[2017] UKFTT 091 (TC)

TC05609

Appeal numbers: TC/2016/02496 & TC/2016/02498

Income Tax – Pensions – Bespoke Pension Trust - Unauthorised payment charge – Unauthorised payment surcharge – Sections 209, 268 and 269 Finance Act 2004 – just and reasonable in all the circumstances – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RORY O'MARA AND CHARLOTTE O'MARA **Appellants**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
MOHAMMED FAROOQ

Sitting in public at Birmingham Tribunal Service, Central City Tower on 9 November 2016

Gary Rooney, Rooney Tax Services, for the Appellants

Charles Bradley, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

With supplementary submissions from the appellant dated 21 November and 9 December 2016 and from HMRC dated 7 December 2016

DECISION

1. The appellants appeal against the decision of HMRC dated 9 February 2016 made pursuant to section 268 of the Finance Act 2004 to refuse to discharge unauthorised payment surcharges imposed upon them. The surcharges were imposed upon them in July 2015 at a rate of 15% pursuant to section 209 of the Finance Act 2004.

2. The issue for the tribunal to decide is whether it would not be just and reasonable for the appellants to be liable to the unauthorised payments surcharges.

The Facts

3. The tribunal received and considered bundles of documents from the appellants and HMRC together with witness statements from both appellants and Dr Christopher Dawkins. Charlotte O'Mara's witness statement was in very similar terms to that of her husband, Rory O'Mara. She did not attend to give evidence.

4. Rory O'Mara gave oral evidence and was cross examined at the hearing. Subsequent to the hearing, at the direction of the Tribunal, the appellants submitted further documents together with supplementary submissions to which HMRC replied.

5. The Tribunal finds the following facts.

6. The appellants are Mr Rory O'Mara and his wife, Mrs Charlotte O'Mara. Both were directors of Biz-Works UK Ltd ('Biz-Works' or 'the company') which was incorporated in the UK on 20 July 2005. They each held 50% of the issued share capital in the company. They remain the only directors with each holding 50% of the share capital until present. Biz-Works traded as Closed Bridging Finance (Biz-Works UK Ltd was taken over by Closed Bridging Finance Ltd). Mr Rory O'Mara was the managing director responsible for all aspects of the owner managed company. In particular, his role covered business development, sales, marketing, working with suppliers, managing customer expectations, FSA/FCA regulation compliance, underwriting loans and managing the loan book. The company changed its name to CBF Mortgages Ltd on 14 July 2015.

7. The company lent bridging finance/short-term loans to professional property investors. Investors borrowed funds from short-term lenders such as the company because mainstream banks would not lend quickly or at all if a property was in need of planning consent or lacked a bathroom or kitchen. The company worked with niche customers who needed access to funds quickly giving them a competitive edge. When the company's working capital had run dry the company borrowed funds from private investors to lend to their customers; this was by way of a loan note for a fixed loan rate and term.

8. The company also brokered loans (Bridging & Buy to Let Mortgages), when their funds ran dry. The appellants had been running Closed Bridging Finance as a

lender and broker since 2006. The company had a consumer credit licence and having successfully migrated to interim permission phase was fully authorised by the FCA for credit broking. Their compliance with the FCA was managed via Simply Biz.

9. Mr O'Mara first came across a Mr James Lau in 2009 following an email he received on 30 June 2009 from property auction news, a monthly magazine for property investors. The article invited readers to contact James Lau of Wightman Fletcher McCabe a firm of independent financial advisers who could help investors raise capital from their pensions.

10. As a bridging lender, under the appellants' company's brand ClosedBridgingFinance.com, Mr O'Mara thought it was worth researching the contact further as many of the company's clients may have wanted access to funds for property acquisitions. The solution put forward by Mr Lau appeared to be a potential source of working capital.

11. Mr O'Mara called Mr Lau and had a brief chat about the use of a Bespoke Pension Trust (BPT). Mr Lau said that he was open to work with new clients and he confirmed that he was a regulated broker working for Wightman Fletcher McCabe Ltd (WFM) which was a trading style of the Clarkson Hill group plc which was authorised and regulated by the Financial Services Authority (FSA).

12. The due diligence that Mr O'Mara conducted on Mr Lau at this time was to check that he was regulated by the FSA, by virtue of working for WFM who were a trading style of Clarkson Hill who were so regulated. He also conducted some basic internet search checks.

13. Wightman Fletcher McCabe Ltd was incorporated in the United Kingdom on 13 October 1997. It notified Companies House that it had resolved to change its name to WFM Management Services Ltd on 21 June 2011. At all material times James Lau was the 100% shareholder of WFM. Wightman Fletcher McCabe Ltd was registered with the Financial Services Authority and Financial Conduct Authority from 27 October 1997, but was never authorised in its own right. It was an appointed representative of an authorised firm until 26 October 2007.

14. On 1 July 2009 Mr Lau sent to Mr O'Mara an email confirming the costs of setting up the facility of a Bespoke Pension Trust together with details of introducer commissions. Mr O'Mara was happy to book the meeting with Mr Lau as Mr Lau was regulated by the FSA and authorised to discuss pensions and offer appropriate advice. The appellants arranged a face-to-face meeting in London on 13th of July 2009.

15. At this stage Mr O'Mara was interested in introducing the BPT facility to his company's clients and receive introducer commissions rather than to use a BPT for his own personal or business needs.

16. At that meeting on 13 July 2009 the appellants discussed the BPT with Mr Lau. Mr Lau provided a document entitled 'Using a Bespoke Pension Trust' together with a diagram to explain to the appellants how the scheme worked.

17. The document stated:

'Below is a brief summary for our Bespoke Pension Trust solution.

We establish for our clients, their own pension trust. All pension trusts must abide with current legislation and receive HMRC approval. They are also subject to annual audits by HMRC.

Correctly done, this pension trust can accept existing pension funds from other traditional pension providers (such as Prudential, Legal & General, to name a few). Once in this trust, the trustees have the ability to invest these funds into suitable commercial ventures for growth. It can also generate loans to existing trading companies on normal commercial terms.

As with any scheme the trustees have to make decisions about where to invest the funds.

For example, the trustees may decide to create a loan on a commercial basis to a trading company that invests in a business looking to take advantage of the current market conditions. Provided the loan is created in a compliant manner, it satisfies HMRC rules regarding loans and offers a commercial rate of interest, this loan could amount to the total size of the pension fund.'

18. Mr Lau explained the document orally at their meeting in July 2009. At the 2009 meeting Mr O'Mara was focussing on introducing the scheme to clients. It was only later, in 2010, that the appellants proposed to use the scheme personally to extract their pension funds to provide loans to their company.

19. The appellants relied on Mr Lau's assurances that the BPT scheme was lawful and compliant. Subsequently, when Mr O'Mara asked his pension providers about it they did not raise any issues with the scheme and proceeded to authorise the transfers of his pension funds. Mr O'Mara therefore assumed the BPT was compliant. He accepted in his oral evidence that the phrase within the document 'Provided the loan is created in a compliant manner…'' is conditional but Mr Lau told him the actions of the trustee had to be compliant.

20. Mr O'Mara believed therefore that the scheme was compliant because Mr Lau told him it was HMRC compliant and this was the main reason he decided to proceed to introduce the scheme to others and later use the scheme himself. Mr O'Mara had done some due diligence and checked that Mr Lau worked for a regulated firm. Mr Lau told Mr O'Mara that use of the scheme would not breach any rules on accessing pension funds. Mr O'Mara assumed he had asked Mr Lau if the scheme breached any rules. Mr O'Mara was broadly aware, like most people, that a person cannot access their pension until the minimum age of 55. The purpose of the use of a BPT for the appellants, when they later came to make use of it, was to draw down their pensions as a loan facility to fund their company.

21. Mr O'Mara does not know if he asked Mr Lau if he had received any legal advice as to the compliance of the scheme. The appellants did not see any legal

advice given to Mr Lau. Nor did the appellants commission or receive their own legal or accountant's advice on the scheme. Mr O'Mara did not refer the scheme to his own accountants as he would not go to an accountant for pensions advice. At the time, he was using a small firm of accountants and he would not necessarily have used them for tax advice.

22. Mr O'Mara did not believe Mr Lau to be giving him independent advice as an Independent Financial Advisor (IFA) as Mr Lau did not offer alternative products. With the benefit of hindsight Mr O'Mara accepted it would have made sense to get someone independent to look over the scheme but it did not concern him at the time.

23. Mr Lau explained to the appellants in July 2009 that the process of making pensions transfers would take approximately 30 to 60 days from inception and approved commercial loans being paid. He also explained that some percentage of the fund value would be invested in an FX trading facility which would generate the 5% loan interest required to satisfy a requirement of HMRC. Mr O'Mara did not understand the complexities of the relevant agency legislation but was assured that Mr Lau and his associates did fully understand it all and so he could rely completely on their expertise in the matter.

24. Mr Lau told Mr O'Mara how the fee structure worked. Mr Lau explained that some percentage of the fund value (about 17%) would be taken as fees and some would be invested in an FX trading facility which would generate the 5% loans interest required to satisfy HMRC of their requirements. These fees would generate the 5% interest on the loan.

