Liability arising from unauthorised payments under FA 2004 (Commissioners for HMRC v Sippchoice Ltd)

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Pensions analysis: When is a scheme administrator liable to a scheme sanction charge under section 239 of the Finance Act 2004 (FA 2004)? Barrister Henry Day of Radcliffe Chambers discusses how the aforementioned issue played out in the case of Commissioners for HM Revenue & Customs v Sippchoice Ltd.

Original news

Commissioners for HM Revenue & Customs v Sippchoice Ltd [2017] UKUT 87 (TCC)

What was the background to the case?

Sippchoice was the administrator of the Sippchoice bespoke self-invested personal pension (SIPP) scheme (the SB SIPP), investments in which were being used, without Sippchoice's knowledge, in what appeared to be a pensions liberation scheme.

The alleged scheme involved investment of a member's savings, at the member's request, in a third party company, Imperium Enterprises, which lent the funds to a fourth party, BOH Investments, which in turn funded a subsidiary, SKW Investments, which made a loan to the member. The intention of the scheme was to enable pension benefits to be accessed early, in the form of the loan, without a charge to tax under the unauthorised payments regime.

Sippchoice had taken the decision to allow the SB SIPP to invest in Imperium in May 2010, following a statement from Imperium that it would not make loans to scheme members. In August 2011 Sippchoice received an email from a member stating that he had transferred his pension to the SB SIPP for the express purpose of securing a loan with SKW. Sippchoice duly contacted HMRC.

For the purpose of the proceedings, it was assumed that the loans in question constituted unauthorised member payments under FA 2004, s 160 and, therefore, were also scheme chargeable payments under FA 2004, s 241 rendering Sippchoice, as scheme administrator, liable to a scheme sanction charge under FA 2004, s 239.

Sippchoice applied to HMRC under FA 2004, s 268(5) for discharge of its liability on the grounds that:

- it reasonably believed that the unauthorised payments were not scheme chargeable payments (FA 2004, s 268(7)(a)), and
- in all the circumstances of the case, it was not just and reasonable for it to be liable to the scheme sanction charge in respect of the unauthorised payments (FA 2004, s 268(7)(b))

HMRC refused to discharge the liability. Sippchoice therefore appealed to the First-tier Tribunal (the FTT) under FA 2004, s 269. The FTT allowed Sippchoice's appeal. HMRC accordingly appealed to the Upper Tribunal.

What arguments did HMRC make as to why the original decision of the FTT should be overturned?

HMRC appealed the decision of the FTT on three grounds:

- ground 1—the FTT had erred in law in interpreting and applying the 'reasonable belief' test under FA 2004, s 268(7)(a)
- ground 2—the FTT had erred in law in interpreting the 'just and reasonable' test under FA 2004, s 268(7)(b), and
- ground 3—in relation to the period between 7 July 2011 and 4 August 2011, the FTT had erred as a matter of law in finding that 'the evidence does not disclose circumstances which would have indicated to them that

a more sophisticated scheme was being operated'

In the event, HMRC withdrew ground 2 of its appeal. The Upper Tribunal therefore did not consider the FTT's approach to the 'just and reasonable' test.

On ground 1, the parties agreed that it was not necessary for a scheme administrator, in order to form a 'reasonable belief' under FA 2004, s 268(7)(a), to be aware that an unauthorised payment was being made.

HMRC argued, however, that the FTT had misinterpreted the 'reasonable belief' test in construing it by reference to the tests applied to transactions connected with VAT fraud as set out in *Kittel v Belgium, Belgium v Recolta Recycling SPRL*, joined cases C-439/04 and C-440/04, [2008] STC 1537, at paras [56]–[59] and applied in *Mobilx Ltd (in administration) and Others v HMRC* [2010] EWCA Civ 517, [2010] STC 1436. *Mobilx*, HMRC submitted, was concerned with the question of constructive knowledge, or what a person 'should have known'. That was different from the question of whether a belief was reasonable, as posed by FA 2004, s 268(7)(a).

