



TC05217

Appeal number: TC/2014/04220

INCOME TAX – pension scheme sanction charges – scheme administrator appealing under s269 FA 2004 against HMRC’s decision to refuse the discharge of its liability to scheme sanction charges – the question being whether the scheme administrator reasonably believed that no unauthorised payment was being made and whether it would not be just and reasonable for the scheme administrator to be liable to the scheme sanction charges - s268(7) FA 2004 – held that on the evidence the appellant reasonably believed that no unauthorised payment was being made and that it would not be just and reasonable for it to be liable to the scheme sanction charges – appeal allowed and application for discharge granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SIPPCHOICE LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE JOHN WALTERS QC
 MR CHARLES BAKER FCA**

**Sitting in public at the Royal Courts of Justice, London on 19 and 20 January
2016**

Rebecca Murray, Counsel, for the Appellant

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

DECISION

5 1. This is an appeal, under section 269 Finance Act 2004 (“FA 2004”), by Sippchoice Limited (“Sippchoice”) against the decision of the Respondents (“HMRC”) to refuse Sippchoice’s application (made under section 268 FA 2004) for the discharge of its (Sippchoice’s) liability to scheme sanction charges. The amounts originally assessed in respect of scheme sanction charges were reduced, pursuant to a decision contained in a letter from the Respondents (“HMRC”) to Sippchoice dated
10 13 March 2014, to £205,307.80 in respect of the tax year 2010/2011, and £168,545.00 in respect of the tax year 2011/2012.

15 2. Section 268(5) FA 2004 entitles a scheme administrator (a person responsible for the discharge of functions imposed on it in relation to a pensions scheme by FA 2004 – see the definition in section 270 FA 2004) to apply to HMRC for the discharge of its liability to a scheme sanction charge on (so far as is relevant to this appeal) the ground mentioned in section 268(7) FA 2004.

3. It is common ground that Sippchoice is a scheme administrator for these purposes and the ground mentioned in section 268(7) FA 2004 is that:

20 ‘(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.’

25 4. In short, the reason for HMRC’s decision was that with effect from 22 December 2010 Sippchoice did not reasonably believe that the unauthorised payments in question were not scheme chargeable payments (see: below) because it failed to take adequate action, having received clear indication that a scheme member was waiting to receive an unauthorised payment.

30 5. The Tribunal’s function in this appeal is to consider whether Sippchoice’s liability to the scheme sanction charges in issue ought to have been discharged (see: section 269(6) FA 2004). In other words, we must consider whether, on the evidence before us, the ground mentioned in section 268(7) FA 2004 has been made out by Sippchoice.

35 6. In order to make the issue in this appeal (which we have summarised above) comprehensible to the general reader, we provide further background as follows.

40 7. It is HMRC’s case that a self-invested personal pension scheme (a “SIPP”), known as the Sippchoice Bespoke SIPP (the “SB SIPP”), which is operated by Sippchoice in its capacity as scheme administrator, held investments which have been used to enable members of the SB SIPP to access their pension funds (in the form of obtaining loans) before the age (55 years) at which pension scheme members are

permitted to obtain benefit from their pensions, and that attempts have been made to access pension funds in this way in a manner aimed at avoiding a charge to tax. Schemes of this type are known as ‘Pension Liberation Schemes’. We say at once that HMRC accept that Sippchoice did not know that a Pension Liberation Scheme was being operated. Put very broadly, HMRC’s case is that Sippchoice did not take adequate steps to ensure that the SB SIPP was not being abused in this way.

8. At the heart of HMRC’s case is their assertion that members of the SB SIPP have accessed their pension funds by receiving payments (made in the form of loans) which were ‘unauthorised member payments’ for the purposes of Part 4 of the FA 2004 (which deals with pension schemes) – unauthorised member payments are a type of unauthorised payments. The definition of ‘unauthorised member payment’ is contained in section 160(2) FA 2004 and the relevant part of that definition is that an unauthorised member payment is ‘a payment made 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 [FA 2004]’ (see: section 160(2)(a) FA 2004). Section 164 FA 2004 deals, unsurprisingly, with authorised member payments.

9. Where an unauthorised member payment is made, a charge to income tax, known as ‘the unauthorised payments charge’ arises under section 208 FA 2004. This charge (which is at 40%) is normally made on the recipient, not on the scheme administrator. HMRC have, we are told, assessed the majority of the members of the SB SIPP for the unauthorised payments charge, and this has given rise to a number of appeals to this Tribunal which had not yet been heard (at the time of the hearing of this appeal). The issue in those appeals will be whether or not any payments received out of the SB SIPP were unauthorised member payments, and, if so, whether they attracted the unauthorised payments charge.

10. We were asked by both sides to assume (in HMRC’s favour) that the payments in issue which were made were indeed unauthorised payments. This is obviously without prejudice to any appeals by any members of the SB SIPP where that point is in issue.

11. If we had decided (which we have not – see: below) that Sippchoice’s liability to the scheme sanction charges in issue ought *not* to be discharged, our decision would have been preliminary in nature, because it is fundamental to any liability of Sippchoice to scheme sanction charges that unauthorised payments have been made out of the SB SIPP and we have not made any decision on that issue. It is useful for us to decide whether Sippchoice’s liability to the scheme sanction charges in issue ought to have been discharged without prejudice to the issue of whether unauthorised payments have been made out of the SB SIPP, because, as we have determined that issue in Sippchoice’s favour, our duty is to grant the application for such discharge (see: section 269(8) FA 2004), whether or not the payments in issue were unauthorised payments.