25. For example, when the appellants later transferred their pensions to the BPT, WFM took fees of £15,445.43 from both appellants' pensions funds which had a gross value of £88,407.44 so that the net transfer from the BPT in a loan to their company was to be £72,962.01. The 5% interest on the loan would have to have been generated from the FX account. This would be about £3,600 interest per annum. Therefore, Mr O'Mara accepted that some proportion of the £15,445.43 in fees would have to go into the FX account but he did not know how much of the £15,445.43 in fees would have used to be to generate this 5% interest. In his oral interest Mr O'Mara could not say what percentage of the fees would be used to generate loan interest although his witness statement suggested that it was 5%.

26. Mr O'Mara accepted that a significant proportion of the fees would have to have been invested in the FX account to generate the loan interest. Even if all the fees were invested, which would be uncommercial for WFM, the FX account would have to generate an annual return of around 25% to create the loan interest. If half of WFM's fees had been invested in the FX account then the account would have to generate an annual return of around 50% to support the loan interest. Mr O'Mara did not think this suggested very high rate of return nor that the scheme was uncommercial. He knew people who traded currency and made great returns. He did not think the risk was too high to guarantee 50% return every year – he accepted that even a guaranteed 25% would be a great return. Mr O'Mara's oral evidence regarding this rate of return contrasts with the draft email which is set out below. In that email he calculated that a

300% rate of return was required if 5% of the fees were to be placed into the FAX account to generate the annual loan interest.

27. Mr O'Mara asked Mr Lau questions at the meetings. Mr Lau told Mr O'Mara he was confident he would make the returns. Indeed in May 2010, prior to transferring their pensions into the BPT, the appellants agreed to invest £10,000 into a FX trading facility with FGX which was another entity of Mr Lau.

28. Following the assurances from Mr Lau, who the appellants took to be an expert in such matters, and having established that he was working for a fully regulated firm of advisers, the appellants were happy to accept the arrangements Mr Lau set out were valid, lawful and fully tax compliant.

29. Following the meeting in July 2009 Mr O'Mara also agreed, as he had been convinced of the veracity of Mr Lau's assurances, that Mr O'Mara would be open to communicating with his clients about this facility and that potential customers could contact Mr Lau and his team. Mr O'Mara sent a mailshot on 27 July 2009 to his own customers providing details Mr Lau and the broad concept he put forward regarding the BPT.

30. Mr O'Mara did not produce the material relating to the July 2009 client mailshot as an exhibit to his witness statement. Nor did he produce it at the hearing of the appeal. At the hearing he stated he did not have access to the correct email server in order to produce the material to the tribunal. However he did agree, once pressed by the tribunal, that he could produce it. The Tribunal therefore directed he produce it subsequently. On 21 November 2016, the appellants produced a sample mailshot email dated 18 September 2009 together with the supplementary submissions and other documents. An extract from the mailshot email reads:

'Solution: There's a source of finance that belongs to you and you haven't even noticed it yet. Pensions don't have to be boring, learn how you can take control of your existing pension pot now. If you find that just investing in stocks and shares, cash or commercial property is not enough you then talk to us.

Learn how the wealthy and well-informed use their retirement. We have spoken to a company in the city who can do this. You tell them what your business ambitions are and let them show you how they can potentially make this happen. Seriously… This is completely unique and is above and beyond whatever you have heard about before with regards to pensions.

If you speak with our contact, they can even forward a simple diagram that explains everything.

You simply have to talk to James Lau of Wightman Fletcher McCabe Ltd about this. He's a great chap. Call and mention Closed Bridging Finance.

Kind regards

Rory O' Mara'

31. The wording of this email was arrived at through consultation between Mr Lau and Mr O'Mara.

32. Another draft and undated email from Mr O'Mara at Closed Bridging Finance to clients was titled 'CBF: Access cash in your pension'. It recommended use of the BPT on certain terms and stated 'We are not regulated to provide pension advice but act an introducer to a qualified IFA who can provide appropriate advice. If you are interested in this please confirm your information below and I can arrange for a colleague to call you'.

33. Mr O'Mara, through Closed Bridging Finance, stated that he was simply to act as an introducer for his clients to refer them to Mr Lau. He would expect his clients to seek their own advice. Mr O'Mara did not offer advice and would not advise. He would simply tell clients about individuals who would offer him an introducer commission. He would equally refer clients to mortgage or commercial finance brokers but he would not go into detail with clients when acting as an introducer – he was not authorised or qualified to give advice. Neither he nor his firm had insurance to offer advice. He would of course do the best of his ability to do gain some understanding of what was involved before introducing a product.

34. On 29 March 2010 Mr O'Mara had a conversation in which Mr Lau explained how the appellants could set up a BPT for their pensions. Mr Lau followed this up with an email. Having met Mr Lau and spoken to him repeatedly, the appellants decided that they could grow their business by setting up a BPT using their joint pension funds. The additional working capital of £72,000 would enable them to generate additional sales revenue and profit for their business. Mr O'Mara felt comfortable that Mr Lau had a reputable business, was an expert in the field and was comforted in the knowledge that he appeared to have successfully provided this service to many other clients.

35. On 22 September 2010 Mr and Mrs O'Mara agreed to proceed with setting up the BPT facility for their pensions. On the same date, Victor Ray at Whiteman Fletcher McCabe (WFM) emailed the application pack for them to complete. The pension scheme was a Salmon Enterprises UK pension scheme.

36. WFM confirmed that Tudor Capital Management Ltd (Tudor Capital) would be setting up and running the scheme as Trustees of the Salmon Enterprises Scheme. The additional member application form stated that the applicant would consent for Tudor Capital to obtain the details from the pension provider and requested Tudor Capital to provide the appropriate benefits as may be required from time to time. The form also include the following statement:

'I understand and agree that the managing trustee will not permit any investments or payments by the scheme which would result in the loss of HMRC registered status, that any such decision by the managing trustee is binding upon the trustees as a whole.'

37. On 27 September 2010 Mr O'Mara emailed Victor Ray copied to Mrs O'Mara and Mr Lau regarding their meeting the previous week. Mr O'Mara stated that he had contacted the relevant pensions providers and was awaiting the relevant transfer forms. He stated that once he had these documents, all information would be sent in one pack.

38. In the email he went on to provide the names of his pension firms and expected transfer values. The total was £77,181 with a cash transfer of 85% being £65,603, a cash balance at 15% being £11,577 and cost of the 1.5% Management Fee being £1,157 and amount traded on FX being £385. He stated: 'Assuming these are correct 1.5% (£1157) is required each year to pay for the management fees. 5% of this, £385 is traded with GFXI, this means we need a 300% return in 12 months to return £1157. A) Is this correct? B) Is this achievable?' It appears therefore that at the time Mr O'Mara did query the terms on which the interest on the loan was to be paid and whether it was commercial.

39. Based upon the assurances given to the appellants in September 2010 and those already received regarding the veracity of the arrangements, Mr and Mrs O'Mara were about to enter into, they agreed to arrange for their following personal pensions to be entered into the BPT as follows:

Contributor	Gross Pension Value	WFM fees	Net Transfer
Rory O'Mara	£69,750.97	£12,186.01	£57,564.96
Charlotte O'Mara	£18,656.47	£3,259.42	£15,397.05
Totals	£88,407.44	£15,445.43	£72,962.01

40. The BPT as to be a Salmon Enterprises pension scheme. Salmon Enterprises UK Ltd had been incorporated in United Kingdom on 7 June 2009 as BJ number 10 Ltd. It notified Companies House that it had changed its name to Salmon Enterprises UK Ltd on 20 August 2009. At all material times James Lau had been the 100% shareholder of the company. The company's accounts filed at Companies House indicated the company was dormant from incorporation through to being dissolved on 22 September 2015. The Salmon Enterprises UK Ltd pension scheme was registered with HMRC on 28th of August 2009.

41. It was explained to Mr and Mrs O'Mara that the process of setting up the BPT would take at least 3 to 6 months due to the volume of business being processed. All loan paperwork would be provided once the loan facility was approved by the trustees and then, if applicable, made available.

42. The appellants never received anything in writing to explain the fee structure. Their understanding comes only from what Mr Lau told him at the initial meeting in 2009. WFM's fees, at around 17% did not seem too high. The appellants felt it would be good for their company, Biz-Works, to access the loan from their pensions as working capital. Pension funds returns were low at the time and they could generate greater capital for their business. It was a way of getting working capital

into their company and they would receive £50-65,000 to fund their business. No bank would provide this overdraft facility. They did not consider it as a premium fee – they would lend on projects where 15% fees were involved.

43. As is set out above in relation to the July 2009 meeting, a proportion of the fee was to be traded in FX account to generate the loan interest. WFM did not go into the detail of how this was split and did not give them any paperwork on this topic.

44. Mr O'Mara did not find it strange or implausible that the lender itself would be paying the interest on the loan rather than his company as the recipient of the loan. He did not know if it made sense that the BPT, assuming it had all the funds including all of that used to generate the FX, used some of its other money to generate and pay interest when their company, receiving the loan payment, was not paying the interest. He accepted that the alternative scenario was that the money being used to do the FX trading went to Mr Lau as part of his fees – and he did not know if it made sense that the BPT was making an interest bearing loan to Biz-Works but Mr Lau was servicing the interest for which Biz-Works was liable. Mr O'Mara simply did not know the details of how this was to work.

45. With the benefit of hindsight the appellants might have gone to the individual pension providers to ask them about the scheme and the fees. However, if the pension providers had considered the scheme non-compliant he assumed they would not have made the transfers to Salmon Enterprises / Tudor Capital. The appellants felt the scheme and fees seemed fair and reasonable.

