



Neutral Citation: [2023] UKFTT 00014 (TC)

Case Number: TC08676

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2019/07010

PENSIONS –scheme sanction charge – whether loan made by pension scheme was “unauthorised employer payment” – whether registration required at Companies House – effect of retrospective registration – appeal dismissed

Heard on 5 October and 16 November 2022

Judgment date: 19 December 2022

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

NILEBOND LIMITED

Appellant

and

**THE COMMISSIONERS FOR
HIS MAJESTY’S REVENUE AND CUSTOMS**

Respondents

Representation:

For the Appellant: Mr Andrew McDermott, director of the Appellant

For the Respondents: Mr Charles Bradley of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. Nilebond Ltd (“Nilebond”) is the administrator of a registered pension scheme known as the Nilebond Directors’ Retirement Account (“the NDRA”). The sponsoring employer was Sauvage Ltd (“Sauvage”). In 2017, the NDRA advanced £37,500 (“the Loan”) to Sauvage; the Loan was secured by a floating charge (“the Charge”). The Loan was repaid in full by two instalments on 28 March 2018 and 2 November 2018.

2. On 7 March 2019, HM Revenue & Customs (“HMRC”) issued Nilebond with a scheme sanction charge of £15,000 (“the Scheme Sanction Charge”) under s 239 of the Finance Act 2004 (“FA 2004”) on the basis that the Loan was an “unauthorised employer payment” within the meaning of s 160(4)(a) of that Act.

3. Nilebond appealed the Scheme Sanction Charge to HMRC, and asked for a statutory review; the HMRC Review Officer upheld the Scheme Sanction Charge and Nilebond notified its appeal to the Tribunal. The hearing took place by video; prior notice was published on the gov.uk website, with information about how representatives of the media and/or members of the public could apply to join the hearing remotely to observe the proceedings, and it was thus heard in public.

4. The First Issue was whether the Loan was an “unauthorised employer payment” or whether it was an “authorised employer loan” as defined by FA 2004, s 179(1) read with Sch 30. The answer to that question turned on whether the Charge had to have been registered at Companies House under s 859A of the Companies Act 2006 (“CA 2006”) in order to be an “authorised” employer loan. I agreed with Mr Bradley that where a loan was made to a corporate employer, it was only an “authorised employer loan” if the related charge had been registered in accordance with the requirements of CA 2006, s 859A.

5. The Second Issue was whether the Loan was nevertheless an authorised employer loan because the Charge had been registered after the Loan had been repaid, or whether the Loan had to have been registered within 21 days of being made. I decided that retrospective registration did not satisfy the requirements and as a result the Loan was an unauthorised employer loan.

6. Nilebond’s appeal is therefore dismissed and the Scheme Sanction Charge upheld.

Other matters

7. Nilebond’s Notice of Appeal also referred to Mr McDermott’s separate application to HMRC for the Scheme Sanction Charge to be discharged under FA 2004, s 268 (“the Discharge Application”). However, as explained at §49, the Discharge Application was not before this Tribunal to decide.

8. In addition, a number of related appeals (“the Other Appeals”) made by Nilebond had been struck out by the Tribunal. Mr McDermott had made reinstatement applications on behalf of Nilebond; those applications had been joined. I asked at the beginning of the hearing whether the parties considered it was in the interests of justice for this appeal to be linked to the Other Appeals, but it was common ground that there should be no delay, and that this appeal should go ahead as listed.

THE EVIDENCE

9. HMRC provided the Tribunal with a bundle of documents which included:

- (1) various bank statements of Sauvage; that company’s statutory accounts for the year ended 31 March 2016 and its tax return for the same year;

- (2) correspondence between Nilebond and Sauvage;
- (3) correspondence between Nilebond and/or Sauvage of the one part, and HMRC of the other;
- (4) correspondence between the parties and the Tribunal, including Nilebond's Notice of Appeal and the Tribunal's directions;
- (5) witness evidence and exhibits relating to a hearing at the County Court on 15 July 2019, and the Order issued by that Court on 22 July 2019; and
- (6) documents relating to the registration of the Charge at Companies House.

10. Although witness statements were filed and served by two witnesses, neither gave oral evidence, because the facts relevant to this appeal were not in dispute, and their witness statements focused on other matters:

- (1) Mr Ian Burns, an HMRC Officer, gave two statements. The first related to an investigation by Mr Burns and another HMRC Officer, Ms Faulkner, into pension relief at source ("PRAS") tax relief claims made by Nilebond. Much of the witness statement was concerned with those PRAS claims, and was not relevant to the issues before this Tribunal. Mr Burns' second witness statement related to the Discharge Application and was not considered for the purposes of this appeal for the reasons explained at §49.
- (2) Mr McDermott filed and served a witness statement, but it related to the Other Appeals and to the Discharge Application, together with some comments about Mr Burns and Ms Faulkner which were not relevant to the issues I had to decide.

