

22 March 2023

Private and confidential

Member of the Ark Pension Schemes

Dear Member,

DECISION IN THE TAX TRIBUNAL

As you will be aware, Dalriada's and members' appeals against tax charges levied by HMRC were heard in a Tax Tribunal hearing, which took place in December 2022. The Tribunal has now published its decision.

Please find enclosed an Announcement that provides detailed information about the decision.

In summary, both Dalriada's and the members' appeals were unsuccessful which means there are significant tax consequences for both the members personally and the Schemes themselves.

The Tribunal's decision centred on the application of the law as it stands and the judge recognised that, in applying the law, this resulted in unfavourable (and, in some cases, unfair) outcomes for members.

Clearly the decision is both incredibly disappointing and frustrating for the members and Dalriada. We considered that the approach to taxation that we argued for in the Tribunal was both correct and resulted in a fair and reasonable outcome for members and the Schemes. Unfortunately, the Tribunal disagreed. Dalriada and its advisers will carefully consider the full detail of the decision before deciding whether or not there are any merits in an appeal against the Tribunal's decision.

In the meantime, as set out in the Announcement, Dalriada will run a webinar next week to explain the decision and what it means for members. The webinar will be held on 29th March, 2.00pm to 3.00pm. You can register for the webinar at the following link: <https://bit.ly/ARKmemberwebinar> or by using the QR code below.

We have discussed the decision with HMRC and they will look to provide their own set of 'FAQs' relating to next steps for members, which will also take into account any questions that arise from the webinar.

Dalriada fully appreciates the impact this will have on members, having already suffered years of uncertainty in their financial affairs. We understand that members of the Ark schemes were not looking at ways of avoiding tax, rather they were told by the perpetrators of the Ark schemes that they could access funds in a completely legal manner and, were not made aware of the risk of substantial tax charges that would arise in doing so.

Leaving aside the merits or otherwise of any appeal, Dalriada will continue to work with others in the wider pensions industry in considering what alternative means of redress might be available to members.

As previously advised, we are in active and ongoing discussions with the Fraud Compensation Fund (FCF) about compensation claims for all of the Ark Schemes and these discussions will continue in parallel with further consideration of the best way forward following the Tribunal's decision.



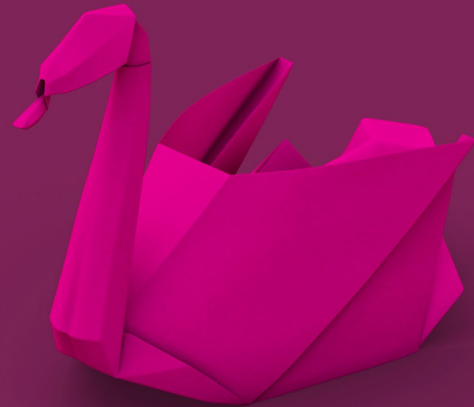
For and on behalf of Dalriada Trustees.

March 2023.

QR code to use for registering for webinar:



**Cranborne Star Pension Scheme
Grosvenor Parade Pension Scheme
Tallton Place Pension Scheme
The Lancaster Pension Scheme
The Portman Pension Scheme
Woodcroft House Pension Scheme
("the Schemes")**



Dalriada. A better way

DECISION IN THE TAX TRIBUNAL

As members will be aware from previous Announcements, Dalriada's and member's appeals against tax charges levied by HMRC were heard in a Tax Tribunal hearing which took place in December 2022.

The Tribunal has now released its decision (the "decision"). We will include a link to the decision on our website when this has been made publicly available.

This Announcement and accompanying Frequently Asked Questions and Answers (FAQs) seek to address a number of points regarding the decision and its consequences for members and their tax liabilities.

We appreciate that the outcome of this decision is complex and may not be easy to understand. Once you have had chance to review this Announcement and the FAQs and, if you wish to, have reviewed the decision document, should you have any questions, please contact Dalriada through the usual channels.

