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UT (Tax & Chancery) Case Number: UT/2023/000103

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London

Heard on 21 and 22 January 2025
Judgment given on: 25 March 2025

INCOME TAX – pensions – unauthorised payments – scheme sanction charges – contractual interpretation – what is meant by "the commercial context" – challenges to the FTT's findings of fact and evaluative judgments – time limit for making an application to be discharged from the scheme sanction charge – appeal allowed in part

Before

MR JUSTICE MELLOR
JUDGE ANNE REDSTON

Between

MORGAN LLOYD TRUSTEES LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Philip Simpson KC (Scot) instructed by TLT LLP

For the Respondents: Ms Laura Poots, Mr Jamie Muir Wood, Ms Sarah Black and Mr Emile Simpson, all of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant, Morgan Lloyd Trustees Ltd ("MLT") is a trustee of numerous pension schemes, many of which are Small Self Administered Schemes ("SSASs"). These are typically set up by family companies who employ the directors and sometimes a small number of other employees. SSASs are registered with HM Revenue & Customs ("HMRC") in accordance with the provisions set out at Part 4, Finance Act 2004 ("FA 2004")[1].

2. Over 580 employers set up SSASs of which MLT was a trustee, and they subsequently transferred various items of IP, such as domain names, websites and trademarks, to their SSAS in exchange for cash. HMRC estimate that between December 2004 and January 2013 some £52m was paid out to employers in over 840 transactions as a result of these IP-related deals.

3. HMRC decided that many of the employers had received "unauthorised employer payments" which had given rise to unauthorised payment charges and surcharges under s 208 and s 209, and issued the related assessments. HMRC also assessed MLT to scheme sanction charges under s 239. MLT applied to HMRC for the scheme sanction charges to be discharged under s 268; HMRC refused some of the applications and decided others had been made outside the statutory time limit.

4. Around 580 employers appealed to the First-tier Tribunal ("FTT") against the unauthorised payment charges; MLT appealed to the FTT against (a) the scheme sanction charges, and (b)HMRC's refusal to discharge those charges; MLT also appealed on the basis that HMRC had misunderstood and/or misapplied the time limit provisions relating to applications for discharge.

5. Seven employers ("the Employers") were selected as informal lead appeals, and the FTT hearing took place over four weeks at the end of 2022 before Judge Rachel Short and Mr Julian Stafford. The FTT rejected all the appeals in a decision released on 31 March 2023 under reference [2023] UKFTT 355 (TC) ("the FTT Decision"). In this judgment, references to paragraphs of the FTT Decision are shown by square brackets, as [XX].

6. MLT applied for permission to appeal against the FTT Decision; this was refused by the FTT but granted on the papers by the Upper Tribunal ("UT"). None of the Employers applied for permission to appeal.

7. The hearing of MLT's appeal at the UT took place over two days, with Mr Simpson representing MLT, as he had done at the FTT, while Ms Poots, who had represented HMRC at the FTT, was assisted by Mr Jamie Muir Wood, Ms Sarah Black and Mr Emile Simpson[2]. We are grateful for their clear and helpful submissions and also for their command both of the relevant principles and of the extensive documentation: the document bundles exceeded 5,000 pages. We also extend our thanks to their legal teams.

The appeal grounds

8. On behalf of MLT, Mr Simpson put forward eight grounds of appeal.

   (1) Grounds 1-4 were that the FTT had made errors of law when deciding that certain transactions carried out by five of the Employers had given rise to unauthorised payments. Because scheme sanction charges are calculated based on unauthorised

[1] In this decision, all statutory references are to FA 2004, unless otherwise stated.

[2] It appears from HMRC's skeleton for the FTT hearing that all four counsel also appeared at first instance, albeit their names are not on the frontsheet of the FTT Decision.

payments, success on one or more of these Grounds would reduce MLT's scheme sanction charges.

(2) Ground 5 was that the FTT had wrongly construed the statutory time limit within which a scheme administrator is required to apply for relief from the scheme sanction charge, and Ground 6 was that the FTT made an error of law when it decided MLT had served applications to be discharged from the scheme sanction charges relating to transactions carried out by three of the Employers, after the statutory time limit.

(3) Grounds 7 and 8 were that the FTT made errors of law when it decided MLT did not meet either of the statutory tests in s 268(7). The FTT instead found that MLT did not "reasonably believe that the unauthorised payment was not a scheme chargeable payment" and that it was "just and reasonable" for it to be subject to the scheme sanction charges. The FTT therefore agreed with HMRC that MLT was not discharged from liability to those charges.

9. For the reasons set out in this decision, we allow MLT's appeal on Ground 1 in relation to two of the Employers and remit those issues to the FTT for further consideration. We uphold the FTT Decision in all other respects.

The Pension Funding Deals and the Employers

10. The FTT considered three types of funding transaction ("the Pension Funding Deals"):

(1) loans made from the pension fund to the employer, secured by a charge over IP assets owned by the employer ("loans");

(2) a sale from the employer to the pension fund of IP assets and their lease back to the Employer for regular payments consisting of both interest and capital ("sale and leaseback"); and

(3) a sale from the employer to the pension fund of IP assets and their licence back to the employer on an "interest only" basis ("sale and licence back").

11. Under the Pension Funding Deals, IP relating to software, trademarks, domain names, websites and databases were transferred to the Employers' pension fund in exchange for cash. The Employers and the Pension Funding Deals were as follows:

(1) Prisym ID Ltd ("Prisym"), May 2009: sale and licence back[3] of software.

(2) Formwise Washrooms Ltd ("Formwise"), July 2009: sale and leaseback.

(3) Langford Performance Engineering Ltd ("Langford"), March 2011: loan.

(4) Louis Fraser Ltd ("Fraser"), July 2012: loan.

(5) Ballards Removals Ltd ("Ballards"), September 2012: loan.

(6) Criticall Ltd ("Criticall"), November 2014: sale and leaseback of software.

(7) Gannon Associates Ltd ("Gannon"), January 2015: sale and leaseback of non-registered trade mark, domain name and website, and customer database.

12. The FTT's findings as to the nature of the IP transferred by Formwise, Langford and Fraser were challenged by MLT as Ground 1 of this appeal, as we explain below.

[3] This was described by the FTT as a leaseback [18], but nothing turns on that for the purposes of either the FTT Decision or this decision.

THE LEGISLATION

13. The legislation governing registered pension schemes is set out in FA 2004 and regulations made under the *vires* given by that Act. In this decision, all legislation is cited only so far as relevant to the issues we have to consider.

Payments by registered pension schemes

14. Section 160 is headed "Payments by registered pension schemes", and it includes the following provisions (italics in original):

> "(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, to or in respect of a person who is or has been a sponsoring employer, which is not authorised by section 175…"

15. It was common ground that the Employers were the sponsoring employers of their SSASs and that the SSASs were occupational pension schemes.

16. Section 161 is headed "Meaning of payment etc" and subsection (2) provides that "'payment' includes a transfer of assets and any other transfer of money's worth."

17. Section 175 is headed "Authorised employer payments". It lists the only payments which a registered pension scheme is authorised to make "to or in respect of a person who is or has been a sponsoring employer". Of these, the ones relevant to this appeal are "authorised employer loans" and "scheme administration employer payments".

Employer loans

18. Section 179 is headed "Authorised employer loans", and it includes the following provisions:

> "(1) A loan made to or in respect of a person who is or has been a sponsoring employer is an authorised employer loan if –
>
> (a) the amount loaned does not exceed an amount equal to 50% of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme immediately before the loan is made,
>
> (b) the loan is secured by a charge which is of adequate value, and
>
> (c) the repayment terms comply with subsection (2).
>
> (2) The repayment terms comply with this subsection if –
>
> (a) the rate of interest payable on the loan is not less than the rate prescribed by regulations made by the Board of Inland Revenue,
>
> (b) the loan repayment date is before the end of the period of five years beginning with the date on which the loan is made, or has been postponed to a date after the end of that period under subsection (3), and
>
> (*c*) the amount payable in each period beginning with the date on which the loan is made, and ending with the last day of a loan year, is not less than the required amount.
>
> (3) If on a standard loan repayment date any amount (including interest) is owing, the loan repayment date may be postponed to a date before the end of the period of five years beginning with the standard loan repayment date.

(4) The loan repayment date may be postponed under subsection (3) only once.

(5) If the amount of a loan to or in respect of a person who is or has been a sponsoring employer is increased, the amount of the increase is to be treated as a loan made on the date of the increase.

(6) 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)."

19. Section 179 thus sets out what the parties and the FTT referred to as "the five key tests for loans", namely that to be "authorised":

(1) a loan must not exceed more than 50% of the value held within the pension scheme immediately before the loan is made;

(2) be secured by a charge of "adequate value";

(3) the interest rate payable must be no less than that prescribed by HMRC in regulations;

(4) the loan must be repayable within five years, unless postponed under s 179(3); and

(5) the amount repaid each month must not be less than "the required amount".

20. Sch 30, para 4 provides that the "required amount" is determined using a prescribed formula which ensures that:

(a) the loan is repaid in equal instalments;

(b) each instalment is a combination of capital and interest; and

(c) at the end of the term both the loan and the interest have been repaid.

21. Schedule 30 para 1 sets out what is meant by "a charge of adequate value". It 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."

22. Section 278 is headed "market value". It includes the following provisions, which cross-refer to the Taxation of Chargeable Gains Act 1992 ("the TCGA"):

"(1) For the purposes of this Part the market value of an asset held for the purposes of a pension scheme is to be determined in accordance with section 272 of TCGA 1992.

(2) Where an asset held for the purposes of a pension scheme is a right or interest in respect of any money lent (directly or indirectly) to any relevant associated person, the value of the asset is to be treated as being the amount owing (including any unpaid interest) on the money lent.

(3) The following are "relevant associated persons"—

(a) any employer who has at any time (whether or not before the making of the loan) made contributions under the pension scheme…"

23. The definition of market value at TCGA s 272 reads:

"In this Act "market value" in relation to any asset means the price which those assets might reasonably be expected to fetch on a sale in the open market".

24. Sch 30, para 8(1) provides:

"If at any time after a loan is made —

(a) there is an alteration in the repayment terms, and

(b) as a result the repayment terms cease to comply with one or more paragraphs of section 179(2) (authorised repayment terms),

there is an unauthorised payment of an amount equal to the larger of such of amounts A, B, and C (see paragraphs 14 to 16) as arise when that paragraph or those paragraphs are not complied with."

25. It is not necessary for the purposes of this decision to set out how the amount of the unauthorised loan is calculated (ie by reference to amounts A, B and C).

26. The loans made to Langford, Fraser and Ballards from the respective SSASs therefore had to comply with the above provisions in order not to give rise to unauthorised employer payments.

27. The key issue before the FTT was whether the IP provided as security for the loans was "at least equal" to the amount of the loan, including interest, and this turned on whether the price paid for the IP was "the price which those assets might reasonably be expected to fetch on a sale in the open market".

Scheme administration employer payments

28. Section 180 is headed "scheme administration employer payments", and it reads:

"(1) A "scheme administration employer payment" is a payment made —

(a) by a registered pension scheme that is an occupational pension scheme, and

(b) to or in respect of a person who is or has been a sponsoring employer,

for the purposes of the administration or management of the pension scheme.

(2) But if a payment falling within subsection (1) exceeds the amount which might be expected to be paid to a person who was at arm's length, the excess is not a scheme administration employer payment.

(3) Scheme administration employer payments include in particular —

(a) the payment of wages, salaries or fees to persons engaged in administering the pension scheme, and

(b) payments made for the purchase of assets to be held for the purposes of the pension scheme.

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

29. The lease/licence back transactions carried out by Prisym, Formwise, Criticall and Gannon had to comply with s 180 in order not to give rise to unauthorised employer payments. The key issue before the FTT was whether the amounts paid by the SSAS for the IP transferred to them by those Employers exceeded "the amount which might be expected to be paid to a person who was at arm's length".

Charges

30. Employers who receive an unauthorised employer payment are liable to unauthorised payments charges and surcharges. The provisions relating to the former are set out at s 208, which reads:

"(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)-b)…

(*c*) in the case of an unauthorised employer payment, is the person to or in respect of whom the payment is made.

(3) If more than one person is liable to the unauthorised payments charge in respect of an unauthorised payment, those persons are jointly and severally liable to the charge in respect of the payment.

(4) …

(5) The rate of the charge is 40% in respect of the unauthorised payment.

(6) …

(7) An unauthorised payment may also be subject to

(a) the unauthorised payments surcharge under section 209, and

(b) the scheme sanction charge under section 239."

31. Section 209 sets out the unauthorised payments surcharge; it reads:

"(1) A charge to income tax, to be known as the unauthorised payments surcharge, arises where a surchargeable unauthorised payment is made by a registered pension scheme.

(2) "Surchargeable unauthorised payments" means

(a) …

(b) surchargeable unauthorised employer payments (see section 213).

