[2016] UKFTT 0802 (TC)

TC05527

Appeal number: TC/2013/06935

Whether loan an "unauthorised member payment" for pensions purposes within Part 4 of the Finanance Act 2004—meaning of "payment" –"in connection with"—held loan was an unauthorised member payment as made in connection with an investment by the pension scheme

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD WHITE **Appellant**

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 5 September 2016

Frances Ratcliffe of Counsel for the Appellant

Laura Poots of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns the application of the pension scheme provisions contained in Part 4 of the Finance Act 2004 to a loan of £75,000 entered into by the Appellant in October 2010.

2. The issue is whether or not, when viewed in conjunction with certain other transactions, the loan was an "unauthorised payment" to the Appellant, giving rise to an income tax charge on him of £30,000.

Background

3. The appeal was at one stage designated as a "lead case" under Rule 18 of the Tribunal Rules. The relevant direction has since been withdrawn.

4. Since the appeal was made (in 2013), the decision of the First-tier Tribunal in *Danvers v HMRC* [2016] UKFTT3 (TC) has been handed down. *Danvers* concerns the same technical issues as the appeal, and there are certain similarities between the facts of *Danvers* and those of this appeal. However, this appeal must be determined on its own particular facts and circumstances. The decision in *Danvers*, for which leave to appeal has been granted, is discussed further below.

Evidence

5. I was provided with several bundles of documents. For HMRC, I also received a witness statement from Mr Alan Bush, a former compliance investigator in the Pensions Schemes Services division of HMRC. Mr Bush attended the hearing and was examined and cross-examined. I found him to be a credible and reliable witness.

6. Certain of the documents provided by HMRC did not concern Mr White or the transactions which are the subject of this appeal, but rather other taxpayers and other examples of what HMRC refer to as "pension liberation schemes". I have considered whether those other documents should be admitted as evidence in this appeal, and concluded that they should not. Even if I were to admit them but give them less weight as evidence than the documents which do relate to Mr White, they would not be sufficiently relevant to the determination of the issues in this appeal, which turn on the particular facts and circumstances of the case.

7. I received no evidence from Mr White himself. I was not given any explanation for this. Given that one of the two issues in the appeal is, as will be seen below, the extent and degree of any connection between the loan to Mr White and certain other transactions, this means that I have had to determine the factual aspects of that question without the benefit of witness evidence from Mr White.

Findings of fact

8. I make the following findings of fact, described in chronological order.

9. In the summer of 2010, when the events relevant to the appeal began, Mr White was a pilot with British Airways. He had worked for them since 1990. He had pension rights under the British Airways Pension Scheme ("the BA Scheme"), which was an occupational final salary scheme.

10. At some point prior to 12 August 2010, Mr White met with a company called SKW Investments Ltd ("SKW") regarding his rights under the BA Scheme. He met with a representative of SKW called John McFadzean.

11. In early September 2010 Mr White contacted a firm called Michael J Field Consulting Actuaries ("MJF") regarding the possibility of using a self-invested personal pension or SIPP to invest in a company called Imperium Enterprises Ltd, which had been incorporated in May 2010 ("Imperium"). Imperium is described in internal correspondence by Michael J Field as an "SPV".

12. Mr White became a member of the MJF SIPP on 14 September 2010, and was appointed to act as an additional trustee in relation to his own fund on the same day.

13. On 23 September 2010 Mr White received a letter from Malcolm Pritchard, an independent financial adviser. The letter refers to a "recent meeting" and states "[you] have been asked to see an Independent Financial Adviser by your Pension Trustee in respect of transferring from your final salary scheme." The letter makes it clear that Mr Pritchard is not advising on the SIPP investment, and states as follows:

> "We discussed all the points and the underlying factors, for yourself being in control [of your pension fund] and cascading wealth to your children are your main concern. There is no doubt as a pure investment the final salary pension is a better option because of the employer contribution, guarantees and benefits available."

14. On or before 29 September 2010 Mr White confirmed his intension to transfer his pension benefits from the BA Scheme to the MJF SIPP with effect from 1 October 2010. On 29 September 2010 MJF communicated this to the BA Scheme.

15. A note of a telephone conversation between MJF and Mr White on 30 September 2010 states as follows:

> "I rang [Mr White] following the discussion with HMRC to tell him I had some concerns and was not yet in a position to say definitely yes to the investment in Imperium Enterprises Limited.
>
> [He] asked me what my concerns were as this was late in the day and he had given BA his notice to opt out. I said that I was still awaiting some details of the company and I was also concerned that the investment managers [of Imperium] BOH Investments Ltd

had appeared on a list. He asked me what the list was and I said we had previously been asked to provide information on any members who had invested in this company…".

16. On 5 October 2010 MJF informed Mr White as follows :

> "… we have taken the decision that we do not want our SIPPs product to be involved in this investment. Our reasons are as follows:
>
> (1) As discussed we have noticed that BOH Investments Ltd was on a letter we received from HMRC requesting information on all members that had investments with them. You are aware that this caused me some concern and this was the reason I rang you to delay your request to transfer out of [the BA Scheme]…
>
> (2) To date [Imperium] has only raised £1.1 million, your investment would be a significant proportion of this and we do not feel comfortable with the lack of control that we would have over how these funds were invested…"

17. On the same day, 5 October, Mr White decided not to proceed with the transfer from the BA Scheme to the MJF SIPP, and the transfer request was cancelled.

18. On 7 October 2010 Mr White applied to join a SIPP provided by Pilgrim Trustee Services Ltd ("the Pilgrim SIPP"). The sum of £515,794 was transferred from the BA Scheme to the Pilgrim SIPP.

19. In early October 2010 Mr White contacted another SIPP provider, Rowanmoor Pensions ("Rowanmoor"), sending them an Investment Memorandum for Imperium, and stating that he wished to invest £520,000 in a SIPP and would like some of that to be invested in Imperium.

20. On 7 October 2010 Rowanmoor told Mr White that Imperium would not be an acceptable investment for a registered pension scheme. On 8 October, they indicated that in theory a SIPP could in fact acquire shares in Imperium, but went on to state as follows:

> "My remaining concern is that [Imperium] is permitted to make loans. Under no circumstances could this company, or any company connected with it, make a loan to you personally or any company connected to you as this would be classed as a 'back to back loan' made to contravene the lending restrictions on SIPPs.
>
> Under the circumstances, we would require a signed declaration from you that under no circumstances would you or any company connected with you seek or accept a loan from [Imperium] or any company associated with [Imperium] before we could consider agreeing to the purchase."

21. On 12 October 2010 Mr White stated as follows in an email to Rowanmoor:

> "… I can confirm that I am not a company and as such will not be receiving a loan from Imperium Enterprises Ltd or any company that I know to be associated with them."

22. Rowanmoor having approved the SIPP investment in Imperium, Mr White applied to join the Rowanmoor SIPP on 14 October 2010.