Dalriada is holding a webinar on 29th March, 2.00pm to 3.00pm, that members can register to join, where we will look to provide more information as to what the Tribunal's decision means for members and Schemes. A link to register for the webinar is included in our covering e-mail/letter and, also, on the members' website.'

Please note, however, that, as this time, we cannot say how much tax you will be asked to pay by HMRC.

BACKGROUND TO PROCEEDINGS

As you may recall, the High Court had previously determined that the payments by the Ark Schemes to individuals constituted unauthorised payments under the Finance Act 2004. As such members, and the Schemes themselves (by way of Scheme Sanction Charges – "SSCs"), were liable for tax charges. However, HMRC and Dalriada did not agree on how the tax charges should be calculated.

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HMRC's proposed approach

HMRC argued that a tax charge arose on a payment (in this case, the MPVA loans) "to or in respect of" a member. It was HMRC's view that an MPVA loan was a payment made "in respect of" a member that would result in a 'reciprocal' loan back from another Ark scheme. In effect, members would be taxed on the loan they had 'made' to a member of another Ark scheme.

As such, for HMRC's view to be correct, the Tribunal needed to conclude that member to member matching was intended by the Schemes.

Dalriada's proposed approach

Dalriada argued that that it was never the intention of the people who set up the Ark Schemes that there was member to member matching and that the correct approach to taxing the MPVA loans was as determined in the earlier High Court proceedings, essentially in the same way as if they had received an employment related loan. Dalriada's proposed approach would have resulted in significantly less tax than under HMRC's approach.

It was the view of both HMRC and Dalriada that only one of the approaches to taxation put to the Tribunal would apply to the payments.

The Good Faith Discharge

Dalriada had also made a 'Good Faith Discharge' application against the SSCs. The first part of this application considered whether the scheme administrator at the time the unauthorised payments (i.e. the MPVA loans) were made, reasonably believed that the unauthorised payment was not a payment subject to a SSC.

One of the test members in the appeal, made a similar application against their Unauthorised Payment Surcharges ("UPS").

SUMMARY OF THE DECISION

Charges on members

The Tribunal concluded that member to member matching was intended and therefore accepted HMRC's proposed approach that tax charges apply to payments made 'in respect of' members.

As such, members would be taxed on the amount of MPVA loan the member (or members) they were matched with received, in other words, on the amount of MPVA loan a member had 'made'.

The Tribunal decided that where multiple persons are matched with the member 'making' the MPVA loan, then the unauthorised payment should be calculated proportionally and the member taxed accordingly. The Tribunal concluded that the portions attributed to each member matched with the member 'making' the MPVA loan would be calculated in accordance with the intentions of the operators of the Ark Schemes (i.e. Ark and the previous trustees).

However, the Tribunal decided that if a person making an MPVA loan was not a member of the lending Ark scheme when the MPVA was paid, then that person could not have received an unauthorised member payment and will not be subject to a tax charge.

The Tribunal also decided that, because a member is seen to have received an unauthorised payment equivalent to the amount of MPVA loan (or loans) made from their scheme to a person (or persons) they are

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'matched with', it is irrelevant that that member may not have transferred in enough money to fund the MPVA loans he or she has 'made'. The Tribunal acknowledged that this may result in some very unfair situations.

The Tribunal has left it to HMRC and Dalriada to attempt to agree the amount of unauthorised payments attributable to each member matched with the recipient of an MPVA loan. The Tribunal expects this to be done in a manner which reflects the intentions of the operators of the Ark Schemes at the time. HMRC and Dalriada are able to apply to the Tribunal for clarification where problems arise.

The Tribunal concluded that it was **also** possible for tax to arise in accordance with Dalriada's proposed approach, so on the payment a member received. In effect, members could end up being taxed twice.

This conclusion was against the position of Dalriada, the test members and even HMRC.

