# Business transactions, beneficial title and resulting trusts:
# The meaning of "payment" within the unauthorised payments charge regime

COMMENTARY BY JONATHAN DAVEY QC

In the recent Court of Appeal ("CA") decision of *Clark v HMRC* [2020] EWCA Civ 204 ("*Clark*") the Court gave valuable guidance as to the meaning of "*payment*" for the purpose of the imposition of the tax charge on unauthorised member payments from registered pension schemes under sections 208-210 of the Finance Act 2004 ("FA 2004").

The factual context of the case concerned arrangements entered into by Mr Clark, the purpose of which was to enable him to access his pension monies for personal investment. The arrangements were designed to generate an authorised surplus payment that would not be subject to tax on the basis that the scheme administrator was offshore and thought to be outside the charge to UK corporation tax. The monies would then be made available to Mr Clark via a BVI company known as Cedar Investment Management Limited ("CIM").

The scheme involved a number of steps. Two particularly important steps were as follows: first, the transfer of £2.115m (the "Suffolk Life transfer") from Mr Clark's Suffolk Life self-invested personal pension ("SIPP") into what was purported to be a registered pension scheme known as the Laversham Marketing Limited pension scheme ("LML pension"); secondly, the transfer of £2.115m (the "LML transfer") by the LML pension to Laversham Marketing Limited ("LML"), which was the company incorporated in Cyprus which had established the LML pension. As a result of the remaining steps within the scheme, which included the receipt by CIM of the monies (minus fees), and the provision of loans to Mr Clark thereafter, Mr Clark was able to invest the monies profitably in the London property market.

The dispute initially focused on whether or not the LML transfer constituted an unauthorised member payment within the meaning of section 160 FA 2004 and was therefore subject to a charge and surcharge. However, following the first instance hearing, the First-tier Tribunal ("FTT") found that the instrument establishing the LML pension was sufficiently uncertain as to render the trusts of the pension scheme void, the result of which was that, while the remaining steps taken by Mr Clark were implemented as planned, the Suffolk Life transfer into the purported pension scheme gave rise to a resulting trust in favour of the Suffolk Life SIPP. Thus, the Suffolk Life transfer had been ineffective to convey beneficial title, which stayed with Suffolk Life.

Mr Clark argued that the charging provisions within FA 2004 were only apt to include transfers of beneficial ownership, but the FTT held that the Suffolk Life transfer was a "*payment*" for the purposes of the legislation. The Upper Tribunal ("UT") agreed with the FTT. The taxpayer appealed to the CA.

The CA (Henderson LJ, Bean LJ, Nicola Davies LJ) upheld the decisions of the FTT and the UT, finding that the Suffolk Life transfer did give rise to an unauthorised payment charge. In reaching this conclusion the CA had to consider whether or not the passing of beneficial title was a necessary constituent element of a "*payment*" for the purposes of the relevant FA 2004 provisions. This in turn involved the CA considering its previous decision (judgment of Chadwick LJ) in *Venables v Hornby* [2002] EWCA Civ 1277 and the High Court's decision (judgment of Arden J) in *Hillsdown Holdings Plc v IRC* [1999] STC 561. The CA ultimately found that the passing of beneficial title was not a necessary feature of a "*payment*". At the core of the CA's analysis that the Suffolk Life transfer was a "*payment*", notwithstanding the fact that it transferred only legal title and not beneficial title, was the unrealism of the potential contrary analysis. Henderson LJ stated (at [40]): "*…the natural reaction of anybody to the question whether there had been a payment of the £2.115m by Suffolk Life to the LML Pension would surely be that of course there had…From a practical and common-sense perspective, why should it make any difference to this analysis if it later transpired that, unknown to everybody at the time, the transfer was in fact defective and gave rise to a resulting trust? In the context of the carefully designed scheme of the 2004 Act, one would not expect the meaning of an everyday word like "payment" to depend on legal niceties of that kind.*"

Another key element of Henderson LJ's reasoning was the fact that if the charging provision excluded transfers where no beneficial interest had transferred, then, given that its underlying purpose included the deterring of transfers out of pension schemes, the legislation would be self-defeating. An unauthorised payment out of a pension scheme would "*in most cases*" ([82]) constitute a breach of trust, the effect of which was that beneficial title to the property would not pass to the transferee, save where it ended up in the hands of a bona fide purchaser for value without notice. Accordingly, the CA held (at [82]) that an analysis necessitating the passing of beneficial title "*would deprive the charge to tax of effect in many of the most egregious cases where it is most needed*".

Ultimately, the question of whether a "*payment*" had been made fell to be answered by looking at "*the practical, business reality of the transaction*" (at [82]), including any composite character of the overall arrangement of which the payment formed part. Applying that approach, on the facts of the case, a transfer of legal title without beneficial title did constitute a "*payment*".

Jonathan Davey QC acted for the Respondents (HMRC).

For more information on our Tax practice, please click here.

*If you are viewing this document on LinkedIn, you can download it by clicking on the icon in the top-right-hand corner when in full screen view.*