Neutral Citation: [2023] UKFTT 00314 (TC)

Case Number: TC08771

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: See Schedule

INCOME TAX – payments out of registered pension schemes – an arrangement pursuant to which registered pension schemes made loans to the members of other registered pension schemes on a reciprocal basis - appeals against unauthorised payments charges, unauthorised payments surcharges and scheme sanction charges and appeals against the Respondents' refusal of applications to discharge an unauthorised payments surcharge and the scheme sanction charges – conclusion that each loan made by a pension scheme was an unauthorised payment in respect of the member of that pension scheme who was matched to the member of the other pension scheme that was the borrower under the arrangement, the use of the assets of a pension scheme to give rise to a loan to a member of that pension scheme by another pension scheme was an unauthorised payment made by the first-mentioned pension scheme to that member, the first category of unauthorised payment gave rise to scheme sanction charges for the scheme administrator of the relevant pension scheme and the applications against the Respondents' refusal to discharge the unauthorised payments surcharge incurred by one member and the scheme sanction charges should be dismissed

Heard on: 5, 6, 7, 8, 9, 12, 13, 14 and 15 DECEMBER, 2022
Judgment date: 21 March 2023

Before

TRIBUNAL JUDGE TONY BEARE
MS GILL HUNTER

Between

DALRIADA TRUSTEES LIMITED (AS ADMINISTRATOR OF THE GROSVENOR PARADE PENSION SCHEME AND OTHERS)

MS DEBORAH OADES

MR JEREMY DONAGHY-SUTTON

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellants:	Mr Michael Jones KC, instructed by Pinsent Masons LLP (for Dalriada Trustees Limited), Ms Rebecca Sheldon (for Ms Oades) and Ms A Brooks for Mr Donaghy-Sutton
For the Respondents:	Ms Laura Poots, Mr Sam Chandler and Mr Ronan Magee, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to the tax consequences of certain transactions which have been implemented by six registered occupational pension schemes (the "Ark Schemes") – namely,

(1) The Grosvenor Parade Pension Scheme (the "Grosvenor Scheme");

(2) The Cranborne Star Pension Scheme (the "Cranborne Scheme");

(3) The Lancaster Pension Scheme (the "Lancaster Scheme");

(4) The Portman Pension Scheme (the "Portman Scheme");

(5) The Tallton Place Pension Scheme (the "Tallton Scheme"); and

(6) The Woodcroft House Pension Scheme (the "Woodcroft Scheme").

2. The Ark Schemes operated what was described as a "Pensions Reciprocation Plan" (or "PRP"), which was conceived as a way of allowing members access to the value of their pension capital prior to retirement but without triggering an unauthorised payment which would lead to tax charges under Part 4 of the Finance Act 2004 (the "FA 2004"). In this decision, unless another enactment is expressly specified, all section numbers refer to the relevant section of the FA 2004.

3. At the heart of the PRP model was a structure called a "Maximising Pension Value Arrangement" (or "MPVA"), whereby an individual transferred his or her pension funds into one of the Ark Schemes and received an "MPVA loan" from another of the Ark Schemes. Under the MPVA:

(1) one of the Ark Schemes (Scheme Y) would lend funds to a member of another Ark Scheme, Scheme Z (Member B); and

(2) Scheme Z would lend funds to a member of Scheme Y (Member A).

4. Dalriada Trustees Limited ("Dalriada") is a company registered in Northern Ireland with registered number NI 38344 whose registered office is Linen Loft, Adelaide Street, Belfast, Northern Ireland, BT2 8FE and is a professional trustee company. On 31 May 2011, it was appointed by the Pensions Regulator (the "PR") to act as an independent trustee in respect of thirteen pension schemes, including the Ark Schemes, due to concerns which the PR had over the PRP model. At the time of Dalriada's appointment, the PR also ordered the vesting in and assignment and transfer to Dalriada, as trustee, of all property and assets of the Ark Schemes.

5. Although the appointment did not remove the existing trustees of the Ark Schemes, under the appointment Dalriada is entitled to exercise all the powers of the trustees to the exclusion of the other trustees pursuant to Section 8(4) of the Pensions Act 1995 (the "PA"). Effectively, it therefore acts as the sole trustee of each of the Ark Schemes. Moreover, upon its appointment, Dalriada became the "scheme administrator" of each of the Ark Schemes for the purposes of the pension scheme taxation rules in the FA 2004.

6. Following Dalriada's appointment, the Respondents assessed Dalriada (in its capacity as the incumbent scheme administrator), as well as the members of the Ark Schemes, to tax under Part 4 of the FA 2004. Dalriada, and certain of the members, have appealed to the First-tier Tribunal (the "FTT") in respect of the assessments made on them. In addition, Dalriada and one of the members, Ms Oades, have appealed against the Respondents' refusal to discharge their liabilities under certain of the assessments made on them. Dalriada's appeals and the appeals of two of the members, Ms Oades and Mr Donaghy-Sutton, are the subject of this decision. Dalriada's appeals are set out in Part A of the Schedule. The appeals

by Ms Oades and Mr Donaghy-Sutton are set out in Part B of the Schedule. This decision is merely a decision in principle in relation to the relevant appeals. The appeals of the other members of the Ark Schemes have been stayed pending this decision. However, the principles set out in this decision are also pertinent to those stayed appeals.

THE FA 2004 LEGISLATION

Introduction

7. Before setting out the specific provisions in the FA 2004 which are relevant to this decision, we think that it is helpful to place those provisions in the context of the entire statutory scheme relating to pensions. That scheme is helpfully described in the decision of the Upper Tribunal in their decision in *The Commissioners for Her Majesty's Revenue and Customs v Bella Figura Limited* [2020] UKUT 120 (TCC) ("*Bella Figura*") as follows:

"[72]…In essence, that scheme provides: (i) for contributions made by employers and employees to benefit from tax relief at the point of payment; (ii) for the funds contributed to be held securely to provide pension benefits 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).

[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."

Unauthorised member payments

8. It may be seen from this description that an essential plank of the regime is that a member of a pension scheme should not be able to access the value in that scheme before the age of fifty-five except in certain closely-defined circumstances. To that end, Section 160 provides, inter alia, as follows:

"(1) 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 member of the pension scheme are those specified in section 164.

(2) In this Part "unauthorised member payment" means –

(a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164, and

(b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part".

9. One of the provisions in Part 4 of the FA 2004 which identifies amounts that are to be treated as unauthorised payments for the purposes of that Part is Section 173, which, so far as material, provides as follows:

(1) A registered pension scheme is to be treated as having made an unauthorised payment to a person who is or has been a member of the pension scheme if an asset held for the purposes of the pension scheme is used to provide a benefit (other than a payment) to

(a) the person, or

(b) a member of the person's family or household…

(5) The person who receives the benefit is to be treated as having received the unauthorised payment…

(8) The amount of an unauthorised payment treated as having been made by this section –

(a) in relation to such benefits, and in such circumstances, as may be prescribed by regulations made by the Board of Inland Revenue, is an amount determined in accordance with the regulations, and

(b) otherwise, is the amount which would be the cash equivalent of the benefit under the benefits code if the benefit were received by reason of an employment and the benefits code applied to it.

(9) For the purposes of subsection (8) –

(a) references in the benefits code to the employee are to be treated as references to the person who is or has been a member, and

(b) references in the benefits code to the employer are to be treated as references to the pension scheme.

(10) In this section –

"the benefits code" has the meaning given by section 63(1) of the Income Tax (Earnings and Pensions) Act 2003 …"

10. In relation to the legislation set out above:

(1) the word "payment" is defined in Section 161(2) as "[including] a transfer of assets and any other transfer of money's worth"; and

(2) Section 279(2) provides that "[in] this Part references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme."

11. Just pausing there, it may be seen that Section 160(2), along with Section 173, contemplate two distinct types of "unauthorised member payment" which may be made by a pension scheme. These are as follows:

(1) a payment by the pension scheme "to or in respect of" the relevant member (Section 160(2)(a)); and

(2) the use of the assets of a pension scheme to provide a benefit (other than a payment) to the relevant member (Section 160(2)(b), coupled with Section 173).

For the sake of convenience, we will refer in the rest of this decision to the first category of "unauthorised member payment" as an "actual UMP" and the second category of unauthorised member payment as a "deemed UMP" and to the two categories together as "unauthorised payments".

The unauthorised payments charge and the unauthorised payments surcharge

12. Section 208 imposes a charge to income tax – an "unauthorised payments charge" - at 40% on a member who receives an unauthorised member payment and Section 209 imposes a charge to income tax – an "unauthorised payments surcharge" - at 15% on a member who receives a "surchargeable unauthorised member payment". There are complex rules for identifying which unauthorised member payments are surchargeable but, essentially, an unuathorised member payment needs to exceed a threshold before it becomes surchargeable. At the request of the parties, we do not address in this decision whether any particular unauthorised member payment exceeds that threshold and confine ourselves to matters of principle.

13. Whereas the amount of an actual UMP is straightforward to identify – the amount of the payment in question - the amount of a deemed UMP is not. As we have noted in paragraph 9 above, Section 173 requires the relevant amount to be quantified by reference to "the benefits code" as defined in Section 63(1) of the Income Tax (Earnings and Pensions) Act 2003 (the "ITEPA"). That definition includes Chapters 2 to 7 and 10 and 11 of Part 3 of the ITEPA. Of those chapters, Chapter 7 (Sections 173 to 191 of the ITEPA) is concerned with loans made to employees and is therefore relevant where the benefit provided to the relevant member by the use of the assets of the pension scheme takes the form of a loan. (In this case, if we conclude that the assets of an Ark Scheme have been used to provide a benefit to a member of that scheme in the form of an MPVA loan, then that MPVA loan would be "employment-related" as defined in that section by virtue of the effect of Section 173(8) of the FA 2004 (which, as noted above, equates the "employer" with the pension scheme and the "employee" with the scheme member.))

14. Under Chapter 7 of the ITEPA:

(1) an "employment-related loan" is defined in Section 174 of the ITEPA and includes a loan made by the employee's employer – see Section 174(2) of the ITEPA;

(2) subject to certain qualifications, the "cash equivalent" of the benefit of an "employment-related loan" is to be treated as earnings from the employee's employment for a tax year if it is a "taxable cheap loan" – see Section 175(1) of the ITEPA;

(3) an employment-related loan is a "taxable cheap loan" in relation to a particular tax year if:

(a) there is a period consisting of the whole or part of that tax year during which the loan is outstanding and the employee holds the employment;

(b) no interest is paid on the loan for that tax year, or the amount of interest paid on it for that tax year is less than the interest that would have been payable on it at the "official rate"; and

(c) none of the exceptions in Sections 176 to 179 of the ITEPA applies -

see Section 175(2) of the ITEPA. None of the exceptions in Sections 176 to 179 of the ITEPA applies in this case;

(4) the "cash equivalent" of the benefit of an employment-related loan for a tax year is the difference between:

(a) the amount of interest that would have been payable on the loan for that tax year at the "official rate"; and

(b) the amount of interest (if any) actually paid on the loan for that tax year -

see Section 175(3) of the ITEPA;

(5) the "official rate" of interest is defined in Section 181 of the ITEPA. (At the time when the MPVA loans were made, the official rate stood at 4% and, since then, the official rate has been reduced over time to its current level of 2%;)

(6) the cash equivalent of the benefit of an employment-related loan is not to be treated as earnings under the benefits code if the amount of the loan (or the aggregate of them if more than one) does not exceed the relevant threshold, which, at the relevant time, stood at £5,000 – see Section 180 of the ITEPA;

(7) where a person has been subject to tax in respect of an employment-related loan in any tax year on the basis that the whole or part of the interest payable on the loan for that tax year was not paid, and that interest is subsequently paid after the relevant tax year, then the relevant person may make a claim for relief – see Section 191 of the ITEPA; and

(8) finally, in the event that the whole or part of an employment-related loan is released or written off in a tax year, the amount released or written off is to be treated as earnings from the employment for that tax year – see Section 188 of the ITEPA.

The scheme sanction charge

15. Section 239 provides for a charge to income tax, known as the "scheme sanction charge", which arises where, in any tax year, one or more "scheme chargeable payments" are made by a registered pension scheme. The person liable to the scheme sanction charge is the scheme administrator (see Section 239(2)).

16. A scheme administrator's liability ceases when that person ceases to be a scheme administrator of the pension scheme in question and the liability becomes that of the incoming replacement – see Section 271. The position has been modified in respect of independent trustees, like Dalriada, so that they do not assume liability, which instead remains with the previous scheme administrator, but this change took effect only in respect of independent trustee appointments made on or after 1 September 2014 and so does not apply to the scheme sanction charges which are in issue in these appeals – see Sections 272A to 272C.

17. It is also possible for liabilities of a scheme administrator to be assumed by others in circumstances where there is no scheme administrator of the pension scheme, the scheme administrator cannot be traced or the scheme administrator is in serious default – see Section 272.

18. The amount of the scheme sanction charge is determined under Section 240, as follows:

"(1) The scheme sanction charge for any tax year is a charge at the rate of 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.

(2) But if—

(a) the scheme chargeable payment is an unauthorised payment, or any of the scheme chargeable payments are unauthorised payments, and

(b) tax charged in relation to that payment, or any of those payments, under section 208 (unauthorised payments charge) has been paid,

a deduction is to be made from the amount of tax that would otherwise be chargeable for the tax year by virtue of subsection (1).

(3) The amount of the deduction is the lesser of—

(a) 25% of the amount of the scheme chargeable payment, or of the aggregate amount of such of the scheme chargeable payments as are tax-paid, and

(b) the amount of the tax which has been paid under section 208 in relation to the scheme chargeable payment, or in relation to such of the scheme chargeable payments as are tax-paid.
…
(4) A scheme chargeable payment is "tax-paid" if the whole or any part of the tax chargeable in relation to it under section 208 has been paid."

19. The term "scheme chargeable payment" is defined in Section 241. So far as is material, that section provides:

"(1) In this Part "scheme chargeable payment", in relation to a registered pension scheme, means—

(a) an unauthorised payment by the pension scheme, other than one which is exempt from being scheme chargeable, and
…
(2) An unauthorised payment is exempt from being scheme chargeable if—

(a) it is treated as having been made by section 173 (use of scheme assets to provide benefits) and the asset used to provide the benefit in question is not a wasting asset,
…
(3) "Wasting asset" has the same meaning as in section 44 of TCGA 1992."

20. In this case, it is common ground that the cash which was used to make each MPVA loan was not a wasting asset and that therefore any deemed UMP which may have arisen under Sections 160(2)(b) and 173 by virtue of the use of that cash to give rise to a benefit for a member of the lending Ark Scheme was not a "scheme chargeable payment". Thus, in this context, only an actual UMP can give rise to a scheme sanction charge.

Applications to discharge

Types of applications

21. Pursuant to Section 268, a person liable to an unauthorised payments surcharge in respect of an unauthorised payment, or a scheme administrator liable to a scheme sanction charge in respect of a scheme chargeable payment, can apply to the Respondents for the discharge of that liability.

Application to discharge an unauthorised payments surcharge

22. In the case of an unauthorised payments surcharge, the ground of discharge is prescribed by Section 268(3) of the FA 2004 as being that, "in all the circumstances of the case, it would not be just and reasonable for the [relevant person] to be liable to the unauthorised payments surcharge in respect of the payment".

23. An application to discharge an unauthorised payments surcharge is required to be made in accordance with paragraph 3 of the Registered Pension Schemes (Discharge of Liabilities under Sections 267 and 268 of the Finance Act 2004) Regulations 2005 (SI 2005/3452) (the "Discharge Regulations"). This requires that:

(1) the application must be made in writing;

(2) in the case of an individual, the application must be made no later than 5 years after the 31 January next following the tax year to which it relates; and

(3) the application must set out the particulars of the ground relied on to obtain the discharge.

24. On receiving an application under Section 268 from a person who is liable to the unauthorised payments surcharge, the Respondents must decide whether to discharge that person's liability to the unauthorised payments surcharge. If the Respondents refuse to discharge the liability, then an appeal to the FTT lies pursuant to Section 269. The FTT can then decide whether the liability ought to have been discharged.

Application to discharge a scheme sanction charge

25. In the case of a scheme sanction charge, the ground of discharge is prescribed by Section 268(7) as being 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."

26. An application to discharge a scheme sanction charge is required to be made in accordance with paragraph 3 of the Discharge Regulations. This requires that:

(1) the application must be made in writing;

(2) in the case of a company, the application must be made no later than 6 years after the end of the accounting period to which it relates; and

(3) the application must set out the particulars of the ground relied on to obtain the discharge.

27. On receiving an application under Section 268 from the scheme administrator, the Respondents must decide whether to discharge the scheme administrator's liability to the scheme sanction charge in respect of the unauthorised payment. If the Respondents refuse to discharge the liability, then an appeal to the FTT lies pursuant to Section 269. The FTT can then decide whether the liability ought to have been discharged.

THE SPREADSHEETS

28. A crucial part of the evidence which we have considered for the purposes of the appeals is various spreadsheets.

29. Chief amongst those is a redacted spreadsheet (the "Final Redacted Spreadsheet") which was prepared by Dalriada in co-operation with the Respondents for the purposes of the hearing and which was based on an earlier unredacted spreadsheet (the "Database"). The Database was sent to Dalriada following its appointment as the administrator of the Ark Schemes but without any explanation of the precise manner in which it had been created or the purposes for which it had been generated, both of which are in issue between the parties. The identities of the people who prepared the Database is unknown. However, it is common ground that they were part of the administration team employed by the Ark LLPs (as defined below) and the evidence of Mr Tweedley was that the Database may have been created out of paper records prepared by the directors of the two trustee companies, Mr Julian Hanson and Mr Andrew Hields. According to Mr Sean Browes, the main witness for Dalriada in these proceedings, the metadata for the Database shows that it was first created on 24 February 2011, some months after the PRP was first implemented and several months before the intervention of the PR and the appointment of Dalriada brought an abrupt end to the PRP. The Database is therefore a valuable contemporaneous record of what the individuals involved in creating and operating the PRP were thinking at the time when the PRP was in progress.

30. The Final Redacted Spreadsheet is essentially a reflection of the Database, given that it is simply a more developed version of the Database taking into account the attempts by Dalriada to make sense of the PRP following its appointment. Each row of the Final Redacted Spreadsheet relates to one member of the Ark Schemes. The Final Redacted Spreadsheet includes numerous columns relating to each member. For the purposes of the issues which we need to address in this decision, the most significant column in the Final Redacted Spreadsheet is one entitled "Matched With1". In relation to most members, the "Matched With1" column includes the name of another member (and sometimes other members) of the Ark Schemes.

31. Another spreadsheet which was prepared by Dalriada, sent to the Respondents and provided to us for the purposes of the hearing was a bank statement reconciliation which tracked payments into and out of each Ark Scheme by and to each member and which included the dates, amounts and paying Ark Scheme in relation to each MPVA loan which was made to each member (the "Bank Statement Reconciliation").

32. A further spreadsheet which was prepared by Dalriada, sent to the Respondents and provided to us for the purposes of the hearing compared some of the information set out in the Final Redacted Spreadsheet with other information held by Dalriada and identified consistencies and inconsistencies in that information (the "Comparison Spreadsheet"). The Comparison Spreadsheet was accompanied by a number of other spreadsheets which either:

(1) demonstrated the results of the comparisons described above in further detail; or

(2) contained diagrams showing the transfers made into the Ark Schemes in respect of, and the MPVA loans made to, certain members

and which were exhibited to Mr Browes's witness statement (together, the "Exhibited Spreadsheets").

33. The Final Redacted Spreadsheet, the Bank Statement Reconciliation, the Comparison Spreadsheet and the Exhibited Spreadsheets are referred to collectively in this decision as the "Spreadsheets".

MEMBER CATEGORIES

34. The parties to the appeals have divided the members of the Ark Schemes into different categories. Each category reflects a different fact pattern. The categories have developed over

time and so the naming convention is not sequential. For example, there is no Category E or Category F. The various categories are as follows:

(1) Category A – members who received MPVA loans and did not repay them, and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the name of one other member of the Ark Schemes who also received an MPVA loan;

(2) Category B – members who received MPVA loans and did not repay them, and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the names of multiple other Ark Scheme members who also received MPVA loans;

(3) Category C – members who did not receive MPVA loans, but in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the names of another member or other members of the Ark Schemes who did receive MPVA loans;

(4) Category D – members who received MPVA loans and did not repay them, and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the names of another member or other members of the Ark Schemes who did not receive an MPVA loan;

(5) Category G – members who did not receive MPVA loans and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the name of another member or other members of the Ark Schemes who did not receive an MPVA loan; and

(6) Category H – members who received MPVA loans and have subsequently repaid all or part of those MPVA loans.

35. Of the Appellants, Ms Oades falls in Category B and Mr Donaghy-Sutton falls in Category C.

THE AGREED FACTS

36. The Appellants and the Respondents have agreed certain facts. Those facts are set out in paragraphs 37 to 58 below.

The MPVA loans

37. As noted above, the PRP involved an arrangement under which each Ark Scheme made an MPVA loan to a member of another Ark Scheme. (For completeness, we would note that there are examples of cases where an Ark Scheme made an MPVA loan to one of its own members but it is common ground that those circumstances arose as a result of an error by those who were responsible for operating the PRP and was not the aim of the PRP. We do not consider those circumstances further in this decision.)

38. When a member of an Ark Scheme borrowed from another Ark Scheme, the borrowing member and the lending Ark Scheme would execute a deed known as an "MPVA Agreement".

39. The typical MPVA Agreement provided for the lending Ark Scheme to make an MPVA loan to the borrowing member. Under the typical MPVA Agreement, the lending Ark Scheme was entitled to set a repayment date which would fall at least 25 years after the date of the MPVA Agreement. The MPVA Agreement did not expressly state that interest would accrue over its term. However, in most MPVA Agreements, the amount to be repaid at the end of the term (the "MPVA Discharge Amount") was expressed as a fixed amount, calculated by reference to the amount borrowed plus 3% simple interest per annum over twenty-five years.

Interest of 3% per annum above the base lending rate was also payable on any sum not repaid by its due date. The MPVA loan was unsecured.

40. The MPVA loan offered to the member would be up to 50% of the value of the member's pension rights. The lending Ark Scheme did not carry out credit checks on any of the borrowing members.

The origins of the PRP

41. Mr Craig Tweedley devised the PRP. He did so after being shown an alternative scheme which enabled members to access funds on the basis of their pension scheme entitlements (the "KJK Scheme").

42. Mr Tweedley began to implement the PRP in May 2010, when the first two of the Ark Schemes were established. These were the Lancaster Scheme and the Portman Scheme, both established on 12 May 2010. The Grosvenor Scheme, the Cranborne Scheme, the Tallton Scheme and the Woodcroft Scheme were established on 26 January 2011.

43. The "Principal Sponsors" of the Ark Schemes are set out below:

Scheme	Date of Establishment	Principal Sponsor
The Lancaster Scheme	12 May 2010	Lancaster TC Limited
The Portman Scheme	12 May 2010	Portman LC Limited
The Grosvenor Scheme	26 January 2011	Grosvenor Parade Limited
The Cranborne Scheme	26 January 2011	Cranborne Star Limited
The Tallton Scheme	26 January 2011	Tallton Place Limited
The Woodcroft Scheme	26 January 2011	Woodcroft House Limited

Original scheme trustees

44. The original sole trustee of each of the Ark Schemes was either Athena Pension Services Limited ("Athena") or Minerva Pension Services Limited ("Minerva"), as identified further below.

45. The directors of Athena were:

Director	Dates
Mr Michael Cowan	29 April 2010 – 29 April 2010
Mr Craig Tweedley	29 April 2010 – 28 July 2010 and 23 November 2011 – present
Mr Andrew Hields	27 July 2010 – 23 November 2010

46. The directors of Minerva were:

Director	Dates
Mr Michael Cowan	30 April 2010 – 30 April 2010
Mr Craig Tweedley	30 April 2010 – 28 July 2010 and 23 November 2011 - present
Mr Julian Hanson	27 July 2010 – 23 November 2011

47. Outline details of the Ark Schemes (their trustees and the first and last dates on which funds were transferred) are set out below:

Scheme	Original trustee	First transfer of funds to the scheme in respect of a new member	First payment under an MPVA Agreement by the relevant Ark Scheme	Final payment under an MPVA Agreement by the relevant Ark Scheme
The Lancaster Scheme	Athena	31 August 2010 (based on the bank account statement available to the Appellants and unverified by the Respondents)	13 September 2010	1 June 2011
The Portman Scheme	Minerva	9 September 2010	20 September 2010	25 May 2011
The Cranborne Scheme	Athena	28 February 2011	8 March 2011	25 May 2011
The Tallton Scheme	Minerva	28 February 2011	16 March 2011	1 June 2011
The Grosvenor Scheme	Athena	4 April 2011	15 April 2011	1 June 2011
The Woodcroft Scheme	Minerva	18 April 2011	9 May 2011	1 June 2011

Scheme Administrator

48. The trust deeds of each of the Ark Schemes stated that the trustee of each scheme (which is to say, Athena or Minerva) was to be the scheme administrator.

49. Apart from the Portman Scheme, Ark Commercial Pension Planning LLP ("Ark CPP LLP") made the required declaration under Section 270 in respect of each of the Ark Schemes. Ark Commercial Retirement Planning LLP ("Ark CRP LLP") made the required declaration under Section 270 in respect of the Portman Scheme.

50. Ark CPP LLP was incorporated on 11 March 2010 and dissolved on 13 August 2019. The members of Ark CPP LLP were:

Member	Dates
QA Registrars Ltd	11 March 2010 – 11 March 2010
QA Nominees Ltd	11 March 2010 – 11 March 2010
Sovereign Corporate Management Services Ltd	11 March 2010 – 23 September 2011
Bond Street Chambers LLP	11 March 2010 – 23 September 2011
Waddling Duck Ltd	23 September 2011 – 13 August 2019
Mr Craig Tweedley	23 September 2011 – 13 August 2019

51. Ark CRP LLP was also incorporated on 11 March 2010 and dissolved on 13 August 2019. The members of Ark CRP LLP were the same persons for the same periods as those of Ark CPP LLP (set out at paragraph 50 above).

52. The declarations pursuant to Section 270 were made on the following dates for each scheme:

Scheme	Date of Declaration	Entity Making Declaration
The Lancaster Scheme	14 May 2010	Ark CPP LLP
The Portman Scheme	14 May 2010	Ark CRP LLP
The Grosvenor Scheme	28 January 2011	Ark CPP LLP
The Cranborne Scheme	26 January 2011	Ark CPP LLP
The Tallton Scheme	28 January 2011	Ark CPP LLP
The Woodcroft Scheme	26 January 2011	Ark CPP LLP

Scheme Sanction Charges

53. The Respondents assessed Dalriada (as scheme administrator of each of the Ark Schemes) to scheme sanction charges under Sections 239 and 255, as set out in Part A of the Schedule.

54. On or about 6 August 2015, Dalriada appealed to the Respondents against each of the assessments.

55. On 24 July 2015, Dalriada made applications to the Respondents under Section 268 for the discharge of the scheme sanction charges in respect of each Ark Scheme.

56. On 18 January 2016, the Respondents rejected each of Dalriada's applications under Section 268.

57. On 16 February 2016, Dalriada appealed to the Respondents against the decisions to reject their applications under Section 268.

58. On 19 February 2016, Dalriada notified its appeals against the Respondents' decisions in relation to the applications to the FTT.

Ms Oades

59. The following are the agreed facts relating to Ms Oades. They are agreed by Ms Oades, the Respondents and Dalriada (so far as it is aware) but not by Mr Donaghy-Sutton or any appellant under the stayed appeals and are as follows:

(1) Ms Oades is a member of the Portman Scheme;

(2) prior to Ms Oades becoming a member of the Portman Scheme, Ms Oades was a member of an occupational pension scheme with the National Health Service (the "NHS").

(3) Ms Oades was made aware of the PRP by Isles & Storer Limited ("I&S Limited"), which shared a business address with Portman TC Ltd and Lancaster TC Ltd except for the period from 23 November 2011 to 13 January 2012;

(4) on 7 September 2010, Ms Oades completed a "Membership Consideration Form" in order to join one of the Ark Schemes;

(5) on 27 October 2010, Ms Oades applied to the NHS pension scheme to request a transfer of pension benefits;

(6) on 30 November 2010, the provider of the NHS pension scheme transferred £230,725.71 to the Portman Scheme;

(7) Ms Oades and the trustee of the Lancaster Scheme entered into four MPVA Agreements, as follows, and Ms Oades received the following payments from the Lancaster Scheme bank account less £25 bank charges deducted from each payment:

	MPVA Agreement Date	MPVA loan
1	14 December 2010	£27,500
2	14 December 2010	£55,000
3	19 January 2011	£10,000

4	19 January 2011	£22,500

(8) according to the Final Redacted Spreadsheet, an "MPVA Issued Amount 1" of £115,000 was received by Ms Oades on the "MPVA Issued Date" of 14 December 2010;

(9) in the Final Redacted Spreadsheet, in respect of Ms Oades, the column headed "Matched With1" lists four individuals (ID numbers 64, 60, 75 and 80) all of whom are members of the Lancaster Scheme. As other members of the PRP, those individuals have their own rows within the Final Redacted Spreadsheet which record their details and their involvement in the PRP. These aspects of the Final Redacted Spreadsheet, along with its accuracy and role in the operation of the PRP, are in dispute between the parties;

(10) on the following dates, Ms Oades filed self-assessment tax returns and none of those returns made any reference to the MPVA loans or any amounts related to the Ark Schemes:

(a) 2010/11 tax year – filed on 13 January 2012;

(b) 2011/12 tax year – filed on 14 January 2013;

(c) 2012/13 tax year – filed on 14 January 2014; and

(d) 2013/14 tax year – filed on 7 January 2015; and

(11) the Respondents issued discovery assessments to Ms Oades in respect of the above tax years on the dates set out below:

(a) 2010/11 tax year – 25 February 2015;

(b) 2011/12 tax year – 4 March 2016;

(c) 2012/13 tax year – 24 November 2016; and

(d) 2013/14 tax year – 18 October 2017.

Mr Donaghy-Sutton

60. The following are the agreed facts relating to Mr Donaghy-Sutton. They are agreed by Mr Donaghy-Sutton, the Respondents and Dalriada (so far as it is aware) but not by Ms Oades or any appellant under the stayed appeals and are as follows:

(1) prior to his involvement with the PRP, Mr Donaghy-Sutton was a member of three pension schemes, as follows:

(a) the British Midland Airways Ltd Pension & Life Assurance Scheme, operated by Aon Consulting Limited;

(b) the Easyjet Pup Scheme, operated by AEGON; and

(c) a unit trust personal pension plan, operated by HSBC Trust Company (UK) Ltd;

(2) on 7 October 2010, Mr Donaghy-Sutton completed a "Membership Consideration Form" in order to join the Portman Scheme;

(3) each of Mr Donaghy-Sutton's existing pension providers transferred funds to the Portman Scheme at his request or with his authority, as follows:

Scheme	Date of Transfer	Value

Aon Consulting Limited	13 May 2011	£363,262.67
AEGON	29 December 2010	£5,219.66
HSBC Trust Company (UK)	31 December 2010	£9,188.29
	Total	£377,670.62

(4) in the Final Redacted Spreadsheet, in respect of Mr Donaghy-Sutton, the column headed "Matched With1" includes the name of five individuals (ID numbers 138, 134, 231, 172 and 204), who were members of other Ark Schemes. As other members of the PRP, those individuals have their own rows within the Final Redacted Spreadsheet which record their details and their involvement in the PRP. These aspects of the Final Redacted Spreadsheet, along with its accuracy and role in the operation of the PRP, are in dispute between the parties;

(5) as noted at paragraph 4 above, Dalriada was appointed as independent trustee on 31 May 2011, which was shortly after the transfer from Aon Consulting Limited, effectively putting an end to the PRP and halting any ongoing implementation. As a result, Mr Donaghy-Sutton did not enter in an MPVA Agreement and did not receive an MPVA loan from any of the Ark Schemes;

(6) on 13 July 2015, Mr Donaghy-Sutton filed a self-assessment tax return in respect of the 2011/12 tax year;

(7) on 21 January 2016, Mr Donaghy-Sutton filed a self-assessment tax return in respect of the 2010/11 tax year;

(8) on 26 May 2016, the Respondents opened an enquiry into Mr Donaghy-Sutton's 2010/11 tax return;

(9) on the same day, the Respondents opened an enquiry into Mr Donaghy-Sutton's 2011/12 tax return;

(10) on 16 August 2017, the Respondents issued a closure notice to Mr Donaghy-Sutton in respect of the enquiry into his 2010/11 tax return; and

(11) on the same day, the Respondents issued a closure notice to Mr Donaghy-Sutton in respect of the enquiry into his 2011/12 tax return.

Claims in the High Court

61. Following Dalriada's appointment as independent trustee, Dalriada commenced claims against:

(1) a member of one of the Ark Schemes, representing all of the members, and

(2) Athena and Minerva, as original trustees of the Ark Schemes.

62. In these claims, Dalriada sought declarations that the MPVA loans had not been made pursuant to valid exercises of the trustees' powers of investment in respect of the Ark Schemes and were therefore void.

63. Approximately three weeks prior to start of the hearing in the High Court proceedings, Dalriada's representatives at that time (McGrigors LLP, now Pinsent Masons LLP following a merger) wrote to the Respondents to ask if the Respondents were prepared to agree to be bound by the decision of the High Court.

64. A few days later, the Respondents wrote to McGrigors LLP to say that, whilst they would, of course, take notice of what the High Court said in reaching their view on the position following the hearing, they were not prepared to commit to be bound by the High Court's decision. The Respondents added that:

"As far as the tax implications of any decision, we think that the proper place for any rulings on the tax position would be via a tax appeal under the relevant legislation. The Court will presumably consider this point but in any event we could not agree to be bound by it."

65. Dalriada's claims were heard by Bean J in November and December 2011 and Bean J's decision - in *Dalriada Trustees Ltd v Faulds and others* [2011] EWHC 3391 (Ch), [2012] ICR 1106 ("*Faulds*") – along with the implications of that decision for the present proceedings, is discussed in paragraphs 266 to 308 below. It is common ground that, not only were the Respondents not party to the proceedings but:

(1) they had not agreed to be bound by the decision; and

(2) following the decision, no application was made under Rule 19.8A(2)(b) of the Civil Procedure Rules (the "CPR") for the decision to bind the Respondents unless they applied under Rule 19.8(b) of the CPR to set aside or vary the order of the High Court.

THE ISSUES

66. In view of the law summarised in paragraphs 7 to 27 above, and the agreed facts summarised in paragraphs 36 to 60 above, the parties have agreed the following to be the issues which are relevant to all parties to the appeals:

(1) whether a payment made by one of the Ark Schemes (Scheme Y) to a member of another Ark Scheme (Scheme Z) under an MPVA Agreement was an actual UMP "in respect of" the members of Scheme Y within the meaning of Section 160(2)(a) ("Issue 1");

(2) if the answer to Issue 1 is yes, whether:

(a) a member of Scheme Y should be assessed on the amount paid to a member of Scheme Z where that amount can be "matched" to the member of Scheme Y; or

(b) whether every member of Scheme Y should be assessed in respect of payments made by Scheme Y (whether or not those payments can be "matched" to that member),

("Issue 2"); and

(3) alternatively, whether the making of a payment by one of the Ark Schemes (Scheme Y) to a member of another Ark Scheme (Scheme Z) amounted to the use of an asset held by Scheme Y to provide a benefit to the members of Scheme Y within the meaning of Sections 160(2)(b) and 173, with the result that Scheme Y is treated as having made deemed UMPs to the members of Scheme Y who received MPVA loans in each tax year in which the MPVA loans remain outstanding ("Issue 3").

67. In addition, if the answer to Issue 3 is yes, while this is not technically an issue in any of the appeals which have so far been made, Dalriada has asked us to consider and determine how the benefit accruing to the members of Scheme Y should be quantified when:

(1) the MPVA loan is repaid; or

(2) the MPVA loan is not repaid and is instead written off as a bad debt –

("Issue 4").

68. Just pausing there, we think that it is convenient to address Issue 1 and Issue 2 together – given that they both relate to the potential application of Section 160(2)(a) – and Issue 3 and Issue 4 together – given that they both relate to the potential application of Sections 160(2)(b) and 173. In addition, in considering those two pairs of issues, we think that it is helpful to adopt the terminology chosen by the Respondents to describe their case in their skeleton argument and then adopted by the parties at the hearing, which is as follows:

> (1) "Primary Case Preferred Analysis" – a member of Scheme Y is to be assessed on an MPVA loan made by Scheme Y to a member of Scheme Z on the basis that that MPVA loan can be "matched" to that member of Scheme Y and was therefore made "in respect of" that member of Scheme Y;
>
> (2) "Primary Case Alternative Analysis" (and, together with the Primary Case Preferred Analysis, the "Primary Case") – every member of Scheme Y is to be assessed on an MPVA loan made by Scheme Y to a member of Scheme Z on the basis that, although that MPVA loan cannot be "matched" to any specifically-identifiable member of Scheme Y, it was made with a view to the making of MPVA loans by Scheme Z to the members of Scheme Y and was therefore made "in respect of" all the members of Scheme Y; and
>
> (3) "Alternative Case" – the making of an MPVA loan by Scheme Y to a member of Scheme Z does not amount to a payment by Scheme Y "in respect of" any member of Scheme Y but nevertheless a member of Scheme Y receiving an MPVA loan from Scheme Z is to be assessed on the benefit of receiving that MPVA loan on the basis that that MPVA loan arose as a result of the use of the assets of Scheme Y to make an MPVA loan to a member of Scheme Z.

69. Each of the Appellants considers that the Alternative Case is correct and that each of the Primary Case Preferred Analysis and the Primary Case Alternative Analysis is not. The Respondents consider that the Primary Case Preferred Analysis is correct and that, if we consider this not to be so, the Primary Case Alternative Analysis is correct. The Respondents then say that, as long as we agree that one of the Primary Case analyses is correct, the Alternative Case does not arise. However, the Respondents go on to say that, if we do not agree with either of the Primary Case analyses, the Alternative Case is correct. This is therefore a somewhat unusual situation, to say the least.

70. In the event that we decide that actual UMPs were made in respect of members of the Ark Schemes pursuant to Section 160(2)(a), we also need to decide Dalriada's appeals against the Respondents' decisions to refuse its applications under Section 268 to discharge the scheme sanction charges which have been assessed under Section 239. This is because, while those appeals involve only Dalriada (and not Ms Oades, Mr Donaghy-Sutton or any of the other members of the Ark Schemes), the determination of the appeals will affect each of the Ark Schemes a whole, and so in that sense they are common issues.

71. The determination of those appeals involves our considering two issues in relation to each actual UMP - namely, has Dalriada satisfied us that its liability to the scheme sanction charges ought to have been discharged because:

> (1) the scheme administrator reasonably believed that the actual UMP was not a scheme chargeable payment ("Issue 5"); and
>
> (2) 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 actual UMP ("Issue 6") –

see Section 268(7).

72. Mr Donaghy-Sutton's appeals do not raise any issue which is different from the issues outlined above because Mr Donaghy-Sutton has not made an application to discharge the unauthorised payments surcharge which has been assessed against him.

73. The same is not true for Ms Oades because Ms Oades submits that she has made a valid application under Section 268(3) to discharge the unauthorised payments surcharge which was assessed under Section 209 in respect of the tax year 2010/11. That submission gives rise to two issues - namely:

(1) did Ms Oades make a valid application under Section 268(3) to discharge that unauthorised payments surcharge ("Issue 7"); and

(2) if she did, has she satisfied us that her liability to the unauthorised payments surcharge ought to have been discharged because, in all the circumstances of the case, it would not be just and reasonable for her to be so liable ("Issue 8").

THE EVIDENCE AND OUR FINDINGS OF FACT

THE EVIDENCE AND OUR FINDINGS OF FACT – AN INTRODUCTION

Summary of the evidence

74. We were provided with a considerable amount of written and oral evidence in relation to the proceedings.

75. In addition to the Spreadsheets, the written evidence included:

(1) witness statements from Mr Sean Browes – a representative of Dalriada – both for the purposes of these proceedings and for the purposes of the hearing in *Faulds*;

(2) witness statements from Mr Tweedley, both for the purposes of these proceedings and for the purposes of the hearing in *Faulds*;

(3) a witness statement from Ms Oades for the purposes of these proceedings;

(4) a witness statement from Mr Andrew Isles of I&S Limited - the representative of, and adviser to, Ms Oades - for the purposes of these proceedings;

(5) a witness statement from Mr Donaghy-Sutton for the purposes of these proceedings;

(6) a witness statement from Ms Kirsty Allsopp - an officer of the Respondents involved in the investigation into the PRP - for the purposes of these proceedings;

(7) various determinations and notices by the PR and the Determinations Panel in connection with the PR's intervention in relation to the Ark Schemes and the appointment of Dalriada;

(8) a witness statement from Mr Alan Fowler – adviser to Mr Tweedley – for the purposes of the hearing in *Faulds*;

(9) the skeleton arguments of each party to the proceedings in *Faulds*;

(10) a Beddoe application claim form and the subsequent Beddoe order, along with a witness statement from Mr Ben Fairhead of Pinsent Masons LLP in support of Dalriada in connection with the Beddoe claim;

(11) a note of a meeting (the "HMRC meeting") attended by Mr Tweedley, Mr Fowler and Mr Stephen Ward of Premier Pension Solutions SL ("PP") – one of the financial advisers responsible for marketing the PRP - with two representatives of the

Respondents, a Mr Alan Bush and Ms Allsopp on 22 February 2011 which was prepared by Mr Bush following that meeting and sent to Mr Tweedley for comment (the "HMRC meeting note");

(12) a document which was alleged by Mr Tweedley to be a note of the HMRC meeting based on a recording made by Mr Tweedley at the time and provided to the Respondents a week before the hearing (the "Mr Tweedley meeting note");

(13) instructions to Ms Amanda Hardy, of counsel, in relation to the PRP, which were sent by Mr Fowler to Ms Hardy on 8 March 2011 (the "Instructions"), along with the opinion of Ms Hardy dated 27 March 2011 based on the Instructions (the "Counsel's Opinion");

(14) various documents which were provided to, and completed by, an individual upon becoming a member of an Ark Scheme, including a member information form which was provided to a prospective member by Ark Business Consulting LLP ("Ark BC LLP, and, together with Ark CRP LLP and Ark CPP LLP, the "Ark LLPs");

(15) certain correspondence between transferring schemes and Ark Schemes;

(16) various MPVA Agreements;

(17) correspondence between Mr Isles, on behalf of Ms Oades, and the Respondents in relation to the assessments made on Ms Oades which are the subject of Ms Oades's appeals in the present proceedings; and

(18) various email exchanges between introducers of the PRP and members.

76. We were also provided with the oral testimony of Mr Browes, Mr Tweedley, Ms Oades, Mr Isles, Mr Donaghy-Sutton and Ms Allsopp at the hearing.

