TC05982

Appeal number: TC/2016/02000

INCOME TAX - registered pension scheme - unauthorised payments charge, surcharge and scheme sanction charge under ss 208, 209 and 239 Finance Act 2004 - were payments an authorised employer loan – no – were they made in error – no - meaning of payment - limit of Tribunal's jurisdiction - s 268 Finance Act 2004 - no reasonable belief - just and reasonable in all the circumstances to discharge liability – no - s 269 Finance Act 2004 - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AIM (PERTH) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: NOEL BARRETT

Sitting in public at George House, 126 George Street, Edinburgh on Thursday 27 and Friday 28 April 2017

Philip Simpson, QC instructed by Henderson Loggie, for the Appellant

Elizabeth Roxburgh, Counsel, instructed by General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal relates to two Notices of Assessment dated 22 January 2015 issued by the respondents ("HMRC") under section 255 Finance Act 2004 ("FA 04"). Those income tax assessments imposed the following charges:

(a) An unauthorised payments charge of £159,156.80 under section 208 FA 04.

(b) An unauthorised payments surcharge of £59,683.80 under section 209 FA 04, and

(c) A scheme sanction charge of £159,156.80 under section 239 FA 04.

2. The first two charges were imposed on the appellant in its capacity as sponsoring employer. The third charge was imposed on the appellant in its capacity as scheme administrator.

3. In terms of section 268 FA 04, the appellant applied to HMRC for the discharge of liability for the unauthorised payments surcharge and the scheme sanction surcharge and that was refused.

4. HMRC's decisions were confirmed by HMRC in a review decision dated 11 March 2016.

5. The Notices of Assessments were issued following an investigation by HMRC into two payments made to the appellant by AIM Developments Ltd Executive Pension Trust Fund ("the Pension Fund") on 6 and 13 October 2010 of £100,000 and £297,892 respectively.

6. The appellant lodged a notice of appeal with the Tribunal on 1 April 2016. The appellant subsequently complied with Directions of the Tribunal to lodge more detailed grounds of appeal. Those grounds of appeal did not include the substantive argument subsequently advanced to the effect that the payments were not made deliberately since an employee had not checked the relevant law.

Background Facts

7. We had the benefit of a brief Statement of Agreed Facts but the general factual background narrated under this heading was not in dispute.

8. Mr Andrew I Morrison ("Mr Morrison") is, and always has been, the sole shareholder, director and controlling mind of the appellant.

9. At all material times the sole member of the Pension Fund had been Mr Morrison. Mairi M R Morrison and Mr Morrison were Trustees of the Pension Fund at all relevant dates.

10. The commencement date of the Pension Fund was 30 March 1988. The Definitive Trust Deed of the Pension Fund was restated on 11 June 2001 and at that time the Pensioneer Trustee was NPI Trustee Services Limited. On 11 September 2007, that Deed was replaced and the scheme administrator was JLT Trustees Limited.

11. The appellant became the scheme administrator on 28 May 2008 and at an unspecified date JLT resigned, having been asked to offer a discount on its fees. On the relevant dates of 6 and 13 October 2010, the appellant was still the scheme administrator.

12. Mr Morrison has made no employee contributions to the Pension Fund so all funds are derived from employer contributions. The appellant was a sponsoring employer in terms of FA 04.

13. In or around 2010, the appellant was the holding company of AIM Developments Limited (which was a company trading as roofing contractors) and a number of other companies.

14. At all relevant dates the appellant has had an in-house accountant. Mr Stephen Glanas ("Mr Glanas") performed that role, initially on secondment, from September 2001. He was employed by the appellant from 1 May 2002. He was part qualified as an accountant. He had no specific qualifications in relation to pensions.

15. The Pension Fund made two interest bearing loans to the appellant in 1995 and 1998 and three further loans to the appellant and two associated companies in 2002. Those loans were documented and approved by the Pensioneer Trustee. The in-house accountant in post at the relevant dates liaised with the Pensioneer Trustee.