23. On 22 October 2010 Mr White signed an application form for his Rowanmoor SIPP to subscribe £300,000 for 300,000 £1 ordinary shares in Imperium. A date stamp shows the accompanying letter as received by Rowanmoor on 26 October 2010. In that letter, Mr White states that:

> "I expect the transfer of about £303,000 to take place on 28 October or soon after. This should be enough to purchase the Imperium shares, plus pay for the set-up of the fund and a few years running costs."

24. On 26 October 2010 Mr White signed a loan agreement ("the Loan Agreement") for the loan which is the subject of this appeal ("the Loan"). The Loan Agreement is also signed on behalf of SKW, but on the only copy with which I was provided that signature is undated.

25. The key terms of the Loan were as follows:

a) The amount requested is "£75,000 on an interest only basis and the capital will be paid from the proceeds of your pension fund."

b) After deductions of the first year's interest in advance, the amount advanced was £70,762.50.

c) The interest rate was 6% fixed for the first year, and thereafter was 5.5% above bank base rate, with a floor of 6% and a cap of 11%.

d) The Loan was limited recourse, with the amount repayable being limited to the amount received, net of tax, by Mr White or his estate from his Rowanmoor SIPP.

e) Mr White is obliged to repay the Loan from the net proceeds of his Rowanmoor SIPP. The Loan Agreement states as follows:

> "The borrower will repay the loan from the net proceeds of the borrower's pension with Rowanmoor Pensions Ltd (or subsequently transferred to another provider). Upon receiving a payment from his pension with Rowanmoor Pensions Ltd (either of tax free cash or income) the borrower shall pay the amount received (net of any tax applicable) within 28 days to SKW Investments Ltd to reduce the outstanding balance of the loan until such time as the outstanding balance of the loan has been reduced to zero. If the borrower fails to meet this condition then the whole loan will become repayable immediately and a default rate of 24% shall apply until such time as the loan has been repaid".

26. On 29 October 2010 Mr White gave instructions to his bank to transfer £303,000 from his Pilgrim SIPP to his Rowanmoor SIPP.

27. On 2 November 2010 Rowanmoor Trustees Limited authorised the investment in Imperium. On the same date the Rowanmoor SIPP subscribed £300,000 for the ordinary shares in Imperium.

28. Again on 2 November 2010 Mr White received the advance under the Loan Agreement of £70,762.50.

29. In April 2012 HMRC opened an enquiry into Mr White's tax affairs for 2010-2011. Following correspondence, HMRC issued a closure notice on 18 May 2012, which Mr White appealed against on 30 May 2012. Following the rejection of that appeal, Mr White requested a statutory review by HMRC. By a review letter of 30 August 2013 HMRC upheld their decision to levy the unauthorised payment charge of £30,000 in respect of the Loan. By an appeal dated 24 September 2013, Mr White appealed to the Tribunal against that review decision.

Legislation

30. The relevant provisions are contained in Part 4 of the Finance Act 2004 ("FA 2004"). References below are to the provisions of FA 2004 in force for 2010-11.

31. Section 208 provides (so far as relevant) as follows:

> "**208 Unauthorised payments charge**
>
> (1) A charge to income tax, to be known as the unauthorised payments charge, arises where an unauthorised payment is made by a registered pension scheme.
>
> (2) The person liable to the charge –
>
> (a) in the case of an unauthorised payment made to or in respect of a person before the person's death, is the person…
>
> (5) The rate of the charge is 40% in respect of the unauthorised payment…".

32. The legislation describes two types of "unauthorised payment", namely an "unauthorised member payment" and an "unauthorised employer payment". Section 160 provides (so far as relevant) as follows:

> "**160 Payments by registered pension schemes**
>
> (2) In this Part "unauthorised member payment" means –
>
> (a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164, and
>
> (b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part.
>
> (3) The only payments which a registered pension scheme that is an occupational pension scheme is authorised to make to or in respect of a person who is or has been a sponsoring employer are those specified in section 175.
>
> (4) In this Part "unauthorised employer payment" means –
>
> (a) a payment by a registered pension scheme that is an occupational pension scheme, or in respect of a person who is or has been a sponsoring employer, which is not authorised by section 175…

(5) In this Part "unauthorised payment" means –

(a) an unauthorised member payment, or

(b) an unauthorised employer payment."

33. Section 161 provides (so far as relevant) as follows:

"(2) "Payment" includes a transfer of assets and any other transfer of money's worth.

(3) Subsection (4) applies to a payment made or benefit provided under or in connection with an investment (including an insurance contract or annuity) acquired using sums or assets held for the purposes of a registered pension scheme.

(4) The payment or benefit is to be treated as made or provided from sums or assets held for the purposes of the pension scheme, even if the pension scheme has been wound up since the investment was acquired.

(5) A payment made by a registered pension scheme to or in respect of a person who –

(a) is connected with a person who is or has been a member or sponsoring employer (or was connected with such a person at the date of the person's death), and

(b) is not a person who is or has been a member or sponsoring employer,

is to be treated as made in respect of the person who is or has been a member or sponsoring employer.

…

(8) For the purposes of this section whether a person is connected with another person is determined in accordance with section 993 of ITA 2007."

34. Section 164 lists the only "authorised member payments" which a registered pension scheme is permitted to make, including (in section 164(1)(d)) "scheme administration member payments".

35. In defining "scheme administration member payments", section 171(4) provides that:

"(4) A loan to or in respect of a person who is or has been a member of the pension scheme is not a scheme administration member payment".

36. Section 175 lists the only "authorised employer payments" which a registered pension scheme that is an occupational pension scheme is permitted to make. The relevant provisions are as follows:

"**175 Authorised employer payments**

The only payments which a registered pension scheme that is an occupational pension scheme is authorised to make to or in respect of a person who is or has been a sponsoring employer are –

…

(d) authorised employer loans (see section 179)…".

37. Section 179 sets out the conditions which must be satisfied in order for a loan made to or in respect of a person who is or has been a sponsoring employer to be an "authorised employer loan."

38. Finally, section 279(2) provides as follows:

> "(2) In this Part references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purpose of the pension scheme."

The issues

39. It is common ground between the parties that:

> (a) the only transaction which could give rise to the unauthorised payments charge was the Loan.
>
> (b) the Rowanmoor SIPP was at all relevant times a registered pension scheme.
>
> (c) if (which the Appellant does not accept) the Loan was a "payment", it was made to Mr White when he was a member of the Rowanmoor SIPP, and
>
> (d) the Loan was not an "authorised member payment" within section 164 FA 2004.

40. There are therefore only two issues to be determined. First, was the Loan a "payment"? Secondly, if so, was the Loan an "unauthorised member payment" because it was "made in connection with an investment… acquired using sums or assets held for the purposes of a registered pension scheme" within section 161(3) FA 2004? The second issue may be more helpfully expressed as "was the Loan made in connection with the investment in shares of Imperium?".