Our conclusions in relation to the witnesses

77. Before proceeding any further, we should say something about each of the witnesses who provided oral evidence at the hearing.

Mr Browes

78. We considered that Mr Browes was an honest and straightforward witness who did his best to assist us in our attempts to grapple with the implications of the Spreadsheets. We are grateful to Mr Browes for the assistance which he provided to us in that regard and we have accorded considerable weight to his answers in weighing up the evidence.

Mr Tweedley

79. Unfortunately, we cannot say the same for Mr Tweedley. Mr Tweedley repeatedly sought to avoid answering the questions which had actually been put to him, tried to anticipate future questions which had not actually been put to him, sought to defend the indefensible and was generally evasive and hostile. Many of his answers were inconsistent with the documents with which we had been provided and, in some cases, with his own evidence. In short, we have accorded almost no weight to Mr Tweedley's evidence and, where that evidence is inconsistent with the documents, we have chosen to rely on the documents.

80. Whilst we are on the subject of Mr Tweedley, we would be remiss if we did not at this point make some observations about the PRP and the conduct of Mr Tweedley in devising and marketing the PRP because it has considerable relevance to these proceedings. In our view, leaving aside the tax consequences of the PRP – which are our primary concern and which, as will be seen in this decision, are, in our opinion, disastrous for every member who chose to participate in it – the PRP was fatally flawed from the commercial perspective. Not a single

part of the scheme made any sense commercially, whether it was lending half the assets of each Ark Scheme on a long-term unsecured basis at a below-market rate of interest to individuals who had not been the subject of prior credit checks and without taking out insurance to cover death prior to the stipulated maturity date, through to the risky investments which were made with the remaining part of each Ark Scheme's assets.

81. We would expand on those observations as follows. On the basis of the evidence with which we were provided as described in paragraphs 74 to 76 above, it is apparent that the essence of the proposal from the commercial perspective was that, for every £100 that was contributed on behalf of a member into an Ark Scheme:

(1) a fee of £5 would be paid to the Ark LLPs;

(2) £50 would be used to make an MPVA loan to a member of a parallel Ark Scheme; and

(3) the remaining £45 would be used to make other investments which would generate a return that was sufficient to ensure that the member in question would be able to discharge his or her own MPVA loan out of the tax-free lump sum which the relevant member would then be entitled to receive from his or her pension fund. (As that tax-free lump sum could not exceed 25% of the member's pension fund at the point when the member was able to claim the tax-free lump sum, this meant that the other investments would need to grow at such a rate that, at the point when the member in question was able to claim the tax-free lump sum in order to discharge his or her MPVA loan, the relevant member's pension fund as a whole would be equal to or exceed four times the amount to be discharged.)

82. There were a number of significant flaws in this model.

83. First, we were provided with figures at the hearing that showed that, even if each MPVA loan were to have been discharged in full, the other assets of each Ark Scheme would have needed to generate a return of between 8% and 9% in order to enable the assets of each Ark Scheme to be sufficient to enable the members to discharge their MPVA loans out of their tax-free lump sums. (At one point in his evidence, Mr Tweedley asserted that, in fact, the return required from the other investments was only 5% but he provided no figures to support this claim and it was contrary to the figures with which we had been provided. We therefore do not believe him).

84. There were a number of reasons why the MPVA loans were not going to be discharged in full. Those included the fact that:

(1) no credit checks were undertaken before MPVA loans were made even though the MPVA loans had lengthy maturity dates and, in general, the individuals who were attracted to join the PRP and take out MPVA loans were people who had a pressing need to access funds and thus, as a class, were arguably more likely than most to default on their MPVA loans;

(2) the MPVA loans were unsecured so that, even if a borrowing member had an entitlement to a tax-free lump sum on becoming entitled to draw down his or her pension which was equal to or greater than the amount of the MPVA loan to be discharged, the relevant member might very well have had other creditors at that time with a claim against the relevant borrowing member which ranked pari passu with the claim of the lending Ark Scheme. (In his evidence, Mr Tweedley asserted that each lending Ark Scheme had a lien over the tax-free lump sums which were payable but produced no

evidence to show that any such lien existed and none of the legal counsel present at the hearing considered that one existed); and

(3) no life insurance was taken out to cover the premature death of a borrowing member prior to the stipulated maturity date of the relevant MPVA loan.

85. Secondly, the assets of each Ark Settlement were invested in assets which were high risk and highly speculative and were therefore unlikely to grow in value at the required rate. They included:

(1) an option to buy shares in a property-holding company in Cyprus run by one of Mr Isles's clients;

(2) an investment in a British Virgin Islands property-development company;

(3) an investment in a Guernsey company which indirectly owned properties in Derby and Hackney;

(4) an investment in a St Lucia company which was developing a luxury hotel and apartment villa complex in Freedom Bay, St Lucia; and

(5) an investment in a high street travel agent which rented out villas in holiday destinations.

86. In his evidence, Mr Tweedley was conspicuously vague on the extent of the due diligence which had been conducted in relation to each of the investments. For example, he accepted that his due diligence in relation to Freedom Bay involved little more than a Caribbean holiday. The only due diligence he had carried out in St Lucia had been to talk to some government officials to confirm that planning permission was in place. He also admitted that the Ark LLPs received commissions in connection with the making of many of the relevant investments.

87. Although, by dint of assiduous efforts following its appointment, Dalriada has been able to recover most of the amounts invested, the monies invested in the Guernsey company had not been recovered by the time of Mr Fairhead's witness statement in relation to the Beddoe application in 2016 and none of the investments has produced anything close to the return of between 8% and 9% which they would have needed to produce in order for the PRP to have had any prospect of working from the commercial perspective.

88. As regards the making of the MPVA loans and the other investments, Mr Tweedley accepted in giving his evidence that:

(1) contrary to Section 36 of the PA, no written advice had been obtained by the Ark Schemes or the trustees either in relation to the making of the MPVA loans or in relation to any of the other investments; and

(2) he had taken steps to ensure that none of the Ark Schemes ever acquired more than ninety-nine members in order to avoid the more rigorous scrutiny of scheme assets to which that would have given rise under paragraph 4 of the Occupational Pension Schemes (Investment) Regulations 2005.

89. Thirdly, the fees received by the Ark LLPs in connection with the PRP were substantial. Mr Tweedley was evasive when he was asked about the extent of those fees at the hearing but, in his witness statement in relation to the Beddoe application, Mr Fairhead testified that fees of a little over £1 million had been paid by the Ark Schemes to the Ark LLPs in aggregate.

90. Fourthly, the relationships between the various individuals who were responsible for operating the PRP was such as to give rise to some conspicuous conflicts of interest. Mr Tweedley himself owned the two trustee companies and so there was a connection between

each trustee company even before taking into account the fact the two directors of the trustee companies, Mr Hanson and Mr Hields, were related to each other. In addition, each of Mr Hanson and Mr Hields, who were making the decisions in relation to accepting new members into the Ark Schemes and advancing MPVA loans, stood to profit, through their membership of Ark BC LLP, from the fees which were charged to the Ark Schemes and also received fees by virtue of acting as introducers of participants.

91. The issues which we have described above were reflected in the conclusions reached by the PR when it intervened to appoint Dalriada as independent trustee of the Ark Schemes. At that time, the PR noted its concern that the Ark Schemes involved a systematic breach of trustee investment duties, including not exercising powers of investment for the purposes for which they had been granted, high fees, irregular transfers and inconsistencies in the information which had been provided to the PR by the trustees.

92. In addition to the commercial flaws in the structure and the deficiencies in the conduct of Mr Tweedley described above, there were other highly regrettable aspects to Mr Tweedley's conduct in relation to the PRP including, following Dalriada's appointment, orchestrating an amendment to the rules of each Ark Scheme in an attempt (which ultimately failed) to enable further MPVA loans to be made, retrospectively to cure the invalidity of the MPVA loans which had previously been made and retrospectively to validate the fees which had previously been charged to the Ark Schemes.

93. None of this redounds terribly well to the credit of Mr Tweedley. We agree with the Respondents' summary at closing that Mr Tweedley's actions in relation to the PRP displayed a total disregard for due diligence and careful administration and was primarily motivated by a desire for personal financial gain. In giving his evidence, Mr Tweedley displayed very little remorse for the damage and misery that the PRP has caused to so many people.

Mr Isles

94. Whilst Mr Isles was by no means as evasive as Mr Tweedley, there were certain parts of his evidence which troubled us.

95. Mr Isles was keen to distance himself from the PRP. For example, we were somewhat perplexed by his refusal to accept that he had acted as an introducer of members to the Ark Schemes even though:

(1) he was forced to concede that he had received commissions from the Ark LLPs in return for doing just that;

(2) Ms Oades confirmed that he was the person who had made her aware of the PRP; and

(3) the Final Redacted Spreadsheet listed him as the introducer in relation to around fifteen members of the Ark Schemes.

He was also not very forthcoming on the link between the Ark Schemes and one of his major clients, the benefits which he had received for setting up and running the sponsoring employer companies for the Portman Scheme and the Lancaster Scheme (of each of which he was the sole director) and the role which he had played in the proposed amendments to the powers of the two schemes to which we have referred in paragraph 92 above.

96. In the light of his approach, we were not entirely convinced by his protestations to the effect that that he had subsequently divested himself of all of the commissions which he had obtained from the Ark LLPs for introducing members to the Ark Schemes, either to the member in question or to charity and, in any event, his assertion that he had not benefitted financially from the PRP in any way sat somewhat uncomfortably with his admission that the arrangement

had produced benefits for the major client referred to in paragraph 95 above and that this had led to more work from that client and some new clients for I&S Limited.

97. Mr Isles also gave contradictory evidence in relation to the extent of his advice to prospective members. At one stage he said that he did not provide advice to potential members at all and, at another, he said that he had advised Ms Oades not to transfer her pension monies out of the NHS pension fund and into the PRP – advice which Ms Oades confirmed.

98. Finally, there was a perplexing exchange during Mr Isles's cross-examination when he denied having signed documents relating to the attempt by the sponsoring employer companies, following the appointment of Dalriada, to enable further MPVA loans to be made, retrospectively to cure the invalidity of the MPVA loans which had previously been made and retrospectively to validate the fees which had previously been charged to the Ark Schemes even though he was the sole director of two of the sponsoring employer companies and had apparently referred to those amendments in his witness statement for the proceedings in *Faulds*. That was something which remained unresolved at the hearing.

99. Overall, we did not find Mr Isles to be a credible or reliable witness.

Ms Oades

100. Although we experienced fewer problems in relation to the evidence of Ms Oades than we did with Mr Tweedley and Mr Isles, we did not find her to be entirely straightforward as a witness. We accept that Ms Oades did not wish to mislead us but there were certain features of her testimony which were unsatisfactory. For example, in a letter to the Respondents dated 26 August 2014, I&S Limited claimed on Ms Oades's behalf that she had read a tax barrister's opinion which blessed the arrangements before transferring her pension funds into the Portman Scheme – and Ms Oades repeated this assertion in giving her evidence at the hearing - but, in fact, it is clear from the documents bundle for the proceedings (the "DB") and the evidence of Mr Tweedley that no opinion in relation to the PRP was obtained from tax counsel until some months after that transfer took place.

101. Ms Oades also:

(1) claimed in her grounds of appeal to have read a member information form dated 27 March 2011 before applying to become a member of the Portman Scheme but that member information form post-dated by several months her transferring her pension funds to the Portman Scheme; and

(2) said categorically in her witness statement that credit checks had been carried out before her application for membership of the Portman Scheme had been accepted but conceded in cross-examination that she wasn't sure that that had been the case and couldn't remember. As it happens, there is no evidence that any of the members of the Ark Schemes had been subjected to credit checks at any time for the purposes of the PRP. Mr Tweedley confirmed that to be the case and it is, in any event, part of the agreed facts for the purposes of these proceedings.

102. Finally, in cross-examination, Ms Oades had a tendency to respond to questions which could logically only be answered in the affirmative but where an affirmative answer did not help her case with the answer "I don't know". We did not find this to be very helpful.

103. For these reasons, we did not consider Ms Oades to be entirely reliable as a witness.

Mr Donaghy-Sutton

104. We considered Mr Donaghy-Sutton to be a reliable and straightforward witness and had no reason to doubt any of his testimony. However, as Mr Donaghy-Sutton has not made any

appeal in relation to an application to discharge the unauthorised payments surcharge, his evidence was of no relevance to the issues which we have to address in this decision.

Ms Allsopp

105. Finally, we considered Ms Allsopp to be a reliable and straightforward witness and had no reason to doubt any of her testimony.

The various categories of evidence and our findings of fact

106. Given the issues set out in paragraphs 66 to 73 above, we have found it convenient to deal with the evidence, the submissions of the parties in relation to the evidence and our findings of fact based on the evidence under the following broad headings:

(1) matching – which is relevant to Issue 1 and Issue 2;

(2) if the MPVA loans give rise to actual UMPs, the reasonableness of the scheme administrator's belief that the MPVA loans were not scheme chargeable payments – which is relevant to Issue 5;

(3) whether Ms Oades made a valid application under Section 268(3) to discharge the unauthorised payments surcharge which was assessed under Section 209 – which is relevant to Issue 7; and

(4) if so, whether, in all the circumstances of the case, it would not be just and reasonable for Ms Oades to be liable to the unauthorised payments surcharge – which is relevant to Issue 8.

107. We have not found it necessary to make any separate findings of fact in relation to Issue 3, Issue 4 or Issue 6 for reasons which will become apparent.

108. For the avoidance of doubt, we should make it clear at this point that, although we have divided our summary of the evidence and our findings of fact into the separate headings described in paragraph 106 above for ease of reference, there is inevitably a degree of overlap between the various issues when it comes to the evidence and findings of fact. It should therefore be assumed that the evidence we describe in the paragraphs which follow, and the findings of fact we make in the paragraphs which follow, apply for the purposes of these proceedings as a whole and are not confined to the particular issue to which they have been nominally allocated.

EVIDENCE AND FINDINGS OF FACT IN RELATION TO MATCHING

Introduction

109. By far the most significant part of the evidence in the proceedings related to the question of matching. By that we mean the question of whether the individuals who operated the PRP intended there to be member-to-member matching of MPVA loans – which was the Respondents' position in the proceedings - or whether those individuals merely intended to ensure that each Ark Scheme within a pair of Ark Schemes had broadly the same value – which was the Appellants' position in the proceedings.

The evidence - general

The documentary evidence

110. In relation to this question, we were provided with various documents which were contained in the DB, along with the Spreadsheets.

The DB

111. One of the documents in the DB was a table setting out the MPVA loans which were made by each Ark Scheme to the members of other Ark Schemes. This revealed:

(1) some small anomalies where an Ark Scheme made an MPVA loan to its own members – for example MPVA loans of £54,425 by the Lancaster Scheme to one or more of its own members and MPVA loans of £38,460 by the Portman Scheme to one or more of its own members; and

(2) a close correlation between:

(a) the aggregate amount of MPVA loans which had been made by each Ark Scheme within a pair of Ark Schemes to the members of the other Ark Scheme within that pair; and

(b) the aggregate amount of MPVA loans which had been made by the other Ark Scheme to the members of the first-mentioned Ark Scheme

– for example:

(i) the Lancaster Scheme made aggregate MPVA loans of approximately £2.5 million to the members of the Portman Scheme and the Portman Scheme made aggregate MPVA loans of approximately £2.4 million to the members of the Lancaster Scheme;

(ii) the Tallton Scheme made aggregate MPVA loans of approximately £1.45 million to the members of the Cranborne Scheme and the Cranborne Scheme made aggregate MPVA loans of approximately £1.54 million to the members of the Tallton Scheme; and

(iii) the Woodcroft Scheme made aggregate MPVA loans of approximately £500,000 to the members of the Grosvenor Scheme and the Grosvenor Scheme made aggregate MPVA loans of approximately £270,000 to the members of the Woodcroft Scheme.

112. The DB also contained various standard documents which were completed by the Ark LLPs and by prospective participants in the PRP. These included:

(1) an example of the form which was executed by a prospective member when applying to join an Ark Scheme. The form invited the prospective member to indicate the term and amount (expressed as a percentage of the relevant prospective member's pension fund overall) of the MPVA loan which he or she wished to take and contained a statement to the effect that the Ark Scheme which the prospective member would join would be "determined by the administrators once an appropriate level of MPVA [loan] is identified". The form also offered the prospective member the opportunity to indicate the nature of the investments which he or she wished his or her Ark Scheme to make with the portion of its assets that did not comprise MPVA loans;

(2) an internal standard document for completion by the Ark LLPs in relation to each person who became a member. This had three sections, as follows:

(a) the first indicated whether the member in question had completed his or her application form and been given a membership identification number;

(b) the second indicated the relevant member's then current pension provider and the Ark Scheme which the relevant member had been approved to join; and

(c) the third indicated whether an MPVA Agreement had been authorised in respect of the relevant member, whether the relevant member's bank account details had been provided and the date or dates of the MPVA loans which had been made to the relevant member; and

(3) a leaflet published by Ark BC LLP describing the PRP which contained an illustration:

(a) showing that, where a participant borrowed an amount equal to 50% of the monies which he or she transferred into the PRP, then the same proportion of his or her pension monies transferred into the PRP would be invested in MPVA loans; and

(b) with a footnote to the effect that the 5% fee was "to discharge initial setup costs, member matching and issue of MPVA, final year fees, administration and introducer commission".

113. The DB also contained various emails and letters which were relevant to the question of whether or not there was member-to-member matching. These included:

(1) an email from a Mr Fraser Collins of PP dated 10 February 2011 to one of the members of the Ark Schemes in which Mr Collins told the member that she had "been 'matched' with a very urgent case" and that consequently Mr Collins would be grateful if she could scan and email the MPVA Agreement and application form back to Ark the next day;

(2) a letter from Mr Ward of PP to Mr Donaghy-Sutton which said, inter alia, and in somewhat Delphic terms, that "up to 50%" of the amount which Mr Donaghy-Sutton transferred into the PRP would be lent out by way of MPVA loan and that the same amount would be available to be borrowed by Mr Donaghy-Sutton in connection with the PRP;

(3) an email from Mr Hanson in which he declined to give evidence in these proceedings on the basis that the ground which he could cover had already been covered by Mr Tweedley in his evidence;

(4) an email from Mr Hields in which he declined to give evidence in these proceedings on the basis that he had "had no dealings with the day to day administration";

(5) a letter from Ms Rebecca Tweedley, Mr Tweedley's daughter, who was described by her father as being "involved in the administration of the PRP", to Pinsent Masons LLP, in which she said that:

(a) she had not been involved in the processing or administration of cases;

(b) she had always understood that the terminology of matching had been used "in order to identify what funds were available for MPVA'S and Investment, they were not matched on an individual client to client basis"; and

(c) she was reluctant to appear as a witness in the proceedings as she could not provide any further information than her father in relation to the question of matching; and

(6) a letter from Ms Sarah Kowalczyk, Mr Tweedley's assistant at the time when the PRP was in operation, to Pinsent Masons LLP, in which she said that:

(a) she had never been employed by the Ark entities but had instead worked within Mr Tweedley's regulated business;

(b) any administration which she had carried out for the Ark LLPs had been carried out under instruction and guidance and was never part of her main responsibilities;

(c) her recollection was that members were matched into a scheme depending on the expected values of their pensions in order to balance the schemes but not that there was member-to-member matching; and

(d) she was reluctant to appear as a witness in the proceedings given the limited role she had played in relation to the Ark Schemes and "was not in control of the schemes, the workings of the schemes and the structure".

The Spreadsheets

114. Turning to the Spreadsheets, the Final Redacted Spreadsheet contained columns with various entries in relation to each member, including columns specifying:

(1) the Ark Scheme joined by the member (Column AP);

(2) the member's introducer (Column M);

(3) the amount expected to be transferred into the relevant Ark Scheme by the member, along with the transfer values received in respect of the member and the date or dates when they were received (Columns Z to AC and AL to AO);

(4) the name of another member, or the names of other members, in the "Matched With1" column (Column AQ);

(5) notes in relation to the member (Column N); and

(6) an "MPVA Issued Amount" or "MPVA Issued Amounts" in relation to the member - which is to say the MPVA loans which were to be made to the member - and an "MPVA Issued Date or "MPVA Issued Dates" in relation to those MPVA loans (Columns BM to BP and Columns BQ to BT).

115. In the Final Redacted Spreadsheet:

(1) there were 652 MPVA issued amount entries and 384 MPVA issued date entries;

(2) the number of entries in the MPVA issued amount columns was the same as the number of entries in the MPVA issued date columns 50.5% of the time;

(3) the number of entries in the MPVA issued amount columns was the same as, or greater than, the number of entries in the MPVA issued date columns 94.5% of the time;

(4) there were no members who had an entry in the MPVA issued date column but did not have an entry in the MPVA issued amount column. (The Comparison Spreadsheet suggested that there were five such cases but each of those cases was shown in the course of the hearing to be referable to an error in transposing information from the Final Redacted Spreadsheet to the Comparison Spreadsheet;)

(5) there was a 76.9% correlation between the number of MPVA issued dates shown in relation to an individual member and the number of payments shown as being made to that individual member in the Bank Statement Reconciliation; and

(6) there was only a 45.4% correlation between the number of MPVA issued amounts shown in relation to an individual member and the number of payments shown as being made to that individual member in the Bank Statement Reconciliation.

116. The Comparison Spreadsheet contained a column (Column T) which set out a "Yes" or "No" answer provided by Dalriada to the following question:

"Is it likely that a hypothetical 'matching' would be possible based on information available?"

and, in his evidence, Mr Browes explained that:

(1) a "Yes" answer had been set out in that column only in relation to those individuals for whom it was definitively possible for member-to-member matching to work and that, in all other cases, a "No" answer had been set out in that column; and

(2) the individuals in relation to whom a "No" answer had been set out in that column included:

(a) those individuals who had not become a member of any Ark Scheme or whose pension funds had not been transferred into any Ark Scheme by the time of Dalriada's appointment or who had a person in his or her "Matched With1" column who had not become a member of any Ark Scheme or whose pension funds had not been transferred into any Ark Scheme by the time of Dalriada's appointment;

(b) those individuals who appeared a different number of times in the "Matched With1" columns of other individuals than they had names in their own "Matched With1" column;

(c) those individuals who were shown as having MPVA issued amounts in the Final Redacted Spreadsheet but who had not received MPVA loans by the time of Dalriada's appointment;

(d) those individuals who had a different number of MPVA issued dates in the Final Redacted Spreadsheet as compared to the number of MPVA Agreements in relation to them which were shown in the Exhibited Spreadsheets as being in Dalriada's possession; and

(e) those individuals who had a different number of MPVA issued amounts in the Final Redacted Spreadsheet as compared to the number of MPVA loans shown as being made to that individual in the Bank Statement Reconciliation; and

(3) a "Yes" answer had been set out in that column in 66% of the cases. In other words, he and his colleagues had concluded that, for the various reasons set out above, but on a non-exhaustive analysis, it was not definitively possible for member-to-member matching to work in 34% of the cases.

117. The Exhibited Spreadsheets contained a column (Column G) which showed that the number of MPVA loans made to a member and the number of MPVA issued dates shown in the Final Redacted Spreadsheet in relation to that member were the same 76.9% of the time.

118. We were taken to two examples of a member who was shown in the Final Redacted Spreadsheet as having more MPVA issued date entries than MPVA issued amount entries. Those were as follows:

(1) a Mr Robert Armstrong of the Lancaster Scheme, in respect of whom there was a single transfer into the Lancaster Scheme of approximately £95,300 on 22 December 2010 and who was shown in the Final Redacted Spreadsheet as having two MVPA issued date entries – 22 December 2010 and 8 February 2011 – and only one MPVA issued amount entry of £47,500. However, the Bank Statement Reconciliation showed that Mr Armstrong in fact received two MPVA loans – approximately £20,000 and approximately £27,500 – on the two MPVA issued dates set out in the Final Redacted Spreadsheet and therefore had two MPVA issued amounts as well as two MPVA issued dates.

In the Final Redacted Spreadsheet, Mr Armstrong was said to be matched with two members of the Portman Scheme, one of whom (Mr Anthony Arnold) was shown as having an MPVA issued amount of £20,000 and an MPVA issued date of 22 December

2010 and the other of whom (Mr David King) was shown as having an MPVA issued amount of £25,000 and an MPVA issued date of 10 February 2011 (although the Bank Statement Reconciliation showed that the actual MPVA loan received by Mr King was approximately £30,000); and

(2) a Mr Philip Ackerman of the Woodcroft Scheme, who was shown in the Final Redacted Spreadsheet as having transferred his existing pension into the Woodcroft Scheme in three tranches and as having three MPVA issued amounts each of which was approximately 50% of the amount transferred into the Woodcroft Scheme but as having no MPVA issued dates. However, the Bank Statement Reconciliation showed that Mr Ackerman in fact received no MPVA loans.

119. We were taken to two examples of a member who was shown as having a different number of MPVA issued date entries in the Final Redacted Spreadsheet than the number of MPVA Agreements in relation to that member which were shown in the Exhibited Spreadsheets as being in Dalriada's possession. Those were as follows:

(1) an anonymised Category A member (the "ACAM"), who was shown in the Final Redacted Spreadsheet as having an MPVA issued date of 11 February 2011 but in relation to whom the Exhibited Spreadsheets stated that Dalriada did not possess an MPVA Agreement. However, at the hearing, we were shown that an MPVA Agreement did exist in the DB in relation to the ACAM, albeit that that MPVA Agreement was unsigned, and we were taken to the Bank Statement Reconciliation and Final Redacted Spreadsheet entries which showed that the ACAM received an MPVA loan on the date and in the amount (subject to the deduction of fees) shown in the MPVA Agreement; and

(2) a Mr Ashwin Wagjiani, who was shown in the Final Redacted Spreadsheet as having no MPVA issued date but in relation to whom the Exhibited Spreadsheets stated that Dalriada possessed an MPVA Agreement. However, at the hearing, we were taken to the entry in the Bank Statement Reconciliation which showed that Mr Wagjiani received an MPVA loan on 24 May 2011.

120. The Final Redacted Spreadsheet contained:

(1) a row relating to Mr Jeremy Heath-Smith, whose "Matched With1" column contained the names of various individuals and then concluded with the words "Now got spare £5,000 MPVA";

(2) a row relating to Mr Barry James, whose notes column contained the words "Spare 15000 MPVA";

(3) a row relating to Ms Nicola McHugh, whose notes column contained the following:

"11/4 confirmation of transfer requested

3/5 emailed Julian to see if we can match this for £9k -DS

5/5 No match for £9k from an opposite scheme – Awaiting on another case from Mike to match it with. Di is getting back to me on this – DS

9/5 from Di – I am sending a case down today in the name of Wendy Croal which has a value of £19,054.78. Can you use this one to match with Nicola McHugh for £18,000? DS…"; and

(4) a row relating to Ms Wendy Croal, whose notes column contained the following:

"09/05 Email1 sent to introducer js

12/05 Spoke to MR – this is to be matched to McHugh – Advise JH and get MPVA's done for £9000 – MT…"

121. Finally, the Spreadsheets contained an example of Ms Diane Rotherforth, a member of the Lancaster Scheme, who received an MPVA loan of more than 50% of the amount that she had transferred into the Lancaster Scheme (approximately £44,600 transferred in and an MPVA loan of approximately £25,000 received).

The witness evidence

122. In relation to the question of matching, Mr Tweedley testified that:

(1) the intention underlying the PRP was not that there would be member-to-member matching of MPVA loans but rather that there would be broadly equivalent value in each pair of Ark Schemes so that MPVAs of broadly equivalent value could be made by each Ark Scheme to the members of the other while leaving sufficient other assets in each Ark Scheme to make the other investments;

(2) indeed, it would have been difficult to achieve member-to-member matching given:

(a) the difficulties involved in finding individuals with the same pension values and pension maturity dates; and

(b) timing difficulties arising out of the early death of a member or a member's request to transfer out of the arrangement or to take his or her pension early;

(3) moreover, each Ark Scheme had been established on the basis that it would hold funds for the benefit of its members in general. It was not segregated and so no member had an entitlement to a specifically-identifiable part of the funds. As a result, it would have been impossible to identify a specific part of any Ark Scheme which could be said to belong to an identifiable member and which was being lent to a specifically-identifiable member or specifically-identifiable members of other Ark Schemes;

(4) the fact that there were members who received their MPVA loans from more than one Ark Scheme tended to suggest that there was not member-to-member matching but instead merely a desire to match the overall value of each Ark Scheme with the overall value of its paired Ark Scheme;

(5) he had had no involvement with the day-to-day operation of the PRP and therefore with the creation of the Database which was the basis for the Final Redacted Spreadsheet. The day-to-day operation of the PRP had been left to Mr Hanson and Mr Hields, each of whom was a director of one of the two trustee companies, Athena and Minerva respectively;

(6) he had discussed the Database with Mr Hanson after Dalriada's appointment and the upshot of that conversation was that he thought that the Database might simply have been a hangover from a paper exercise conducted by Messrs Hanson and Hields that was designed to achieve the equivalence between each set of parallel Ark Schemes described in paragraph 122(1) above;

(7) Mr Hanson had told him that he and Mr Hields had created a paper record following their receipt of applications from prospective members. That paper record was created as follows. They would receive an application from an introducer which would set out the approximate value of the funds which were to be transferred into the PRP by the relevant applicant. They would then choose the particular Ark Scheme into which the relevant applicant's funds were to be transferred and would do so by "balancing the total

value of the pension funds in paired schemes to allow for an MPVA for that individual. They would do this by roughly matching the pension transfer values (i.e. the amount to be transferred into the Ark Scheme) of prospective members and recording that information for balancing purposes and for no other purpose". Once all the applicants and the transfer values of their pension funds had been recorded in this way on the paper record, they would "pass the paper record to the Ark administration staff that would computerise it for record keeping". Mr Tweedley speculated that, in so doing and creating the Database, the Ark administration staff "may have inadvertently captured irrelevant information, perhaps relating to the rough calculations [Mr Hanson and Mr Hield] would perform to ensure that applicants were added to pension schemes in such a way that the pension scheme values were broadly equivalent"; and

(8) PP, which was run by Mr Ward, was one of the largest introducers of members to the PRP and, towards the end of the period in the MPVA loans were made, more and more of the administration of the PRP had been moved to PP.

123. Mr Browes testified that:

(1) the vast majority of members had entered into an MPVA loan and there was no indication that anyone who had decided to transfer their pension funds into an Ark Scheme actively chose not to obtain an MPVA loan. He pointed out that "[indeed] the very rationale of the scheme appears to have been the ability to obtain an upfront payment of a member's pension through entering into an MPVA [loan]";

(2) the Database on which the Final Redacted Spreadsheet was based had not been prepared by Dalriada and it seemed likely that it had been prepared by the administrators of the Ark Schemes for the purpose of ensuring that there were sufficient monies in the Ark Schemes for the MPVA loans to be made;

(3) Dalriada had in its possession 374 MPVA Agreements, a figure which was very close to the number of MPVA issued date entries in the Final Redacted Spreadsheet (384);

(4) when one examined the relationship between the MPVA Agreements in Dalriada's possession and the number of MPVA issued dates on a member-by-member basis, the degree of correlation was slightly lower than the above comparison would imply - the Exhibited Spreadsheets showed that the number of MPVA Agreements in Dalriada's possession in relation to an individual member matched the number of MPVA issued date entries in the Final Redacted Spreadsheet in relation to that individual member only 75.7% of the time;

(5) the degree of correlation on a member-by-member basis between the number of MPVA Agreements in Dalriada's possession and the number of MPVA issued amount entries in the Final Redacted Spreadsheet was lower than the percentage set out in paragraph 123(4) above, at 46.6%;

(6) he and his colleagues had studied the Database in some detail and, in his view, matching on a member-to-member basis would not have allowed the Ark model to function. For example:

(a) in some cases, it was impossible to identify accurately which individual mentioned in the "Matched With1" column for a member was intended – for example, there was a common surname with no initial recorded or a misspelling;

(b) in some cases, the individual in the "Matched With1" column for a member was only a prospective member and yet the member still received an MPVA loan;

(c) in some cases, an individual appeared in the "Matched With1" column for a member but the member did not appear in the "Matched With1" column for the individual;

(d) in some cases, a member received an MPVA loan even though there was no individual named in the member's "Matched With1" column;

(e) in some cases, a member received an MPVA loan from an Ark Scheme despite the fact that no individual who was a member of the lending Ark Scheme appeared in the "Matched With1" column of that member; and

(f) in some cases, a member received an MPVA loan in an amount which was greater than the aggregate values of the pension funds transferred into the Ark Schemes by all of the individuals who were named in that member's "Matched With1" column; and

(7) however, he conceded that a number of the cases where he and his colleagues had concluded that it was not definitively possible for member-to-member matching to work – and hence inserted a "No" answer in Column T of the Comparison Spreadsheet – either reflected an error on their part in carrying out the comparison exercise or could be explained in a manner which was consistent with member-to-matching. He accepted that he and his colleagues had been focused on outcomes ahead of intentions and had not taken into account the impact on the operation of the PRP of Dalriada's appointment so that a number of "No" answers should have been "Yes" answers.

The arguments of the parties - general

Evidential burden of proof

124. Before setting out the substantive arguments of Mr Jones and Ms Poots in relation to the question of member-to-member matching, we should note that there was a dispute between Mr Jones and Ms Poots in relation to the burden of proof.

125. Mr Jones accepted that the burden of establishing that member-to-member matching was not intended (and therefore that each MPVA loan made by an Ark Scheme was not made "in respect of" a member or members of that Ark Scheme) lay with Dalriada. However, he said that, given that the point in question involved establishing a negative – that is to say that there had been no member-to-member matching – and the evidence which Dalriada had produced for the purposes of the proceedings which supported that proposition, the evidential burden had passed to the Respondents and it was for the Respondents to show why that evidence was insufficient. He relied in this respect on the decision of the FTT in *Perenco Holdings v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 65 (TC) ("*Perenco*") at paragraphs [100] to [109].

126. In response, Ms Poots submitted that the evidential burden remained with Dalriada. She said that this was not a case like *Perenco* where both parties would have been in possession of the relevant evidence at the outset. Instead, it was Dalriada which held the fullest set of documentation in relation to this question and Dalriada which was able to call the appropriate witnesses. In addition, Dalriada had chosen to rely on Mr Tweedley's hearsay evidence in this respect, instead of calling Mr Hanson or Mr Hields as witnesses. As such, Dalriada had not done enough to shift the evidential burden of proof onto the Respondents.

The substantive arguments

The evidence

127. Turning then to the substantive arguments, Mr Jones submitted that there was no sound evidential basis for concluding that member-to-member matching had been intended by the

administrators of the Ark Schemes. This was because that was contrary to the evidence of Mr Tweedley, the architect and controlling mind of the arrangement, and Mr Browes, who had given evidence on behalf of Dalriada and who and whose colleagues had studied the Database in some depth and reached that conclusion. In addition, it was contrary to the recollections of Ms Tweedley and Ms Kowalczyk.

128. In response, Ms Poots said that the only witness evidence in relation to the intentions of the trustees of the Ark Schemes provided by Dalriada was the hearsay evidence of Mr Tweedley and even that was based on what Mr Tweedley had been told by Mr Hanson who had been found to be dishonest in subsequent High Court proceedings. Neither Mr Hanson nor Mr Hields nor anyone involved in producing the Database which was the source of the Final Redacted Spreadsheet had provided any witness evidence. The letters from Ms Tweedley and Ms Kowalczyk should be discounted as both had disclaimed any first-hand knowledge of the day-to-day operation of the PRP.

129. Ms Poots added that, in any event, in considering this question, greater regard should be paid to the contemporaneous documentary evidence (in the form of contemporaneous emails and the Final Redacted Spreadsheet, based as it was on the contemporaneous Database) than on the recollections of witnesses some years after the events in question. This was consistent with the approach recommended by Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & another* [2013] EWHC 3560 (Comm) ("*Gestmin*") at paragraphs [15] to [22]. Although *Gestmin* was not a tax case, the same approach was relevant in the tax cases – see the Upper Tribunal decision in *R (on the applications of) Mukesh Sehgal and Promila Sehgal v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKUT 151 (TCC) at paragraphs [17] to [22].

130. Mr Jones pointed out that, although the Database on which the Final Redacted Spreadsheet was based had been prepared contemporaneously with the operation of the PRP, the Database had not been constructed by Mr Hanson and Mr Hields themselves. Instead, Mr Hanson and Mr Hields had conducted the allocation exercise on paper and then the Database had been constructed by others with the benefit of the papers. It was perfectly possible that the intention of Mr Hanson and Mr Hields was merely to match the value of each Ark Scheme within a pair of Ark Schemes but that the individuals who prepared the Database had misinterpreted the papers with which they had been provided and transposed that exercise into a document which bore the hallmarks of member-to-member matching.

131. Ms Poots said that that explanation did not make sense. On the balance of probabilities, as the Database had been prepared on the basis of the papers prepared by Mr Hanson and Mr Hields, it was highly likely to be a fair and accurate reflection of those papers and, hence, of their intentions.

The extent of the task

132. Mr Jones said that attempting to match on a member-to-member basis was a hugely complicated task which carried with it no apparent advantage or benefit. Why would Mr Hanson and Mr Hields go to all that trouble given the complexities to which it gave rise and the fact that it was totally unnecessary to the effective operation of the arrangement? He added that the unsegregated nature of the Ark Schemes supported his position in relation to this question. Given that each Ark Scheme was unsegregated, there was no need to identify a matching member or matching members for each member. Accordingly, there was no obvious reason why the persons responsible for administering the Ark Schemes would have sought to match on a member-to-member basis.

133. In response, Ms Poots pointed out that there was no explanation for the "Matched With1" column apart from the fact that member-to-member matching was intended. In addition, the entries in that column and in the notes column for a number of individuals made it clear that member-to-member matching was intended.

134. As for Mr Jones's allegation that the unsegregated nature of the Ark Schemes tended to support his position, the fact that the Ark Schemes were unsegregated meant that there was no need to ensure that each member in a matched member-to-member pairing needed to have the same maturity date for their MPVA loans or became entitled to access their pension funds at the same time and this meant that many of the reasons suggested for why member-to-member matching could not work fell away. Thus, that fact was neutral in considering this question.

135. Ms Poots said that, at this distance in time and without the evidence of the relevant people, it was hard to say why the trustees might have chosen to carry out member-to-member matching when it was so complicated to implement and unnecessary to the effective operation of the PRP. However, she speculated that it might have been because the PRP, as originally conceived and marketed, involved matching an MPVA loan made by one Ark Scheme to a member of the Ark Scheme with which it was paired with an MPVA loan made by the borrower's Ark Scheme to a member of the first-mentioned Ark Scheme and the trustees might very well have extrapolated from that original concept to believe that member-to-member matching was required. Alternatively, it might have been because the trustees mistakenly believed that the assets of each Ark Scheme were in fact segregated and so each member had his or her own siloed pot of monies within his or her Ark Scheme. However, it didn't really matter why the trustees had formed the intention to carry out member-to-member matching. All that was relevant was that they had had that intention.

The discrepancies

136. Mr Jones said that Ms Poots's proposition was inconsistent with the fact that there was no obligation on any member to take an MPVA loan and there was no obligation on the trustees to advance an MPVA loan even if one was requested. So it was perfectly possible for an individual to become a member without taking out an MPVA loan.

137. Ms Poots said that had the PRP been able to run for its full term, instead of being disturbed by the appointment of Dalriada, there was no practical likelihood that any member would not have received an MPVA loan. That was the whole reason why individuals had chosen to join the PRP and become members of the Ark Schemes.

138. Mr Jones said that, in any event, when one tried to put the position to the test, there were a number of gaps, inconsistencies and flaws with the proposition of member-to-member matching which emerged from a consideration of the detail, as outlined more fully by Mr Browes in his evidence.

139. In response, Ms Poots said that many of the discrepancies which had been noted by Mr Jones and Mr Browes could be attributed to the fact that the operation of the PRP had been disturbed by the appointment of Dalriada. For example, that explained why:

> (1) there was a greater divergence between the aggregate amount of the MPVA loans made by the Woodcroft Scheme to members of the Grosvenor Scheme and the aggregate amount of MPVA loans made by the Grosvenor Scheme to the members of the Woodcroft Scheme than existed between the MPVA loans made by each Ark Scheme within the other two pairs of Ark Scheme to the members of its paired Ark Scheme. The Grosvenor Scheme and the Woodcroft Scheme were the last two Ark Schemes to be created;

(2) there were cases where an MPVA loan had been made to one member who was matched with an individual in circumstances where that individual had either not become a member or failed to receive an MPVA loan; and

(3) there were differences within the records in relation to certain members. Put simply, the record-keeping by the administrator of the Ark Schemes had not been brought up to date by the time of Dalriada's appointment when everything came to a halt. The case of Mr Wagjiani referred to in paragraph 119 above was an example of a situation where, because the MPVA loan had been made only a week before Dalriada's appointment, the Database had not yet caught up with reality when Dalriada was appointed. The same fact might well explain some of the 33.1% of the cases where there was a discrepancy between the number of MPVA loans made to a member and the number of MPVA issued dates shown in the Final Redacted Spreadsheet in relation to that member.

140. Mr Jones said that one of the discrepancies was the fact that, in the Final Redacted Spreadsheet, the number of entries in the MPVA issued amount column for a member was not the same as the number of entries in the MPVA issued date column for that member 49.5% of the time.

141. Ms Poots said that that could be explained by seeing the MPVA issued amount column as recording the MPVA loans which were expected to be made, as opposed to the MPVA loans which had actually been made, whereas the MPVA issued date column was recording the dates on which MPVA loans had actually been made. That explained why:

(1) there were 652 MVPA issued amount entries but only 384 MVPA issued date entries;

(2) the number of entries in the MPVA issued amount column was the same as, or higher than, the number of entries in the MPVA issued date column 94.5% of the time;

(3) there were no cases where there was no entry in the MVPA issued amount column but there was an entry in the MPVA issued date column;

(4) Mr Armstrong was shown in the Final Redacted Spreadsheet as having two MVPA issued dates and only one MVPA issued amount. Mr Armstrong had made only one transfer of funds into the Lancaster Scheme and had accordingly been allocated a single MPVA issued amount. However, he been matched with two people who each received an MPVA loan - Mr Arnold and Mr King. Accordingly, his single MPVA issued amount had given rise to two MPVA issued dates and he had received two MPVA loans;

(5) Mr Ackerman was shown in the Final Redacted Spreadsheet as having three MPVA issued amounts and no MPVA issued dates. However, he had been shown in the Bank Statement Reconciliation as having received no MPVA loan and that explained why his three MPVA issued amounts had led to no MPVA issued dates; and

(6) there were 384 MPVA issued date entries in the Final Redacted Spreadsheet and Dalriada had in its possession 374 MPVA Agreements. That amounted to a 97% correlation.

142. Mr Jones said that another problem for the proposition of member-to-member matching was that there was a discrepancy between the MPVA issued date (if any) shown in relation to a member in the Final Redacted Spreadsheet and the existence of an MPVA Agreement in relation to the relevant member which was shown in the Exhibited Spreadsheets as being in Dalriada's possession.