(3) The person liable to the charge

(a)-(b)…

(c) in the case of a surchargeable unauthorised employer payment, is the person to or in respect of whom the payment was made.

(4)-(5)…

(6) The rate of the charge is 15% in respect of the surchargeable unauthorised payment."

32. Section 239 provides for related scheme sanction charges to be levied on the scheme administrator. It reads:

> "(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."

33. Section 240(1) provides that the amount of the scheme sanction charge is "40% in respect of the scheme chargeable payment, or the aggregate of the scheme chargeable payments, made by the pension scheme in the tax year". Section 241(1) provides that a "scheme chargeable payment" includes "an unauthorised payment by the pension scheme, other than one which is exempt from being scheme chargeable".

Applications for discharge

34. Section 268 and related regulations set out the conditions for an administrator to be discharged from liability to the scheme sanction charge. We consider these provisions under Ground 5.

FACTUAL BACKGROUND

35. The FTT made numerous findings of fact; these are scattered through the text of the FTT Decision. We decided it was helpful to bring those findings together, along with other facts which formed part of the background and which were not in dispute, in order that the Grounds, the parties' submissions and our decision could be more easily understood.

36. There are further findings of fact later in our decision, these include in particular findings which are under challenge by MLT in these proceedings.

MLT and its associated companies

37. MLT is the trustee and scheme administrator for numerous pension schemes. At the relevant time, it had directors but no employees. Two other companies in the same corporate group were also involved in the Pension Funding Deals, namely:

> (1) Morgan Lloyd Administrators Ltd ("MLA"), which provided MLT with administration services, albeit no contractual agreement set out MLA's responsibilities [153]; and
>
> (2) Clifton Consulting Ltd ("Clifton"), which was authorised by the Financial Services Authority (later the Financial Conduct Authority) to provide financial services [152].

The Pension Funding Deals generally

38. Clifton contacted businesses which had a critical need for finance because most traditional financing sources had already been exhausted. Some business owners had already mortgaged their own homes in order to provide finance, and were desperate for other forms of fund raising [36].

39. Clifton held an initial conversation with the employer about funding needs [155] and suggested that the company's pension funds could be used to raise finance [36]. Some of the employers already had a SSAS with MLT, others were advised to set one up. The trustees of each SSAS were MLT together with one or more of the directors of the employer company**.**

40. The Employers were more interested in how much financing could be raised than in the definitions of the IP which was to be used to raise the finance, or the details of how the Pension Funding Deal worked or the details of the documentation [37]. In some cases, the business would have gone under had it not obtained this finance [36]. The Pension Funding Deals generated fees for MLT and other members of the group, including Clifton [224]. Some employers who entered into Pension Funding Deals subsequently became insolvent and some SSASs wrote off amounts due to them from the related employer.

The period up to 2011

41. What happened after the initial contact between Clifton and the employer changed around 2011. Until then, the next stage was for Clifton to meet with the employer to form an initial view of the viability of the transaction, referred to as the "initial review" [155].

42. Clifton then instructed a firm of local accountants to value the IP [177]; these firms had business valuation expertise [167] but no experience in valuing IP [192]. The fee paid for some of these valuations was £250, which the FTT said "suggests that not much care could have been taken in producing them" [172].

43. If there was too great a gap between the employer's funding needs and the value of the available IP assets, the deal would be abandoned. About 5% of deals were dropped at this stage, for reasons such as the existence of a charge over IP which could not be released (so limiting the available IP assets) [155]. As soon as the process got past this stage, no substantial challenge to the valuation occurred [178], and Clifton had no incentive to challenge the valuations [171].

44. There would also be meetings between Clifton and MLA, following which MLA would carry out various administrative tasks. Just before the Pension Funding Deal went live, there was a final review, referred to as a "debrief", in which a check list was completed by an MLA administrator and signed off by an MLA technician and another senior member of MLA, often Mr Dowding, a director of that company [155].

45. Three of the Pension Funding Deals considered by the FTT fell within this period: Prisym, Formwise and Langford.

Prisym

46. On 13 February 2009, certain software owned by Prisym was valued by a local firm of accountants, Savile Consultancy Ltd[4] ("Savile"), at £300,000. On 13 May 2009, Prisym entered into a sale and licence back agreement with its SSAS, the Tech Pension Scheme [18].

47. Before the conclusion of the FTT hearing, the parties agreed the valuation as being £250,000. As a result of that agreement, the only issue decided by the FTT was whether MLT had applied in time for relief from the related scheme sanction charge [59]. The FTT's finding on that issue is the basis for Grounds 5 and 6 of MLT's appeal to this Tribunal, and we consider it later in our decision.

The Formwise Pension Funding Deal

48. Formwise's business is the manufacture and installation of shower rooms, toilet cubicles and related goods. In 2009 all other forms of financing had been exhausted and the company was having severe cash flow problems [36]. A SSAS called the Formwise Pension Scheme was established on 11 June 2009, with Mr Morris, Formwise's finance director [35] and MLT as the trustees.

49. On 6 July 2009, the same local firm of accountants, Savile, provided a valuation of certain IP (the FTT's findings as to the nature of the IP is disputed and we consider this at Ground 1 below). In order to carry out the valuation, Savile was provided with management accounting figures for the nine month period to March 2009, together with financial projections for the three years ending June 2012. Savile concluded that the IP was worth "anything between £37,800 and £381,600"; Mr Dowding, later accepted that this range of values was "unusual" [157]. Savile then took the mid-point of that range and rounded it down by 20% "due to current financial conditions", giving a final valuation of £145,000.

[4] Abbreviated to "Savils" in the FTT Decision

50. On 20 July 2009, Formwise entered into a Sale and Leaseback deal [24] under which (a) it agreed to transfer the IP to the SSAS for £145,000 [223], and (b) the SSAS agreed to lease it back to Formwise for a five year period, in exchange for monthly payments of £2,300.

Langford

51. Langford's business activity was the building and preparation of racing car engines. Mr Langford had two meetings with Clifton, following which he transferred the company's pension savings to a SSAS, the Performance Engineering Pension Scheme, of which he and MLT were the trustees.

52. Clifton arranged for a valuation to be carried out by Pinstripe Accountancy Ltd ("Pinstripe"), which (like the other accountancy firms used at this time) was not an expert in valuing IP [181]. The valuation was dated 30 March 2011. Based on Langford's "average after-tax earnings", Pinstripe said the valuation of its "domain name and associated website" was "considered to be £78,000".

53. On the following day, Langford:

(1) assigned to its SSAS an unregistered trademark which had been valued at £50,000, albeit this was not part of the Pension Funding Deal considered by the FTT, see [61] and [121]; and

(2) entered into a loan agreement with its SSAS under which it received a loan of £69,000 secured on different IP [122]. The FTT's findings as to the nature of that IP is again considered under Ground 1.

54. On the same date, the value of the assets held within the SSAS was £139,000 including the unregistered trademark, and £89,477 without the trade mark [122].

The HMRC meetings

55. HMRC became concerned about the Penson Funding Deals, and meetings were held in May and July 2011 [193]. As a result of HMRC's criticisms [193], MLT recognised that it needed a system which provided "more robust" valuations [166], and took the following steps:

(1) It recruited Mr Manchester [205], who had IP expertise [177];

(2) Mr Manchester had the initial review meeting with employers, instead of Clifton holding this meeting[155];

(3) the valuation experts were contracted by MLA rather than Clifton [177]; and

(4) firms of valuers with IP expertise were added to MLA's valuation panel [158]. These included Coller IP Management Ltd ("Coller") and Metis Partners ("Metis") [167]. However, until December 2012 some of the original accountant valuers continued to be used [158].

Fraser

56. Fraser was an architectural hardware company. Its owner and managing director, Mr Kilmister, passed away before the FTT hearing [14]. On 18 June 2010, a SSAS – the Louis Fraser Pension Scheme – was set up with Mr Kilmister and MLT as trustees.

57. In July 2010, the SSAS loaned Fraser £30,000 on the security of its Domain Name, and in October 2010, the SSAS made a second loan, also secured on the Domain Name. Neither was part of the Pension Funding Deal considered by the FTT.

58. On 21 June 2012, a firm called Valuation Consulting Co Ltd ("Valuation Consulting") provided a valuation of certain IP; the FTT's findings as to the nature of that IP are challenged

and we return to this under Ground 1. The amount of the valuation was £36,142. On 18 July 2012, the SSAS lent Fraser £23,000, secured by that IP.

Ballards

59. Ballards operates in the home removals business in the East Midlands. It established a SSAS, called the Ballards Removals Pension Scheme. On 8 June 2010, Ballards signed an agreement with its SSAS under which it received £145,000 through the sale and leaseback of its domain name and website [223].

60. Ballards owned vehicles on which its logo was painted; it also operated a franchise agreement with another firm, Bishops Move Ltd [73], those vehicles being branded with the Bishops Move logo.

61. On 14 July 2011, a valuation of the Ballards trademark (logo) was carried out by Savile based on the post-tax profit of the company for the previous four years, together with projections for the next three years. The forecasts relied on were provided by Ballards and were based on "hope for growth" [89].

62. Savile concluded that the value of the trademark "could be anything between £98,030 and nil. Savile then averaged the seven years' earnings to arrive at a figure of £36,332, which was rounded down to £35,000 [175]. The following day, and as a result of the Pension Funding Deal, Ballards filed an application to register the trademark.

63. On 19 July 2011, Ballards entered into a loan agreement with its SSAS on the security of the trademark, under which it borrowed £32,000 ("the First Loan"). The trademark was registered on 21 October 2011.

64. In September 2012 [175], a second valuation of the trademark was carried out by David Kelly of Seabright & Co (Nailsea) Ltd, another accountant. He had no experience of valuing IP assets prior to this engagement [185]. At the time, Ballards was moving into new business areas, namely military contracts and the moving of aggregates [73].

65. Mr Kelly applied what he described as the "market approach" to valuation, relying on the "rule of thumb", taking 50% of Ballard's 2012 turnover as his starting point, and then applying a discount to provide a value for the trademark on a stand-alone basis. He had not seen Ballard's business plan and was not aware of any previous funding deals undertaken by Ballards [186]-[187]. Mr Kelly concluded that the trademark was worth £73,000 [105].

66. On 27 September 2012, Ballards entered into a second loan agreement with the SSAS ("the Second Loan"), the agreement stated that the SSAS was lending Ballards £48,956 [55] secured on the trademark. On that date, the principal outstanding on the First Loan was £24,956, so the difference was £24,000 [56].

67. The FTT found at [56]-[58] that:

(1) the First Loan was no longer "extant" and had been replaced by the Second Loan; and

(2) Ballards had failed to discharge the burden of proof in relation to the value of the trademark.

68. Both those findings were challenged before us as Grounds 2 and 4 respectively, and we return to them later in our decision.

69. The FTT also held that MLT had failed to consider whether consolidating the First Loan with the Second Loan had caused two of the five key tests in s 179 to be breached [208]. Before us, it was common ground that there had been a breach, because:

(1) the repayment date for the sums due under the First Loan had been put back to a date more than five years after that Loan had been made, see s 179(3); and

(2) although a repayment date may be deferred once under s 179(4), that is only possible where an amount of capital and interest is outstanding at the end of the term for that loan, see s 179(3), and the First Loan had not reached the end of its term.

70. At the time of the Second Loan, the Ballards SSAS held assets valued at £200,000 and the pension funding was £194,000 (£145,000 + £48,956), almost 100% of the total value of the fund [223].

The credit committee

71. In 2014 ML established a credit committee [158]. Its role was to consider the likelihood of payment defaults rather than assessing the valuations received of the underlying IP [174].

Criticall

72. Criticall was a software development company. On 22 September 2014, Coller valued software owned by Criticall. The valuation was carried out by Dr Asher, who had been an IP valuer for more than 14 years and so had significant expertise [181].

73. MLA supplied Dr Asher with financial reports, business plans and the list of assets to be valued [188]. He was asked to provide an indicative valuation in an email, after which he was told to proceed with a detailed valuation; this was the case not only for Criticall but for 90% of the cases referred to him [190].

74. Dr Asher was aware of the need to provide conservative valuations [190]. He was not prepared to give a market valuation in the Criticall case because in his view there was insufficient market information available [189]. He valued the software at £105,000, being a midpoint between £87,000 and £122,000. Dr Asher was not subsequently contacted by MLA about the valuation [213].

75. On 3 November 2014, Criticall assigned its IP rights in the software to its SSAS in exchange for a payment of £110,000, and the SSAS agreed to lease the software back for £2,750 a month for five years. The IP assets were described in the sale and leaseback agreement as "Criticall Limited Software" rather than the specific software which had been valued by Dr Asher [168]. The MLA checklist was signed off, despite the price being undefined, and the trustee resolution was signed only by one of the parties [168].

76. At the time of the Pension Funding Deal, the value of the assets held in the Criticall SSAS was £143,623**.** Before the deal was finalised, it was referred to the credit committee because of the high level of pension funds involved, but this did not prevent it going ahead [174]. HMRC subsequently accepted that the Criticall software was worth £85,000 [210].