46. They were satisfied with the original BPT document which stated 'All pension trusts must abide with current legislation and receive HMRC approval. They are also subject to annual audits by HMRC'. Although the document does not say the BPT is HMRC compliant, James Lau had said it was.

47. However, the appellants did not receive any copies of the documents they completed and signed which authorised the transfer of their pensions to the BPT or the loan to be received by their company. They asked for copies but were not provided with these. Therefore at the time of signing up to the scheme, they had no paperwork. In particular they had no pension or trust documents or loan agreements from Salmon Enterprises or other documents detailing how the scheme was to operate other than those referred to above.

48. They did ask for copies of the signed paperwork, and in particular a copy of the loan documents, at the time of signing up to the BPT in September 2010. Mr Ray said he would give this to them. They followed the request with further phonecalls. It did not concern them at that time that they were not given copies of the corresponding paperwork.

49. The delays following September 2010 and into 2011 did however concern Mr O'Mara because wanted to know where his pension funds where and when his company would receive the loan from the BPT. Mr Lau had fallen into 'radio silence'.

50. Over the next few months from September 2010, progress was very slow. Mr O'Mara contacted Mr Lau to ascertain the reasons for this. Around the same time Mr O'Mara had heard from other people who were signing up with Mr Lau about their experiencing delays.

51. He did not perceive there to be any risk of the scheme being non-compliant. The closest he came to thinking of there being a risk was when he received an email about pension liberation in May 2011 as is set out below. With hindsight, he might have undertaken more checks but his prime concern was that Mr Lau's firm was regulated.

52. On 11 April 2011, unbeknownst to the appellants, the Pensions Regulator issued a determination notice under section 96 of the Pensions Act against Tudor Capital Management Ltd, the trustees of the Salmon Enterprises Scheme. The notice was of decision of 5 April 2011 continuing Tudor's suspension as a trustee of any trust scheme in light of the fact that a criminal investigation was being undertaken into its trustees, Peter and Alison Bradley and Andrew Meeson.

53. A later article in Pension Life identified James Lau of WFM as being the promoter of pensions schemes with Tudor Capital Management and stated that members never received any loan agreement or pension statement from either James Lau or the trustees – Tudor Capital. It stated Tudor had been the trustees of 25 schemes. Mr Bradley and Mr Meeson, were subsequently convicted of tax fraud in imprisoned in 2013. Mr O'Mara produced these documents to the Tribunal at the hearing but stated that he was not aware of these publications at the time and they post-dated his contact with Mr Lau.

54. In May 2011, there was some progress and WFM were then in the process of completing the necessary transfer forms. On 12 May 2011 Charlotte O'Mara emailed Patricia Barnett of WFM and regarding the transfer of pension forms for policies held by her and her husband with Aviva, Axa Sun Life, Virgin, Wyeth, Scottish Widows and Clerical medical.

55. On 22 June 2011 Mr O'Mara was made aware of a press article concerning regulated action connected to pension schemes and loans. He put this to Mr Lau and Mr Lau again assured Mr O'Mara that his services very different was fully compliant. Mr O'Mara's email to Mr Lau stated as follows:

"Hi James,

Just read this, thought you maybe interested.

[link to money marketing article titled 'investors warned over a deal to take a loan from pension']

kind regards

Rory

56. Mr O'Mara's oral evidence was that this email represented him checking with Mr Lau that the BPT was compliant. He had become aware of pension liberation schemes from reading this article and seeing other articles in the financial press. He wanted to check with Mr Lau that the BPT was not linked to these schemes. The article talked of loans and had some similarity to Mr Lau's scheme. He was concerned that other schemes had received sanctions from the pensions regulator.

57. Mr Lau replied half an hour later in the following terms;

'Hi Rory

Thanks for the links. Not our problem as our plans work entirely differently. However, all the more reason to stop email/web marketing and to vet clients more carefully. There is also a lot of misdirection you need to know how to handle as it is mostly different from our design. On both the above we really need to spend time with you to update our offering. We are planning a training session soon and would like to discuss your inclusion. Regards J'.

58. Mr O'Mara accepted that his email did not say he had a concern and in hindsight Mr Lau's email in return probably would not have given reassurance. However, Mr O'Mara and Mr Lau had a phone conversation at around the same time where he also raised these concerns and these were allayed.

59. At this point in time the appellants were raising concerns with Mr Lau about the delays in processing the loans. Mr Lau assured him it was as a result of sheer volume of work WFM was dealing with. The transaction was meant to take a few months but that was taking longer.

60. On 7 July 2011 Mr and Mrs O'Mara attended a meeting at Mr Lau's offices at Number One Poultry in the City of London. They wanted a status update on their BPT with an explanation as to the delay. Later that month they received contact from a mutual BPT client who was also not 100% happy with Mr Lau's communication. His BPT transfer was being delayed with limited expect explanation from Mr Lau. They were assured that WFM were busy with volume of work and all was in order.

61. Unknown to the appellants the actual transfers from each of their pension schemes to the Salmon Enterprises UK Ltd pension scheme for the following amounts had begun to be effected. The transfers took place on the following dates:

Mr O'Mara

20/6/11	Aviva	£7,409.68
21/6/11	Virgin	£13,156.59
22/6/11	Scottish Widows	£6,405.66
27/6/11	Clerical Medical	£14,092.63

01/7/11	Aviva	£21,558.88
07/7/11	Axa	£7,127.53
Total		£69,750.97

Mrs O'Mara

22/6/11	Scottish Widows	£4,902.66
15/08/11	Mercer	£13,753.81
Total		£18,656.47

62. On 19 December 2011, the first tranche of BPT loan was final received by Biz-Works UK Ltd (trading as Closebridgingfinance.com) but it came from Goswell Square Capital, not Salmon Enterprises. The appellants were expecting £72,962.01, however the sum received by their company at this stage was £24,962 only.

63. Victor Ray of WFM confirmed on the same day by email that this was the first BPT loan tranche. Loan paperwork was requested by the appellants from Victor Ray but never received. The appellants sent their own 'loan agreement' by post confirming the transaction for their own company's business records. This document, drafted by Mr O'Mara, recorded the borrower as Biz-Works UK Ltd and the lender as Salmon Enterprises (UK) Ltd Pension Scheme – Mr R. O'Mara and Mrs C. O'Mara. It was signed by Mr O'Mara on behalf of Biz-Works and addressed to Mr Ray of WFM. The document began 'We confirm receipt of the funds below from the BPT for the purpose of lending to property investors. Please confirm when the balance of funds will be sent.' They received no reply to this 'loan agreement'.

64. On 14 February 2012, the second tranche of BPT loan of £25,000 was received by Biz-Works UK Ltd. On this occasion it came from GG Blue Sky Ltd, rather than Salmon Enterprises. Again, loan paperwork was requested from Victor Ray but not received. Once again, the appellant sent by post their own loan agreement summary confirming the transaction for their company's business records in similar terms to that of 19 December 2011.

65. GG Blue Sky Ltd was incorporated in the United Kingdom on 10 December 2009 as BJ number 24 Ltd. It notified Companies House that it had changed its name to GG Blue Sky Ltd on 24 February 2010. Its shareholders were James Lau and Salmon Enterprises UK pension scheme. The company passed a special resolution to go into voluntary liquidation on 17 September 2013.

66. On 9 March 2012, the third and final BPT loan tranche of £22,990 was received by Biz-Works UK Ltd again from GG Blue Sky Ltd. Again, loan paperwork was requested from Victor Ray but not received. Mr O'Mara sent by post his own 'loan agreement' summary confirming the transaction in similar terms to the earlier two except it concluded 'We have received all funds from the trust as loans as of today'.

67. The three 'loan agreements' recorded Salmon Enterprises as the lender when the funds had been received from Goswell Square Capital and GG Blue Sky Ltd.

68. The documents were drawn up by Mr O'Mara as he had received no contact from Mr Ray or Mr Lau. Mr O'Mara did not speak to GG Blue Sky or Goswell Square Capital who actually provided the funds. He never received any formal loan agreement from these companies nor from Salmon Enterprises.

69. The total loans received by the appellants' company was £72,952. All loans were paid into the appellants' trading company and not the appellants' personal accounts as directors of the company.

70. After they received the loan funds, the appellants again tried to contact Mr Lau and his team. Mr O'Mara made repeated phone calls for the loan paperwork but none was ever received. Introducer fees were not paid and the appellants decided not to pursue Mr Lau any further.

71. The funds received from the BPT were only intended to be used as working capital by the appellants' company, enabling bridging loans to be made to customers. The funds are still shown as liability in the books and accounts of the company and can be returned to the pension fund. However the appellants were unable to return the payments to Salmon Enterprises and its trustee Mr Lau owing to the dissolution of that company and the inability to contact Mr Lau.

72. On 24th of December 2012 both appellants delivered self-assessment tax returns for the year ending 5 April 2012 to HMRC.

73. On 6 March 2015 HMRC made a discovery assessment against Mrs O'Mara for £10,905.39 for the tax year ending 5 April 2012 on the basis that, following a change in her pension arrangements, she received payments from Salmon Enterprises UK Ltd pension scheme. The assessment was based on 55% of the value of the payment which comprised a 40% unauthorised payments charge and an unauthorised payment surcharge of 15%.