143. Ms Poots said that, as the examples of the ACAM and Mr Wagjiani in paragraph 119 above showed, there were explanations for at least some of those cases.

144. Mr Jones said that there were numerous examples where the amounts which were said to be advanced to members on the basis of member-to-member matching were not the same.

145. Ms Poots said that the fact that bank fees and introducer's fees were deducted from the amount of MPVA loans advanced accounted for a number of those discrepancies.

Specific members

Introduction

146. In their submissions, each of Mr Jones and Ms Poots sought to support his or her position by reference to a number of specific examples. In essence, Mr Jones sought to rely on the examples as indicating that, because of one or more identified discrepancies between the figures in the Spreadsheets and the figures which would have arisen from member-to-member matching had member-to-member matching applied, member-to member matching could not have been intended whereas Ms Poots's position was that the discrepancies could be explained and were in fact consistent with an intention to carry out member-to-member matching.

147. For reasons which will become apparent, we do not think that, at the end of the day, this approach of claim and counter-claim provides a conclusive answer to the question of whether member-to-member matching was intended. However, since the relevant evidence was presented to us in great detail and these appeals may well proceed further, we have set out the evidence with which we were provided in relation to each specifically-identified member, along with the submissions made by Mr Jones and Ms Poots in relation to that member.

Ms Oades

The evidence

148. In relation to Ms Oades, who became a member of the Portman Scheme:

(1) Ms Oades was the only name shown in the "Matched With1" column for two members of the Lancaster Scheme - Ms Nancy Gray and Mr Philip Barnard - and one of three names (the other two being Mr Martin Dudley and Mr Gary Collin, each also of the Portman Scheme) shown in the "Matched With1" column for two other members of the Lancaster Scheme, Mr Anthony Thomas and Mr Simon Laing;

(2) none of Ms Gray, Mr Barnard or Mr Laing was shown in the "Matched With1" column for Ms Oades;

(3) Mr Laing and Mr Barnard were the only names shown in the "Matched With1" column for Mr Neale Morgan of the Portman Scheme;

(4) Mr Morgan was not shown in the "Matched With1" column for either Mr Laing or Mr Barnard;

(5) Ms Gray and Mr Zahid Butt, also of the Lancaster Scheme, were the only names shown in the "Matched With1" column for Mr Martin Lorimer of the Portman Scheme;

(6) Mr Lorimer was not shown in the "Matched With1" column for Ms Gray;

(7) a "Mr Lormier" was the only name shown in the "Matched With1" column for Mr Butt;

(8) Mr Terry Byrne, Ms Deborah Hanson, Mr Derek Joseph and Mr Thomas, each of the Lancaster Scheme, were the only names shown in the "Matched With1" column for Ms Oades;

(9) Ms Oades was the only name shown in the "Matched With1" column for each of Mr Byrne and Ms Hanson;

(10) Ms Oades and Ms Glynnis Morris, also of the Portman Scheme, were the only names shown in the "Matched With1" column for Mr Joseph;

(11) as noted in paragraph 148(1) above, each of Ms Oades, Mr Dudley and Mr Collin were the only names shown in the "Matched With1" column for each of Mr Thomas and Mr Laing;

(12) as well as being one of the four names shown in the "Matched With1" column for Ms Oades, Mr Thomas was the only name shown in the "Matched With1" column for each of Mr Dudley and Mr Collin;

(13) Mr Laing was not shown in the 'Matched With1" column for Mr Dudley or Mr Collin;

(14) Mr Geoffrey Woodacre of the Lancaster Scheme and Mr Joseph were the only names shown in the "Matched With1" column for Ms Morris;

(15) from the Spreadsheets, it was apparent that:

(a) Mr Thomas received three MPVA loans – an MPVA loan of approximately £27,500 on 13 December 2010, an MPVA loan of approximately £42,500 on 15 December 2010 and an MPVA loan of approximately £20,000 on 28 January 2011;

(b) Ms Oades received four MPVA loans - an MPVA loan of £27,500 on 14 December 2010, an MPVA loan of £55,000 on 14 December 2010, an MPVA loan of 19 January 2011 and an MPVA loan of £22,500 on 19 January 2011;

(c) Mr Dudley received an MPVA loan of £42,500 on 15 December 2010;

(d) Mr Collin received an MPVA loan of £20,000 on 28 January 2011;

(e) Mr Thomas had the same member reference number as Mr Laing;

(f) Mr Joseph received two MPVA loans, the amounts and dates of which corresponded closely to the amounts and dates of the MPVA loans made to Ms Oades and Mr Morris;

(g) Mr Morgan received an MPVA loan of £27,500 on 2 December 2010, Mr Barnard received an MPVA loan of £15,000 on 6 December 2010 and Mr Laing received an MPVA loan of £12,500 on 14 December 2010; and

(h) Mr Butt received an MPVA loan of £23,000 on 29 September 2010 and Mr Lorimer received three MPVA loans – an MPVA loan of £22,500 on 29 September 2020 and MPVA loans of £6,250 on each of 8 December 2010 and 9 December 2010; and

(16) in his testimony, Mr Browes agreed that:

(a) given that there was mutual matching between Ms Oades, on the one hand, and each of Mr Byrne, Mr Joseph, Mr Hanson and Mr Thomas, on the other hand, no difficulties arose in terms of matching Ms Oades to each of those four members; and

(b) as regards Mr Barnard and Mr Laing, Ms Poots's explanation for how the appearance of Ms Oades in the "Matched With1" column of each of those individuals might be consistent with an intention to have member-to-member matching as set out in paragraph 151 below was plausible.

The submissions of the parties

149. In relation to Ms Oades, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that:

(1) there were three individuals who had Ms Oades listed in their "Matched With1" column without being listed in Ms Oades's "Matched With1" column – Mr Barnard, Mr Laing and Ms Gray; and

(2) whilst Mr Morgan appeared in the "Matched With1" column for each of Mr Barnard and Mr Laing, Mr Morgan's name did not appear in the "Matched With1" column for any other member and Mr Morgan had in fact received three MPVA loans.

150. In response, Ms Poots submitted that the likely reason for these anomalies was that there were various errors in the Final Redacted Spreadsheet.

151. As regards Mr Barnard and Mr Laing, a likely explanation was as follows:

(1) although the value of the pension funds which Mr Laing and Mr Thomas were expected to transfer into the Ark Schemes was very different - £25,500 for Mr Laing and £168,000 for Mr Thomas – and therefore one would expect them to be matched with different named individuals - they both had the same member reference number and were in adjacent rows in the Final Redacted Spreadsheet and they both had the same names in their "Matched With1" column – namely, Ms Oades, Mr Dudley and Mr Collin;

(2) according to the Exhibited Spreadsheets, Mr Thomas was shown in the "Matched With1" column for those three members whereas Mr Laing was not;

(3) this suggested that there had been a duplication or data entry mistake in preparing the Database and that parts of the entries for Mr Thomas had mistakenly been copied across into the entries for Mr Laing;

(4) Ms Oades was shown in the "Matched With1" column for Mr Barnard and Mr Laing and Mr Barnard and Mr Laing were shown in the "Matched With1" column for Mr Morgan;

(5) the MPVA issued amount for Mr Morgan was equal to the aggregate value of the MPVA issued amounts for Mr Barnard and Mr Laing; and

(6) therefore, this suggested that Mr Morgan, and not Ms Oades, ought to have appeared in the "Matched With1" columns for Mr Barnard and Mr Laing.

152. As regards Ms Gray, a likely explanation was as follows:

(1) Mr Lorimer had received three MPVA loans in September and December 2010 and the last two of those MPVA loans had been of the same amounts, and made on the same dates, as the MPVA loans made to Ms Gray;

(2) Ms Gray and Mr Butt appeared in the "Matched With1" column for Mr Lorimer and the first of the three MPVA loans made to Mr Lorimer had been of the same amount, and made on the same date, as the MPVA loan made to Mr Butt;

(3) a "Mr Lormier", who was clearly intended to be Mr Lorimer as there was no member by that name, was the only name which was shown in the "Matched With1" column for Mr Butt; and

(4) this suggested that Mr Lorimer and not Ms Oades should have appeared in the "Matched With1" column for Ms Gray.

The ACAM

The evidence

153. In relation to the ACAM, who became a member of the Lancaster Scheme:

(1) Mr Philip Court of the Portman Scheme was the only name shown in the "Matched With1" column for the ACAM;

(2) the ACAM was the only name shown in the "Matched With1" column for Mr Court; and

(3) from the Spreadsheets, it was apparent that:

(a) the ACAM received an MPVA loan of £16,150 on 11 February 2011; and

(b) Mr Court received an MPVA loan of £17,475 on 11 February 2011.

The submissions of the parties

154. In relation to the ACAM, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that, although the dates of the MPVA loans to the ACAM and Mr Court matched, the amounts of those MPVA loans did not match.

155. In response, Ms Poots pointed out that the figures in the Spreadsheets did not take into account the bank fees and introducer's fees which were paid by each member. It was clear from the DB and the Bank Statement Reconciliation that the ACAM had been required to pay an introducer's fee of £1,300 to PP and, once that fee was taken into account, the amounts of the MPVA loans made to each of the ACAM and Mr Court did match.

Mr Barrie Richardson

The evidence

156. In relation to Mr Barrie Richardson, who became a member of the Lancaster Scheme:

(1) Mr Steven Poar, Mr Nicholas Green and Mr Stephen Sampson, each of the Portman Scheme, were the only names shown in the "Matched With1" column for Mr Richardson;

(2) Mr Richardson was the only name shown in the "Matched With1" column for Mr Poar;

(3) Mr Richardson and Mr Terence Winders, who was due to join the Lancaster Scheme but did not do so prior to the appointment of Dalriada, were the only names shown in the "Matched With1" column for Mr Green;

(4) Mr Richardson, Mr Mark Baldwin of the Lancaster Scheme and Mr Winders were the only names shown in the "Matched With1" column for Mr Sampson;

(5) Mr Green and Mr Sampson were the only names shown in the "Matched With1" column for Mr Winders;

(6) Mr Sampson and Mr Andrew O'Connor, who was due to join the Portman Scheme but did not do so prior to the appointment of Dalriada, were the only names shown in the "Matched With1" column for Mr Baldwin;

(7) Mr Baldwin was the only name shown in the "Matched With1" column for Mr O'Connor;

(8) from the Spreadsheets, it was apparent that:

(a) Mr Richardson received an MPVA loan of £35,000 on 9 March 2011;

(b) Mr Poar received an MPVA loan of approximately £15,000 on 16 March 2011;

(c) the amount transferred into the Portman Scheme by Mr Green was £28,000 but the amount which had been expected to be transferred into the Portman Scheme by Mr Green was £32,000;

(d) Mr Green received an MPVA loan of approximately £12,500 on 28 March 2011;

(e) Mr Sampson received an MPVA loan of approximately £27,500 on 24 February 2011;

(f) Mr Winders did not transfer any monies into the Lancaster Scheme or receive an MPVA loan but was expected to transfer approximately £33,500 into the Lancaster Scheme;

(g) Mr O'Connor did not transfer any monies into the Portman Scheme or receive an MPVA loan but was expected to transfer approximately £35,000 into the Portman Scheme;

(h) Mr Baldwin received two MPVA loans – an MPVA loan of approximately £25,000 on 4 February 2011 and an MPVA loan of approximately £15,000 on 9 March 2011;

(i) in the "Matched With1" column for Mr Green, the name of Mr Richardson was set out as follows:

"Richardson, B 12500"; and

(j) in the "Matched With1" column for Mr Richardson, the names of Mr Poar, Mr Green and Mr Samson were set out as follows:

"Poar 15000 Green 12500 Sampson, DS 7500".

The submissions of the parties

157. In relation to Mr Richardson, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that:

(1) Mr Winders, who appeared in the "Matched With1" column for Mr Green and whose "Matched With1" column showed Mr Green and Mr Sampson, never became a member of an Ark Scheme and never received an MPVA loan;

(2) Mr O'Connor, who appeared in the "Matched With1" column for Mr Baldwin and whose "Matched With1" column showed Mr Baldwin, never became a member of an Ark Scheme and never received an MPVA loan;

(3) consequently, the MPVA loans of approximately £25,000 and approximately £15,000 which had been made to Mr Baldwin were insufficiently matched. The MPVA loan made to Mr Sampson was insufficient and, if the whole of the MPVA loan made to Mr Sampson were to be matched with the MPVA loans made to Mr Baldwin, that would leave nothing to match to Mr Richardson; and

(4) the aggregate amount of the MPVA loans received by the individuals who were shown in Mr Richardson's "Matched With1" column was approximately £55,000 whereas Mr Richardson had received an MPVA loan of only £35,000. There were also significant disparities in the dates on which the various MPVA loans had been made.

158. In response, Ms Poots pointed out that:

(1) the discrepancy in amounts noted in paragraph 157(4) above failed to take into account the fact that:

(a) in addition to having Mr Richardson shown in his "Matched With1" column, Mr Sampson had Mr Winders and Mr Baldwin shown in that column; and

(b) Mr O'Connor as well as Mr Sampson were shown in Mr Baldwin's "Matched With1" column;

(2) the Final Redacted Spreadsheet showed that Mr O'Connor had been expected to transfer approximately £35,200 into the Portman Scheme, which suggested that he would have been intended to receive an MPVA loan of approximately £17,500 from the Lancaster Scheme. Had that occurred, that MPVA loan would have been matched with the MPVA loans made to Mr Baldwin and left a further £22,500 to be matched with the MPVA loans made to Mr Baldwin;

(3) if £7,500 of the MPVA loan made to Mr Sampson had been matched with the MPVA loan made to Mr Richardson, as the "Matched With1" column for Mr Richardson suggested, that would have left £20,000 of the MPVA loan which had been made to Mr Sampson to be matched with the MPVA loans made to Mr Baldwin;

(4) that would have left just £2,500 of MPVA loans to be matched with the MPVA loans to Mr Baldwin and that could have been an MPVA loan to Mr Winders if Mr Winders had become a member of the Lancaster Ark Scheme, as intended;

(5) the fact that Mr Winders and Mr O'Connor had not in the end become members of an Ark Scheme did not negate the clear intention that they would become members and would then receive MPVA loans which would then be available for matching; and

(6) the fact that the "Matched With1" column for each of Mr Richardson and Mr Green referred to the MPVA loans to be made to the individuals referred to in those columns (and not to the value of the pension funds to be transferred into the Portman Scheme or the Lancaster Scheme, as the case may be, by the relevant individuals) was indicative of the fact that member-to-member matching was intended.

Mr Donaghy-Sutton

The evidence

159. In relation to Mr Donaghy-Sutton, who became a member of the Portman Scheme:

(1) Mr Donaghy-Sutton was the only name shown in the "Matched With1" column for Mr Ronald Dawson of the Grosvenor Scheme and one of three names (the other two being two members of the Tallton Scheme) shown in the "Matched With1" column for Mr Steven Radford, who was another member of the Grosvenor Scheme;

(2) neither Mr Dawson nor Mr Radford was shown in the "Matched With1" column for Mr Donaghy-Sutton;

(3) Ms Sharon Vigar-Jones, Ms Wendy Keppel and Mr Geoffrey Leach of the Lancaster Scheme and Mr Mark Skipp and Mr Nicholas Instone of the Cranborne Scheme were the only names shown in the "Matched With1" column for Mr Donaghy-Sutton;

(4) Mr Donaghy-Sutton was the only name shown in the "Matched With1" column for each of Ms Vigar-Jones, Ms Keppel, Mr Skipp and Mr Instone;

(5) Mr Donaghy-Sutton and Mr Steven Vickery, also of the Portman Scheme, were the only names shown in the "Matched With1" column for Mr Leach;

(6) Mr Leach and Mr Anthony Higgins, of the Cranborne Scheme, were the only names shown in the "Matched With1" column for Mr Vickery;

(7) Mr Vickery was the only name shown in the "Matched With1" column for Mr Higgins;

(8) from the Spreadsheets, it was apparent that:

(a) Ms Vigar-Jones received an MPVA loan of approximately £22,500 from the Portman Scheme on 27 April 2011;

(b) Ms Keppel received an MPVA loan of approximately £17,500 from the Portman Scheme on 23 March 2011;

(c) Mr Skipp received an MPVA loan of approximately £33,600 from the Portman Scheme on 28 April 2011;

(d) Mr Instone did not receive an MPVA loan (and his pension funds of approximately £30,000 in aggregate were not transferred into the Cranborne Scheme prior to Dalriada's appointment);

(e) Mr Leach received an MPVA loan of approximately £50,000 from the Portman Scheme on 4 May 2011;

(f) Mr Vickery received an MPVA loan of approximately £2,500 from the Lancaster Scheme on 13 April 2011 and an MPVA loan of approximately £13,700 from the Cranborne Scheme on the same day;

(g) Mr Higgins did not receive an MPVA loan and the notes column for Mr Higgins indicated that, as of 16 May 2011, the administrators of the Ark Schemes were still in discussions with Phoenix, one of Mr Higgins's existing pension providers, about the transfer of funds from them to the Cranborne Scheme;

(h) Mr Dawson transferred his pension funds into the Grosvenor Scheme on 16 May 2011 and Mr Radford transferred his pension funds into the Grosvenor Scheme in two tranches, on 25 May 2011 and 7 June 2011, respectively;

(i) neither Mr Dawson nor Mr Radford received an MPVA loan;

(j) Mr Donaghy-Sutton transferred his pension funds into the Portman Scheme in three tranches on 4 January 2011, 11 January 2011 and 13 May 2011;

(k) the notes column for Mr Donaghy-Sutton stated that, as of 27 May 2011, "we have matched to £140,000 and we rematch for a further £47,500"; and

(l) as of 31 May 2011, when Dalriada was appointed, Mr Donaghy-Sutton was due to receive MPVA loans of £185,000 in aggregate; and

(9) in his testimony, Mr Browes agreed that:

(a) Ms Poots's explanation set out in paragraph 161 below as to how the aggregate amount of MPVA loans which had been matched to Mr Donaghy-Sutton at the time of Dalriada's appointment was £136,000 was plausible;

(b) that was consistent with the notes column for Mr Donaghy-Sutton; and

(c) it was possible that the balance of the MPVA loans which were intended to be made to Mr Donaghy-Sutton was intended to be matched with the MPVA loans which were intended to be made to Mr Radford and Mr Dawson.

The submissions of the parties

160. In relation to Mr Donaghy-Sutton, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that:

(1) Mr Vickery appeared in the "Matched With1" column for Mr Higgins and vice versa and yet Mr Higgins did not receive an MPVA loan;

(2) as Mr Higgins had received no MPVA loan, the entirety of the MPVA loan of approximately £50,000 made to Mr Leach would have needed to be matched with the approximately £16,200 of MPVA loans made to Mr Vickery and that would have left a shortfall in terms of matching between Mr Leach and Mr Donaghy-Sutton;

(3) Mr Donaghy-Sutton appeared in the "Matched With1" column for each of Mr Dawson and Mr Radford and yet neither of those individuals had received an MPVA loan;

(4) by 4 May 2011, Ms Vigar-Jones, Ms Keppel, Mr Leach and Mr Skipp had collectively received MPVA loans of approximately £120,000 in aggregate and yet Mr Donaghy-Sutton had transferred only approximately £14,500 of his pension funds into the Portman Scheme;

(5) there were five individuals shown in the "Matched With1" column for Mr Donaghy-Sutton and yet Mr Donaghy-Sutton was shown in the "Matched With1" columns for seven individuals; and

(6) despite being shown in the "Matched With1" columns for seven individuals, Mr Donaghy-Sutton did not receive any MPVA loans.

161. In response, Ms Poots pointed out that:

(1) the fact that Mr Higgins had not yet received an MPVA loan at the time of Dalriada's appointment did not mean that MPVA loans to Mr Higgins were not intended to be made and matched to the MPVA loans which had been made to Mr Vickery. The answer to the matching question depended on the intentions of the people who were operating the PRP as opposed to what had actually occurred and there was evidence in the notes column for Mr Higgins that some of the funds which were intended to be transferred into the Cranborne Scheme on his behalf were still being pursued by the administrators of the PRP in mid-May 2011, just before Dalriada was appointed;

(2) given that Mr Donaghy-Sutton was the only person shown in the "Matched With1" column for each of Ms Vigar-Jones, Ms Keppel and Mr Skipp and that each of those individuals was shown in the "Matched With1" column for Mr Donaghy-Sutton, it would be reasonable to assume that the MPVA loans which were intended to be made to Mr Donaghy-Sutton were intended to be matched with the whole of the MPVA loans which were made to Ms Vigar-Jones, Ms Keppel and Mr Skipp;

(3) given that:

(a) the value of the pension fund transferred into the Cranborne Scheme by Mr Instone after the appointment of Dalriada was £30,000, it would be reasonable to assume that Mr Instone was intended to receive an MPVA loan of approximately £15,000; and

(b) Mr Donaghy-Sutton was the only person shown in the "Matched With1" column for Mr Instone and that Mr Instone was one of the persons shown in the "Matched With1" column for Mr Donaghy-Sutton, it would be reasonable to

assume that Mr Donaghy-Sutton was intended to be matched with the whole of that MPVA loan;

(4) given that Mr Vickery received his MPVA loan of approximately £2,500 from the Lancaster Scheme of which Mr Leach was a member and his MPVA loan of approximately £13,700 from the Cranborne Scheme of which Mr Higgins was a member, it would be reasonable to assume that:

(a) the first of those MPVA loans to Mr Vickery of approximately £2,500 was intended to be matched with approximately £2,500 of the MPVA loan from the Portman Scheme to Mr Leach of approximately £50,000;

(b) the second of those MPVA loans to Mr Vickery of approximately £13,700 was intended to be matched with an MPVA loan which was intended to be made by the Portman Scheme to Mr Higgins; and

(c) therefore, it would be reasonable to assume that the MPVA loans to Mr Donaghy-Sutton were intended to be matched with the balance of the MPVA loan from the Portman Scheme to Mr Leach, which was approximately £47,500;

(5) the consequence of the above matches was that:

(a) approximately £136,000 of the MPVA loans of £185,000 which were intended to be made to Mr Donaghy-Sutton had been matched with the MPVA loans which had been made to Ms Vigar-Jones, Ms Keppel, Mr Skipp and Mr Leach and the MPVA loan which was intended to be made to Mr Instone; and

(b) it was possible that the balance of the MPVA loans to Mr Donaghy-Sutton was intended to be matched with the MPVA loans which were intended to be made to Mr Radford and Mr Dawson;

(6) the entry in the notes column for Mr Donaghy-Sutton referred to in paragraph 159(8)(k) above was entirely consistent with the above reasoning. (There was a small difference between the £136,000 referred to above and the £140,000 referred to in the notes column but that difference could readily be explained by reference to bank fees and introducer's fees;) and

(7) the mere fact that many of the MPVA loans which were matched with the MPVA loans which were intended to be made to Mr Donaghy-Sutton had been made before Mr Donaghy-Sutton had transferred the bulk of his pension funds into the Portman Scheme was irrelevant because his intention to do so and the expected extent of the funds which he intended to transfer into the Portman Scheme were clear from the Final Redacted Spreadsheet. It may have been risky for the administrators of the Ark Schemes to match an MPVA loan which an Ark Scheme was making to a member of another Ark Scheme with an MPVA loan which the other Ark Scheme was intending to make with funds which had yet to be transferred into the other Ark Scheme but that level of risk-taking was hardly surprising given the way that the Ark Schemes were administered in general.

Mr Philip Gorman

The evidence

162. In relation to Mr Philip Gorman, who became a member of the Grosvenor Scheme:

(1) Mr Scott Ewing of the Woodcroft Scheme was the only name shown in the "Matched With1" column for Mr Gorman;

(2) Mr Gorman was the only name shown in the "Matched With1" column for Mr Ewing;

(3) from the Spreadsheets, it was apparent that:

(a) Mr Gorman received an MPVA loan of approximately £17,500 on 10 May 2011;

(b) Mr Ewing transferred approximately £14,800 into the Woodcroft Scheme on 21 April 2011 and approximately £21,300 into the Woodcroft Scheme on 26 May 2011;

(c) Mr Ewing did not receive an MPVA loan; and

(d) the notes column for Mr Ewing stated that, as of 18 May 2011, one of Mr Ewing's pension providers had only recently received a signed deed of indemnity which they had requested from Mr Ewing and that they expected to be able to transfer the funds on 23 May 2011.

The submissions of the parties

163. In relation to Mr Gorman, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that Mr Ewing had not received an MPVA loan and that this could not be explained by the appointment of Dalriada given that Mr Ewing joined the Woodcroft Scheme on 21 April 2011 and Mr Gorman received his MPVA loan on 10 May 2011, both well before the date on which Dalriada was appointed.

164. In response, Ms Poots pointed out that:

(1) as noted in paragraph 162(3)(b) above, Mr Ewing's pension funds had been transferred into the Woodcroft Scheme in two tranches, the second of which was made only on 26 May 2011, just before Dalriada's appointment; and

(2) the initial transfer by Mr Ewing into the Woodcroft Scheme of approximately £14,800 on 21 April 2011 was insufficient to allow Mr Ewing to receive his MPVA loan of £17,500 and so it would not have been until after the second transfer had been effected that the MPVA loan to Mr Ewing could have been made.

Ms Julie Baines

The evidence

165. In relation to Ms Julie Baines, who became a member of the Tallton Scheme:

(1) Ms Linda Bartlett, who was due to join the Cranborne Scheme but did not do so prior to the appointment of Dalriada, was the only name shown in the "Matched With1" column for Ms Baines;

(2) Ms Baines was the only name shown in the "Matched With1" column for Ms Bartlett;

(3) from the Spreadsheets, it was apparent that:

(a) Ms Baines received an MPVA loan of approximately £28,800 on 13 April 2011;

(b) Ms Bartlett did not transfer any monies into the Cranborne Scheme or receive an MPVA loan but was expected to transfer approximately £32,200 into the Cranborne Scheme;

(c) in the "Matched With1" column for Ms Baines, the name of Ms Bartlett was set out as follows:

"L Bartlett 15000 MPVA"; and

(d) the notes column for Ms Bartlett stated that there were difficulties in arranging the transfer of Ms Bartlett's pension fund to the Cranborne Scheme and that, as of 16 May 2011, the existing pension provider was awaiting certain documents before it would effect the transfer and there would be a ten working day turnaround time between its receipt of the documents and its making the transfer.

The submissions of the parties

166. In relation to Ms Baines, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that:

(1) Ms Bartlett, who appeared in the "Matched With1" column for Ms Baines, never became a member of an Ark Scheme and never received an MPVA loan; and

(2) this could not be explained by the appointment of Dalriada given that Ms Baines received her MPVA loan on 13 April 2011, nearly seven weeks prior to Dalriada's appointment.

167. In response, Ms Poots pointed out that the notes for Ms Bartlett made it clear that there had been difficulties in arranging the transfer of Ms Bartlett's pension fund into the Cranborne Scheme and that those difficulties had not been resolved by the time of Dalriada's appointment.

Mr Jeremy Beech and Mr David Beech

The evidence

168. In relation to Mr Jeremy Beech, who became a member of the Grosvenor Scheme:

(1) Mr John Caskey, who was due to join the Woodcroft Scheme but did not do so prior to the appointment of Dalriada, was the only name shown in the "Matched With1" column for Mr Jeremy Beech;

(2) Mr David Beech, who became a member of the Cranborne Scheme, and not Mr Jeremy Beech, was the only name shown in the "Matched With1" column for Mr Caskey; and

(3) in his evidence, Mr Browes confirmed that:

(a) the reference to Mr David Beech in the "Matched With1" column for Mr Caskey was intended to be a reference to Mr Jeremy Beech; and

(b) on that basis, Mr Jeremy Beech and Mr Caskey were intended to be matched although the fact that a transfer of approximately £24,000 was made to the Grosvenor Scheme in respect of Mr Jeremy Beech on 24 May 2011 but no transfer into the Woodcroft Scheme was made in respect of Mr Caskey meant that neither Mr Jeremy Beech nor Mr Caskey received an MPVA loan.

169. In relation to Mr David Beech:

(1) Mr William Perkins and Mr Richard Baker, each of the Tallton Scheme, were the only names shown in the "Matched With1" column for Mr David Beech;

(2) Mr David Beech was the only name shown in the "Matched With1" column for each of Mr Perkins and Mr Baker;

(3) the notes column for Mr Baker stated that there had been a problem in transferring Mr Baker's pension funds with an expected value of £57,000 with a company called Pension Builder into the Tallton Scheme and that, on 17 May 2011, the Ark administrator had sent a chaser to Pension Builder;

(4) from the Spreadsheets, it was apparent that:

(a) Mr Perkins transferred approximately £137,000 to the Tallton Scheme on 14 April 2011 and approximately £6,200 to the Tallton Scheme on 28 April 2011 and Mr Baker transferred approximately £21,000 to the Tallton Scheme on 31 May 2011 (an aggregate sum of approximately £164,200);

(b) the MPVA issued amount shown for Mr Baker was £10,000 and the MPVA issued amounts shown for Mr Perkins were £67,500 and £2,500;

(c) Mr David Beech received an MPVA loan of approximately £99,500 on 3 May 2011;

(d) in the matching column for Mr Caskey, the name of Mr David Beech was set out as follows:

"D Beech (Grosvenor) 10,000"; and

(e) in the matching column for Mr Jeremy Beech, the name of Mr Caskey was set out as follows:

"J Caskey (Woodcroft) 10,000".

The submissions of the parties

170. In relation to Mr Jeremy Beech, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that, assuming the reference in the "Matched With1" column for Mr Caskey to Mr David Beech was indeed an error and was intended to be a reference to Mr Jeremy Beech, so that there was expressed to be mutual matching as between Mr Caskey and Mr Jeremy Beech, neither Mr Caskey nor Mr Jeremy Beech received an MPVA loan and Mr Caskey did not even become a member of an Ark Scheme.

171. In response, Ms Poots submitted that Mr Browes had accepted in his evidence that Mr Jeremy Beech and Mr Caskey were matched and that the only reason why neither had received an MPVA loan was that Dalriada had been appointed shortly after the transfer into the Grosvenor Scheme had been made in respect of Mr Jeremy Beech and before any transfer into the Woodcroft Scheme had been made in respect of Mr Caskey.

172. In relation to Mr David Beech, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that Mr Perkins and Mr Baker, with whom Mr David Beech was expressed to be matched, had transferred an aggregate sum of approximately £164,200 into the Tallton Scheme whereas Mr David Beech had received an MPVA loan of approximately £99,500, which was more than 50% of that aggregate amount.

173. In response, Ms Poots submitted that that discrepancy fell away once the anticipated transfer of an additional £57,000 into the Tallton Scheme in respect of Mr Baker referred to in paragraph 169(3) above was taken into account.

Mr Matthew Bradley

The evidence

174. In relation to Mr Matthew Bradley, who became a member of the Cranborne Scheme:

(1) Mr Gary Adderley of the Tallton Scheme was the only name shown in the "Matched With1" column for Mr Bradley;

(2) Mr Bradley was the only name shown in the "Matched With1" column for Mr Adderley;

(3) from the Spreadsheets, it was apparent that:

(a) Mr Bradley received an MPVA loan of approximately £15,000 on 11 May 2011;

(b) Mr Adderley received an MPVA loan of approximately £14,000 on 25 May 2011; and

(c) the notes column for Mr Adderley referred to the fact that, although there would be a slight shortfall in the value which was to be transferred to the Tallton Scheme in respect of him, "he should still get £15k".

The submissions of the parties

175. In relation to Mr Bradley, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that, as regards the MPVA loans made to Mr Bradley and Mr Adderley, there were differences both in the amounts of the MPVA loans and the dates on which they were made.

176. In response, Ms Poots submitted that the figures in the Spreadsheets did not take into account the introducer's fees which were paid by each member. Both MPVA loans could sensibly be rounded to £15,000 once those fees were taken into account and the notes column for Mr Adderley indicated that a £15,000 MPVA loan was intended to be made to him too.

Mr Thomas Ison

The evidence

177. In relation to Mr Thomas Ison, who became a member of the Cranborne Scheme:

(1) Ms Alexis McStay of the Tallton Scheme was the only name shown in the "Matched With1" column for Mr Ison;

(2) Mr Ison was the only name shown in the "Matched With1" column for Ms McStay;

(3) Mr Isles testified that Mr Ison, who was one of the members whom he had introduced to the PRP, had transferred his pension funds into the arrangement without wishing to draw down an MPVA loan and simply because he thought that the return which the arrangement appeared to him to be offering was better than the return which he was getting from his then-current pension provider, Prudential; and

(4) it was apparent from the Spreadsheets that:

(a) Ms McStay received an MPVA loan of approximately £17,500 on 31 March 2011;

(b) a Ms Rebecca Ison became a member of the Cranborne Scheme and funds were transferred into that scheme on her behalf by Scottish Widows and Prudential;

(c) no names appeared in the "Matched With1" column for Ms Ison; and

(d) the notes column for Ms Ison recorded that, as of 25 May 2011, the administrator of the Ark Schemes had received transfer documents "but can't match until Prudential sent value".

The submissions of the parties

178. In relation to Mr Ison, Mr Jones submitted that the fact that member-to-member matching was not intended could be seen in the fact that Mr Ison and Ms McStay were expressed to be mutually matched and yet the evidence of Mr Isles was that Mr Ison had never wanted to receive an MPVA loan and had not in fact received an MPVA loan whereas Ms McStay had received an MPVA loan of approximately £17,500.

179. In response, Ms Poots submitted that we should be slow to conclude that Mr Ison did not wish to receive an MPVA loan because:

(1) in his evidence, Mr Isles had referred to the fact that Mr Ison's pension provider at the time of the transfer into the PRP was Prudential whereas the Final Redacted Spreadsheet showed that Mr Ison's current pension providers at that time were in fact Scottish Widows and Canada Life;

(2) as a general matter, the essence of the PRP and the very reason for its existence was to enable participants to access part of the value in their pension funds and it was therefore unlikely that anyone had joined the PRP without wishing to receive an MPVA loan;

(3) at the time of Dalriada's appointment, only £10,000 had been transferred into the Cranborne Scheme in respect of Mr Ison and that had occurred only on 18 May 2011. The bulk of the funds in respect of Mr Ison had yet to be transferred into the Cranborne Scheme. There was thus every reason why Mr Ison should not have received an MPVA loan by the time of Dalriada's appointment;

(4) no evidence had been received from Mr Ison himself; and

(5) insofar as Mr Isles's recollection that one of the individuals named "Ison" whom he had introduced to the PRP did not wish to receive an MPVA loan, that was more likely to be Ms Rebecca Ison than Mr Thomas Ison, given that no names appeared in the "Matched With1" column for Ms Ison.

The findings of fact

Preliminary points

Introduction

180. The question of whether member-to-member matching was intended as the basis for operating the PRP is of fundamental importance to these proceedings. In short, we need to determine whether, taking into account the Final Redacted Spreadsheet, and the other evidence with which we have been presented, Mr Hanson and Mr Hields intended, in operating the PRP, to match members on a member-to-member basis or simply to balance the size of each Ark Scheme within a pair of Ark Schemes.

181. Mr Jones submits that the latter is the case. In making that submission, Mr Jones relies on:

(1) the evidence of Mr Tweedley, based on Mr Tweedley's discussions with Mr Hanson;

(2) the fact that there was no need for Mr Hanson and Mr Hields to have matched on a member-to-member basis in order for the PRP to work as envisaged;

(3) the huge amount of complexity to which member-to-member matching would have given rise in operational terms; and

(4) the various examples in the Spreadsheets where member-to-member matching appeared not to work.

182. We do not agree. We think that the evidence shows that, on the balance of probabilities, member-to-member matching was intended.

183. In order to explain why we have reached that conclusion, we would start by making seven general observations.

The burden of proof

184. The first is that, for the reasons which will shortly become apparent, we do not think that it is necessary to spend much time on the question of whether the Appellants have produced enough evidence to shift the evidential burden of proof onto the Respondents. That is because, in our view, the nature of the evidence is such that, wherever the evidential burden of proof may lie, it is clear that, on the balance of probabilities, the PRP was intended to involve member-to-member matching. However, we are inclined to agree with Mr Jones that, by pointing out the various examples in the Spreadsheets in which member-to-member matching appears to be impossible or at least questionable, Dalriada have done enough to shift the evidential burden of proof on this point onto the Respondents.

The nature of the evidence

185. The second is that, in considering the evidence, we have relied almost exclusively on the Spreadsheets and, in particular, the Final Redacted Spreadsheet, based as it was on the Database that was produced contemporaneously with the operation of the PRP. We have done this in large part because of the direction in *Gestmin* to favour contemporaneous written evidence over the recollections of witnesses some time after the event but also because of the nature of the witness evidence in relation to this particular question.

186. There are two aspects to the above statement, namely:

(1) the reliability of the Final Redacted Spreadsheet as contemporaneous written evidence; and

(2) the difficulties in relation to the witness evidence.

187. As regards the reliability of the Final Redacted Spreadsheet, it is common ground that the Database on which the Final Redacted Spreadsheet was based was prepared by unnamed individuals working for the Ark LLPs and not Mr Hanson and Mr Hields. As such, the individuals who prepared the Database were not themselves responsible for the day-to-day operation of the PRP. Instead, they were merely recording that day-to-day operation in the Database. At the hearing, Mr Jones sought to make something of that distinction. As we have already mentioned, he pointed out that the actual allocation of each prospective member to an identified Ark Scheme as well as the approval of MPVA loans to members had been carried out by Mr Hanson and Mr Hields as a paper exercise and that the individuals who prepared the Database had simply misinterpreted the papers with which they had been provided and somehow transposed an exercise which merely involved an attempt to balance the size of each Ark Scheme within a pair of Ark Schemes into a spreadsheet which bore the hallmarks of member-to-member matching.

188. We do not accept that theory. We are reluctant to conclude that the information which was set out in the Database and has found its way into the Final Redacted Spreadsheet was the creation of the individuals who were responsible for recording the day-to-day operation of the PRP and did not truly reflect the intentions of Mr Hanson and Mr Hields. The fact is that the Database was prepared by the administration team on the basis of the information provided by Mr Hanson and Mr Hields. Whilst we have no direct evidence to that effect, Mr Tweedley

speculated that that was the case (based on his discussions with Mr Hanson) and we consider it to be implausible that the individuals in question would have prepared the Database in a vacuum and without recourse to the papers prepared by Mr Hanson and Mr Hields. We therefore find as a fact that the individuals in question were possessed of the information provided by Mr Hanson and Mr Hields at the time when the Database was prepared. Whilst that conclusion in itself is not controversial, Mr Jones's proposition is that, in the process of recording, in the Database, the information set out in the papers, the individuals in question misinterpreted the relevant information. We can see no reason why that would have been the case and we therefore think that, on the balance of probabilities, the entries in the Database will have reflected that information. Accordingly, we find as a fact for the purposes of the proceedings that the Database, and therefore the Final Redacted Spreadsheet, is a fair indication of the intentions of Mr Hanson and Mr Hields at the relevant time.

189. As regards the lack of reliability of the witness evidence, we wish to make it clear that we intend no discourtesy or criticism whatsoever of Mr Browes and his colleagues at Dalriada, who have sought so manfully to make sense of the materials with which they have been provided. We have the utmost admiration for the task which they have performed and we have given a lot of weight to the views which they have reached on this question but, at the end of the day, their conclusions, like ours, are necessarily constrained by the fact that they have been approaching the question in retrospect and have only the written evidence to rely on. More importantly, as Mr Browes conceded at the hearing, in preparing the Comparison Spreadsheet, he and his colleagues focused on whether, in each case, member-to-member matching was definitively possible based on the figures which appeared in the Final Redacted Spreadsheet than on whether, based on those figures, it was definitively possible that member-to-member to matching was intended but was simply not recorded in those figures for one or more reasons.

190. In contrast, in answering this question, we have placed no reliance whatsoever on the evidence of Mr Tweedley or the letters from Ms Tweedley and Ms Kowalczyk that were provided to us at the hearing.

191. We have discounted the evidence of Mr Tweedley essentially because we considered him to be an unreliable witness for the reasons set out in paragraphs 79 to 93 above but also because he was not involved in the day-to-day administration of the arrangements and therefore his opinion in relation to the mindset of Mr Hanson and Mr Hields was inevitably based on speculation and hearsay. Only Mr Hanson and Mr Hields were present at the meetings when prospective members were allocated to Ark Schemes and MPVA loans to members were approved and neither of them has provided any evidence in these proceedings. Moreover, as Mr Hanson has been found by the High Court in subsequent proceedings to be dishonest, Mr Tweedley's report of what Mr Hanson may have told him about the intentions of the trustees in operating the PRP is hardly compelling.

192. We have also placed little weight on the views expressed in the letters of Ms Tweedley and Ms Kowalczyk. For reasons which are perhaps understandable, both of those individuals have sought to distance themselves from the operation of the PRP and declined to provide witness evidence for the purposes of these proceedings. Having done so, their recollections as to what was involved in the administration of the PRP carry little weight.

The importance of the MPVA loans

193. The third general point we wish to make is that we do not accept that any person became a member of an Ark Scheme without wishing to draw down an MPVA loan. The marketing literature made it very plain that that was the very essence of the PRP. Indeed, the example of the prospective member application form with which we were provided invited the prospective member to indicate the term and quantum of the MPVA loan which he or she wished to draw

down and contained a statement to the effect that the Ark Scheme which the prospective member would join would be "determined by the administrators once an appropriate level of MPVA [loan] is identified". In addition, the form that was completed by the Ark LLPs in relation to each member showed that the making of an MPVA loan was integral to the process whereby a person became a member of an Ark Scheme because it contained a place for that information to be recorded.

194. In the light of:

(1) the very clear documentary evidence to the contrary;

(2) Mr Isles's testimony to the effect that Mr Ison's pension provider at the time of his becoming a participant in the PRP was Prudential when it was in fact Scottish Widows and Canada Life; and

(3) our conclusions in relation to the general credibility of Mr Isles,

we do not accept Mr Isle's evidence that Mr Ison (or indeed Ms Ison or, frankly, any other member) joined an Ark Scheme without wishing to draw down an MPVA loan. It follows that, in our view, had the operation of the PRP not been interrupted by the intervention of the PR and the appointment of Dalriada, every member of the Ark Schemes would have drawn down an MPVA loan at some point. Some anecdotal support for this conclusion was to be found in the evidence of Ms Oades, who confirmed that the ability to access the value in her pension fund early was the whole point of her entering into the PRP and that she would have been "put out", to put it mildly, if she had not received an MPVA loan from another Ark Scheme after transferring her pension monies from the NHS pension fund to the Portman Scheme.