12. The nature of the Pension Liberation Scheme alleged to have been operated in this case was as follows:

Step One: An individual (“the Member”) transferred his/her pension savings to the SB SIPP.

Step Two: At the request of the Member, Sippchoice, as scheme administrator of the SB SIPP, invested the Member’s pension savings in shares in Imperium Enterprises Limited (“Imperium”).

Step Three: Imperium lent the funds to BOH Investments Limited (“BOH”).

Step Four: BOH funded a subsidiary, SKW Investments Limited (“SKW”) by way of a share subscription.

Step Five: SKW made a loan (“the Loan”) to the Member. The Loan was of an amount up to 25% of the value of the Member’s savings with the SB SIPP and was expressed to be repayable out of the Member’s pension derived from the SB SIPP.

13. The alleged Pension Liberation Scheme was in practice implemented as follows:

(1) SKW found individuals who needed a loan and who had funds within a conventional pension scheme.

(2) SKW promised a loan to such an individual of up to 25% of the value of his/her pension fund, if the individual transferred his/her pension fund from the existing provider to a pension fund administered by Sippchoice and, therefore, became a Member.

(3) After transferring the pension funds, those individuals requested that Sippchoice invest their pension funds in shares in an unquoted trading company, Imperium.

(4) As well as investing in property, Imperium made loans to BOH and another company, Real Bridging Finance Ltd (“RBF”).

(5) BOH subscribed in cash for new shares in SKW.

(6) Either before or afterwards, SKW made the promised loan to the Member. The precise timing is unclear.

14. The overall effect was that funds moved from the Member’s existing pension scheme to a pension scheme administered by Sippchoice. From there cash flowed to Imperium, then, sooner or later to BOH, then to SKW and then by loan from SKW to the Member. Thus, the Member enjoyed a loan indirectly from his/her own pension fund. HMRC say that this was an unauthorised payment.

The evidence

15. We had before us two volumes of documents. These included brief witness statements from Officer Alan Bush of HMRC, Mark Bakes, an individual Member, and Claire Cobbold (formerly Claire O’Neil), an employee of Sippchoice. In addition, the following witnesses appeared, gave evidence and were cross examined:

- (1) Hyman Wolanski, managing director of Sippchoice;
- (2) George Bonello, director of administration of Sippchoice; and
- (3) Kevin Jack of Enhance Support Solutions Limited, a specialist consultancy providing technical support to SIPP providers.

5 16. We found all these witnesses to be honest and reliable and we accept their evidence. Officer Bush's evidence, however, related to events after 4 August 2011, following Sippchoice's bringing the matter in issue to HMRC's attention. It is of very limited assistance to us in determining the issues raised by the appeal.

10 17. Only nine days before the hearing, HMRC applied to admit in evidence a skilled persons report prepared for Sippchoice as a requirement of the FSA. Sippchoice objected to HMRC's application because it was unclear what points HMRC would make in relation to the report. Sippchoice contended that it would have had insufficient time to prepare a response and to introduce counter-evidence. At the hearing Ms Murray, for Sippchoice, renewed her objection to the skilled persons report. After a brief review of the report, we indicated that we were inclined to give it 15 little weight. It seemed to us to be written with the benefit of hindsight and to be a summary of conclusions without much explanation of the evidence. Most importantly, the author was not available to explain the basis for his conclusions.

20 18. The report was put to Mr Wolanski during his evidence. Mr Wolanski responded that the report was commissioned to look at the company's procedures. There was only one brief comment on the relevant matter, with which he disagreed, and no description of any evidence supporting that comment. Having taken the report and the submissions made about it into consideration, we concluded that the skilled persons report was of no assistance to us in determining this appeal, and we have 25 disregarded it.

The facts

19. Mark Bakes did not attend the hearing to give evidence or be cross-examined. The contents of his witness statement were not seriously in dispute. Ms Murray, for Sippchoice, did say that she would have liked to ask Mr Bakes whether he had 30 worded his witness statement to tie into the email Claire Cobbold sent to Mr Bonello (which was in the terms of her witness statement – see: below, paragraph 21). We consider the contents of the witness statement to be credible and we reproduce it as follows (and accept the evidence it contains):

35 'On 12 May 2015, I was asked by Mr Alan Bush of HMRC about my recollection of events which took place back in 2010. At that time, I was in severe financial difficulty and was in desperate need of cash and so when I received an email telling me that it was possible to unlock your pension, I made contact with the sender of the email and was referred to a company called SKW Investments Ltd.

40 I cannot recall the name of the person who called me from SKW Investments Ltd, but he told me there was a loophole in the law which would enable me to take the tax-free cash from my pension straightaway in the form of a loan, rather

than have to wait until I reached age 55. He told me that they would invest my pension money (which was then with Zurich) in a company through the purchase of shares which would then invest in property, fixed interest stocks, gilts and corporate bonds. Interest would be payable annually on the loan. I signed a loan agreement ... I recall that the first year's interest was deducted from the initial loan. I have not been required to pay any further interest and I remember being told that the return from the investment would eventually repay the loan and all of the interest. I was also told that I had to join the Sippchoice Bespoke SIPP and I was given all the necessary forms by SKW to complete.