The tax under Dalriada's proposed approach is triggered when a member receives an MPVA from the lending Ark scheme. The Tribunal decided that, in this situation, members receiving an MPVA loan are liable to tax on the amount received, in the same way as if they had received an employment related loan. The Tribunal also decided that members were not able to receive any reduction in the tax due for repaying the higher figure due under the MPVA agreement (the MPVA discharge amount). Whilst the Tribunal acknowledged that this may have been an attempt to capture rolled up interest, it was irrelevant because interest didn't accrue as it normally would.

Good Faith Discharge

The Tribunal concluded that, technically, there was no Scheme Administrator in place at the time the MPVA loans were paid. As such, it rejected Dalriada's good faith discharge application and concluded that the SSCs remain payable and will be met from scheme assets.

The Tribunal rejected the member's application to discharge their UPS, as it was made too late. However, had the member made a valid appeal, the Tribunal concluded that it would have allowed her discharge application. The Tribunal notes that this is finely balanced and fact dependent but this bodes well for members with an in-time discharge application.

WHAT DOES THE DECISION MEAN FOR ME? – FREQUENTLY ASKED QUESTIONS

1. Will I be subject to a tax charge?

Whether you will be charged tax depends on whether MPVA loans were made in 'respect of you' (section 160(2)(a) charge - "HMRC's basis") and whether you received an MPVA loan (s173 charge - "Dalriada's basis").

Whether you received an MPVA is relatively simple to determine and the consequences are covered below. However, whether an MPVA loan has been made 'in respect of you' is dependent on the intentions of the operators of the Ark Schemes and which member or members you were matched with.

We appreciate that this is outside your control and taxation on this basis can result in some unfair results. The Tribunal has recognised this but has nevertheless decided that this will still be the case based on the requirements of the tax rules.

Appendix 1 includes a diagram seeking to assist with your understanding of the application of the charges.

We cannot say at this time how much tax you will be asked to pay by HMRC.

We have set out below the two tax charges that can apply to the members. Please be aware that members, who both received and notionally 'made' a loan may be taxed on both bases.

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The two tax charges that can apply are as follows:

Section 160(2)(a) charge ("HMRC's basis").

This tax charge is based on MPVA loan payments notionally made by you to a member (or members) of other schemes with whom you were 'matched' (if anyone) by the operators of the Ark Schemes. For the purpose of this charge, it is irrelevant whether you received an MPVA loan.

The MPVA loans notionally made by you are seen as Unauthorised Payments and are the payments upon which the Unauthorised Payment tax charge is based.

The intentions of those operating the Ark Schemes as to whom you were matched with will be determined based on the evidence we hold and will need to be agreed between Dalriada and HMRC.

There can be situations where multiple MPVA loans are made 'in respect of' a single member.

Where members are matched with multiple persons as regards any MPVA loan payments made, the Tribunal determined that the unauthorised payment should be split between those members proportionally and the portions attributed to each member matched with the member 'making' the MPVA loan calculated in accordance with the intentions of the operators of the PRP.

However, the Tribunal decided that if the 'matched with' person was not a member of the lending Ark scheme when the MPVA was paid, then that person could not have received an unauthorised member payment and will not be subject to a tax charge.

When calculating the amount of the unauthorised payment attributable to each member, the Tribunal decided that the amount of pension that had been transferred into the pension scheme was irrelevant. Accordingly, a person matched with the recipient of the MPVA receives an unauthorised payment equivalent to the amount of the MPVA (or MPVAs) made from their scheme to the person(s) they are 'matched with'. This means that you may be charged tax on unauthorised payments that exceed your transfer in value. Again, the Tribunal acknowledged that this may result in some very unfair situations but determined it was the correct application of the rules.

Once the value of the unauthorised payments attributed to you is determined, an unauthorised payment charge of 40% will be applied to the value, as well as an unauthorised payment surcharge of 15% if the MPVA loans made in respect of you exceed 25% of the value of your pension fund.