16. Since 28 May 2008, when the appellant became scheme administrator, and during the period with which we are concerned, Mr Glanas handled all matters relating to the Pension Fund. He was therefore responsible for compliance in that regard.

17. For approximately two decades, since the advent of electronic banking, Mr Morrison has delegated all financial matters to the in-house accountant.

18. The appellant had monthly management meetings to review trading and finances. Trading accounts were produced for those meetings and verbal reports discussed. Management accounts were subsequently produced.

19. The appellant banked with the Royal Bank of Scotland ("RBS") and in general had an annual review meeting each autumn. The 2009 review was delayed until spring 2010. Since at least 1994, RBS have held a Floating Charge over all of the assets of the appellant. There was also a Bond and Floating Charge and three Standard Securities were granted in 2007, 2008 and 2012.

The evidence and facts found in relation thereto

20. We heard from Mr Morrison whose oral evidence expanded upon his witness statement and, in the course of doing so, a number of inaccuracies and deficiencies therein were identified. There were also a number of discrepancies between the witness statement and the oral evidence and it was clear that Mr Morrison had been relying on recollection for both, rather than having checked information against source documentation. He had no clear recollection of a number of events to the extent that he initially suggested that the payments in question had been made in June 2010. His witness statement made mention of only one meeting with RBS but in oral evidence it transpired that there had been two meetings. That is consistent with other evidence.

21. In the spring of 2010, Mr Morrison and Mr Glanas met RBS for a routine review meeting with their Relationship Manager and his deputy. The appellant wished to extend the overdraft but RBS stated unequivocally that they would reduce the overdraft and replace it with term loans secured on properties. There was no scope for negotiation.

22. The appellant approached other lenders with no success.

23. In or about July or August 2010, at a further meeting with Mr Morrison and Mr Glanas, RBS finalised the details of their offer of funding and the level of overdraft. It was also made clear that the previously agreed level of return on the cash deposits of the Pension Fund was not going to be honoured.

24. Mr Morrison had told RBS, at one or both of the meetings, that he did not intend to retire until he was 65 and that he would therefore use the Pension Fund to help with the working capital and ease the debtor delays and creditor pressure. At that point the Pension Fund was entirely liquid and the funds were invested with RBS.

25. On leaving the summer meeting Mr Morrison, who was irritated by RBS, indicated in clear terms to Mr Glanas that he should "get the money out of that Bank" and into the appellant. In fact the funds were simply moved into the appellant's bank account with RBS on 6 and 13 October 2010.

26. In his witness statement he said that he had had a discussion with Mr Glanas about how the transfer should be structured and a loan was seen as the best way of easing cash flow and reducing expensive term loan interest. In his oral evidence he said that he did not really discuss matters with Mr Glanas.

27. Mr Morrison said that he was unable to explain why the money was only transferred in October or why it was in two tranches. He did explain that when he asked Mr Glanas to arrange the transfer, he assumed that it would be handled in the same way as the previous loans and that any necessary formalities would be correctly handled.

28. He said that although he had limited interaction, in his words "no rapport", with Mr Glanas, he had always found him to be very efficient, professional and meticulous.

In his words "I had complete faith in him." He did know that he had limited qualifications and had encouraged him to pursue qualifications but did not know if he had done so.

29. Mr Morrison stated that the transfer of the Pension Fund monies to the appellant had "not been on my radar". In his witness statement he had stated that "The thinking was before allocating security for the pension fund we had to wait for RBS to announce what term loan security they required." That was explored with him at some length. He conceded that he was aware that pension funds required security but he had not known the detail. In his words, at a subconscious level he had known that security would have to be "sorted".

30. He said that he did not know why security had not been arranged after the summer meeting when RBS had identified precisely what they required. He was aware that because there was a Floating Charge the consent of RBS would have been required for any security. He said that Mr Glanas had made no suggestions on security. Mr Morrison stated that the management of the monies from the Pension Fund was "not a high priority in my thoughts at the time".

