the policy of the provisions on which Arden J relied were also present, in materially identical terms, in those relevant to this case.

123. Mr Jones also relied on *Thorpe v Revenue and Customs Commissioners* [2009] STC 2108, in the High Court. In that case the taxpayer, who at the relevant time was the only employee of the company which had established a pension scheme, determined to wind down the company and retire. He withdrew the whole of the fund from the pension scheme. He was assessed to tax under s 600(1) ICTA on the basis that his withdrawals from the fund were in each case a "payment to or for the benefit of an employee, otherwise than in course of payment of a pension, being a payment made out of funds which are … held for the purposes of [an approved scheme]". HMRC also withdrew approval of the scheme, and the taxpayer was assessed under s 596A ICTA on benefits received under a non-approved scheme.

124. In the High Court, on appeal from the special commissioner, there were three issues before Evans-Lombe J. One was whether the rule in *Saunders v Vautier* applied, and if so its effect. The second was whether, under the rule in *Re Hastings Bass*, the fund could be reconstituted under the pension scheme by Mr Thorpe returning the moneys he had received with accrued interest to the control of the trustees. The third was an argument that, if the taxpayer failed on the first two issues, the tax charges amounted to double taxation, contrary to principle and A1P1 of the European Convention on Human Rights.

125. It was held that the rule in *Saunders v Vautier* did not entitle Mr Thorpe to call upon the trustees of the scheme to hand the fund over to him. It followed that his withdrawal of the fund was unauthorised. Nor was the rule in *Re Hastings Bass* applicable. However, Evans-Lombe J concluded, at [19], that when Mr Thorpe had acted as a trustee in sanctioning the withdrawals he had been committing a breach of trust. Accordingly, when Mr Thorpe received the payments he received them with notice of his own breach of trust and held the sum received as a constructive trustee for the fund. The proper analysis of the facts was that, notwithstanding that at the direction of a trustee the entirety of the fund had been paid out to a private account in the name of Mr Thorpe, a trustee, with the intention that it should become his property absolutely, property in the money comprising the fund never left the trusts of the scheme. If that conclusion was correct, neither a 596A not s 600(1) ICTA applied to the withdrawals.

126. Having heard further submissions, Evans-Lombe J decided on this basis, at [42], to allow the appeal of Mr Thorpe against the Revenue's assessment under s 596A, subject to being able to satisfy himself that the funds held by Mr Thorpe had been returned to the control of the original trustees of the pension scheme.

127. The focus of Evans-Lombe J in considering the further submissions was on the case of *Venables v Hornby* [2001] STC 1221, both in the High Court (Lawrence Collins J) and the Court of Appeal (Peter Gibson, Potter, and Chadwick LJ). That case concerned payments out of a pension scheme that were authorised to be made if a member had retired "in normal health". The taxpayer was assessed under s 600(1) ICTA on the basis that because the taxpayer had remained a director he had not retired for the purposes of the pension scheme rules. Both the special commissioner and Lawrence Collins J found that the taxpayer had retired, but Lawrence Collins J allowed the taxpayer's appeal on the basis that the special commissioner had been wrong to decide that the state of the taxpayer's health disentitled him to early retirement benefits. The Court of Appeal allowed the Crown's appeal, holding that the taxpayer had not retired. That conclusion was itself reversed by a majority of the House of Lords.

128. As well as arguments concerning his retirement and state of health, the taxpayer had also argued that if the payments to him had attracted tax under s 600, they would have been in breach of the terms of the pension scheme's trust deed and that, as the taxpayer was one of the trustees, he would have continued to hold the money as such and could not be said to have received anything in his personal capacity. That question did not arise in the High Court in view of Lawrence Collins J's conclusion on the retirement and normal health questions, but he went on to consider it *obiter*. Having referred to the judgment of Arden J in *Hillsdown*, and a case to the opposite effect, *R v IRC, ex p Roux Waterside Inn Ltd* [1997] STC 781, where there was an assessment to tax under s 591C ICTA, and in which Tucker J held that equity would not have imposed a constructive trust, since it was not a case in which property had been wrongfully transferred to a third party, Lawrence Collins J concluded, at [37]:

> "In this case, if the taxpayer, who was not only a member of the scheme, but also a trustee, had known, or should have known, that the

> payment was unauthorised by the terms of the trust, then he would have been accountable as a trustee. In such circumstances, the funds would have been recoverable by the trustees, and if they had been recovered, there would have been no effective payment to the taxpayer. I am of the view that if each and every one of the following conditions is fulfilled, then there is no taxable payment for the purposes of s 600: that the payment is in breach of trust, that the recipient is accountable to the trustees as an actual or constructive trustee, and that the recipient is able and prepared to account to the trustees. In those circumstances, I would accept that the rationale of the *Hillsdown* case applies, and I would follow it."