The first issue: "Payment"

41. I will first summarise the arguments of the parties on this point.

42. For Mr White, Ms Ratcliffe's argument that the Loan was not a "payment" was based both on the ordinary meaning of that word and on a purposive construction of the legislation.

43. She submitted that the ordinary meaning of the word connotes a reference to an unconditional transfer of money for the provision of goods or services. She cited certain passages in the decisions of the First-tier Tribunal and Upper Tribunal in *Murray Group Holdings Ltd v Revenue & Customs Commissioners* [2014] UKUT 0292 (TCC) as authority that a payment necessarily involves the unconditional transfer of money such that it is placed unreservedly at the

disposal of the recipient. A payment, she argued, is fundamentally different from a loan in that a loan envisages the temporary parting with money, which is intended to be returned and not permanently surrendered.

44. Further, Ms Ratcliffe submitted, construing the term purposively, the context of Part 4 FA 2004 makes it clear that "payment" does not include a loan. The purpose of Part 4, she argued, is to prevent the dissipation of pension scheme assets other than for the provision of retirement benefits; hence the restriction on the payments which a registered pension scheme is authorised to make.

45. Ms Ratcliffe pointed to the inclusion of "authorised employer loans" in sections 175 and 179 FA 2004 as clear indications that, but for those specific inclusions, such "loans" would not amount to "payments" for the purposes of Part 4 FA 2004.

46. Ms Ratcliffe further highlighted the absence of any prohibition in Part 4 on a registered pension scheme providing a loan to a third party as an indication that a loan does not fall within the definition of payment in Part 4. That is because a loan is not a "payment", she argued, and a commercial loan for the benefit of the pension scheme is therefore not discouraged.

47. For HMRC, Ms Poots argued that *Murray Group* was clearly distinguishable. The question in that case was not whether there had been a "payment", but whether there had been a "payment of earnings (or emoluments)", so the analysis in *Murray Group* has little or no bearing on the interpretation of "payment" in the context of Part 4 FA 2004.

48. In relation to sections 175 and 179, Ms Poots submitted that they clearly pointed in the opposite direction to that suggested by Mr White. A "payment" by a pension scheme to an employer is unauthorised unless it is within one of the categories specified in section 175. One of the categories of authorised payments is "authorised employer loans", which are loans made to or in respect of an employer (section 179, subject to various restrictions). If a loan was not a "payment" within Part 4, Ms Poots argued, there would be no need to specify certain types of loans as authorised.

49. In relation to the issue of "payment", the arguments raised on each side follow the respective arguments raised, by the same Counsel, in *Danvers* (referred to at [4] above).

50. In *Danvers*, Judge Poole decided the issue as follows (at [58]):

> *"Is a loan a "payment?*
>
> [58] We can dispose of this point quite shortly. Essentially, we agree with Ms Poots. If a loan were not a payment, there would be no need for "authorised employer loans" to be included within the class of "authorised employer payments" in section 175 [Finance Act 2004]. In *Willey v HMRC* [2013] UKFTT 328 (TCC), the First-tier Tribunal was not even asked to adjudicate on the question, it being agreed between the parties (as recorded at [24]) that the underlying loan in that case was an unauthorised member payment.

> Furthermore, in *Dalriada*, Bean J considered the point so obvious that he simply said (at [31]) when summarising the statutory regime that "any payment, **including a loan**, [emphasis added] by a registered scheme to a member which is not within the list at section 164(1) would be an unauthorised member payment." "

51. As another decision of the First-tier Tribunal, the conclusion on this issue in *Danvers* is not binding on me. Furthermore, permission to appeal in *Danvers* has been granted. Nevertheless, I have, of course, carefully considered Judge Poole's reasoning and conclusion on the "payment" issue in reaching my decision.

52. I will deal first with the relevance of the decisions in *Willey* and *Dalriada*, which are referred to by Judge Poole.

53. *Willey* was a decision of the First-tier Tribunal concerning the provisions of Part 4 FA 2004 which may impose an additional tax charge, known as a "scheme sanction charge", on a pension scheme administrator where there has been an "unauthorised employer payment". The case concerned a payment by a pension scheme to its sponsoring employer which was held to be a loan: see [24] in particular. The relevance of the decision to the first issue in this appeal is that it was accepted by both parties that the loan was an unauthorised employer payment.

54. This is made clear at several points in the judgment, including in particular the following:

> "[2]… There is no dispute that there was an unauthorised payment.
>
> [24]… It is common ground that the loan was an unauthorised employer payment.
>
> [33] The appellant accepts, as he must, that the loan made by the Scheme to the Company was an unauthorised employer payment. In particular there was no security and the terms did not satisfy section 179."

55. For completeness, the reference in *Danvers* at [58] to the loan in *Willey* being an unauthorised member payment is clearly intended to refer to it being an unauthorised employer payment.

56. Ms Ratcliffe submitted that since the "payment" issue was not argued in *Willey*, with the parties simply proceeding on the basis that it was an unauthorised employer payment, the decision is of no assistance in the appeal.

57. In general, particular caution should be exercised in assessing the wider significance of issues which are agreed by the parties. Such issues are not by definition the subject of competing submissions or of judicial analysis. However, while not addressing the meaning of "payment" in the relevant context, in my view *Willey* is indeed relevant to that issue. It is relevant because it highlights the force of the argument that if, in the context of Part 4, a loan was not a "payment" then the provisions in sections 175 and 179 which distinguish

between loans to employers which are authorised and those which are unauthorised would make little sense.

58. In relation to *Dalriada Trustees Ltd v Faulds and others* [2012] 2 All ER 734, the first point to note is that the case did not concern a tax assessment, but rather the proper construction of a trust deed. While Sean J did hold, in the High Court, that the loans in that case were "unauthorised member payments" within section 160(2) FA 1984, the facts and the context were very different from this appeal. Further, as recorded in the judgment (at [9]):

> "[9] The correspondence indicates that HMRC has been invited to join in the proceedings and/or to agree to be bound by the decision, but has declined both options."

59. In my opinion, therefore, the passage at [31] of *Dalriada* referred to in *Danvers* (at [58]) has no material relevance to the first issue in this appeal.

60. In considering whether the Loan was a "payment" for the purpose of the statutory provisions relevant to the appeal, it is in my judgment necessary to give significant weight to the statutory context rather than focussing on any "ordinary meaning" of the term. It is a term the meaning of which depends heavily on its context. If the question was, for instance, whether I had "paid" my tax bill, or whether I had "paid" a contribution to my SIPP, then, in those contexts, it would be unlikely that I could respond in the affirmative if I had simply lent the relevant amount to HMRC or my SIPP manager.

61. Given the importance of the statutory context in interpreting the term, in my judgment the passages from the decisions of the First-tier Tribunal and Upper Tribunal in *Murray Group* referred to by Ms Ratcliffe shed little light on the first issue in this appeal. The issue in this case is not whether the Loan gave rise to a payment of earnings or emoluments to Mr White.