No reason to carry out member-to-member matching

195. The fourth general point is that we think that it is a mistake to approach this question on the assumption that intentions underlying the day-to-day operation of the PRP would necessarily have been logical. The fact that the PR was obliged to step in and appoint Dalriada when it did, and the concerns which were articulated by the PR in doing so, speak volumes in relation to the individuals who were responsible for operating the PRP before Dalriada's appointment. For that reason, we do not accept the premise that because member-to-member matching made the PRP unnecessarily complicated for Mr Hanson and Mr Hield to operate, that could not have been their intention. We think that it is perfectly possible that Mr Hanson and Mr Hields mistakenly concluded that member-to-matching was required in order for the PRP to operate. Although it is, of course, pure speculation, Ms Poots provided us with two possible reasons why they might have reached that conclusion – see paragraph 135 above.

196. Mr Jones submitted that it would be wrong for us to conclude that, just because, as a concept, the PRP was an irrational structure with fundamental commercial flaws, the people involved in the creation and operation of the PRP would irrationally undertake an academic exercise of enormous complexity for no benefit or apparent advantage. He said that those two things were very different. Whilst we accept that the two things are different, we are not persuaded. Both of them involve reaching conclusions which are not entirely logical and so, in that sense, they are related.

Errors

197. The criticisms made of the operators of the PRP by the PR bring us logically to the fifth general point which we wish to make, which is that we think that it is wrong to expect that, if member-to-member matching was intended, that process would have been carried out seamlessly and accurately. Even before taking into account Ms Poots's theory about the impact of the appointment of Dalriada on the operation of the arrangement, which we find persuasive,

we think that, given the individuals who were responsible for the operation of the PRP and the complexity of the process, mistakes in carrying out the process were inevitable.

The appointment of Dalriada

198. In referring to the potential for inaccuracies to have arisen, we have touched on the sixth general point, which is that we agree with Ms Poots that the appointment of Dalriada, which brought the operation of the PRP to a sudden end, will have had a severe impact on the manner in which the arrangement was being carried out and recorded and that this needs to be borne in mind in considering whether member-to-member matching was intended. The appointment of Dalriada would have had two distinct (and separable) impacts on how accurately the Final Redacted Spreadsheet could have reflected member-to-member matching had member-to-member matching been intended, as we think it was. The first impact is that it would have prevented participants and intended participants either from becoming members or from transferring funds into the arrangement or from receiving the MPVA loans which they expected to receive. And the second impact is that it would have meant that the individuals who were responsible for recording the information in relation to the operation of the PRP in the Database would have been interrupted in that task so that discrepancies would inevitably arise in the Database.

199. The fifth and sixth general points, taken together, mean that, in our view, it would be a mistake to expect that, if member-to-member matching was intended, we should expect to find that, in all cases, that was carried out properly and recorded accurately in the Final Redacted Spreadsheet. There were bound to be anomalies. It follows from this that, in our view, it would be a mistake for us to seek to answer this question by considering whether member-to-member matching works in all cases in the Final Redacted Spreadsheet. It inevitably does not. Our task is not to consider whether member-to-member matching actually occurred in all cases. Instead, it is to consider whether member-to-member matching was intended in all cases. Those two things are not the same. In answering the latter question, it is much more appropriate to look at the general picture and trends and to accept that there will be examples where the intention may not have been carried out properly or, if carried out properly, may not have been recorded accurately in the Database.

Segregation

200. The final and seventh general point is that we do not think that the fact that the funds of each Ark Scheme were unsegregated takes us forward in answering this question. Mr Jones sought to rely on that fact to support his position and it is true that the unsegregated nature of the funds meant that it was unnecessary for Mr Hanson and Mr Hields to carry out member-to-member matching. However, as we have already noted in our fourth general point, the mere fact that it was unnecessary does not mean that it was not intended. Moreover, as Ms Poots pointed out, the unsegregated nature of the funds meant that some of the allegations in relation to the impracticality of member-to-member matching fall away. We therefore regard this to be a neutral point in answering the question.

Analysis

201. The general observations set out above mean that, in our view, there is limited value in considering the respective submissions of Mr Jones and Ms Poots in relation to the specific members set out in paragraphs 146 to 179 above. As it happens, we think that there is considerable force in the explanations which have been provided by Ms Poots in relation to each of those members but that is not the basis on which we have ultimately reached our decision. That is because, as we have noted in paragraph 199 above, the question with which we are concerned is not whether member-to-member matching actually occurred in all cases but rather whether member-to-member matching was intended in all cases. For the reasons

already rehearsed, even if member-to-member matching was intended, there were bound to be cases where member-to-member matching either failed or was not reflected in the Final Redacted Spreadsheet.

202. It follows that focussing on those cases where member-to-member matching did not actually exist does not really advance the position very much in either direction. Instead, what is needed is to identify the intention of those who were responsible for the day-to-day operation of the arrangement from the accumulation of evidence at our disposal. We have therefore set out in this decision the evidence in relation to those specific individuals and the parties' respective submissions in relation to them only because of the time and energy which was devoted to them at the hearing and in case these proceedings should go further and the material we have recorded should be considered relevant by a higher court.

203. We think that a more fruitful approach to this question is to accept that there will have been cases where member-to-member matching did not actually occur or was not reflected in the Database, either because of mistakes made by the individuals who were operating the arrangement or because of Dalriada's unexpected appointment, and focus instead on some specific questions which we think need answering.

204. For instance, if the intention had simply been to match on an Ark Scheme by Ark Scheme basis and not on a member-to-member basis:

(1) why are there so many examples where it is possible to conclude that member-to-member matching worked? According to the Comparison Spreadsheet and Mr Browes's evidence, it was "definitively possible" for member-to-member matching to work in 66% of cases. By that, we understood Mr Browes to be saying that, based on the information in the Spreadsheets, it was possible to conclude that member-to-member matching worked in 66% of cases. That figure is even higher once one takes into account:

(a) the concession made by Mr Browes at the hearing that, in preparing the Comparison Spreadsheet, he and his colleagues had made errors or failed to take into account possible explanations for discrepancies which were consistent with an intention to carry out member-to-member matching – as outlined in paragraphs 123(7), 148(16), 159(9) and 168(3) above; and

(b) the explanations proffered by Ms Poots in relation to some of the anomalies that led Mr Browes and his colleagues to conclude that it was not possible to conclude that member-to-member matching would work in 34% of the cases – as outlined in paragraph 141, 143, 145, 151, 152, 155, 158, 161, 164, 167, 171, 173, 176 and 179 above.

Even before taking into account the cases where, on the basis of that concession and those explanations, the "No" recorded in the Comparison Spreadsheet ought to have been a "Yes", if the intention had simply been to match on an Ark Scheme by Ark Scheme basis, one would naturally have expected member-to-member matching to be possible in many fewer than 66% of the cases.

Mr Jones suggested that, in circumstances where the intention was to match the value of each Ark Scheme in each pair of Ark Schemes and the structure permitted members to borrow 50% of the value of their pension funds, there were bound to be cases where MPVA loans of similar amounts were crossing from one Ark Scheme to the members of another and vice versa. In other words, he said that the cases where it was possible to conclude that member-to-matching worked were just a by-product or side-effect of trying to match the value of the two Ark Schemes in question. We do not agree. We

think that the number of cases where it is possible to conclude that member-to-member matching worked is much too high to be explained as a mere by-product or side-effect and not an intention.

We would add that a number of the cases where it was said in the Comparison Spreadsheet that it was not possible to conclude that member-to-member matching worked were also cases where the increases in value in the two Ark Schemes as a result of the contributions made to those Ark Schemes by the named matched members were not the same. Mr Donaghy-Sutton was a case in point – see paragraphs 159 to 161 above. Those cases are therefore inconsistent with the theory proposed by Mr Jones and, as such, are neutral when it comes to identifying the intentions of the operators of the PRP at the relevant time;

(2) why was there any need for names in a "Matched With1" column at all? If all that was intended was that the value of each Ark Scheme in each pair of Ark Schemes should broadly be the same, the only thing that would have been needed was a record of the amounts transferred into each Ark Scheme. The fact that, in the vast majority of cases, a named individual or named individuals were specified in that column for each member is a clear indication that something more than parity between the paired Ark Schemes was intended;

(3) given that names were set out in the "Matched With1" column in the Final Redacted Spreadsheet:

(a) why are there references in the "Matched With1" column for various members of the amount of MPVA loans which were made to the named individuals set out in those columns – see, for example, paragraphs 169(4)(d) and 169(4)(e) above?

(b) why did the notes column for Mr Donaghy-Sutton refer to the fact that he had been matched as to £140,000 and that there was a further £47,500 to match – see paragraph 159(8)(k) above?

(c) why did the "Matched With1" column for Mr Heath-Smith say "Now got spare £5,000 MPVA" – see paragraph 120(1) above?

(d) why did the notes column for Mr James say "Spare 15000 MPVA" - see paragraph 120(2) above? and

(e) why did the notes columns for Ms McHugh and Ms Croal contain references to their receiving matching MPVA loans of £9,000 – see paragraphs 120(3) and 120(4) above?

If the intention had simply been to match on an Ark Scheme by Ark Scheme basis, why would it have been necessary specifically to mention the amount of MPVA loans in the "Matched With1" columns and the notes at all? In any event, if amounts were to be mentioned, then one would have expected the amounts so mentioned to be the amounts transferred into the relevant members' Ark Schemes and not the amounts of the relevant members' MPVA loans. Whilst it is true that the notes column for Ms McHugh does contain one reference to her being matched with the gross amount transferred into the PRP by Ms Croal, the notes column for Ms Croal and the remaining part of the notes column for Ms McHugh make it very clear that what was being matched in their case was the respective MPVA loans of £9,000 which each was due to receive from the other's Ark Scheme and not the gross amount transferred by either of them into her own Ark Scheme;

(4) why are there cases in the Final Redacted Spreadsheet where a single MPVA issued amount has been provided to a member in more than one tranche? By way of example, why did Mr Armstrong obtain his MPVA issued amount by way of two separate MPVA loans on two different dates? Mr Armstrong was matched with Mr Arnold and Mr King who were both members of the Portman Scheme. There was only a single transfer into the Lancaster Scheme by Mr Armstrong. If the intention was simply to match the value transferred by Mr Armstrong into the Lancaster Scheme with the value transferred by Mr Arnold and Mr King into the Portman Scheme, there would have been no need for Mr Armstrong to receive two separate MPVA loans.

The same point may be made about Ms Oades, who received four different MPVA loans which corresponded to MPVA loans made to the named individuals appearing in her "Matched With1" column. If the intention was simply to match the value transferred by Ms Oades into the Portman Scheme with the values transferred into the Lancaster Scheme by those four individuals, there would have been no need for Ms Oades to receive four separate loans;

(5) why did the email from Mr Collins referred to in paragraph 113(1) above inform the prospective member that she had been "matched" with a very urgent case? PP, Mr Collins's employer, was one of the largest introducers to the PRP and involved in the administration of the PRP and can be expected to have known how the PRP worked. If the intention was simply to match on an Ark Scheme by Ark Scheme basis, one would not have expected there to have been such urgency in the process; and

(6) why did the illustration in the notice published by Ark BC LLP describing the PRP contain a footnote to the effect that the 5% fee was "to discharge initial setup costs, member matching and issue of MPVA, final year fees, administration and introducer commission"? The language used suggests that member-to-member matching was an integral part of the process pursuant to which the MPVA loans were made.

Conclusion

205. In the circumstances, we think that the answers to the questions posed in paragraph 204 above lead inescapably to only one conclusion, which is that, on the balance of probabilities, Mr Hanson and Mr Hields, who were the individuals responsible for administering the PRP, intended there to be member-to-member matching and we therefore find that to be a fact for the purposes of these proceedings.

206. We recognise that, in making this finding of fact, we are reaching a different conclusion from the one reached by Bean J in *Faulds*. However, looking at the decision in *Faulds*, it appears to us that Bean J did not have the benefit of seeing the detailed documentary evidence in the form of the Spreadsheets with which we have been presented. Instead, he had only the transaction documents and witness statements from Mr Tweedley, Mr Fowler and Mr Browes. Moreover, because of the nature of the proceedings in question – an application under Part 8 of the CPR for certain declarations and directions – there was no cross-examination of the witnesses. The proceedings in *Faulds* lasted for only three days whereas these proceedings took place over ten days. This means that we have had the benefit of receiving considerably more by way of evidence and submissions in relation to this question than was available to Bean J. In short, we think that there are sound reasons why, without making any criticism of the process in the High Court, we are entitled to reach a different conclusion on this question from the one reached by Bean J.

207. We also recognise that, in making this finding of fact, we are reaching a different conclusion from the one reached by Mr Browes and his colleagues, who have spent no little

time on the Spreadsheets. We do that with some diffidence. However, I think that everyone involved in these proceedings acknowledges that this is a difficult question in relation to which reasonable people can differ. The question is hard enough as it is, even before taking into account the fact that we did not have the benefit of receiving evidence from Mr Hanson, Mr Hields or the individuals who were responsible for creating and populating the Database.

EVIDENCE AND FINDINGS OF FACT IN RELATION TO THE REASONABLENESS OF THE SCHEME ADMINISTRATOR'S BELIEF

The evidence

The documentary evidence

Introduction

208. The documentary evidence in relation to this question comprised:

(1) the HMRC meeting note;

(2) the Mr Tweedley meeting note;

(3) the Instructions; and

(4) the Counsel's Opinion.

The HMRC meeting note

209. The HMRC meeting note recorded that:

(1) at the start of the meeting, Mr Bush informed Mr Tweedley, Mr Fowler and Mr Ward that the purpose of the meeting was exploratory. He said that he and Ms Allsopp wanted to understand more about the PRP and whether or not it fell within the rules relating to registered pension schemes;

(2) Ms Bush asked who had designed the PRP and Ms Allsopp explained that that would be relevant if the PRP were to fall within the rules relating to the disclosure of tax avoidance schemes;

(3) Mr Bush explained that the reason for the existence of the rules was to discourage individuals from gaining early access to their pension monies;

(4) Mr Bush expressed concern that pension reciprocation plans might involve pensions liberation; and

(5) Mr Bush and Ms Allsopp asked some questions about how the PRP worked and asked to see further information and documentation relating to the arrangement.

The Mr Tweedley meeting note

210. We do not propose to summarise the Mr Tweedley meeting note in this decision because we have discounted it as being an accurate record of what occurred at the HMRC meeting. We say that for three reasons.

211. The first is that, for the reasons set out in paragraphs 79 to 93 above, we have very little confidence in the evidence of Mr Tweedley in general. The second is that, on this specific point, we find it remarkable, to say the least, that, after failing to avail himself of any of the opportunities to comment on the HMRC meeting note, which had been prepared by Mr Bush a short time after the HMRC meeting was held, Mr Tweedley produced the Mr Tweedley meeting note some ten years later and only a short time before the hearing in these proceedings without any evidence to support his allegation that the note was based on a recording of the HMRC meeting. For example, we have not been provided with the recording itself or with the email to which the note was apparently attached. The third is that, when one looks at the note,

it appears to be a fairly incomprehensible mixture of transcript and summary and contains numerous gaps. In addition, Mr Tweedley himself said that the tape had run out before the end of the meeting (see paragraph 215(11) below). It is therefore difficult to regard it as an accurate summary of the events which took place at the HMRC meeting.

The Instructions

212. The Instructions were prepared by Mr Fowler and sent to Ms Hardy on 8 March 2011, shortly after the HMRC meeting. In the Instructions:

(1) Ms Hardy was asked to comment on the manner in which the enquiries raised by the Respondents should be handled and further in relation to certain features of the PRP and generally;

(2) Mr Fowler, in describing the meeting with the Respondents, noted that "[it] was apparent from the start that Mr Bush particularly had determined that the PRP amounted to avoidance, and commented that he did not consider PRP to be within the spirit of FA04";

(3) Mr Fowler said that Sections 172 to 174A did not apply to the PRP because "[these] restrict connected party transactions";

(4) in explaining why a passage from the Respondents' Registered Pension Schemes Manual (the "RPS Manual") describing the use of the assets of a pension scheme for purposes other than providing retirement benefits was inapplicable, Mr Fowler said as follows:

"PRP, and the investments and transactions undertaken by the trustees, are solely for the purpose of providing retirement benefits. The trustees of MPS A decide to make an investment (an MPVA) to other persons who are not, nor ever have been, members of MPS A. Those persons may be members of MPS B but equally they may not be members of any MPS at all. It is for the trustees of Scheme A to determine the terms of any such investment…"; and

(5) in explaining why a passage from the RPS Manual describing the extraction of value from a pension scheme was inapplicable, Mr Fowler said as follows:

"…in the context of a scheme, its purpose is to provide authorised member payments. That's fine, since there is no extraction of value from the member's scheme. For the member who enters into a financial transaction with trustees of another MPS they are maximising their pension value, not gaining access to any part of their own funds."

The Counsel's Opinion

213. The Counsel's Opinion was issued on 27 March 2011 on the basis of the Instructions and a subsequent consultation. In the Counsel's Opinion:

(1) Ms Hardy noted that she was instructed to advise on whether the operation of the Ark Schemes was "within the scope of the [FA 2004]";

(2) after agreeing with those instructing her that the Ark Schemes were occupational pension schemes for the purposes of the legislation and noting that the Ark Schemes had been registered with the Respondents, Ms Hardy went on to address the question of whether an MPVA loan made by an Ark Scheme to a member of another Ark Scheme fell within Section 160(2)(a);

(3) in paragraphs [30] and [31], Ms Hardy noted that she agreed with those instructing her that, as an MPVA loan involved a payment to a person who was not connected with

a member or sponsoring employer of the lending Ark Scheme, the MPVA loan could not constitute an unauthorised member payment for the purposes of Section 160;

(4) in paragraph [32], Ms Hardy set out a section of the RPS Manual which specified that pension schemes "may make loans to third parties but loans to members (or those connected to members) are not permitted and any such loans will be taxed as an unauthorised payment …All loans are only acceptable if they are genuine investments of pension schemes. They should be prudent, secure and on a commercial basis…There is no objection to a registered pension scheme making loans to third parties – i.e. persons not connected to members or sponsoring employers. Such loans are normally on an arm's length basis at a market rate";

(5) in paragraph [33], Ms Hardy agreed with her instructing agents that the PRP would not fall within any of Sections 162 or 172 to 174A as "these all apply to connected party transactions"; and

(6) in paragraphs [34] and [35], Ms Hardy turned to sections of the RPS Manual which dealt with tax charges that might be imposed where the assets of a registered pension scheme were used for purposes other than providing retirement benefits and, in particular, where a member sought to extract value from his or her scheme. The relevant passage gave various examples of that, which included a category of transactions between the scheme and a connected third party that was directly or indirectly for the benefit of a member of the scheme and she concluded that "as the arrangements are not between connected persons and are on a [sic] arm's length basis, and the assets in [each Ark Scheme] are to be held for the purposes of providing benefits for its members, in my view the [Ark Scheme] and its operation would fall within the provisions of FA 2004 and not be treated as an unauthorised member payment".

The witness evidence

Introduction

214. The witness evidence in relation to this question comprised the witness evidence of Mr Tweedley and Ms Allsopp.

Mr Tweedley

215. Mr Tweedley's testimony in relation to this question may be summarised as follows:

(1) he said that he had devised the PRP, in conjunction with Mr Hanson and Mr Fowler, as a means of avoiding the application of the restrictions on accessing pension monies before the age of fifty-five. He was aware of those restrictions as a result of his experience as a small self-administered scheme adviser and, in his view, the PRP did not fall foul of those restrictions because the MPVA loan received by a member did not derive from the member's own pension funds but instead derived from another person's pension funds;

(2) he was equivocal in relation to the degree of control which he exercised over the PRP. In his witness statement for the proceedings, he said that, although he was no longer a director of Athena or Minerva at the time when the PRP was operating, he still maintained a significant amount of control over those companies at that time and he had control, or at least a significant influence, in relation to all high-level operational decisions made in relation to the Ark Schemes. However, at the hearing, he sought to distance himself somewhat from the operations of the trustee companies, saying that each trustee company had a discretion as to whether or not to make the MPVA loans that were

requested of it and that the exercise of that discretion was entirely a matter for Mr Hanson and Mr Hields, as the directors of those companies;

(3) in any event, he conceded that it was highly unlikely that a trustee company would ever refuse to make an MPVA loan which was requested of it, given that it was of the essence of the PRP that members participating in it would be able to obtain MPVA loans. He was aware from the outset that the attraction of the PRP was that it enabled members to gain access to part of the value inherent in their pension schemes and therefore that their receiving MPVA loans was of the essence of the PRP. He said that he was aware of the reasons why prospective members decided to join the PRP and those reasons were "often quite heart-rending";

(4) he explained that:

(a) the three Ark LLPs who were responsible for administering the PRP were all connected with each other and were also connected with the two trustee companies (Athena and Minerva), both of which were both wholly-owned by Mr Tweedley;

(b) in addition, Mr Hanson and Mr Hields were related. He thought that they were second cousins; and

(c) although neither Mr Hanson nor Mr Hields had been paid for acting as directors of the trustee companies, they had benefited financially as a result of their participation in the PRP because each of them received fees for introducing new members to the PRP and was a member of Ark BC LLP and therefore benefited through that entity from the fees payable on behalf of new members;

(5) he said that, although he had had some experience of small self-administered pension schemes, he was by no means an expert in pensions planning. Accordingly, after coming up with the initial idea for the PRP, he had looked for the assistance of a pensions lawyer to advise on the idea. Mr Fowler was the then head of pensions at the law firm of Stevens & Bolton ("S&B") and was recommended to him by a Mr Simon Bourge of the Bourse Trust Company in Guernsey who had worked with Mr Fowler for a number of years and described Mr Fowler as "the best pensions lawyer in the UK". He understood Mr Fowler to have worked for a number of large law firms in addition to S&B and to be a pensions expert. The S&B website noted that Mr Fowler was an expert in his field according to Chambers. He had first met Mr Fowler to discuss the PRP at the Grosvenor Hotel in London;

(6) in relation to his relationship with Mr Fowler, he said that:

(a) Mr Fowler had been remunerated for his advice and his fees were paid into a personal account in his own name as opposed to an S&B account;

(b) the arrangement with Mr Fowler was that Mr Fowler would be responsible for the legal elements of the arrangement such as drafting documents and providing advice on the structure, whilst he would deal with the financial elements of the arrangement; and

(c) the terms of the deal with Mr Fowler were that, in return for his work, Mr Fowler would receive a share in the profits arising from the arrangement. Mr Fowler had informed him that a share in profits outside S&B was part of his retirement plans. Although the share of profits which Mr Fowler had expected to receive from his role in the arrangement had not materialised, he believed that Mr Fowler had received a share of the introducer's fees which had been paid by the Ark LLPs to PP;

(7) he accepted that:

(a) Mr Fowler was not a qualified solicitor (but he added that he had not become aware of that until Mr Fowler had provided his witness statement for the proceedings in *Faulds*);

(b) nowhere in the S&B website was Mr Fowler described as an expert in tax law (but he added that he saw pensions law and tax law as intermingled areas of expertise);

(c) he did not sign a formal engagement letter with S&B or Mr Fowler (but he did not think that this was unusual because Mr Fowler was highly recommended and he "was aware that Mr Fowler wanted to branch out from his full time role at [S&B]";)

(d) he was never under any impression that he was formally engaging with S&B (but he assumed that Mr Fowler's contract with S&B allowed Mr Fowler to give advice outside his capacity as an S&B adviser;)

(e) the terms of his arrangement with Mr Fowler were not set out in writing. He had never received a formal engagement letter from Mr Fowler; and

(f) he had never obtained any written advice from Mr Fowler in relation to the PRP because he and Mr Fowler were setting up the PRP together and Mr Fowler "had an interest in the arrangements following implementation and would receive on-going payments as I would";

(8) he said that, at the point when he took the initial advice from Mr Fowler, he had considered confirming Mr Fowler's advice with Ms Hardy of tax counsel but had decided not to do that as:

(a) Mr Fowler had no reservations about the ability of the PRP to fall within the rules and he did not think that Ms Hardy would add much to that advice;

(b) paying another legal professional would have been duplicative and an unnecessary expense;

(c) he had re-read the relevant rules and was sure that the arrangement fell within the rules; and

(d) were he to obtain tax counsel's advice it might look to outsiders as though he thought he was trying to create a tax avoidance scheme. That was because the marketing materials for tax schemes were often backed by an opinion from tax counsel and so it would look suspicious. However, he accepted in cross-examination that he could have obtained the advice of Ms Hardy at the initial stage of the structure without then seeking to use that advice as part of the marketing materials and therefore that this reason was not a sound one;

(9) turning to his interactions with the Respondents, he said that, at the HMRC meeting, he had understood that:

(a) as a general matter, the Respondents were relentless in their pursuit of schemes which enabled people to access their pension monies before the age of fifty-five;

(b) Mr Bush and Ms Allsopp had formed no definite view on whether or not the PRP gave rise to unauthorised payments but were at the meeting in order to find out more about the arrangement to see if it did;

(c) in order to reach that view, they needed to see further information and documentation relating to the arrangement;

(d) they had concerns that the PRP might involve tax avoidance which was disclosable under the rules relating to the disclosure of tax avoidance schemes; and

(e) they were also concerned that the PRP might give rise to unauthorised payments.

In short, he accepted that he had not left the HMRC meeting believing that Mr Bush and Ms Allsopp were content with the PRP and certain that it did not give rise to unauthorised payments;

(10) he insisted that, at the end of the HMRC meeting, he had said to Mr Bush and Ms Allsopp that he would stop the PRP with immediate effect if the Respondents were to conclude that it gave rise to unauthorised payments. However, he accepted that:

(a) there was no record of the relevant statement in the HMRC meeting note; and

(b) Mr Bush had sent him a copy of the HMRC meeting note under cover of a letter dated 28 February 2011 inviting him to comment on the note and then sent a further chasing communication on 10 May 2011 to ask for comments and that he had not provided any comments on the note in response to those requests;

(11) he explained that his own note of that meeting – the Mr Tweedley meeting note – had come about as a result of his looking through old emails recently and finding the note attached to one of them. He had not provided the email to which the note was attached but just the attachment. The note was a typed version of an audio recording which he had made of the meeting. The Mr Tweedley note also contained no record of the statement which he said he had made as mentioned in paragraph 215(10) above but the tape had run out before the end of the meeting and the statement had been made right at the end of the meeting;

(12) he accepted that:

(a) in the subsequent communications from Mr Bush after the meeting, Mr Bush had made it clear that he was still awaiting further information in relation to the structure and design of the PRP before he could reach a concluded view on whether or not it gave rise to unauthorised payments; and

(b) whilst Mr Bush had not articulated any specific concerns in relation to the PRP, it was plain that he had not yet said that he was content that the PRP did not give rise to unauthorised payments;

(13) he said that:

(a) following the HMRC meeting, he and Mr Fowler had sought the advice of Ms Hardy in order to confirm Mr Fowler's advice and that that had been positive;

(b) on the basis of the Counsel's Opinion, he had continued to operate the PRP "with restored vigour" even though he knew that the Respondents had not yet completed their enquiries; and

(c) although he could not be sure, he thought that introducers had been told of the favourable view of Ms Hardy or received a copy of the Counsel's Opinion but he did not know the extent to which that information had been conveyed to prospective participants in the PRP; and

(14) he provided conflicting evidence in relation to the question of when he considered that he had first sought independent advice on the structure. At one point in his testimony, he conceded that he had not obtained independent advice until March 2011, following the HMRC meeting, when he and Mr Fowler had consulted Ms Hardy in relation to the PRP and, at another, he alleged that the initial advice he had obtained from Mr Fowler was independent and that Mr Fowler only "subsequently became part of the structure".

Ms Allsopp

216. Ms Allsopp's testimony in relation to this question may be summarised as follows:

(1) she said that she had not seen the Mr Tweedley meeting note until shortly before the hearing. Prior to seeing the Mr Tweedley meeting note, so far as she had been aware:

(a) the only note of the HMRC meeting was the HMRC meeting note, prepared by Mr Bush shortly after the HMRC meeting, using Mr Bush's notes and her notes; and

(b) the HMRC meeting had not been recorded. Indeed, she had specifically asked Mr Ward at the time whether he was recording the HMRC meeting and Mr Ward had said that he was not;

(2) she said that, in her view:

(a) the HMRC meeting note was an accurate record of the HMRC meeting;

(b) Mr Tweedley had provided no comments on the HMRC meeting note despite specifically being asked whether he had any comments by Mr Bush on 28 February 2011 and again on 10 May 2011; and

(c) the Mr Tweedley meeting note was not an accurate record of the HMRC meeting. For instance, it did not record the fact that she had asked Mr Ward whether the HMRC meeting was being recorded; and

(3) she said that she had no recollection of Mr Tweedley's saying at the HMRC meeting that he would stop the PRP if the Respondents were to conclude that it did not work.

The submissions of the parties

Introduction

217. The submissions of the parties in relation to the facts which were pertinent to the reasonableness of the scheme administrator's belief focused on three key questions–

(1) whether the advice which Mr Tweedley obtained from Mr Fowler at inception was independent professional advice;

(2) what took place at the HMRC meeting; and

(3) whether Ms Hardy was properly apprised of the facts in relation to the PRP when she provided the Counsel's Opinion.

Mr Fowler

218. As regards the first of these questions, Mr Jones said that the fact that Mr Fowler had not provided written advice to Mr Tweedley in relation to the PRP was irrelevant. Oral advice could still be formal advice and that was what Mr Fowler had provided in this case. In addition, Mr Fowler had drafted the documents for the structure. In providing that advice and drafting the documents, Mr Fowler was acting independently.

219. In response, Ms Poots said that the advice which Mr Tweedley obtained from Mr Fowler was not independent professional advice because it was informal in nature – there was no engagement letter from either S&B or Mr Fowler himself, Mr Tweedley knew that Mr Fowler was not acting for S&B when he provided the advice and the advice was not in writing. In addition, and most significantly, Mr Tweedley knew that Mr Fowler intended to share in the profits arising from the PRP and that therefore Mr Fowler was not providing objective independent advice.

The HMRC meeting

220. As regards the second of these questions, Mr Jones said that the HMRC note of the HMRC meeting did not suggest that Mr Bush and Ms Allsopp had expressed any doubts at the meeting about the ability of the PRP to avoid the application of the unauthorised payments regime. Instead, they had merely said, without offering any view on the question, that they wished to find out more about the PRP and its operation. In fact, they had not expressed any view on the PRP until after Dalriada had been appointed.

221. In response, Ms Poots said that the HMRC note of the HMRC meeting made it clear that, although Mr Bush and Ms Allsopp had not reached a concluded view on the matter and wished to find out more about the PRP and its operation, they were concerned that the PRP would give rise to unauthorised payments. Indeed, Mr Tweedley had admitted that to be the case in giving his testimony at the hearing and the terms of the Instructions had made it clear that that was his and Mr Fowler's understanding following the HMRC meeting.

The Counsel's Opinion

222. As regards the third of these questions, Mr Jones said that the reference in paragraph [35] of the Counsel's Opinion to the transactions' being at arm's length should be considered in context. In that part of her advice, Ms Hardy was focused on connected party transactions and, in that paragraph, she was simply making the point that the MPVA loans were not connected party transactions. The reference in the paragraph to "arm's length" was merely another way of saying that the parties to each MPVA loan were not connected. In fact, Ms Hardy had made an unequivocal statement in paragraph [30] of the Counsel's Opinion that the PRP would not give rise to unauthorised payments because the MPVA loans were not connected party transactions and she had said nothing in that paragraph about the transactions' being at arm's length.

223. In response, Ms Poots said that the Instructions contained a number of misleading or incorrect statements. For example:

(1) it was incorrect to say that Section 173 applied only to transactions between connected persons;

(2) the paragraph explaining why the passage from the RPS Manual describing the use of the assets of a pension scheme for purposes other than providing retirement benefits was inapplicable was misleading in suggesting that:

(a) MPVA loans might be made to persons who were not members of an Ark Scheme at all; and

(b) the trustee of each Ark Scheme had a meaningful discretion over whether or not, and to whom, to make an MPVA loan; and

(3) the paragraph explaining why the passage from the RPS Manual describing the extraction of value from a pension scheme was inapplicable was misleading in that the MPVA loans did not maximise pension value at all. The fact that they carried a below-market rate of interest, were long-term and unsecured in nature, were made without first

carrying out credit checks and were not insured for the early death of the borrowers all meant that, effectively, the MPVA loans did involve an extraction of value from the Ark Schemes.

224. She added that there was no evidence from the Instructions (or the Counsel's Opinion) that Ms Hardy had been told about the overall investment strategy or the underlying mathematics so that Ms Hardy would not have been able to reach a proper understanding of the precise mechanics of the PRP. This was manifest in paragraph [35] of the Counsel's Opinion, where, after setting out the three categories of connected party transactions described in the RPS Manual, Ms Hardy noted that the PRP would not give rise to unauthorised payments because, in addition to the fact that the arrangement did not involve transactions between connected parties, those transactions were "on an arm's length basis" and the assets in each Ark Scheme were "to be held for the purposes of providing benefits for its members".

The findings of fact

Mr Fowler

225. By his own admission:

(1) at the time when he devised the PRP, as a result of his experience in relation to small self-administered pension schemes, Mr Tweedley was well aware of the policy underlying the tax rules in relation to unauthorised payments and the serious consequences for a person who received an unauthorised payment;

(2) Mr Tweedley himself was not an expert in the rules relating to unauthorised payments; and

(3) Mr Tweedley did not seek the advice of Ms Hardy at the point when the PRP was first created because he thought that that would have been an unnecessary expense given his own and Mr Fowler's views on the proposal and the fact that he believed that obtaining an opinion from tax counsel and using it for marketing purposes might give prospective members the impression that the PRP involved tax avoidance.

226. The other evidence with which we have been provided in these proceedings is entirely consistent with those admissions. We therefore find each of the matters set out in paragraph 225 above to be facts for the purposes of these proceedings.

227. Mr Tweedley was more equivocal in relation to the question of whether or not Mr Fowler was ever a truly independent adviser. At one stage in his testimony, he suggested that there might have been an initial stage, before Mr Fowler became personally invested in the structure, when, even though Mr Fowler was acting on his own account and not as a representative of S&B, Mr Fowler was advising him on an independent basis that the PRP did not give rise to unauthorised payments. However, at another point in his testimony, Mr Tweedley accepted that he knew from the outset that Mr Fowler was not truly independent in providing his advice because he was part of the arrangement and stood to share in the profits arising out of the arrangement along with a share of the introducer's fees and that Mr Tweedley had not sought truly independent advice until he obtained the advice of Ms Hardy in March 2011.

228. We think that the second of those two positions is the more accurate. That is because it seems to us to be inherently unlikely that there was ever an initial stage in which Mr Fowler intended to provide his advice in relation to the PRP as an independent adviser before subsequently deciding to take a stake as principal in the structure. We consider that, had that been Mr Fowler's intention at the outset, he would have provided his advice through S&B, the firm for which he was acting at the relevant time, or alternatively entered into an engagement letter with Mr Tweedley to provide independent professional advice on his own account to Mr

Tweedley. Mr Fowler did neither of those things. Instead, he engaged with Mr Tweedley from the outset as a principal with a personal stake in the structure. As Mr Tweedley noted in his evidence, Mr Fowler saw the PRP as a way of providing for his retirement and that was why he engaged with Mr Tweedley outside of his role with S&B and without providing an engagement letter on his own account. Since Mr Fowler engaged with Mr Tweedley on that basis, he had a vested personal interest in the PRP and was at no stage a truly independent objective adviser in relation to the structure and we find that to be a fact for the purposes of these proceedings.

The HMRC meeting

229. Turning then to the facts relating to the HMRC meeting, we have already explained in paragraphs 210 and 211 above why we place no weight on the Mr Tweedley meeting note.

230. As for the remaining evidence, in the course of his testimony, Mr Tweedley accepted that:

(1) at the HMRC meeting, he understood that Mr Bush and Ms Allsopp had not yet reached a concluded view on whether or not the PRP gave rise to unauthorised payments but he knew that Mr Bush and Ms Allsopp:

(a) were concerned that it might well do so and might also fall within the rules relating to the disclosure of tax avoidance schemes; and

(b) wished to be provided with additional information before reaching their conclusion in relation to those points; and

(2) at the time when he had decided to operate the PRP "with restored vigour", he knew from the subsequent communications which he had received from Mr Bush after the HMRC meeting that Mr Bush was still awaiting further information in relation to the structure and design of the PRP and had not yet concluded that the PRP did not give rise to unauthorised payments.

231. The other evidence with which we have been provided in these proceedings is entirely consistent with those admissions. In particular, the evidence shows that, following the HMRC meeting, Mr Tweedley was well aware that Mr Bush and Ms Allsopp were concerned about the efficacy of the PRP. Although they had asked for further information about the structure and had not yet reached a concluded view, they had expressed concerns about it. That was why Mr Tweedley and Mr Fowler decided to consult Ms Hardy, having previously considered that that would be an unnecessary expense, and it was also why Mr Fowler, in describing the HMRC meeting to Ms Hardy in the Instructions, said that "[it] was apparent from the start that Mr Bush particularly had determined that the PRP amounted to avoidance, and commented that he did not consider PRP to be within the spirit of FA04".

232. Accordingly, we find as facts for the purposes of these proceedings that, taking into account the HMRC meeting note, the content of the Instructions and Mr Tweedley's testimony at the hearing, all as summarised in paragraphs 230 and 231 above, at the HMRC meeting, Mr Bush and Ms Allsopp:

(1) did not express any concluded view in relation to the PRP;

(2) requested further information and documentation pertaining to the PRP in order that they might reach a concluded view;

(3) expressed a general concern about pensions liberation and arrangements like the PRP; and

(4) indicated that they suspected that the PRP might well fall foul of the rules which were designed to prevent pensions liberation.

233. In addition, we find as a fact for the purposes of these proceedings that Mr Tweedley did not say at the meeting that he would stop the PRP with immediate effect if the Respondents were to conclude that it gave rise to unauthorised payments. We say that because that statement is not contained in the HMRC meeting note (or, for that matter, the Mr Tweedley meeting note) and Ms Allsopp's evidence, which we prefer to Mr Tweedley's evidence, was that Mr Tweedley did not say that. Moreover, the behaviour of Mr Tweedley in the period following the HMRC meeting was not consistent with that fact, given that Mr Tweedley was aware that the Respondents had reservations about the PRP and were still investigating it and yet still persisted in marketing the PRP. Indeed, following his receipt of the Counsel's Opinion, he had done so "with restored vigour". He could easily have suspended the operation of the PRP during the period of the Respondents' investigation but instead he simply ploughed on regardless.

The Counsel's Opinion

234. Finally, as regards the advice from Ms Hardy, we find the following to be facts for the purposes of these proceedings:

(1) the arrangements comprising the PRP were not arm's length commercial arrangements and both the MPVA loans and the other investments which were made by each Ark Scheme were made without obtaining proper advice and without carrying out appropriate due diligence; and

(2) Ms Hardy was instructed, and provided her advice in the Counsel's Opinion, on the basis that:

(a) there was a meaningful discretion for the trustee of the lending Ark Scheme as to whether or not to make a particular MPVA loan;

(b) each MPVA loan was an arm's length transaction;

(c) an MPVA loan might be made to a borrower who was not a member of another Ark Scheme;

(d) the making of an MPVA loan did not involve any extraction of value from the lending Ark Scheme; and

(e) on the contrary, the making of an MPVA loan was consistent with maximising the value of the lending Ark Scheme for the benefit of its members.

235. We have made the finding of fact set out in paragraph 234(1) above for the reasons which we have set out in detail in discussing the credibility of Mr Tweedley as a witness in paragraphs 79 to 93 above.

236. As for the findings of fact set out in paragraph 234(2) above, given the significance to the outcome of these proceedings of those findings of fact, we should say a little more about why we have made them.

237. There is no indication whatsoever, either in the Instructions or the Counsel's Opinion, that Ms Hardy was even informed of the non-arm's length nature of the MPVA loans, let alone having her attention expressly drawn to that feature of the PRP. Reference was made in the Instructions to a brochure which described the PRP concept in more detail. We were not provided with that brochure at the hearing and it is conceivable that that brochure might have contained sufficient information for Ms Hardy to deduce that the MPVA loans were not at arm's length. However, we think that that is unlikely given the entire absence from the

Instructions and the Counsel's Opinion of any mention of the terms on which the MPVA loans were made. If the brochure had made clear the terms on which the MPVA loans were made, we would have expected some mention of those terms, and the fact that they were not at arm's length, to have appeared in the Counsel's Opinion, particularly in the context of the reference in paragraph [35] of the Counsel's Opinion to the arm's length nature of the arrangements.

238. The focus of the Instructions was on the fact that the MPVA loans were being made to persons who were not connected with the lending Ark Scheme, rather than on the terms on which the MPVA loans were being made - hence, the references in the Instructions to the fact that:

(1) the MPVA loans were being made "solely for the purpose of providing retirement benefits";

(2) the MPVA loans might be made to persons who were not members of any Ark Scheme; and

(3) the MPVA loans involved no extraction of value from the lending Ark Scheme and that members of the lending Ark Scheme were "maximising their pension value" as a result of the arrangement.

239. As regards the Counsel's Opinion, we have reflected on Mr Jones's submission to the effect that the statement made by Ms Hardy in paragraph [30] of the Counsel's Opinion – to the effect that the better view was that the PRP would not give rise to unauthorised member payments – was not qualified by any reference to the arm's length nature of the MPVA loans. We agree that that was the case. However, the mere fact that the view expressed in that paragraph was not expressly made subject to that qualification does not mean that that was not the implicit understanding of Ms Hardy at the point when she made the statement. We think that the extracts from the RPS manual set out in paragraph [32] of the Counsel's Opinion reveal quite clearly that Ms Hardy's understanding was that each MPVA loan was "a genuine investment" and made "on an arm's length basis at a market rate". Had Ms Hardy thought otherwise, she would surely have gone on to make some comment in the Counsel's Opinion in relation to how the fact that each MPVA loan was not "a genuine investment" and not "on an arm's length basis at a market rate" might affect her conclusions in the light of what was being said in the relevant extracts from the RPS Manual. We therefore do not see the reference in paragraph [35] in the Counsel's Opinion to the arm's length nature of the MPVA loans as simply an isolated example of Ms Hardy's equating the phrase "arm's length basis" to the absence of a connection between the parties to each MPVA loan.

EVIDENCE AND FINDINGS OF FACT IN RELATION TO WHETHER MS OADES MADE A VALID APPLICATION FOR DISCHARGE

The evidence

The documentary evidence

240. The documentary evidence in relation to this question comprised the correspondence which passed between the Respondents, on the one hand, and I&S Limited and Ms Oades, on the other hand.