31. He stated that he had been extremely busy in 2010 with issues in both his personal and business life. The trading conditions in 2010 were very difficult and that was exacerbated by the attitude of RBS. He had been "stretched" dealing with trading issues on many fronts and had not had the management time to check what the staff such as Mr Glanas were doing. He had relied on his staff, not least because he was only in Perth at most once per week. Staff had standing instructions to open mail, and emails, and deal with matters. If it was important, he expected paperwork to be scanned and sent to him. He expected things to be dealt with properly.

32. He assumed that the letter sent to him by the appellant's pension advisor in 2007 explaining the changes introduced by FA 04 had been opened by Mr Glanas and filed in the pension file on the basis that it was a "flier". He said that he had no recollection of seeing it before 2014.

33. There were no limits on Mr Glanas' authority in relation to financial matters and in particular he could move funds and take professional advice, as required. He would have been expected to have done so.

34. As far as the appellant's obligations as scheme administrator of the Pension Fund were concerned Mr Morrison had put no governance procedures in place but had relied on Mr Glanas. He stated that he himself had no involvement with the Pension Fund notwithstanding the fact that he was a Trustee and signed the accounts.

35. Mr Morrison was taken to the management accounts for the year ended 31 July 2011. He explained that he "was not the best at reading balance sheets". Mr Morrison explained that he had known that the funds had been transferred and he would have been told that verbally, although he conceded that it is in fact evident from the management accounts.

36. We have reviewed those accounts. Not only is the transfer totalling £397,892 absolutely clearly identifiable as having happened in October 2010 but the reason for that happening in October is equally clear. In September 2010 the bank overdraft stood at £452,987 and by October that had been reduced to £8,099. In both September and October 2010, of the appellant's balance sheet value of approximately £1.4 million, fixed assets amounted to marginally under £1 million. Accordingly, in September 2010 the overdraft accounted for almost all of the liquidity in the company and that was replaced in October 2010 by the Pension Fund monies.

37. Unlike the previous loans there was never any documentation.

38. The funds transferred were the whole assets of the Pension Fund in 2010. The statutory accounts for both the appellant and the Pension Fund disclose that £397,899 had been lent to the appellant at an interest rate of 3%. No interest was actually paid and the interest was accrued in the accounts.

39. In November 2011, when the auditors came to produce those statutory accounts they recognised that there was a major problem with the loan since it was not compliant with the statutory framework. Mr Morrison recognised the issue, took responsibility, since he had instructed the loan, and he then put in hand the rectification of the problem. He did not recall precisely who had done what and when but after negotiation with RBS, who instructed valuation reports, the group was restructured. Two properties were sold to the Pension Fund at market value, a formal loan agreement was executed between the appellant and the Pension Fund and Mr Morrison provided security over a property that he owned. The bank borrowings were also restructured. That was all achieved by the end of July 2012.

40. At no stage had the appellant itself been in a position to repay the funds outright.

The HMRC enquiry

41. On 21 September 2012, HMRC opened an enquiry into the appellant's tax return for the accounting period ending 31 July 2011. On 9 November 2012, the appellant's advisors, Henderson Loggie, wrote to HMRC stating in regard to the transfers from the Pension Fund that:

> "The transfer of funds…was considered by the company as a temporary measure. The company was in dispute with the bank…In order to keep the company out of financial difficulty and potential receivership, it sought, as a last resort, financing from the pension fund…".

42. Unsurprisingly, HMRC responded asking if the relevant conditions had been met in relation to the loans. On 18 January 2013, the response on that was:

> "At the time the money was borrowed…the consequences…were not understood or foreseen due to the lack of knowledge of the regulations and there being no professional pension advisor in place…the group's cash flow position was under severe pressure and this transfer was instructed to ensure the

> company was able to withstand this crisis for the benefit of employees, creditors and the economy generally…. With hindsight it was recognised that the informal loan of £397,892 inadvertently did not constitute an authorised payment under the legislation as it did not comply with all of the five conditions…".