Gannon

77. Gannon was a personal services company [90] which provided Mr Gannon's management consulting services to clients [98]. In 2015, Mr Gannon's ill-health caused a downturn in the company's profits [99].

78. The valuation was carried out on 5 January 2015 by Mr Robinson for Metis [94]; Mr Robinson had extensive experience in IP valuation [182]. He had no direct contact with Mr Gannon [99], but reviewed a standard bundle of financial information provided by MLA and provided a valuation on a "fair value" basis on the understanding that MLA clients wanted a high valuation for their assets. He decided it was not possible to provide a market-based valuation because there was insufficient market information. Before he gave an indicative valuation, Mr Robinson was aware of how much an MLA client such as Gannon wanted to raise in funding [183].

79. In his valuation, which was seen by the FTT [97], Mr Robinson valued the following assets at £22,500 [94]:

(1) a "trademark" which consisted of a headshot of Mr Gannon himself and a strap line, with no reference to the Gannon name at all [90];

(2) a "database" of Mr Gannon's own client list [90], made up of some 1,500 names from 80 clients [97]; this was valued at between £16,000 and £5,000, although Mr Robinson did not see the database [83]. It was also not provided in evidence at the FTT hearing [97]; and

(3) a website and domain name [90]; the website was "brochure style" [84].

80. On 28 January 2015:

(1) a sale and leaseback agreement was signed between Gannon and its SSAS [97] under which Gannon received £25,000 and the SSAS agreed to lease the IP back for £675 a month for five years;

(2) the SSAS made a loan to Gannon of £75,000; and

(3) Gannon entered into a debenture which referred to a charge over assets of Gannon including "all of the intellectual property and all fees and royalties delivered from or incidental to the intellectual property" [97].

81. No-one at MLA [205]:

(1) looked at the Gannon database;

(2) looked critically at the Metis valuation of a website/trademark which was clearly tailored specifically to Mr Gannon and therefore unlikely to be valuable to anyone but him;

(3) critically evaluated the financial inputs used by Metis;

(4) checked the precise terms of the documentation signed by Gannon, including the impact of entering into a general debenture on the same date as the sale and leaseback over IP; or

(5) checked whether the Gannon trademark was actually registered, despite the impact this had on its value.

Overall approach to documentation

82. MLA had a "cavalier approach to documentation" [169], which was exemplified by various errors and omissions, such as finalised loan documents which did not contain a figure for the loan amount, and trustee resolutions which were signed but not dated, and/or were incomplete. Examples included the following [168]:

(1) the trustee resolutions for the Gannon and Criticall transactions had information missing;

(2) in the Criticall case the resolution had only been signed by one party; and

(3) in the Criticall sale and leaseback document, the IP assets were defined as "Criticall Limited Software", rather than the specific software identified by the Coller valuation report.

83. In addition, the checklists for each of Ballards, Gannon and Criticall Pension Funding Deals had issues outstanding, marked in red, at the time when those Deals were signed off [155].

Lack of challenge to the valuations

84. MLA accepted the valuations provided to them at face value with no real interrogation of the assumptions made in coming to those valuations [170]. This was particularly acute in the period before Mr Manchester's recruitment [171], but was also true of some later valuations – for instance, in the 2015 Gannon transaction no one checked whether the trademark which was the subject of the sale and leaseback was registered or not [173] and no-one even questioned how the highly personalised "trademark" valued for Mr Gannon could possibly have had any real value to anyone but him [195].

85. Any scrutiny of the valuations by the MLA/MLT team was limited to making sure the valuation had been based on the right inputs (the correct company accounts which were in the name of the right company) and were over the right IP assets. There was no questioning of the valuation itself, including the profit forecasts on which it had been based [175].

86. Commercial pressure meant that it was more likely for the IP assets to be overvalued rather than undervalued and it was in no one's interest to challenge those valuations as being too high [179].

The assessments

87. HMRC made the following assessments on the Employers:

(1) To Prisym on 2 October 2013, on the basis that the sum it had received from its SSAS of £300,000 for the sale of its software was an unauthorised payment subject to an unauthorised payments charge of 40% and a surcharge of 15%, so a total of £165,000.

(2) To Formwise on 15 November 2013, on the basis that it had received a sum estimated at £166,750 from its SSAS, which was an unauthorised payment subject to an unauthorised payments charge of 40% and a surcharge of 15%, so a total of £91,712.50.

(3) To Langford on 18 March 2015, on the basis that the loan it had received from its SSAS of £69,000 was an unauthorised payment subject to the unauthorised payments charge of 40% and a surcharge of 15%, so a total of £37,950.

(4) To Fraser, on 11 August 2016, on the basis that the loan it had received from its SSAS of £23,000 was an unauthorised payment subject to the unauthorised payments charge of 40% and a surcharge of 15%, so a total of £12,650.

(5) To Ballards on 12 August 2015, on the basis that the loan it had received from its SSAS of £48,856 was an unauthorised payment subject to the unauthorised payments charge of 40% and a surcharge of 15%, so a total of £26,926.95.

(6) To Criticall on 26 September 2016, on the basis that the payment it had received from its SSAS of £110,000 for the sale of its software was an unauthorised payment subject to the unauthorised payments charge of 40% and a surcharge of 15%, so a total of £60,500.

(7) To Gannon on 31 August 2016, on the basis that the payment of £25,000 it had received from its SSAS for the sale of its IP was an unauthorised payment subject to the unauthorised payments charge of 40% and a surcharge of 15%, so a total of £13,750.

88. HMRC assessed MLT to the related scheme sanction charges under s 239, and MLT applied to be discharged under s 268(7) for all of the Employers except Fraser. We return to the discharge applications at Grounds 7 and 8.

89. We considered whether the FTT had made a finding of fact that at some subsequent point the Employers repaid the Pension Funding Deals in full. The FTT recorded at [216] that the Appellants had placed reliance on "the fact that all of the Employers had repaid the Pension

Funding Deals in full". However, at [222] the FTT says (our emphasis) "*if* each of these deals were actually successfully paid off, that is not as a result of MLT's rigorous processes". On balance, and despite the use of the word "if" in the second sentence, it appears to us that the FTT did find as a fact that the Employers had fully repaid the Pension Funding Deals.

The FTT Decision and the Grounds

90. The FTT refused the Employers' appeals, and MLT's appeals against the scheme sanction charges, finding that (a) the market value of the IP involved in some of the Pension Funding Deals was nil or negligible, and (b) the Employers had failed to meet their burden of proof in relation to other Pensions Funding Deals. Grounds 1 to 4 of MLT's appeal to this Tribunal seek to challenge some of those findings.

91. The FTT also held that MLT's applications to be discharged from liability to the scheme sanction charges relating to the unauthorised payments made to Prisym, Formwise and Langford were made after the statutory time limit. Grounds 5 and 6 set out MLT's challenges to those findings.

92. The FTT went on to consider MLT's appeal against HMRC's refusal to discharge it from the scheme sanction charge in relation to Ballards, Criticall and Gannon, and agreed with HMRC. MLT's appeal against that finding is considered under Grounds 7 and 8.

GROUND 1: DOMAIN NAMES AND WEBSITES

93. Ground 1 is relevant to the Pension Funding Deals carried out by Formwise, Langford and Fraser. We first set out the background, and then consider the position of each of those Employers.

The background

94. Formwise appealed to the FTT on the basis that it had not received an unauthorised payment, because the £145,000 received from its SSAS in exchange for the IP transferred did not exceed "the amount which might be expected to be paid to a person who was at arm's length", and was thus not an unauthorised payment, but a "scheme administration employer payment" under s 180.

95. Langford and Fraser appealed on the basis that there was no unauthorised payment because the IP provided to the respective SSAS as security for their loans was of "adequate value" and so satisfied s 179(1)(b).

96. Before the FTT hearing, the parties had agreed to a number of points relating to IP valuation [19]-[20], including the following:

(1) A website is a separate asset from a domain name.

(2) A domain name is an intangible asset which points users to a website.

(3) A domain name can be sold without the related website.

(4) A domain name as a stand-alone asset is of negligible or nil value

97. The FTT construed the contractual documents and found that the IP transferred in each case was a domain name as a stand-alone asset, and it was thus of nil value. It went on to find that unauthorised payments had therefore been made by each SSAS to the related Employer.

98. Ground 1 was that:

> "The Tribunal erred in concluding that references in the operative documents to domain names were references only to the relevant domain names and did not include the websites of which those domain names were the addresses."

Formwise

99. As set out earlier in this decision, Formwise entered into a Sale and Leaseback deal with its SSAS under which it agreed to transfer certain IP to the SSAS for £145,000 and the SSAS agreed to lease the IP back for monthly payments of £2,300. The IP had been valued by Savile at £145,000.

The Formwise Contract

100. The contract signed by the parties ("the Formwise Contract") began by setting out two recitals:

> "(A) the Company is the legal and beneficial owner of the Intellectual Property Rights (defined below).
>
> (B) the Company has established the Formwise Pension Scheme and has agreed to assign all right, title and interest in and to the Intellectual Property Rights to the Fund (defined below) on the terms set out in this Agreement and the Fund has agreed to licence use of the assigned Intellectual Property Rights back to the Company on the terms set out in this Agreement."

101. Clause 1 set out definitions and interpretation, and *inter alia* stated that "Intellectual Property Rights means the Domain Names", and "Domain Names means the internet domain names detailed in Part 1 of Schedule 1". Part 1 of Schedule 1 was headed "Domain Names" and it read "www.formwise-washrooms.co.uk".

The FTT Decision

102. Before the FTT, the Appellants had submitted that the Formwise Contract should be interpreted on the basis that the reference to "domain name" incorporated a reference to the company's website because it was necessary to take into account the "commercial context".

103. The FTT considered the case law, including *Mannai Investment Company Limited v Eagle Star Insurance Company Limited* [1997] AC 749 ("*Mannai*") and *Arnold v Britton* [2015] AC 1619[5] ("*Arnold*"), together with the evidence as to what the parties had understood, and then held that the only asset transferred was the domain name, for the following reasons:

> (1) In *Arnold* the Court had held at [18] that "the clearer the natural meaning, the more difficult it is to justify departing from it" and the wording of the Formwise Contract only referred to the domain name.
>
> (2) The only "context" which was relevant was "what was in the minds of both of the parties to the operative documents", in this case the trustees of the SSASs and the Employers, and:
>
> > (a) Mr Morris, Formwise's finance director, was unclear whether the transaction involved a domain name alone, or a domain name plus the website, and thought they were the same thing; while
> >
> > (b) there was no evidence from anyone at MLT or MLA who had been involved in the drafting or negotiation of the Formwise Contract.

Mr Simpson's submission relating to Mr Morris' evidence

104. Mr Simpson submitted that the FTT had made an error of law because it had not properly reflected the evidence given by Mr Morris. However, as Ms Poots correctly pointed out, this is a challenge to the FTT's findings of fact at [38] and [35] that "Mr Morris was unclear whether

[5] Cited as *Abbot v Britain* in the FTT Decision, but the textual references are all correct.

the transaction involved a domain name alone, or a domain name plus his website" and that he "thought they were the same thing".

105. It is well-established that a challenge to a finding of fact can only succeed if it meets the high thresholds set out in the case law. In *Edwards v Bairstow* [1956] AC 14, Viscount Symonds said at p 29:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence, or on a view of the facts which could not reasonably be entertained."

106. In the same case, Lord Radcliffe said at p 36:

> "it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test."

107. Lord Hoffman said in *Biogen v Medeva* [1997] RPC 1, at p 45:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance…of which time and language do not permit exact expression but which may play an important part in the judge's overall evaluation."

108. In *Georgiou v C&E Commrs* [1996] STC 463 ("*Georgiou*"). Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said at p 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law… It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure…to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

109. Finally, in *Megtian v HMRC* [2010] STC 840 at [11], Briggs J (as he then was) said:

> "The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact."

110. We kept all those principles in mind when considering the challenge made by Mr Simpson based on Mr Morris's evidence. In his witness statement Mr Morris had said:

> "Given that our domain name and website was such an essential tool for our business, £145,000 seemed like a small sum of money in comparison to the turnover it helped generate over the following months and years."

111. In evidence-in-chief, Mr Morris was asked "do you recall what the transaction involved", and he replied "it was the purchase and lease back of the company's website, Formwise Washrooms Ltd". However, when asked "at the time in 2009 what did you know about what a domain name actually is", he said:

> "I didn't really have much to do with domain names, websites and so on. To me, it is the same thing: you buy a domain name and that becomes your website."

112. We agree with Ms Poots that there is no basis for this Tribunal to interfere with the FTT's findings of fact about Mr Morris's understanding as to what was encompassed in the transaction. This is not a case where there was "no evidence" to support the findings, or where the evidence was "inconsistent with, and contradictory of, the determination, or [where] the true and only reasonable conclusion contradicts the determination". Instead, the FTT placed weight on a different part of Mr Morris's evidence from that emphasised by Mr Simpson. This was not an error of law.