Early in December 2010 I received my first communication from Sippchoice welcoming me as a new member. Despite being told that I should only ever contact SKW about the arrangement I was entering into, as Christmas was approaching and I was desperate for money, I telephoned Sippchoice to chase up my money. I distinctly remember telling the lady I spoke to that I needed the money and I asked whether she had received the pension money. I also remember that shortly after that call, I received a call from my contact at SKW, telling me off for contacting Sippchoice. He threatened to pull the plug on my loan and said that I had jeopardised everything they were doing. He assured me that everything was legal and told me again not to speak to Sippchoice. I was taken aback by his outburst but as I was desperate for money, I didn't push matter [*sic*] any further. The money arrived in my bank account within a fortnight, just in time for Christmas.'

20. The witness statement does not contain a statement of truth in terms.

21. The lady at Sippchoice to whom Mr Bakes spoke was Claire Cobbold. She also did not attend the hearing to give evidence, but the contents of her witness statement were not in dispute and the parties agreed they could be taken at face value. She was an administration manager at Sippchoice in 2010, having joined them in 2009 with some 6 years' experience in pensions administration. Her witness statement contained a statement of truth. She said as follows:

'I was responsible for looking after all of the Imperium cases and in December 2010 I had suspicions about Imperium when dealing with the case of Mr Mark F Bakes ... We sent discharge forms to Zurich on 6 December 2010. The funds were not received until 22 December 2010.

In the run up to receiving the funds, Mr Bakes was calling me at least once a day to find out if the cash had been received yet. In the last conversation I had with him he said something along the lines of "I need to get this money". It is not unusual for members to call us with a view to getting money invested as soon as possible, this is particularly the case before a period of bank holidays such as Christmas. The wording that Mr Bakes used sounded a bit odd and so I called Mark [Roberts] at Imperium to ask if there was a closing date for the investment or if there was any reason why he was in such a rush to get the money invested so urgently. Mark said there was no closing date and advised that the share price wouldn't be negatively impacted by monies arriving later so

he didn't know why there was a big rush. Mark said that he had found Mr Bakes to be a bit odd when he had dealt with him and said that he would go back to him. I didn't have any further calls from Mr Bakes after this conversation with Mark.

5 Since this was unusual, I referred this matter to my manager, George Bonello.

There were no other cases like Mr Bakes.'

22. Mr Bonello has been Director of Administration and Operations at Sippchoice since Sippchoice commenced business in April 2009. He had about 9 years previous experience in the pensions industry before joining Sippchoice. He told us that
10 Sippchoice is authorised and regulated by the Financial Conduct Authority. It operates the SB SIPP, which is a registered scheme for tax purposes and (as at 24 March 2015, the date of his witness statement) had approximately 1,250 members with total assets under administration of approximately £500 million. These assets are invested in a very wide range of investments.

15 23. Mr Wolanski has been the Managing Director of Sippchoice since the company commenced business in 2009. He has many years of previous experience in the pensions industry.

24. From the evidence of Mr Bonello and Mr Wolanski and the documentary evidence before us we find further facts as follows (unless the contrary appears from this
20 Decision, we should be taken to have accepted the evidence we have recorded):

25. According to Sippchoice's website, the SB SIPP had been designed for individuals who expect to have a pension fund of at least £100,000 and require investment flexibility and a high level of personal service.

17 May 2010

25 26. On 17 May 2010, Sippchoice received an unsolicited email from William Ross-Jones who was previously unknown to them. He said that he was aware of several individuals who were looking to invest their pensions in unquoted companies *via* a SIPP. He asked whether Sippchoice would allow that and enquired generally about the conditions. Mr Bonello replied on behalf of Sippchoice on the same day. He
30 confirmed that investment in unquoted companies would be permitted and that the due diligence would involve a check with Companies House and identity verification checks on the directors.

20 May 2010

27. Imperium was incorporated on 20 May 2010. The initial directors and
35 shareholders were:

William Kennedy Ross-Jones, born April 1982 (and so aged 28) who described his occupation as "photograph".

Robert John Metcalfe, born March 1971 (and so aged 39) who described his occupation as “solicitor”.

By 28 May 2010

28. Mr Bonello had several telephone conversations with William Ross-Jones, during which he was told that Imperium was a newly formed company that was going to make investments in property, primarily in and around Liverpool, that were considered to be at depressed prices and to be suitable long-term investments for self-invested personal pension funds. During May 2010, Mr Wolanski and Mr Bonello reviewed Imperium's website, which contained details of Imperium's investment strategy. At this stage, it was apparent to them that Imperium was going to make commercial loans. It was explained to them that this would be as a short-term investment option as Imperium accumulated funds between property purchases. Mr Ross-Jones confirmed verbally that Imperium would not be making loans to SIPP members, or indeed any individuals. Mr Bonello's understanding of the nature of pensions liberation schemes at that time was that pension funds were released to investors in a much more direct fashion than in the scheme alleged to have been implemented in this case (which, of course, Mr Bonello had no knowledge of at the time). His concern in his correspondence with Imperium was to ascertain whether Imperium was lending to pension scheme members, or to other companies that themselves lent to pension scheme members.