129. In the Court of Appeal, the retirement issue having been decided in favour of the Revenue, the question whether the payments had been made at all fell to be considered. The leading judgment was given by Chadwick LJ, with whom the other two Lords Justices agreed. Having summarised the decision of Lawrence Collins J on this point, Chadwick LJ said, at [27] – [28]:

> "[27] In my view, that argument was plainly untenable. Section 600 of the 1988 Act imposes a charge to tax in circumstances where (i) a payment to or for the benefit of an employee (otherwise than in course of payment of a pension) is made out of funds which are held for the purposes of an approved scheme and (ii) the payment is not expressly authorised by the rules of the scheme. In those circumstances the employee is chargeable to tax on the amount of the payment (whether or not he was the recipient of the payment). It is axiomatic that moneys or property transferred in breach of trust out of funds subject to a trust will, for so long as they are identifiable, continue to be subject to that trust until they come into the hands of a bona fide purchaser for value without notice of the equity to trace (see *Snell's Equity* (30th edn, 2000) para 13-41, p 340–341). To hold that there had been no payment because the moneys paid remained subject to the trusts of the scheme would be to defeat the obvious purpose of the taxing provision. It could not have been the intention of the legislature that the question whether or not a charge to tax arose under s 600(2) of the 1988 Act would turn upon an investigation whether or not there remained out of the moneys or property transferred some moneys or property which (into whoever's hands they might have come) were still subject to the trusts of the scheme.
>
> [28] The judge did not, I think, accept the argument in the stark terms in which it was advanced. But he would have been prepared to hold (had the point arisen) that there was no payment for the purposes of s 600 of the 1988 Act if three conditions were fulfilled: (i) that the payment was in breach of trust, (ii) that the recipient is accountable to the trustees as an actual or constructive trustee, and (iii) that the recipient is able and prepared to account to the trustees (see [2001] STC 1221 at 1243–1244, para 37). He found support for that formulation in the decision of Arden J in *Hillsdown Holdings plc v IRC* [1999] STC 561."

130. Chadwick LJ then summarised the reasoning of Arden J in *Hillsdown*, before distinguishing that case on the basis that, in relation to the charge to tax under s 601

ICTA whenever a payment was made to an employer out of an exempt approved pension scheme, such payments would normally be authorised by the scheme rules, and the unauthorised payment was likely to be the exception. By contrast, as Chadwick LJ observed at [33], the charge to tax under s 600 ICTA arose only where the payment was unauthorised and in breach of trust. He continued, at [33]:

> "… If an unauthorised payment is to be treated as no payment at all, the section is self-defeating. That cannot have been Parliament's intention. The judge in the present case sought to avoid that difficulty by identifying the three conditions which I have set out. But, to my mind, those conditions do not meet the difficulty. The first of those conditions—(i) that the payment was in breach of trust—is a restatement of the premise upon which a charge to tax under s 600 arises. The second condition—(ii) that the recipient is accountable to the trustees as an actual or constructive trustee—is likely to be satisfied in any case in which the recipient has not disposed of all the moneys paid to him before the breach of trust is brought to his knowledge; and it leads to the conclusion that he is not taxable in respect of the moneys of which he had disposed, but (potentially) is taxable in respect of those which he had retained. The third condition—(iii) that the recipient is able and prepared to account to the trustees—leads to the conclusion that the question whether or not a payment has been made depends on the state of mind (and the financial position) of the recipient after the event."

131. In reaching this conclusion, Chadwick LJ was applying a purposive construction to s 600 ICTA, identifying from its language and context the intention of Parliament. To illustrate this further, he went on to say, at [34]:

> "The point can be illustrated by an example. Suppose A receives a lump sum out of the scheme funds on 1 January. On 1 July it is discovered that that sum was paid in breach of the rules. A is not willing to accept there has been a breach of the rules, and wishes to take legal advice. At that stage, applying the judge's third condition, the payment is treated as a payment for the purposes of s 600 of the Act. On 1 October, after taking advice, A accepts that he should repay the moneys; but is not then in a position to do so. Again, applying the judge's third condition, the payment made on 1 January is still treated as a payment for the purposes of s 600 of the Act. On 1 December the Revenue make an assessment on A in respect of the moneys received in the previous year of assessment. Applying the judge's third condition, that assessment is properly made at the time. Six months later, on 1 June in the following calendar year, A receives a windfall and is then in a position to make repayment. He remains willing to do so. The effect of the judge's third condition is that what has been, for the previous 18 months, properly treated as a payment for the purposes of s 600 of the 1988 Act (and has given rise to a valid assessment to tax under that section) has ceased to be a payment for those purposes. And the position is the more bizarre if it is supposed that, on 1 September in the second year, before A has actually made any repayment, he falls on hard times (or finds some other pressing need for the money) and is no longer in a position to do so. Is the payment

> of 1 January once again to be treated as a payment for the purposes of s 600 of the Act? The judge's third condition requires an affirmative answer. I cannot believe that Parliament intended that the question whether a charge to tax has arisen should depend on the state of mind and financial position of the taxpayer after the event.”