Construction of the Formwise contract

113. Mr Simpson also submitted that the FTT had misconstrued the authorities on the construction of contracts, and that:

> "the proper interpretation of the term 'domain name', and the actual domain name included in the relevant contract, having regard to the factual matrix and the knowledge of the parties at the material time, is that it should be interpreted as covering not only rights to the domain name but also rights in the website."

114. It would, he said, make no commercial sense for the parties to have contracted to sell the domain name on its own, and the FTT should have given the Formwise Contract a "commercially sensible construction".

115. We agree with Mr Simpson that the FTT misunderstood what is meant by the "commercial context" of a contract. It is not "what was in the minds of both of the parties to the operative documents", as the FTT stated was the position. Instead, as Lord Clarke said when giving the only judgment in *Rainy Sky v Kookmin Bank* [2011] UKSC 50 ("*Rainy Sky*") at [14], having considered earlier authorities:

> "the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant…the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

116. He expanded that summary slightly at [21], saying:

> "the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to refer the construction which is consistent with business common sense and to reject the other."

117. The test is thus objective: we must establish what the reasonable person would have understood the contract to mean, albeit that the reasonable person is informed by the background knowledge which would reasonably have been available to the parties at the time. It is not "what was in the minds of both of the parties". There was thus an error of law in the FTT Decision.

118. Section 11 of the Tribunal, Courts and Enforcement Act 2007 is headed "Right to appeal to Upper Tribunal", and subsection 1 gives a person the "right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision".

119. Section 12 TCEA provides:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision."

120. It follows that if the UT identifies an error of law in an FTT decision which is under appeal, the UT "may (but need not) set aside" the decision, and if the UT does set aside the decision, it must either remit the case to the FTT with directions for reconsideration, or remake the decision. The language of the TCEA clearly indicates that the UT has a discretion as to how to proceed once an error of law has been identified.

121. In this case, although Mr Simpson's argument centred on commercial context and commercial common sense, the present situation engages additional principles of interpretation:

(1) One is whether the term used "domain name" admits of any ambiguity. In this regard, it is necessary to keep in mind another important principle re-affirmed in *Rainy Sky*, namely "Where the parties have used unambiguous language, the court must apply it."

(2) However, as part of the iterative process of interpretation, in deciding whether the language of the contract is clear and unambiguous, the court must test the rival interpretations against their commercial consequences, see Lewison on the Interpretation of Contracts, (8th Edition, 2024) at 2.82, and *Napier Park European Credit Opportunities*

Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV [2014] EWCA Civ 984, where Lewison LJ said:

> "Thus we must seek to discern the commercial intention, and the commercial consequences from the terms of the contract itself; and that feeds in to the process of deciding whether a particular word or phrase is in reality clear and unambiguous. It follows in my judgment that, where possible, the court should test any interpretation against the commercial consequences. That is part of the iterative process of interpretation. It is not merely a safety valve in cases of absurdity."

(3) It is also necessary to be aware that deciding whether a term is ambiguous is not always easy. As Briggs LJ (as he then was) observed in *Sugarman v CJS Investments Ltd* [2014] EWCA Civ 1239:

> "There can unfortunately be a fine dividing line between that which appears commercially unattractive and even unreasonable and that which appears nonsensical or absurd. It causes continuing difficulty in the application of English law to problems of constructions, not least because it is not unusual for apparently reasonable judicial minds to disagree on the question whether a particular contractual or other documentary provision has crossed it…."

(4) Another relevant principle is whether one outcome or the other produces a result which is absurd. It suffices to cite Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749 at 771:

> "In determining the meaning of the language of a commercial contract and unilateral contractual notices, the law therefore favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would interpret them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on the niceties of language."

(5) There are, however, limits on the application of commercial common sense. See for example, Lord Neuberger in *Arnold v Britton* [2015] UKSC 36:

> "…while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill advised, even ignoring the benefit of wisdom of hindsight and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid rewriting it in an attempt to assist an unwise party or to penalise an astute party."

122. The following features of the present case appear to us to be material:

(1) First, the term used in the contract – "domain name" – appears at first sight to be clear.

(2) Second, it is important not to ascribe to the parties the clarity of analysis which we are now able to bring to bear. By that we mean the clarity of the distinction between a

domain name and the website accessible at that domain name. We recognise that "*the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*" should reflect the imperfect knowledge of these particular contracting parties.

(3) Third, the domain name in question was www.formwise-washrooms.co.uk. This is plainly not an inherently valuable domain name. One can think of the highly generic domains such as www.business.com which might achieve a high valuation. Indeed, this domain would only appear to have value for a business named formwise connected with washrooms.

(4) Fourth, the valuation which had taken place produced a figure of £145,000, but it was explicitly a valuation of the domain name alone, even though the website is mentioned as part of the analysis leading to the valuation.

(5) Fifth, it is apparent from the valuation that it relied on an analysis of the trading performance of the company. Leaving aside the question of whether this valuation approach was appropriate because the valuation by Savile appears to have been closer to a valuation of the goodwill of the business, a valuation of the domain name alone at £145,000 can only be described as absurd. Thus the valuation points fairly strongly to the point that the valuation was of domain name and website. This also means that a literal interpretation of the term 'domain name' appears to lead to a commercially absurd result.

(6) Sixth, it is relevant to note that this is not a case where the *parties* to the relevant contract argue for different interpretations. Indeed, it appears that the parties to the contract agree on the wider interpretation that the term "domain name" includes the website. It is HMRC which argues for a different and more literal interpretation.

(7) Seventh, it is apparent that there was a lack of care involved: no-one appears to have applied their mind to the question of what asset was actually involved in this transaction. It is clear that an appreciation that (a) a domain name and a website were different assets and (b) that a domain name on its own was of negligible value only came much later, long after the assessments were issued, in the course of preparing for the FTT hearing.

(8) Eighth, in terms of the transaction itself, the background knowledge available to the parties at the time was that: IP could be transferred under a sale agreement; a SSAS can buy IP assets from the related employer company; domain names were a type of IP; a valuer could be instructed to provide a value for the IP which would form the basis of the sale agreement; in reliance on that value, a seller could transfer the IP to the buyer; the buyer could then license or lease the IP back to the seller in exchange for regular payments; but

(9) nonetheless, the parties clearly intended that this transaction involved a valuable asset, precisely in order to justify the size of the sum being paid to Formwise.

123. We have found this issue somewhat finely balanced. On the one hand the court is often anxious to avoid an absurd result. On the other hand, an appeal to a commercially sensible interpretation has two effects in the particular circumstances of this case: first, it would override the plain wording of the contract and second, it would also have the effect of absolving the parties of their own lack of care. In the somewhat peculiar circumstances of this case, we have concluded that the parties must live with the contract which they agreed – which refers only to the domain name.

Conclusion

124. Thus, although there was an error of law in the FTT's decision because it misunderstood the meaning of "commercial context", there is no change to the outcome. The only asset transferred under the Formwise Contract was the domain name, and this had a negligible value. It follows that the £145,000 received by Formwise was an unauthorised payment, such as to give rise to an unauthorised payment charge and surcharge, and to a scheme sanction charge.

125. We mention a further possible point, even though it has not been the subject of argument. If "domain name" had been interpreted to include the website, a further issue would have arisen on what was meant by the 'website' and how it should have been valued – was it the cost of replacement i.e. the cost of writing the code to create an equivalent website or should the valuation have included some or all of the goodwill generated by the use of the website in the business. The valuation of £145,000 seems to have included goodwill, but there is no reference to this in the contract

Langford

126. The Langford Pension Funding Deal which was the subject of the HMRC assessment was the receipt of a loan from the SSAS secured by IP; the nature of that IP was similarly in dispute.

The Langford Contract

127. The contract between Langford and the SSAS ("the Langford Contract") provided that the SSAS, as "the Lender" would "grant a loan of £69,000" to Langford as "the Borrower" for "the purpose of business expansion".

128. Clause 3.1 read:

> "As security ("Security") for the payment or discharge of the Secured Suns, the Borrower hereby charges the Assets to the Lender…"

129. The "Secured Sums" were defined as being all money due from the Borrower to the Lender, being both the capital loaned and any interest. The "Assets" were defined as:

> "The assets referred to in the Schedule, including without limitation the Intellectual Property, and all and every interest therein or the proceeds of sale thereof which the Borrower may charge at law or in equity."

130. The Schedule was headed "The Assets", and the text said "Domain name – www.lpengines.com". We analyse the contractual language further below.

The evidence and findings of fact

131. At [44] the FTT found as a fact in relation to all three Employers that "at best there was some confusion about the differentiation between a website and a domain name", and this finding therefore applies to Langford. The FTT also recorded at [40] and [41] the evidence given by Mr Dowding and Mr Carwithen about this Pension Funding Deal, but placed no weight on that evidence as neither was involved in the negotiation and drafting of the Langford Contract [42].

132. Mr Simpson submitted that reliance should have been placed on:

(1) the evidence given by Mr Carwithen and Mr Dowding;

(2) the wording of the valuation provided by Pinstripe; and

(3) Mr Langford's oral evidence that the money received from the SSAS was "something to do with the domain name and the website".

133. In relation to those three points:

(1) The FTT was plainly entitled not to place weight on the evidence of Mr Carwithen and Mr Dowding for the reasons it gave.

(2) In Mr Langford's witness statement he said he "did not recall receiving the valuation for our domain name", while in oral evidence he said "I don't recall Pinstripe" and confirmed that he had no interaction with Pinstripe at all. It follows that there was no evidence before the FTT that Mr Langford had seen Pinstripe's valuation at the time he signed the Langford Contract.

(3) The oral evidence relied on by Mr Simpson was in the following context:

> "Mr Simpson: So what was the purpose of [the Langford Contract]?
>
> Mr Langford: To raise some money against my pension.
>
> Mr Simpson : Are you aware how the money was raised?
>
> Mr Langford: No. This is something to do with the domain name and the website."

He was then asked "at the time…what did you think then a domain name actually was?" to which he replied "a company name, company logo, company website", adding that all he recalled was that Clifton had told him what "could be done with a domain name and what could be raised". Under cross-examination he said the website was dealt with by an employee, not by him**.**

134. The FTT therefore had evidence "sufficient to support the finding which it made" that "at best there was some confusion about the differentiation between a website and a domain name".

135. We have already set out the case law relating to challenging findings of fact. This is not a case where there is no evidence to support the FTT's finding, nor is it one where the evidence is inconsistent with, and contradictory of, the determination, or where the true and only reasonable conclusion contradicts the determination. It is instead a finding which is capable of being "rationally or reasonably justified" by the evidence.

136. We thus find that MLT has failed to show that FTT's findings of fact about the Langford Contract contained an error of law.

Construction of the Langford Contract

137. Mr Simpson also submitted that the FTT had misconstrued the authorities when interpreting the Langford Contract, for the same reasons as set out above in relation to Formwise.

138. The situation has a number of similarities with the Formwise contract, but there are some significant differences. As before, we start with the language of the contract. The Langford Contract itself is a Deed of Charge for a Secured Loan of £69,000, the security being a charge over the "Assets". There are a number of clearly defined terms:

(1) The "Assets" are defined as those "referred to in the Schedule (including without limitation the Intellectual Property)…"

(2) The Schedule simply lists "Domain Name – lpengines.com".

(3) However, the "Intellectual Property" is defined as "any and all of the Goodwill/Domain Names and including all and any improvements thereto".

(4) The "Domain Names" are defined as "the domain names set out in the Schedule".

(5) "Goodwill" is defined as "the goodwill of the Borrower in relation to the Intellectual Property".

(6) The "Borrower" is Langford Performance Engineering Limited i.e. the operating company of the business.

139. Although there is an element of circularity in the definitions of Goodwill and Intellectual Property, they are not completely circular because 'Intellectual Property' expressly includes the domain name(s).

140. In this instance, it is plain that the IP in question is the domain name plus associated goodwill i.e. the goodwill generated by the use of the domain name. That goodwill can only have been generated via the website accessible at the domain name.

141. The valuation from Pinstripe underpinning this Deed was "for the intellectual property rights attaching to the domain name (www.lpengines.com) and related website...." It was stated to be "A fair market value of the domain name and associated website…" and was "considered to be £78,000". That valuation was based on the trading performance of Langfords and could only have been justified, in our view, on the basis that it included some or all of the goodwill of the business.

Conclusion

142. It follows from the analysis above that there was a plain error of law in the FTT's decision and we must set aside the FTT's interpretation of the Langford Contract and its conclusion consequent thereon that the loan of £69,000 was an unauthorised payment.

143. The Langford Contract was supported by the Pinstripe valuation. The FTT received expert valuations of £65,000-75,000 from Ms Cawdron (albeit this included 'the Langford unregistered sign' and we were told it was now common ground that the security for the loan did not include that unregistered sign) and from Mr Mann of £500.