29. By 28 May 2010, that is 11 days after initial contact, the identity verification process had been completed. Mr Wolanski decided in principle to allow the SB SIPP to invest in Imperium because:

- (1) the individuals at Imperium had a good understanding of HMRC rules and appeared to be professional in their dealings with Sippchoice;
- (2) the verification of identity checks was satisfactory;
- (3) one of the directors was a qualified solicitor;
- (4) the investment strategy described on Imperium's website was credible and appeared to be genuine; and
- (5) there was no suggestion of any involvement in a pension liberation scheme.

30. Sippchoice, unlike many SIPP providers, was willing to accept non-standard investments such as unquoted shares and unregulated collective investment schemes. They were not willing to accept esoteric investments of uncertain value such as holiday resorts, commodities or foreign plantations. Imperium seemed to them to be a genuine investment.

7 July 2010

31. On 7 July 2010, Sippchoice accepted the first transfer of pension funds where an investment in Imperium was proposed.

11 August 2010

32. On 11 August 2010, Sippchoice made the first investment in Imperium on behalf of a member. A second investment was made on 15 August 2010.

16 August 2010

5 33. On 16 August 2010 Mark Roberts of Imperium sent Mr Bonello an email, which attached Imperium's Investment Memorandum. In the covering email, Mr Roberts stated "once again I can confirm that Imperium Enterprises Ltd have not made, and will not make at any point in the future, any loans to individuals." The Memorandum itself stated "The Company does not have a consumer credit license
10 and cannot lend to individuals".

34. Mr Wolanski was asked about various inconsistencies in the Memorandum, particularly in relation to the realisation of their investment by the shareholders. It was clear that he had not given this any great attention at the time.

15 35. Following this time, investments continued *via* the SIPP until the summer of 2011, as explained below.

19 August 2010

20 36. On 19 August 2010 Mr Wolanski emailed Michael Posner, the co-founder of Sippchoice, saying that Imperium was an example of a gut feeling of concern about an investment and asking for advice on how to deal with such situations. Mr Wolanski and Mr Posner exchanged emails in this chain on 6 September and 17 November 2010. Mr Wolanski summed up: "the basic issue here, which is very difficult to address in a structured way, is that there is nothing explicitly wrong with this but it fails the "smell" test".

17 November 2010

25 37. Mark Roberts of Imperium emailed George Bonello and Claire Cobbold (then Claire O'Neil) at Sippchoice with a copy of the management accounts of Imperium made up to 31 October 2010. These showed interest income of £2,656 but expenses of £225,299 to give a net loss of £222,643. Gross assets were a total of £1,380,341 made up of land £741,000, cash £237,592 and debtors £401,749.

30 *December 2010*

38. Claire Cobbold formed suspicions about Imperium as a result of contact with Mr Bakes. Sippchoice sent the papers to transfer Mr Bakes's pension funds to the SB SIPP to his existing pension provider (Zurich) on 6 December 2010. Sippchoice received the funds on 22 December 2010.

35 39. There are no contemporaneous notes of the number of telephone calls made by Mr Bakes or of their content. Claire Cobbold spoke to Mr Bonello about her concerns but did not commit them to writing. Neither Mr Wolanski nor Mr Bonello thought to

5 speak to Mr Bakes about the matter. It was not until some nine months later that
6 Claire Cobbold recorded her recollection in her email of 17 August 2011 which she
7 repeated in slightly expanded form in her witness statement (see: above, paragraph
8 21).

5 40. Sippchoice could not have known why they received no further calls from Mr
6 Bakes after those referred to by Claire Cobbold in her witness statement. Mr
7 Wolanski's concern at the time was whether money was going out of Imperium to
8 scheme members 'big time' and it was, he said, obvious to him that this was not
9 happening because most of Imperium's money was in property or financial assets. He
10 failed to appreciate that loans by Imperium to BOH were being invested in shares in
11 SKW which was making loans to pension scheme members. Mr Bakes's case seemed
12 to him at the time to have been a 'one off' and it did not occur to him to investigate it.

22 December 2010

15 41. On 22 December 2010 Mr Bonello sent an email to Mr Roberts of Imperium in
16 which he said:

17 "Following your conversation with Claire re Mr Bakes I am again
18 concerned about what Imperium is doing. Primarily I am still
19 concerned that SIPP money is reaching the hands of the underlying
20 client. I appreciate that your memorandum only allows for loans to be
21 made to corporations but this doesn't then prevent the corporation from
22 lending to an individual. Technically this type of transaction doesn't
23 contravene HMRC rules but it is definitely not in the spirit of the rules
24 and I would decline further business if this was the case.'

25 42. Mr Bonello asked for a breakdown of Imperium's debtors, along with
26 confirmation of whether the debtor companies had any common directors with
27 Imperium. He said he would like to know what type of business the debtor companies
28 conduct and that he may need to see company accounts.

30 43. Mr Roberts replied on the same day. He confirmed that Imperium and the
31 debtors did not have any directors in common. He also provided a copy of the
32 purchase contract for apartments at Trencherfield Mill, Wigan. He said he would
33 provide further information the following afternoon. Mr Bonello was comforted by
34 this quick, if partial, response.

23 December 2010

35 44. On 23 December 2010 Mr Roberts identified two debtors: BOH and RBF. He
36 said that RBF provided secured finance to individuals and that BOH did not lend to
37 individuals, and provided property advice to Imperium. Thus, Mr Bonello said, no
38 alarm bells sounded for him at this stage.

