Neutral Citation Number: [2022] EWHC 392 (Ch)

Case No: BL-2020-002279

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 February 2022

Before: Deputy Master McQuail

Between:

(1) Morten Høegh **(2) Thomas Høegh**	**Claimants**
- and -	
(1) Taylor Wessing LLP **(2) MSR Partners LLP (previously known as Moore Stephens LLP)**	**Defendants**

- -

Mr Patrick Lawrence QC and Mr Charles Phipps (instructed by **Fieldfisher LLP**) for the **Claimants**)
Mr Christopher Greenwood (instructed by **Clyde & Co LLP**) for the First Defendant
Mr Ben Hubble QC and Mr Ben Smiley (instructed by **Mayer Brown International LLP**) for the Second Defendant

Hearing date: 27 January 2022

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand down is deemed to be 28 February at 10.00 am

Deputy Master McQuail:

1. This is an application by the claimants to amend their particulars of claim. The claim form was issued on 22 December 2020 and the particulars of claim dated 19 April 2021 (**POC**) were served on 22 April 2021. This application was issued on 17 September 2021; defences have not yet been served.

2. The form of the draft proposed amended particulars of claim for which permission is sought is not that originally accompanying the application, but a version sent to the solicitors for the defendants on 7 December 2021 with the proposed amendments shown in red (**APOC**).

3. The first defendant has consented to the amendments. The second defendant resists the application to amend.

4. The evidence that has been filed in connection with the application is as follows:

(i) the third statement of Jonathan Ray-Smith (partner in Fieldfisher LLP, solicitors to the claimants) dated 17 September 2021 ("Ray-Smith 3"), in support of the application;

(ii) the second statement of Jonathan Oulton (partner in Mayer Brown International LLP, solicitors to the second defendant) dated 27 October 2021 ("Oulton 2"), in opposition to the application;

(iii) the first statement of Peter Golden (now partner in Fieldfisher LLP, formerly partner in Linklaters LLP) dated 24 December 2021 ("Golden 1"), in support of the application;

(iv) the first statement of the first claimant dated 29 December 2021 ("Morten 1"), in support of the application;

(v) the first statement of the second claimant dated 31 December 2021 ("Thomas 1"), in support of the application;

(vi) the fourth statement of Mr Oulton dated 13 January 2022 ("Oulton 4"), in opposition to the application; and

(vii) the second statement of Mr Golden dated 21 January 2022 ("Golden 2"), in response to Oulton 4.

Summary of the Claim

5. By their claim the claimants seek damages from the first defendant, Taylor Wessing LLP, their former solicitors, and the second defendant, MSR LLP, their former accountants, for negligent advice in relation to their tax affairs. The claimants are and were at all material times resident in the UK but domiciled abroad.

6. The claimants engaged the first defendant to provide legal advice including tax advice and engaged the second defendant to prepare and submit the claimants' tax returns and provide connected tax advice for the tax years 2008/9 to 2016/17 (**the Relevant Tax Years**).

7. The claimants allege that the defendants were in breach of duty in failing to provide proper advice following changes to the remittance basis of taxation introduced by the Finance Act 2008 (**FA 2008**). During the Relevant Tax Years payments were made which under the statutory regime were to be treated as remittances giving rise to tax liabilities for the claimants.

8. The claimants say that properly advised they would have arranged their affairs differently to avoid any making of remittances which gave rise to tax liabilities in the years 2011/12 to 2016/17 (**the Assessable Tax Years**).

9. The claimants therefore claim to be entitled to be compensated for the loss suffered by the making of the avoidable remittances in the Assessable Tax Years.

10. In the POC the claimants say that numerous payments were made which constituted taxable remittances of the claimants (**the Original Remittances**), in circumstances where the claimants were unaware that they were assessable as such. By the APOC the claimants seek to say that there were further remittances (**the Further Remittances**) which they have only more recently become aware were taxable and which they now wish to add to their claim.