For example:

If Member A's scheme made payments to Member B of £20,000 and Member C of £30,000 and the available evidence shows they were matched with Member A, the following charges would apply to Member A:

Unauthorised payment charge = £50,000 @ 40% = £20,000

Unauthorised payment surcharge* = £50,000 @ 15% = £7,500

Total tax due = £27,500

Please note that the amount of loan received by Member A is irrelevant to the section 160(2)(a) calculation.

Section 173 charge ("Dalriada's basis")

This charge is triggered when a member receives an MPVA from the lending Ark scheme.

The Tribunal decided that, as no interest was paid annually on the MPVA, members received a benefit equal to the official rate of interest applied to the MPVA loan in each year, and that benefit was an unauthorised payment. An unauthorised payment charge of 40% will be applied to the value of that

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benefit. However, due to the low level of this tax charge, it is unlikely that an unauthorised payment surcharge of 15% would be added on top.

The Tribunal also decided that members were not able to receive any credit for repaying an inflated figure under the MPVA agreement. The Tribunal acknowledged that this may have been an attempt to capture rolled up interest but it was irrelevant because it did not accrue as interest normally would.

A charge would be due each year that the loan was held and remained unpaid.

For example:

If Member D received a loan of £40,000, the following charges would apply (please note that a number of assumptions are made for illustration purposes):

2010/11

- 5 October 2010 loan received of £40,000
- Beneficial rate of interest for year 2010/11 = 4%
- Cash equivalent of loan = $£40,000 * 4% * 6/12$ (months) = £800
- Unauthorised payment charge due = £800 @ 40% = £320

2011/12

- Loan outstanding 6 April 2011 = £40,000
- Loan outstanding 5 April 2012 = £40,000
- Beneficial rate of interest for year 2011/12 = 4%
- Cash equivalent of loan = $£40,000 * 4% * 12$ (months) = £1,600
- Unauthorised payment charge due = £1,600 @ 40% = £640

2012/13

- Loan outstanding 6 April 2012 = £40,000
- **6 October 2012 Member D repaid £10,000 of the loan**
- Loan outstanding 5 April 2013 = £30,000
- Beneficial rate of interest for year 2012/13 = 4%
- Cash equivalent of loan = $£35,000$ (£30,000 for 6 months and £40,000 for 6 months) * 4% * 12 (months) = £1,400
- Unauthorised payment charge due = £1,400 @ 40% = £560

2013/14

- Loan outstanding 6 April 2013 = £30,000
- **5 April 2014 Member D repays the loan in full**
- Loan outstanding 5 April 2014 = nil

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- Beneficial rate of interest for year 2013/14 = 4%
- Cash equivalent of loan = £30,000 * 4% * 12 (months) = £1,200
- Unauthorised payment charge due = £1,200 @ 40% = £480

2014/15

- Loan repaid so no s173 tax charges

2. I did not receive a MPVA loan, will I still be subject to a tax charge?

Unfortunately, the s160(2)(a) charge is calculated based on payments made 'in respect of' you rather than the loan(s) you received. As such, those who had a payment made in respect of them will be subject to a s160(2)(a) charge regardless of whether they received an MPVA loan themselves.

You will not be subject to a s173 charge if you did not receive a loan.

We appreciate the apparent unfairness of this, as does the Tribunal in its decision, but this unfairness is a result of the application of the relevant rules which the Tribunal decided were applicable.

3. How will my tax be calculated?

HMRC will calculate your tax charges based on whether MPVA loans were made in respect of you (section 160(2)(a) charge) and whether you received an MPVA loan (s173 charge). We expect HMRC will communicate this calculation with you in due course and you will be able to dispute the values if you disagree.

Please see question 1 above for further information about how the calculations work.

4. My tax charge is calculated based on MPVA loans paid to other members rather than what I received, how can this be fair?

We appreciate that the payments notionally made by (so 'in respect of') you were outside your control and that this can result in considerable unfairness, particularly where members did not receive an MPVA loan but are still subject to a tax charge. The Tribunal also acknowledged this unfairness in its decision but stated that this is a result of the strict application of the relevant rules which the Tribunal decided were applicable.