62. One week after this appeal was heard, the judgment of the First-tier Tribunal in *Gareth Clark v HMRC* [2016] UKFTT 630 (TC) was handed down. That case concerned whether or not certain transactions gave rise to an unauthorised payments charge within Part 4 FA 2004. Those transactions included a transfer from a UK-based SIPP to a registered pension scheme established by a Cyprus-incorporated employer, a refund of surplus to that employer and a subsequent transfer to a third company which funded loans to Mr Clark. While the facts were very different to those in this appeal, one of the issues was whether a transfer of funds in that case was a "payment" to Mr Clark for those purposes: see [64] and [70].

63. Judge Berner considers the meaning of "payment" for this purpose at [106] to [140] of the judgment. The case concerned movements of money (to use a neutral term) which, for various reasons, might not have clearly transferred beneficial title.

64. Nevertheless, I have found certain of Judge Berner's comments helpful in considering the first issue in this appeal.

65. The first point of statutory construction confirmed by *Clark* is that the "payment" question is materially affected by the statutory context. The judgment endorses the approach of Chadwick LJ in the Court of Appeal decision in *Venables v Hornby* [2002] All ER (D) 93 (Sep) (see, in particular, [135] of *Clark*). One aspect of Chadwick LJ's judgment was that a purposive approach to construing "payment" would justify a different approach depending on whether the context was unauthorised member payments or unauthorised employer payments.

66. Secondly, the judgment considers the relevance of section 161(2) and section 279(2) FA 2004 to the interpretation of "payment" within section 160(2) and concludes as follows (at [138]):

> "[138]… The inclusion by s161(2) within the meaning of "payment" of transfers of assets and "any other transfer of money's worth" do not, in our respectful view, say anything about the wider meaning of "payment" more generally. The provision is one of extension, and not one of limitation. Nor can it be inferred from s279(2) that payments made by a pension fund must be transfers of value: s279(2) merely describes the source of the payments and not their quality."

67. The ratio of the decision in *Clark* on the "payment" issue is set out at [139] of the judgment:

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

68. While not specifically relevant to the question of whether a loan could also be a "payment" within section 160(2), in my judgment this conclusion does indicate that the test suggested by Ms Ratcliffe – has the money been transferred unconditionally such that it is placed unreservedly at the disposal of the recipient – is too narrow.

69. Construing the relevant provisions purposively leads to the conclusion that the Loan was a "payment" for the purposes of the provisions regarding unauthorised member payments. As regards the purpose of those provisions, I respectfully agree with the view expressed in *Clark* (at [137]):

> "The position is different [to unauthorised employer payments] in relation to unauthorised member payments, as in issue in this case. Such payments, being unauthorised, are likely to be in breach of trust, if the pension scheme is constituted as a trust. It cannot have been within the intention of Parliament to exclude from charge such a payment. The evident purpose of a provision such as that in s160(2) FA 2004 is not to exact taxation on such payments but to deter the making of such payments in order to preserve the integrity of the fund within the pension scheme itself."

70. In my judgment, both section 175 (together with section 179) and section 171(4) proceed on an assumption by the draughtsman that a loan is a "payment". It

follows from that assumption that it is necessary to provide in the statute that only employer loans which satisfy numerous conditions are "authorised", and that loans to members are not "scheme administration member payments", and are therefore not authorised.

71. If, as Ms Ratcliffe suggests, a loan was not assumed by the draughtsman to be a "payment", then that would open up a line of argument that, for instance, it was irrelevant whether an employer loan satisfied the conditions to be authorised, because it could never be an unauthorised employer "payment" in the first place. On the same argument, section 171(4) would be entirely otiose. That cannot have been Parliament's intention.

72. I therefore conclude that the Loan was a "payment" for the purposes of the unauthorised member payments provisions. For the avoidance of doubt, I would have reached this conclusion regardless of the decision in *Clark*.

The second issue: "In connection with"

73. Having determined that the Loan was a "payment", the second issue is whether it was an "unauthorised member payment".

74. In categorising payments by a pension scheme, the legislation recognises that "pension scheme" is defined not by reference to a particular legal entity but by reference to a "scheme or other arrangement": section 150 FA 2004. Section 279(2) therefore provides that:

> "(2) In this Part references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme."

75. The Loan was not in fact made by the Rowanmoor SIPP or any other pension scheme. However, the second issue concerns the potential application of the following provisions of section 161 (which are more easily understood by reference to section 279(2):

> "(3) Subsection (4) applies to a payment made or benefit provided under or in connection with an investment (including an insurance contract or annuity) acquired using sums or assets held for the purposes of a registered pension scheme.
>
> (4) The payment or benefit is to be treated as made or provided from sums or assets held for the purposes of the pension scheme, even if the pension scheme has been wound up since the investment was acquired."

76. It was common ground that:

(a) If the Loan fell within section 161(3), then the effect of sub-section (4) was that the payment would be treated as made by the Rowanmoor SIPP.

(b) The Loan was not a "benefit".

(c) The Loan was not provided "under" an investment of the type described in sub-section (3).

77. The second issue is therefore whether the Loan was provided to Mr White "… in connection with an investment …. acquired using sums or assets held for the purposes of " the Rowanmoor SIPP.

78. HMRC contend that the Loan was so provided, because it was provided in connection with Rowanmoor's investment in the shares in Imperium. Mr White contends that the Loan was not in fact connected with the Imperium investment, and that HMRC's approach gives too wide a meaning to section 161(3).

79. Ms Ratcliffe's submission in relation to the interpretation of section 161(3) placed emphasis on the purpose of the legislation. The purpose, she argued, was considerably narrower than that suggested by HMRC. She pointed out that Part 4 is headed "Payments by Registered Pension Schemes." She referred to guidance in HMRC's Registered Pension Scheme Manual, at RPSM09100160:

> "Where the purchased item (annuity, insurance contract, investment vehicle etc) remain in the ownership of the [pension] scheme, then the payment is already considered a payment under the registered pension scheme under section 161(2), so s161(3) and (4) come to the fore when the ownership of the item does not lie with the scheme. This typically arises where an annuity is purchased by the scheme in the name of the member, so the annuity contract is then owned by the member and the insurance company is directly liable to the member."

80. Ms Ratcliffe submitted that the meaning intended to be attributed to the words "in connection with" in section 161(3), was, as illustrated by this Manual extract, that the payment is made "from" the relevant scheme investment. The reasoning behind this, she argued, is to prevent pension scheme assets from being used in a manner other than for the benefit of members in the provision of pension benefits to those members. As Ms Ratcliffe stated in her Skeleton Argument:

> "Having regard to the purpose of sections 161(3) and (4) FA 2004, namely to prevent payments from pension scheme investments thereby jeopardising the value of the pension scheme, it is clear that the sections cannot be applied to the Appellant's case. The Loan was not made from Imperium, a company which invests principally in commercial and residential properties."