The POC

11. Paragraph 3 of the POC identifies persons connected to the Claimants as follows:

(i) Høegh Capital Partners Limited (**HCP London**)…;

(ii) Høegh Capital Partners Services (Guernsey) Limited (**HCP Guernsey**)

(collectively referred to as **HCP**);

(iii) Dana Høegh (**DH**)

(iv) Julie Høegh (**JH**)

12. Paragraph 4 of the POC goes on to explain that the claimants held offshore investments through offshore trust structures (**the Structures**) and identifies the following entities within the Structures as follows:

(i) **The Pomor Trust**;

(ii) **The Goran Trust**; and

(iii) Pomor Holdings Limited (**PHL**), Pomor (BVI) Ltd (**Pomor**) and Goran Enterprises Ltd (**Goran**) as well Aequitas Investments Ltd (**AIL**) and (from 22 September 2009)

Aequitas Holding ARL (**ARL**). PHL, Pomor Goran, ARL and AIL being collectively referred to as **the Holding Companies.**

A diagram illustrating the structure of the Pomor and Goran Trusts and the Holding Companies is annexed as Schedule 5 to the POC.

13. Paragraph 8 of the POC contains the following summary of the claim:

> "8.1. Taylor Wessing was engaged to provide legal advice, including tax advice, to the Claimants. So far as relevant to this claim, that advice related in particular to the tax years 2008/09 to 2016/17 (**the Relevant Tax Years**). As set out below, Taylor Wessing owed a duty to advise on the changes made to the remittance basis of taxation by the Finance Act 2008 (**FA 2008**) and on the measures that should be taken to avoid unnecessary tax liabilities.
> 8.2. Moore Stephens was engaged by the Claimants to prepare and submit their tax returns for the Relevant Tax Years, and to provide tax advice in connection with the preparation of the said returns. Moore Stephens owed a duty to make appropriate enquiries, and to give appropriate advice, so as to ensure (so far as reasonably possible) the accuracy of the tax returns; in particular, by taking reasonable steps to ensure that remittances were identified, having regard to the relevant provisions of FA 2008.
> 8.3. Taylor Wessing was in breach of the said duty to advise. As a result various payments were made (**the Relevant Payments**) which constituted taxable remittances of the Claimants, without the Claimants being aware that they were assessable as such. The Relevant Payments were made by the Holding Companies and are set out in full, as apportioned to each of the Claimants, at Schedule 2.
> 8.4. Moore Stephens was in breach of the said duty to advise, and to make appropriate enquiries. As a result payments continued to be made (including all the Relevant Payments) which constituted remittances of the Claimants, without the Claimants being aware that they were assessable as such.
> 8.5. As a result the Claimants have suffered loss, consisting in their tax liability plus interest in respect of the tax years 2011/12 to 2016/17 (**the Assessable Tax Years**), together with professional fees incurred as a result of the erroneous returns for the Relevant Tax Years (including, without limitation, professional fees incurred making disclosure, putting the position right and negotiating settlement with HMRC). There is also a risk of tax penalties being issued by HMRC."

14. The original Schedule 2 to the POC sets out the Relevant Payments as follows:

> (i) a chronological schedule of payments in respect of the first claimant in the period April 2011 to February 2017 running to some 10 pages and totalling in excess of £18 million; and

(ii) a chronological schedule of payments in respect of the second claimant in the period April 2011 to January 2017 running to some 15 pages and totalling nearly £3.5 million.

The common feature of the Relevant Payments in the original Schedule 2 is that the payer was in each case one of the Holding Companies.

15. At paragraph 13 the POC sets out that:

> "The new definition of *"remitted to the United Kingdom"* in s.809L ITA 2007 was fundamentally different to the previous definition(s), in that:
> 13.1. It became necessary to identify who was a 'relevant person' in respect of each taxpayer, as under the s.809L definition there was no distinction between the taxpayer themselves and a 'relevant person' in respect of the taxpayer. That is to say, any act or omission of a 'relevant person' which would be a remittance if carried out by the taxpayer (including receipt of funds) would constitute a remittance of the taxpayer and be taxable on them.
> 13.2. The statutory definition of relevant person (a concept which had not previously existed) included the taxpayer's spouse, minor children and grandchildren and certain legal persons connected to the taxpayer."