It went on to explain the rectification measures.

43. The outcome of the investigation was the issue of the two assessments which have been appealed.

Appellant's submissions

44. At the heart of the appellant's argument has been the consistent assertion that the two transfers were accidental or inadvertent and therefore should not be treated as "payments" within the meaning of section 161 FA 04. The payments were made in genuine error and therefore should not be treated as unauthorised payments. Reliance was placed on the HMRC Guidance RPSM12101020 which indicates that HMRC will not treat inadvertent payments which are genuine errors as unauthorised payments. It is argued that the appellant assumed that any payments would be compliant with legislation and it was an accident that they were not.

45. If they were payments, it would not be "just and reasonable" in terms of section 268 FA 04 for the appellant to be liable to the unauthorised payment surcharge. The appellant always intended to comply with all legislative requirements.

46. The scheme sanction charge should not be imposed because the appellant had reasonably believed that the two transfers were not scheme chargeable payments and therefore it would not be "just and reasonable" for the appellant to be liable to the charge.

47. The legislation should be construed purposively and that purpose is

> (a) To enable pension funds to make loans to employers but only on commercial terms,
>
> (b) To ensure there are sufficient assets to provide for benefits payable to scheme members, and
>
> (c) To protect the integrity of the tax relief granted to payments into pension funds/prevent abuse of the tax relief by preventing any deliberate use of pension funds for purposes outside the scope of the legislation.

48. In this case there was simply an innocent administrative error in that Mr Morrison was relying on Mr Glanas to ensure that the formalities were completed, that error was rectified without undue delay once discovered and the only risk had been to Mr Morrison himself. There had never been any intention to abuse the Pension Fund.

49. If the assessments are upheld, the charges will equate to approximately 70% of the value of the Pension Fund although, of course, the charges would be borne by the appellant.

50. It is conceded that Mr Morrison is the controlling mind of the appellant but it is argued that he did not know that there had been no compliance with the legislative requirements until after the payments were made. He reasonably believed that no transfer would be made unless there was compliance.

HMRC's submissions

51. HMRC agree that in interpreting a statutory provision it is necessary to have regard to the purpose of the particular provision. The ultimate question is whether the relevant statutory provision viewed purposively was intended to apply to the transaction viewed realistically.

52. Whilst HMRC accept that there are limited circumstances where it could be concluded that a transfer from a pension fund was not, in essence and reality, a payment because it was an administrative error which was immediately rectified, that was not the case in this appeal. Further, the Tribunal has no jurisdiction beyond that set out in section 50(6) Taxes Management Act ("TMA")1970.

53. Simply put, HMRC's stance is that there was no compliance with the legislative requirements and, although there was no loss to the Pension Fund, nevertheless the funds were at risk due to the deliberate actions of the appellant.

Discussion

54. We had been provided with a substantial Bundle which, apart from the management accounts included correspondence, primarily with HMRC, and documentation relating to the Pension Fund. There was also included valuation reports (instructed by RBS, not the appellant) relating to the properties conveyed to the Pension Fund. We had a slim witness statement from Mr Morrison and his oral evidence.

55. Although initially we found Mr Morrison to be credible, we also thought that there was a great deal that he could not recall in any detail which was unfortunate given the discrepancies in the evidence. When we had the opportunity to reflect on the evidence, although there were some aspects in regard to which he was very transparent and straightforward, we were not convinced in regard to his credibility on other aspects.

56. Although he stated that he could not recall why the two transfers were made in October 2010, when we reviewed the management accounts and in particular the balance sheet, as we point out at paragraph 36 above, we can see that the appellant was under very significant financial pressure at that time.

57. Firstly, that explains why the correspondence with HMRC, excerpts of which we have produced above, referred to such pressures.

58. Secondly, we do not accept Mr Morrison's argument that working capital was just "stretched". In his oral evidence, Mr Morrison consistently underplayed the dire financial straits that the appellant found itself in in 2010. Notwithstanding the tenor of the correspondence that we have quoted above, he tried to argue that he had had a number of unspecified options available to him. He did suggest that bridging finance for him personally might have been accessible.