74. On 10 March 2015 HMRC made a discovery assessment against Mr O'Mara for £38,363.03 for the tax year ended 5 April 2012 on the basis that, following a change in his pension arrangements he had received payments from Salmon Enterprises UK Ltd pension scheme. The assessment was based on 55% of the value of the payment, which comprised a 40% unauthorised payments charge and an unauthorised payment surcharge of 15%.

75. Mrs O'Mara appealed against her assessment and provided further information about the amount actually transferred to Salmon Enterprises and the subsequent loans made to her company, Biz-Works Limited. Mrs O'Mara contended that the funds were transferred to Salmon Enterprises to allow her pension to be used for the purposes of providing working capital for Biz-works Ltd.

76. Mr O'Mara appealed against his assessment in a letter dated 26 March 2015 and provided further information about the amount transferred to Salmon Enterprises and

the subsequent loans made to Biz-Works. Mr O'Mara also contended that the funds were transferred to Salmon Enterprises to allow his pension to be used for the purposes of providing working capital for Biz-works Ltd.

77. On 26 March 2015 Mr O'Mara finally managed to contact Mr Lau by telephone. Mr Lau said that he could not help and it was a matter for HMRC and Mr O'Mara needed to speak to Morag Collins of Cobham Murphy, Chartered Accountants, for assistance in dealing with HMRC. Mr Lau said he would email Mr O'Mara. Mr Lau gave Mr O'Mara little indication of what was happening with the BPT – he mentioned there were major problems and some of the trustees had gone to jail.

78. The appellants subsequently received an email stating that they would need to pay Ms Collins £500. At that point Mr O'Mara thought Ms Collins would not be the right person to speak to and he would not pay this sum. That is when he sought the advice of his current tax advisor.

79. Mr O'Mara would not have entered into arrangements of a suspect nature. At the time the appellants trusted the fact that Mr Lau was regulated and that his firm was regulated. Mr O'Mara checked on the FSA register that Clarkson Hill Plc was regulated and he was happy with this.

80. On 11 June 2015 HMRC responded to the grounds of appeal both appellants.

81. On 10 November 2015 Mr and Mrs O'Mara submitted an application to discharge the unauthorised payment surcharges. These applications were made under section 268 of the Finance Act 2004. These applications were refused by HMRC on 9 February 2016 and the appellants appealed this on 16 February 2016.

82. HMRC responded to these appeals on 17 February 2016.

83. On 18 March 2016 review conclusion letters from HMRC were issued to the appellants.

84. Mr O'Mara's assessment was varied to £31,663.35 based on the amount of the unauthorised payment being £57,569.74 which was received by the company Biz-Works Ltd following the transfer of £69,750.97 from his authorised pension schemes to Salmon Enterprises. The assessment was 55% of the unauthorised payment – being 40% in unauthorised payment charge and 15% in unauthorised payment surcharge (£8,635.46).

85. Mrs O'Mara's assessment was varied to £8,460.24 based on the amount of the unauthorised payment being £15,382.26 which was received by the company Biz-Works Ltd following the transfer of £18,655.47 from her authorised pension schemes to Salmon Enterprises. The assessment was 55% of the unauthorised payment – being 40% in unauthorised payment charge and 15% in unauthorised payment surcharge (£2,307.34).

86. The review letters stated that in HMRC's opinion and in all the circumstances of the case it was just and reasonable for HMRC to raise the surcharge.

87. The letters acknowledged that the appellants had given explanations that they were misled by Mr Lau and his associate who they understood to be regulated pensions and taxation experts. The appellants said they had trusted the veracity of the advice they had received. They said they did not seek to circumvent any tax obligations and they were convinced that what they were doing was compliant with HMRC guidance and law.

88. However, HMRC decided that the facts of the case indicated that payments were paid to the appellants' company from their pension funds. HMRC concluded that the payments were generated by a scheme designed to liberate pension funds. HMRC also considered that they took part in a pension liberation scheme with a view to obtaining funds that were unauthorised as per part 4 of the Finance Act 2004. It was their view that in all the circumstances of the case unauthorised pension surcharges were just and reasonable.

The law

89. HMRC raised the tax assessments under the 'discovery' provisions of section 29 Taxes Management Act 1970 as an officer of the HMRC had discovered that an amount that ought to have been assessed to tax had not been assessed and raised an assessment to make good that amount. These discovery assessments have now been accepted by the appellants and no longer are under appeal.

90. Sections 160 and 164 of the Finance Act ("FA") 2004 deal with payments which a registered pension scheme (being a pension scheme as defined in section 150 FA 2004 which is registered under Chapter 2, FA 2004) is authorised to make to or in respect of a member of the pension scheme. A payment made by a registered pension scheme to or in respect of a member which is not authorised by section 164 is an 'unauthorised member payment' – see: section 160(2)(a) FA 2004.

91. Section 161 of FA 2004 provides that a payment made to a person connected with a person is a payment made to them. Loans are payments for the purpose of section 161 of FA 2004. The appellants' company is a legal person and they control that company. Therefore the loan payments to Biz-Works Ltd are treated as payments to the appellants.

92. Section 164 FA 2004 lists various payments which a registered pension scheme is authorised to make:

(1)] The only payments 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—

(a) pensions permitted by the pension rules or the pension death benefit rules [to be paid to or in respect of a member] (see sections 165 and 167),

(b) lump sums permitted by the lump sum rule or the lump sum death benefit rule [to be paid to or in respect of a member] (see sections 166 and 168),

(c) recognised transfers (see section 169),

(d) scheme administration member payments (see section 171),

(e) payments pursuant to a pension sharing order or provision, and

(f) payments of a description prescribed by regulations made by the Board of Inland Revenue.

93. Payments include 'recognised transfers' (see: section 164(1)(c) FA 2004). A 'recognised transfer' is defined in section 169 FA 2004 as being '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' another registered pension scheme, in connection with a member of that pension scheme.

94. By section 169 (1B) FA 2004, HMRC may by regulations provide that where sums or assets transferred represent an original scheme pension, the transfer is not a recognised transfer 'unless those sums or assets are, after the transfer, applied towards the provision of' a new scheme pension'. HMRC has, by regulation 3 of the 25 Registered Pension Schemes (Transfer of Sums and Assets) Regulations 2006 (SI 2006/499), made such a regulation, and by regulation 3(2) of those Regulations it is provided that if the sums or assets are so applied, the new scheme pension is to be treated as if it were the original scheme pension for stated relevant purposes.

95. The legislation sets out the payments which are authorised and any payments not listed are consequently unauthorised (section 160).

96. The legislation seeks to protect the generous tax reliefs given to contributions and build up of tax exempt funds with a view to the members receiving a taxable pension when they come to take their pension benefits at retirement.

97. In this appeal the payments received by the appellants in loans to their company are not listed as authorised payments and therefore they are subsequently classed as unauthorised payments. There is no dispute about this – the appellants latterly accepted this. It is not at issue in the appeal.

98. Section 208 FA 2004, as already indicated, imposes a charge to income tax, to be known as the unauthorised payments charge, to which, in the case of an unauthorised member payment, the person in respect of which the payment is made is to be liable (section 208(2)(a) FA 2004). The rate of the charge is 40% (section 208(5) FA 2004).

99. The FA 2004 also provides that an unauthorised payment (which includes an unauthorised member payment) may also be subject to the unauthorised payments surcharge under section 209 (see: section 208(7)(a) FA 2004).

100. Section 209 FA 2004 imposes a charge to income tax, to be known as the unauthorised payments surcharge, where a surchargeable unauthorised payment (which includes a surchargeable unauthorised member payment) is made by a registered pension scheme. The rate of the surcharge is 15% (see: section 209(6) FA 2004). It is chargeable on the member where the unauthorised payment represents 25% or more of the members' rights under the scheme. In this instance the unauthorised loan payments to Biz-Works represented the whole of the total pension funds invested in Salmon Enterprises. It also represented 80% of the appellants' funds invested in their original pensions schemes as the only other payment was in WFM's fees.

101. In the case of unauthorised member payments, the surcharge applies only if 'the surcharge threshold' is reached within 12 months after a 'reference date' (section 210 4 FA 2004). The first 'reference date' is the date on which the pension scheme first makes an unauthorised member payment to or in respect of the person concerned (section 210(4) FA 2004). The 'surcharge threshold' is reached, in effect, when 25% of the pension fund is used up by unauthorised member payments.

102. As already indicated, a person liable to the unauthorised payments surcharge may apply to HMRC for the discharge of that person's liability to the surcharge on the ground that 'in all the circumstances of the case, it would not be just and reasonable for' that person to be liable to the surcharge in respect of the payment giving rise to it (section 268(2) and (3) FA 2004).

103. Where HMRC decide to refuse an application made under section 268 (as in this case), the applicant may appeal to this Tribunal against that decision (section 269(2) FA 2004).

104. The Tribunal's function on that appeal is to consider whether the applicant's liability to the surcharge ought to have been discharged (section 269(6) FA 2004). In other words, this Tribunal has a full appellate jurisdiction in the matter.

105. In *Stephen Willey v HMRC* [2013] UKFTT 328 (TC) Judge Canaan considered unauthorised employer payments under the Finance Act 2004 in the following paragraphs of his decision:

> 6. FA 2004 contains a prescriptive regime in relation to the payments that registered pension schemes are authorised to make and the consequences of unauthorised payments. The rationale is to ensure that the tax reliefs and exemptions in respect of contributions to registered pension schemes are available only to the extent that the pension schemes genuinely make provision for the benefit of members on retirement, subject to various statutory limits. The compliance regime and reporting requirements set out in FA 2004 are directed towards the same end.
>
> ……
>
> 35. HMRC submitted that one of the reasons for the tax charges which arise where a pension scheme makes unauthorised payments is to safeguard the tax relieved funds in the scheme for the provision of retirement benefits. In relation to loans the provisions seek to

ensure that funds are not loaned in circumstances where there is a risk they might not be repaid. We accept that submission.