241. The relevant correspondence was as follows:

(1) the letter of assessment dated 25 February 2015 in respect of the 2010/11 tax year which had been sent to Ms Oades by the Respondents. That letter:

(a) included an assessment to an unauthorised payments charge at 40% on an unauthorised payment of £115,000 (£46,000) and an unauthorised payments

surcharge at 15% on the same unauthorised payment of £115,000 (£17,250), amounting in total to £63,250;

(b) informed Ms Oades of the basis on which the assessment had been made;

(c) informed Ms Oades that the Respondents were still making enquiries in relation to the PRP and that she should not "consider this assessment to signify the closure of HMRC's enquiries";

(d) informed Ms Oades that she had a right to appeal against the assessment and enclosed full details of how an appeal could be made; and

(e) went on to say as follows:

"I would also like to tell you that you may want to consider making an application for discharge of the unauthorised payments surcharge under Section 268 Finance Act 2004 if you think that you meet the ground set out in Section 268(3) Finance Act 2004. If you do want to make an application, this should be sent to me at the address shown above and you will need to set down the reasons why you meet the condition set out in the legislation";

(2) a response to that letter from I&S Limited to the Respondents dated 6 March 2015, the relevant part of which read as follows:

"We thank you for the letter of 25th February 2015 and we hereby appeal against the assessments issued on that date and received on 2nd March 2015 on the grounds that the assessment is estimated and based on an incorrect interpretation of the law and subject to an on-going dispute with HM Revenue and Customs";

(3) a letter from Mr David Hunt of the Respondents to I&S Limited dated 10 March 2015 in which the Respondents confirmed receipt of I&S Limited's letter of 6 March 2015 "appealing against the 2010/11 assessment for £63,250";

(4) an email from Mr Isles to Ms Hannah Wilce of the Respondents dated 16 October 2019 in relation to the preparation for these proceedings in which, after acknowledging receipt of the Respondents' statement of case and a clarification in relation to the calculation of the unauthorised payments, Mr Isles said as follows:

"We should like to take this convenient opportunity to explore with you a connected matter. The Appellant has, of course, appealed generally, both to HMRC and to the Tribunal, against the assessments, which assessments include an unauthorised payments surcharge. The Appellant intended (and expected) that the appeal against the assessments would embrace both the unauthorised payment and the unauthorised payment surcharge. For the avoidance of doubt however, and to ensure that all matters relating to the appeals against the assessments are dealt with fully and conveniently, we consider that specific provision might properly now be made to deal with a good faith discharge from the surcharge available to members under s. 268 Finance Act 2004 and the Registered Pension Schemes (Discharge of Liabilities under Sections 267 and 268 Finance Act 2004) Regulations 2005…"

Mr Isles went on to suggest that the Respondents might wish further to amend their statement of case so as to include what he had referred to as the good faith discharge;

(5) an email from Ms Wilce to Mr Isles dated 1 November 2019 in which Ms Wilce pointed out that the statutory deadline for making an application under Section 268 in respect of the tax year 2010/11 was 31 January 2017 and therefore Ms Oades was out of time for making such application;

(6) an email from Mr Isles to Ms Wilce of 14 November 2019 in which Mr Isles informed Ms Wilce that Ms Oades did not accept that decision and was appealing against it; and

(7) a letter from Mr Isles to Mr Hunt dated 14 November 2019 in which Mr Isles referred to previous correspondence and in particular to, inter alia, Mr Hunt's letter of 25 February 2015 and his own letter dated 6 March 2015 and informed Mr Hunt that "[this] letter contains my application for discharge from the unauthorised payments surcharge under s. 268 Finance Act 2004". The letter went on to say that Mr Isles considered that, "in all the circumstances of the case, it would not be just and equitable for me to be liable to the unauthorised payments surcharge" and then set out the grounds on which Mr Isles was seeking to rely in relation to the application. Those were that he had relied on:

(a) the fact that the Portman Scheme had been registered with the Respondents;

(b) the fact that assets had been transferred to the Portman Scheme from the NHS pension scheme and transfers were only permitted from one registered pension scheme to another.

As such, Mr Isles "had every reason to believe that the provisions of, or arrangements made by, under or through the Portman Pension Scheme, would not be such as to result in an unauthorised payments surcharge under s. 268 Finance Act 2004 being imposed on me". Mr Isles went on to say that he invited Mr Hunt to accept the application, that he considered the application to have been made within the applicable time limit set out in the Regulations "and, or alternatively, I will rely on the contents of your letter of 25 February 2015". He added, "[should] you find otherwise, I request that you use your discretion to accept and determine the application"; and

(8) a letter from Ms Lynn Faulkner of the Respondents to Ms Oades dated 22 January 2020 in which Ms Faulkner said that the application set out in Mr Isles's letter of 14 November 2019 had been made after the expiry of the time limit for making such applications in relation to the tax year 2010/11 and that the Respondents had no discretion to extend the time limit.

The witness evidence

242. At the hearing, Mr Isles testified that he had not received the letter from the Respondents dated 10 March 2015 acknowledging receipt of his letter of 6 March 2015 (as to which, see paragraphs 24(2) and 241(3) above) until 12 February 2018. However, he did not dispute that it had been sent and acknowledged that a copy of the letter was in the DB.

The submissions of the parties

243. In relation to the facts which were pertinent to the question of whether or not Ms Oades had made a valid application for the discharge of the unauthorised payments surcharge within the applicable time limit, Ms Sheldon submitted as follows:

(1) I&S Limited's letter of 6 March 2015 should be construed as a written request on behalf of Ms Oades for the discharge of the unauthorised payments surcharge in respect of the tax year 2010/11. That was because it referred to "the assessments" (in the plural, not the singular) and the Respondents' letter of 25 February 2015 to which it was a response contained two assessments – one to the unauthorised payments charge and the other to the unauthorised payments surcharge; and

(2) the Respondents' acknowledgment of that letter of 10 March 2015 implicitly acknowledged that the Respondents were aware that both categories of charge were included in I&S Limited's letter because, although it referred to "assessment" (in the

singular), it expressly referred to the amount of £63,250, which encompassed both categories of charge.

244. In response, Ms Poots submitted that I&S Limited's letter of 6 March 2015 did no more than appeal against the two assessments which had been set out in the Respondents' letter of 25 February 2015. The Respondents' letter made it perfectly clear that, upon receipt of the assessments, Ms Oades had the right to appeal against them and that, quite separately and in addition, Ms Oades could make an application for the discharge of the unauthorised payments surcharge. It was very clear that, in its response to the assessments, I&S Limited was taking up the right to appeal but not making any application for the discharge of the unauthorised payments surcharge.

The findings of fact

245. On the basis of the chain of correspondence described in paragraph 241 above, we find the following to be facts for the purposes of these proceedings:

(1) I&S Limited's letter of 6 March 2015:

(a) said that Ms Oades wished to appeal against the two assessments in respect of the tax year 2010/11which had been set out in the Respondents' assessment letter of 25 February 2015 – one to the unauthorised payments charge and the other to the unauthorised payments surcharge;

(b) gave as the grounds for that appeal the fact that the assessments were estimated and based on an incorrect interpretation of the law and subject to an on-going dispute with the Respondents;

(c) did not say, either expressly or impliedly, that Ms Oades wished to make an application for the discharge of the unauthorised payments surcharge in respect of the tax year 2010/11 under Section 268; and

(d) did not set out any particulars of the ground for such application.

We reach the above conclusions on the basis of the clear language used in I&S Limited's letter. In particular, the use of the words "assessments" in the plural – upon which Ms Sheldon placed so much reliance as demonstrating that the letter contained an application for the discharge of the unauthorised payments surcharge under Section 268 - was nothing to the point. The key fact is that, in that letter, I&S Limited said "we hereby appeal against the assessments" and made no reference at all to an application for the discharge of the unauthorised payments surcharge. There is a significant difference between appealing against an assessment to the unauthorised payments surcharge and applying for the discharge of the unauthorised payments surcharge set out in the assessment. That distinction is fundamental to the structure of the regime and the Respondents' letter of 25 February 2015 to which I&S Limited was responding had made it very clear that the right to apply for the discharge of the unauthorised payments surcharge was quite separate and distinct from the right to appeal against both assessments.

Moreover, whilst I&S Limited's letter set out the grounds upon which Ms Oades wished to appeal against the two assessments – in other words, the grounds on which Ms Oades was arguing that she should not have been assessed to the unauthorised payments charge and the unauthorised payments surcharge – it did not go on to say why, even if there had been unauthorised payments and Ms Oades was liable to the unauthorised payments charge and the unauthorised payments surcharge, it would not be just and reasonable in all the circumstances for Ms Oades to be liable to the unauthorised payments surcharge;

(2) the letter of acknowledgement from Mr Hunt to I&S Limited dated 10 March 2015 showed that Mr Hunt understood I&S Limited:

(a) to have appealed against the assessments to the unauthorised payments charge and the unauthorised payments surcharge in respect of the tax year 2010/11 set out in the assessment of 25 February 2015; and

(b) not to have made an application for the discharge of the unauthorised payments surcharge in respect of the tax year 2010/11 under Section 268.

We reach the above conclusions because the letter refers only to the appeal which had been described in I&S Limited's letter and makes no mention of any application for the discharge of the unauthorised payments surcharge; and

(3) no application for the discharge of the unauthorised payments surcharge in respect of the tax year 2010/11 under Section 268 was made by or on behalf of Ms Oades prior to the letter from Mr Isles to Mr Hunt dated 14 November 2019. We would note that, even at that stage, the relevant application was deficient in that it purported to be an application under Section 268 by Mr Isles himself and not by Ms Oades. However, overlooking that deficiency, and treating the letter, as it was doubtless intended, to be an application by Ms Oades, that was:

(a) the first occasion on which Ms Oades made an application for the discharge of the unauthorised payments surcharge in respect of the tax year 2010/11 under Section 268; and

(b) the first occasion on which Ms Oades provided the Respondents with particulars of the ground for that application.

We reach the above conclusions because we have been provided with no evidence to suggest that the possibility of Ms Oades's making an application for the discharge of the unauthorised payments surcharge in respect of the tax year 2010/11 had been raised with the Respondents prior to Mr Isles's letter to Ms Wilce of 16 October 2019. On the contrary, it was not until Mr Isles received Ms Wilce's response to that letter of 1 November 2019 that he became aware that no such application had been made.

Moreover, in his letter to Mr Hunt of 14 November 2019, Mr Isles implicitly acknowledged that no such application had been made before that date by saying that the letter contained his application for discharge and by setting out at that stage the particulars of the ground for the application.

EVIDENCE AND FINDINGS OF FACT IN RELATION TO WHETHER IT WOULD NOT BE JUST AND REASONABLE FOR MS OADES TO BE LIABLE TO THE UNAUTHORISED PAYMENTS SURCHARGE

The evidence

The documentary evidence

Introduction

246. The DB contained various documents which are relevant to this question, including:

(1) a redacted example of the standard form which was executed by a prospective member and his or her introducer when the prospective member applied to join an Ark Scheme and the actual application form which was executed by Ms Oades and I&S Limited when Ms Oades applied to join an Ark Scheme;

(2) a membership information form dated 27 March 2011 from Ark BC LLP which provided prospective participants in the PRP with information about the arrangement;

(3) a leaflet prepared by Ark BC LLP in relation to the PRP setting out how the PRP was intended to operate, which was provided to prospective members;

(4) the MPVA Agreements executed by Ms Oades and Athena, as the trustee of the Lancaster Scheme in relation to the MPVA loans made by the Lancaster Scheme to Ms Oades; and

(5) relevant correspondence.

The application form

247. In the standard form application form, the part of the application form which was executed by the prospective member contained a declaration to the effect that, inter alia:

(1) the statements made in the form were correct to the best of the prospective member's knowledge and belief;

(2) the prospective member would rely on his or her own decisions or advice received from external advisors when making a decision to become a member and to benefit from an MPVA loan;

(3) the prospective member was solely responsible for the decision to proceed and acknowledged that none of the Ark LLPs, the trustees of any Ark Scheme or the introducer had given the prospective member any advice in relation to whether or not to become a member, the term of the MPVA loan or whether or not the PRP was appropriate in his or her circumstances; and

(4) the prospective member understood that there was no entitlement under the PRP to unauthorised payments as defined in the FA 2004 and the prospective member would not knowingly carry out any action which could lead to any such unauthorised payments.

248. The standard form application form also invited the prospective member to indicate the term and amount (expressed as a percentage of the relevant prospective member's pension fund overall) of the MPVA loan which he or she wished to take and contained a statement to the effect that the Ark Scheme which the prospective member would join would be "determined by the administrators once an appropriate level of MPVA [loan] is identified". The form also offered the prospective member the opportunity to indicate the nature of the investments which he or she wished his or her Ark Scheme to make with the portion of its assets that did not comprise MPVA loans.

249. The part of the standard form application form which was executed by the introducer contained statements to the effect that, inter alia:

(1) the introducer had provided the prospective member with the full details of the PRP;

(2) the introducer had covered each point in the client protection form with the prospective member;

(3) the introducer had supplied the prospective member with the latest available version of all relevant literature; and

(4) where the prospective member was proposing to transfer his or her existing pension arrangement into an Ark Scheme, the introducer had advised the prospective member to seek independent pensions advice.

250. Turning to the actual application form which was executed by Ms Oades and I&S Limited when Ms Oades applied to join an Ark Scheme, that had been executed by Ms Oades on 12 August 2010. The application form was in the standard form described in paragraphs 247 to

249 above. The introducer declaration, which had been completed with Mr Isles's details, had not been signed by Mr Isles and a manuscript note at the bottom of the page containing the declaration indicated that the reason for the lack of signature was that Mr Isles was away on holiday at the time when the form had been completed.

The membership information form

251. The membership information form was dated 27 March 2011. It contained statements to the effect that all benefits provided under the PRP would be consistent with the Respondents' requirements.

The information leaflet

252. The information leaflet prepared by Ark BC LLP in relation to the PRP set out how the PRP was intended to operate, using example figures, and contained statements to the effect that:

(1) all references to pensions, tax or legislation and any comments or statements reflected the understanding of Ark BC LLP; and

(2) neither Ark BC LLP nor the trustees of the Ark Schemes could provide the prospective member with advice and, if the prospective member needed advice on pensions, he or she should contact a suitably qualified pensions adviser.

253. Then, in a section headed "Important Notice" at the end of the leaflet, the leaflet stated that:

(1) the information set out in the leaflet was general in nature;

(2) the law and tax implications were believed to be correct at the time when the leaflet was produced;

(3) no responsibility was accepted for any inaccuracies; and

(4) Ark BC LLP recommended the prospective member to seek appropriate pensions advice in order to clarify the suitability of becoming a member of an Ark Scheme.

The MPVA Agreements

254. Each MPVA Agreement contained warranties from Ms Oades to the effect that:

(1) she was responsible for any tax arising out of or in connection with the MPVA Agreement;

(2) she had not received any advice from the trustee or any person acting for or on behalf of the trustee; and

(3) she acknowledged that the trustee had drawn her attention to the desirability of taking appropriate financial advice and to the fact that neither the MPVA Agreement nor the Lancaster Scheme was a product regulated by the Financial Services Authority.

The correspondence

255. The DB contained a letter to Ms Oades from Penvest Limited dated 20 May 2009 in which Penvest Limited:

(1) noted that Ms Oades had enquired as to whether or not it might be possible for her to obtain access to some of her pension funds in the NHS pension scheme in order to purchase a home as she had invested all of her spare cash in two of her businesses;

(2) advised her that, as regards part of her pension monies, it would be possible for her to do this indirectly by transferring some of her NHS pension fund into a small self-

administered scheme and then procuring that that scheme lent money to her company so that the company could then repay some of the monies which she had lent to it; and

(3) made it clear that only a small part of her overall pension fund could be accessed in this way.

256. The DB contained a letter from Mr Isles to the Respondents dated 26 August 2014 in which Mr Isles informed the Respondents that:

(1) Ms Oades had not received an unauthorised payment because the MPVA loans which she had received had come from "an unconnected structure";

(2) *Faulds* was not a tax case and therefore no reliance could be placed on it by the Respondents;

(3) Ms Oades had corresponded directly with Ms Kowalczyk in relation to her participation in the PRP;

(4) Ms Oades had taken advice from him and from an independent financial adviser in relation to her possible participation in the PRP;

(5) both he and Penvest Limited had advised Ms Oades not to transfer her pension monies out of the NHS pension scheme because remaining in the NHS pension scheme would have been more beneficial for her in the long term but Ms Oades was in a desperate financial situation. He said that "she was facing bankruptcy from a business venture and without these monies should [sic] would have certainly gone bankrupt, lost her home and it [sic] would have been destitute";

(6) by participating in the PRP, Ms Oades was able to settle her immediate debts and continue in employment and, as a result, she was now in a position to earn and pay significant taxes; and

(7) Ms Oades was aware that all tax structures could be challenged by the Respondents but, "after reviewing the tax Barristers [sic] advice given on the structure before the onset [sic] together with confirmation that the [independent financial adviser] had taken out a complete review of the structure. [sic] She felt reasonably secure that this was a valid investment".

The witness evidence

257. The witness evidence in relation to this question was provided by Mr Isles and Ms Oades.

258. The testimony of Mr Isles was as follows:

(1) he said that he and his firm, I&S Limited, had provided accountancy services to Ms Oades at all times material to Ms Oades's appeals;

(2) in that capacity, prior to his speaking to Ms Oades about joining an Ark Scheme, he had seen a copy of a letter to Ms Oades from Penvest Limited which explained how Ms Oades might be able to access some of her NHS pension monies early by transferring those monies into a small self-administered scheme which could then lend to Ms Oades's company but he had advised Ms Oades not to do that given the security of her NHS pension;

(3) he said that he did not consider himself to be an introducer of members to the Ark Schemes but he accepted that:

(a) he had made certain individuals, including Ms Oades, aware of the existence of the Ark Schemes and the ability to access pension monies which the PRP offered; and

(b) he did receive commissions from the Ark LLPs for doing so although, in the event, he had either returned all of those commissions to the individuals in question or given those commissions to charity;

(4) he said that he had advised all the individuals whom he had made aware of the Ark Schemes to obtain advice from an independent financial adviser. He was not an independent financial adviser himself and had not advised Ms Oades to become a member of an Ark Scheme or participate in the PRP. However, as noted in paragraph 258(2) above, he had advised Ms Oades in general that it would be a bad idea for her to transfer her pension monies out of the NHS pension scheme; and

(5) he said that, although he had told the Respondents in his letter of 26 August 2014 that Ms Oades had seen the advice of a tax barrister before entering into the PRP (see paragraph 256(7) above), he now accepted that this could not have been the case because no advice from a tax barrister had been received until Ms Hardy provided the Counsel's Opinion to Mr Tweedley and Mr Fowler in March 2011 and Ms Oades entered into the PRP some time before that, in 2010.

259. The testimony of Ms Oades was as follows:

(1) she said that, prior to her hearing about the PRP, she had taken the advice of Penvest Limited, an independent financial adviser, in relation to possible ways that she might gain access to her pension monies but the advice of Penvest Limited was that she would be able to access only a small part of her overall pension fund in this way and that, in any case, it would be foolish for her to transfer monies out of the NHS pension scheme in order to do so;

(2) she stressed that, although she was familiar with complex decision-making and regulations in the NHS context, she was entirely unfamiliar with the rules and regulations in relation to tax and pensions. However, she was aware that there were rules imposing restrictions on the ability to access pension monies prior to the age of fifty-five. In addition, she agreed with the general proposition that the less one knew about an area, the more important it was to seek expert advice in relation to that area. She said that that was why she had contacted Penvest Limited in the first instance;

(3) she explained that, after she had received the negative advice from Penvest Limited, she had decided not to pursue the possibility of accessing her pension monies any further but then, in 2010, her business ran into more serious difficulties and, in or around August 2010, she had become aware, through Mr Isles, of the PRP. She saw the PRP as something very different from the proposal that she had been considering with Penvest Limited because, the latter proposal involved her accessing her own pension monies indirectly whereas, under the PRP, she would receive a loan from an unrelated pension fund and would therefore not be doing so;

(4) she said that she had been provided with information and various forms to complete in order to become a member of the Portman Scheme. That scheme had been registered with the Respondents and she considered that to confer a critical badge of authenticity on the arrangement. Had the scheme not been registered with the Respondents, she would not have considered applying for membership. In addition, the information with which she had been provided indicated to her that all benefits that she received under the scheme would be subject to, and consistent with, the Respondents' requirements;

(5) in her witness statement, she said that credit checks had been carried out before her application to become a member of the Portman Scheme had been accepted but, at the hearing, she conceded that she wasn't sure that that was the case. She said at that stage that she simply couldn't remember whether credit checks were or were not carried out;

(6) she explained that, at the time when she applied to become a member of the Portman Scheme, the Lancaster Scheme had notified her that it would consider granting her an MPVA loan. The Lancaster Scheme was also registered with the Respondents and therefore, as had been the case with the Portman Scheme, she relied on that fact in being prepared to deal with the trustee of the Lancaster Scheme. Whether or not an MPVA loan was granted was solely a matter for the discretion of the trustee of the Lancaster Scheme;

(7) she said that her understanding was that the four MPVA loans which she had received had no connection with the Portman Scheme and were not connected in any way with the pension assets held in the Portman Scheme. She therefore had had no reason to be concerned about the legitimacy or legality of the MPVA loans until Dalriada had written to her after its appointment;

(8) she said that she had never heard of Ms Hardy but she was sure that, when she was completing the application form to become a member of the Portman Scheme, she had been shown a letter of advice or a statement from a tax barrister. She could not explain why the other evidence in the proceedings suggested that no such opinion had been obtained prior to her becoming a member of the Portman Scheme;

(9) when she was asked why her grounds of appeal had said that, in making her application to become a member of the Portman Scheme, she had relied on the statement in the membership information form dated 27 March 2011 to the effect that all benefits provided under the PRP would be consistent with the Respondents' requirements, when she had made her application well before the date of that membership information form, she accepted that she could not have read that precise membership information form. However, she asserted that the information with which she had been provided by Ark BC LLP at the time when she applied looked very similar to that contained in the relevant membership information form;

(10) she accepted that:

(a) the information leaflet from Ark BC LLP described in paragraphs 252 and 253 above made it clear that the PRP involved complex tax and pensions law issues as well as investment risk and that simply relying on the fact that the Ark Schemes were registered with the Respondents did not amount to careful due diligence;

(b) the statements made in her declaration in the application form in relation to her taking responsibility for entering into the PRP herself and not relying on advice from any of the Ark LLPs, the trustees of the Ark Schemes or Mr Isles meant just that - she was taking responsibility herself for her decision to enter into the PRP and was not relying on the advice of any of those persons in that context; and

(c) without taking independent professional advice, it was difficult to decipher the statement made in her declaration in the application form to the effect that the PRP did not involve the making of unauthorised payments. When she was asked whether it was unreasonable for her to rely on that statement without understanding it, she said that she didn't know;

(11) she confirmed that she had not taken independent professional advice in relation to her decision to transfer her pension monies from the NHS pension scheme to the Portman Scheme. However, she conceded that she had been advised by both Penvest Limited and Mr Isles not to transfer her pension monies out of the NHS pension scheme;

(12) she said that, despite the statement to the contrary made by Mr Isles in his letter to the Respondents dated 26 August 2014, at the time she entered into the PRP, she had had no idea that the PRP might be challenged by the Respondents. It had come as a great shock to her subsequently when it was; and

(13) she said that she could not recall whether she had read the warranties in the MPVA Agreements described in paragraph 254 above but, even if she had, those warranties would not have given her cause for concern as she didn't think that any tax liabilities could arise by virtue of the MPVA loans. When she was asked whether it would have been reasonable to take independent advice before entering into binding agreements containing those warranties, she said that she didn't know.

The submissions of the parties

260. In relation to the facts which are relevant to the question of whether or not, in all the circumstances of the case, it would not be just and reasonable for Ms Oades to be liable to the unauthorised payments surcharge, Ms Sheldon submitted that, although, in the course of her cross-examination, Ms Oades had not always been as clear on the detail of what she had read as she might have been:

(1) she had consistently maintained that she had read the documentation;

(2) it had been more than 10 years since the events in question; and

(3) the decision in *Gestmin* showed that written evidence was to be preferred to oral evidence in determining facts.

As such, it should be assumed that Ms Oades had read the information set out in the documentation with which she had been provided and relied on the contents of that documentation.

261. In deciding to participate in the PRP, Ms Oades had clearly relied on a number of statements which were set out in the material provided to her. For example, the declaration included in her membership application form contained statements to the effect that she understood that:

(1) there was no entitlement to unauthorised payments and she would not knowingly carry out any action which could lead to unauthorised payments; and

(2) the trustee would not permit any investments or payments which could cause the Portman Scheme to lose its registered status.

262. In addition, although Ms Oades had clearly been wrong to refer in her grounds of appeal to having read the membership information form dated 27 March 2011, her testimony at the hearing was that she recalled seeing a similar notice. We should therefore proceed on the basis that, before applying to become a member, Ms Oades had received a notice from Ark BC LLP which said that the funds held in the Ark Schemes were held in accordance with the Respondents' requirements and the Ark Schemes were all registered with the Respondents.

263. In response, Ms Poots said that Ms Oades:

(1) had twice been advised not to transfer her pension monies from the NHS pension scheme into other pension schemes – once by Penvest Limited in 2009 and then again in the context of the PRP by Mr Isles;

(2) was aware that there were restrictions on accessing pension monies before the age of fifty-five;

(3) had accepted that she did not take any independent advice in connection with participating in the PRP or on the possibility of challenge by the Respondents despite the fact that the application she had signed in order to join the Portman Scheme contained a declaration to that effect; and

(4) had testified that, prior to participating in the PRP, she had seen a favourable opinion from a tax barrister when all of the other evidence in the proceedings demonstrated that this could not conceivably have been the case.

The findings of fact

264. We would start by saying that we do not think that the decision in *Gestmin* is of any relevance in making our findings of fact in relation to this question. The issue which was being addressed in *Gestmin* concerned the weight which should be given to the recollections of a witness when those recollections differed from the contemporaneous written evidence. The decision does not mean that, where the contemporaneous written evidence contains statements which a witness cannot recall reading at the time, the relevant court or tribunal should simply accept that the witness did read the relevant statements and relied on the contents of those statements. Accordingly, we do not think that it is safe to conclude that Ms Oades consciously relied on every single statement which was set out in her application form or in the other documents with which she was provided at the time when she became a member of the Portman Scheme. On the other hand, we do accept that Ms Oades would have taken some general comfort from the statements in those documents to the effect that the Ark Schemes were registered with the Respondents in concluding that the PRP would not give rise to problems under the rules relating to the early accessing of pension monies.

265. More specifically, on the basis of the evidence described in paragraphs 246 to 259 above, we find the following to be facts for the purposes of these proceedings:

(1) Ms Oades was twice advised not to transfer her pension monies from the NHS pension scheme into other pension schemes – once by Penvest Limited and then again in the context of the PRP by Mr Isles – see paragraphs 255, 256(5), 258(2), 258(4), 259(1) and 259(11) above;

(2) when she applied to become a participant in the PRP, Ms Oades:

(a) was unfamiliar with the rules and regulations in relation to pensions but was aware that there were rules imposing restrictions on the ability to access pension monies prior to the age of fifty-five – see paragraphs 259(2) above;

(b) considered that her involvement in the PRP would not give rise to difficulties under the rules preventing early access to pension monies because the MPVA loans which were to be made to her were coming from an Ark Scheme other than the one of which she was a member – see paragraphs 259(3) and 259(7) above;

(c) took comfort from the fact that the Ark Schemes were registered with the Respondents and the statement in the membership information form with which she was provided to the effect that all benefits which were to be provided under the PRP would be consistent with the Respondents' requirements - see paragraphs 251, 256(4), 259(4), 259(6) and 259(9) above;

(d) was advised to seek advice from an independent financial adviser and should not rely on the views expressed by the Ark LLPs, the trustees of any Ark Scheme or the introducer but did not do so – see paragraphs 247(2), 247(3), 249(4), 252(2), 253(4), 254(3), 258(4) and 259(11) above;

(e) did not take comfort from the statement made in her declaration in the application form to the effect that the PRP did not involve the making of unauthorised payments because, without taking that advice, that statement was impossible for her to understand – see paragraphs 247(4) and 259(10(c) above;

(f) did not see any favourable opinion concerning the structure from a tax barrister – see paragraphs 256(7), 258(5) and 259(8) above. Although Mr Isles said in his letter to the Respondents of 26 August 2014, and Ms Oades said in her evidence, that she had done so, no such opinion dating from before Ms Oades became a member of the Portman Scheme has been produced, Mr Tweedley admitted that no such opinion was obtained and Mr Isles conceded at the hearing that she could not have done. We have concluded that Ms Oades must be mistaken in thinking that she saw such an opinion – possibly because she has had sight of the Counsel's Opinion in the intervening period;

(g) was in serious financial difficulties – see paragraphs 256(5), 259(1) and 259(3) above; and

(h) was not subjected to credit checks – see paragraph 259(5) above. Although Ms Oades said in her witness statement that credit checks had been carried out, she conceded at the hearing that she was not entirely sure that was the case and, in any event, it is an agreed fact that no credit checks were carried out in connection with the PRP and Mr Tweedley confirmed that to be the case at the hearing;

(3) at the time of executing the MPVA Agreements, the terms of the warranties in those agreements did not give rise to any concerns for Ms Oades, either because Ms Oades did not read those warranties or because Ms Oades considered, without taking advice on the point, that no tax liabilities could arise as a result of the MPVA loans – see paragraph 259(13) above; and

(4) Ms Oades accepts the following propositions to be true:

(a) the less one knows about an area, the more important it is to seek expert advice in relation to that area – see paragraph 259(2) above;

(b) in the light of the fact that the relevant rules are complex and the fact that the leaflet which was provided to her by Ark BC LLP prior to her applying to become a participant in the PRP stated that the PRP involved complex tax and pensions law issues, relying on the fact that the Ark Schemes were registered with the Respondents did not amount to careful due diligence - see paragraph 259(10)(a) above; and

(c) she should have taken advice from an independent financial adviser before participating in the PRP – see paragraphs 259(10(c) and 259(13) above. Although Ms Oades replied "I don't know" to each of those propositions, we have interpreted that response as indicating her acceptance of them.

THE LAW

FAULDS

Introduction

266. These proceedings are somewhat unusual because, as noted in paragraphs 61 to 65 above, the circumstances which we have been asked to consider have previously been the subject of proceedings in the High Court. In *Faulds*, Bean J (as he then was) held, inter alia, that the making of an MPVA loan by a lending Ark Scheme involved the use of the assets of the lending Ark Scheme indirectly to provide a benefit to those members of the lending Ark Scheme who received a loan from another Ark Scheme and therefore fell within Sections 160(2)(b) and 173 – see *Faulds* at paragraphs [46] to [57]. In other words, "[the] PRP, as its name suggests, was established for the purpose of reciprocation" and therefore "when scheme Y (of which A is a member) makes an MPVA payment to B (the member of scheme Z), it does so in the sure and certain hope that a corresponding payment is going to be made by scheme Z to A; the payment to B "is used to provide" a benefit to A; and, on receiving that benefit in the form of the loan from scheme Z, A is to be treated as having received an unauthorised payment" (see *Faulds* at paragraphs [47] and [48]). This meant that each MPVA loan was outside the powers of the trustee of the lending Ark Scheme and was therefore void in equity. (Bean J went on to hold that each MPVA loan was outside the powers of the lending Ark Scheme for other reasons too, but those other reasons are not material to the present proceedings).

267. The conclusion set out above was predicated on the assumption that, as a matter of fact, there was no member-to-member matching between the person to whom the lending Ark Scheme advanced an MPVA loan and a member or members of the lending Ark Scheme. The decision referred to the fact that that was the evidence of Mr Tweedley and Mr Fowler (see *Faulds* at paragraphs [13] and [39], respectively) and it is apparent from the rest of the decision that that evidence was accepted by both parties and the Judge – see *Faulds* at paragraphs [36], [39], [43] and [48].

Points on which the parties agree

268. It is fair to say that the parties are not entirely aligned on the impact which the decision in *Faulds* should have on the present proceedings.

269. Before we elaborate on the points on which they disagree, we think that it is helpful to set out those points on which there is a common understanding. Those are as follows:

(1) notwithstanding the decision of Bean J in *Faulds*, the Respondents are not barred, by reason of the doctrine of issue estoppel, from adopting the Primary Case Preferred Analysis or the Primary Case Alternative Analysis. That is because they were not party to the proceedings in *Faulds* and did not agree to be bound by the decision (see *Faulds* at paragraph [9]). In addition, as noted in paragraph 65 above, following the decision, no application was made under Rule 19.8A(2)(b) of the CPR for the decision to bind the Respondents unless they applied under Rule 19.8(b) of the CPR to set aside or vary the order of the High Court. As such, the Respondents are free to advocate those analyses in the present proceedings;

(2) however, as a decision of the High Court, the ratio of the decision in *Faulds* is, of course, binding on us in the same way as is the ratio of any decision of a superior court or tribunal;

(3) having said that, we are not bound by any conclusion reached in *Faulds* which was not part of the ratio in that case;

(4) in addition, as is the case with any precedent, we are not bound to follow *Faulds* to the extent that the facts in the present proceedings are distinguishable from the facts in

Faulds. That may seem like a peculiar thing to say, given that Bean J in *Faulds* was addressing precisely the same circumstances as we are addressing in the present proceedings. However, we are not bound to reach the same conclusions of fact in the present proceedings as Bean J reached in *Faulds*. For example, when it comes to the crucial issue of whether or not there was member-to-member matching, it is open to us to reach a different conclusion from the one reached in *Faulds*, particularly if we conclude that the evidence which has been presented to us is different from the evidence which was presented to Bean J (and, as it happens, we believe that the evidence is very different and we have reached a different conclusion – see paragraphs 109 to 207 above and, in particular, paragraph 206 above);

(5) the advance of a sum of money by way of loan is a "payment" for the purposes of Part 4 of the FA 2004. Although Bean J did not say expressly that he was of that view, he did record at paragraph [30] in *Faulds* a submission made by counsel to Dalriada to that effect and it is implicit in the decision – see, in particular, his observations at paragraph [54] - that he shared that view. Moreover, that view is supported by the fact that:

(a) the definition of "payment" in Section 161(2) is inclusive and not exhaustive; and

(b) Sections 175 and 179 include an "authorised employer loan" as one of the categories of "authorised employer payments";

(6) although Section 173 is stated to apply to a benefit "other than a payment" and the making of an MPVA loan is a "payment", that does not mean that the benefit of receiving an MPVA loan is automatically outside the section. Section 279(2) provides that "[references] to payments made or benefits provided by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme". Thus, viewed in context, the words "other than a payment" in Section 173 must mean "other than a payment from the relevant member's scheme" – see *Faulds* at paragraph [54]. Consequently, where a member of an Ark Scheme received an MPVA loan from another Ark Scheme, the fact that the benefit of receiving that MPVA loan amounted to the receipt of a "payment" by the member in question did not mean that that benefit fell outside Sections 160(2)(b) and 173; and

(7) the MPVA loans which were made to the members of the various Ark Schemes do not fall within any of the categories of "authorised member payments" which are set out in Section 164. Again, it is implicit in the decision in *Faulds* that Bean J considered that to be the case – see *Faulds* at paragraph [31].

270. We agree with each of the propositions set out in paragraph 269 above for the reasons set out in those paragraphs.

Impact of the MPVA loans' being void in equity

271. The parties are also agreed that the fact that, in consequence of the MPVA loans' being void in equity, they may be recovered from the borrowing members does not mean that the MPVA loans should be disregarded when considering the application of Section 160(2). They say that that is because of the conclusion reached by the Court of Appeal in *Clark v The Commissioners for Her Majesty's Revenue and Customs* [2020] EWCA Civ 204 ("*Clark CA*") to the effect that a payment made in breach of trust still amounted to a "payment" for the purposes of Section 160(2)(a) – see *Clark CA* at paragraphs [36] to [86]. In their view:

(1) the decision in *Clark CA* is directly applicable in circumstances where what is being considered is whether a "payment" has been made to or in respect of a member for the purposes of Section 160(2)(a); and

(2) the reasoning in *Clark CA* is equally applicable in circumstances where what is being considered is whether the assets of a pension scheme have been used to provide a "benefit" for a member for the purposes of Sections 160(2)(b) and 173.

272. We agree with the proposition set out in paragraph 271(1) above. In these proceedings, where we are addressing the question of whether a "payment" has been made to or in respect of a member for the purposes of Section 160(2)(a), that is identical to the question which was addressed in *Clark CA* – namely, whether the section should apply on the basis that a payment has been made when the payment is void in equity and is subject to a resulting trust in favour of the paying scheme.

273. However, we consider that the potential application of the decision in *Clark CA* in the context of Sections 160(2)(b) and 173 is much more nuanced.

274. That is for essentially two reasons, as follows:

(1) first, the question which is in issue in the context of Sections 160(2)(b) and 173 is not whether there has been a payment by the relevant Ark Scheme to or in respect of the relevant borrowing member ("A") but instead whether there has been the use of the assets of A's Ark Scheme to provide A with a benefit. Although that benefit – which is the MPVA loan made to A by the Ark Scheme of the member who borrowed from A's Ark Scheme ("B") – happens to be a payment (namely the advance of the MPVA loan by B's Ark Scheme to A), the issue we are addressing is not whether A's Ark Scheme has made a payment to or in respect of A but instead whether A's Ark Scheme has used its assets to provide A with a benefit and it seems to us that the word "benefit" raises slightly different considerations from the word "payment". That is because the word "benefit" is arguably more focused on the substance of the transaction which has occurred than on the form of that transaction. Putting it another way, a "payment" remains a "payment" even if, when it is received, the recipient is subject to an equitable obligation to restore the payment (and the profits which have been derived from the payment) to the scheme from which it came whereas there is arguably no "benefit" to a recipient from a payment if, when the payment is received, the recipient is subject to an equitable obligation to restore the payment (and the profits which have been derived from the payment) to the scheme from which it came; and

(2) secondly, it is worth noting that, for the purposes of considering the application of Sections 160(2)(b) and 173, there are two distinct MPVA loans which need to be considered. There is the MPVA loan made by A's Ark Scheme to B – which is the "use" of the assets of A's Ark Scheme indirectly to provide the benefit to A - and there is also the MPVA loan made by B's Ark Scheme to A – which is the "benefit" derived by A from that "use". It seems to us that, when considering the application of Sections 160(2)(b) and 173 in the light of the decision in *Clark CA*, it is the second of those two MPVA loans which is the relevant one.

That is because, although it is not the case on the present facts, it is possible to conceive of circumstances where the assets of a member's scheme are used improperly to give rise to a benefit for the member but the benefit derived by the member as a result of that improper use (in the form of a loan from another scheme) involves no such impropriety by the other scheme. In those circumstances, the borrower would not necessarily be obliged to repay the loan which he or she had received from the other scheme. As it

happens, that distinction is of no moment in the present case because the decision in *Faulds* means that both MPVA loans which we are considering in this context – the MPVA loan which involved the "use" of the assets of A's Ark Scheme and the MPVA loan which involved the "benefit" received by A - were made in breach of trust but, in principle, it is important to keep that distinction in mind in considering whether, in the light of the decision in *Clark CA*, A has received a benefit falling within Sections 160(2)(b) and 173.

275. These two features suggest to us that it is not entirely clear that the reasoning adopted by the Court of Appeal in *Clark CA* should necessarily be extended to the construction and application of the deemed UMP regime in Sections 160(2)(b) and 173. Taking the two points into account, the question which we need to address is whether the fact that A has an obligation to account to B's Ark Scheme for the MPVA loan advanced by B's Ark Scheme to A because that loan was void in equity means that A has not obtained a "benefit" from the use of the assets of A's Ark Scheme indirectly to provide that MPVA loan.

276. We can see how it might be said that no such "benefit" has arisen if A is under an obligation to pay to B's Ark Scheme the amount of the MPVA loan so advanced (and the profits that have been derived from that MPVA loan) because the MPVA loan was made to A by B's Ark Scheme in breach of trust. However, on balance, we are inclined to agree with the parties that, on the basis of the reasoning in *Clark CA*, A has obtained a "benefit" by reason of the MPVA loan made to A by B's Ark Scheme even though that MPVA loan was void in equity. We say that because:

(1) Sections 160(2)(b) and 173 are designed to prevent the use of the assets of a pension scheme to provide a benefit to its members other than an authorised payment from the pension scheme itself. Taking that purpose into account, it would be odd if an MPVA loan made to A by B's Ark Scheme which:

(a) has been held to be void in equity because it was made by B's Ark Scheme in order indirectly to provide a benefit to B; and

(b) has been provided because A's Ark Scheme has made an MPVA loan which has also been held to be void in equity because it was made by A's Ark Scheme in order indirectly to provide a benefit to A,

were to fall outside the unauthorised payments charge under those provisions on the basis that the very acts which made the MPVA loan by B's Ark Scheme to A and the MPVA loan by A's Ark Scheme to B void in equity meant that no "benefit" arose to A.

A similar point was made by Henderson LJ in *Clark CA* at paragraphs [41] and [62] in relation to the unauthorised payment in that case. In effect, the relevant charge to tax becomes self-defeating if it is prevented from applying where the very act which is intended to give rise to the charge falls to be disregarded because it is void in equity. As Henderson LJ put it in *Clark CA* at paragraph [41]:

"In such a case, there is surely every reason why he should be liable to the charge to tax on unauthorised member payments, and the charge to tax would be self-defeating in many cases where it is most needed were his argument on this appeal to prevail".

Putting this another way, the primary reason why each MPVA loan was held to be void in equity in *Faulds* was that it had been made in order to provide a benefit to a member of the lending Ark Scheme and therefore fell within Sections 160(2)(b) and 173. (There were other reasons why each MPVA loan was held to be void in equity in *Faulds* but that was the primary reason). It would therefore be circular to conclude that Sections

160(2)(b) and 173 could not apply because, by virtue of their application, no benefit arose to the member of the lending Ark Scheme;

(2) in addition, although the use of the assets of A's Ark Scheme to provide a benefit to A in a form other than an authorised payment by A's Ark Scheme and the use of the assets of B's Ark Scheme to provide a benefit to B in a form other than an authorised payment by B's Ark Scheme amounted to breaches of trust by those schemes and were therefore void in equity:

(a) if the amount advanced to A by B's Ark Scheme were to pass to a bona fide purchaser without notice, then the bona fide purchaser would be able to retain the monies which had been advanced to A by B's Ark Scheme; and

(b) it is possible that A might never be in a position to repay the amount advanced to A by B's Ark Scheme. For example, A might become bankrupt before he or she was able to account to B's Ark Scheme for the amount advanced.

It is therefore unrealistic to say that the sum of money which was advanced to A by B's Ark Scheme by way of an MPVA loan was necessarily recoverable from A in all circumstances and that A therefore did not obtain a "benefit" from that advance – see *Clark CA* at paragraph [45];

(3) A obtained the benefit of the MPVA loan from B's Ark Scheme on the day that that MPVA loan was advanced and has had the unfettered use of that money since that date without so far having had to repay it. Viewing the transaction which has occurred from the perspective of a practical person of business and not an equity lawyer versed in trust law, that can fairly be described as a "benefit" for A – see *Clark CA* at paragraphs [51] and [64]; and

(4) the question of whether A has obtained a "benefit" should be determined by reference to the facts as they stand at present – when the amount advanced to A by B's Ark Scheme by way of MPVA loan has not been repaid – and not by reference to future steps which A might take to restore the relevant advance to B's Ark Scheme. As Henderson LJ put it in *Clark CA* at paragraph [79]:

"The validity and amount of an assessment to tax should normally be determined by reference to the facts as they stood at the date of assessment, not by reference to steps later taken by the taxpayer in an effort to retrieve the situation which led to the charge being incurred. At least in the context of unauthorised payments made to members of pension schemes which have enjoyed generous fiscal benefits, I consider that charges to tax under provisions such as s 600 of ICTA 1988, and s 208 of FA 2004, were clearly intended to have a strong deterrent effect, as well as to preserve the integrity of the pension fund. These objectives would be significantly compromised if it were open to the taxpayer, after the conditions for liability to the charge have arisen and an assessment to tax has been made, to escape liability by restoring the relevant assets to the fund."