81. If HMRC's wide interpretation of section 161(3) were correct, argued Ms Ratcliffe, then it would impose a charge to tax on ordinary commercial arrangements such as pension-backed mortgages, where the mortgage loan is to be repaid from the proceeds of a member's pension.

82. In so far as Part 4 is intended to protect pension funds and the value of the fund investments, Ms Ratcliffe submitted that Mr White's Loan did not prejudice that protection. In the words of her Skeleton Argument:

> "The purpose of Part 4 FA 2004 is to secure and protect pensions and to ensure that pension funds are used to provide retirement benefits. The result of the arrangements

> involving the transfer of the Appellant's pension to the Rowanmoor SIPP, the investment by the pension scheme in Imperium, and the Loan by SKW, is that the Appellant's pension remains secure and protected in the Rowanmoor SIPP. There is no risk to the Appellant's pension from the Loan entered into: his pension remains intact in a registered pension scheme (with all the consequent protection that that involves). The Appellant has not accessed his pension funds early, or any part of his pension. Accordingly no unauthorised payment arises."

83. For HMRC, Ms Poots submitted that the proper approach to interpreting and applying a statutory provision was set out by Lord Nicholls (on behalf of the Judicial Committee of the House of Lords) in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1, at [36] :

> "… the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transactions will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35]:
>
> > "[T]he driving principle is the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically." "

84. As to the purpose of the legislation regarding unauthorised payments, Ms Poots cited the judgment of Judge Cannan in *Willey*, at [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 provisions 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."

85. Ms Poots argued that the tax reliefs given in relation to registered pension schemes are intended to encourage individuals to make provision for retirement. For this reason, there are restrictions on how the scheme investments can be accessed, and the funds are not intended to be accessible in any manner before the normal minimum pension age of 55.

86. Ms Poots submitted that the intended effect of the unauthorised payment regime is to prevent abuse of the relevant tax reliefs by reducing the tax benefits which have been given to the fund. That is clearly set out in the Explanatory Notes to the relevant clause in the Finance Bill 2004 (Clause 197, paragraphs 12 and 13).

87. Ms Poots stated that the HMRC guidance and Finance Bill Explanatory Notes provide no support for the Appellant's narrow interpretation of "in connection with" as meaning "from" an investment. The examples given of payments caught by section 161(3) and (4) are only examples, and are clearly not exhaustive.

88. In relation to Ms Ratcliffe's argument regarding risk and the value of Mr White's pension fund (summarised at [82]), Ms Poots submitted in her Skeleton Argument as follows:

> "(a) There is no evidence as to whether the Appellant's pension remains "intact". The value of the Imperium shares is heavily dependent upon the ability of BOH to repay the loans made to it, which in turn is heavily dependent upon the ability of other pension scheme members to repay loans made by SKW.
>
> (b) The purpose of the unauthorised payments regime is not limited to ensuring that the value of a pension scheme is maintained. The regime is intended to ensure that the generous tax reliefs granted in respect of pensions are not abused by an individual obtaining early access to the pension savings. As the Tribunal held in *Danvers* [at (62)] "[T]he unauthorised payment charge is not levied by reference to any change in value of the underlying fund as the result of an unauthorised payment, it is levied by reference to the amount of the payment." "

89. In HMRC's submission, the Loan was within section 161(3) by virtue of what they termed the "clear casual connection" between the Loan and the investment in Imperium. The investment in Imperium was part of a series of pre-ordained transactions undertaken with the expectation that Mr White would receive the Loan from SKW. In terms of causation, HMRC submitted that Mr White would not have transferred his pension savings to Rowanmoor and instructed Rowanmoor to invest in Imperium if he had not expected to receive a loan from SKW, and SKW would not have made the loan to Mr White if Mr White had not instructed Rowanmoor to invest in Imperium.

90. Although Judge Poole decided the "in connection with" issue in *Danvers*, clearly he had to do so on the facts of the case. While I have taken careful account of his analysis and findings, I have therefore approached the second issue in this appeal by reference to the "two-step" approach enunciated by Lord Nicholls in the passage from *Barclays Mercantile* set out at [83] above.

91. That approach can in my respectful opinion be summarised as "what does the statute mean, and does it apply in this case?"

Meaning

92. Sub-paragraphs (3) and (4) of section 161 treat a payment as made by a pension scheme if it is made "under or in connection with" an investment which is, broadly, acquired using pension scheme sums or assets.

93. These provisions are extending the definition of payment, and therefore the categories of unauthorised payment. The intention of such extension is anti-avoidance in nature, but what is the scope of the words "in connection with"?

94. Ms Ratcliffe, relying heavily on the supposed purpose of the legislation, contends that "in connection with" should effectively be read as "from". This has the effect that the wording is confined to a payment to a member directly sourced from an investment made by the fund. It cannot (perhaps absent a sham) catch a payment made by a third party, such as SKW. This, argues Ms

Ratcliffe, is entirely consistent with the purpose behind the legislation, which is to preserve the value of the fund investments.

95. The logical conclusion of Ms Ratcliffe's construction, it seems to me, is that the nature and degree of any connection between the Loan and the investment in Imperium is irrelevant. That is because the Loan was not made "under or from" any Rowanmoor SIPP investment, but by SKW. Even if, as in *Danvers*, it was found that a third party loan and a fund investment were "inextricably linked" (*Danvers* at [59]), on this construction the former could never be a payment made in connection with the latter.

96. This would in my judgment be a startling result. Apart from the question of whether "from" would then add anything material to "under" in section 161(3), it should be assumed that the draughtsman reached a deliberate decision to use the words "in connection with" rather than "from".

97. I was not referred by either party to any authority other than *Danvers* on the construction of the phase "in connection with". However, in a different context, there is case law on whether a payment is received in connection with a particular event, namely a termination of employment. While the context and statutory language differ from section 161, in my judgment certain observations of the Upper Tribunal in *Moorthy v Revenue and Customs Commissioners* are of interest in relation to the second issue in this appeal.

98. One of the issues in *Moorthy* was whether a settlement amount fell within section 401 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Section 401(1) ITEPA provides, so far as relevant, as follows:

> "(1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with
>
> (a) the termination of a person's employment …."

99. The language of section 401(1) ITEPA is wider in several respects than section 161(3) FA 2004. However, in reviewing the relevant case law the Upper Tribunal endorsed the broad approach to the construction of the predecessor to section 401(1) taken by the Upper Tribunal in *HMRC v Kenneth Colquhoun* [2010] UKUT 431 (TCC). In dissecting the language used in section 148(2) of the Income and Corporation Taxes Act 1988 (the predecessor to section 401(1) ITEPA), the Upper Tribunal in *Colquhoun* stated (at [12]):

> "[12] The statutory language of s148(2) has been broadly drawn. That can be seen from the use of words and phrases such as "indirectly" and "otherwise in connection with". "Otherwise" may simply mean "in any way" and is consistent with the parliamentary intention to catch a wide range of payments. In [*Walker v Adams* [2003] STC 269] a compensation payment awarded for constructive dismissal of a former employee fell within the charge to the extent that it related to loss of income but not to the extent that it compensated for injury to feelings. Special Commissioner O'Brien observed (in an appeal relating to s148 ICTA) that "[t]he word "otherwise" shows that the relevant connection or link may be looser than would be required for a strict causation test." While we are not entirely clear what is meant by a "strict causation text" we agree with

> the general sentiment that the word "otherwise" does not restrict the scope of s148(2) and is entirely consistent with a broad approach to the application of the phrase "in connection with" … the language could hardly be less prescriptive."