40 45. Mr Bonello said that he was not concerned about RBF making secured loans to
41 individuals. His understanding at the time was that individuals who were able to offer
42 security for loans did not need pension liberation. Only individuals who were unable
43 to offer security would be interested in borrowing from their own pension fund.

31 January 2011

46. Mark Roberts at Imperium emailed George Bonello to let him know the new business process as seen from the Imperium end:

- 5 (1) Prospective investor (or their introducer) emails or calls to let us know their interest in investing.
- (2) Imperium send the individual the Information Memorandum.
- (3) Individual confirms whether they wish to proceed along with acknowledgement that no advice is offered or provided by us.
- 10 (4) Imperium sends the individual the Sippchoice application form and investment request form,
- (5) Imperium send "information only email".
- (6) Sometimes the individual will want our assistance with paperwork, and we make it very clear that no financial advice can be offered and that they should seek a qualified adviser if they are unsure whether the investment suits their needs.
- 15 (7) The client either directly, or via Imperium, sends the Sipp pack over to Sippchoice with all relevant transfer forms.

47. We find that this description was misleading. It is clear from Mr Bakes's witness statement that individuals were (directly or indirectly) approached by SKW with a proposal to 'unlock your pension' and that this involved investment of pension funds (through the SB SIPP) in a company investing in property and financial assets, which we infer was Imperium. At this time, Sippchoice was wholly unaware of the existence of SKW and could not have known of its role.

20

48. Imperium provided management accounts for BOH to 31 December 2010. These showed that it received management fees and was profitable and its principal asset was "investments". The document did not describe the nature of these investments (which apparently actually included shares in SKW).

25

4 March 2011

49. Imperium provided management accounts of RBF to 31 January 2011. These showed that it had made loans of £1.5m and was profitable. There was insufficient narrative to explain to someone who did not already know, what RBF's business actually comprised.

30

Spring 2011

50. In the early part of 2011, Sippchoice made several verbal requests to meet with Imperium, because a volume of business greater than had been anticipated, had been received from Imperium. Mr Bonello said that Imperium "did not commit to a meeting" and on 4 May 2011 Sippchoice "formally" requested a meeting with the directors.

35

51. Prior to this "formal" request for a meeting, Natalie Ward of Sippchoice had "1 or 2" clients chasing about their pension transfers. Ms Ward thought this was a bit strange. She said "we discussed it in the office and then George was making arrangements for a meeting".

5 *7 July 2011*

52. This meeting took place on 7 July 2011. Mr Bonello was not at the meeting because of childcare issues. A note of the meeting prepared on behalf of Sippchoice recorded:

10 Notes of meeting with Imperium Enterprises Ltd at 1 Eversholt Street
on 7 July 2011

Present:

Gary Quillan, Director, BOH Investments Limited (also, Managing
Director, Accelerated Bridging Finance)
15 Mark Roberts, Administration and Accounts Manager, Imperium
Enterprises Ltd
William Ross-Jones, Director, Imperium Enterprises Ltd
Robert Metcalfe, Director, Imperium Enterprises Ltd

Sippchoice:

20 Hyman Wolanski
Michael Posner
Claire O'Neil

25 1. Sippchoice has received a lot of business that has been introduced to
us by Imperium Enterprises Ltd ('Imperium') and, as a consequence,
Sippchoice wanted to meet Imperium to 'put a face to a name' and to
better understand the Imperium proposition.

30 2. Imperium is Gary Quillan's brainchild. Gary (and his colleagues) is
based in Liverpool and he has considerable experience of financial
services — he used to be an IFA (he is on the FSA Register under
reference GXQ00009 but is shown as 'inactive') and has been actively
involved in mortgage and bridging finance. He has a number of
business interests and felt that there was a business opportunity using
35 his experience and contacts in creating a 'fund' that invests principally
in properties that could be acquired on good discounts in the current
economic difficulties. Imperium was created for this purpose as an
unregulated company that invests in this way for individuals with
SIPPs (since these were considered to be the best source of funding).
The Information Memorandum for Imperium, which contains many
40 risk warnings, makes it clear that the company can invest, inter alia, in
commercial property, land, residential property, loans to other
companies and in shares in companies whose shares appear to be
under-priced and good value.

45 3. The intention is for Imperium to raise £10 million over the period
from 2010/2011 i.e. 10 million share of £1 each). This will be locked-
up until 2014, although the directors may buy back shareholdings in
exceptional circumstances, following which it may be possible for

shareholders to cash in shares based on the underlying market value of the company's assets.

5 4. Gary has no direct involvement with Imperium but the link is that his company, BOH Investments Limited ('BOH') provides investment services to Imperium. Therefore, Imperium is BOH's client.

10 5. Imperium is run by Mark, William and Robert and they deal with the business introductions and day-to-day administration. (William and Robert receive directors' remuneration that varies from £20,000 to £60,000 pa each depending on the number of shares purchased by investors.) Potential investors are introduced to Imperium by various IFAs and other introducers. No advice is given to potential investors by either the introducers or by Imperium. Similarly, no advice is given to individuals who make a transfer to a SIPP from an occupational pension scheme in order to invest in Imperium. Potential investors are told that Sippchoice is a SIPP that will allow investment in Imperium but it is not recommended.