16. Paragraph 58 of the POC pleads that the scope of the second defendant's duty was

> "…to make appropriate enquiries, and to give appropriate advice, so as to ensure (so far as reasonably possible) the accuracy of the tax returns; in particular, by taking reasonable steps to ensure that remittances were identified, having regard to the relevant provisions in the statutory regime including but not limited to FA 2008. This duty to enquire required, in particular and without limitation, making proper enquiries as to the following matters:
>
> 58.1. What persons were, or might be, relevant persons in respect of one or both of the Claimants (such persons, so far as relevant to this claim and in the Assessable Tax Years, included the Holding Companies, and HCP London), and
>
> 58.2. Whether:
>
> (a) money or other property had been brought to, received in, or used in the UK by or for the benefit of a relevant person;
>
> (b) a service had been provided in the UK to or for the benefit of a relevant person, in circumstances where the property, service or consideration for the service was, or might be, income (or capital gains) of the relevant Taxpayer (or derived from such income or capital gains).
>
> (**the Appropriate Questions**)"

17. As to breach of duty:

(i) paragraph 64.2 alleges a failure to ask Appropriate Questions to determine what persons were or might be relevant persons in respect of the claimants;

(ii) paragraph 65.1(c) refers to the absence of proper questions and requests for information concerning what payments or transactions made by "relevant persons" might constitute taxable remittances of the claimants

18. As particulars of breach the POC:

(i) at paragraph 69.3 pleads a failure on the second defendant's part to

> "Ask proper questions to determine whether "relevant persons" in respect of the Claimants had made, or received, payments (or received services) which would, or might, constitute a "remittance" of the Claimants"

(ii) paragraph 71.2 pleads:

> "On no occasion did Moore Stephens give any indication that details of money brought to or received in the UK by "relevant persons" also needed to be identified and reviewed."

(iii) Paragraph 72.3 pleads that the second defendant's requests for information from entities in the Structures in years after 2008/9:

> "(b) Failed to properly identify who were or might be relevant persons in respect of the Claimants; and
> (c) Failed to properly identify what payments from, or to, such persons, would need to be considered."

19. As to causation and loss the POC:

(i) pleads in paragraphs 102.1 and 102.2 the counterfactual restructuring of HCP London that it is said would have been undertaken to avoid making Relevant Payments;

(ii) pleads in paragraph 103 and 104 the counterfactual that Relevant Payments made to UK stockbroker, Arden Securities, would have been made instead to an off-shore broker.

20. Paragraphs 107 and 109 plead the nature and quantum of the loss by reference to calculations set out in Schedule 4 and paragraph 110 summarises that loss.

The APOC

21. By proposed amendments to paragraph 3 the claimants seek to add to the list of persons connected to the claimants as follows:

(i) Høegh Capital Partners Services Limited (**HCP Services**)

(and then refer to HCP London, HCP Guernsey, and HCP Services together as **HCP**); and

(ii) Arts Alliance Production Limited (**AAP**).

22. Proposed amendments to paragraph 4 the APOC would go on to identify that the Claimants' offshore investment trust structures (**the Structures**) include also

(i) Høegh Capital Partners (Next Generation) Fund Limited (**HCP Next Gen**).

The proposed revised Schedule 5 diagram (**the Structure Diagram**) illustrates HCP Next Gen's position within the Structures and identifies a further 14 companies within the Structures (**the Non-Relevant Person Companies**).

23. Proposed amended paragraph 8.3 renames Schedule 2 as Schedule 2a and refers to two new Schedules, 2b and 2c, and encompasses all payments within them in the Relevant Payments Definition. The proposed amended description of the schedules is as follows:

> "(a) The payments set out at Schedule 2a were made by the Holding Companies. That class of payments was disclosed to HMRC in 2019 under the Worldwide Disclosure Facility;
> (b) The payments set out at Schedule 2b were made (including by the Non- Relevant Person Companies and HCP Next Gen) to "relevant persons" in the UK (including HCP and AAP). Such payments were not disclosed to HMRC in 2019 as the Claimants were not at that time aware that such payments amounted to taxable remittances. That class

> of payments was disclosed in outline to HMRC in July 2021. A more substantive disclosure is to be prepared.
> (c) The payment at Schedule 2c is a payments made by HCP Next Gen, as a previously unidentified "relevant person" within the Structures, to a "non- relevant persons" in the UK. Schedule 2c excludes those payments made by HCP Next Gen already recorded at Schedule 2b. Such payments were not disclosed to HMRC in 2019 as the Claimants were not at that time aware that such payments amounted to taxable remittances. A disclosure to HMRC is to be prepared in respect of such payments."