On ground 3, HMRC argued that the FTT's finding was inconsistent with the documentary evidence before it. It was clear, HMRC said, that by 7 July 2011 (when representatives of Sippchoice had met representatives of Imperium) Sippchoice had a concern about the nature of the scheme being operated by Imperium, including that it might involve the making of loans by an unconnected party.

What did the Upper Tribunal decide and what were its reasons?

HMRC's appeal was dismissed on both grounds.

On ground 1, the Upper Tribunal agreed with HMRC's submission that the test of 'reasonable belief' was not the same as what a person 'should have known'. The test set out in *Mobilx* is whether there is no reasonable explanation for a transaction other than that it was connected with fraud. A belief that something is the case may be unreasonable, however, in circumstances other than when the contrary is the only reasonable explanation—doubts that ought reasonably to have been entertained or unexplained circumstances may render a belief unreasonable even where there are a number of possible reasonable explanations.

The Upper Tribunal did not therefore conclude, however, that the FTT had made an error of law. The 'no reasonable explanation test', it held, was not the determining principle on which the FTT had based its decision. Prior to referring to *Mobilx*, the FTT had considered the evidence before it, directed itself to the issue for decision and had done so purely in terms of reasonable belief, concluding that Sippchoice's belief that no unauthorised payments were being made was in fact reasonable. The FTT confined its reference to *Mobilx* to evidential issues, and reached its conclusion as to the reasonableness of Sippchoice's belief independently of the 'no reasonable explanation' test. In referring to *Mobilx*, the FTT was not setting out a test to be applied under FA 2004, s 268(7)(a).

On ground 3, the Upper Tribunal emphasised that the FTT was concerned with what Sippchoice actually knew at the relevant time. HMRC's submissions, by contrast, focused on what Sippchoice might have known. The Upper Tribunal accordingly upheld the FTT's finding that the circumstances were not such as to have indicated to Sippchoice that 'a more sophisticated scheme' was being operated than it had been told was the case, concluding that the FTT was entitled to find as it did on the evidence and that it had not erred in law.

What are the implications of the judgment?

This is the latest in a number of recent appeals against HMRC in respect of liability arising from unauthorised payments under FA 2004. While in *White v Revenue and Customs Commissioners* [2016] UKFTT 0806 (TC) and *Danvers v Revenue and Customs Commissioners* [2016] UKUT 569 (TCC) loans similar to those in Sippchoice were held to be unauthorised payments, it is notable that in the present case the Upper Tribunal expressly refrained from determining the point (the parties having both proceeded on the assumption that the loans were in fact unauthorised payments), emphasising that such issues are always fact-sensitive.

The judgment does, however, provide guidance as to the construction of FA 2004, s 268(7)(a). As well as clarifying the nature of the test for 'reasonable belief', the Upper Tribunal also approved the parties' agreed position that it is not necessary for the scheme administrator, in order to form a reasonable belief, to be aware that an unauthorised payment had been made. Such a construction, it noted, would give rise to injustice where a scheme administrator acted reasonably

both in not knowing about an unauthorised payment and in believing therefore that no scheme chargeable payments had occurred.

More broadly, the judgment serves as a reminder of the circumstances in which an appellate court or tribunal may set aside a decision. The Upper Tribunal made clear that, even where a lower tribunal commits an error of principle, this will not necessarily vitiate its decision, which must be considered as a whole—the question is whether the error of principle infects the lower tribunal's decision in a way that renders it erroneous.

Following *Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 at para [7] and dicta of Lord Hoffmann in *Biogen v Medeva* [1997] RPC 1 at para [45] and *Designer Guild v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 at 2423, the Upper Tribunal also emphasised that the reasonableness of Sippchoice's belief was a value judgment of the FTT and therefore susceptible to an appeal on a point of law only in limited circumstances and, unless a legal error has occurred, it is not for the appellate court or tribunal to interfere.

Henry Day is a barrister at Radcliffe Chambers. He has a traditional and commercial Chancery practice, focusing on pensions, financial services and private client work. He recently appeared as junior counsel for the defendant trustee in the British Airways pension scheme litigation and as junior counsel for the appellant sponsoring employer in Barnardo's v Buckinghamshire.

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Interviewed by Barbara Bergin.

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