100. Another authority cited in *Moorthy* was *Crompton v HMRC* [2009] UKFTT 71 (TC). The main issue in *Crompton* was whether a compensation payment was made "in connection with" the recipient's termination of employment within section 401 ITEPA. The First-tier Tribunal in *Crompton* held that although the language of section 401 was very wide, it nevertheless required the existence of some connection of the specified type. The parties agreed that the principal issue in the appeal was "in connection with" (see [63]). In finding, on the somewhat unusual facts, that there was no "linkage between the payment and the termination of his employment of the sort envisaged by the legislation" (at [36]), the Tribunal observed (at [35]):

> "A connection must be some sort of link, joint or bond between two things."

101. In construing the phrase "in connection with" in section 161(3), I did not find the Explanatory Notes to the relevant clause in the Finance Bill 2004 illuminating. Nor did I find support in the HMRC Manual passage relied on by Ms Ratcliffe (at [79]) for her contention that the phrase should be read narrowly as meaning "from" a fund investment. I agree with HRMC that these are examples, not intended to be exhaustive. For completeness, I note that HMRC's Registered Pension Scheme Manual was replaced in 2015 by the Pensions Tax Manual, which no longer contains the quoted guidance.

102. Ms Ratcliffe raised a further point, by reference to the provisions in section 161 (contained in sub-sections (5) to (7)) which refer to payments to, or assets held by, a person who is "connected with" a member or sponsoring employer. Section 161(8) provides that for the purposes of section 161 whether a person is connected with another person is determined in accordance with section 993 of the Income Tax Act 2007. In her Skeleton Argument, Ms Ratcliffe cited this as evidence of the narrow purpose of section 161, and noted that "the connected persons test does not apply in this case".

103. In my judgment, these provisions shed no useful light on the proper construction of section 161(3). In any event, HMRC did not seek to argue that the connected persons test did apply in this case.

104. In the hearing, Ms Ratcliffe appeared to go further, suggesting, somewhat tentatively, that section 161(8) should apply in interpreting "in connection with" in section 161(3). That is patently misconceived, since the reference to "person" in sub-section (8) is quite clearly to the categories of person described in section 993 of the Income Tax Act 2007 and relevant to sub-sections (5) to (7). The necessary connection for sub-section (3) is between a payment and an investment, neither of which is such a "person".

105. In construing the phrase purposively, the context is the purpose of the unauthorised payments legislation. While I respectfully agree with the

comments of Judge Cannan in *Willey* at [6] (see [84] above) they seem to me to provide limited guidance in distinguishing the competing submissions of Ms Ratcliffe and Ms Poots in this respect.

106. Judge Berner in *Clark* stated as follows (at [137]):

> "The evident purpose of a provision such as that in s160(2) FA 2004 is not to exact taxation on [unauthorised employer payments] but to deter the making of such payments in order to preserve the integrity of the fund within the pension scheme itself."

107. At first blush, Judge Berner's view may appear to support Ms Ratcliffe's argument that the purpose of the provisions is to preserve the value of fund investments. However, Judge Berner's pronouncement should be seen in context. The issue there was whether an employer payment was not a "payment" because it was (broadly) in breach of trust. Approaching the relevant provision as primarily having a deterrent purpose is, in my respectful opinion, correct. However, preservation of "the integrity of the fund" is in my judgment more properly regarded as a consequence of the unauthorised payments regime than its purpose. As Judge Poole accurately observed in *Danvers*, the unauthorised payment charge is not levied by reference to any change in value of the underlying fund as a result of an unauthorised payment, but by reference to the amount of the payment. The preservation of the integrity of the fund may be a consequence of deterring payments which the legislation categorises as unauthorised, but the tax charge itself concentrates on the "payment" received by the member or sponsoring employer.

108. In submitting that the purpose of section 161 cannot have been to catch the Loan to Mr White, Ms Ratcliffe argued that unless the provisions were interpreted narrowly they would catch arrangements such as pension-backed mortgages, which Parliament cannot have regarded as abusive. The same argument was put forward in *Danvers*. In my judgment, the point is simply too generalized to have force; whether or not section 161(3) applies depends on the precise facts and circumstances of each particular case. I fully endorse the conclusion reached on this argument by Judge Poole in *Danvers* (at [63]) as follows:

> "Ultimately we did not find it helpful to consider whether the arrangements which are the subject of this appeal should be regarded as an "abuse" of the registered pension scheme reliefs, as this would have required us to judge what Parliament's reactions would have been if these specific arrangements had been considered by it when enacting the relevant provisions. With no particular guidance to go on, that would have reduced us to reliance on our own views as to whether the arrangements were "abusive". Faced with that situation, we consider the better approach is simply to interpret the words used by Parliament as best we can in their context, applied to the facts of this case."

109. The broad purpose of the unauthorised member payments regime is to penalise (and doubtless thereby deter) any payments to members made by a registered pension scheme other than those specifically listed in section 164 as authorised member payments. That broad purpose is clear from section 160(1). Not surprisingly, the basic mechanism to achieve that purpose – dividing payments

into authorised and unauthorised – is strengthened by provisions intended to curb avoidance. In some cases, the anti-avoidance provisions operate in a relatively mechanistic fashion, such as the extension of members to those connected with members, discussed above. In others, such as sub-sections (3) and (4) of section 161, their operation requires an objective determination of the circumstances surrounding a member payment.

110. In achieving a purposive construction, it is the construction of section 161(3) in the context of this broad purpose which is relevant. It is not, in my judgment, necessary to go behind that to speculate as to the possible rationale for that broad purpose.

111. In my judgment, the phrase "in connection with" in section 161(3) indicates the existence of a connection or link between the member payment and a fund investment. I respectfully agree with the observations made in the context of employee termination payments in *Crompton* (at [35]):

> "A connection must be some sort of link, joint or bond between two things."

112. As to the nature of the connection or link, in view of the broad purpose of the provisions I consider that it is likely to be primarily causal. In common with the Upper Tribunal in *Colquhoun*, I am not entirely clear what is meant by a "strict causation test", and I do not find that formulation particularly helpful, but in my view the primary focus of the "connection" in section 161(3) is causal.

Application

113. Having first considered the meaning of the statute, the second step is to determine whether it applies in this case.