……

56. We note that the total charge to tax in relation to an unauthorised employer payment is 55% comprising the 40% charge on the employer and the reduced 15% charge on the scheme administrator. It is notable that the 40% charge is on the recipient of the payment, rather than on the Scheme. The total charge is the same level of charge which arises where funds are paid out of a scheme on the death of a member or where the lifetime allowance is exceeded. Both parties agreed that the 55% charge is a broad measure by which the tax relief on contributions and tax free growth are recovered. In that sense, the scheme sanction charge, being part of an overall charge of 55% does appear to be a charge to tax rather than a penalty.

57. In the event however we do not need to determine whether the scheme sanction charge is properly to be viewed as a charge to tax or a penalty for the purposes of the Convention. We do not consider that on any view it is disproportionate, still less that it is devoid of reasonable foundation and outside the wide margin of appreciation enjoyed by Parliament. As Mr Clarke submitted the charge is there in part to act as a deterrent against unauthorised payments. It seeks to protect the assets in pension schemes 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. In reaching this conclusion we consider that the factors referred to above in the context of relief under section 268 are equally applicable in testing the proportionality and reasonableness of the charge for the purposes of Article 1.

106. *In Peter Browne v HMRC [2016] UKFTT 595 (TC)* Judge John Walters QC held that payments received by a taxpayer from two pension providers were unauthorised member payments chargeable to tax at 40% under section 208 FA 2004. However, the appellant's intention to transfer the pension funds to another pension scheme, which he put into effect three years after receiving the payments, justified the quashing of the unauthorised payments surcharge which had been imposed by HMRC. At paragraphs 70 to 71 of the decision the Judge stated:

70. In the context of deciding whether, in all the circumstances of the case, it would not be just and reasonable for Mr Browne to be liable to the unauthorised payment surcharge in respect of the payments by the Pearl and Scottish Life, we consider that we should have regard to the discernible purpose of the surcharge.

71. We consider that the purpose of the surcharge is to penalise unauthorised payments where they are made in order to frustrate the purposes of the pension scheme tax regime and abuse its tax reliefs and exemptions. Where, as we consider is the case with these appeals, the unauthorised payments were not made for that reason, and the funds concerned remain vested in a registered pension scheme (albeit with a three year interlude under the personal control of Mr Browne), we find, having considered all the circumstances, that it would not be just and reasonable for Mr Browne to be liable to the unauthorised payment surcharge in respect of the payments by the Pearl and Scottish Life, and we so decide. Among the circumstances relevant to our decision is the fact that at least some of the three year delay was caused by Mr Browne's anxiety and HMRC's criminal investigation into the matter.

107. Extracts from the background notes to clauses 197 and 255 of the Finance Bill 2004, forming part of the explanatory note, state as follows:

Clause 197

…….

12. This Part of the Finance Bill imposes four new tax charges on funds held by, or payments made out of, registered pension schemes in certain circumstances. These charges are intended to prevent abuse by the scheme administrator, any member or any employer sponsoring the scheme of the benefits obtained from the tax relief provided to such schemes.

13. Registered pension schemes will benefit from tax relief on contributions made into the scheme and on income or gains made on investments held within the scheme. Where a registered pension scheme does not comply with the requirements of this part of the Act a charge will be imposed on any scheme funds that cease being held by a registered pension scheme. The effect of that charge is to remove the tax benefits received on that fund or that part of it that is removed from the scheme.

14. These charges are the: · unauthorised payments charge 197; · unauthorised payments surcharge 198; · scheme sanction charge 228; · de-registration charge 231.

15. The "unauthorised payments charge" will impose a tax charge on any scheme member or sponsoring employer who receives a payment or benefit from the scheme that is not authorised by this part of the Finance Act. That person will be liable to a charge, based on the amount of the payment received by them, or paid to another person for that member or employer's benefit. The rate of tax is at 40%.

16. The "unauthorised payments surcharge" is a further tax charge, paid in addition to the unauthorised payments charge. It can be imposed where the value of the payment was 25% or more of the fund value. The unauthorised payments surcharge will be 15%, bringing the total tax charge to 55%, to reflect the higher level of tax relief likely to have been received on such a large amount of the scheme's fund.

……

Clause 255

1. This clause provides an opportunity for a person or a scheme administrator to apply to the Inland Revenue for discharge from their liability to pay either the unauthorised payments surcharge or the scheme sanction charge (as appropriate) in a case where it would not be just and reasonable to impose it.

……

11. Under the new tax regime for pension schemes, the Government wishes to set out clear and unambiguous rules in legislation, including instances where tax charges and surcharges fall due. However, there may be cases where it would not be just nor reasonable to impose such charges. This Clause allows for the person or scheme administrator to be discharged from liability to pay the charge or surcharge where in all the circumstances of the case it would not be just and reasonable to impose it. This allows for a flexible approach where justified.

…….

Submissions

Appellants

108. Mr Rooney submitted that the appellants disagree with any assertion that they intended to take part in a pension liberation scheme. They believed they were transferring funds from their existing lawful pensions schemes to another lawful pensions scheme. Mr O'Mara believed the new pension was, like a Self Invested Personal Pension (SIPP) and that the capital in the BPT could be loaned to his company and paid back into their pension fund in due course. Their treatment of the funds in their accounts accords with that belief. They simply do not know where to return the sums but they remain accounted for as loans.

109. Mr Rooney submitted the Tribunal should be careful not to examine the case with the benefit of hindsight but examine the beliefs, understanding and actions of the appellants at the relevant time. The appellants took advice and information from a fully regulated advisor and at the time they believed a seemingly qualified advisor that this was the case. They did check the credentials of the advisor. A lot of people who found themselves in similar position of the appellants and were taken in by the advice that Mr Lau was giving.

110. He submitted that the appellants made sure they took reasonable steps and conducted due diligence. They ensured they dealt with a regulated firm. They did not have the detailed technical knowledge to know for sure if the BPT was compliant. Mr O'Mara did flag up a similar pension scheme and was reassured by Mr Lau in the email of June 2011. At the material time they considered they were being advised by an expert and trusted advisor. The absence of taking advice from independent accountants or lawyers should not be held against them.

111. Between signing up to the BPT in September 2010 and receiving their first funds in December 2011, the appellants were worried as they had not received any of their monies in loans. They questioned the delay in July 2011 at the meeting. In July 2011 they were assured matters were proceeding. Whether they should have cancelled the transfers at this time depended on the 'alarm bells ringing in their minds' and at this stage. Having been assured all was in order they were prepared to proceed. Many of their pension policies had already been transferred, unknown to them, beginning on 20 June 2011.

112. They had been convinced by Mr Lau and told that the scheme was compliant with the law. The appellants did not recognise the loans as unauthorised payments but accept they are and cannot appeal the 40% unauthorised payment charge. The appellants always believed that they could use the funds for their business and return them to their pension pots.

113. Mr Rooney submitted that the surcharges are not just nor reasonable for the following reasons. The payments to Biz-Works Ltd were genuine commercial loans. Owing to the lack of communication from Mr Lau the appellants' company has not

been able to repay the debts. As such they continue to recognised the debts in the company's accounts and entitlement to the funds has not passed to Biz-Works.

114. He submitted that the value of the pension fund has not decreased as interest paid by Biz-Works has increased the value of that fund which is available to be returned to an authorised pension scheme. The appellants were misled by Mr Lau and his associates, who they understood to be regulated pensions and taxation experts. They trusted the veracity of the advice they received. They did not seek to circumvent any tax obligation and they were convinced that what they were doing was compliant with HMRC guidance and law.

115. Furthermore Mr Rooney submitted that the surcharges represented a substantial over-recovery of the tax relief that the appellants would have received. Mr Rooney submitted that there was evidence from the appellants about both their incomes and levels of tax. In the periods they built up their original pension schemes they were generally basic rate taxpayers. Mr O'Mara was only occasionally a higher rate taxpayer so the tax relief on his total pension fund would be substantially less than 40%. So Mr Rooney contended that the HMRC would over-recover tax relief by applying the unauthorised payments charge.

116. Therefore it was submitted that the unauthorised payment charges of 40% would be more than sufficient to compensate the Crown for the relief enjoyed on the transfer into the appellants' pension schemes. Mr Rooney submitted that a surcharge of a further 15% is excessive and is far greater than the relief or other benefit the appellants would not have come close to enjoying. It duly penalises the appellants.

117. Mr Rooney submitted that the aims of the charge and sur-charge under the Finance Act 2004 were to compensate the Crown. Furthermore he relied upon *Browne v HMRC* which lent weight to the submission that where there was no intention to abuse or frustrate the secured tax reliefs by the appellants the surcharge was akin to a penalty.

118. The appellants had acted in a reasonable fashion and therefore it was neither just nor reasonable to penalise them with surcharges. He relied upon the decision in *Herefordshire Property Company Ltd v HMRC* [2015] UKFTT 0079 at paragraphs 44-53 to submit that the test of negligence is whether the appellants failed to do something that a reasonable taxpayer would have done, or did something that no reasonable taxpayer would have done. He compared the factual circumstances of that case, where the appellants were found not to be negligent, as being comparable to the appellants' position.