144. In these circumstances, the valuation relied upon by HMRC of £500 was plainly wrong because it was founded on an incorrect interpretation of the Langford Contract. The valuations (of both Pinstripe and Ms Cawdron) *may* support a conclusion that the loan was secured by a charge of 'adequate value' but we do not have sufficient information to be able to decide the point. So we must remit the issue to the FTT and the FTT will have to reconsider the analysis at [120]-[125] of their decision in relation to Langford.

145. In this regard, we note the FTT's conclusion at [123] that the value of the unregistered mark (said to be £50,000) had to be excluded from the value of the pension fund at the date of the loan because (it is said) "it is not possible to transfer an unregistered mark". However, the true principle is that it is not possible to transfer an unregistered mark *separately from the goodwill* generated by its use.

Fraser

146. The Fraser Pension Funding Deal which formed the basis for HMRC's assessment was the loan to Fraser from the SSAS of £23,000, secured by IP.

Submissions and our conclusions

147. Mr Simpson sought to challenge the FTT's finding of fact at [44] which we set out at §131 above, on the basis that reliance should have been placed on:

(1) the wording of the valuation provided by Valuation Consulting;

(2) the evidence given by Mr Carwithen and Mr Dowding; and

(3) the evidence in Mr Kilmister's witness statement that the IP used in the transaction was "our website and the goodwill surrounding it".

148. There is no evidence that Mr Kilmister had seen the valuation, and we have already found that the FTT was entitled to place no weight on the evidence given by Mr Carwithen and Mr Dowding. On the third point, as Mr Kilmister had passed away before the hearing, he was unable to be cross-examined on his witness statement, and the FTT was therefore entitled to place no weight on it.

149. In conclusion, these submissions do not meet the threshold set by the case law for challenging a finding of fact.

150. However, on the question of law, the FTT recorded that the Fraser Contract was a carbon copy of the Langford Contract, other than that the parties and the loan amount was different. On that basis, our conclusions are the same, and we must also remit the issue of whether the loan to Fraser was an unauthorised payment and any consequences flowing therefrom relating to the scheme sanction charge.

Overall conclusion on Ground 1

151. Although we have found that there were errors of law in the way the FTT construed the Formwise, Langford and Fraser Contracts, they lead to differing outcomes. We refuse MLT's appeal on Ground 1 on Formwise, but allow it in relation to Langford and Fraser and remit the issues outlined above to the FTT for further consideration.

GROUND 2: BALLARDS LOAN

152. As set out earlier in this decision, Ballards entered into two loan agreements with its SSAS. Under the First Loan it borrowed £32,000 secured on its trademark, while the contract for the Second Loan stated that the SSAS was lending Ballards £48,956 secured on the same trademark. HMRC decided Ballards had received an unauthorised payment of £48,956, and the FTT agreed.

153. Ground 2 was that:

> "The Tribunal erred in law in concluding that the amount of the loan included the previous loan by the Ballards' pension scheme to the sponsoring employer that was 'consolidated' with the new loan made by the relevant transaction."

154. In other words, MLT's position was that the Second Loan had given rise to an unauthorised payment of £24,000, being the difference between the amount of that Loan and the £24,956.24 outstanding on the First Loan.

The FTT's approach and the finding

155. The FTT set out at [55] the evidence which it had considered. This included the contract for the Second Loan; the schedule of loan repayments for both Loans; Mr Ballard's written and oral evidence, and the Ballard's bank account. The FTT also took into account Mr Simpson's submissions, see [58].

156. Having considered and weighed the evidence, and taken into account the submissions, the FTT found that the First Loan was no longer "extant" at the time of the Second Loan, and it had been replaced with Second Loan.

157. Before us, Mr Simpson submitted that the amount of the unauthorised payment was limited to £24,000 because:

(1) For an unauthorised payment to arise, there must be a "payment", see s 160 and s 161.

(2) Ballards had already received a "payment" of the First Loan, and when the Second Loan was entered into, a further sum was paid out of the SSAS to top up the amount of the First Loan, so at the time of the Second Loan, the amount of the "payment" was the top-up amount.

(3) The result of the FTT's conclusion would mean that the First Loan would be an unauthorised payment of £32,000 (albeit that HMRC had not made an assessment), and the Second Loan would constitute a further unauthorised payment of £48,956, despite the employer only having received a much lower sum.

***Edwards v Bairstow* challenge**

158. Mr Simpson's submission that the Second Loan topped up the First Loan was a challenge to the FTT's finding of fact that the First Loan was no longer extant at the time the Second Loan was made.

159. Ms Poots summarised the evidence which supported the FTT's finding, as follows

(1) The Loan Agreement refers to the Loan being for £48,956.24; she said that had it just been a top up or further loan, the Loan would have been for £24,000.

(2) On 27 September 2012, Mr Dowding emailed Mr Carwithen saying "have we got a redemption declaration for the existing loan to confirm that it has been paid off. If not, we can get one as part of the tidy up". Mr Carwithen replied the same day, saying "yes, the Trustee declaration has been signed in advance and on file".

(3) The deal sheet for the Second Loan describes the "deal shape" as "Second Loan to the Principal Employer, plus full repayment of L001 [the First Loan]".

(4) The same document has a check list of requirements, including "secured by way of first charge", being a reference to Sch 30 para 1 which sets out the condition that a charge must "take priority over any other charge over the assets". In response to that question, the response on the checklist was "Fine - Pension Scheme will hold the first charge over the Trademark. Trademark was released for L001 and the Release stands for future loan transactions".

160. MLT has not only failed to show that none of the exceptions set out in *Edwards v Bairstow* apply such that the FTT's finding was an error of law, but, as Ms Poots said, the FTT's finding was plainly soundly based on the evidence.

161. We add that the Loan Agreement also included a supersession clause, which stated that the agreement "superseded any previous agreement whether written oral or implied between the Borrower and the Lender in relation to the Loan Amount", and this too supports the FTT's finding that the First Loan was no longer extant.

The other submission

162. For completeness we also considered Mr Simpson's other submission, that this outcome results in a possible double unauthorised payment amount. However, as Ms Poots pointed out, the legislation allows an authorised loan to be increased, with the amount of the increase being treated as a loan made on the date of the increase, see s 179(5) set out earlier in this decision. Thus, the statute provides a way for parties to a loan agreement to increase a loan without triggering a double charge. As the FTT said, the fact that the parties were "badly advised" does not change the outcome.

Conclusion on Ground 2

163. For the reasons set out above, we dismiss Ground 2 of MLT's appeal.

GROUND 3: GANNON DATABASE

164. As set out at §80(1), Gannon sold certain IP to its SSAS for £25,000, and leased it back. The IP had three parts: a trademark, being a headshot of Mr Gannon himself and a strap line, with no reference to Gannon; a database of Mr Gannon's clients, and a brochure style website together with a related domain name. HMRC issued their assessment on the basis that the £25,000 was an unauthorised payment, see §87(7).

165. The FTT made the following findings:

> "[101] In our view there are so many actual issues with the Gannon assets that it is impossible to value them on the theoretical basis suggested by the Appellants and produce a reasonable market value. We have to assume that the assets are to be sold into the real market as they were at the date of the transaction, taking account of the fact that:
>
> (1) the database seems to have been valued on an unseen basis,
>
> (2) the trademark was unregistered at the relevant time,
>
> (3) there are potential legal issues with the transferability of the other IP assets because of the debenture, (we would expect that standard commercial terms of sale would include a warranty that the asset to be sold is not subject to any restrictions on sale),
>
> (4) we have concluded that given the lack of legal clarity on this point, this is an issue which a reasonable buyer would have taken account of as a significant risk and would have reduced the price which a buyer would have been willing to pay,
>
> (5) The realistic value of the domain name and website to anyone other than Mr Gannon is negligible because of its personal character.
>
> 102. We accept that we can assume that one of the potential hypothetical buyers in the real market is Mr Gannon, but the price which he would pay in the open market has to be discounted to reflect the fact that there is no guarantee that he would be a purchaser.
>
> 103. We also doubt whether even Mr Gannon would have been willing to spend the sums suggested rather than recreate the database for himself (after all he has all the relevant information to do this) and create a new logo (a new photograph of himself and strapline would be very easy to re-create).
>
> 104. For these reasons we do not accept that the Appellant has discharged the burden of proof to overturn HMRC's assessments for Gannon."

166. Ground 3 reads:

> "The Tribunal erred in law in concluding that the Appellant had not discharged the burden of proof as regards the database owned by Gannon Associates Limited and had reached the unsustainable conclusion that a database such as that owned by Gannon Associates Limited had nil value."

167. This Ground therefore relates to only one of the IP assets transferred to the SSAS, the database of Mr Gannon's client names.

Discussion

168. Mr Simpson submitted that as the database plainly had *some* value, the FTT had reached "an unsustainable conclusion that a database such as that owned by Gannon had nil value".

169. However, as is clear from the extract from the FTT Decision set out above, the FTT did not make a positive finding that the database had a nil value, but instead held that the Appellants

had not met their burden of proving that the database was worth more than the £nil on which HMRC had based its assessment.

170. Even if the FTT Decision could be read as a finding that the database had a nil value, that was plainly a finding open to it on the evidence, as we explain below:

(1) At [83], the FTT recorded some evidence from Mr Tatum, one of HMRC's experts, who "said that 'the database (which had not been seen by any of the valuers including him) may have use but [no][6] it had no value'". Before us, Mr Simpson sought to displace that finding by referencing various responses given by Mr Tatum during cross examination, and a passage from Mr Tatum's witness statement which read:

> "The Employer may consider paying an amount to the purchaser of the Trademark to continue to use the Trademark to avoid the nuisance of having to remove the Trademark from aspects of its business e.g. website, removal vans, etc. However, due to the lack of other options for the purchaser of the Trademark to monetise the asset the Employer would be in a strong bargaining position and in my view offer no more than say £1,000 to continue to use the Trademark."

(2) Mr Simpson submitted that the evidence pointed "in favour of a finding that the database has some material value". This is, however, a classic example of the "island hopping" referred to by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 ("*Fage*") at [114] when he said that "in making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping"; that was, he said, one reason why appellate courts should not interfere with factual findings made at first-instance "unless compelled to do so".

(3) Mr Simpson also invited us to accept the amended figures for the valuation of the database given during the hearing by the Appellants' expert, Ms Cawdron, saying these were "reasonable". But that was not the view of the FTT which had considered all the evidence. At [85] the FTT found that Ms Cawdron applied her preferred relief from royalty method "without considering the market in which the sale of the IP assets would actually be made", and went on to hold at [100] that her valuation "failed to seriously consider whether there was a realistic market for those assets". The FTT also said at [91] that:

> "The fact that the Appellant's valuers at the time (Metis) and to a lesser extent Ms Cawdron were prepared to defend this [Gannon] valuation by reference to royalty rates and discount rates suggests to us that, for this Appellant at least, the harsh light of reality was never allowed to penetrate the comfortable conclusions provided by the valuers and MLT in support of the client's need for funding."

171. There is in short no basis on which the FTT's conclusions on the Gannon database constitute an error of law, and we dismiss this Ground of appeal.

GROUND 4: BALLARDS TRADEMARK

172. As set out earlier in this decision, on 27 September 2012, Ballards entered into an agreement with its SSAS for the Second Loan of £48,956, secured by its trademark which had been valued by Mr Kelly of Seabright at £73,000. HMRC assessed the £48,956 as an unauthorised payment, on the basis that the related loan was not secured by an asset of adequate value.

[6] That this "no" was included in error is confirmed by the relevant entry in the Note of Evidence.

173. At the FTT, the Appellants relied on their expert's valuation of £64,500 [105], calculated on an "income approach" [109], while Mr Ballard also put forward an alterative valuation of £60,500 on a costs approach [107]. The FTT summarised the evidence and discussed the valuations before concluding at [119]:

> "The onus of proof is on the Appellant to demonstrate that HMRC's original valuation is incorrect. We have concluded that the Appellant has not displaced the burden of proof to overturn HMRC's assessment in this case, either on the basis of their original approach (the Income Approach) or, alternatively on a Costs Approach."

174. Ground 4 reads:

> "The Tribunal erred in law in relation to its conclusion on the valuation of the Ballards trademark in two respects. Firstly, in assuming that, if selling its trademark to a person who wanted to compete in the same geographical market as Ballards, Ballards would insist on a non-compete clause preventing the purchaser from competing in that market. Secondly, in rejecting Mr Ballard's evidence as regards the costs Ballards would have to incur to create and apply a new trademark and requiring documentary evidence to vouch what were, on their face, reasonable estimates, the appellant contends that the Tribunal was setting too high a standard, and thereby erred in law."