59. Without the injection of funds from the Pension Fund there was virtually no working capital and the appellant had 75 employees, and thus PAYE and NIC obligations, and interest to be paid to RBS quite apart from other creditors. We find that it would indeed have been facing receivership as the letter of 9 November 2012 stated.

60. We also had a problem with his explanation of the statement in his witness statement, to which we refer at paragraph 29 above, that although he knew, however vaguely, that pension funds needed to be provided with security that had to wait until matters had been resolved with RBS. Mr Morrison knew that the appellant had a floating charge in favour of RBS and it included all assets. Therefore, he having made the decision that he intended to use monies from the Pension Fund, would, or certainly should, have known that he needed to negotiate with RBS to release property, as in fact happened in 2012. He did not, and on the balance of probability that was because he knew that, since he was in what he described as a "take it or leave it" position, they would not release any property.

61. On the balance of probability, we find that the appellant did not have other realistic options. We do not accept that Mr Morrison would have been able to source bridging finance. We know that that has been a difficult and time consuming process for almost anyone since the banking crisis. The use of the Pension Fund was indeed a last resort and as Mr Morrison said in his letter of 20 February 2014:

> "The pension fund in totality is playing its part in propping up the…business…Any intent was to save the day…It was a personal sacrifice to support the business and 75 jobs…".

62. We do not accept that Mr Morrison only knew about the transfer of the funds after the event, as was argued on his behalf. As the foregoing paragraphs make clear, we find that he must have known that the appellant was in a perilous position when the overdraft facility was removed. It was not just "stretched" or "tricky" as he suggested. At the management meeting at the end of September, it must have been abundantly clear that without the Pension Fund monies, the business was in danger of going to the wall.

63. However, even if we had accepted that he was blissfully unaware of any of this, and we certainly do not since he has been in business for some thirty years and has a group of companies, he had instructed the transfer of the funds, he was the only person with the authority to do so and he expected his instructions to be implemented.

64. This was a transfer that was personally and corporately significant. Not only do we not accept that he did not know about the transfer until November, as was alleged in the course of the hearing, but we find that he instructed the two payments in October 2010 and that he did so in order to save the business.

65. It may well be that he did not know or understand the consequences. We do not know and do not attempt to guess. What we do know is that from the point in 2008 when the appellant became scheme administrator, no governance measures were put in place, and Mr Glanas received no training in order to discharge his new responsibilities.

66. We note Mr Morrison's assertion that having asked Mr Glanas to arrange for the transfer of funds he expected him to take advice on any implications. In order to take advice, he would need to be able to recognise that there was an issue. He was only part qualified and had no pensions expertise.

67. We do not accept that Mr Morrison was able to rely on the fact that Mr Glanas had dealt with three loans in 2002 and would do so in the same way. Firstly, at that time the Pensioneer Trustee would have handled the technicalities and secondly, by 2010 there was no such thing as a Pensioneer Trustee and the whole pension "environment", in terms of regulation, had changed significantly and that had been widely publicised.

68. Crucially, Mr Morrison's argument that he had innocently relied on Mr Glanas and he had been "let down" because he only discovered that the loan was not secured when the auditors looked at the loan is simply not credible. By his own admission he knew that security had to be put in place, he knew that RBS would not negotiate on that and he knew that as the sole possible signatory he had signed nothing.

69. Naturally, we were not referred to the case but as Lord Sumption stated in *Lowick Rose LLP (in liquidation) v Swynson Limited*[1] "The distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies as indistinguishable from themselves … is not the first businessman to make that mistake and doubtless he will not be the last." Of course we are in Scotland but the principle is the same. In our view that is precisely the situation in this matter. Mr Morrison viewed the Pension Fund, which his company administered, as being his to control. We find that he instructed the transfer of the funds to the appellant in the knowledge that the loan was, and would be, wholly unsecured.