5. I have already repaid my MPVA loan. Will this reduce my tax charge?

If you have repaid your loan this will impact the value of the s.173 charge (please see worked example above at question 1), but this will have no impact on the s.160(2)(a) charge.

Repaying the loans will have no impact on any s160(2)(a) charge you are subject to.

Please note that it does not make a difference to either charge if the person a loan is made to in respect of your pension repays their loan.

6. When I repaid my MPVA I paid an amount higher than the original MPVA I received. Will I get a credit for this?

No. Unfortunately, the Tribunal determined that no credit is available to members who repaid an inflated figure which purported to capture rolled up interest.

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The Tribunal decided that this wasn't a form of interest which would give rise to a credit.

7. What happens next?

Once HMRC has considered the application of the decision to your personal circumstances, they will contact you about the relevant tax charges they believe apply to you.

We have set out more detail in the questions below about the process for agreeing the values, payment of tax charges and appealing charges (if applicable).

8. How will I agree the values with HMRC?

HMRC will contact you in due course, setting out the relevant tax charges they believe apply to you.

The steps that cause you to be subject to tax under s160(2)(a) (see question 1 above) also lead to a tax charge on the scheme administrator. As a result, Dalriada will be working through the data to calculate the values of unauthorised payments to check the charge on the scheme administrator and this should assist HMRC with determining the correct values.

9. When should I expect to hear from HMRC regarding calculation of my tax charges?

HMRC are currently working through the data they hold in order to apply the decision to the members and calculate the correct tax charges. We cannot say when HMRC will be in touch but we have asked HMRC for comment. As and when we hear from them, we will advise members.

10. What if I disagree with HMRC's calculations?

HMRC will normally give you the opportunity to request information about how the charges have been calculated, as well as the opportunity to say why you disagree with HMRC's calculations before they are finalised.

If you are unable to agree the value of the tax charge with HMRC you will have the opportunity to appeal unless you have already failed to comply with any relevant deadlines. We understand that most members currently have their appeals 'stayed' (so, effectively, put on hold) pending the outcome of the recent appeal. If you are in this position, you will have the option to progress your appeal should you wish to. See question 15 below.

11. I have already received a statement from HMRC showing the tax I owe. Can HMRC increase this amount following the decision?

Our view is that in most cases HMRC would be unable to increase the value of their assessment but this will depend on personal circumstances. In the event that the tax calculated, following the Tribunal's decision, is less than the amount assessed currently, HMRC should reduce the amount of tax payable.

It should be noted that if your appeal goes before a Tribunal, the Tribunal has the power to increase the amount of tax due.

12. When will I have to pay the charges by?

The deadline for payment will depend on your personal circumstances and whether you have received a closure notice or assessment.

You should discuss this with HMRC as it may be possible to agree a payment plan with HMRC if necessary.

13. What if I can't afford to pay the charges at all?

If you are unable to pay the tax charges in full you should contact HMRC's Debt Management Department.

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HMRC may be willing to offer options such as a time to pay arrangement where an affordable monthly payment option can be agreed.

14. Does Dalriada intend to appeal the Tribunal's decision?

All parties to the proceedings will have 84 days from the release of the decision to appeal it.

Please note that this appeal deadline is only relevant to the parties to the proceedings i.e. HMRC, Dalriada and the test members. Those whose appeals were stayed behind the proceedings are treated separately, see question 15 below.

We will keep the members updated in respect of any appeals made against the decision.

15. My appeal was stayed behind Dalriada's appeal, what happens now?

If your appeal was stayed and is currently with HMRC, you are likely to receive a response in due course to confirm that your appeal is live again and to set out any relevant tax charges applying to you and the deadlines you must comply with.

If your appeal reached the Tribunal and was stayed at that point then HMRC is likely to make an application shortly to restart your appeal.

Once your appeal becomes live, you will be able to progress it should you wish to do so.

Alternatively, you can withdraw your appeal and pay the relevant tax charge(s) or agree a payment plan with HMRC.