277. For the above reasons, we are inclined to agree with the parties that the fact that the MPVA loans in this case were void in equity does not mean that the borrower under each MPVA loan did not obtain a "benefit" for the purposes of Sections 160(2)(b) and 173. However, we think that the impact of the decision in *Clark CA* in that particular context is not as straightforward and obvious as the parties have assumed.

A potential double charge

Introduction

278. The parties are also agreed that it is not possible for a member to be liable to an unauthorised payments charge both pursuant to Section 160(2)(a) and pursuant to Sections

160(2)(b) and 173 because, where Section 160(2)(a) applies, that necessarily means that the exclusion in Section 173 for "payments" comes into play.

279. We regret to say that we do not agree with that conclusion. In our view, the two provisions are both capable of applying to the same member on the facts in this case for the simple reason that Section 160(2)(a) is potentially engaged by virtue of the MPVA loan made by the Ark Scheme of the member in question to a member of another Ark Scheme whereas Sections 160(2)(b) and 173 are potentially engaged by virtue of the benefit derived by the member in question from the MPVA loan made to the member in question by an Ark Scheme of which he or she is not a member.

The parties' submissions

280. Both Ms Poots and Mr Jones reached the view which they did for essentially the same reason although they put it slightly differently.

281. Mr Jones said that, in circumstances where Section 160(2)(a) has applied to an MPVA loan made by A's Ark Scheme to B, because the MPVA loan has been made "in respect of" A:

> (1) the benefit arising to A from the corresponding MPVA loan made to A by B's Ark Scheme has arisen as a result of that payment by A's Ark Scheme in respect of A; and
>
> (2) that activates the exclusion for "payments" in Section 173 because the use of the assets of A's Ark Scheme which generated the benefit to A was a payment by A's Ark Scheme in respect of A.

282. Ms Poots said that, given that Sections 160(2)(b) and 173 were part of the same code as Section 160(2)(a), one would not expect the same event to give rise to an unauthorised payment both pursuant to Sections 160(2)(b) and 173 and pursuant to Section 160(2)(a). In other words, if A's Ark Scheme made an MPVA loan to B and that MPVA loan to B was "in respect of" A so that it was to be regarded as an actual UMP by A's Ark Scheme to A, it would be very surprising to find that the matching MPVA loan made by B's Ark Scheme to A in consequence of the MPVA loan made by A's Ark Scheme to B gave rise to a deemed UMP by A's Ark Scheme to A.

283. She expanded on that proposition as follows. The focus of the language used in Sections 160(2)(a), 160(2)(b) and 208 was on the making of the payment in question – whether actual or deemed - by the relevant pension scheme, as opposed to the receipt of the payment in question by the member of the relevant pension scheme. That same focus could be seen in the way in which Section 173 operated in that, although the charge arising pursuant to that section was triggered by the receipt of a benefit, the receipt of the benefit was said to result in the relevant pension scheme's being deemed to have made a payment (in contrast to its having actually made a payment) and it was that deemed payment which then triggered the charge under Section 208. Ms Poots said that this demonstrated that Sections 160(2)(b) and 173 were simply back-up provisions which deemed the pension fund to have made an unauthorised payment to a member in circumstances where it had not actually made an unauthorised payment to or in respect of the member and, as such, those provisions could not apply where the pension fund in question had actually made an unauthorised payment to or in respect of the member.

284. Ms Poots said that it followed from this reasoning that the exclusion in Section 173 for "payments" needed to be read as qualifying not just the word "benefit" but instead more widely as qualifying the whole phrase "used to provide a benefit". On that basis, the relevant provision should be construed as if it read as follows:

"A registered pension scheme is to be treated as having made an unauthorised payment to a person who is or has been a member of the pension scheme if an asset held for the purposes of the pension scheme is used to provide a benefit other than where the use of the asset held for the purposes of the pension scheme to provide a benefit is an actual unauthorised payment made to or in respect of the member".

She said that, reading the provision in that way, the section should not be treated as applying where the use of the assets of the pension scheme involved an actual UMP by the pension scheme whose assets were being used in respect of the member in question.

Analysis

285. With the greatest of respect to two such able counsel, and with considerable regret because of the dire financial consequences to which our conclusion inexorably leads, we do not agree with the construction of the relevant provision which both Mr Jones and Ms Poots have adopted. In our view, it involves reading the words "(other than a payment)" as if they qualified the word "used" and not, as we believe to be the correct construction, as if they qualified the word "benefit" and, once one reads the provision in that way, the exclusion does not apply on these facts.

286. We can see no basis in the language of Section 173 for adopting a construction which leads to the application of the exclusion for "payments" to the word "used" as opposed to the word "benefit", given the way that the provision is set out. The fact that the legislation is focused on payments by the relevant pension scheme as opposed to receipts by the member of the relevant pension scheme does not seem to us to advance the position in this respect. One still needs to identify the circumstances in which a benefit received by the member does not give rise to a deemed UMP by the relevant pension scheme and the legislation makes it clear that that is solely where the benefit received by the member is itself an actual payment by the relevant pension scheme. Moreover, to pick up on the point which was made by Ms Poots to the effect that the charge arising pursuant to Sections 160(2)(b) and 173 is only a back-up in circumstances where Section 160(2)(a) has not applied, whilst we do not disagree with that statement as a general proposition, it is not entirely surprising to us that a scheme which sought to avoid falling within Section 160(2)(a) by ensuring that there was no direct payment by an Ark Scheme to a member of that Ark Scheme but which then failed to achieve that objective because the payment was held to be in respect of the member in question might then fall outside the scope of the language in Section 173 which was designed to avoid an overlap between the two different regimes.

287. We would elaborate on our conclusion as follows.

288. It is common ground – and we agree – that the word "payment" in the exclusion in Section 173 must mean a payment from the pension scheme of which the person receiving the payment is a member and not simply a payment from any source whatsoever. That is consistent with the language in Section 279(2) and is why Sections 160(2)(b) and 173 were held to apply on the facts in *Faulds* – see *Faulds* at paragraph [54]. That makes perfect sense in that the two parts of Section 160(2) can then be seen as operating symbiotically. Section 160(2)(a) captures payments made by a scheme to a member of the scheme and Sections 160(2)(b) and 173 capture benefits received by the member out of the use of the assets of the scheme other than benefits comprising payments made by the scheme to the member.

289. It follows that a benefit for A which takes the form of a payment from an Ark Scheme other than A's own Ark Scheme is not an excluded benefit so far as Section 173 is concerned. It could hardly be an excluded benefit because, if it were, that would also prevent Sections 160(2)(b) and 173 from applying in circumstances where the payment made by A's Ark

Scheme which has led indirectly to the payment by B's Ark Scheme to A has fallen outside Section 160(2)(a) and that would be contrary both to the position of all of the parties in these proceedings and to the conclusion of Bean J in *Faulds.*

Faulds

290. The only way in which the parties' position in these proceedings could be rendered consistent with the decision in *Faulds* would be to say that, whilst the exclusion for payments in Section 173 did not apply in *Faulds* in the light of Bean J's conclusion to the effect that Section 160(2)(a) did not apply, that exclusion would have applied if Bean J had concluded that, on the contrary, Section 160(2)(a) did apply. However, that would necessarily entail explaining the conclusion in *Faulds* on the basis that the "payment" referred to in the exclusion in Section 173 does not extend to all payments made by the scheme of which the recipient of the benefit is a member but is instead limited to those payments made by that scheme which are "to or in respect of" that member and, hence, fall within Section 160(2)(a). There are two fundamental problems with that argument. The first, and less significant of the two, is that there is absolutely no indication in Bean J's decision that he was reading those additional words into the exclusion for payments in Section 173. Instead, Bean J merely referred in paragraph [54] of the decision to the fact that "the words in brackets "other than a payment" must mean "other than a payment from the scheme". However, there is a second, and more fundamental problem with the argument, which is that, even if those additional words were to be read into the exclusion, that would still not change the fact that the exclusion is qualifying the word "benefit" and not the word "used". It therefore follows inexorably that, unless the benefit which is received by the relevant member is itself a payment made by that member's own scheme, the exclusion is not engaged and that is regardless of whether Section 160(2)(a) has or has not applied to the use of the assets of that member's scheme which has given rise to the benefit. Putting this another way, the benefit received by each relevant member in this case was the MPVA loan made to that member by an Ark Scheme of which he or she was not a member. That was not a payment made by the Ark Scheme of which he or she was a member and so the exclusion cannot apply regardless of whether the MPVA loan made by the member's own Ark Scheme which has given rise to the MPVA loan to the member was made "to or in respect of" that member - and thus fallen within Section 160(2)(a) - or not made "to or in respect of" that member - and thus fallen outside Section 160(2)(a).

291. We have considered whether the language at the end of paragraph [54] in *Faulds* might be prayed in aid to support the proposition that the exclusion for payments in Section 173 necessarily applies where Section 160(2)(a) has applied. In that part of his decision, Bean J said the following:

"Everyone is agreed that, just as payments of cash by a scheme to its own members (unless within the categories of payment authorised by section 164) are unauthorised payments, so the provision of a free or subsidised benefit in kind such as accommodation or a car is caught by section 173. If I am right in my interpretation of the words "used to provide", it follows that the indirect provision of a free or subsidised flat or car is also within section 173; and it is inconceivable that Parliament would have wished the indirect provision of a payment (including a transfer of assets or transfer of money's worth: section 161(2)) to be treated in a more favourable way."

292. Focusing on the language used in the final part of that paragraph, we have considered whether it might be said that the use of the assets of A's Ark Scheme comprising the making of an MPVA loan to B which then gives rise to an MPVA loan made to A by B's Ark Scheme should fall to be regarded as an indirect payment by A's Ark scheme to A and therefore to amount to a payment falling within the exclusion for payments in Section 173. However, we think that that interpretation would be misconceived. It would involve:

(1) failing to distinguish between an indirect provision of a payment by A's Ark Scheme to A and an indirect payment by A's Ark Scheme to A; and

(2) turning the logic of Bean J on its head and using the reason given by Bean J as to why Sections 160(2)(b) and 173 ought to apply in a case where Section 160(2)(a) has not applied as the basis for concluding that the exclusion in Section 173 is engaged where Section 160(2)(a) has applied.

293. It would also involve ignoring the clear distinction which exists in the section between "use" and "benefit". When he referred to the "indirect provision of a payment" at the end of paragraph [54], Bean J was merely explaining why the indirect provision by A's Ark Scheme of the MPVA loan made by B's Ark Scheme to A ought to be treated in the same way as the indirect provision by A's Ark Scheme of a free or subsidised flat or car to A. He was not saying that the indirect provision by A's Ark Scheme of the MPVA loan made by B's Ark Scheme to A should be regarded as equating to an indirect payment by A's Ark Scheme to A. Indeed, had he been of that view, he would have held that the MPVA loan made by B's Ark Scheme to A was an indirect payment to A by A's Ark Scheme and therefore fell both within Section 160(2)(a) and within the exclusion for payments in Section 173. He did neither of those things.

294. In short, treating the MPVA loan made by B's Ark Scheme to A as an indirect payment by A's Ark Scheme to A for the purposes of applying the exclusion for payments in Section 173 would in fact be directly contrary to the reasoning of Bean J in *Faulds*. In that part of his decision, Bean J was explaining why the exclusion did not apply to prevent Section 173 from applying. If he had considered the MPVA loan made by B's Ark Scheme to A to be an indirect payment by A's Ark Scheme to A, he would have said so at that point as that would then have engaged Section 160(2)(a). On the contrary, he held that no such payment by A's Ark Scheme to A (whether direct or indirect) had been made and that was why Sections 160(2)(b) and 173 applied.

Conclusion

295. To summarise our conclusions on this crucial point:

(1) the trigger event for the charge for A pursuant to Section 160(2)(a) is the making of the MPVA loan by A's Ark Scheme to B whereas the trigger event for the charge for A pursuant to Sections 160(2)(b) and 173 is the MPVA loan made by B's Ark Scheme to A;

(2) the latter MPVA loan is not a payment by A's Ark Scheme and therefore does not fall within the exclusion for payments in Section 173;

(3) it is true that that MPVA loan arises as a result of the use of the assets of A's Ark Scheme to make an MPVA loan to B. However, that advance by A's Ark scheme to B is not the advance which constitutes the benefit received by A. Instead, it is the advance of the MPVA loan by B's Ark Scheme to A which constitutes that benefit; and

(4) there is a clear difference between the advance of the MPVA loan to B by A's Ark Scheme which constitutes the "use" of the assets of A's Ark Scheme and the "benefit" derived by A from the advance of the MPVA loan made to A by B's Ark Scheme. The structure of the regime is such as to create a dichotomy between the "use" of the assets of a scheme and the "benefit" derived from that "use". That dichotomy may also be seen in the language of Section 279(2), with its distinction between "payments" and "benefits". In the context of Section 173, the relevant dichotomy is reflected in the distinction between the "use" (which in this case, so far as A was concerned, was the

payment made to B by A's Ark Scheme) and the "benefit" (which, in this case, so far as A was concerned, was the payment made to A by B's Ark Scheme).

296. The soundness of that conclusion can be tested by comparing and contrasting the present facts against the paradigm scenario of a loan made by a scheme to one of its own members. In the latter case:

(1) the loan constitutes a payment by the scheme to the member and therefore falls within Section 160(2)(a); and

(2) correspondingly, as the loan is a payment made to the member by the member's own scheme, the exclusion in Section 173 applies to prevent the benefit of that loan from giving rise to a charge pursuant to Sections 160(2)(b) and 173.

In contrast, in the present case, the exclusion for payments in Section 173 does not operate because the loan made by the member's own scheme is not the loan which gives rise to the benefit for the member. In this case, there are two distinct loans. Section 160(2)(a) will still apply to the loan made by the member's own scheme as long as it can be said to be "in respect of" the member – it is, of course, not "to" the member - but that has no relevance to the question of whether the benefit of the loan which is made to the member by the other scheme falls within Sections 160(2)(b) and 173.

297. To conclude on this point, we think that, far from being successful in avoiding the application of Section 160(2) altogether, the PRP has exposed its participants to charges pursuant to both parts of the provision. We reach that conclusion with considerable reluctance but it seems to us to be inescapable, given the language used in the legislation. It is not entirely surprising to find that that disastrous outcome potentially arises from the PRP given that its *raison d'etre* was to avoid the charge for actual UMPs arising pursuant to Section 160(2)(a) so that, if it fails to do so, it would then fall outside the language in Section 173 which is intended to prevent actual UMPs from giving rise to deemed UMPs by excluding benefits which are actual UMPs from falling within the section.

Points on which the parties disagree

Introduction

298. Turning then to the matters relating to the decision in *Faulds* on which the parties do not agree, those are twofold.

Part of the ratio or not

299. The first area of disagreement in relation to *Faulds* is whether part of the ratio of the decision reached in the case was that the MPVA loans fell outside Section 160(2)(a).

300. Mr Jones points out that:

(1) although Dalriada did not rely on Section 160(2)(a) in its submissions in *Faulds*, the point was addressed by counsel for Mr Faulds, as recorded in paragraphs [39] and [40] of the decision;

(2) moreover, the point which Bean J was addressing in that part of his decision was whether the MPVA loans were unauthorised payments for the purposes of Section 160(2) as a whole; and

(3) in order for the MPVA loans not to be void on the ground that they were unauthorised payments, they needed to fall outside both parts of Section 160(2) and not simply Section 160(2)(b). Bean J had done just that in paragraph [46] of his decision when he agreed with counsel for Mr Faulds "that, looking at section 164 alone, the MPVA loan made from scheme Y to B (the member of scheme Z) is made neither "to" nor "in respect

of" any member of scheme Y. Similarly the reciprocal loan made back to A, the member of scheme Y, by scheme Z is made neither "to" nor "in respect of" any member of scheme Z."

301. Ms Poots disagrees. She is of the view that the decision in *Faulds* is not binding authority to the effect that the MPVA loans were not made "in respect of" any member of the lending Ark Scheme because:

(1) it was no part of Dalriada's case in *Faulds* that the payments fell within Section 160(2)(a). Instead, Dalriada's case was based exclusively on the fact that the MPVA loans were a benefit falling within Sections 160(2)(b) and 173. Thus, the point was not fully argued before Bean J; and

(2) although there were other issues addressed by Bean J in *Faulds*, the only issue which Bean J was considering in relation to Part 4 of the FA 2004 was whether the MPVA loans were void because they were unauthorised payments. He concluded that Sections 160(2)(b) and 173 were decisive in that regard. So, in relation to this issue, the ratio of his decision was that the MPVA loans were void because Sections 160(2)(b) and 173 applied.

302. In relation to this point, we prefer the submissions of Mr Jones. We think that it involves an overly-restricted reading of the decision in *Faulds* to say that the ratio of the decision on this issue was that the MPVA loans were unauthorised payments because they fell within Sections 160(2)(b) and 173 as opposed to saying that the ratio of the decision on this issue was that the MPVA loans were unauthorised payments because they fell outside Section 160(2)(a) but within Sections 160(2)(b) and 173. Reading paragraph [46] of the decision, it seems clear to us that the latter formulation was exactly what Bean J was deciding. Moreover, given that the key question which Bean J was considering was whether the MPVA loans were void in equity because they amounted to unauthorised payments, Bean J necessarily had to consider both parts of Section 160(2) and could not simply ignore Section 160(2)(a).

303. We should add that we are slightly perplexed by the Respondents' position on this point when taken together with their position in relation to the manner in which the two parts of Section 160(2) interact, as outlined in paragraphs 282 to 284 above. Along with the Appellants, the Respondents' position is that the MPVA loans cannot fall within Sections 160(2)(b) and 173 if they fall within Section 160(2)(a). That is why they rely on the application of Sections 160(2)(b) and 173 only for their Alternative Case and rely on Section 160(2)(a) for their two Primary Cases and why they submit that their Alternative Case is not engaged if one of their two Primary Cases succeeds. However, it is surely implicit in that position that Bean J can hardly have decided that the MPVA loans were unauthorised payments pursuant to Sections 160(2)(b) and 173 without also having decided that they were not unauthorised payments pursuant to Section 160(2)(a). Thus, on the Respondents' own construction of the exclusion in Section 173, it was impossible for Bean J to have concluded that Sections 160(2)(b) and 173 applied to the MPVA loans without first having decided that Section 160(2)(a) did not so apply.

304. Be that as it may, given the conclusion which we have reached in paragraphs 278 to 297 above to the effect that Sections 160(2)(b) and 173 can still be engaged regardless of whether or not Section 160(2)(a) has applied, that is not the reason why we have reached our conclusion on this point. Instead, we base that conclusion on our view that, taking into account paragraphs [39], [40] and [46] of *Faulds*, part of the ratio of that case was that the MPVA loans fell outside Section 160(2)(a).

Distinguishable on the facts or not

305. The second area of disagreement in relation to *Faulds* is whether the facts in the present proceedings are distinguishable from the facts found in *Faulds*.

306. Mr Jones submits that, regardless of whether or not we have been presented with more evidence in relation to the question of matching than was Bean J in *Faulds*, the evidence in relation to that question with which we have been presented shows that there was not intended to be any member-to-member matching of MPVA loans. He says that the purpose of the individuals who operated the PRP was simply to balance the overall values in each pair of matching Ark Schemes.

307. Ms Poots submits that the facts in the present proceedings are distinguishable from the facts in *Faulds* because:

(1) we have had the benefit of considerably more evidence and submissions in relation to the question of member-to-member matching than was made available to Bean J in *Faulds*; and

(2) that evidence – and, in particular, the Spreadsheets – demonstrates clearly that there was intended to be member-to-member matching and not simply an attempt to balance the overall values in each pair of matching Ark Schemes.

308. For the reasons set out in the section of our decision containing our findings of fact in relation to the question of matching – see paragraphs 109 to 207 above, and, in particular, paragraph 204 above - we prefer Ms Poots's submissions on this question.

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The submissions of the parties

Primary Case Preferred Analysis

309. Mr Jones accepted that, should we find as a fact, contrary to the facts found by Bean J in *Faulds*, that there was member-to-member matching in this case, then the Respondents were entitled to succeed in their Primary Case Preferred Analysis. Since we have made that finding of fact, we propose to say no more about the submissions of the parties in relation to the Primary Case Preferred Analysis.

Primary Case Alternative Analysis

Introduction

310. However, in case these appeals should go further, we should set out the submissions of Mr Jones and Ms Poots in relation to the Primary Case Alternative Analysis. By definition, that analysis is predicated on a finding of fact that member-to-member matching did not exist.

311. Before we set out the parties' respective submissions on this analysis, we need to provide a little more information about the calculation process which it involves. Ms Poots explained that the process identified by the Respondents for determining the extent to which each MPVA loan made by the lending Ark Scheme should be allocated to each member of that scheme under the Primary Case Alternative Analysis involved identifying, at any point in time, how much of the money held by the lending Ark Scheme and available for lending was attributable to each member of the lending Ark Scheme. In adopting that approach, the assumption was that the amount which each participant transferred into his or her Ark Scheme that then became available for lending by the relevant Ark Scheme was the same as the amount which that participant expected to be able to borrow. That assumption was implicit in the notice published by Ark BC LLP describing the PRP to which reference is made in paragraph 112(3) above. Moreover, in the vast majority of cases, the amount which the participant expected to be able to borrow was equal to 50% of the amount which the relevant participant transferred into his or her Ark Scheme and that would be the working assumption in applying the analysis in the absence of being displaced by specific evidence to the contrary.

312. Mr Jones submitted that there were six problems with the Primary Case Alternative Analysis.

No evidential basis

313. The first was that there was no evidential basis for the proposition that, when the trustee of the lending Ark Scheme made an MPVA loan, it did so with a view to benefiting the general body of members of the lending Ark Scheme as a whole. For instance, the reciprocal MPVA loan, when it was made, was not made to the general body of members as a whole, acting jointly and severally. Instead, each MPVA loan was made to a particular named individual. Even if it might be said that, had the PRP continue to run for its full term as originally planned, each of the members of the lending Ark Scheme would ultimately have received an individual MPVA loan from another Ark Scheme, there was no basis for saying in relation to any individual MPVA loan that that MPVA loan had been made in respect of all of the members of the lending Ark Scheme. A generalised intention to confer some sort of potential benefit on some unidentifiable members of a class was too remote and weak to satisfy the "in respect of" requirement.

314. Ms Poots disagreed. She said that the essence of the PRP was implicit in its title. It involved reciprocation. That was its whole point. As such, if we were to conclude that there was no member-to-member matching and an MPVA loan was not made with a specific individual member in mind, then that must mean that the MPVA loan was being advanced in respect of a wider range of members, those being the members of the lending Ark Scheme who expected to receive MPVA loans themselves as a result of the advance of the MPVA loan in question.

Method too vague and remote

315. Mr Jones's second problem with the Primary Case Alternative Analysis was that, even if an evidential basis for a general intention to benefit all of the members of the lending Ark Scheme did exist, the Respondents' approach was to identify the portion of the MPVA loan which had been made in respect of each member of the lending Ark Scheme by reference to the amount which was available for lending in relation to that particular member and that approach was too vague and remote to satisfy the "in respect of" requirement. For example, there might be members of the lending Ark Scheme who did not wish to borrow an MPVA loan at all or who wished to borrow less than 50% of the amounts which they had transferred into the lending Ark Scheme. The benefit on offer to the members of the lending Ark Scheme was very broad and unparticularised.

316. As regards this second point, Ms Poots said that, whilst it was true that no participant in the PRP was obliged to enter into an MPVA loan of any particular amount, and there might well be exceptions in a small number of cases as noted in paragraph 311 above, the essence of the PRP was that participants would be able to borrow 50% of the monies that they transferred into the arrangement. That was the whole aim of the PRP and what the vast majority of participants wanted. If a particular participant could show, by reference to the evidence, that he or she wanted to borrow only a smaller percentage of the monies which he or she transferred into the arrangement, then that smaller amount would be the amount which was taken into account both in calculating the aggregate amount available for lending by the relevant Ark Scheme and that participant's share of that aggregate amount.

317. In response, Mr Jones said that the very fact that some participants might have wanted to borrow less than 50% of the monies that they transferred into the arrangement cut right through the heart of the analysis because, once it was accepted that participants wished to borrow different percentages, then it was impossible to adopt the "one size fits all" approach which

was of the essence of the analysis. It would be necessary to ask each member of the lending Ark Scheme about his or her intentions as regards borrowing on each occasion that the lending Ark Scheme made an MPVA loan.

The need for specific identification

318. Mr Jones's third point, which was related to his first two points, was that the very essence of the language used in Section 160(2)(a) was that there needed to be a specific identifiable member or specific identifiable members of the lending Ark Scheme in respect of whom the relevant MPVA loan had been made. Simply allocating the MPVA loan in question to all of the members of the lending Ark Scheme was too crude and imprecise to reach the standard of specificity which the language in Section 160(2)(a) required. It would result in certain members of the lending Ark Scheme paying a disproportionate amount of tax.

319. Ms Poots said that there was nothing crude or imprecise in the way that the method of calculation operated. It was entirely appropriate to treat the amount which each participant wished to borrow upon entering into the arrangement as the basis for determining at any time how much money remained available for lending by the relevant Ark Scheme and how much of that money was attributable to the relevant participant.

Inconsistency with Faulds

320. Mr Jones's fourth point was that the Primary Case Alternative Analysis was inconsistent with the reasoning of, and the conclusions reached by, Bean J in *Faulds*. He pointed out that, despite noting in paragraph [47] of his decision that, when the lending Ark Scheme made an MPVA loan to a member of another Ark Scheme, it was doing so in the sure and certain hope that a corresponding payment was going to be made by the Ark Scheme of which the borrower was a member to a member of the lending Ark Scheme, Bean J had not concluded that the MPVA loan was in respect of all of the members of the lending Ark Scheme for the purposes of Section 160(2)(a). It was therefore implicit in Bean J's conclusion that Section 160(2)(a) could not apply on this global basis.

321. In response, Ms Poots said that Bean J had not been required to consider whether Section 160(2)(a) might apply even in the absence of member-to-member matching because it had not been in the interests of any of the parties to the proceedings to argue for that proposition. Instead, he had simply been directed to consider whether Dalriada's submission that the circumstances fell within Sections 160(2)(b) and 173 was correct. As such, it could not be said that the ratio of *Faulds* included a rejection of the Primary Case Alternative Analysis.

Method not workable in practice

322. Mr Jones's fifth point was that the method proposed by the Respondents for calculating the charge pursuant to Section 160(2)(a) under the Primary Case Alternative Analysis was extremely complicated. Indeed, the Respondents had yet to establish that it was workable in practice. We should be slow to adopt an interpretation of the legislation which had not been shown to work in practice. As a general matter, it was fair to assume that, in enacting legislation, Parliament intended the legislation to be capable of being practically applied. We should therefore be wary of adopting an interpretation which had not been shown to meet that threshold.

323. As regards this fifth point, Ms Poots said that the method itself was not complicated although, clearly, applying the method would involve a lot of work on the detailed figures in the light of the facts. And, having carried out the process, the likelihood was that, assuming that the PRP had run through to completion, the aggregate unauthorised payments made in respect of each member would, in the vast majority of cases, be equal to 50% of the amount that that member had transferred into the PRP, which is exactly what one would expect.

Flawed method

324. Mr Jones's final point was that the method proposed by the Respondents for applying this analysis was flawed even as an abstract proposition. For instance, where a member of the lending Ark Scheme had already received an MPVA loan himself or herself by the time that the lending Ark Scheme made the MPVA loan in question, it was hard to see how the making of the MPVA loan in question could be said to be being made in order to benefit that particular member. Logically, that particular member ought to be removed from the pool of potential allottees upon receiving his or her MPVA loan and that would mean that the sooner a member received his or her MPVA loan, the lower the tax charge which would be visited on him or her under this method.

325. Ms Poots said that, as regards this final point, Mr Jones was not correct in saying that the sooner a participant received his or her MPVA loan, the lower the amount of the tax charge that would be visited on that participant. This was because the method being proposed by the Respondents did not take into account the time when a participant received his or her own MPVA loan. Under the Respondents' method, each participant's proportion of the aggregate monies available for lending by that participant's Ark Scheme at any time was unaffected by whether or not the relevant participant had received an MPVA loan from another Ark Scheme. Instead, the proportion reduced only as a result of prior allocations to that participant of MPVA loans previously made by that participant's Ark Scheme.

326. Mr Jones said that he did not see how a member of the lending Ark Scheme could still be said to have an intention to receive an MPVA loan once he or she had already received one. It therefore made no sense to allocate any part of an MPVA loan made by the lending Ark Scheme to any member of that scheme who had already received his or her own MPVA loan.

Discussion

Primary Case Preferred Analysis

327. It is common ground that:

> (1) if member-to-member matching was intended when an MPVA loan was made by an Ark Scheme to a member, then that MPVA loan should be regarded as being made to that member "in respect of" the member or members of the lending Ark Scheme who was or were matched with that member; and
>
> (2) consequently, the principal amount of that MPVA loan should be regarded for the purposes of Section 160(2)(a) as an actual UMP made by the lending Ark Scheme to those of the lending Ark Scheme's members who were matched with the borrower of the MPVA loan from the lending Ark Scheme.

328. We agree with that conclusion. The meaning of the phrase "in respect of" in Section 160(2) was considered by the FTT in *Gareth Clark v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 0630 (TC) ("*Clark FTT*") at paragraphs [87] to [105]. The FTT in *Clark FTT* noted that:

> (1) in considering whether something has been done "in respect of" a person, "regard must be had to all the circumstances, including the overall context in which…the [thing in question has been done]" – see *Clark FTT* at paragraph [89];
>
> (2) the phrase has "the widest possible meaning of any expression intended to convey some connection or relationship between the two subject-matters to which the words refer" – see Mann CJ in a decision of the Supreme Court of Victoria in *The Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 ay page 111, which formulation was approved

by Lightman J in *Albon (trading as N A Carriage Co) v Naza Motor Trading Sdn Bhd and another* [2007] EWHC 9 (Ch), as cited in *Clark FTT* at paragraph [91]; and

(3) the expression is not without limit but the authorities show that "the limitation is only in the requirement for some relationship or connection between the two subject matters" – see *Clark FTT* at paragraph [93].

329. We should add for completeness that, from its explanation of the decision in *Faulds*, it is clear that the FTT in *Clark FTT* considered that the finding in *Faulds* that member-to-member matching did not exist was crucial to the conclusion of Bean J to the effect that the MPVA loans did not fall within Section 160(2)(a) and that, had Bean J found that member-to-member matching did exist, he would have held that the MPVA loans did fall within Section 160(2)(a) – see *Clark FTT* at paragraphs [94] to [97]. We agree with that interpretation of the conclusion in *Faulds.*

330. Although the decision in *Clark FTT* is not binding on us, we agree with the reasoning of the FTT in that case and the FTT's construction of the phrase "in respect of". We therefore conclude that, on the basis of our factual finding to the effect that member-to-member matching was intended when each MPVA loan was made, each MPVA loan was made "in respect of" the members of the lending Ark Scheme who were matched with the borrower of the MPVA loan from the lending Ark Scheme.

331. It follows from that conclusion that:

(1) in a case where only one member of the lending Ark Scheme was matched with the person to whom the MPVA loan was made, that matched member should be regarded for the purposes of Section 160(2)(a) as having received an actual UMP in an amount equal to the entire MPVA loan that was made by the lending Ark Scheme; and

(2) in a case where more than one member of the lending Ark Scheme was matched with the person to whom the MPVA loan was made, each matched member should be regarded for the purposes of Section 160(2)(a) as having received an actual UMP in an amount equal to his or her pro-rata proportion of the entire MPVA loan that was made by the lending Ark Scheme. (As to what we mean when we refer to "his or her pro-rata proportion", see paragraph 340 below).

332. The conclusion which we have reached is perfectly straightforward to apply in cases where, at the time when the relevant MPVA loan was made, each person who was matched with the borrower:

(1) was a member of the lending Ark Scheme himself or herself; and

(2) had transferred into the relevant Ark Scheme pension funds which were at least equal to that person's pro-rata proportion of the MPVA loan in question.

333. However, as we have already seen in the various examples discussed in the section of this decision dealing with member-to-member matching, that was not invariably the case. We therefore need to consider how the conclusion which we have reached should apply in practice in those circumstances where the conditions set out in paragraph 332 above were not satisfied. In other words, we need to address the position in circumstances where:

(1) a person who was matched with the borrower was not a member of the lending Ark Scheme at the time when the MPVA loan to the borrower was made and never became a member of the lending Ark Scheme;

(2) a person who was matched with a borrower was not a member of the lending Ark Scheme at the time when the MPVA loan to the borrower was made but became a member thereafter;

(3) a person who was matched with the borrower was a member of the lending Ark Scheme at the time when the MPVA loan to the borrower was made but did not at any point transfer into the relevant Ark Scheme pension funds which were at least equal to that person's pro-rata proportion of the MPVA loan in question; and

(4) a person who was matched with the borrower was a member of the lending Ark Scheme at the time when the MPVA loan to the borrower was made, had not transferred into the relevant Ark Scheme at the time when the MPVA loan to the borrower was made pension funds which were at least equal to that person's pro-rata proportion of the MPVA loan in question but did do so after the relevant MPVA loan was made to the borrower.

334. Starting with the first two of those scenarios – the ones described in paragraphs 333(1) and 333(2) - it is in our view axiomatic from the language used in Section 160(2)(a) that a charge under that section can arise only if, at the time when the relevant payment is made, the person in respect of whom the payment is made "is or has been a member" of the pension scheme making the payment.

335. It follows that, in the case of the first scenario, where a person who was matched with the borrower never became a member of the lending Ark Scheme, we do not see how any of the MPVA loan which was made to the borrower in such a case can be said to have been made "in respect of a person who is or has been a member" for the purposes of Section 160(2)(a). Consequently:

(1) that person should not be regarded for the purposes of Section 160(2)(a) as having received an actual UMP; but

(2) the fact that that person was intended to be matched with the borrower should not be ignored when it comes to calculating the amount of the actual UMP which other persons who were matched with the borrower should be regarded for the purposes of Section 160(2)(a) as having received by virtue of the MPVA loan in question. In other words, where the person who never became a member of the lending Ark Scheme was one of two or more persons who were matched with the borrower, and one or more of those other persons was a member of the lending Ark Scheme at the time when the relevant MPVA loan was made, the fact that the first-mentioned person never became a member should not lead to any change in the proportion of the MPVA loan made by the lending Ark Scheme which is to be regarded for the purposes of Section 160(2)(a) as having been paid "in respect of" that other person or those other persons who were matched with the borrower and were themselves members.

Our reason for saying this is that the proportion of the MPVA loan which is to be regarded as having been made "in respect of" a person does not change simply because a proportion of the same MPVA loan is to be regarded as having been made in respect of a person who is not, and never has been, a member at the relevant time. The latter proportion of the MPVA loan is still "in respect of" the person who is not, and never has been, a member. It is just that it does not give rise to a charge pursuant to Section 160(2)(a) because the person in respect of whom it is paid is not, and has never been, a member.

336. We believe that precisely the same outcome arises in the second scenario, and for precisely the same reason. Even if the person who was not a member of the lending Ark Scheme at the time when the relevant MPVA loan was made subsequently became a member

after that date, it cannot be said that, at the time when the payment comprising the advance of the MPVA loan was made, that person "is or has been a member" of the lending Ark Scheme. We do not think that membership arising only after the payment has been made can be sufficient to give rise to a charge pursuant to Section 160(2)(a) for the person becoming a member after the payment has been made.

337. So far, we have focused solely on the question of whether or not a person who was matched with the borrower was a member of the lending Ark Scheme at the time when the MPVA loan was made. We have not addressed the case where a person was such a member at the relevant time but either never transferred into the relevant lending Ark Scheme pension funds which were at least equal to that person's pro-rata proportion of the MPVA loan in question or did so only after the MPVA loan in question was made. It is to those scenarios - the ones set out in paragraphs 333(3) and 333(4) above – that we now turn.

338. In our view, although it gives rise to a result which, at least in the case of the scenario described in paragraph 333(3) above is highly unfair, the amount of the pension funds which the relevant person transferred to the lending Ark Scheme either before the MPVA loan was made or thereafter is of no relevance to the application of Section 160(2)(a). This is because the funds of each Ark Scheme were unsegregated and therefore there was no sense in which the relevant person's interest in the relevant lending Ark Scheme could properly be said to be confined to the pension funds which he or she transferred into the relevant lending Ark Scheme. Instead, each member of the lending Ark Scheme had an interest in the whole of the funds of that Ark Scheme. It follows that, in our view, the mere fact that the relevant person was a member at the time when the relevant MPVA loan was made is sufficient to mean that the relevant person should be regarded for the purposes of Section 160(2)(a) as having received an actual UMP in an amount equal to the MPVA loan in question (or the relevant person's pro-rata proportion of the MPVA loan in question).

339. Finally in this context, we should make it clear that, when we refer in this section of our decision to a person's being or becoming a member of an Ark Scheme, we mean that person's being or becoming a member in accordance with Section 151 and pursuant to the rules of the relevant Ark Scheme. Although we do not understand there to be any dispute between the parties in relation to how that section and those rules work in this particular case, the parties may apply to us for clarification and make further submissions in relation to that application should they so wish in due course.

340. Similarly, when we refer in this section of our decision to a person's pro-rata proportion of an MPVA loan made by a lending Ark Scheme, we mean that that proportion is to be identified by reference to the intentions of the operators of the PRP in carrying out the member-to-member matching. In other words, where two or more persons were matched with the relevant borrower, it will be necessary to identify, from the available evidence, what proportion of the MPVA loan made to the relevant borrower was intended to be identified with each of the relevant persons who were so matched. We appreciate that that is by no means straightforward, as is demonstrated by the section of this decision dealing with member-to-member matching. There will doubtless be a number of cases where it is hard to identify the persons who were intended to be matched with the borrower in the case of a particular MPVA loan or, where such persons are readily identifiable, the proportion of the particular MPVA loan in respect of which each such identified person was intended to be matched. That is an inevitable consequence of the flawed nature of the proposal to start with, the inadequate record-keeping and the appointment of Dalriada before the PRP could run to term. We do not wish to make light of those difficulties. However, based on the evidence with which we have been provided, we are hopeful that the appropriate answer will be identifiable in the vast majority

of cases. In those cases where the relevant parties cannot reach agreement on the answer, they may apply to us for clarification and make further submissions in relation to that application should they so wish in due course.

341. In conclusion on the Primary Case Preferred Analysis, we accept that the conclusions which we have set out above will lead to difficulties in application, as well as somewhat arbitrary, and, in many cases, unfair, results. However, that is a function of the unusual facts in this case and, in particular:

(1) the way in which the PRP was designed – in other words, in a deliberate attempt to avoid the application of Section 160(2);

(2) the manner in which the PRP was operated – for example, by the making of an MPVA loan to a member before the person with whom that member was matched had either become a member or transferred all of his or her funds into the lending Ark Scheme; and

(3) the fact that the operation of the PRP was disturbed by the appointment of Dalriada.

In our view, it does not arise because of any oddity in the legal analysis, as such.

Primary Case Alternative Analysis

342. Our conclusions in relation to the Primary Case Preferred Analysis make it unnecessary for us to consider the merits of the parties' respective arguments in relation to the Primary Case Alternative Analysis. However, the parties have asked us to indicate how we would have answered that question in the event that we had concluded that, because there was no member-to-member matching in this case, the Primary Case Preferred Analysis failed.

343. There is a simple answer to this question and that is that, for the reasons which we have already rehearsed in paragraphs 299 to 304 above, we consider that we are bound by the decision of Bean J in *Faulds* to reject the Primary Case Alternative Analysis. Contrary to the submissions made by Ms Poots in relation to Mr Jones's fourth objection – see paragraph 321 above - we believe that we are not entitled to reach any other conclusion than that in relation to the analysis. Once we assume that member-to-member matching was not present, we are confronted with the same relevant facts as those with which Bean J was confronted. We therefore do not see how we could conclude that Section 160(2)(a) applied to the facts without ignoring clear binding authority to the contrary.

344. At the hearing, Ms Poots said that, even if we were to find against her submissions in relation to the binding nature of the decision in *Faulds*, we might still provide some indication of our own views on the merits of the parties' respective arguments. Such views are of course irrelevant for two distinct reasons, given the conclusions we have reached in relation to the Primary Case Preferred Analysis and our view on the binding nature of the decision in *Faulds*. However, had we been left entirely to our own devices, we would have been inclined to favour the submissions of Ms Poots in relation to this analysis. It seems to us that the very essence of the PRP was that each participant would agree to a proportion of his or her pension monies' being made available by way of MPVA loan to other participants in the PRP in order for the first-mentioned participant to be able to borrow an equivalent amount by way of MPVA loan himself or herself. We therefore believe that it is not stretching the language of Section 160(2)(a) too broadly to say that each MPVA loan made by a lending Ark Scheme was being made "in respect of" all of the members of that lending Ark Scheme who transferred their pension monies into the lending Ark Scheme in anticipation of receiving MPVA loans themselves. Based on the conclusion of fact we have reached in paragraphs 193 and 194 above, to the effect that every participant entering into the PRP wished to borrow monies, this means

that each MPVA loan made by a lending Ark Scheme was being made "in respect of" all of the members of that lending Ark Scheme at the time when the relevant MPVA loan was made.

345. We accept that that conclusion then gives rise to some issues to consider.

346. Starting at the beginning, were we to be untrammelled by prior authority, the conclusion which we would draw from the conclusion set out in paragraph 344 above is that the whole of each MPVA loan made by the lending Ark Scheme should be treated as amounting to an unauthorised payment in respect of each member of the lending Ark Scheme at the relevant time. After all, in the absence of any language which provides for an unauthorised payment made in respect of more than one member of a pension scheme to be apportioned between those members, the whole of each such payment would seem to be an unauthorised payment "in respect of" each of them. However, that does not produce a very satisfactory answer. It would mean that the aggregate unauthorised payments made by each lending Ark Scheme would be exponentially greater than the aggregate of the MPVA loans actually made by the lending Ark Scheme. It therefore makes sense to apply the legislation in a way that results in an apportionment of the relevant unauthorised payment between each of the persons in respect of whom the relevant unauthorised payment was made. That, after all, is what would happen in the case of an outright payment made by a pension scheme to two or more members jointly.