The first part of this Ground

175. The first part of this Ground refers to [113] of the FTT Decision, which reads:

> "We have concluded that while it is possible that another business would wish to purchase the trademark the number of potential buyers in the real open market would be small. This is because:
>
> (1) It was accepted that Ballards was operating in a small local market therefore it is that small local market which is giving their trademark value.
>
> (2) We have assumed that anyone who wished to purchase their trademark would be doing so either:
>
> > (a) in order to compete in that same small local market, but if that was the case it should be assumed that Ballards, as a "prudent business negotiating seriously" would have included a "non-compete" provision in the sale agreement extending to that local market;
> >
> > (b) in order to compete in a different market elsewhere, in which case it is hard to see why they would ascribe any value to the Ballards' trademark and not simply have created a new trademark for themselves."

176. Mr Simpson submitted that the reference at (2)(a) of the above passage to a non-compete agreement was an error of law because "it makes no commercial sense" and was contrary to Mr Ballard's evidence that if the trademark was sold to a third party, Ballards would have licensed it back and paid a licence fee. Mr Simpson asked us to find that if this evidence had been taken into account "the FTT's conclusion is unsustainable".

177. However, Mr Simpson accepted that there was no error of law in the FTT's finding that "the number of potential buyers in the real open market would be small". Thus, this Ground is a not a challenge to a finding of fact (because the finding is accepted). It is instead a challenge to part of the reasoning by which the FTT arrived at that finding, and this part of the Ground therefore cannot succeed.

The second part of this Ground

178. The second part of this Ground refers to the following two passages from the FTT Decision, at [107] and [118]:

> "Mr Ballard provided evidence at the Tribunal of the replacement costs of a new trademark, essentially accepting the costs approach to valuing the trademark, which he estimated to be £60,500. We saw no corroborating evidence of these costs and have some doubts about the basis of this estimate, particularly in the context of a business which was in any event planning to change its core activities."

> "Mr Ballard did produce some estimates of the costs of reproducing the Ballards trademark, but we were not provided with any evidence to support his figures."

179. Mr Simpson submitted that the FTT was wrong to reject Mr Ballard's evidence, which he described as "acceptably clear and definite", adding that there was "no inherent reason" to reject it, for example there was "no internal inconsistency or incoherence, and no apparent exaggeration". He criticised the FTT for doubting Mr Ballard's evidence in part because of the changes to the business to include aggregates and military work, saying that household removals remained Ballards core business at the relevant time, and the new work was "an irrelevant matter" such as to constitute an error of law.

Our view

180. We begin by reiterating that it is no part of the role of this Tribunal to dissect the reasoning of the FTT in the way suggested. We have already referred to *Fage,* where Lewison LJ said:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

181. Similarly, in *Northern Light Solutions Ltd v HMRC* [2021] UKUT 0134 (TCC), this Tribunal cautioned at [85]:

> "…As the authorities have repeatedly indicated, this Tribunal should be reluctant to interfere with the evaluative judgment of the FTT unless it is clear that the FTT has misdirected itself as to the law, misapplied the law to the facts or has reached a conclusion which is not open to it on the facts found (in accordance with the principles set out in *Edwards v Bairstow*)."

182. Ground 4 discloses no error of law in the way the Tribunal carried out its evaluative judgment of the value to be ascribed to the trademark. The FTT set out the evidence, discussed the valuations and carried out a weighing exercise before coming to its conclusion.

183. We add the following observations:

(1) Mr Ballard's evidence about the costs required to replace the trademark was given for the first time in a witness statement dated 21 October 2022, the first day of the FTT hearing, see [10]. The witness statement was thus written over ten years after the Pension Funding Deal had taken place.

(2) It is part of the role of the first-instance court or tribunal to assess the evidence, and there is no error of law in the FTT declining to accept Mr Ballard's estimate, particularly given the lapse of time, the absence of corroborating material and the projected business changes.

GROUND 5: TIME LIMITS

184. HMRC assessed MLT to scheme sanction charges in relation to the Pension Funding Deals entered into by each of the Employers, and MLT applied for its liability to be discharged. Before the FTT, MLT argued that the time limit for making a discharge application ran from the end of the year in which HMRC issued the assessment, but the FTT agreed with HMRC that the time limit ran from the end of accounting period in which the liability to the charge arose. Ground 5 reads:

> "The Tribunal erred in law in concluding that the time limit for making an application under s268 FA 2004 was six years from the end of the year of assessment in which the transaction took place, as opposed to from the end of the year of assessment in which the assessment was made."

185. We first set out the relevant law and then consider the parties' submissions.

The assessment provisions

186. Section 239 is headed "scheme sanction charge" and begins:

> "(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."

187. Section 255(1) provides:

> "The Board of Inland Revenue may by regulations make provision for and in connection with the making of assessments in respect of—
>
> (a)-(c)…
>
> (d) the scheme sanction charge…"

188. The Registered Pension Schemes (Accounting and Assessment) Regulations 2005 ("the Assessment Regs") were made under the *vires* given by that subsection. Paragraph 4(1) provides that "in the cases listed in column 1 of Table 2 an officer of Revenue and Customs must issue an assessment to tax to the assessable person specified in column 2". Column 1 then lists nine "Cases", of which Case 4 is "a charge to tax arises under section 239 of the Act (scheme sanction charge)", and the related text in column 2 provides that the "assessable person" is "the scheme administrator".

189. The Assessment Regs do not set out the time limits within which assessments must be made; these are to be found in TMA s 34 and 36 because the scheme sanction charge is a charge to income tax, so the related assessment is to income tax, and both s 34 and 36 apply to "an assessment to income tax".

190. TMA s 34 is headed "ordinary time limit of 4 years", and subsection (1) reads:

> "Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates."

191. TMA s 36 is headed "Loss of tax brought about carelessly or deliberately etc" and includes the following provisions:

> "(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it

relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period.

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax −

(a) brought about deliberately by the person

(b)-(d)…

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

The discharge provisions

192. Section 268 is headed "Unauthorised payments surcharge and scheme sanction charge", and the provisions relating to the latter are as follows:

"(1) This section applies where

(a) …

(b) the scheme administrator of a registered pension scheme is liable to the scheme sanction charge in respect of a scheme chargeable payment.

(2)-(4) …

(5) The scheme administrator may apply to the Inland Revenue for the discharge of the scheme administrator's liability to the scheme sanction charge in respect of a scheme chargeable payment on the ground mentioned in subsection (6) or (7).

(6) …

(7) In any other case, the ground is that −

(a) the scheme administrator reasonably believed that the unauthorised payment was not a scheme chargeable payment, and

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

(8) On receiving an application under subsection (5), the Inland Revenue must decide whether to discharge the scheme administrator's liability to the scheme sanction charge in respect of the unauthorised payment.

(9) The Inland Revenue must notify the applicant of the decision on an application under this section.

(10) Regulations made by the Board of Inland Revenue may make provision supplementing this section; and the regulations may in particular make provision as to the time limits for the making of an application."

193. The Registered Pension Schemes (Discharge of Liabilities under Sections 267 and 268 of the Finance Act 2004) Regulations 2005 ("the Discharge Regs") were made under the *vires* given by s 268(10).

194. Paragraph 3 of the Discharge Regs reads:

"(1) Any…section 268 application must be made in writing −

(a) in the case of a company, not later than six years after the end of the accounting period to which it relates…

This is subject to the following qualification.

> (2) If an assessment is made under section 36 of the Taxes Management Act 1970 (assessments for the purpose of making good any loss to the Crown from a loss of income tax, etc), the…section 268 application…must be made within two years of the date on which the assessment is issued as stated in the notice of that assessment.
>
> (3) A…section 268 application shall set out particulars of the ground relied on under the relevant section."

Mr Simpson's submissions

195. Mr Simpson submitted that the six year time limit set out in para 3(1)(a) of the Discharge Regs ran from the date on which HMRC made the assessment to the scheme sanction charge, because:

> (1) The word "it" in the sentence "not later than six years after the end of the accounting period to which it relates" was a reference to application for discharge, and that application "relates" to the assessment and seeks relief from it.
>
> (2) A person in receipt of a scheme sanction charge only becomes aware of that charge when it has been assessed, so if (for example) HMRC issued the assessment three years after the year in which the liability arose, the administrator would have only a further three years to apply for the discharge. That person would thus be deprived of half the statutory time limit, and "as a matter of general policy, time limits should not run when the person to whom they apply has no knowledge that they are running".
>
> (3) Scheme sanction charge assessments do not inform recipients that they can apply for discharge of the liability under s 268. In contrast, where there is a statutory right of appeal, HMRC inform taxpayers of that right in the decision letter.
>
> (4) There is no equivalent in the Discharge Regs to TMA s 49, which allows HMRC or the Tribunal to allow a taxpayer to make a late appeal. As a result, there is no discretion for HMRC to allow a person to make a discharge application after the end of the time limits set out in Reg 3. This was a further reason why the provisions should be interpreted generously, so as to allow more time, not less time.

The Tribunal's view

196. We do not accept the submissions set out above. We instead agree with the FTT and with the submissions made by Ms Poots in the hearing, which are incorporated in our reasons below.

197. Our starting point is that s 239 provides (our emphasis):

> "(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."

198. The term "scheme chargeable payment" is defined at s 241(1) to include "an unauthorised payment by the pension scheme". Thus, the administrator's liability to the charge arises in the year when the unauthorised payment is made.

199. Section 268(5) then provides that the administrator may "apply to the Inland Revenue for the discharge of the scheme administrator's liability to the scheme sanction charge". The application is therefore to discharge the liability.

200. It is well established that there is a difference between a liability to tax, its assessment and its payment. In *Whitney v IRC* [1926] AC 37 at 52, Lord Dunedin said:

> "There are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

201. Paragraph 3 of the Discharge Regs provides that the application for discharge must be made "not later than six years after the end of the accounting period to which it relates". The word "it" can only refer to the liability, because the administrator is asking to be discharged from the liability, not for the assessment to be cancelled.

202. We also agree with Ms Poots that the Discharge Regs are carefully drafted to fit with the TMA time limit provisions. Under that legislation, HMRC must issue the assessment within the ordinary time limit of four years, unless there is careless or deliberate behaviour on the part of the administrator. Thus, even where an assessment is issued at the end of that four year period, the administrator will have a further two years to make the discharge application. If HMRC issue an assessment in reliance on the longer time limits in TMA s 36, Reg 3(2) of the Discharge Regs provides that the administrator has two years from the date of that assessment. Thus, in either case, there is at least two years within which the application can be made.

203. We reject Mr Simpson's suggestion that a time limit of at least two years is in some way unfair to an administrator. Taxpayers issued with income or capital gains assessments have 30 days to accept the offer of a statutory review, and 30 days from the date of that review to notify the appeal to the Tribunal, see TMA s 49C, 49G and 49H.

204. He also submitted that "as a matter of general policy, time limits should not run when the person to whom they apply has no knowledge that they are running". We do not recognise the policy to which he refers. It is in the nature of statutory time limits that they apply whether or not a person is aware of them.

205. In addition, Mr Simpson referred to the fact that the assessments do not include information about making a discharge application, but what HMRC include in their assessments and/or any related letters is irrelevant to the statutory construction of the provisions.

206. Finally, he is unlikely to be correct that HMRC have no powers to extend the time limits set out in the Discharge Regs: in *R (oao Ames) v HMRC* [2018] UKUT 190 TCC it was common ground that HMRC had an unfettered discretion to admit a late claim for EIS relief under their care and management responsibilities in s 5(1) of the Commissioners for Revenue and Customs Act 2005, and we can see no reason why the position would be different in the case of a late application to discharge an administrator from liability to the scheme sanction charge.

207. We thus dismiss Ground 5.

GROUND 6: SENDING OF APPLICATIONS

208. Ground 6 is that the FTT "erred in law in concluding that applications for relief under s268 FA 2004 were not sent to HMRC in April 2016, contrary to evidence provided by Mr Carwithen and Mr Dowding".

209. Before the FTT, MLT had submitted that it had filed applications for discharge of scheme sanction charges in April 2016. HMRC's position was that no applications had been received until December 2018, and that as a result MLT's applications for discharge of scheme sanction charges relating to the unauthorised payments assessed on Formwise, Langford and Prisym were out of time.

210. The FTT summarised the evidence at [135]-[142] and set out various preliminary findings of fact at [143]. It then said at [144] (our emphasis):

> "We accept that a bundle of documents was sent in April 2016 by Mr Carwithen relating to these s 268 applications, but there is no evidence to support the statements of Mr Carwithen and Mr Dowding that they were actually sent to HMRC."

211. The FTT went on to conclude at [148] that the applications were not sent to HMRC before December 2018. That is a finding of fact.

212. Mr Simpson submits that [144] contains an error of law, because there was evidence to support the statements of Mr Carwithen and Mr Dowding that the applications were sent to HMRC.

213. A tribunal will make an error of law if it makes "a finding which, on the evidence, is not capable of being rationally or reasonably justified", see *Megtian* cited earlier in this decision. However, the evidence put forward by Mr Simpson does not come close to meeting that threshold.