70. It is not disputed that the two payments did not meet the statutory criteria. We do not accept the argument that they were made accidentally or as the result of an error. The letters from Henderson Loggie, from which we quote at paragraphs 41 and 42 above, set out the factual circumstances succinctly and accurately, other than that we do not accept that there was any inadvertence.

[1] 2017 UKSC 32

71. In any event, the legislation does not provide for relief in circumstances where payments are made in error. This Tribunal is a statutory body and a party must be able to point to a statutory provision which gives the Tribunal jurisdiction. Mr Simpson referred us to HMRC's Guidance in regard to errors and to Hansard reports relating to this legislation arguing that "the line should be drawn more widely" when deciding what constitutes an error and indeed a payment.

72. Whilst those documents are interesting, firstly, our jurisdiction in this matter is indeed limited to the terms of Section 50(6) TMA 1970 and that is to decide whether an appellant has been overcharged by an assessment. The legislation with which we are concerned deals with charges arising where a "payment" has been made (Section 161 FA 04). In this case there is no doubt that two payments were made. HMRC have made a policy decision not to apply the legislation strictly in certain very limited circumstances where payments have been made inadvertently, as their Guidance on errors makes explicit. HMRC find that there was no error in this case and have chosen not to exercise their discretion. That is their prerogative. We must apply the legislation.

73. Secondly, we agree with Judge Scott in *Eden Consulting Services (Richmond) Ltd v HMRC*[2] that questions relating to fairness or HMRC's use of discretion are not within the jurisdiction of the Tribunal.

Unauthorised payments charge

73. We find that both of the payments comprising the loan to the appellant were "a payment" for the purposes of the relevant charging provisions. It was not in dispute that they did not meet the statutory criteria. Specifically, the payments exceeded 50% of the value of the Pension Fund; no security was provided for the loan; the loan did not have a fixed term and there were no fixed repayment terms. The loan is therefore not an authorised employer loan in terms of section 179 FA 04 and the payments are indeed unauthorised employer payments in terms of section 160(4) FA 04. The unauthorised payments charge of £159,156.80 imposed under Section 208 FA 04 is upheld.

Unauthorised payments surcharge and scheme sanction charge

74. The burden of proof is on the appellant to establish that "in all the circumstances of the case it would not be just and reasonable for the person to be liable" to the surcharge and the scheme sanction charge. Both parties agreed that, when looking at the legislation, the purpose of that legislation must be kept in mind. That is well captured by the appellant in its arguments as set out at paragraph 47 above. In particular, the purpose of the legislation is to prevent "any deliberate use of pension funds for purposes outside the scope of the legislation". Unfortunately for the appellant that is precisely what happened in this case.

[2] [2016] UKFTT 0656 (TC)

75. As we set out above, the payments made did not comply with the requirements of sections 175 and 179 of FA 04. Further, it is certainly arguable that the allegedly commercial terms of the loan were not in fact commercial. The rate of interest was very low, there was nothing in writing relating to the loan and no payments of interest were actually made. There was simply an accrual in the accounts. At the time the payments were made the appellant was in financial difficulty. Accordingly the funds of the Pension Fund were at significant risk. We agree with the submission of HMRC that the payments were precisely the type of transaction that the legislation seeks to deter.

76. It was argued that the liability to pay the unauthorised payment surcharge ought to be discharged because there was ultimately no loss to the Pension Fund. That is not the point of the legislation. The deterrent in the legislation is to ensure that there is minimal risk to any pension fund.

77. Both parties referred us to *O'Mara v HMRC*[3] and we agree with HMRC that paragraph 162 is precisely in point. That reads:-

> "Examined objectively the purpose of the payments to the appellants was to circumvent the restrictions on the use of their pension funds which otherwise pertained. The effect was objectively to take money out of their pension funds where they could not normally and lawfully do so. This was the case irrespective of the appellants' intent…".

That is precisely the position in this appeal.