If one of the parties to the recent proceedings (so either HMRC, Dalriada or the test members) is given permission to appeal the decision, you can ask to stay your appeal behind that.

16. I understand that making a good faith discharge application can reduce my tax charge. Am I able to do this now?

A person who is liable to pay the unauthorised payments surcharge of 15% in respect of an unauthorised payment can apply for it to be discharged. The person has to demonstrate that in the given circumstances it would not be just and reasonable for them to have to pay that tax charge.

The only ground for applying for a discharge is that it would not be just and reasonable for the individual to be liable to pay the unauthorised payments surcharge. The application itself must set out the reasons why it would not be just or reasonable for the individual to be liable to pay the surcharge.

The time limits for making a good faith discharge application are strict and it is unlikely that you will be able to bring one at this time if you have not done so already. As such, the good faith discharge application is likely only to be of benefit to members who:-

- 1) Have made a good faith discharge appeal after receiving their assessment. This may include members who made points about the charge being neither just or reasonable in their original appeal to HMRC, even if they had not directly referred to it as a good faith discharge. If you feel that your appeal included good faith discharge grounds this could be sufficient to give you a live application and you should discuss this with HMRC; and
- 2) If you stayed your appeal you may also have stayed your right to bring a good faith discharge application but this will depend on individual circumstances.

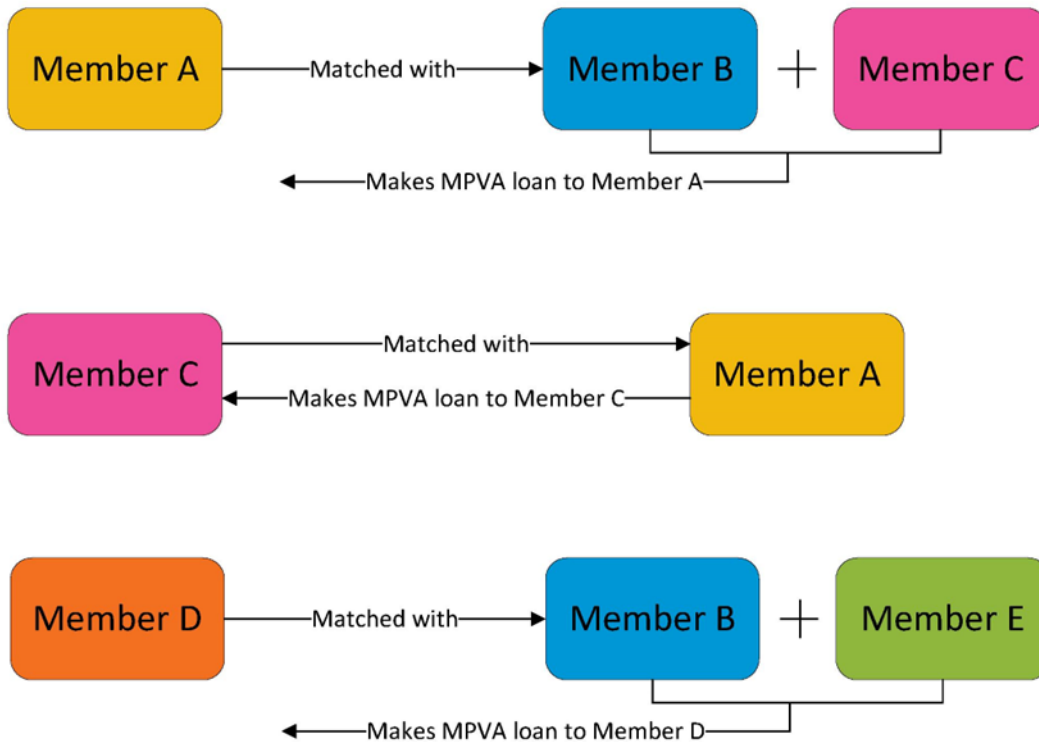
In the proceedings, the Tribunal considered a good faith discharge made by Deborah Oades. The Tribunal determined that Ms Oades did not have a valid appeal but it also decided that it would have allowed her discharge application against the scheme sanction charge, had it been validly brought. This should be encouraging for any members who have brought a valid good faith discharge application.