FINDINGS OF FACT

11. The findings of fact were made based on the evidence in the Bundle and were not in dispute.

The Charge

12. On 3 February 2017, the Trustees of the NDRA and Sauvage signed a document headed "Floating Legal Charge and Agreement". This recorded that on the same day, NDRA had made a loan of £10,000 to Sauvage and that further loans were proposed, to a total value of £37,500. Clause 2 then said:

"this total sum of £37,500 is hereby secured as a floating charge over all the undertakings and property of the borrowing company."

13. Clause 3 provided that:

"This charge will crystallise immediately if the company (Sauvage) enters into any form of insolvency or liquidation and will be a first charge on the assets of the company ranking above all other charges. This charge must be recorded in the Register maintained by the Borrower [Sauvage] and may also be registered at Companies House within twenty-one days of the date of this agreement."

14. The agreement also set out terms in relation to interest and repayments, together with confirmation that the value of the Loan was less than 50% of the NDRA.

15. Mr McDermott and Mr Wyldes (the director of Sauvage) were informed by their advisers that it was sufficient to register the Charge in Sauvage's own register; the Charge was therefore not registered at Companies House within 21 days of the date it was made.

16. During the lifetime of the Loan, there was no other charge on Sauvage's assets. It was repaid in two instalments, on 23 March 2018 and 2 November 2018.

The Scheme Sanction Charge

17. On 19 January 2019, Mr Wyldes sent Mr Burns a copy of the Charge, and Mr Burns checked the Companies House register. As the Charge had not been registered, on 8 March 2019 Mr Burns issued Nilebond with the Scheme Sanction Charge. In accordance with FA 2004, s 240(1), it was calculated at 40% of the Loan and so was for £15,000.

The County Court

18. On 22 March 2019 Nilebond made an application to the County Court for an order that the time limit for registering the Charge be extended from the 21 days provided for in CA 2006, s 859A; the relevant provisions are set out at §29ff.

19. On 22 July 2019 the County Court made an Order under CA 2006, s 859F, extending the period for registration of the Charge to 12 August 2019 (“the Order”). The final recital to the Order reads:

“UPON the Court being satisfied that the omission to deliver to the Registrar of Companies pursuant to Section 859A of the Companies Act 2006 the Legal Charge hereinafter mentioned, together with the prescribed particulars thereof, was accidental or due to inadvertence or some other sufficient cause and/or that it is just and equitable to grant relief.”

20. The final paragraph of the Order says:

“THIS ORDER is without prejudice to the rights of any person acquired during the period between the creation of the said Legal Charge and the date of its/their actual registration.”

21. The Charge was delivered to Companies House on 5 August 2019, and on 5 September 2019 Companies House issued a “Certificate of the Registration of a Charge” by way of confirmation.

The appeal

22. On behalf of Nilebond, Mr McDermott appealed the Scheme Sanction Charge, and asked for a statutory review, but the review officer upheld Mr Burn’s decision. Nilebond notified the appeal to the Tribunal on 23 October 2019.

STATUTORY PROVISIONS

23. Most of the relevant statutory provisions in this judgment are from FA 2004, and all references are to that Act unless otherwise stated; the remainder are from CA 2006. All legal provisions are cited only so far as relevant to the issues before the Tribunal.

Unauthorised employer payments

24. Section 160 is headed “payments by registered pension schemes”, and subsection (4)(a) provides that an “unauthorised employer payment” includes:

“a payment by a registered pension scheme that is an occupational pension scheme, to or in respect of a person who is or has been a sponsoring employer, which is not authorised by section 175.”

25. One of the types of payment authorised by s 175 is an “authorised employer loan”. Section 179 sets out a number of requirements for a loan to be “authorised”. In the context of this appeal, the relevant provision is subsection (1)(b), which requires that “the loan is secured by a charge which is of adequate value”. Subsection (6) then provides:

“Schedule 30 gives the meaning of expressions used in this section and explains how to calculate the amount of the unauthorised payment when a loan to or in respect of a person who is or has been a sponsoring employer does not comply with subsection (1).”

26. Sch 30 para 1 reads:

“(1) a charge is of adequate value if it meets conditions A, B and C.

(2) Condition A is that, at the time the charge is given, the market value of the assets subject to the charge:

(a) in the case of the first charge to secure the loan, is at least equal to the amount owing (including interest), and

(b) in any other case, is at least equal to the lower of that amount and the market value of the assets subject to the previous charge.

(3) Condition B is that if, at any time after the charge is given, the market value of the assets charged is less than would be required under condition A if the charge were given at that time, the reduction in value is not attributable to any step taken by the pension scheme, the sponsoring employer or a person connected with the sponsoring employer.