119. Finally, it was submitted that the Tribunal should find it was not just nor reasonable to impose the surcharges. The appellants had no history of tax irregularity. They have been compliant and law-abiding and tax payers. They had no adverse dealings with HMRC, they had not filed the returns late or failed to make payments. They could not reasonable have known the scheme was non-compliant. He cautioned the Tribunal against applying hindsight. He submitted that the surcharges were excessive and punitive.

HMRC

120. Mr Bradley, for HMRC, submitted that it was common ground that the payments made to the appellants' company were not authorised payments for the purposes of the Finance Act 2004. The issue was whether under section 268(3) it would not be just and reasonable in all the circumstances to impose the surcharges. Section 269 of the FA 2004 gives the Tribunal full appellate jurisdiction to determine the issue and not simply a supervisory jurisdiction.

121. Mr Bradley submitted that the Tribunal should be familiar with applying the test of what is just and reasonable. The Tribunal is not required to make a finding of any bad faith or dishonesty against the appellants.

122. He submitted it would be wrong to characterise the surcharge as penal. He relied on the decision in *Willey* at paragraphs 6, 35, 56 and 57. Even were the surcharge a penalty for the purposes of the Human Rights Act, it is not disproportionate. He asked the Tribunal to examine the statutory scheme and policy background and relied upon the explanatory note and background notes to the Finance Bill as set out above. He submitted that the mischief the surcharge is designed to address is the recouping of tax relief – not the imposition of a penalty.

123. He relied upon the analogy with *Willey* where the total charge and surcharge equated to 55%. He submitted that the appellants would not simply have benefitted from tax relief of up to 40% but also have received tax free growth – more than the merely the relief the appellants received on the payments into their pension schemes. He submitted the legislation adopts a rough and ready approach to calculating the tax repayable.

124. He relied upon paragraph 71 of the decision in *Browne*. He submitted that the tribunal was entitled to focus on the purpose of the unauthorised payments and not just the mental state of the person who made the payments (the loans in this case) or incurs the liability. Examined objectively, the purpose of the payments was to get around the restrictions on the use of pension funds in the appellants' case.

125. 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 and whether they intended to involve themselves in a pension liberation scheme. The appellants knowingly took part in a scheme whose intention was unauthorised even if they did not share that intention. The intentions of the persons behind the BPT – the orchestrator or promoter of the scheme being Mr Lau – was to devise a scheme with the intention of extracting funds from pensions.

126. He submitted that the Tribunal should frame the just and reasonable question by considering three interlocking points:

127. First, because the policy objective was primarily to recoup tax rather than punish the circumstances in which the unauthorised payment was made, the circumstances in which it would not be just and reasonable to impose a surcharge

must be quite limited. He submitted that the Tribunal would have to find it was just and reasonable for the appellant not to repay tax that they ought to have paid.

128. Second, derived from *Browne*, the Tribunal was not simply looking at the state of mind of appellants but look at the purpose of the unauthorised payments. He submitted that the Tribunal would have no trouble in finding that the purpose of the payments was to avoid the restrictions of pensions legislation.

129. Third he submitted that a surcharge is not penal. That means the Tribunal should not be distracted by looking at the test of negligence or dishonesty and whether it applies to the appellants' actions. To reduce the test only to the appellants' state of mind and whether they had been dishonest or negligent would be to restrict and 'cut down' the scheme.

130. In order to uphold the surcharge as just and reasonable he submitted that the Tribunal does not have to go so far as to find that a tax payer has entered into an arrangement which he or she knows or understands a) will take some value out of his pension before retirement date; and b) that the purpose of the scheme is to extract value without being liable to tax charges that would follow. However, if the Tribunal is satisfied of both points it would be sufficient to render the surcharge liability just and reasonable.

131. The purpose of payment is viewed to be objectively. Was this the kind of payment designed to avoid the normal tax charge?

132. One relevant circumstance may be that a taxpayer knowingly entered into a scheme and, contrary to an agent's advice, it was unauthorised or unlawful. However, in these circumstances the taxpayer would have remedies against their agent. If the tribunal was to find it would be unjust and unreasonable for a taxpayer to pay a surcharge where they understood the arrangement but had relied on incorrect advice that the scheme was authorised, it would be a massive fillip to those who promote such schemes. Unscrupulous advisers would be able to say to potential clients considering these schemes that the worst that would happen is that there would be an unauthorised payment charge to recover the tax relief if the scheme was held to be unauthorised.

133. Even if a taxpayer took legal, accounting and tax advice that the scheme was authorised or appropriate, this of itself should not be sufficient to rely upon to discharge a surcharge as not being just and reasonable where the payment was latterly found to be unauthorised.

134. Mr Bradley submitted that irrespective of his submissions on principle there were various factual submissions as to the conduct of the appellants that rendered it just and reasonable in the circumstances for the surcharges to be upheld.

135. One argument on behalf of the appellants was that they did not really know what was going on and relied on Mr Lau who turned out to be unreliable and they were duped. They also said that they took appropriate steps to vet Mr Lau and the scheme.

136. However, Mr Bradley relied upon the following points against the appellants in considering all the circumstances of the case.

137. Mr and Mrs O'Mara did not take reasonable action in relation to their dealings with Mr Lau and entering the BPT. The following points evidence this.

138. There were 'warning bells' right from the start but they chose not to act upon them. At the meeting with the appellants in July 2009, Mr O'Mara accepted Mr Lau was not providing them with independent advice. Mr O'Mara accepted that he ought to have a scheme proposal and could have had the scheme reviewed by an independent professional. He accepted he ought to have asked Mr Lau whether he could back up his assertion by pointing to something from HMRC to say the scheme was compliant. It is not that HMRC would have given a ruling upon the scheme but that Mr O'Mara ought to have asked what Mr Lau had done to verify or support his belief it was compliant and the grounds upon which he relied.

139. One part of the scheme was based on the FX trading account generating the interest on the loan payments from the BPT to the appellant's company. The rate of return by the FX trading implied by what Mr Lau had told the appellants was very impressive to say the least. That such a trader had the skills and knowledge and trading plan to do this was surprising but Mr O'Mara was not able to say that he tried to find out from Lau what was the basis of the ability to make such a high return. Whichever way it was to be generated, the interest on the loan from Salmon Enterprises to the appellants' company was either to be paid out from their own pension fund or a segregated part of it or by Mr Lau from his fees. None of these arrangements made sense. Nor should it have made sense to persons such as the appellants whose business it was to make loans.

140. In relation to the arrangement in September 2010 when Mr and Mrs O'Mara signed up to the scheme, they did this without being given copies of any signed documents despite entirety of their pensions having to be transferred into the BPT. They had no signed loan, pensions or trust documents and still did not have these nine months later or ever. In the following months, they had chased Mr Lau to no avail for the documents and the transactions had not progressed either. The appellants were right to be concerned.

141. In relation to the email Mr O'Mara sent to Mr Lau on 22 June 2011 regarding his concern about a pension liberation scheme, this evidenced that by this stage Mr O'Mara had been concerned regarding the BPT. The mechanics of a loan being made in respect of the member was a shared feature with the BPT. Mr O'Mara put this to Mr Lau in his email. The text of the email in reply from Mr Lau was not such as anybody should have reasonably taken to be reassuring. Mr Bradley submitted that Mr O'Mara could not say positively that he had discussed his concerns with Mr Lau beyond that email. This was another red flag.

142. Mr Bradley submitted that, as a matter of fact, at the time of late June / early July 2011 only half of the appellants' pensions had been transferred into the BPT scheme. The appellants could have attempted to stop the remaining half of the

transactions proceeding. In a sense, this was not the main point. As at the end of June 2011 the appellants did not know if any of their funds had been transferred into the Salmon Enterprises pension scheme. There was no reason that the appellants could not have aborted the transaction. All of the warnings could reasonably have alerted the appellants not to enter into the scheme which resulted in their receiving unauthorised payments.

143. The appellants' dealing with Mr Lau involved them seeking to obtain introducer commissions for bringing Mr Lau and the BPT to the attention of their clients. Not only would the appellants have understood in broad terms the nature of the scheme in terms of extracting funds from their pensions but they sought to make money by introducing the scheme to other clients.

144. Mr Bradley submitted that it would not be sensible for the Tribunal to find it was not just and reasonable to impose the surcharge because the appellants had been led into the scheme by Mr Lau. Mr O'Mara himself sought to introduce others to the scheme for his own commercial benefit. The email from Mr O'Mara of 22 June 2011 does not read as the email of someone concerned about the propriety of the scheme, even after a nine-month delay and absence in progress of the transaction and the absence of supporting documentation. The email does not read as if Mr O'Mara was greatly concerned. Rather it reads as if Mr O'Mara's relationship with Mr Lau was that of two people enjoying a mutually beneficial business relationship rather than Mr O'Mara as an innocent victim.

145. The scheme depended on the existence of a loan agreement from Salmon Enterprises to the appellants' company, Biz-Works, which was never provided. In the absence of loan documentation, Mr O'Mara created his own 'loan agreements' which were not acknowledged by Mr Ray or Mr Lau. Furthermore, Mr O'Mara never had any reason to believe that the loans had been entered into or did exist with GG Blue Sky or Goswell Square Capital who actually made the payments rather than Salmon. Mr O'Mara's 'loan agreements' were still in the name of Salmon Enterprises.