214. Mr Simpson referred to an e-mail dated 14th March 2016 from Mr Carwithen to Lynne Gray of HMRC which read (our emphasis) "I can also confirm that I will be issuing Section 268 appeals to HMRC Pension Scheme Services over the course of this week". Even Mr Simpson accepted that this amounted only to "indirect corroboration" of MLT's position. He also relied on a second email dated 8 August 2026 from Mr Carwithen to HMRC in which he said "Morgan Lloyd had issued additional appeals under section 268…we hadn't heard from yourselves since we sent them". That email is evidence that Mr Carwithen genuinely believed he had sent the applications, it is not evidence that they had been sent. We note that at [145] the FTT made a finding of fact that Mr Carwithen held that genuine belief.

215. Mr Simpson also submitted that "taken as a whole, this documentary corroboration strongly supports the proposition that the applications were sent to HMRC". This is simply another way of challenging the FTT's assessment of the evidence. The weight to be given to particular evidence is a matter for the first instance decision-maker, as Lord Millett emphasised in *Begum v London Borough of Tower Hamlets* [2003] UKHL 5, [2003] 2 AC 430 at [99] when he said:

> "The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence…are for the decision making authority and not the court."

216. This Ground does not identify any error of law in the FTT Decision. It is also dismissed.

GROUND 7: REASONABLE BELIEF

217. Grounds 7 and 8 are that the Tribunal erred in law in refusing MLT relief from the scheme sanction charge under s 268. Because MLT did not succeed before the FTT on either of the time limit arguments (which were appealed as Grounds 5 and 6), MLT's applications to be relieved from liability for the scheme sanction charges relating to Formwise, Langford and Prisym were out of time. As a result, the FTT only considered whether MLT met the s 268 requirements in relation to the unauthorised payments made by Ballards, Criticall and Gannon.

218. Section 268 was set out in full under Ground 5; subsection (7) provides that an administrator may apply to be discharged from a scheme sanction charge if it:

> "(a) …reasonably believed that the unauthorised payment was not a scheme chargeable payment, and

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

219. To succeed in obtaining a discharge, an administrator must therefore meet both parts (a) and (b) of subsection (7). The FTT found that MLT met neither. This Ground concerns part (a), and Ground 8 relates to part (b). Ground 7 was that the "the only conclusion available to the Tribunal was that the trustees had a reasonable belief that there were no unauthorised payments".

The statutory test

220. The meaning of the statutory test at s 268(7)(a) has been considered in two previous UT judgments, *HMRC v Sippchoice* [2017] UKUT 0087 (TCC) ("*Sippchoice*") and *HMRC v Bella Figura* [2020] UKUT 0120 (TCC) ("*Bella Figura*").

221. In *Sippchoice,* the UT begin their consideration of the provision by saying at [36]:

> "It is clear that, on its terms, s 268(7)(a) FA 2004 requires both that the scheme administrator has formed a belief that an unauthorised payment was not a scheme chargeable payment and that such belief must be reasonably held."

222. Before the FTT and before us, both parties proceeded on the basis that MLT believed that Pension Funding Deals entered into by Ballards, Criticall and Gannon were not scheme chargeable payments, and we have taken that to be the position. The issue is thus whether MLT's belief was "reasonable".

223. The meaning of the word "reasonable" was considered in *Perrin v HMRC* [2018] UKUT 0156 (TCC) in the context of what was meant by a "reasonable excuse". The UT held as follows (emphasis in original):

> "[71] …the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer…
>
> [72] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times."

224. We find that the same approach is appropriate in determining whether an administrator "reasonably believed that the unauthorised payment was not a scheme chargeable payment". The FTT must therefore decide "whether facts exist which viewed objectively" are sufficient to prove, on the balance of probabilities, that the particular administrator acted reasonably, taking into account its "experience, knowledge and other attributes [and]the situation in which [it] was at the relevant time or times".

The FTT's assessment of the reasonable person

225. We first considered whether the FTT had approached its task in the right way. At [191] the FTT held that the reasonable pension fund trustee in the position of MLT would have relied on expert valuers only if they had:

> "(1) undertaken some steps to ensure that those on who they relied have the relevant expertise and

> (2) even if they did so, to scrutinise the transactions in which they are involved to fulfil their role as trustee of the pension fund and to at least apply basic commercial acumen to test the valuations which are being provided."

226. The FTT clarified at [194] that the second of those points did not extend to engaging in the "technical analysis underlying the valuations", but did require consideration "from a commercial perspective, whether the valuations made sense", and adding that "no technical expertise is required for this".

227. At [202] the FTT took into account that MLT was not only a pension fund trustee but also a professional pension fund provider, adding that although the reasonable person in that position can contract out its obligations as a trustee to a third party, that reasonable person would also have tested the information provided by that third party "by reference to critical analysis".

228. At [203] the FTT set out how the reasonable corporate pension trustee who had contracted out valuation of assets to third parties would have acted, saying that reasonable trustee would have:

> "1. Applied a critical commercial and business view to the information provided to it from its professional valuers.
>
> 2. Carefully considered the legal identity of the assets which were to be subject to the sale and leaseback.
>
> 3. Given detailed scrutiny to the documents (and other related transactions) which formed the basis of the funding transaction to ensure that they reflected the transaction as it was intended to be implemented.
>
> 4. Applied time and commercial acumen to considering the actual risks in the transaction before signing it off."

229. The FTT therefore identified the correct legal test, namely how a reasonable person in the position of MLT would have acted.

A value judgment

230. In *Proctor and Gamble UK v R&C Comrs* [2009] EWCA Civ 407, [2009] STC 1990 ("*Proctor and Gamble*"), Jacob LJ said at [9]:

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment— what is commonly called a value-judgment."

231. Jacob LJ went on to summarise earlier authorities, including his own decision in *Rockwater v Technip* [2004] EWCA (Civ) 381, [2005] IP & Tribunal 304 ("*Rockwater*"), where he had said at [73]:

> "It is important here to appreciate the kind of issue to which the principle applies. It was expressed this way by Lord Hoffmann in *Designers Guild*:
>
> > 'Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle.'"

232. In *Perrin,* the UT similarly said at [71] that in deciding whether a person has a reasonable excuse, the FTT was:

> "making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and come

> to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with."

233. Whether or not MLT "reasonably believed" that the unauthorised payments made to Ballards, Criticall and Gannon were not scheme chargeable payments is exactly the sort of multi-factorial value judgment referred to by the authorities set out above, and we should only interfere with that judgment if the threshold set out above is met.

The FTT's findings about all three transactions

234. In relation to all three Pension Funding Deals, the FTT found as facts [204] that MLT was content to:

(1) rely unquestioningly on the advice of others;

(2) raise questions only about "obvious" administrative errors in critical documents;

(3) sign off documents which were incomplete with a short turnaround time; and

(4) have no one in the sign off chain who considered it their role to apply commercial acumen and consider the real risks in a transaction.

235. MLT did not seek or obtain permission to appeal on the basis that any of those findings of fact constituted an error of law, so they are not under challenge before us.

MLT's case

236. MLT's case was that "the only conclusion available to the Tribunal was that the trustees had a reasonable belief" – in other words, that the FTT's conclusion was not "within the range of reasonable conclusions". The basis for that submission was set out in Mr Simpson's skeleton as follows:

> "The points on which the FTT relied for its conclusion that the Appellant's belief that there were no unauthorised payments was not reasonable were that the Appellant had not done enough in relation to the earlier valuers to determine whether they had sufficient relevant expertise to be able to value intellectual property, and the Appellant had not done enough to scrutinise the valuations provided and apply commercial common sense to those valuations…
>
> The reliance placed by the Appellant on third party professionals who all claimed sufficient expertise to be able to value, properly, intellectual property assets was not unreasonable."

237. Mr Simpson added that "the criticisms made by the FTT of the Appellant in relation to reliance on valuations would place an excessive burden on scheme administrators".

238. The issue is thus whether the FTT's conclusions about how MLT acted in relation to Ballards, Criticall and Gannon were not "within the range of reasonable conclusions". We consider each in turn.

Ballards

239. The FTT found at [208] that MLT's belief that the Ballards Pension Funding Deal was not reasonable, for the following reasons.

(1) MLT had relied on Mr Kelly's valuation, despite him never having previously carried out an IP valuation.

(2) MLT rolled over the First Loan into the Second Loan:

(a) without considering "the full implications" for the five key tests set out in s 179; and

(b) despite Ballards already having received £145,000 through an earlier Pension Funding Deal, being the sale and leaseback of its domain name.

(3) The Ballards trademark was valued at £36,332 in 2011, and had been used as security for the First Loan of £35,000. Only a year later, the same trademark was valued at £73,000 and used as security for the Second Loan, but MLT did not ask any questions about this increase in value.

Mr Simpson's submissions

240. Mr Simpson said that the FTT "appeared to reject as irrelevant" the fact that Mr Kelly was a chartered accountant who "held himself out as having the competence necessary to give the valuation in question". This is, however, nothing more than a disagreement as to the weight to be placed on Mr Kelly's accountancy qualifications (when compared to his lack of any experience in valuing IP assets) and cannot provide a basis for setting aside this part of the FTT Decision on the basis that it was "not within the range of reasonable conclusions" open to that Tribunal.

241. Mr Simpson also submitted that "given the inherent uncertainty in the valuation of intellectual property, it cannot be reasonable to require more than that the valuations were checked for accuracy of figures and correspondence with information provided, and included no obvious errors". This is a challenge to elements of the FTT's starting point, namely that the reasonable pension fund trustee in the position of MLT would have "applied a critical commercial and business view to the information provided to it from its professional valuers"; and given "detailed scrutiny to the documents (and other related transactions) which formed the basis of the funding transaction". We reject Mr Simpson's submission, and instead endorse and accept all four of the identified factors set out at [203] of the FTT Decision and repeated at §228 above. The FTT was plainly correct to find that the reasonable corporate trustee with responsibility for administering pension funds would not blindly accept valuations without applying any "commercial common sense". As the FTT repeatedly said (see [194], [199] and [203]), this did not require MLT to carry out a technical review of the basis of the valuation.

242. We also disagree with Mr Simpson's wider submission that the FTT's approach places "an excessive burden on scheme administrators". As the FTT said, the reasonable administrator would appoint valuers qualified in the relevant field and would also carry out a commercial and common sense check of the valuations received. In Ballards case, MLT did neither.

Criticall

243. As set out earlier in this decision:

(1) The Criticall Pension Funding Deal concerned software valued by Dr Asher, who was experienced in IP valuation. He valued the software at £105,000, being a midpoint between £87,000 and £122,000, and Criticall assigned the IP rights in the software to its SSAS in exchange for a payment of £110,000; the SSAS agreed to lease the software back to Criticall for £2,750 per month for five years.

(2) On 26 September 2016, HMRC issued Criticall with an assessment on the basis that the payment it had received from its SSAS of £110,000 for the sale of its software was an unauthorised payment subject to the unauthorised payments charge of 40% and a surcharge of 15%, so a total of £60,500; HMRC subsequently issued MLT with a scheme sanction charge of £44,000, being 40% of the unauthorised payment.

244. HMRC later accepted that the software was worth £85,000. The FTT say at [210] that they were not provided with information about how or why that valuation had been agreed, and there is no record in the FTT Decision of it using its power under TMA s 50(6)(c) to reduce either (a) the assessment on Criticall to the unauthorised payment, or (b) the assessment on

MLT to the scheme sanction charge. However, we were not addressed on this point by either party[7].

The FTT Decision

245. The FTT began its consideration of Criticall by recognising that (a) the IP was "a specific piece of software" and thus dissimilar to the other types of IP for which valuation had been disputed by HMRC, and (b) Mr Asher was a professional valuer with extensive experience in valuing IP. The FTT then said:

> "[212] On that basis, it is tempting to conclude that in this instance at least, MLT were acting reasonably in assuming that no unauthorised payment had been made. The alternative, and our preferred analysis, is that MLT behaved no differently for this Employer than for any other and were simply fortunate to find a relatively experienced valuer for a type of IP which is more straightforward to value.
>
> [213] We say this because we saw no evidence that the sign off process was any different in this case than in others:
>
> 1. Mr Asher told us that he did not hear anything from MLT after he had provided his valuation.
>
> 2. The MLA check list which we saw had several outstanding issues.
>
> 3. The documents which we saw had omissions.
>
> 4. The transaction was signed off despite credit issues being raised."

246. The findings of fact which underpin paragraph [213] are set out earlier in this decision at §§74-75 and were not challenged by MLT as part of this appeal.

Mr Simpson's submissions

247. Mr Simpson made the following submissions:

(1) The valuation was provided by Mr Asher, an expert in valuing IP, and it was thus plainly reasonable for MLT to have relied upon it.

(2) HMRC have agreed that the software is valued at £85,000, which is not very different from Dr Asher's valuation of £105,000, which itself was a midpoint between £87,000 and £122,000; Mr Simpson said that "no amount of further thought or consideration by [MLT] could possibly have led to the conclusion" that Dr Asher's valuation was not reliable.