132. Faced with this judgment of the Court of Appeal, Evans-Lombe J in *Thorpe* first considered whether it was binding on him. Although the conclusion on the “payment” issue had been necessary for that Court’s determination and consequently part of the *ratio decidendi* of the judgment of the Court of Appeal in *Venables v Hornby*, the reversal of that judgment by the House of Lords on the retirement point had meant that, taking the case as a whole, that part of the judgment of the Court of Appeal had not been part of the *ratio decidendi* of the case.

133. Evans-Lombe J decided not to follow the approach of the Court of Appeal in *Venables v Hornby*, but instead to follow that of Lawrence Collins J in the High Court. He explained his reasons for doing so at [34] – [35]. Referring to the construction of the relevant provisions which he would be bound to follow if he were bound by the Court of Appeal’s judgment, he said:

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

> pay. On this view, the result would have been the same if the building society had paid over the fund to Mr Thorpe, not at his request, but as a result of a mistake for which he was not responsible."

134. Although *Thorpe* went to the Court of Appeal, on the taxpayer's appeal, and the Revenue put in a respondent's notice in respect of those parts of Mr Thorpe's appeal that had been allowed by Evans-Lombe J, including the "payment" issue, the Revenue did not in the end pursue their cross-appeal.

135. Having considered the different conclusions reached by the High Court in *Venables v Hornby* and *Ingram*, and the Court of Appeal in *Venables v Hornby*, we have arrived at the clear view that it is the judgment of Chadwick LJ in the Court of Appeal that is to be preferred and that we should follow that conclusion of Court of Appeal in that case.

136. We respectfully consider that Lawrence Collins J was wrong, for the reasons given by Chadwick LJ, to apply the rationale of *Hillsdown* to the position in *Venables v Hornby*. As Chadwick LJ explained, *Hillsdown* is explicable by reference to the fact that it concerned a charge to tax on an employer under s 601 ICTA, which applied whenever a payment was made to an employer out of funds held for the purpose of an exempt approved scheme. Applying a purposive construction to that provision, as explained by Chadwick LJ, it could be concluded that, in the circumstances of the *Hillsdown* case, Parliament could not have intended the invalid payment to Hillsdown plc, in breach of trust, to be a "payment" within s 601.

137. The position is different in relation to unauthorised member payments, as in issue in this case. Such payments, being unauthorised, are likely to be in breach of trust, if the pension scheme is constituted as a trust. It cannot have been within the intention of Parliament to exclude from charge such a payment. The evident purpose of a provision such as that in s 160(2) FA 2004 is not to exact taxation on such payments but to deter the making of such payments in order to preserve the integrity of the fund within the pension scheme itself. That intention would be undermined if the incidence of taxation in respect of transfers out of a pension fund depended on whether, according to equitable principles, a resulting or constructive trust arose. It cannot, therefore, have been the intention of Parliament that s 160(2) should not apply to payments merely because the payer was entitled, under those equitable principles, to have the property transferred restored to it. Nor can it have been the intention of Parliament that the application of s 160(2) should depend on the willingness or the ability of a recipient of funds, such as Mr Clark, to restore value to the pension scheme.

138. Nor, although the corresponding provisions formed part of the reasoning of Arden J in *Hillsdown*, do we consider that the provisions of Part 4 FA 2004 relied upon by Mr Jones compel a different conclusion. The inclusion, by s 161(2) within the meaning of "payment" of transfers of assets and "any other transfer of money's worth" do not, in our respectful view, say anything about the wider meaning of "payment" more generally. That provision is one of extension, and not one of limitation. Nor can it be inferred from s 279(2) that payments made by a pension

fund must be transfers of value; s 279(2) merely describes the source of the payments and not their quality.

139. In our judgment, therefore, "payment" in s 160(2) FA 2004 includes a transfer of funds which, by reason of a breach of trust, or because the recipient trust is void for uncertainty, gives rise to a constructive trust or a resulting trust in favour of the payer, and is not dependent on whether or not the funds are recovered from the recipient or otherwise by tracing or any other means, or are recoverable, or on whether the recipient or any other constructive trustee is willing and able to restore those funds (and any profit derived from those funds) to the payer.