20 6. Introducers receive payment of up to 6.5% of the amounts invested. Imperium appears to make a one-off charge of 1.25% of the amount invested to a third party administrative service and BOH charges a one-off of 2% of the total amount invested in the company's shares and an annual management charge of 1.5% per annum of the value of the company. Furthermore, Imperium pays the Sippchoice fees.

25 7. In total, around £5 to £6 million has been raised so far, almost all of which has come via Sippchoice but a very small amount seems to have been raised via Rowanmoor and Michael Field SIPPs.

30 8. We were provided with out of date management accounts for both Imperium and BOH and no meaningful communication about the fund investments has been issued yet, although a newsletter is in the course of preparation (but has been held back pending a significant investment that will be made when the recently announced changes to stamp duty for multiple purchases has been introduced).

35 9. We queried the extent to which investors really understand the nature of the investment in Imperium (based on some queries that the investors have raised with us) and were told that every potential investor is given the information memorandum and it is really a matter for them to familiarise themselves with its contents.

40 10. We also queried whether a loan facility was being offered to investors in conjunction with an investment in Imperium. We were told that no such loans were made either by Imperium or BOH, although it seems that loans may be being made by an unconnected party.

11. Imperium has appointed Baker Tilly as its accountants, although no accounts have yet been prepared and there was uncertainty as to when the first set of accounts will be due (the Information Memorandum refers to a 31 March year-end).

45 53. After the meeting on 7 July 2011, 8 new investments in Imperium were made via Sippchoice. Of these, one was made on behalf of a Member whose pension funds

had been transferred to Sippchoice after 7 July 2011 (on 26 July 2011). This was the final transfer to Sippchoice for the purposes of an Imperium investment.

4 August 2011

54. Mr Orpwood was one of the earliest members to invest in Imperium. Sippchoice sent him his first annual statement. Then on 4 August 2011, Mr Orpwood sent an email to Natalie Ward at Sippchoice expressing dissatisfaction with his SIPP. In that email, he stated

10 "the only reason I transferred my pension from the Ford Pension fund was to secure a loan with SKW loans, who recommended me, and that I had to transfer my pension in order to secure a loan with them."

55. On the same day Mr Wolanski forwarded Mr Orpwood's email to Imperium and informed Imperium that Sippchoice would be looking into the matter and would be unable to accept any new business from Imperium in the meantime.

8 August 2011

15 56. On 8 August 2011, Mr Wolanski informed Mr Bush of HMRC about a client having received a loan following an investment in Imperium.

57. At this point, there were approximately 100 Imperium related cases out of a total of 700 cases managed by Sippchoice. The amount invested in Imperium was approximately £6m out of a total of £200m. The pattern up to and after 22 December 2010 was similar:

	Up to 22 December 2010	After 22 December 2010
Total number of investments in Imperium	45	53
Smallest investment	£16,646	£22,474
Largest investment	£260,801	£220,940
Number less than £50,000	21	22

58. Mr Kevin Jack, an employee of Enhance Support Solutions Limited, gave evidence for Sippchoice about the 'general state of the SIPP market in relation to pensions liberation around December 2010'. His evidence was that at that time the focus of SIPP providers with regard to the avoidance of pensions liberation schemes was on the possibility of direct payments or fund movements from a scheme to a scheme member.

The parties' submissions

59. Ms Murray, for Sippchoice, submits that Sippchoice reasonably had no knowledge of the fact that loans were being made to individuals in connection with the investment of funds in shares in Imperium, until 4 August 2011, when Mr Orpwood
5 emailed Sippchoice, as noted above. It had carried out due diligence in line with market practice at the time and had found no evidence of loans to scheme members being made out of the invested pension funds.

60. She comments that this is not surprising, given the 'highly innovative' nature of the scheme which had been put in place, and the fact that Sippchoice had been
10 deliberately kept in ignorance of the scheme's existence by Imperium – and Mr Quillan (at the meeting on 7 July 2011).

61. She submits that it would not have been possible to trace funds through from Imperium to individual members of the SB SIPP and to draw the conclusions which HMRC have drawn, without knowledge of SKW's existence and accounting
15 information for SKW and BOH and a forensic analysis of such information. That information was not known to Sippchoice on or before 4 August 2011, at which point no further new business was accepted by Sippchoice from Imperium.

62. She submits that the conversations between Mr Bakes and Ms O'Neil were not such that Sippchoice could have been able to work out the steps of the alleged scheme
20 and realise that some of the funds invested in Imperium were reaching the hands of SB SIPP members. Sippchoice (Mr Bonello and Mr Wolanski) reasonably thought that it was likely that Mr Bakes wanted to see his pension funds invested urgently, rather than take money out of his pension funds.

63. Sippchoice reacted to this incident by making further enquiries of Imperium and, she submitted, were reasonably satisfied until 4 August 2011, on the basis of the
25 information obtained, that scheme members were not receiving funds from their investments in Imperium.

64. Ms Poots, for HMRC, submits that without accepting that Sippchoice's due diligence on investments made by the SB SIPP in unquoted companies was adequate
30 before 22 December 2010, when Mr Bakes telephoned Ms O'Neil and said that he 'needed the money', Sippchoice's belief that no unauthorised payments were being made in connection with the SB SIPP's investments in Imperium then became an 'unreasonable' one.

65. She submitted that section 268(7)(a) FA 2004 which, as we have already said, contains grounds for discharge of liability to a scheme sanction charge if:
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 '(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
40 the unauthorised payment.'

should be interpreted to include situations where the scheme administrator reasonably believed that there was no unauthorised payment being made, and so, reasonably believed that there was no scheme changeable payment.