(3) The FTT erred by describing MLT as "fortunate" to have used Dr Asher, saying "it was not fortune" but "a deliberate strategy…to find and engage experienced valuers".

Discussion

248. The issue the FTT had to decide was whether MLT "reasonably believed" that an unauthorised payment had been made to Criticall. The issue was not whether the valuation itself was objectively reasonable. In deciding whether MLT had the necessary reasonable belief, the FTT took into account the fact that MLT had appointed Dr Asher an experienced IP valuer, but also considered the process carried out by MLT.

249. The FTT gave more weight to:

(1) the process failures and MLT's acceptance of the value provided without carrying out any sort of common sense review, than to

[7] The same appears also to be true of the Prisym Pension Funding Deal, see §47.

(2) the appointment of Dr Asher and the fact that, had MLT carried out that check, there would have been no basis to question or challenge the valuation.

250. Mr Simpson considers that the FTT should have weighted the factors differently. However, this was an evaluative judgment involving "a combination of features of varying importance" to which the FTT applied the "not altogether precise legal standard" set out in s 268(7)(a), see *Rockwater* cited earlier in this decision. The FTT's conclusion is within the range of reasonable conclusions and is not one with which this Tribunal should interfere. There is no error of law.

Gannon

251. As set out at §78ff, the Pension Funding Deal involved three types of IP: a "trademark" consisting of a headshot of Mr Gannon and a strap line with no reference to Gannon; a database of Mr Gannon's clients, and a website and domain name. Those assets were valued as being worth a total of £22,500 and the valuation was carried out by Mr Robinson of Metis, who was experienced in valuing IP.

252. The FTT accepted at [205] that MLT had improved its processes before the Gannon transaction, including by recruiting Mr Manchester. However, on the basis of its findings of fact, the FTT went on to decide that MLT did not meet the reasonable belief test in relation to the Gannon transaction. Those findings have already been set out at §81 but are repeated here for ease of reference. They were that no-one at MLA had:

(1) looked at the Gannon database;

(2) looked critically at the Metis valuation of a website/trademark which "was clearly tailored specifically to Mr Gannon and therefore unlikely to be valuable to anyone but him";

(3) critically evaluated the financial inputs used by Metis;

(4) checked the precise terms of the documentation signed by Gannon, including the impact of entering into a general debenture on the same date as the sale and leaseback over the IP in this Pension Funding Deal; or

(5) checked whether the Gannon trademark was actually registered, despite the impact this had on its value.

253. None of Mr Simpson's submissions focused on the Gannon transaction, other than that he said it was reasonable for MLT to rely on the valuation provided by Mr Robinson.

254. However, as with Ballards and Criticall, the FTT considered a range of factors in making its evaluative judgment. Its conclusion was plainly within the range of reasonable conclusions and there is no error of law.

Overall

255. For the reasons set out above, the FTT made no error of law in deciding that MLT did not reasonably believe the unauthorised payments made to Ballards, Criticall and Gannon were not scheme chargeable payments.

GROUND 8: JUST AND REASONABLE

256. As we have already noted in relation to Ground 7, for an administrator to succeed in an appeal against HMRC's refusal to discharge its liability for the scheme sanction charge, it must satisfy both parts of the test in s 268(7).

257. Ground 8 relates to the second part of that test, and is that the FTT made an error of law in concluding that relief under section 268 FA04 ought to be refused by reference to the requirement that it be "just and reasonable" for MLT not to have to pay the charge.

258. Because we have already upheld the FTT's finding that MLT did not meet the first part of the test in s 268(7), it follows that even if MLT were to succeed on Ground 8, this would not result in the discharge of its scheme sanction charge liabilities for Ballards, Criticall and/or Gannon. Nevertheless, as the FTT considered and decided both parts of the test, and as MLT received permission to appeal on Ground 8, we have gone on to consider it.

259. This second part of s 268(7), like the first, requires the FTT to carry out a multi-factorial evaluative judgement with which an appeal court should be slow to interfere. In *O'Mara v HMRC* [2017] UKFTT 91 TC at [152]–[153], approved by the UT in *Bella Figura* at [70], the FTT (Judge Rupert Jones and Mr Farooq) said in relation to s 268(7):

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

The statutory scheme

260. In *Bella Figura* the UT said at [72] that the statutory scheme in essence 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 that can, at least in usual cases, only be taken once an individual reaches the age of 55;
>
> (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 (with the most important exception of the ability to take a tax-free lump sum equal to 25% of the accumulated fund)."

261. The UT continued:

> "[73] While conceptually it might be said that tax relief granted to individuals and employers at stage (i) is counteracted by the taxability of pension benefits at stage (iv), the overall scheme clearly involves a material cost to the Exchequer. First, the Exchequer suffers an obvious timing disbenefit as it gives relief at stage (i) a long time before it obtains tax at stage (iv). That timing benefit is not counteracted by a charge on income and gains of the pension scheme– see stage (iii). Second, a person's income in retirement will tend to be lower than income when working, so even in absolute terms the tax charged at stage (iv) will tend to be lower than the tax relief given at stage (i).
>
> [74] Parliament is content for the Exchequer to suffer these costs given the social utility of individuals saving for their retirement, but only where the entire bargain set out at [72] is respected. It is for this reason that different aspects of the unauthorised payments regime apply to different potential breaches of the bargain. For example, if a registered scheme impermissibly pays benefits to a member before he or she reaches 55, there is an unauthorised

> payment because the Exchequer has suffered the costs we have outlined, but since the funds have been drawn before retirement age, the social utility of funding retirement is not present. In a similar vein, 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."

The FTT's Decision

262. The FTT discussed the "just and reasonable" test in two places:

(1) between [148] to [190] ("the earlier section"), where it considered and assessed the evidence and made relevant findings, and

(2) between [215] to [224] ("the later section"), which for the most part consisted of a list of factors put forward by Appellants, together with the FTT's discussion and conclusions.

263. In the earlier section, the factors identified by the FTT focused on the documentation and the valuations. The FTT described the documentation as "cavalier" [169], as exemplified by the following:

(1) Documents signed off by Mr Carwithen which contained various errors and omissions, see [168].

(2) Mr Dowding signing off some of the Pension Funding Deals within five to ten minutes, see [159].

(3) Some MLA checklists signed off with issues still outstanding, although the FTT also noted Mr Dowding's evidence that these outstanding issues would be actioned subsequently, see [161].

264. However, the FTT also observed that many commercial companies large and small are similarly poor at ensuring the documents are properly completed and said that this factor alone does not lead to the conclusion that it was not just and reasonable to discharge MLT from liability, see [169].

265. In relation to the valuations, the FTT took into account the following:

(1) MLT's decision in 2011 to move from using accountants to instructing experienced IP valuers to provide "more robust" valuations, together with the fact that this was a gradual process and some of the original accountant valuers were used until December 2012, see [158] and [167].

(2) The only scrutiny of the valuation reports by anyone at MLT or MLA was:

(a) to check that the valuation was sufficient to cover the funding required by the client, see [165]; and

(b) to ensure the valuation had been based on the right inputs; the correct company accounts, in the name of the right company and over the right IP assets.

(3) There was no questioning of the valuation itself, or of the profit forecasts on which the valuation was based [175].

(4) As soon as the process got past the initial review stage, no substantial challenge to the valuation occurred [178].

(5) MLA failed to "consider from a commercial perspective, whether the valuations made sense", as exemplified by the fact that "no-one even questioned how the highly

personalised "trademark" valued for Mr Gannon could possibly have had any real value to anyone but him", see [194]-[195].

(6) It was in no-one's interest to challenge the valuations as being too high [179].

266. The later section of the FTT Decision considered the points put forward by the Appellants. We have set these out in italics, followed by the FTT's discussion of the weight to be given to each:

(1) *The loans were ultimately repaid to the SSAS*. The FTT accepted that in *Bella Figura* the UT had said at [75] that repaying the loans would be "considerably less serious" than if the money was never recovered, and recognised that this was therefore "a significant element of the test". However, the FTT went on to say that this was not "the only element in the context of a set of provisions which include other specific tests which are to be applied at the time when the loan is entered into not at the time when it is repaid".

(2) *As the loan or leaseback payments were made, the risk to the pension fund diminished.* The FTT accepted this was the case, but again referred to the fact that "the legislation is drafted on the basis that the relevant time for measuring the risk is the time when the transactions are entered into".

(3) *The pension fund belonged to the Employers and so no third party was in jeopardy.* The FTT recognised that this was a relevant factor, but also took into account that "the legislation is premised on the fact that the pension funds in question belong to the directors of the borrowing company, and these rules apply even though this is the case".

(4) *Both HMRC's experts and the Appellants' experts were agreed that someone who was not a professional valuer would not have a reason to doubt the valuations* . The FTT had already accepted that this was the position, see [194], but reiterated that the key issue was MLT's failure to "stand back and apply commercial common sense".

(5) *MLT had processes, such as the checklist and the valuations, which were designed to comply with the legislation and which went beyond what was required by those provisions.* The FTT's own assessment was that there was "more form than substance" in MLT's procedures.

(6) *MLT did not deliberately seek to circumvent the rules.* The FTT said this "may be true" but held that MLT did "consistently fail to apply any critical analysis to fundamental aspects of the Pension Funding Deals, which…amounts to at best a passive approach to the application of the rules in favour of generating fees for themselves and other members of the group".

267. In addition to the factors put forward by the Appellants, at [223] the FTT also placed weight on the fact that MLT was prepared to sign off multiple pension funding deals with the same Employer, resulting in nearly 100% of that Employer's pension fund being leveraged, as exemplified by:

(1) the 2012 Ballards transaction, entered into after that company had already obtained pension funding through an earlier sale and leaseback of £145,000, providing funding of £194,000 on a total pension value of £200,000, and "on assets to which no realistic valuation had been applied"; and

(2) the Criticall transaction, which provided funding of £110,000 on a total pension value of £143,000.

Mr Simpson's submissions

268. Mr Simpson's submissions all related to points considered and weighed by the FTT. They included the following (in italics, followed by our view):

(1) *The FTT had refused to take into account the subsequent repayment of the loans, and it was clear from Bella Figura that this was an error of law*. This misrepresents what the FTT decided, see §266(1) above. The FTT not only took this factor into account, but found that it was "a significant element of the test". However, the FTT went on to find that the factor was not decisive, given that the statutory tests are to be applied when the loan is taken out, not when it is repaid. This submission is thus a disagreement about the weight to be given to the repayment of the loans and does not identify any error of law.

(2) *The FTT had failed to take into account the improvements introduced by MLT during the later part of the relevant period, in particular the move to experienced IP valuers.* However, that factor was considered in the earlier section of the FTT's consideration of s 268(7), see [158] and [167], as we noted §265(1); it was not ignored.

(3) *The FTT failed to take into account that MLT's processes were "intended to be robust" albeit "inevitably, errors crept in".* The FTT did consider MLT's processes, see [222] and our summary at §266(5).

269. It is not necessary to set out the other points made by Mr Simpson in his skeleton argument and oral submissions as they too are repetitions of submissions made before the FTT all of which were considered when the FTT was carrying out its evaluation.

Conclusion on Ground 8

270. Taking into account all the above, the FTT made no error of law when carrying out the evaluative judgment required by s 268(7)(b) and there is no basis for this Tribunal to interfere with its conclusion.

271. We add that we agree with the FTT's comment at [219] that this case was very different from *Bella Figura*. That case concerned an unauthorised payment made by a pension scheme set up by Bella Figura Limited ("BFL"), which was also the scheme administrator. BFL was owned and managed by Mr Wightman, who had no special knowledge of pensions law, see [19] of the UT decision. In contrast, MLT is a corporate trustee of numerous pension schemes. Through MLA, it also operated as "a professional pension administrator", see [198]. Together with Clifton, it marketed and sold a structured arrangement to monetise the IP of small family businesses. Many of those companies were in financial difficulty and had failed to obtain financing through more conventional means. They had no pensions expertise and trusted MLT to be acting within the relevant statutory provisions. Instead, as the FTT said, MLT acted in a "cavalier" fashion, and consistently failed "to apply any critical analysis to fundamental aspects of the Pension Funding Deals, which…amounts to at best a passive approach to the application of the rules in favour of generating fees for themselves and other members of the group". We agree.

272. In addition, the Pension Funding Deals put at risk the assets of the SSASs. As the UT said in *Bella Figura* "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".

273. Save in respect of Langford and Fraser, we therefore endorse the FTT Decision and find that it is just and reasonable that MLT pay the scheme sanction charges.

DISPOSITION

274. MLT's Appeal is allowed in relation to Langford and Fraser, but both cases must be remitted to the FTT for further consideration based on our interpretation of the relevant contracts. In all other respects, the FTT Decision is confirmed and MLT's appeal is dismissed.

MR JUSTICE MELLOR
JUDGE ANNE REDSTON

Release Date: 25 March 2025