140. Our conclusion on the payment question, therefore, is that in the circumstances of this case,

(1) assuming that the LML Pension was constituted by a valid trust, the transfer of funds by LML Pension to LML in May 2009, although in breach of trust, giving rise to a constructive trust in favour of LML Pension, was a payment for the purpose of s 160(2) FA 2004; and

(2) the transfer of funds by Suffolk Life SIPP to LML Pension, which we have found was constituted under a trust void for uncertainty, although giving rise to a resulting trust in favour of Suffolk Life SIPP, was also such a payment.

Summary of conclusions

141. We have concluded:

(1) The trust constituting the LML Pension was void for uncertainty.

(2) The LML Pension was not a registered pension scheme within s 150 FA 2004.

(3) Consequently, the transfer of funds by LML Pension to LML in May 2009 was not a payment by a registered pension scheme and that payment was not an unauthorised member payment within the meaning of s 160(2) FA 2004.

(4) If, contrary to our conclusion at (2), the LML Pension was a registered pension scheme:

(a) the surrender by Mr Clark of his benefits under the LML Pension was invalid, with the consequence that the purported payment by the LML Pension to LML was in breach of trust and a constructive trust arose in favour of LML Pension;

(b) notwithstanding that, the transfer of funds by LML Pension to LML in May 2009 was a "payment" within the meaning of that term in s 160(2) FA 2004; and

(c) that payment was in respect of Mr Clark, a person who was, or had been, a member of the LML Pension.

(5) On the basis of our conclusion that the LML Pension was constituted under a trust which was void for uncertainty:

(a) the Suffolk Life SIPP was a registered pension scheme of which Mr Clark was a member;

(b) in respect of the transfer of funds by the Suffolk Life SIPP to the LML Pension on 21 April 2009, a resulting trust of those funds arose in favour of the Suffolk Life SIPP;

(c) notwithstanding that, that transfer of funds was a "payment" within the meaning of that term in s 160(2); and

(d) that payment was in respect of Mr Clark, a member of the Suffolk Life SIPP.

(6) Consequently, the transfer of funds by the Suffolk Life SIPP to the LML Pension was a payment by a registered pension scheme in respect of a person who was or had been a member of the pension scheme, and was not authorised by s 164 FA 2004. Accordingly, that payment was an unauthorised member payment within s 160(2) FA 2004.

Determination

142. By finding that there was an unauthorised member payment in respect of Mr Clark in the tax year 2009-10, we have determined the substantive issue in this case in favour of HMRC. Mr Clark is chargeable to both the unauthorised payments charge and the unauthorised payments surcharge. However, the question remains whether we should confirm the assessment.

143. In the rather exceptional circumstances of this case, that question is not one we consider we should resolve without further submissions. Although, in answer to a question from the Tribunal at the outset of the hearing, the parties confirmed that, notwithstanding that the assessment on Mr Clark had been a discovery assessment, there was no issue on the validity of the assessment itself, or the application of s 29 of the Taxes Management Act 1970, in the events which happened the nature of the substantive issue itself developed well beyond the pleaded cases of the parties. The original case had been concerned exclusively with the question of the application of s 160(2) FA 2004 to the transfer of funds by LML Pension to LML. In that respect we have found for Mr Clark. But in doing so, the issue of the initial transfer of funds from the Suffolk Life SIPP to the LML Pension fell to be considered, and it is in that respect that we have found in favour of HMRC, and in respect of which the chargeability of Mr Clark to tax has arisen.

144. Although we received some, fairly brief, submissions on the assessment question were we to find that the only unauthorised member payment was the transfer of funds from the Suffolk Life SIPP to the LML Pension, that was only one of the possible outcomes of our consideration of the case. In the circumstances, we should give Mr Clark the opportunity, should he be so advised, of disputing the validity of the assessment so far as it is said to relate to the transfer of funds by the Suffolk Life SIPP to the LML Pension, and in the light of the conclusions we have reached on the substantive issue.

Directions on assessment issue

145. We shall with this decision release directions to the parties for the purpose of enabling such submissions as they wish to make on the assessment question to be made.

Appeal rights

146. Until such time as the Tribunal releases its decision on the assessment question, or that issue is determined otherwise than by decision of the Tribunal, so that all issues in these proceedings are disposed of, or as the Tribunal may direct, the time for applying for permission to appeal under rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 shall not begin to run.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 12 SEPTEMBER 2016