(4) Condition C is that the charge takes priority over any other charge over the assets.”

27. Section 239 is headed “Scheme sanction charge” and provides as follows:

“(1) A charge to income tax, to be known as the scheme sanction charge, arises where in any tax year one or more scheme chargeable payments are made by a registered pension scheme.

(2) The person liable to the scheme sanction charge is the scheme administrator...”

28. Section 240(1) provides that the rate of charge is 40% of the amount of the unauthorised payment.

Companies Act 2006

29. CA 2006, s 859A is headed “Charges created by a company” and includes the following provisions:

“(1) ...this section applies where a company creates a charge.

(2) The registrar must register the charge if, before the end of the period allowed for delivery, the company or any person interested in the charge delivers to the registrar for registration a section 859D statement of particulars.

(3) Where the charge is created or evidenced by an instrument, the registrar is required to register it only if a certified copy of the instrument is delivered to the registrar with the statement of particulars.

(4) ‘The period allowed for delivery’ is 21 days beginning with the day after the date of creation of the charge (see section 859E), unless an order allowing an extended period is made under section 859F(3).

(5) Where an order is made under section 859F(3), a copy of the order must be delivered to the registrar with the statement of particulars.”

30. CA 2006, s 859F is headed “Extension of period allowed for delivery”, and reads:

“(1) Subsection (3) applies if the court is satisfied that—

(a) neither the company nor any other person interested in the charge has delivered to the registrar the documents required under section 859A...before the end of the period allowed for delivery under the section concerned, and

(b) the requirement in subsection (2) is met.

- (2) The requirement is—
 - (a) that the failure to deliver those documents—
 - (i) was accidental or due to inadvertence or to some other sufficient cause, or
 - (ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or
 - (b) that on other grounds it is just and equitable to grant relief.
- (3) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the period allowed for delivery be extended.”

31. CA 2006, s 859H is headed “Consequence of failure to deliver charges”, and reads:

- “(1) This section applies if—
 - (a) a company creates a charge to which section 859A...applies, and
 - (b) the documents required by section 859A...are not delivered to the registrar by the company or another person interested in the charge before the end of the relevant period allowed for delivery.
- (2) ‘The relevant period allowed for delivery’ is—
 - (a) the period allowed for delivery under the section in question, or
 - (b) if an order under section 859F(3) has been made, the period allowed by the order.
- (3) Where this section applies, the charge is void (so far as any security on the company's property or undertaking is conferred by it) against—
 - (a) a liquidator of the company,
 - (b) an administrator of the company, and
 - (c) a creditor of the company.
- (4) Subsection (3) is without prejudice to any contract or obligation for repayment of the money secured by the charge; and when a charge becomes void under this section, the money secured by it immediately becomes payable.”

THE FIRST ISSUE

32. The First Issue was whether the Loan was an “unauthorised employer payment” or an “authorised employer loan”. Mr Bradley said that where, as here, a loan was made to a corporate employer, it was only an “authorised employer loan” as defined by s 179(1) read with Sch 30, if it had been registered at Companies House in accordance with CA 2006, s 859A.

33. Mr McDermott’s submissions related only to the Second Issue, but I decided that in order to decide that Issue, the Tribunal had first to decide whether or not HMRC were correct on the First Issue.

The statutory purpose

34. Mr Bradley said that the purpose of the FA 2004 pension provisions had been summarised in *Bella Figura Ltd v HMRC* [2020] UKUT 120 (Nujee J and Judge Richards). In the context of considering whether a scheme sanction charge should be discharged, the UT said at [72] that it was important to “consider the entire statutory scheme of which these charges form part”, and then said:

“In essence, that scheme provides: (i) for contributions made by employers and employees to benefit from tax relief at the point of payment; (ii) for the funds contributed to be held securely to provide pension benefits (iii) for most income and gains received by the registered pension scheme in connection with the investments of contributions not to be subject to tax; but (iv) for amounts payable to an individual taking benefits to be subject, in most cases, to income tax...”

35. At [74], the UT described this trade-off between “social utility” and tax reliefs as a “bargain”, and continued:

“if pension funds are lent by way of risky loans to an employer, the Exchequer is exposed to the risk that, even though it has given tax relief, and exempted income and gains of the scheme from tax, the funds are not ultimately available to pay pension benefits.”

36. In Mr Bradley’s skeleton argument, he said:

“The purpose of the authorised employer loan provisions, and of the tax charges that arise if a registered pension scheme makes an unauthorised employer loan, is to ensure that the tax-relieved funds in the pension scheme are not loaned in circumstances where there is a risk they might not be repaid.”

37. In oral submissions, Mr Bradley amended this part of HMRC’s case, stating that the purpose of the provisions was to ensure that the funds “are not loaned where, *so far as possible*, there is a risk they might not be repaid”.