114. In relation to that determination, I make two preliminary observations.

115. First, the intentions, expectations and understanding of Mr White in relation to the various transactions are clearly relevant. The burden of proof in the appeal rests with Mr White, to produce sufficient evidence to demonstrate to the satisfaction of the tribunal, on the balance of probabilities, that his appeal should be allowed: *Tynewydd Labour Working Men's Club and Institute Ltd* [1979] STC 570, at 581b. It is therefore unfortunate that I was presented with no witness evidence from Mr White. Nor was I given any reason which would have prevented the giving of such evidence. In those circumstances, it has been necessary for me to determine the second issue on the evidence available.

116. Secondly, while HMRC provided evidence relating to various supposed links and connections between the entities involved in the transactions and their funding, for the reasons given below (at [121]) I have not found it necessary to consider that evidence.

117. HMRC submitted that this appeal, like *Danvers*, involved a series of transactions which were designed to operate together, forming a "pension

liberation scheme" deliberately designed to allow members to access their pension savings, by way of a loan, without a tax charge arising. The steps of the scheme, they argued, were pre-ordained, comprising five linked transactions, as follows:

a) Mr White transferred his pension savings to a SIPP.

b) At Mr White's request, the SIPP invested in Imperium.

c) Imperium lent money to BOH.

d) BOH funded its subsidiary, SKW, by way of a subscription for ordinary shares.

e) SKW made a loan to Mr White, of approximately 25% of the value of the pension savings transferred at step (a), with the loan being expressed to be repayable out of the proceeds of that pension.

118. For Mr White, as I have pointed out, Ms Ratcliffe's submission that "in connection with" should be read as "from" renders largely irrelevant the nature and extent of any connection or links between the Loan and the investment in Imperium. As Ms Ratcliffe correctly observed, the Loan was not made "from" Imperium.

119. Ms Ratcliffe in any event rejected HMRC's suggestion that the "limited recourse" nature of the Loan demonstrated any connection with the other transactions. She pointed out that there was no obligation on Mr White to discharge the Loan from the proceeds of his Rowanmoor pension should he choose to use other funds, and there was no restriction on his ability to repay the Loan prior to his retirement. The Loan, she submitted, was a commercial loan, at a commercial rate of interest and containing commercial terms.

120. In establishing a connection between the loan and the fund investment in *Danvers*, HMRC confined its arguments and evidence to the linkage between loan and investment. In this appeal, HMRC also adduced evidence in relation to other types of connection, in respect of what they termed "people" and "funding". This evidence related to the individuals who either owned or managed BOH, Imperium and SKW, and to the flow of funding which, HMRC submitted, showed that the investments made in Imperium by a number of SIPPs ultimately funded the loans made by SKW to members of those SIPPS.

121. In view of the conclusions I have reached (at [111-112]) on the nature of the connection primarily intended by section 161(3), and my conclusions on that question below, I did not find it necessary to consider this HMRC evidence regarding "people" and "funding" and I make no finding in respect of it.

122. The critical question is the connection, if any, between the Loan and the investment by the Rowanmoor SIPP in Imperium ("the Investment"). Putting this at its simplest, would one have been made without the other?

123. The person best placed to answer whether the Investment would have been made regardless of the Loan is of course Mr White. The person best placed to answer whether the Loan would have been advanced regardless of the Investment is of course the lender, SKW. In the absence of evidence from either Mr White or SKW, it has therefore been necessary for me to determine whether the issue of connection can be properly discerned from the evidence which was available, including in particular the findings of fact which I have set out in some detail at [8] to [28] above.

124. I will deal in turn with the following areas:

a) The background and events leading up to the transactions concerned in this appeal.

b) Chronology.

c) The Loan.

d) The Investment.

e) Other evidence relevant to connection between the Loan and the Investment.

Background

125. Mr White first met with SKW at some point prior to 12 August 2010. Since Mr White contacted MJF very shortly thereafter, in early September 2010, regarding the possibility of using a SIPP to invest in Imperium (described by MJF as an SPV or special purpose vehicle) it appears most likely in view of the fact that the opportunity to invest in Imperium was not public knowledge that that possibility was identified as a result of the discussions with SKW. From the outset, therefore, I conclude that it was likely that the entity which advanced the Loan (SKW) introduced the idea of investing in Imperium through a SIPP. No other evidence was presented to suggest the contrary.

126. Mr White's first attempt to invest in Imperium through a SIPP to which he had transferred his pension benefits from the BA Scheme was thwarted when MJF refused (on 5 October 2010) to allow its SIPP to be used for this purpose. Mr White then promptly set in train another such attempt with Rowanmoor. Mr White took various steps to assuage Rowanmoor's concerns as to the investment in Imperium.

127. It is clear from these facts that Mr White wished to transfer pension benefits from his BA Scheme to a newly established SIPP. While Mr White may have had various reasons for wishing to do this (see, for instance, the letter from Mr Pritchard referred to at [13]), the natural inference from the events regarding MJF and Rowanmoor is that Mr White clearly wished that SIPP investment to be used to invest in Imperium. The inability to achieve that evidently led to the arrangement with MJF being cancelled, and Mr White was at pains to ensure that the Imperium investment was indeed made from his Rowanmoor SIPP.

128. The obvious inferences from these background facts are therefore that it is likely that SKW (the entity advancing the Loan) introduced the possibility of investing in Imperium through a SIPP, and that Mr White regarded it as important, and possibly essential, that any SIPP to which he transferred his pension benefits did make that investment.

Chronology

129. Having applied to join the Rowanmoor SIPP on 14 October 2010, Mr White signed an application form for that SIPP to invest £300,000 in shares in Imperium on 22 October.

130. On 26 October 2010 Mr White signed the Loan Agreement. The date on which SKW signed it has not been established.

131. On 2 November three events occurred. The Rowanmoor Trustees authorised the investment in Imperium, the SIPP made that investment, and Mr White received the advance under the Loan Agreement.

132. On its face and without more, this chronology suggests the likelihood of a connection between the transactions as identified by HMRC at [117]. In particular, the events of 2 November 2010 suggest a connection or link between the investment in Imperium and the Loan.

133. One material difference between the facts in this appeal and those in *Danvers* is that in *Danvers* the transfer to the SIPP and the investment by the SIPP of the transfer monies in a specified private company were conditions of the loan being granted (see *Danvers* at [19] paragraph (8)). Here, there was no such conditionality under the terms of the Loan Agreement or any other documents with which I was presented. However, the absence of any such express conditionality does not, of course, mean that the transactions were necessarily unconnected, or even that, in practice, such inter-conditionality did not in fact exist. What the chronology plainly suggests, in my judgment, is that the events of 2 November 2010 were more likely than not to have been connected. I was presented with no explanation why Mr White signed the Loan Agreement on 26 October but did not receive the advance until the day when his SIPP made the Investment. While the making of the Investment and the Loan on the same day could, of course, have been mere coincidence, I was presented with no evidence to suggest that this was the case.

The Loan

134. Ms Ratcliffe argued (as set out at [119]) that the Loan was a normal commercial loan, which Mr White could have chosen to repay before he received his pension. Furthermore, there was no obligation on Mr White to repay the Loan from the proceeds of his Rowanmoor pension if he chose to repay it from other funds.