146. Mr O'Mara received no contact from the people who were to make the loan at Salmon Enterprises nor the other two companies which actually made the payments in the three tranches between December 2011 and March 2012. The absence of any loan agreement and contact from any person making the loan or the payments should have provided an enormous red flag to the appellants. However, by that time the appellants were simply focused on where their money had gone and when they were to receive it - nothing else.

147. Mr Bradley submitted that the appellants knew that the purpose of the scheme they entered into was to take money out their pensions which would normally render them liable to tax charges.

148. He also submitted that they had acted unreasonably. Irrespective of their state of knowledge, if one were to look at the appellants' conduct it is not sufficient to discharge their liability. Mr Bradley submitted that in all the circumstances of the

appellants' case it would not be just and reasonable for the surcharges to be discharged.

Discussion and Decision

149. The Tribunal largely agrees with the submissions made on behalf of HMRC.

150. Section 269(6) of the Finance Act 2004 confers upon the Tribunal full appellate jurisdiction to determine whether the unauthorised payments surcharges ought to have been discharged. The ground for discharge is whether it would not be just and reasonable in all the circumstances for the appellants to be liable to the unauthorised payments surcharges in respect of their payments under section 268(3) of the Act.

151. The burden of proof is upon the appellants to bring evidence to satisfy the Tribunal that it would be not be just and reasonable in all the circumstances for them to be liable to the surcharges.

152. The statutory test will not benefit from unnecessary gloss. It requires the Tribunal to examine all the circumstances and decide whether it would be just and reasonable for the appellants to be liable to surcharges.

153. It does not require any finding of dishonesty or negligence on part of the appellants. It allows the Tribunal to examine all the circumstances surrounding the making and receipt of the unauthorised payments in each appellant's case. This in turn allows the Tribunal to examine an appellant's conduct or any other relevant mitigating circumstances pertaining to the payments or the appellant's circumstances. It also allows the Tribunal to take account of the statutory scheme and mischief the surcharge is designed to prevent.

154. The Tribunal is of the view that it would be wrong to characterise the surcharge as penal - the surcharge is a tax charge designed to recoup tax relief on contributions and tax free growth. This is for the same reasons suggested in the decision on unauthorised employment payments in *Willey* at paragraphs 56:

> Both parties agreed that the 55% charge is a broad measure by which the tax relief on contributions and tax free growth are recovered. In that sense, the scheme sanction charge, being part of an overall charge of 55% does appear to be a charge to tax rather than a penalty.

155. The rationale appears at paragraph 16 of the background note to Clause 197 of the Finance Bill 2004:

> The "unauthorised payments surcharge" is a further tax charge, paid in addition to the unauthorised payments charge. It can be imposed where the value of the payment was 25% or more of the fund value. The unauthorised payments surcharge will be 15%, bringing the total tax charge to 55%, to reflect the higher level of tax relief likely to have been received on such a large amount of the scheme's fund.

156. The Tribunal is not required to enter into a detailed attempt to calculate whether 55% does exactly represent or equate to the value of tax relief and tax free growth on the appellants' pensions. We there resist Mr Rooney's invitation to enter into a

notional calculation of what the tax relief on contributions and tax relief amounts to. As Mr Bradley submits, this is a broad or 'rough and ready' measure. The surcharge is aimed at payments which are 25% or more of the value of the pension fund. In the appellants' case their unauthorised payments (the loans to their company Biz-Works) represented the entirety of the pension funds held by Salmon Enterprises. The unauthorised payments also represent the vast majority of the value of their previous authorised pensions funds (subject to WFM's fees).

157. We therefore do not consider the surcharges amount to penalties in the circumstances of this case.

158. However, even if the surcharges were penalties in the circumstances of this case we do not consider it would be disproportionate for the purposes of the Human Rights Act for the appellants to be liable to them. This is for the reasons set out in *Willey* at paragraph 57 in relation to the proportionality of the legislative scheme:

> 57. In the event however we do not need to determine whether the scheme sanction charge is properly to be viewed as a charge to tax or a penalty for the purposes of the Convention. We do not consider that on any view it is disproportionate, still less that it is devoid of reasonable foundation and outside the wide margin of appreciation enjoyed by Parliament. As Mr Clarke submitted the charge is there in part to act as a deterrent against unauthorised payments. It seeks to protect the assets in pension schemes 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. In reaching this conclusion we consider that the factors referred to above in the context of relief under section 268 are equally applicable in testing the proportionality and reasonableness of the charge for the purposes of Article 1.

159. Furthermore, even if the surcharges applied to the appellants are to be categorised as penalties, they are reasonable and proportionate in all the circumstances of the case. This is for the same reasons set out below in relation to them being just and reasonable.

160. We consider that the appellants have not satisfied us that it would not be just and reasonable for them to be liable to the surcharges in all the circumstances. This is for the following reasons.

161. The tribunal is entitled to take into account the purpose of the unauthorised payments and not just the mental state of the person who made the payments (the loans in this case) or incurs the liability.

162. 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 and whether they intended to involve themselves in a 'pension liberation scheme.

163. The appellants knowingly took part in a scheme whose intention was unauthorised even if they did not share the intention. The intentions of the persons behind the scheme, appearing to include Mr Lau, was to devise a scheme designed to take funds out of pensions schemes and avoid incurring tax charges. The intention of the person making the payments to the appellant's company, Salmon Enterprises, was the same.

164. Whatever their intent, the appellants knowingly took part in a scheme whereby they accessed the value of pensions prior to normal retirement age. In addition, they must have realised that entering any scheme in which it was proposed that no tax charges would result would come with some risk.

165. The Tribunal agrees with the thrust of Mr Bradley's submissions.

166. First, because the policy objective was primarily to recoup tax rather than punish the circumstances in which the unauthorised payment was made, the circumstances in which it would not be just and reasonable to impose a surcharge may be limited. The surcharge only applies where a significant proportion of the pension fund's value (25% or more) is represented by the unauthorised payment. As above, the unauthorised payments represented the whole of the appellants' pension schemes.

167. Second, derived from *Browne* the Tribunal was not simply examining the state of mind of appellants but the purpose of the payments. As above, the purpose of the payments was to avoid the restrictions of pensions legislation.

168. Third, in order to uphold the surcharge as just and reasonable the Tribunal does not have to go so far as to find that a tax payer has entered into an arrangement which he or she knows, understands or believed to have constituted unauthorised payments for the purposes of the legislation.

169. Of itself, an honest but mistaken belief of a taxpayer, based on the advice of a scheme provider or otherwise, that that the arrangement is authorised and compliant is not sufficient to render liability to a surcharge as unjust or unreasonable. Otherwise it would encourage the promoters of unauthorised schemes, whatever the promoter's beliefs. Unscrupulous advisers and promoters, in recommending such schemes, would be able to advise clients that the worst that would happen if a scheme turned out to be unauthorised is that HMRC would impose an unauthorised payment charge to recover the tax relief.

170. Where a payment turns out to be unauthorised, the fact that a taxpayer has taken legal, accounting or tax advice that the scheme was legitimate or authorised should not be sufficient, of itself, to make it unjust or unreasonable to impose a surcharge. The taxpayer cannot rely on such advice as conclusive. Of course, it may be a relevant circumstance but it would not be determinative. The nature and extent of the advice and other circumstances of the case would have to be taken into account. In any event, the appellants took no such advice.

171. Irrespective of these points of principle, the Tribunal considers it just and reasonable in all the circumstances for the surcharges to be upheld. The following factors as to the conduct of the appellants are taken into account.

172. The tribunal is satisfied that the appellants were aware that by entering into the BPT they were to benefit from value from their pensions before retirement date. This is despite their evidence that they believed they were not extracting the value for good but simply receiving it in a loan which they believed would be repaid and to which no tax charges would apply. It is unnecessary to decide whether they believed the purpose of the scheme was to extract value without being liable to tax charges that would follow. The Tribunal is prepared to accept they held an honest belief that the scheme and the payments were compliant and authorised and that no tax charges would follow. Nonetheless this belief was mistaken.

173. The appellants' belief was not based upon reasonable grounds. The appellants did not take significant steps to mitigate the risk that they should reasonably have realised they were incurring by entering into such a scheme. They simply relied upon an adviser who had a financial interest in selling them a product and the limited due diligence conducted was not a reasonable response to the risk they incurred.

174. For example, they did not take any independent advice, whether from a lawyer, accountant or tax adviser upon the scheme. They did not seek to examine or inspect the grounds or advice upon which Mr Lau said he believed the scheme was authorised. They simply relied upon Mr Lau and now believe that he 'duped' them. The appellants' lack of reasonable care has to be viewed not simply as participants in the BPT scheme but also in the context of them seeking to introduce the scheme to others. A reasonable tax payer should wish to have a high degree of confidence, based upon independent and substantial grounds, that a scheme and payments are authorised and compliant before entering agreeing to them or introducing them to others.

175. One argument on behalf of the appellants was that they did not really know the detail of what was going on. The Tribunal considers that it would have been reasonable for them to make themselves familiar with the detail. They relied on Mr Lau who turned out to be unreliable and they were duped. They also say that they took appropriate steps to vet Mr Lau and the scheme. However, as set out above in relation to the lack of advice sought, Mr and Mrs O'Mara did not take reasonable action in relation to their dealings with Mr Lau and entering into the BPT.

176. The Tribunal considers that in addition to the lack of reasonable steps taken by the appellants, the following matters were available to the appellants contemporaneously and it is not considering these with the benefit of hindsight.