347. Once one reaches that conclusion, then it is simply a case of identifying a fair and reasonable method of apportionment in this particular case and we do not see any conceptual problems with the method proposed by the Respondents. We can see how the application of that method may give rise to some practical and evidential difficulties but, as a general proposition, it seems to us to be reasonable to apportion the unauthorised payment comprising each MPVA loan to each member of the lending Ark Scheme at the relevant time:

> (1) by reference to the amounts which each such member expected to receive by way of MPVA loan from another Ark Scheme when the relevant member joined the relevant lending Ark Scheme; and
>
> (2) without regard to when the relevant member actually received his or her MPVA loan.

348. We say the first of those things because the evidence suggests that there was a correlation between the amount which each member transferred into his or her own Ark Scheme that was to be made available for lending by that Ark Scheme and the amount which the relevant member expected to be able to borrow from another Ark Scheme – see paragraph 112(3). It therefore makes sense to apportion each MPVA loan between the relevant members of the lending Ark Scheme on that basis in the absence of evidence to the contrary.

349. As for the second thing, this brings us to Mr Jones's point that it makes no sense to allocate any part of an MPVA loan to a member of the lending Ark Scheme who has already received his or her MPVA loan from another Ark Scheme at the time when the relevant MPVA loan is made by the lending Ark Scheme because the latter MPVA loan cannot have been made with a view to benefiting such a member. Whilst we understand why Mr Jones has made that point, we think that it involves viewing each MPVA loan made by the lending Ark Scheme in isolation as opposed to seeing each such MPVA loan as part of a single unified programme involving multiple MPVA loans.

350. In the context of an arrangement such as the PRP which involves multiple MPVA loans and where it is necessary to identify an appropriate method for calculating how much of each MPVA loan in the programme is "in respect of" each member of the lending Ark Scheme, we think that it makes sense to ignore the timing of the MPVA loans which are made by other Ark Schemes to the members of the lending Ark Scheme in conducting the apportionment process.

That will lead to a fair allocation of the aggregate unauthorised payments made by the lending Ark Scheme over the course of the programme as a whole across the members of the lending Ark Scheme – an allocation that depends on how much each member of the lending Ark Scheme wished to borrow by way of MPVA loan when he or she became a member of the lending Ark Scheme. In effect, an allocation of part of an MPVA loan made to a member of the lending Ark Scheme after that member has already received his or her MPVA loan from another Ark Scheme is simply making up for an under-allocation to that member of MPVA loans previously made by the lending Ark Scheme. In other words, it merely involves a catching up. In the long term, the effect is to allocate to each member of the lending Ark Scheme an amount equal to the MPVA loan which that member intended to draw down when he or she became a member of the lending Ark Scheme.

351. Having said that, the above discussion is entirely academic given our conclusion in relation to the Primary Case Preferred Analysis and the effect of the decision in *Faulds*.

RELATIONSHIP BETWEEN SECTIONS 160(2)(A) AND 160(2)(B)

352. As we have already discussed in paragraphs 278 to 297 above, we do not agree with the parties' commonly-held view that Sections 160(2)(b) and 173 can apply to the PRP only in circumstances where Section 160(2)(a) has not applied. For the reasons set out in those paragraphs, we think that, even though we have found in favour of the Respondents to the effect that their Primary Case Preferred Analysis is correct, so that an MPVA loan made to a borrower is to be treated as an actual UMP for the member of the lending Ark Scheme who was matched with that borrower (pursuant to Section 160(2)(a)), the matched member of the lending Ark Scheme should still be treated as receiving a deemed UMP upon receiving the benefit of an MPVA loan from the borrower's Ark Scheme (pursuant to Sections 160(2)(b) and 173).

ISSUE 3 AND ISSUE 4 – SECTIONS 160(2)(B) AND 173

The submissions of the parties

Introduction

353. Although there was a disagreement between the Respondents and the Appellants as to whether or not Sections 160(2)(b) and 173 applied in this case, that disagreement was predicated on their disagreement as to whether Section 160(2)(a) applied. There was no disagreement between the parties in relation to whether or not the language in Sections 160(2)(b) and 173 was satisfied in the event that Section 160(2)(a) did not apply.

354. The parties were also agreed that:

> (1) where Sections 160(2)(b) and 173 apply, the combination of the deeming language in Sections 173(8) and 173(9) and the terms of Chapter 7 of Part 3 of the ITEPA means that the borrowing member is liable to tax pursuant to Sections 160(2)(b), 173 and 208 on the benefit of the MPVA loan in the same way as if that benefit arose on an employment-related loan; and
>
> (2) in the case of each MPVA loan received by a borrowing member, because no interest has actually been paid in respect of that MPVA loan in any tax year to date, the amount of the benefit is equal to the official rate of interest from time to time over the period in question.

355. The only areas of disagreement between the parties in relation to Issue 3 and Issue 4 are ones which are not pertinent to any of the appeals which are the subject of these proceedings because they are not relevant on the facts as they currently stand. However, Dalriada has asked us to address those questions in the context of these proceedings because, although they relate

to circumstances which have not yet occurred, those circumstances may well occur in future. We will do so, albeit briefly.

Potential application of Section 191 of the ITEPA

356. The first area of dispute relates to the application of Sections 160(2)(b) and 173 in circumstances when an MPVA loan is repaid in an amount which is greater than the amount of the MPVA loan originally advanced.

357. Mr Jones submitted that, in those circumstances, Section 191 of the ITEPA, as incorporated by reference into Section 173 by Sections 173(8)(b) and 173(9), should apply to enable the relevant member to make a claim for relief in respect of the tax previously paid by the relevant member by virtue of Section 175 of the ITEPA (to the extent that that tax was attributable to such part of the amounts chargeable under that section as was equal to that excess).

358. Ms Poots accepted that Section 191 of the ITEPA was, in principle, capable of applying in the context of Section 173 because of the deeming in Sections 173(8)(b) and 173(9). However, she submitted that, on the facts in this case, Section 191 of the ITEPA could never apply. This was because Section 191 of the ITEPA applied only where:

> (1) tax had been payable for a tax year in respect of a loan on the basis that, for the purposes of Section 175 of the ITEPA, "the whole or part of the interest payable on the loan for that year was not paid"; and
>
> (2) such interest was subsequently paid,

and, in this case, no interest was "payable for any tax year" in respect of any MPVA loan. Instead, insofar as an MPVA Agreement made provision for the lending Ark Scheme to be compensated for being out of its money for the term of the relevant MPVA loan, it simply provided that, when the relevant MPVA loan fell to be repaid, it was to be repaid at a specified fixed amount and that specified fixed amount happened to be greater than the original advance by an amount equal to simple interest at 3% over the entire originally-anticipated term of the MPVA loan. There was no sense in which the difference between the two amounts constituted interest accruing on a day-to-day basis in respect of the original advance.

Release or writing-off of the MPVA loans

359. The second area of dispute relates to the application of Sections 160(2)(b) and 173 in circumstances where an MPVA loan is formally released or written-off.

360. Mr Jones submitted that, in those circumstances, the principal amount of the MPVA loan so released or written-off should be treated as a deemed UMP for the borrowing member in the same way that the release or writing-off of an employment-related loan by an employer would be treated as giving rise to employment income for the purposes of Chapter 7 of Part 3 to the ITEPA. He said that this was consistent with the architecture of the two sets of provisions, which was to calculate the tax arising under Sections 160(2)(b) and 173 in respect of the benefit of a loan in the same way as the tax arising under Chapter 7 of Part 3 of ITEPA in respect of the benefit of an employment-related loan.

361. Ms Poots did not say that that analysis was definitely incorrect. Instead, she submitted that there was some doubt over whether it was correct. She said that this was because of the way in which the deeming language in Section 173(8)(b) interacted with the charging provisions in Chapter 7 of Part 3 to the ITEPA. Section 173(8)(b) stipulated that the amount of the unauthorised payment arising pursuant to Sections 160(2)(b) and 173 was "the amount which would be the cash equivalent of the benefit under the benefits code if the benefit were received by reason of an employment and the benefits code applied to it". However, when one

then turned to the benefits code as so directed, one found that the way in which it operated was slightly different in the case of the release or writing-off of an employment-related loan than it was in the case of a beneficial rate of interest under such a loan.

362. The latter was taxable under Section 175 of the ITEPA. Section 175(1) of the ITEPA specified that the amount to be treated as employment earnings in the case of a cheap employment-related loan was "the cash equivalent of the benefit" and Section 175(3) of the ITEPA then set out the formula for calculating "the cash equivalent of the benefit". In contrast, the former was taxable under Section 188 of the ITEPA. That section made no reference whatsoever to "the cash equivalent of the benefit". Instead, it simply provided that, where the whole or part of an employment-related loan was released or written-off at a time when the borrower was still employed, "the amount released or written off was to be treated as earnings from the employment for that year".

363. In addition, there was no other statutory provision which might apply to give rise to a charge in this context. The Respondents had initially considered that Section 174 – which applied to tax a shift in value out of a pension scheme to a member by the release of a right held by the pension scheme in circumstances which were not arm's length – might give rise to a charge but had concluded that it would not apply in these circumstances because the MPVA loan being released or written-off would be held by a pension scheme other than that of the borrower and, in any event, such a release or writing-off might well be arm's length if the MPVA loan was already worthless at the point of release or writing-off.

364. Mr Jones said that:

(1) his interpretation of the legislation was consistent with the view which the Respondents had espoused until relatively recently in their own published material. He took us to an example of that;

(2) he thought that, if a taxpayer were to try the argument which was outlined in paragraphs 361 and 362 above with the Respondents, the Respondents would give it short shrift because it was completely at odds with the underlying purpose of the regime;

(3) since Sections 160(2)(b) and 173 were intended to cover a whole host of situations and benefits, it wouldn't be surprising to find that the link between those provisions and the charging provisions of Part 3 of the ITEPA was not entirely seamless;

(4) a possible explanation for the deficiencies in the drafting in this context was that, because the value of the benefit which was derived from the release or writing-off of a loan was clear and easy to quantify, there was no need for the charge under Section 188 of the ITEPA to refer to a "cash equivalent" of that benefit but the value of the benefit was nonetheless a "cash equivalent" for the purposes of Section 173(8)(b); and

(5) each of Section 175 of the ITEPA and Section 188 of the ITEPA had its origins in the same provision of the predecessor legislation – Section 160 of the Income and Corporation Taxes Act 1988 – and this showed how the two distinct charges were very much conceived as part of the same package of legislation which was designed to tax the benefits associated with employment-related loans. There was therefore no logical reason why Parliament would have intended to exclude the charge under Section 188 of the ITEPA when it linked the deemed UMP regime in Sections 160(2)(b) and 173 with the charges under Part 3 of the ITEPA.

Discussion

Conclusion

365. We agree with the parties that the language in Sections 160(2)(b) and 173 is satisfied in this case. Indeed, there could hardly be any disagreement on that question given the conclusion reached by Bean J in *Faulds*. Although Bean J was proceeding on the basis that Section 160(2)(a) did not apply on the facts that he had found, we have explained in paragraphs 278 to 297 and paragraph 352 above why we consider that the applicability or otherwise of Section 160(2)(a), whether on the facts that Bean J had found or on the facts which we have found, has no bearing on the applicability or otherwise of Section 160(2)(b) to both versions of the facts. It follows that, in our view, we are bound by the conclusion of Bean J to the effect that, on the facts which we have found, the present circumstances fall within Sections 160(2)(b) and 173.

366. We also agree with the parties that the combination of the deeming language in Sections 173(8) and 173(9) and the terms of Chapter 7 of Part 3 of the ITEPA means that the borrowing member is liable to tax pursuant to Sections 160(2)(b) and 173 on the benefit of the MPVA loan in an amount equal to the official rate of interest from time to time over the period in question. That is because no interest has been paid on any of the MPVA loans to date.

367. As we have already noted, we have been asked to address two questions which strictly do not arise in relation to the appeals before us but are likely to be relevant in due course in connection with the MPVA loans.

Potential application of Section 191 of the ITEPA

368. The first question is whether, when an MPVA loan is repaid in an amount which is greater than the amount of the MPVA loan originally advanced, Section 191 of the ITEPA, as incorporated by reference into Section 173 by Sections 173(8)(b) and 173(9), should apply to enable the relevant member to make a claim for relief in respect of the tax previously paid by virtue of Section 175 of the ITEPA to the extent that that tax is attributable to such part of the amounts chargeable under that section as is equal to that excess (as Mr Jones contends) or whether no such relief should be available (as Ms Poots contends).

369. In answering that question, we should start by noting that, in accordance with the agreed facts, an MPVA Agreement, insofar as it requires the borrower to compensate the lending Ark Scheme for being out of its money for the period of the relevant MPVA loan, does not provide for interest to accrue from day-to-day on the amount of the relevant MPVA loan. Instead, it simply provides that the MPVA loan is to be discharged at the MPVA Discharge Amount and the MPVA Discharge Amount is a specified fixed amount which happens to be equal to the amount of the initial MPVA loan together with an amount equal to simple interest at 3% over the entire originally-anticipated term of the MPVA loan – see paragraph 39 above.

370. It follows that a significant consequence of the manner in which each MPVA Agreement is drafted is that no provision has been made for the MPVA Discharge Amount to be reduced in the event of the repayment of the MPVA loan in question before its stipulated maturity date. In other words, the borrower is required to pay the same MPVA Discharge Amount no matter when the MPVA loan in question is actually repaid and the difference between the MPVA Discharge Amount and the original advance is simply a fixed premium on repayment.

371. Neither counsel made any submissions to us in relation to whether or not that premium might amount to "interest" as a matter of law. The case law in relation to the question of what constitutes "interest" as a matter of law, as opposed to some other compensation to a lender for being out of its money for the period of a financing – for example, a discount or a premium - is extensive and complicated and the answer in any particular case is not always straightforward. We therefore express no view in this decision on whether or not the premium

(or at least some part of the premium) which is payable on the repayment of an MPVA loan in this case can properly be said to be "interest" despite not being described as such in the relevant MPVA Agreement.

372. All that we would say is that, insofar as it can properly be described as "interest" as a matter of law, it seems to us that that interest is not accruing daily, as is shown by the fact that the premium is payable in full no matter when the relevant MPVA loan is actually repaid. We therefore agree with Ms Poots that it is hard to see how any part of the premium can properly be described as being interest payable on the MPVA loan for any period, including a tax year. It follows that we believe that no relief should be available under Section 191 of the ITEPA, as incorporated by reference into Section 173 by Sections 173(8)(b) and 173(9), for any amount by which the MPVA Discharge Amount exceeds the MPVA loan originally advanced.

Release or writing-off of the MPVA loans

373. The second question is whether, upon a release or writing-off of an MPVA loan, the amount released or written-off should be treated as a deemed UMP pursuant to Sections 160 and 173, when taken together with Section 188 of the ITEPA. We do not think that there can be any doubt that the appropriate outcome in that situation, taking into account the clear purpose of both sets of provisions, is that the amount released or written-off should be so treated. No doubt, if the specific question had been raised in Parliament at the time when the deeming language in Sections 173(8)(b) and 173(9) was being enacted as to whether or not that should be the outcome in the event of a release or writing-off of a loan which had been made to a member of a pension scheme as a result of the use of the pension scheme's assets, the conclusion would have been unanimously in the affirmative.

374. However, the fact that that might be expected to have been the purpose of Parliament at the time when the legislation was enacted is not the same as saying that that is what the legislation says. The authorities show that it is permissible, and indeed required, for a court or tribunal to adopt a purposive approach in construing legislation but the doctrine of purposive construction has its limits. It is not possible to override the clear words of the statute simply because those words give rise to an unlikely or unwelcome result. In determining purpose, the focus is must be on the words used by Parliament and not on some wider policy aspirations. As Lord Neuberger said in *Williams v Central Bank of Nigeria* [2014] AC 1189 at paragraph [72]:

"When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613, "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used"".

375. If we then turn to examine the language of the provisions in question with that in mind, it is notable that:

(1) Section 173 is designed to catch any benefit which is derived from the use of the assets of a registered pension scheme and not simply benefits derived from loans;

(2) as such, it is perfectly natural for Parliament to have adopted the shorthand of cross-referring to the benefits code in Part 3 of the ITEPA instead of setting out the entire code all over again in the FA 2004;

(3) not all of the charging provisions in Part 3 of the ITEPA use the phrase "cash equivalent" in imposing their charges. For example:

(a) Section 72 of the ITEPA provides that certain sums which are paid to employees are to be treated as earnings but it does not use the phrase "cash equivalent"; and

(b) the same is true for the various residual charges arising under Chapter 12 of Part 3 of the ITEPA in respect of matters like sickness payments, a failure to deduct tax from payments of earnings and payments for the giving of restrictive undertakings;

(4) however, most of the charging provisions in the relevant part do use that phrase. For example:

(a) Sections 81 and 87 of the ITEPA impose a charge to tax on the "cash equivalent" of certain cash and non-cash vouchers;

(b) Section 94 of the ITEPA imposes a charge to tax on the "cash equivalent" of certain credit tokens;

(c) Sections 102 to 108 impose a charge to tax on the "cash equivalent" of certain living accommodation;

(d) Sections 120 to 164 impose a charge to tax on the "cash equivalent" of the provision of certain cars and vans (and fuel for cars and vans); and

(e) Section 203 imposes a charge to tax on the "cash equivalent" of employment-related benefits and facilities in general other than specified "excluded benefits", the latter of which includes benefits to which any of Chapters 3 to 9 of Part 3 of the ITEPA applies;

(5) in each case where a provision in Part 3 of the ITEPA imposes a charge to tax on the "cash equivalent" of the benefit, the overall structure of the relevant provision of Part 3 of the ITEPA is to specify that that "cash equivalent" will be subject to tax as earnings and then to set out expressly exactly how the "cash equivalent" is to be calculated; and

(6) although the relevant provision applies only for the purposes of the tax year 2016/17 and thereafter, Section 173(1A) of the ITEPA, at the start of Chapter 7 of Part 3 of the ITEPA, specifies that "[where] this Chapter applies to a loan … sections 175 to 183 provide for the cash equivalent of the benefit of the loan (where it is a taxable cheap loan) to be treated as earnings in certain circumstances)".

376. From the matters described in paragraph 375 above, we think that the inescapable conclusion is that the phrase "cash equivalent" when it is used in Part 3 of the ITEPA is a term of art for the purposes of that part and that the phrase must bear the same meaning when it appears in Section 173(8)(b). As such, we do not see how, when it is used in Section 173(8)(b), the phrase can simply be regarded as a generic and more expansive term which extends to all amounts that happen to be subject to tax under the provisions of Part 3 of the ITEPA, regardless of how the charge to tax under that part is expressed in the relevant provision of that part. We are not persuaded by Mr Jones's submission that, because the value of the benefit which is derived from the release or writing-off of a loan is clear and easy to quantify, there is no need for the charge under Section 188 of the ITEPA to refer to a "cash equivalent" of that benefit but the value of the benefit is nonetheless a "cash equivalent" for the purposes of Section 173(8)(b). The same point might be made in relation to several of the benefits in Part 3 of the ITEPA which contain a reference to a "cash equivalent" – for example, cash vouchers.

377. In our view, therefore, it would go beyond the boundaries of permissible purposive construction of the language in Sections 173(8)(b) and 173(9), taken together with Section 188 of the ITEPA, to treat the amount which is expressed to be chargeable to tax under Section 188 of the ITEPA in respect of the release or writing-off of an employment-related loan as falling within the charge to tax which arises pursuant to Sections 160 and 173 on the release or writing-off of a loan made to a member of a pension scheme by virtue of the use of the assets of the pension scheme. We recognise that this conclusion is a surprising one and might fairly be said to produce an arbitrary result. But there are limits to the ability of the courts and tribunals to remedy deficiencies in the drafting of the legislation and we think that those limits operate in this case.

ISSUE 5 – REASONABLE BELIEF OF THE SCHEME ADMINISTRATOR

Introduction

The issues

378. Issue 5 and Issue 6 both pertain to the same matter, which is the appeals made by Dalriada against the Respondents' refusal to discharge the scheme sanction charges which they have assessed on Dalriada. The outcome of those appeals depends on Dalriada's satisfying us in relation to two things in relation to each scheme sanction charge as follows:

> (1) first, did the scheme administrator reasonably believe that the actual UMP which has given rise to the scheme sanction charge in question was not a scheme chargeable payment? This is Issue 5; and
>
> (2) secondly, in all the circumstances of the case, would it not be just and reasonable for the scheme administrator to be liable to the scheme sanction charge in respect of that actual UMP? This is Issue 6.

379. It is worth noting that the burden is on Dalriada to satisfy us in relation to both of these issues. If Dalriada fails in relation to Issue 5, then it is not necessary for us to consider Issue 6.

380. Issue 5 and Issue 6 arise because we have held that there have been actual UMPs for the purposes of Section 160(2)(a). Those were scheme chargeable payments for the purposes of Section 239 (see Section 241(1)(a)). The deemed UMPs which we have concluded also arose as a result of the operation of the PRP, pursuant to Sections 160(2)(b) and 173, are not scheme chargeable payments and therefore do not give rise to scheme sanction charges (see Section 241(2)).

The scheme administrator

381. Before outlining the submissions of the parties in relation to Issue 5, there are two important preliminary points which we need to address in relation to the identification of the "scheme administrator".

382. The first point is to observe that the phrase "scheme administrator" is used in both Section 268(7)(a) – which is the provision relevant to Issue 5 – and Section 268(7)(b) – which is the provision relevant to Issue 6. It is common ground that, in the context of the circumstances which have led to these proceedings, those references must mean different persons if the relevant provisions are to make any sense. The reference to the "scheme administrator" in Section 268(7)(a) must mean the person, if any, who was the scheme administrator at the time when the relevant actual UMP was made. That is demonstrated by the use of the past tense in the provision in question. In contrast, the reference to the "scheme administrator" in Section 268(7)(b) must mean the person, if any, who has been assessed to the scheme sanction charge

to which the application relates. That is demonstrated by the use of the conditional future tense in the provision in question.

383. We agree with that approach.

384. The second point is much more difficult to determine and it relates to the identity of the "scheme administrator" at the time when the actual UMPs in this case were made – which is to say, the "scheme administrator" for the purposes of Section 268(7)(a). It may be noted that, when we were outlining the differences between the two parts of Section 268(7) in paragraph 382 above, we referred to the possibility that there might not be a "scheme administrator" at any particular time. We did that because:

(1) there is a section in the legislation which lays out in some detail the rules for identifying the "scheme administrator" at any time (Section 270); and

(2) Sections 271(3) and 272 clearly contemplate the possibility that, as a result of the application of those rules, there might be no "scheme administrator" at a particular time.

385. Section 270 provides that:

(1) references in Part 4 of the FA 2004 to the "scheme administrator" are to the person who is, or the persons who are, appointed in accordance with the rules of the pension scheme to be responsible for the discharge of the functions conferred or imposed on the scheme administrator by or under that part;

(2) however, a person cannot be a "scheme administrator" unless that person satisfies certain residence requirements and "has made the required declaration to [the Respondents]"; and

(3) the "required declaration" is a declaration to the effect that:

(a) the relevant person understands that he or she will be responsible for discharging the functions conferred or imposed on the scheme administrator by or under Part 4 of the FA 2004; and

(b) intends to discharge those functions at all times.

386. There is, perhaps unsurprisingly given the way in which the PRP was conceived and operated, a problem with how the provisions described above apply in the present case to the situation pertaining before Dalriada was appointed. This is because, at the inception of the PRP, the person who was appointed in accordance with the rules of each Ark Scheme to be responsible for the discharge of the functions conferred or imposed on the scheme administrator by or under Part 4 of the FA 2004 was the trustee of the relevant Ark Scheme – which is to say Athena or Minerva – and yet neither of those entities made the "required declaration" in relation to the relevant Ark Scheme. Instead, the "required declaration" was made by one of the Ark LLPs. As such, on the basis of the definition in Section 270, there was no "scheme administrator" in place at any time prior to the appointment of Dalriada.

387. Section 272 provides that, where there is no "scheme administrator" and no-one who remains subject to the liabilities of the "scheme administrator" under Section 271(4) by virtue of having previously been a "scheme administrator", then the liabilities and obligations of the "scheme administrator" are to be assumed by certain persons who are identified by specific rules laid down in the section. Those rules set out a waterfall of identification such that, if a person specified under an earlier heading can be traced and is not in default of the liabilities or obligations in question, then a person specified under a later heading is not so liable or obliged. The earliest heading to apply for this purpose is one which identifies the trustee or trustees of the pension scheme to be the person or persons so liable as long as that person or those persons

is or are resident in the United Kingdom. In this case, in the case of each Ark Scheme, that would be Athena or Minerva, as the trustee of the relevant Ark Scheme.

388. It is important to observe that Section 272 does not say that the person or persons who are identified by virtue of the rules set out in that section should be deemed to be the "scheme administrator" for the purposes of Part 4 of the FA 2004. Instead, it says merely that the person or persons who are identified by virtue of those rules assumes or assume the liabilities and obligations of the "scheme administrator".

389. It is common ground that, on these facts:

(1) although there was no "scheme administrator" in place until the appointment of Dalriada, the person responsible for the liabilities and obligations of the "scheme administrator" of each Ark Scheme pursuant to Section 272 was the trustee of the relevant Ark Scheme and that this means that, in relation to the actual UMPs made by each Ark Scheme, the reference to "scheme administrator" in Section 268(7)(a) should be read as a reference to the trustee of the relevant Ark Scheme; and

(2) the belief of the trustee of the relevant Ark Scheme should be determined by reference to the belief of Mr Tweedley, given that Mr Tweedley was the person who was the controlling mind of each trustee company.

390. Dalriada adds that another way of applying the legislation to the present facts and getting to the same result is to observe that:

(1) of the two requirements which are set out in Section 270, the one which refers to the making of the "required declaration" is more important than the one which refers to responsibility for the discharge of the functions conferred or imposed on the "scheme administrator";

(2) in this case, the "required declaration" was made by the relevant Ark LLP; and

(3) the controlling mind of each Ark LLP was Mr Tweedley.

391. We do not find that alternative view put forward by Dalriada to be at all persuasive. It seems to us that Section 270 does not set out two distinct requirements which need to be satisfied by a person in order for that person to be identified as the "scheme administrator" and then establish a hierarchy between the two requirements. Instead, it operates by:

(1) identifying the "scheme administrator" as the person appointed in accordance with the rules of the pension scheme to be responsible for the discharge of the functions conferred or imposed on the "scheme administrator"; and

(2) then going on to say that that person cannot be the "scheme administrator" unless he or she has made the "required declaration".

We do not detect in that approach any hierarchy as between the two specified requirements. Instead, both requirements need to be satisfied by a person if that person is to be the "scheme administrator" for the purposes of that section. In addition, there is nothing in the language of Section 268(7)(a) to suggest that the state of mind of the person who made the "required declaration" is relevant for the purposes of that provision. Since simply making the "required declaration" alone is not sufficient to make the person in question the "scheme administrator" for the purposes of Section 270 and there is nothing in Section 268(7)(a) to suggest that the making of the "required declaration" is relevant to how that section applies, we can see no basis in law on which to identify the person whose state of mind is relevant for the purposes of the condition in Section 268(7)(a) as the person who made the "required declaration".

392. Turning then to the basis on which the parties have both agreed that Mr Tweedley's state of mind is the relevant one for the purposes of Section 268(7)(a), we find that analysis to be slightly more persuasive. That is because we can see how a practical and sensible approach to the language in Section 268(7)(a) would be to conclude that, where a person has been made subject to the liabilities and obligations of the "scheme administrator" by virtue of the operation of Section 272, one of the obligations of that person is to consider whether the payment in question was a scheme chargeable payment and therefore the state of mind of that person is the relevant one for the purposes of Section 268(7)(a).

393. However, the fact remains that Section 272 does not stipulate that the person who has been made subject to the liabilities and obligations of the "scheme administrator" is, in fact, the "scheme administrator". Moreover, there is no compelling reason why the language in Section 268(7)(a) should be given an artificially broad construction simply to enable the test in that provision to be applied. By way of expanding on that statement, it seems to us to be arguable that, since:

(1) there was no "scheme administrator" in place at the time when the relevant Ark Scheme made its actual UMPs;

(2) Section 268(7)(a) refers expressly to the "scheme administrator"; and

(3) although Section 272 had the effect that the trustee of the relevant Ark Scheme was made subject to the liabilities and obligations of the "scheme administrator", it did not have the effect of making the trustee of the relevant Ark Scheme the "scheme administrator",

there was no person whose state of mind was relevant for the purposes of the test in Section 268(7)(a) and therefore it is impossible for Dalriada to establish that the belief necessary to satisfy the condition in Section 268(7)(a) was held.

394. After reflecting on this question, we have concluded, on balance, that, in this case, there was no person whose state of mind was relevant for the purposes of the test in Section 268(7)(a) for the simple reason that there was no "scheme administrator" at the relevant time the reasonableness of whose beliefs could be tested. That conclusion, in and of itself, means that, in our view, in this case, Dalriada has not satisfied the test in Section 268(7)(a). However, we recognise that the parties have reached a different view and we can certainly see that it is harsh to proceed on the basis that, even though there was a person who had the liabilities and obligations of the "scheme administrator" at the relevant time pursuant to Section 272, the beliefs of that person cannot be relied upon for the purposes of satisfying the test in Section 268(7)(a). Those factors, taken together with the significance of the test to the outcome of these proceedings, mean that we have set out in paragraphs 396 to 417 below the parties' respective submissions, and our conclusions, in relation to the application of the test in Section 268(7)(a) in this case assuming that our view on this question is incorrect and that Mr Tweedley's belief at any time during the period prior to Dalriada's appointment should be regarded as the belief of the "scheme administrator". Having said that, the conclusions set out in those paragraphs are of course irrelevant if our primary conclusion - which is that there was no "scheme administrator" at the relevant time – is correct.

395. Now that we have addressed those preliminary points, albeit at some length, we turn to consider the question which is relevant to Issue 5 – namely, whether the belief of Mr Tweedley to the effect that the MPVA loans in this case were not scheme chargeable payments was a reasonable one.

The submissions of the parties

396. Mr Jones said that the Upper Tribunal decision in *Bella Figura* showed that it was reasonable to rely on implicit advice in reaching a view on whether or not particular circumstances gave rise to unauthorised payments. In that case, even though the sponsoring employer had not obtained explicit advice to the effect that the transaction did not give rise to an unauthorised payment, the fact that the sponsoring employer had instructed an appropriately-qualified practitioner to prepare the transaction documentation meant that it had received implicit advice to that effect – see *Bella Figura* at paragraphs [61], [69], [85] and [87].

397. Mr Jones said that, in this case:

(1) Mr Tweedley had obtained oral advice from Mr Fowler in relation to the efficacy of the proposal and had instructed Mr Fowler to prepare the documentation for the implementation of the proposal; and

(2) Mr Fowler was appropriately qualified. The S&B website made it clear that Mr Fowler was being held out as an expert in relation to pensions and that had been Mr Tweedley's understanding at the relevant time.

Consequently, Mr Tweedley had obtained both explicit and implicit reassurance that the PRP did not give rise to unauthorised payments. His position was therefore even stronger than that of the sponsoring employer in *Bella Figura*.

398. In response, Ms Poots submitted that the situation of the sponsoring employer in *Bella Figura* was very different from the situation of Mr Tweedley in this case. In *Bella Figura*, the person who sought the input of the pensions practitioner was the director of an employer which was running its own pension scheme and sought the advice in that regard. It was in the interests of the person receiving the advice, the sponsoring employer itself, to ensure that the structure did not give rise to unauthorised payments. It had a direct personal interest in the efficacy of the arrangement. In contrast, in this case, Mr Tweedley had set up an arrangement which was not his own pension scheme but was merely designed to generate fees for himself and his associates. He therefore was not personally at risk if the structure did not achieve its objective. Where the person receiving the advice was not personally at risk in relation to the content of the advice, the duty of care on the recipient of the advice was much greater and therefore a higher standard was required before it could be said that reliance on the advice was reasonable.

399. More importantly:

(1) the pensions practitioner who provided the advice in *Bella Figura* was independent and had no personal interest in the outcome of his advice. In contrast, in this case, Mr Tweedley had relied on the advice of a man who was not independent but instead had a vested interest in the arrangement;

(2) Mr Tweedley had admitted in giving his evidence that he was aware that there were provisions in the tax legislation which were designed to prevent early access to pension funds and that he had devised the PRP with a view to circumventing those rules. Mr Tweedley was therefore on notice from the outset that the PRP involved tax avoidance and he knew or ought to have known that it might well be subject to challenge by the Respondents. That meant that obtaining independent positive advice in relation to the arrangement was all the more important; and

(3) the reasons which Mr Tweedley had given for his failure to consult Ms Hardy or another independent tax counsel prior to March 2011 were not good reasons. Mr Tweedley had cited the expense and the fact that obtaining that advice might give the impression to outsiders that the PRP involved tax avoidance. The former was not a good

reason when one was marketing a product so widely and where the consequences for participants were potentially so significant. The latter was also not a good reason given that, as Mr Tweedley had admitted, he could have obtained the relevant advice without using it as a marketing tool.

400. Ms Poots said that, given all of the above, in the period prior to the HMRC meeting, it was manifestly unreasonable for Mr Tweedley to have believed that the PRP did not give rise to scheme chargeable payments.

401. Turning to the period following the HMRC meeting, Mr Jones said that Mr Tweedley's continued belief during that period that the PRP did not give rise to unauthorised payments was also reasonable. Mr Bush and Ms Allsopp had expressed no view on the efficacy of the PRP at the HMRC meeting and had instead merely asked for further information about the structure. As such, there was no reason for Mr Tweedley to be concerned that the advice which he had previously received from Mr Fowler was wrong. Moreover, despite that, Mr Tweedley had not simply waited for the Respondents' officers to reach a view but had immediately sought the advice of Ms Hardy and that advice had been that the better view was that the PRP did not give rise to unauthorised payments.

402. Ms Poots said that the situation following the HMRC meeting was even worse than in the initial period because, at that stage, Mr Tweedley had become aware that the Respondents had concerns about the efficacy of the structure and were actively carrying out further investigations. Accordingly, it was unreasonable for Mr Tweedley to have continued to believe that the PRP did not give rise to scheme chargeable payments following that meeting.

403. Mr Tweedley's view to that effect remained unreasonable even after the consultation with Ms Hardy. At that point, the uncertainties following the HMRC meeting remained. That, along with the flawed basis on which the Counsel's Opinion had been obtained, meant that, even after obtaining the Counsel's Opinion, it was unreasonable for Mr Tweedley to have continued to believe that the PRP did not give rise to scheme chargeable payments.

404. In concluding, Mr Jones said that the tax treatment of the PRP was not straightforward, as had been shown by the protracted arguments in these proceedings. Mr Tweedley's belief that the PRP did not give rise to unauthorised payments stemmed from the advice initially of Mr Fowler and then Ms Hardy, both of whom were reasonably considered by Mr Tweedley to be competent to give that advice. That advice was not obviously wrong to someone in Mr Tweedley's position and he was entitled to rely on it.

405. Ms Poots said that the advice of each of Mr Fowler and Ms Hardy was flawed for different reasons – a lack of independence in the case of Mr Fowler and a lack of proper information in the case of Ms Hardy. As such, it was unreasonable for Mr Tweedley to rely on that advice and his view that the PRP did not give rise to unauthorised payments was unreasonable. More generally, as had been shown by his demeanour and evidence at the hearing, Mr Tweedley was someone who was prone to unreasonable beliefs. Even after all that had gone wrong with the PRP, the intervention of the PR, the decision in *Faulds*, the difficulties encountered by Dalriada in seeking to recover the Ark Schemes' investments and the present proceedings, he was still convinced that there was nothing whatsoever wrong with the arrangement he had conceived.

Discussion

Introduction

406. If the conclusion set out in paragraph 394 above - to the effect that there was no "scheme administrator" in relation to the Ark Schemes in the period prior to the appointment of Dalriada - is correct, the reasonableness of Mr Tweedley's belief over that period is not a relevant

question. However, we set out below our views in relation to that question assuming that that conclusion is incorrect and that Mr Tweedley's belief at any time in that period should be regarded as the belief of the "scheme administrator". In approaching the question, we find it most convenient to divide the unauthorised payments with which these proceedings are concerned into three periods, as follows:

(1) the unauthorised payments made in the period starting from and including the time when the very first MPVA loan was made and ending on and including 22 February 2011, which was the date of the HMRC meeting ("Period 1");

(2) the unauthorised payments made in the period starting from and including 23 February 2011 and ending on and including 18 March 2011, which was the date on which Mr Tweedley received the Counsel's Opinion ("Period 2"); and

(3) the unauthorised payments made in the period starting from and including 19 March 2011 and ending on and including 31 May 2011, which was the date of Dalriada's appointment ("Period 3").

407. We say that because the facts changed over those periods and therefore the reasonableness or otherwise of Mr Tweedley's belief over each period needs to be considered in the light of those changing facts.

Period 1

408. Starting with Period 1, we consider that, in the light of the facts which we have found as set out in paragraphs 225 to 228 above, Mr Tweedley's belief over that period that the PRP did not give rise to scheme chargeable payments was manifestly unreasonable. Mr Tweedley did not take independent professional advice in relation to the efficacy of the PRP but chose to rely on the advice of Mr Fowler whom he knew not to be independent as a result of having a financial interest in the arrangement's proceeding. Mr Tweedley's decision not to take the advice of Ms Hardy at that stage is incomprehensible given that so many people were being encouraged to entrust their life savings with him. The least that he should have done, given that he was aware of the rules which were designed to prevent early access to pension funds and had devised the PRP to get around those rules, was to seek the advice of an appropriately-qualified professional who had no "skin in the game" and provided his or her advice in writing and pursuant to the terms of a formal engagement letter. In the circumstances, we have concluded that Mr Tweedley's belief that the unauthorised payments which were made in Period 1 were not scheme chargeable payments was not reasonable.

Period 2

409. Turning then to Period 2, we think that the position in relation to the unauthorised payments made in this period is, if anything, worse than in relation to the unauthorised payments made in Period 1. In Period 2, Mr Tweedley still had not taken independent professional advice and, by then, he knew that the Respondents:

(1) took a strict approach to the early accessing of pension funds;

(2) had not yet formed a view in relation to whether or not the PRP fell foul of those rules but were actively investigating the PRP with a view to reaching a conclusion on that question; and

(3) were concerned that the PRP did fall foul of those rules.

410. It therefore goes without saying that Mr Tweedley's belief that the unauthorised payments which were made in Period 2 were not scheme chargeable payments was not a reasonable one.

Period 3

411. The reasonableness of Mr Tweedley's belief that the unauthorised payments which were made in Period 3 were not scheme chargeable payments is a much more finely-balanced question. That is because, by the start of Period 3, Mr Tweedley had received the Counsel's Opinion to the effect that the PRP did not give rise to scheme chargeable payments. We agree with Mr Jones that Ms Hardy, who provided the Counsel's Opinion, was an appropriately-qualified independent professional and therefore her advice cannot be discounted for the same reason as that for which we have discounted the advice of Mr Fowler. Moreover, we agree that, generally, a view reached by a layperson in relation to complicated legislation in reliance on the advice of an appropriately qualified independent professional would be a reasonable belief.

412. However, in this case, the position is complicated by two factors.

413. The first and more important of the two is that the views of Ms Hardy were sought on the basis of misleading instructions. We have set out in paragraph 234 above our findings of fact in relation to the basis on which Ms Hardy was instructed. None of the statements set out in that paragraph was in fact accurate and Mr Tweedley, had he been acting reasonably, would have known that to be the case. Taking them in order, contrary to the impression which was given to Ms Hardy:

(1) there was not a meaningful discretion for the trustee of the lending Ark Scheme as to whether or not to make a particular MPVA loan. Any such discretion was purely theoretical given the basis on which the PRP was being marketed, the circumstances of the individuals who were applying to become participants and the obvious conflicts of interest of Mr Hanson and Mr Hields, who stood to benefit personally from introducing participants into the arrangement;

(2) each MPVA loan was not made by way of an arm's length transaction. Apart from the below-market interest rate, the long-term nature of the relevant MPVA loan and the absence of security, no credit check was made prior to advancing the relevant MPVA loan and no insurance was taken out to cover the early death of the borrower;

(3) there was absolutely no prospect that an MPVA loan might be made to a borrower who was not a member of another Ark Scheme because the whole essence of the PRP, as revealed by its name and the related marketing, was that it involved MPVA loans' being made on a reciprocal basis by one Ark Scheme to a member of another Ark Scheme;

(4) the making of an MPVA loan involved an extraction of value from the lending Ark Scheme for the simple reason that, leaving aside the below-market interest rate, the long-term nature of the MPVA loan and the absence of security, there was a meaningful prospect that the relevant borrower would default given the absence of any prior credit check, the financial well-being of the individuals who were likely to be attracted to the PRP and the fact that the relevant borrower's tax-free lump sum was unlikely to be large enough to discharge the MPVA loan because the other investments made by the relevant borrower's Ark Scheme would not produce the necessary return; and

(5) therefore, the making of an MPVA loan was entirely inconsistent with maximising the value of the lending Ark Scheme for the benefit of its members.

414. It is important to note in this context that the fact that the MPVA loans were not made at arm's length was not just a minor inconsequential detail in terms of the tax analysis. Instead, it was fundamental to that tax analysis. It meant that the MPVA loans were totally inappropriate

investments for the Ark Schemes to make. Taking into account the uncommercial features of the MPVA loans, the MPVA loans were not attractive investments and were in fact highly likely to deplete the value of the Ark Schemes. In terms of maximising the value of the funds held by an Ark Scheme, it made absolutely no commercial sense for the trustee of the lending Ark Scheme to make an MPVA loan. The only reason for making an MPVA loan was to generate an equally-depleting matching MPVA loan to a member or members of the lending Ark Scheme by the Ark Scheme of which the borrower from the lending Ark Scheme was a member. This meant that the non-arm's length nature of each MPVA loan was the essential mechanism by which a member of the lending Ark Scheme was able to access part of his or her pension monies. In our opinion, had Ms Hardy's attention been directed by Mr Tweedley and Mr Fowler to the uncommercial features of the MPVA loans, she would have properly understood the ramifications of the structure and realised that, far from amounting to standard investments by the lending Ark Scheme, as the MPVA loans had been presented to her, the MPVA loans were simply a means for members of the lending Ark Scheme to obtain access to part of their pension monies. In our view, this would have had a fundamental impact on Ms Hardy's conclusions in the Counsel's Opinion.

415. As for the second of the two reasons, at the time that he received the Counsel's Opinion, Mr Tweedley was aware of the Respondents' reservations about the PRP and the fact that the Respondents were actively investigating the PRP. The fact that, knowing all of that, he continued to market the PRP "with restored vigour" over Period 3 in our view constitutes unreasonable behaviour on the part of Mr Tweedley.