5 66. We are content to accept that interpretation. Otherwise, in a case where a scheme administrator reasonably believed that there was no unauthorised payment, he would not be able to bring himself within the wording of section 268(7) FA 2004. We would regard that result as unfair and unintended by Parliament. HMRC are also of that view.

10 67. Ms Poots's case is that the evidence shows that Mr Wolanski and Mr Bonello were both aware of the risk of loans being made to scheme members, whether by Imperium or another corporate entity. Despite this, Sippchoice did not take adequate steps to obtain a clear answer from Imperium before continuing to invest in Imperium shares on behalf of SB SIPP members. This failure became particularly apparent following Sippchoice's communications with Mr Bakes in December 2010.
15 Furthermore, Sippchoice did not take the step of asking any one of the many relevant SB SIPP members whether they had received or been offered a loan in connection with their pension fund investment.

20 68. In the result, Ms Poots submits, Sippchoice's belief that the investments in Imperium were not connected to or leading to loans to SB SIPP members was not 'reasonable'.

69. Further, she submits that in view of Sippchoice's failure to act on the warning signs which the evidence discloses, it is just and reasonable for Sippchoice to be subject to the scheme sanction charges.

25 70. She drew our attention to the decision of this Tribunal (Judge Poole and Janet Wilkins) in *Mark Danvers v HMRC* (Appeal number TC/2013/00239), released shortly before the hearing in this appeal, on 5 January 2016. However the only issues between the parties in that appeal were whether the loan made to the appellant was a 'payment' within section 161 FA 2004 (the Tribunal found it was) and whether the payment was made in connection with the investments acquired for the purposes of a
30 registered pension scheme (the Tribunal found it was, as well). Since these issues do not arise on this appeal, we have not derived any assistance from the decision in *Mark Danvers*.

35 71. She pointed out in particular that Mr Wolanski had given a decision in principle to accept investments in Imperium, only 11 days after the first approach from Imperium. He had concluded, after receiving the Investment Memorandum that the Imperium investment failed the 'smell' test. Sippchoice had not investigated the concerns raised by Mr Bakes's telephone conversations with Claire Cobbold, even after Mr Bonello had spotted that there might be an indirect avenue for the release of scheme funds to Members. Similarly, he had not acted on the information obtained at the meeting with
40 Imperium on 7 July 2011 that although no loans were being offered to SB SIPP members by Imperium or BOH, such loans might be being made by 'an unconnected party'.

72. She suggested that Mr Jack's evidence was of no help. Even if the market was unaware of the particular type of pension liberation scheme apparently in operation in this case, Mr Wolanski and Mr Bonello were sufficiently concerned, and had had enough warning signs that they should have followed up.

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Discussion and decision

73. We return to the issue for decision as posed by section 268(7) FA 2004, interpreted as we have explained in paragraph 65 above. From and after 22 December 2010, when Mr Bakes spoke to Claire Cobbold on the telephone, telling her that he 'needed the money' until 4 August 2011, when Sippchoice learned from Mr Orpwood that he had become a Member of the SB SIPP in order to secure a loan from SKW, did Sippchoice reasonably believe that no unauthorised payments were being made?

74. Sippchoice believed that no unauthorised payments were being made. The issue is whether that state of belief on the part of Sippchoice was 'reasonable'. In making our judgment on this point we must have regard to all the evidence before us.

75. Claire Cobbold's reaction after speaking to Mr Bakes was that she had suspicions about Imperium. These were tempered by her experience that it was not unusual for members to call Sippchoice with a view to getting their pension funds invested as soon as possible. Nevertheless, she referred the matter to Mr Bonello, who immediately emailed Mr Roberts of Imperium expressing his concern 'about what Imperium is doing'. He was explicit and wrote that 'primarily [he was] still concerned that SIPP money is reaching the hands of the underlying client'. He was satisfied by Mr Roberts's response which met his concern, which was that Imperium was not itself lending to Members or to other companies that themselves lent to Members. This was why no alarm bells sounded for Mr Bonello at this stage.

76. Mr Wolanski had had a 'gut feeling of concern' about Imperium as far back as August 2010. He explained to Mr Posner (the co-founder of Sippchoice) that there was 'nothing explicitly wrong with [the investment in Imperium] but it fails the "smell test"'. Nevertheless, having received the management accounts of Imperium in November 2010, he was reassured that money was not going out of Imperium to Members 'big time' because the accounts showed that most of Imperium's money was in property or financial assets. He dismissed the case of Mr Bakes as being a 'one off'.

77. The reality was, we find, that both Mr Wolanski and Mr Bonello were concerned to satisfy themselves that there was no 'simple' pensions liberation scheme being operated through Imperium by which money was lent to Members by Imperium or by one of Imperium's debtors. They did not appreciate that a more sophisticated scheme might be being implemented whereby Imperium's apparently innocent financial assets (loans to BOH) were in fact a mask for an investment by BOH in a subsidiary (SKW) which would be the vehicle for lending funds to Members. We consider that in adopting this approach Mr Wolanski and Mr Bonello were behaving reasonably. In our judgment the evidence does not disclose circumstances which would have indicated to them that a more sophisticated scheme was being operated.