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Paragraphs 461 – 475 of the decision provide some examples of the type of evidence that members might need to demonstrate to HMRC/a Tribunal to satisfy that their UPS should be discharged, which would reduce the tax charges by 15%.

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Appendix 1



In the scenario above the following tax charges would apply:

Member A

- Section 173 benefit charge on the value of the MPVA loan made to Member A. This will be equal to the official rate of interest for each year the loan remains unpaid.
- Section 160(2)(a) unauthorised payment charge of 40% of the value of the loan paid to Member C. As Member A was the only member matched with Member C, the whole loan paid to Member C would be deemed to be 'in respect of' Member A's pension. In addition to the unauthorised payment charge, there will also be an unauthorised payment surcharge of 15% of the value of the loan paid to Member C if the value of the loan made exceeds 25% of the value of Member A's pension fund.

Member B

- As Member B does not receive an MPVA loan, they will not be subject to a s.173 charge.
- However, as Member B was matched with both Member A and Member D and MPVA loans were made to these members, Member B will be subject to a s.160(2)(a) unauthorised payment charge of 40% and unauthorised payment surcharge of 15% of the value of the loans made 'in respect of' Member B's pension. This will be a proportion of the MPVA loans made to Members A and D in accordance with the intention of the PRP operators.
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Member C

- Section 173 benefit charge on the value of the MPVA loan made to Member C. This will be equal to the official rate of interest for each year the loan remains unpaid.
- S.160(2)(a) unauthorised payment charge of 40% and unauthorised payment surcharge of 15% of the value of the loan made 'in respect of' Member C's pension to Member A. This will be the proportion of the MPVA loan made to Member A in accordance with the intention of the PRP operators.

Member D

- Section 173 benefit charge on the value of the MPVA loan made to Member D. This will be equal to the official rate of interest for each year the loan remains unpaid.
- There will be no s.160(2)(a) charges as no loans have been made 'in respect of' Member D.

Member E

- As Member E does not receive an MPVA loan, they will not be subject to a s.173 charge.
- However, as Member E was matched with Member D and an MPVA loan was made to member D, Member E will be subject to a s.160(2)(a) unauthorised payment charge of 40% and unauthorised payment surcharge of 15% of the value of the loan made 'in respect of' Member E's pension to Member D. This will be a proportion of the MPVA loans made to Member D in accordance with the intention of the PRP operators.

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What should I do if I have any further questions?

Should you have any queries in relation to this Announcement or your membership of the Scheme, please contact us.

You can contact us as follows:

By Telephone: 028 9041 2756

By Post: Dalriada Trustees Limited
Linen Loft
27-37 Adelaide Street
Belfast
BT2 8FE

By Email: ArkAdmin@dalriadatrustees.co.uk

Other Useful contact details

If you have a complaint or dispute concerning your workplace or personal pension arrangements you should contact:

The Pensions Ombudsman Telephone: 0800 917 4487

Website: www.pensions-ombudsman.org.uk

If you have general requests for information or guidance concerning your pension arrangements contact the Money and Pension Service (MaPS).

Previously pensions guidance has been provided across the three consumer facing brands of MaPS: Pension Wise (PW), The Pensions Advisory Service (TPAS) and the Money Advice Service (MAS).

MaPS has now launched **MoneyHelper** where all retirement and pensions guidance has been brought together under one brand and one website: moneyhelper.org.uk.

Consumers can request an appointment by following the links, emailing virtual.appointments@maps.org.uk or by calling our the pensions helpline on 0800 011 3797.

These appointments are free and impartial.

The email address to the pensions guidance team for general pensions queries is pensions.enquiries@moneyhelper.org.uk

Issued by Dalriada Trustees Limited

March 2023