135. The key terms of the Loan are set out at [25]. Having found as I have that the Loan was a "payment", the extent to which its terms might be regarded as "commercial" is of itself irrelevant. The issue for my consideration is only the extent to which those terms support the contention by HMRC that the various transactions in question were connected.

136. In my judgment, the terms of the Loan make it abundantly clear that the Loan was connected with the Rowanmoor SIPP. While Mr White could, as Ms Ratcliffe suggested, have chosen to repay the Loan other than from his Rowanmoor pension, the evident intention of the parties was that repayment would be from that pension. The Loan's terms state more than once that it "will be repaid" from the net proceeds of that (or any replacement) fund. If Mr White received any payment from his pension fund, failure to apply the amount received in repayment of the Loan would lead to an event of default, and a default interest rate of 24%. Furthermore, the Loan was limited recourse. The amount repayable was limited to the amount received, net of tax, by Mr White or his estate from his Rowanmoor SIPP.

137. The second issue in this appeal is (in effect) whether the Loan was made to Mr White in connection with the Investment. It is not whether the Loan was made in connection with the transfer of monies to the Rowanmoor SIPP, or with the payment by that SIPP of benefits to Mr White in due course.

138. The clear inference from the terms of the Loan that it is linked to the Rowanmoor SIPP is nevertheless relevant. It was the SIPP, and not Mr White directly, which invested in Imperium on 2 November 2010, the day on which the Loan was advanced. I have found it likely on the facts that Mr White did not want to transfer money to a SIPP unless it could and did invest in Imperium. This therefore supports HMRC's overarching contention that the transfer by Mr White to the SIPP, the Investment and the Loan were part of a series of pre-ordained transactions.

139. Furthermore, while a connection between the Loan and the SIPP is not the same as a connection between the Loan and the Investment it is relevant to consider whether the key terms of the Loan in any way suggest the latter connection. In my judgment, it is at least arguable that they do. The question is why the Loan was entirely limited in its recourse. Most loans, of course, are not limited recourse. Would it have been so limited if Mr White had not directed the SIPP to invest in Imperium, but had directed it to make entirely different, unconnected investments? In the absence of any relevant evidence, I cannot properly determine that question. However, given the material effect on the value of a loan, and the security of repayment, of making it limited recourse, it must have been the case that SKW had some good commercial reason for limiting the Loan in this way. Given my finding that it is more likely than not that it was SKW which suggested the possibility of investing in Imperium, it is at least plausible that that reason reflected the linkage between the various transactions suggested by HMRC.

The Investment

140. Imperium was a private limited company which carried out various investment activities. At the time of the events in this appeal, its shareholders were its directors, various SIPPs including Rowanmoor, and a company called Sippchoice Trustees Limited, representing various other SIPPs.

141. Imperium made a number of unsecured loans, to BOH and other companies. BOH was owned by Mr Gary Quillan. BOH was paid commission and fees by Imperium under a Management Agreement between the two companies, including in respect of subscriptions for ordinary shares in Imperium such as that made by the Rowanmoor SIPP in this case.

142. In relation to the second issue in this appeal, the relevant question is Mr White's motivation and expectation in directing his SIPP to invest in Imperium. In particular, did he direct the Investment because he understood that he needed to do so in order to obtain the Loan? Or did he direct the Investment because he considered Imperium to be an attractive company in which to invest the pension savings he had transferred from his BA Scheme?

143. I was presented with a copy of the Investment Memorandum for Imperium (see [19]) marked up with various manuscript comments which were agreed by the parties to be in Mr White's handwriting. Those comments could reasonably be interpreted as indicating that Mr White was giving some consideration to the quality of Imperium as an investment. However, in the absence of any evidence from Mr White, it is not possible to infer from this whether any such exercise was being carried out because Mr White was evaluating Imperium purely on investment grounds or because he knew or believed that the Investment was a "quid pro quo" for the Loan and he wished to ensure that it was not completely unsuitable as an investment.

144. I note that each of MJF and Rowanmoor expressed some reservations as to the suitability of Imperium as a SIPP investment: see [16] and [20]. One of MJF's concerns was the risk attached to that investment. While it is important not to read too much into those reservations, they tend to support the conclusion that Imperium was not of itself a compelling investment opportunity for a SIPP. It was certainly an investment with very limited liquidity. This would be more consistent with an understanding by Mr White that the Investment was necessary in order to obtain the Loan than with a decision by Mr White to invest in Imperium regardless of the Loan.

Other relevant evidence

145. I have considered whether there is any other evidence relevant to the existence of a (primarily casual) connection between the Loan and the Investment.

146. One might have hoped that some relevant information could have emerged from the questions asked by HMRC of Mr White in the course of the enquiry which

they began in 2012. Mr Bush, who appeared as a witness in this appeal, was responsible for much of the initial correspondence with Mr White.

147. Mr Bush did issue Mr White with a notice under paragraph 1 of Schedule 36 to the Finance Act 2008 requiring information and documents relevant to Mr White's reasons for entering into the various transactions. The responses from Mr White, however, were extremely short and did not provide any information on these points.

148. As set out at [20], before Rowanmoor would approve investment by their SIPP in Imperium they sought confirmation from Mr White that he would not seek any loan from Imperium or any company associated with it. Mr White replied as follows:

> "… I can confirm that I am not a company and as such will not be receiving a loan from Imperium Enterprises Ltd or any company that I know to be associated with them".

149. I conclude that Mr White's reply was carefully crafted. As Imperium - unlike SKW - did not have the necessary regulatory authority to lend to individuals, but only to companies, Mr White chose to reply that he would not be receiving a loan from Imperium as he was not a company. It is not possible to ascertain whether his reference to associated companies should be read as encompassing SKW or whether Mr White understood SKW not to be "associated with" Imperium. The wording of the reply appears to be deliberately structured to provide as narrow a response as possible.

Conclusion regarding "in connection with"

150. Having considered all the relevant evidence available, I have concluded that it is considerably more likely than not that the Loan was made "in connection with" the Investment. The burden of proof to displace the series of clear inferences and likelihoods which I have set out on the available facts rests on Mr White, on a balance of probabilities. In light of the absence of any evidence from Mr White, in my judgment he has failed to discharge that burden.

151. In considering the question whether the Loan would have been made without the Investment, and vice versa, the weight of the evidence I have set out above, read as a whole and viewed realistically, points clearly to a response in the negative. The other relevant evidence does nothing to contradict that picture.

Summary and conclusion

152. I find that the Loan was a "payment" for the purposes of section 161 FA 2004, and that it was made in connection with the investment by the Rowanmoor SIPP in Imperium, which was an investment acquired using sums held for the purposes of a registered pension scheme within section 161(3).

153. The appeal is therefore dismissed.

Right to apply for permission to appeal

154. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 30 NOVEMBER 2016