78. As far as the possible discharge of the liabilities for the unauthorised payments surcharge and the scheme sanction charge are concerned, the relevant sections are section 268(1), (3) and (7) FA 04 and those read:

> "268(1) This section applies where—
>
> (a) a person is liable to the unauthorised payment surcharge in respect of an unauthorised payment, or
>
> (b) the scheme administrator of a registered pension scheme is liable to the scheme sanction charge in respect of a scheme chargeable payment …
>
> (3)The ground is that in all the circumstances of the case, it would not be just and reasonable for the person to be liable to the unauthorised payment surcharge in respect of the payment.
>
> (7)In any other case the ground is that—
>
> (a) The scheme administrator reasonably believed that the unauthorised payment was not a scheme chargeable payment, and

[3] [2017] UKFTT 131 (TC

(b) In all the circumstances of the case, it would not be just and reasonable for the scheme administrator to be liable to the scheme sanction charge in respect of the unauthorised payment".

79. As we have set out above, we find that Mr Morrison knowingly instructed the payments. We do not accept the argument that the payments were made as a result of an innocent mistake and nor do we accept that Mr Morrison could, or should, have relied on Mr Glanas.

80. Further, the appellant had adopted the role of scheme administrator without ensuring that there was any level of internal competence to operate in that specialist area. We agree with Judge Cannan in *Willey v HMRC*[4] ("Willey") at paragraph 38 where he states:

> "It is implicit in this sub-section (268(7)) that the scheme administrators should have systems in place…".

There were no systems and no training in place. Judge Cannan went on to find that in the absence of having any system in place, there could be no reasonable belief. We agree.

81. A scheme administrator, such as the appellant, has a duty to safeguard funds and must take appropriate action to inform itself in order to do so. It is a very well established principle that "ignorance of the law is no excuse" and in order for a scheme administrator to properly discharge its function with an appropriate standard of care, systems and training are required.

82. Mr Morrison was aware that his advisers had the facility to offer pension advice and indeed he occasionally met with the gentleman in question. No professional advice was taken in this matter. In our view, that was because Mr Morrison knew that if funds were utilised from the Pension Fund then security would have to be provided and, on the balance of probability, that simply was not possible at that time at the level that was required.

83. We therefore find that there was no basis on which the appellant could reasonably have believed that the payments were not scheme chargeable payments. Indeed, given that Mr Morrison did know about the need for security, it is very likely that he did know that the payments were unauthorised payments. He took a risk, albeit he may not have understood the extent of the consequences.

84. In closing, Mr Simpson argued that this decision might turn on the argument that Mr Morrison expected Mr Glanas to take advice and to act on it. It does not. We have carefully considered all of the circumstances in this case and at the time that the payments were made. For all the reasons set out above, we do not accept that Mr Morrison did not know when the payments were going to be made or the reason for the timing thereof. We find that he knew precisely what he was doing and why. There was nothing inadvertent about these payments or the timing.

---

[4] [2013] UKFTT 328 (TC)

85. As Judge Cannan said in paragraphs 57 and 58 in *Willey* the scheme sanction charge, and in this case also the unauthorised payment surcharge, are

> "…there in part to act as a deterrent against unauthorised payments … and to ensure that the tax reliefs given to pension schemes accrue for the provision of retirement benefits to members. We are not satisfied that it is in any way unreasonable or disproportionate, either generally or in the specific circumstances of the present appeal … The charge is a broad measure designed to ensure that tax relief is available only in respect of retirement benefits within the limits set down by the legislation."

Although Mr Morrison may not have known the detail of the limits set down by the legislation, crucially he certainly knew that there was a need for security and we find that the appellant therefore knowingly disregarded the legislative provisions.

Conclusion

86. Accordingly, in all these circumstances we find that:

(a) The appellant had no reason to believe that the payments were not scheme chargeable payments, and

(b) It is just and reasonable for the appellant to be liable to the unauthorised payment surcharge and the scheme sanction charge.

87. The appeal is therefore dismissed in accordance with section 269(7) FA 04.

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

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2017