416. We appreciate that the question we are required to address in this context in relation to any period is not whether Mr Tweedley acted reasonably over that period but rather whether Mr Tweedley's belief over that period that the unauthorised payments were not scheme chargeable payments was reasonable. As such, it is theoretically possible for us to conclude that, although Mr Tweedley acted unreasonably in Period 3 in continuing to market the PRP with "restored vigour", his view over that period that the unauthorised payments were not scheme chargeable payments was reasonable. However, we do think that Mr Tweedley's knowledge of the Respondents' position over that period – the fact that the Respondents were actively investigating the PRP and had expressed some reservations about it – does play into the question of whether or not Mr Tweedley's view on this question over that period was reasonable. That is because it is more reasonable to rely on a favourable opinion received from an appropriately-qualified independent professional in circumstances where no doubts to the contrary have been expressed by the Respondents and the Respondents are not actively investigating the facts than it is where those are not the circumstances in which that favourable opinion has been received.

417. After reflecting on this question at some length, and recognising:

(1) that the position in relation to Period 3 is much more finely-balanced than the position in relation to Period 1 and Period 2; and

(2) the severe consequences of our conclusion for Dalriada and the members of the Ark Schemes,

we have decided that, as was the case with the first two periods, Mr Tweedley's belief during Period 3 that the unauthorised payments were not scheme chargeable payments was not reasonable.

ISSUE 6 – IS IT JUST AND REASONABLE FOR THE SCHEME ADMINISTRATOR TO BE LIABLE TO THE SCHEME SANCTION CHARGE

Introduction

418. The conclusions we have reached in relation to there being no "scheme administrator" during the relevant period and in relation to Issue 5 mean that, strictly speaking, Issue 6 does not arise. However, since we have heard the evidence in relation to Issue 6 and heard the submissions of Mr Jones and Ms Poots in relation to it, we set out below those submissions and the conclusions which we would have reached in relation to Issue 6 if we had concluded that the belief of Mr Tweedley was relevant to the test in Section 268(7)(a) and concluded Issue 5 in Dalriada's favour, either in whole or in part.

The submissions of the parties

Common ground

419. It was common ground that:

(1) under the legislation as it stood during the period with which these proceedings are concerned, the person who was liable to the scheme sanction charge was Dalriada (see Section 271);

(2) the provisions in Sections 272A to 272C - which had been enacted in 2014 to ensure that, in cases like these, the liability for the scheme sanction charges remained with the person who had been the scheme administrator at the time when the unauthorised payments were made and did not pass to a person who had been appointed as independent trustee of the pension scheme in question after that time - did not apply in this case because Dalriada had been appointed on 31 May 2011 before the change in law occurred and the change in law applied only to independent trustees appointed on or after 1 September 2014 (pursuant to paragraph 22 of Schedule 7 to the Finance Act 2014). As such, that change in law was of no assistance to Dalriada in the present case; and

(3) Section 240(2) provided for a measure of relief in relation to the scheme sanction charge in circumstances where the person who was liable to tax under Section 208 in respect of the unauthorised payment giving rise to the scheme sanction charge paid that tax. In those circumstances, Section 240(3) provided that the amount which was subject to the scheme sanction charge was to be treated as being reduced by the lesser of:

(a) 25% of that amount; and

(b) the amount of tax which had been paid pursuant to Section 208.

Areas of disagreement

420. However, there were various points on which the parties did not agree.

Bella Figura

421. Mr Jones submitted that there were a number of reasons why it would not be just and reasonable for Dalriada to be liable to the scheme sanction charges in this case. His starting point was the decision in *Bella Figura*. He observed that it was clear from *Bella Figura* at paragraphs [70] to [75] that, in assessing whether it is just and reasonable for a person to be liable to a scheme sanction charge, it is necessary to take into account:

(1) all the circumstances, including the relevant person's conduct and any other relevant mitigating circumstances; and

(2) the statutory scheme and the mischief at which the legislation in question was aimed.

422. Unauthorised payments could be more or less serious depending on the circumstances in which they were made. From the examples given by the Upper Tribunal in paragraph [75] of its decision in *Bella Figura*, it was clear that an unauthorised payment comprising a loan was less serious than an unauthorised payment comprising an outright payment. Moreover, from the reasoning adopted by the Upper Tribunal in relation to the facts in *Bella Figura* in paragraphs [76] to [79] of its decision, it was clear that both:

(1) the fact that the taxpayer had tried to ensure that the loan in question did not comprise an unauthorised payment; and

(2) the fact that the loan in question had been repaid,

were relevant circumstances to be taken into account in applying this test – see also paragraph [88] of the Upper Tribunal's decision in that regard.

423. Mr Jones said that there were essentially four reasons why it would not be just and reasonable for the scheme sanction charges to apply in this case.

Application of Bella Figura

424. The first was that the burden of the scheme sanction charges would fall on the members of the Ark Schemes initially because the charges would be paid out of the funds held by the schemes to the extent that they were sufficient. That would be unfair as many of the members were in dire financial straits and the members were relatively unsophisticated in matters relating to tax and pensions and had been caught up in a complex arrangement that had been promoted to them at a time before the public in general had been made aware of the dangers inherent in such schemes. Imposing a further financial penalty on the members in addition to the fees and tax charges which they had suffered already would be unfair, particularly as some of the members in question hadn't even received an MPVA loan before the PRP ceased to operate. Any penal, deterrent or sanctioning effect had already been served even without imposing scheme sanction charges. The total tax charge in respect of actual UMPs, taking into account the unauthorised payments charges, the unauthorised payments surcharges and the scheme sanction charges, amounted potentially to 95%. It was therefore well in excess of any reasonable reimbursement to the Respondents for the fact that the funds had been in a tax-favoured environment.

425. Mr Jones's second point was that the MPVA loans were repayable, together, in most cases, with compensation to the lending Ark Scheme for being out of its money at a rate which equated to simple interest of 3%. They were not outright payments. As such, this was not the type of pensions liberation which was said in *Bella Figura* to be the most serious. In addition, given the structure of the PRP, saddling the Ark Schemes with scheme sanction charges would mean that the members would find it even more difficult to repay their MPVA loans because the tax-free lump sums to which they would become entitled at the point when they were required to repay their MPVA loans would be smaller. This would make the situation even more onerous for the members, who had already suffered severe damage to their pension funds and, in the long term, lead to an additional cost to the Exchequer as the members would be unable to fund their retirements.

426. Ms Poots responded as follows to those first two points:

(1) we had not had witness evidence from every one of the participants in the PRP and therefore we could not evaluate how unsophisticated they were;

(2) it was possible to be sympathetic to the predicament of the participants – which was that they were in financial difficulties – whilst at the same time recognising that the relevant rules were designed to protect the savings of individuals until they retired and

that people who were suffering financial difficulties were more in need of that protection than most;

(3) the scheme sanction charge was not just a deterrent. It was intended to compensate the Exchequer for tax reliefs previously given in the pensions area;

(4) she did not accept that the present circumstances fell at the less serious end of the spectrum described in *Bella Figura* at paragraph [75] because that case was dealing with employer loans and not loans to members. In certain circumstances, an employer loan could amount to an authorised payment. An employer loan did not qualify as an authorised payment only if it failed to meet certain specified technical criteria such as the rate of interest, the timing of repayments or security. An employer loan might therefore fail to be an authorised payment by accident. In contrast, there were no circumstances in which a loan to or in respect of a member could qualify as an authorised payment. Moreover, in the present case, very few of the MPVA loans had been repaid and not all of them would be repaid. We had had limited evidence on whether or not each borrower actually intended to repay his or her MPVA loan. So this was not at the less serious end of the spectrum at all; and

(5) the statement that imposing the scheme sanction charge would make it less likely that members would be able to repay their MPVA loans was speculative. Moreover, it was somewhat circular in that, to the extent that a member was unable to repay his or her MPVA loan, that would mean that the relevant MPVA loan was effectively an advance payment of the relevant member's pension monies and thus at the most serious end of the *Bella Figura* scale and more deserving of the scheme sanction charge.

Inadequacies in the operation of Section 240

427. Mr Jones's third point was that the interaction between the scheme sanction charges and the unauthorised payments charges to which they were related was imperfect. There were two distinct problems with the operation of Section 240, as follows:

(1) the first was that the way in which the formula in Section 240(3) operated meant that there would not be a pound for pound reduction in the amount of a scheme sanction charge for an unauthorised payments charge which was paid before the scheme sanction charge in respect of the same unauthorised payment; and

(2) the second was that that provision applied only in circumstances where the person who was liable to the unauthorised payments charge paid that charge before the scheme administrator paid the related scheme sanction charge in question. Section 240(2) had no effect where the scheme administrator paid the scheme sanction charge in question before the unauthorised payments charge was paid, and that was highly likely to be what happened in the present case.

428. In relation to the first of those two problems, Ms Poots said that the way in which the formula in Section 240(3) applied meant that the charge to tax overall would be a maximum of 70%. This was certainly substantial but the rationale for it was both to deter the making of unauthorised payments and to compensate the Exchequer for the tax-beneficial nature of the pension regime – see *Clark CA* at paragraph [25]. Thus, that was in accordance with the underlying policy of the legislation.

429. In relation to the second problem, the one relating to timing, Ms Poots said that, in the view of the Respondents, Section 240(2) applied both in circumstances where the person who was liable to the unauthorised payments charge paid that charge before the scheme administrator paid the related scheme sanction charge in question and vice versa. Thus,

Dalriada would be able to obtain a refund of the scheme sanction charge in the event that the relevant unauthorised payments charge was discharged after Dalriada had discharged the related scheme sanction charge. This was because the language in Section 240(2) was such that, even if the unauthorised payments charge was paid after the related scheme sanction charge, as soon as the unauthorised payments charge was paid, the deduction described in that section arose and this had the effect of reducing the amount of the scheme sanction charge "that would otherwise be chargeable". In fact, because of the way in which an unauthorised payment was required to be reported, and the date on which the scheme sanction charge fell due, relative to the date on which the related unauthorised payments charge fell due, it was quite commonplace for a scheme sanction charge to be paid before the related unauthorised payments charge had been paid and then for a repayment to arise for the scheme administrator on the subsequent payment by the member of that unauthorised payments charge.

430. She added that there was no time limit within which the relevant unauthorised payments charge would need to be paid in order to generate the repayment for the scheme administrator in respect of the scheme sanction charge under Section 240(2). This was because obtaining such repayment did not require a claim to be made.

431. Mr Jones said that he did not see how the repayment could be accessed unless there was a claim in respect of it. Moreover, he did not accept that Dalriada would be entitled to obtain a repayment of a scheme sanction charge in the event that the related unauthorised payments charge was paid after the scheme sanction charge was paid without making a claim to that effect under Schedule 1AB of the Taxes Management Act 1970 ("Schedule 1AB") and therefore without being subjected to the time limits set out in that schedule. He said that that schedule required a claim to be made where a person had paid an amount of income tax but the person believed that the tax was not due and the circumstances we were considering were just that.

432. Ms Poots said that, on the contrary, in a case such as the one we were considering, the relevant income tax – the scheme sanction charge - would have been due at the time when it was paid and then ceased to be due once the related unauthorised payments charge was paid. That was very different from a case where the relevant income tax had never become due, which was the situation with which Schedule 1AB was dealing. Thus, the schedule was not engaged.

Personal liability

433. Mr Jones's fourth point was that, to the extent that the assets of the Ark Schemes were insufficient to meet the scheme sanction charges, Dalriada would have personal liability for the relevant charges. That was because Dalriada was the incumbent scheme administrator at the time when the scheme sanction charges were assessed and was unable to rely on the provisions in Sections 272A to 272C, which had been enacted in 2014 to ensure that, in cases like these, the liability for the scheme sanction charges remained with the person who had been the scheme administrator at the time when the unauthorised payments were made and did not pass to a person who had subsequently been appointed as independent trustee of the pension scheme in question.

434. In response, Ms Poots pointed out that it had not yet been established that the assets of the Ark Schemes would be insufficient to meet the scheme sanction charges such that Dalriada had to bear the cost of those charges itself. That meant that it would be very difficult for us to take that into account in reaching our conclusion on this question. Having said that, should Dalriada be obliged to meet the cost of the charges, it could always apply to the Respondents for relief from the charges on the grounds of hardship. She accepted that hardship was not the

same as fairness but she understood that the Respondents would take fairness into account in considering any such hardship application.

435. Mr Jones said that it was not appropriate for Dalriada to have to rely on the Respondents' discretion in considering a hardship application in order to avoid a personal liability for the scheme sanction charge. A non-binding statement of that nature was not of great comfort to Dalriada. The unfairness identified should be addressed using the discharge power in Section 268. In any event, a successful hardship application tended to involve merely giving the relevant taxpayer time to pay a tax liability as opposed to absolving the relevant taxpayer from the tax liability absolutely.

Discussion

436. Although our conclusion in relation to Issue 6 is of academic interest only because of our conclusions in relation to there being no "scheme administrator" during the relevant period and in relation to Issue 5, we consider that, had Dalriada succeeded in relation to the test in Section 268(7)(a), we would have allowed its appeal against the refusal by the Respondents to discharge the scheme sanction charges.

437. We have reached that conclusion essentially for the four reasons advanced by Mr Jones. Indeed, given our conclusion to the effect that both Section 160(2)(a) and Sections 160(2)(b) and 173 apply in the context of the PRP, Mr Jones's first point has an even greater resonance. Whilst the charges arising pursuant to Sections 160(2)(b) and 173 are relatively small in comparison to the charges arising pursuant to Section 160(2)(a), and do not themselves trigger scheme sanction charges, they are nevertheless an additional financial burden falling on the participants in the PRP over and above the charges arising pursuant to Section 160(2)(a) in respect of the unauthorised payments which constitute the scheme chargeable payments. For the Ark Schemes to face the additional cost of scheme sanction charges in these circumstances seems to us to be unfair.

438. We agree with Mr Jones that, because the unauthorised payments in this case arose by way of loan and are required to be repaid, these circumstances are at the less egregious end of the *Bella Figura* spectrum. We are not persuaded by the point made by Ms Poots in paragraph 426(4) above to the effect that a distinction should be drawn between loans to members and loans to employers for this purpose. In both cases, the relevant loan is required to be repaid and this, we think, makes the situation very different from an outright payment to a member.

439. We are also not persuaded by the point made by Ms Poots at paragraph 426(5) above. It may well involve an element of speculation on our part but we think that there is a high degree of probability that depleting an Ark Scheme by imposing scheme sanction charges will make it less likely that the members of that Ark Scheme who have received MPVA loans will be able to repay their MPVA loans. This, in turn, will make it less likely that the members of the lending Ark Schemes will themselves be able to repay the MPVA loans which they received, and so on. Such is the nature of the arrangement which we are considering.

440. For the reasons which we have given, we consider that the first two points made by Mr Jones are, in our view, sufficient, in and of themselves, to mean that Dalriada should succeed in relation to Issue 6. However, we also have considerable sympathy with most of his last two points.

441. Turning to the first part of Mr Jones's third point, we agree with Ms Poots that inadequacies in the manner in which the formula set out in Section 240(3) operates are not a particularly sound basis for concluding that a particular scheme sanction charge which has been calculated in accordance with that formula is not just and reasonable. That is because the formula applies in all cases and without regard to the specific circumstances which have given

rise to the particular scheme sanction charge. If the formula itself operates unfairly – as opposed to giving rise to an unfair result in particular specified circumstances - then that is because Parliament has seen fit to provide for it and it is not a sound basis on which to found an allegation that the Respondents' refusal to discharge the particular scheme sanction charge in question is not just and reasonable.

442. However, we think that there is much greater force in the second part of Mr Jones's third point. Ms Poots's responses in relation to the allegations made by Mr Jones are threefold in nature. They are that:

(1) on the language of Section 240(2), the relief can apply even if the unauthorised payments charge is paid after the scheme sanction charge has been paid;

(2) no claim is required to be made by the scheme administrator in those circumstances and therefore the provision can operate without limit as to time; and

(3) in particular, Schedule 1AB is not engaged.

443. We have some difficulties in relation to each of those responses and therefore in concluding that Section 240(2) operates in the manner suggested by the Respondents in circumstances where the scheme sanction charge is paid before the related unauthorised payments charge is paid.

444. In the first place, it seems to us to require a somewhat tortured construction of Section 240(2) to conclude that, after a scheme sanction charge has become "chargeable", then been "charged" and finally been "paid"/"discharged", the subsequent payment of the related unauthorised payments charge can be said to reduce "the amount of tax that would otherwise be chargeable", as provided in Section 240(2). In those circumstances, the relevant scheme sanction charge will already have become "chargeable", will already have been "charged" and will already have been "paid"/"discharged". So it seems odd to suggest that the subsequent payment of the related unauthorised payments charge can, at that stage, change the amount that "would otherwise be chargeable".

445. Secondly, we have some difficulty in seeing how, even if the section could operate in that way in principle, it would be able to operate without the making of a claim and without limit as to time. Is it really the case that, where a scheme sanction charge has been paid in, say, 2022, the subsequent payment of the related unauthorised payments charge in, say, 2052 can give rise to a repayment of the scheme sanction charge in question and without the making of a claim to that effect?

446. Thirdly, we are not persuaded by Ms Poots's suggestion that Schedule 1AB would not apply in these circumstances on the basis that it applies only where the tax in question was not due at the time when taxpayer paid the tax whereas, in this case, the tax in question would have been due at the time when it was paid and would only subsequently have ceased to be due. We would have thought that, if Section 240(2) were to operate as the Respondents allege it does, and the subsequent payment of the authorised payments charge were retrospectively to reduce "the amount of tax that would otherwise be chargeable" for the purposes of Section 240(2), then that would mean that the scheme sanction charge previously paid was not "chargeable", which would in turn mean that it was not "due" and that would then bring Schedule 1AB into play.

447. Finally, as regards Mr Jones's fourth point, we do not agree with Ms Poots's suggestion that, in exercising our judgment in relation to this question, we should not take into account the potential personal exposure of Dalriada for the scheme sanction charges because:

(1) we cannot be sure at this stage that any such personal exposure will arise; and

(2) if it does arise, Dalriada can always rely on making a successful hardship application.

448. The fact is that, in 2014, Parliament saw fit to legislate in relation to circumstances such as these precisely because it would be so unfair for an independent trustee to face an exposure to personal liability. Dalriada cannot benefit from that legislation in this case because of the date when it was appointed but that does not make it any less unfair for Dalriada potentially to face that exposure. Indeed, it somewhat emphasises the extent to which that exposure is not just and reasonable. We therefore consider that Dalriada's potential exposure to personal liability is something which we should necessarily take into account in assessing whether or not to allow Dalriada's appeal against the refusal by the Respondents to discharge the scheme sanction charges.

449. In addition, it is not appropriate, in our view, for the Respondents to say that that potential exposure to personal liability should not be taken into account at the stage of determining Dalriada's appeals on the basis that, should that eventuality arise, Dalriada can then go cap in hand to the Respondents and rely on some concessionary treatment on the Respondents' part to avoid the liability. In our view, it is entirely inappropriate for us to exercise our appellate jurisdiction without taking that potential exposure into account and instead relying on the fact that, should Dalriada incur personal liability, the Respondents will act generously.

450. Of course, none of the above reasoning or conclusions is of any assistance to Dalriada, given the conclusions that we have reached in relation to there being no "scheme administrator" during the relevant period and in relation to Issue 5. It is highly unfortunate, to say the least, that Section 268(7) imposes a two-stage test, particularly given the one-stage test in Section 268(3). It is not entirely clear to us why the legislation is drafted in the way it is – in other words, why a scheme administrator should be prevented from obtaining a discharge of a scheme sanction charge in circumstances where, even though it, or an earlier scheme administrator, did not reasonably believe that the unauthorised payment which has given rise to the charge was not a scheme chargeable payment, it is not just and reasonable for the scheme administrator to be liable to the charge. It seems to us that it might have been more appropriate for the reasonableness of the scheme administrator's belief simply to constitute one of the various factors to be taken into account in determining whether or not it would be just and reasonable for the scheme administrator to be liable to the scheme sanction charge.

ISSUE 7 – DID MS OADES MAKE A VALID APPLICATION UNDER SECTION 268(3)

The submissions of the parties

451. Ms Sheldon said that there were three requirements for a valid application under Section 268(3), namely:

(1) it had to be made in writing;

(2) it had to be made no later than five years after the 31 January next following the end of the tax year to which it related; and

(3) it had to set out the particulars of the ground relied on under the section.

452. She said that each of those conditions had been met in this case by virtue of I&S Limited's letter of 6 March 2015. That letter was clearly in writing, it had been sent before the deadline of 31 January 2017 and it contained the reasons for the application.

453. Ms Poots agreed that Ms Sheldon had correctly outlined the three requirements for a valid application under Section 268(3).

454. However, she submitted that the requirements had not been met in the present case. I&S Limited's letter of 6 March 2015 did not contain an application for the discharge of the unauthorised payments surcharge. It merely contained an appeal against the unauthorised payments surcharge. In any event, that letter did not contain any particulars of the ground for any such application. The sole permissible ground for an application for the discharge of an unauthorised payments surcharge was the one set out in Section 268(3) – namely, that in all the circumstances of the case, it would not be just and reasonable for the relevant person to be liable to the unauthorised payments surcharge in respect of the unauthorised payment in question. I&S Limited's letter made no mention of that. Instead, the grounds to which the letter referred were the grounds for appealing against the assessment to the unauthorised payments surcharge – namely, that the assessment was estimated, based on an incorrect interpretation of the law and subject to an ongoing dispute with the Respondents.

Discussion

455. We think that the answer in relation to this issue is clear and that is that Ms Oades did not make a valid application for the discharge of the unauthorised payments surcharge in respect of the tax year 2010/11 within the applicable time limit.

456. The starting point is to note is that there is a world of difference between, on the one hand, appealing against an assessment to the unauthorised payments surcharge and, on the other hand, making an application for relief from the unauthorised payments surcharge under Section 268(3). I&S Limited's letter of 6 March 2015 did the former but not the latter, as we have already observed in our findings of fact in paragraph 245 above.

457. In addition, I&S Limited's letter did not set out any particulars of the ground relied on for applying to discharge the unauthorised payments surcharge. It merely set out the grounds of appeal against the assessment to the unauthorised payments surcharge. Those grounds were directed at why no unauthorised payment should be treated as having been made. That is why they were grounds of appeal against both the assessment to the unauthorised payments charge and the assessment to the unauthorised payments surcharge. In order to engage Section 268(3), the letter would have needed to say that, even if an unauthorised payment had been made and the unauthorised payments surcharge arose, it would not be just and reasonable in all the circumstances for Ms Oades to be liable to the unauthorised payments surcharge and then set out the reasons why that was the case. The letter did nothing of the sort.

ISSUE 8 – IS IT JUST AND REASONABLE FOR MS OADES TO BE LIABLE TO THE UNAUTHORISED PAYMENTS SURCHARGE

Introduction

458. The conclusion which we have reached in relation to Issue 7 means that, strictly speaking, Issue 8 does not arise. However, since we have heard the evidence in relation to Issue 8 and heard the submissions of Ms Sheldon and Ms Poots in relation to it, we set out below those submissions and the conclusions which we would have reached in relation to Issue 8 if we had concluded Issue 7 in Ms Oades's favour.

The submissions of the parties

459. Ms Sheldon submitted that there were a number of reasons why it would not be just and reasonable for Ms Oades to be liable to the unauthorised payments surcharge in this case, as follows:

(1) the points made by Mr Jones in paragraphs 424 and 425 above in relation to the decision in *Bella Figura* were equally pertinent to the case of Ms Oades;

(2) there were essentially five reasons why it would not be just and reasonable for Ms Oades to be liable to the unauthorised payments surcharge in this case;

(3) first, before becoming a member of the Portman Scheme and taking out an MPVA loan, Ms Oades had taken steps to check that both the Portman Scheme and the Lancaster Scheme were registered with the Respondents and had derived a great deal of comfort from that fact;

(4) secondly, in applying for membership of the Portman Scheme, she had taken steps to ensure that the MPVA loans which were going to be made to her were consistent with the statutory requirements;

(5) thirdly, she was an unsophisticated investor and, at the time when the events in question occurred, there was a lack of public awareness of the risks associated with pension schemes;

(6) fourthly, she was of modest means and had entered into the PRP only because she was in dire financial straits. If the Respondents were to succeed in their approach in relation to Section 160(2)(a), she would become liable to an unauthorised payments charge of £46,000 in respect of the tax year 2010/11 as a result of the unauthorised payments. In addition, the Portman Scheme, which was already severely depleted as a result of litigation costs, faced potential scheme sanction charges. Thus, the deterrent effect of the legislation would have been served without the need for an unauthorised payments surcharge as well; and

(7) fifthly, the MPVA loans made to her would give rise to a minimal loss to the Exchequer as she fully intended and expected to discharge the MPVA loans in full. This was a long way from a co-ordinated attempt to access pension funds and escape tax altogether.

460. Ms Poots said that, on the contrary, it would be just and reasonable for Ms Oades to be liable to the unauthorised payments surcharge in this case because she:

(1) had twice been advised not to transfer her pension monies from the NHS pension scheme into other schemes – once by Penvest Limited in 2009 and then again in the context of the PRP by Mr Isles;

(2) was aware that there were restrictions on accessing pension monies early;

(3) had accepted that she did not take any independent advice in connection with the PRP or on the possibility of challenge by the Respondents despite the fact that she had been repeatedly advised to do so;

(4) had not seen a favourable opinion from a tax barrister before becoming a member of the Portman Scheme despite her statement to the contrary;

(5) had admitted that, since she had not taken any independent advice, she did not understand the declaration she had made in her application form to the effect that the PRP would not give rise to unauthorised payments;

(6) had accepted that relying on the fact that the Ark Schemes were registered with the Respondents did not amount to careful due diligence; and

(7) had had the benefit of the monies advanced by way of MPVA loan at a very cheap effective financing rate for over ten years and had not yet been asked to repay those advances.

Discussion

461. Although our conclusion in relation to Issue 8 is of academic interest only because of our conclusion in relation to Issue 7, we consider that, had Ms Oades made a valid application for the discharge of the unauthorised payments surcharge, we would have allowed her appeal against the refusal by the Respondents to discharge the liability in question. Having said that, we think that the position is very finely-balanced.

462. That is because there are a number of reasons why it might be said to be entirely just and reasonable for Ms Oades to bear the unauthorised payments surcharge in question.

463. Those are broadly the ones advanced by Ms Poots and set out in paragraph 460 above. Whilst we are sympathetic to the predicament in which Ms Oades now finds herself, Ms Oades was well aware that there were rules in the tax legislation which were designed to deter early access to pension monies and realised that she was by no means an expert in the area in question. Those two things should have strongly suggested to Ms Oades that, before applying to become a participant in the PRP, she should take independent advice on the wisdom of moving her pension funds out of the NHS pension scheme and into the Portman Scheme, read the material with which she had been provided (in order to make sure she properly understood it) and take independent advice in relation to the efficacy of the PRP and the documentation into which she was entering.

464. Ms Oades did none of those things.

465. As regards the first of them, we have found as a fact that she was advised by both Penvest Limited and Mr Isles that she should not move her pension funds out of the NHS pension scheme.

466. As regards the second of them, we have found as a fact that she had no understanding of what the statement in her declaration in the application form to the effect that the PRP did not involve the making of unauthorised payments actually meant.

467. Finally, despite the fact that the written material with which she was provided as part of the application process contained numerous injunctions to obtain independent advice, Ms Oades chose to proceed without taking any independent advice whatsoever. By any standards, that was not a reasonable course of action to take.

468. Indeed, at the hearing, Ms Oades accepted the propositions that:

(1) the less one knows about an area, the more important it is to seek expert advice in relation to that area;

(2) in the light of the fact that the relevant rules are complex and the fact that the leaflet which was provided to her by Ark BC LLP prior to her applying to become a participant in the PRP stated that the PRP involved complex tax and pensions law issues, relying on the fact that the Ark Schemes were registered with the Respondents did not amount to careful due diligence; and

(3) she should have taken independent advice from an independent financial adviser before participating in the PRP.

469. We are also somewhat underwhelmed by Ms Oades's attempt to justify her actions retrospectively by claiming in her witness statement that she saw the positive advice of a tax barrister before she applied to become a participant in the PRP - when no such advice was obtained in connection with the PRP until several months after Ms Oades became a member of the Portman Scheme - and that she was subjected to credit checks in advance of drawing down her MPVA loans - when no credit checks were ever carried out on any of the participants.

470. However, we need to weigh the matters described above against two things which point in the opposite direction.

471. The first is that, in our view, in terms of the levels of seriousness of unauthorised payments set out in *Bella Figura*, this is at the less egregious end of the scale. The MPVA loans which have given rise to the unauthorised payments surcharge in this case were advanced to other members of the Ark Schemes– the members with whom Ms Oades was matched – and not to Ms Oades herself. In addition, they were advanced by way of loan and they will ultimately be required to be repaid. Even if we take into account the fact that Ms Oades has herself received MPVA loans by virtue of her participation in the PRP, those MPVA loans will also be required to be repaid. We do not think that the fact that neither any individual with whom Ms Oades was matched nor Ms Oades has yet been required to repay the MPVA loans which he or she received or that the effective rate of finance on those MPVA loans was favourable gainsays those facts. As things stand at present, both the members with whom Ms Oades was matched and Ms Oades have a liability to repay the MPVA loans. Moreover, Ms Oades has testified that she intends to discharge, in full, the MPVA loans that she has drawn down. She therefore has not received an outright payment of any kind, either from the Portman Scheme of which she is a member or from the Lancaster Scheme from which she has drawn down her MPVA loans.

472. Secondly, we have taken into account the fact that, at the time when she chose to become a participant in the PRP, Ms Oades was of modest means and in dire financial straits and was therefore desperate to find a means of raising money. She was unsophisticated in relation to matters of tax and pensions law and the PRP seemed like an answer to her problems since it did not involve any payment to her from the Ark Scheme of which she was a member. Moreover, we have found as facts that Ms Oades took comfort from the fact that the Ark Schemes were registered with the Respondents and the statement in the membership information form with which she was provided to the effect that all benefits which were to be provided under the PRP would be consistent with the Respondents' requirements. All in all, we believe that Ms Oades's view that the PRP would not give rise to unauthorised payments was genuinely-held and that it was a reasonable conclusion for a lay person without any experience in the relevant area to draw, however erroneous it was and however much she ought to have realised that she should confirm that view with an independent financial adviser.

473. In weighing up all of the above, we have concluded that the mistakes made by Ms Oades as described in paragraphs 463 to 469 above were most certainly egregious, and ultimately costly, errors on her part. However, she has suffered a great deal for those errors in the form of the unauthorised payments charges which she has borne directly herself and the costs which she has borne indirectly in the form of the scheme sanction charges, administration costs and litigation costs which have been paid by, or will be paid by, the Portman Scheme and the Ark Schemes whose members have borrowed from the Portman Scheme and are relying on their pension entitlements from those Ark Schemes to finance their repayments to the Portman Scheme.

474. All things considered, we believe that Ms Oades has suffered enough by virtue of her decision to participate in the PRP without also facing the additional cost of the unauthorised payments surcharge. We agree with Ms Sheldon that the deterrent effect of the legislation has already been served before taking the unauthorised payments surcharge into account. For that reason, had we been required to reach a conclusion in relation to Issue 8, we would have found in favour of Ms Oades.

475. Of course, notwithstanding the above conclusion, because of the failure by Ms Oades to make a valid application for the discharge of the unauthorised payments surcharge, we are not

required to reach a conclusion in relation to Issue 8 and Ms Oades will now still have to suffer the additional cost of the unauthorised payments surcharge.

CONCLUSIONS

The unauthorised payments

Main conclusions

476. For the reasons set out above, our main conclusions in relation to these proceedings can be summarised as follows:

(1) based on our findings of fact in relation to matching, the Primary Case Preferred Analysis is correct and the decision in *Faulds* is distinguishable on the facts;

(2) the same findings of fact mean that the Primary Case Alternative Analysis does not arise and it is, in any event, precluded by the binding authority of the decision in *Faulds*; and

(3) contrary to the submissions of the parties, the Alternative Case is also correct and is not precluded by our conclusion that the Primary Case Preferred Analysis is correct.

477. Those main conclusions mean that:

(1) where an MPVA loan was made to a borrower who was matched (on the basis of the member-to-member matching described in paragraphs 109 to 207 above) with a person who was not, and never had been, a member of the lending Ark Scheme at the time when the lending Ark Scheme made the MPVA loan, the lending Ark Scheme is not to be treated as having made an unauthorised payment to or in respect of that person pursuant to Section 160(2)(a) by virtue of the making of the relevant MPVA loan. This is because, in order for the relevant MPVA loan to be an unauthorised payment in respect of that person, it was necessary for that person to be, or to have been, a member of the lending Ark Scheme at the time when the relevant MPVA loan was made;

(2) where an MPVA loan was made to a borrower who was matched (on the basis of the member-to-member matching described in paragraphs 109 to 207 above) with a person who was, or had been, a member of the lending Ark Scheme at the time when the lending Ark Scheme made the MPVA loan, the lending Ark Scheme is to be treated as having made an unauthorised payment in respect of that person pursuant to Section 160(2)(a) which is equal to that person's pro rata proportion – determined as described in paragraph 340 above – of the relevant MPVA loan; and

(3) where a person who was a member of an Ark Scheme received an MPVA loan, the benefit of that MPVA loan is to be treated as an unauthorised payment to that person pursuant to Sections 160(2)(b) and 173. The fact that that benefit may have arisen indirectly from an MPVA loan made by the Ark Scheme of the person in question does not prevent those sections from applying because that benefit is not a payment made to the person in question by the Ark Scheme of which the person in question is a member. The amount of the benefit is equal to the foregone interest on the relevant MPVA loan, as described in paragraph 366 above.

478. In relation to the future:

(1) where an MPVA loan is discharged by the relevant borrower, no relief will be available under Section 191 of the ITEPA, as incorporated by reference into Section 173 by Sections 173(8)(b) and 173(9), for any amount by which the MPVA Discharge Amount exceeds the MPVA loan originally advanced; and

(2) where an MPVA loan is released or written-off, the amount released or written-off is not to be treated as an unauthorised payment to the borrower for the purposes of Sections 160(2)(b) and 173.

Categories of members

479. Turning to the particular categories of members described at the start of this decision, the implications of the conclusions set out in paragraphs 476 to 478 above are as follows:

(1) Category A – members who received MPVA loans and did not repay them, and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the name of one other member of the Ark Schemes who also received an MPVA loan –

(a) an unauthorised payment was made in respect of each Category A member pursuant to Section 160(2)(a) which was equal to the Category A member's pro rata proportion of the MPVA loan made to the matched member; and

(b) unauthorised payments were made to each Category A member pursuant to Sections 160(2)(b) and 173 which were equal to the cash equivalent of the benefit of the MPVA loan made to the Category A member;

(2) Category B (including Ms Oades) – members who received MPVA loans and did not repay them, and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the names of multiple other Ark Scheme members who also received MPVA loans –

(a) an unauthorised payment was made in respect of each Category B member pursuant to Section 160(2)(a) which was equal to the Category B member's pro rata proportion of the MPVA loan made to each matched member; and

(b) unauthorised payments were made to each Category B member pursuant to Sections 160(2)(b) and 173 which were equal to the cash equivalent of the benefit of the MPVA loan made to the Category B member;

(3) Category C (including Mr Donaghy-Sutton) – members who did not receive MPVA loans, but in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the names of another member or other members of the Ark Schemes who did receive MPVA loans – an unauthorised payment was made in respect of each Category C member pursuant to Section 160(2)(a) which was equal to the Category C member's pro rata proportion of the MPVA loan made to each matched member;

(4) Category D – members who received MPVA loans and did not repay them, and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the names of another member or other members of the Ark Schemes who did not receive an MPVA loan –unauthorised payments were made to each Category D member pursuant to Sections 160(2)(b) and 173 which were equal to the cash equivalent of the benefit of the MPVA loan made to the Category D member;

(5) Category G – members who did not receive MPVA loans and in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the name of another member or other members of the Ark Schemes who did not receive an MPVA loan – no unauthorised payments were made in respect of or to any Category G member; and

(6) Category H – members who received MPVA loans and have subsequently repaid all or part of those MPVA loan -

(a) unauthorised payments were made to each Category H member pursuant to Sections 160(2)(b) and 173 which were equal to the cash equivalent of the benefit of the MPVA loan made to the Category H member for the period prior to repayment; and

(b) if the Category H member was a person in respect of whom the "Matched With1" column in the Final Redacted Spreadsheet contains the names of another member or other members of the Ark Schemes who also received an MPVA loan, an unauthorised payment was made in respect of the relevant Category H member pursuant to Section 160(2)(a) which was equal to the relevant Category H member's pro rata proportion of the MPVA loan made to each matched member.

The tax charges

480. So far, we have merely described our conclusions in relation to the unauthorised payments which we consider have been made to or in respect of each member of the Ark Schemes without focusing on the tax liabilities to which those unauthorised payments will have given rise for that member and for Dalriada. Depending on the facts in any particular case:

(1) the unauthorised payments described in paragraphs 477(2) and 477(3) above will potentially have given rise to an unauthorised payments charge under Section 208 for the member in question and to an unauthorised payments surcharge under Section 209 for the member in question; and

(2) the unauthorised payments described in paragraph 477(2) above will potentially have given rise to scheme sanction charges for Dalriada under Section 239.

DISPOSITION

481. For the reasons which we have given in paragraphs 378 to 450 above, Dalriada's appeals against the Respondents' refusal of its applications to discharge its liability to the scheme sanction charges are dismissed.

482. For the reasons which we have given in paragraphs 451 to 475 above, Ms Oades's appeal against the Respondents' refusal of her application to discharge her liability to the unauthorised payments surcharge is dismissed.

483. The conclusions we have described in paragraphs 476 to 480 above are sufficient to amount to decisions in principle in relation to each of the other appeals to which this decision relates.

Closing

484. We realise that the outcome of these proceedings will not be at all welcome either to Dalriada or to the members of the Ark Schemes, who have already had to endure great hardship as a result of the regrettable history of this matter. We are indebted to Ms Brooks for drawing our attention at the hearing to the plight of so many of the members and the unfortunate consequences for them of our decision. Although those matters sadly have no bearing on the legal analysis in relation to the construction of Section 160(2), on which so much of this decision turns, they may well have a bearing on whether, in the case of any particular member, the imposition of an unauthorised payments surcharge was just and reasonable.

485. Mr Donaghy-Sutton's appeals, which are part of these proceedings, do not include an appeal against a refusal by the Respondents to discharge his liability to an unauthorised payments surcharge pursuant to an application made by him under Section 268(3). As a result, neither the unfortunate consequences for Mr Donaghy-Sutton of our conclusions nor the circumstances in which the PRP was marketed and operated, can affect the outcome of his appeals. However, there may well be other members of the Ark Schemes, whose appeals have

been stayed pending the outcome of these proceedings, in relation to whom that will not be the case. That is why we have included in this decision as much as we have in relation to the circumstances in which the PRP was marketed and operated and the damage which the PRP has caused to the members. We are grateful to Ms Brooks for drawing that to our attention and, in closing, we wish to express our sympathy for the predicament of the members and our regret that our conclusions in relation to the application of the law to the relevant facts are as they are.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

486. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). Given the complexity of the matters to which this decision relates, and the number of people who are affected by its conclusions, we have decided to extend the period in which any such application may be made. Accordingly, in accordance with Rule 5(3)(a) of the Tribunal Rules, we hereby direct that the time limit for making any such application shall be extended from the 56 days specified in Rule 39 by an additional 28 days, with the result that any such application must be received by this Tribunal not later than 84 days after this decision is sent to the relevant party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TONY BEARE
TRIBUNAL JUDGE

Release Date: 21st MARCH 2023

SCHEDULE

APPEALS TO WHICH THIS DECISION RELATES

Part A: Ark Schemes' challenges to scheme sanction charges

Appellant	Appeal Reference	Decision Appealed	Amount of Tax	Reference to Bundle
The Cranborne Scheme	TC/2015/04684	Scheme Sanction Charge Assessment in relation to tax year 2010/2011	£176,182	I/10/61
The Cranborne Scheme	TC/2016/02313	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2010/2011	In respect of the same tax as above	I/19/273
The Cranborne Scheme	TC/2015/04685	Scheme Sanction Charge Assessment in relation to tax year 2011/2012	£518,904	I/11/81
The Cranborne Scheme	TC/2016/02314	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2011/2012	In respect of the same tax as above	I/20/341
The Lancaster Scheme	TC/2015/04682	Scheme Sanction Charge Assessment in relation to tax year 2010/2011	£908,544	IV/240/3985
The Lancaster Scheme	TC/2016/02312	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2010/2011	In respect of the same tax as above	IV/277/4799
The Lancaster Scheme	TC/2015/04687	Scheme Sanction Charge Assessment in relation to tax year 2011/2012	£193,516	IV/241/4005
The Lancaster Scheme	TC/2016/02317	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2011/2012	In respect of the same tax as above	IV/278/4865
The Tallton Scheme	TC/2015/04675	Scheme Sanction Charge Assessment in relation to tax year 2010/2011	£106,736	IV/238/3945
The Tallton Scheme	TC/2016/02307	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2010/2011	In respect of the same tax as above	IV/281/5069
The Tallton Scheme	TC/2015/04681	Scheme Sanction Charge Assessment in relation to tax year 2011/2012	£530,802	IV/239/3965
The Tallton Scheme	TC/2016/02318	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2011/2012	In respect of the same tax as above	IV/282/5137

The Grosvenor Scheme	TC/2015/04672	Scheme Sanction Charge Assessment in relation to tax year 2011/2012	£190,080	IV/237/3925
The Grosvenor Scheme	TC/2016/02305	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2011/2012	In respect of the same tax as above	IV/276/4729
The Portman Scheme	TC/2015/04677	Scheme Sanction Charge Assessment in relation to tax year 2010/2011	£903,190	IV/242/4025
The Portman Scheme	TC/2016/02308	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2010/2011	In respect of the same tax as above	IV/279/4933
The Portman Scheme	TC/2015/04679	Scheme Sanction Charge Assessment in relation to tax year 2011/2012	£142,566	IV/243/4048
The Portman Scheme	TC/2016/02310	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2011/2012	In respect of the same tax as above	IV/280/5001
The Woodcroft Scheme	TC/2015/04676	Scheme Sanction Charge Assessment in relation to tax year 2011/2012	£236,438	IV/244/4060
The Woodcroft Scheme	TC/2016/02304	HMRC's refusal to grant discharge of Scheme Sanction Charge in relation to tax year 2011/2012	In respect of the same tax as above	IV/283/5205

Part B: Members' challenges to unauthorised payment charge / surcharge

Appellant	Appeal Reference	Decision Appealed	Amount of Tax	Reference to Bundle
Ms Deborah Oades	TC/2018/03526	Unauthorised Payments Charge and Surcharge Assessment for tax years ended 2011, 2012, 2013, 2014	£65,090 (including the £17,250 surcharge below)	I/22/425
Ms Deborah Oades	TC/2020/02308	HMRC's refusal to grant discharge of Unauthorised Payments Surcharge	£17,250	I/24/469
Mr Jeremy Donaghy-Sutton	TC/2019/04351	Unauthorised Payments Charge and Surcharge Assessment for tax years ended 2010 and 2011	£63,841.25	I/26/519