78. Mr Wolanski raised his concerns and those of Mr Bonello again at the meeting with Mr Quillan of BOH and the Imperium personnel on 7 July 2011. While being satisfied by what they said as to the commercial activity of Imperium in the property market and lending to other companies, they were told that although no loans to investors (Members) were made by either Imperium or BOH ‘it seems that loans may be being made by an unconnected third party’. This was a false assurance given by Mr Quillan and Imperium, because loans were in fact being made by SKW, which was connected with BOH.

79. We find that the concerns which both Mr Wolanski and Mr Bonello had, were laid to rest by misinformation deliberately given them by Imperium (and Mr Quillan). On a number of occasions, Sippchoice were very clear about their concern that a pensions liberation scheme was being operated, and yet they were given answers designed to give false assurances. We refer to the comment that loans may be being made by an unconnected third party, made at the meeting on 7 July 2011. We also refer to Mr Roberts’s misleading email to Mr Bonello of 31 January 2011 in which the involvement of SKW in deliberately soliciting pension funds for transfer to the SB SIPP with proposals to ‘unlock your pension’ were concealed from Mr Bonello. We also refer to the financial information about Imperium which was provided to Sippchoice and which (intentionally, in our judgment) gave no indication of how the investments of Imperium were a cover for the eventual loans to be made to Members by SKW. Further back, there were the assurances given by William Ross-Jones of Imperium in the initial conversations with Mr Bonello in May 2010, and the explicit assurance given by Mark Roberts of Imperium in his email to Mr Bonello of 16 August 2010, covering the Investment Memorandum. Our findings are, of course, confirmed by the evidence that the ‘contact at SKW’ had rebuked Mr Bakes for contacting Sippchoice at all, telling him that he had ‘jeopardised everything they were doing’.

80. In addition to this, we find that Sippchoice conducted standard due diligence on the directors of Imperium though, of course, that did not (and could not have) revealed the operation of the alleged pensions liberation scheme. The fact that one of the directors of Imperium was a solicitor reasonably provided Mr Wolanski with incidental assurance.

81. We have concluded from the evidence that Sippchoice’s belief between 22 December 2010 and 4 August 2011 that no unauthorised payments were being made was reasonable. It is always easy after the event to point to things that were not done which, if they had been done, might have revealed the nature of the alleged scheme. But, in our judgment, approaching the matter realistically, Mr Wolanski and Mr Bonello recognised the possibility, in broad outline, that Imperium might be a front for a pensions liberation scheme and made proportionate enquiries of Imperium. It was reasonable for them to be satisfied with the responses received, which reasonably appeared to them to be genuine and reassuring. Having received those reassuring responses, we consider that their not consulting the Members individually was also reasonable conduct on their part.

82. The question of how to determine whether an honest belief that transactions are not connected to fraud is reasonable has been addressed in the context of Missing Trader Intra-Community VAT fraud (MTIC fraud) in the landmark decision of the Court of Appeal in *Mobilx Ltd (in administration) and Others v HMRC* [2010] STC 1436. There, the question was as to the indicia of a situation where a trader ‘should have known’ that its transactions were connected with VAT fraud. At [52] Moses LJ held that a taxpayer is obliged to deploy the means at his disposal of knowing of the connection. Thus, a trader who ‘turns a blind eye’ can be taken to be in the position of one who should have known of the connection. At [59], Moses LJ considered the extent of knowledge required to satisfy the ‘should have known’ test. He said:

‘If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact.’

83. We consider that the question arising in this case (did Sippchoice reasonably believe that no unauthorised payments were being made?) raises similar evidential issues to the question in MTIC cases of whether a trader should have known that its transactions were connected with fraud.

84. Following *Mobilx*, we have considered whether Sippchoice realistically had means at its disposal to learn of the connection between the investments by Members of the SB SIPP in Imperium shares and unauthorised payments being made, and have concluded that it did not. It made suitable enquiries of Imperium and was deliberately misinformed by them.

85. We have also considered whether the circumstances of the case show (on the evidence) that the only reasonable explanation of the investments in Imperium was that they were connected with the making of unauthorised payments and have concluded that such was not the only reasonable explanation. Quite the reverse, it was reasonable for Mr Wolanski and Mr Bonello to have been satisfied that the investments were genuine commercial investments in a company primarily concerned with building up a property business.

86. For the reasons given above, we hold that Sippchoice has made out the ground contained in section 268(7)(a) FA 2004 – that is, that it reasonably believed that there was no unauthorised payment being made.

87. We turn to the second ground, contained in section 268(7)(b) FA 2004, that in all the circumstances of the case it would not be just and reasonable for Sippchoice to be liable to the scheme sanction charges. It seems to us that this imposes an additional obligation on Sippchoice to show that there is nothing exceptional in the circumstances of the case that would make it just and reasonable for the scheme sanction charges to be imposed, notwithstanding the fact that Sippchoice reasonably believed that there was no unauthorised payment being made.

88. In our judgment the evidence shows nothing exceptional of this kind that would make it just and reasonable to impose the scheme sanction charges. We therefore hold that Sippchoice has made out this ground also.

89. We therefore allow Sippchoice's appeal. For the reasons we have given, we consider that Sippchoice's liability to the scheme sanction charge ought to have been discharged and we grant Sippchoice's application to discharge that liability. As we are allowing the appeal, our decision is final, as opposed to provisional.

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

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**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 30 JUNE 2016