177. There were 'warning bells' from the outset as to the compliance of the scheme. Mr O'Mara ought to have known that he was operating in an area whereby pension value was to be extracted, or benefitted from, before the age of 55. Entering into this

arena presented a degree of risk. Indeed, Mr O'Mara did seek to perform some due diligence on Mr Lau which indicates that he was alive to some risk.

178. At the meeting in July 2009. Mr O'Mara accepted Mr Lau was not providing him with independent advice. On that basis that he might reasonably have sought to the advice by independent professional. At the very least he might have asked Mr Lau to evidence his assertion by pointing to some written confirmation from HMRC or an independent adviser to Mr Lau that the scheme was compliant. The appellants might reasonably have asked what Mr Lau he had done to support his belief it was compliant based on good grounds. The appellants might reasonably have asked to see any supporting evidence for the belief.

179. One part of the BPT and pension scheme was based on the FX trading account generating the 5% interest on the loans. The rate of return by the FX trading account implied by what Mr Lau had told the appellants would have to be high. If all of the sums accounted for as WFM's fees, around 17% of the original pension value, were invested in the FX account, then the account would still need to generate at least 25% returns every year in order to service the 5% annual loan interest. However, if all the fees were invested in the account then there would be no fee available to WFM which would be uncommercial. If only 50% of the fees (around 8.5% of the pension fund) were to be placed in the FX account then this would need to generate over 50% annual returns to service the loan interest.

180. These rates of return would be very high. Mr O'Mara was not able to say that he tried to find out from Lau what was the basis of the ability to make such a high return or question the commerciality of the arrangement. In the email sent by Mr O'Mara on 27 September 2010, received by the Tribunal after the hearing as a result of its direction, we do see that Mr O'Mara was indeed alive to the fact that the rate of return from FX trading would have to be uncommercially high (Mr O'Mara calculated it as 300%) and that he questioned this. Mr O'Mara did not give evidence at the hearing nor supply any later evidence that he obtained any satisfactory answer from WFM to reassure him about this.

181. Whichever way it was to be generated, the interest on the loan from Salmon Enterprises to the appellants' company was either to be paid out from their own pension fund or a segregated part of it or by Mr Lau from his fees. None of these arrangements made commercial sense. It could reasonably be expected that the recipient of the loan, the appellants' company, rather than the lender, was to bear the responsibility for meeting the interest payments. No questions appear to have been asked of Mr Lau regarding the arrangements which deviated from this expectation. It is to be noted that the appellants' business was to make loans so they would have had some insight into lending practices.

182. The total 'cost' of the loans of around £73,000 to the appellants' company was around £15,500 in fees. Neither the appellants nor the Tribunal were told what was the term of the loan agreement but if the loan term was one year it would approximate to 20% per annum. This would be expensive. If the loan term was 10 years it would be around 2 % per annum. This would be reasonable.

The percentage per annum would decline the longer the loan ran and become more and more unrealistic. The fact is that the appellant had no idea of the loan terms and created a document himself. The FX trading account be equated to a "black box" which surprisingly guarantees to generate 5 % interest come what may. In layman's terms the appellants appear to have received an open-ended loan for a total cost of £15,000 to the business. This would appear to be very beneficial.

183. A sophisticated and a financially astute person such as the appellants, those in the business of making loans, should have realised that a loan without repayment terms was not commercial. In fact there was no commitment by appellants to make good any shortfall in the expected 5% return in the FX trading account to account for the loan interest. It appears there was no commitment to, or liability of the appellants on receipt of the loans – hence Mr O'Mara realised he should attempt to create one by drafting 'loan documents' between December 2011 and March 2012.

184. It appears that the appellants' initial motivation was to introduce, or in reality, to promote, the scheme to others for profit. This provides all the more reason as to why they would might have wanted to investigate the detail and supporting grounds and not simply rely on assurances. Indeed, the mailshot email of September 2009 from Mr O'Mara at no point advises potential customers to do their own investigations and due diligence into Mr Lau.

185. Initially the appellants were to seek to profit from introducing the scheme to their clients. In due course, they also sought that their business profit from loans made under the scheme.

186. As of September 2010 the appellant's signed up to the scheme without retaining any signed documents either in relation to BPT or any loan agreement to their company. This was despite the entirety of their pensions having to be transferred into the BPT. They had no signed loan or trust documents and still did not have these, whether nine months later or even today. It might come as a surprise to a reasonable taxpayer that it was investing all its pension in a scheme but was given no copies of any paperwork to evidence the transaction.

187. It would be reasonable to expect any person entering into such arrangements to be given copies of the relevant signed agreements and it is surprising that the appellants did not demand to receive these immediately but were prepared to wait for their provision. In the following months they had chased Mr Lau to no avail for the documents and the transactions had not progressed and the loan had not been received during this time either. They were right to be concerned. This should have set further alarm bells ringing as to the nature of the transactions they had entered into.

188. The email Mr O'Mara sent to Mr Lau on 22 June 2011 regarding a pension liberation scheme evidenced that by this stage Mr O'Mara had some concern regarding pension liberation schemes. The mechanics of a loan being made in respect of the member was a shared feature with the BPT. Mr O'Mara suggested in his evidence that he had put this concern to Mr Lau. The Tribunal agrees with HMRC

that the text of the email in reply from Mr Lau was not reasonably reassuring. This should have been another 'red flag' for the appellants.

189. As at the time of late June / early July 2011 only half of the appellants' pensions had in fact been transferred into the scheme. The appellants could have attempted to stop the remaining half of the transactions proceeding. As at the end of June 2011 the appellants did not know if any of their funds had been transferred into the Salmon Enterprises pension scheme. There was no reason that the appellants could not have sought to abort the transaction if they were reasonably concerned. The warning signs addressed above might reasonably have alerted the appellants not to progress their involvement in the scheme which resulted in unauthorised payments.

190. The appellants' dealings with Mr Lau involved them initially seeking introducer commissions for bringing Mr Lau and the BPT to the attention of their clients. The email of September 2009 which introduced the scheme to clients was clearly aimed at promoting the scheme and it was intended that the appellants profit from this. In these circumstances it provided all the more reason why the appellants should have understood in broad terms what was proposed under the schemes in terms of extracting funds from their pensions.

191. In those circumstances it is difficult to accept the suggestion that the appellants had been led into the scheme by Mr Lau and therefore the surcharges are not just and reasonable in all the circumstances. Mr O'Mara himself sought to lead others into the scheme for his own commercial benefit.

192. Indeed, the email of Mr O'Mara from 22 June 2011 to Mr Lau does not appear to be the email of someone unduly concerned about the propriety of the scheme, even after a nine-month delay, absence in payments and absence of documentation in support. The email does not read as if Mr O'Mara was greatly concerned about the propriety of the scheme but rather reads as if his relationship with Mr Lau was between two people enjoying a mutually beneficial business relationship.

193. The scheme depended on the existence of a loan agreement from Salmon Enterprises to the appellants' company, Biz Works. They were never provided with any signed documents in support and this resulted in Mr O'Mara created his own 'loan agreements' between December 2011 and March 2012 which were not acknowledged by Mr Lau or Mr Ray. These were only drafted after the payments had already been received. These documents appear to have given Mr O'Mara reassurance that he was receiving a normal commercial loan but such reassurance cannot be said to be reasonable. They were 'after the event'.

194. Furthermore, Mr O'Mara never had any reason to believe that the loans he and his wife had entered into were with GG Blue Sky or Goswell Square Capital, the companies who actually made the payments rather than Salmon Enterprises. Mr O'Mara's 'loan agreements' were nonetheless created in the name of Salmon Enterprises. Mr O'Mara received no contact from any individuals making the loan at Salmon Enterprises or the other two companies when the payments were made in the three tranches between December 2011 and March 2012. The absence of a loan

agreement and any contact from an individual connected to making the loan or the payments between these dates should have put the appellants on notice that there was something untoward in the nature of the scheme even at this late stage. Nonetheless, once the appellants had received their payments the motivation to question the scheme had declined.

195. The Tribunal is satisfied that the appellants knew that the purpose of the scheme entered into was to benefit from the value of their pensions prior to retirement age in the form of loans to their company. The intention behind the scheme and the intention behind the unauthorised payments, even if not held by the appellants, was that pensions were to be liberated and tax payments were to be avoided.

196. The Tribunal is prepared to accept that the appellants honestly but mistakenly believed they were not avoiding tax charges properly due and were entering into a scheme to receive authorised payments. However, as is clear from the evidence, the appellants' focus from the beginning of 2011, well before the transfer was effected, was the receipt of their funds and obtaining the loans for their company. The appellants wanted to know that the transactions would be effected, where their pensions had been transferred and when their loans would be received. The propriety of the scheme was not their focus nor their principal motivator.

197. In the Tribunal's view the appellants did not act reasonably in relation to entering into the scheme nor receiving the unauthorised payments.

198. The Tribunal is of the view that the statutory surcharge scheme is not disproportionate, unjust or unreasonable in principle nor as applied on the facts of the appellants' case. The appellants' conduct forms one part of the factual circumstances.

199. In all the circumstances of the case the Tribunal is satisfied that it is just and reasonable for the appellants to be liable to the surcharges as imposed. The Tribunal is satisfied it would not be just and reasonable for the surcharges to be discharged.

200. The appeals should be dismissed.

201. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 19 JANUARY 2017