Secured by a charge?

38. Section 179(6) provides that for a loan to be an “authorised employer loan”, it must be “secured by a charge which is of adequate value”. CA 2006, s 859H(3) provides that an unregistered charge is:

- (1) void as against the liquidator (and therefore as against the borrowing company) when the company is in liquidation;
- (2) void as against the administrator; and in addition
- (3) void as against “a creditor of the company”.

39. Mr Bradley submitted that in consequence, where a charge is unregistered, the loan is not “secured” at all, because the charge is always void as against any other creditor. As a result, the lender is in exactly the same position as an unsecured creditor.

40. He acknowledged that in practice this scenario would only be likely to arise if a company was unable to pay all its creditors, but submitted that:

“It would not be a normal use of language for a creditor to say that his loan was ‘secured’ in circumstances where, in the event of the debtor’s insolvency, the creditor would rank *pari passu* with unsecured creditors.”

41. He added:

“Parliament cannot be taken to have intended that a loan to a sponsoring employer should be ‘authorised’ if the pension scheme had no protection should the employer become insolvent. Otherwise, it would be open for a pension scheme to make loans to an employer that were for all practical purposes unsecured, without any unauthorised payments or scheme sanction charge. This could be done simply by not registering the charge.”

42. In Mr Bradley’s submission, a loan subject to an unregistered charge was therefore not “secured” by a charge, and this was sufficient to decide the First Issue in HMRC’s favour. I agreed with Mr Bradley for the reasons he gave.

Takes priority over any other charge

43. Sch 30, para 1(4) provides that a loan will not be “authorised” unless it meets Condition C, namely that it “takes priority over any other charge over the assets”. Mr Bradley said that this Condition reinforced his main point that an unregistered charge was not enforceable against a liquidator, administrator or other creditors, and thus in terms was not secured at all. Even if a further charge was issued on terms that it ranked above another, that priority was simply not enforceable. An unregistered charge could therefore never take “priority over any other charge over the assets” because all chargeholders would be in the same position as any other creditor.

44. In his submission, a loan could not be an “authorised employer loan” if it was not possible for it to satisfy Condition C. It followed that the Condition was also not met where, as here, there was no other extant charge at any time during the lifetime of the Loan, Again, I agree.

Conclusion on the First Issue

45. For the reasons set out above, I decided that HMRC were right on the First Issue.

THE SECOND ISSUE: THE LATE REGISTRATION

46. Mr McDermott submitted that s 179(1)(b) was satisfied because the period for delivering the charge had been extended by the Order. Moreover, the effect of the Order was that there had been no “failure to deliver” within the meaning of s 859H, and as a result, the Charge was not “void” as against creditors, as HMRC argued was the case. In Mr McDermott’s words, the Order “cured the defect retrospectively”. He added that as a question of fact, there was no other loan and there was no risk to the NDRA.

47. Mr Bradley disagreed. He first noted that the Order had been made after the Loan was repaid, and referred to the final paragraph of the Order, which stated that it was “without prejudice to the rights of any person acquired during the period between the creation of the said Legal Charge and the date of its/their actual registration”. In Mr Bradley’s submission, the Order was not fully retrospective for that reason. As a result, the Loan had never been “secured by a charge”, because by the time the Charge was registered, the Loan no longer existed.

48. Again, I agree with Mr Bradley for the reasons he gave. As he said, the purpose of the unauthorised loan provisions is “to ensure that the tax-relieved funds in the pension scheme are not loaned in circumstances where there is a risk they might not be repaid”; it is for this reason that loans to employers must be “secured by a charge of adequate value”. At the time the Loan was extant, the Charge was not registered at Companies House; although it was subsequently registered, that registration was without prejudice to any other rights acquired in the interim period. It followed that the Charge had not been “secured by a charge” because throughout its existence, the NDRA was in exactly the same position as any other creditor. It was not possible to amend that defect by retrospective registration.

THE DISCHARGE APPLICATION

49. In addition to the statutory provisions set out earlier in this judgment, s 268 allows a person liable to an Scheme Sanction Charge to apply to be discharged from that liability. Mr McDermott made such an application on behalf of Nilebond on 28 August 2019; on 6 January 2020, Ms Faulkner refused that application on behalf of HMRC.

50. On the first day of the hearing, Mr McDermott accepted that Nilebond had not appealed to HMRC against that refusal decision. It was common ground that as a result the Tribunal

had no jurisdiction. On the second day of the hearing, Mr McDermott informed the Tribunal that Nilebond had now made a late appeal application, which would be dealt with in due course.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

51. For the reasons set out above, Nilebond's appeal against the Scheme Sanction Charge is refused.

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

**ANNE REDSTON
TRIBUNAL JUDGE**

Release date: 19th DECEMBER 2022