24. Proposed amended paragraph 8.5 contains a slightly amended description of the type of loss claimed to reflect the fact that the Schedule 2b and Schedule 2c payments have not yet been assessed to tax.

25. The re-named proposed Schedule 2a contains in the case of each of the payments a corrected amount because, as explained in proposed added footnotes, the WDF declaration was in each case slightly too high because of errors in the shareholdings in some of the relevant persons. It is also proposed that one additional payment in the case of the first claimant which is said to have been omitted in error should now be included.

26. Proposed Schedule 2b comprises:

(i) a chronological schedule of payments in respect of the first claimant in the period April 2013 to March 2017 running to some 21 pages and totalling in excess of £4.5 million; and

(ii) a chronological schedule of payments in respect of the second claimant in the period April 2013 to January 2017 running to some 33 pages and totalling just over £2 million.

The common feature of the payments in Schedule 2b is that the payee is in each case said to be a relevant person in the UK (including HCP and AAP).

27. Proposed Schedule 2c lists:

(i) a payment made by HCP Next Gen in respect of the first claimant in February 2016 in the sum of £365,942.17; and

(ii) a payment made by HCP Next Gen in respect of the second claimant in February 2016 in the sum of £111.902.26.

In the case of these payments the payer is said to be a relevant person making a payment to a non-relevant person in the UK.

28. In addition, there is a proposed new Schedule 6 which sets out the shareholdings from time to time in HCP Next Gen and four of the other Non-Relevant Person Companies.

29. There is then a proposed amendment to paragraph 15.3 expanding the scope of the advice said to have been needed by the claimants to understand the impact of the Remittance Reforms on not only (the more broadly defined) Structures as well as "related companies" which words appear not to be defined.

30. There are further proposed amendments in relation to the scope of duty:

(i) to paragraph 58.1 which widens the scope of the pleaded duty to make enquiries as to what persons were or might be included in the definition of relevant persons in respect of the claimants by adding HCP Next Gen, HCP Services and AAP;

(ii) to paragraph 62 by adding HCP Services, "all said HCP companies" (which words do not seem to be defined), and AAP to the list of entities of which it is said the second defendant was aware; and

(iii) to paragraph 63 by adding AAP to the list of entities to consider when completing the claimants' tax returns.

31. Then there are proposed amendments in relation to the plea of breach of duty:

(i) to paragraph 64.2 by adding HCP Next Gen, HCP Service and AAP mirroring the proposed amended duty plea in 58.1; and

(ii) to paragraph 65.1(c) by adding "or to".

32. As to causation and loss the proposed amendments:

(i) would extend the counterfactual restructuring pleaded in paragraphs 102.1 and 102.2 to HCP Services to ensure it was not a relevant person in order to avoid making the Relevant Payments;

(ii) would in paragraph 102A include additionally that payments to AAP would not have been made;

(iii) would in paragraph 103 include additionally payments to professional advisers by HCP Next Gen; and

(iv) would add to paragraph 104.3 that HCP Next Gen would have used offshore advisers instead of ADM.

33. There are consequential proposed amendments expanding the description of the tax and interest liabilities in paragraphs 107 and 107A, and the incorporation of a proposed amended Schedule 4 comprising the calculations of those liabilities referred to in the proposed new versions of paragraph 109 and summarised in proposed amended paragraph 110. The increase of the first claimant's claim is some £2 million plus interest of £300,000 and of the second claimant's is some £1 million plus interest of some £130,000. There are also proposed amendments to the paragraph 112 claim for professional fees incurred which are set out in a revised Schedule 1,

Overview

34. As Mr Hubble pointed out in argument the way in which the proposed amendments to paragraphs 3, 4 and 8 are structured, although looking relatively innocuous in terms of red ink in the body of the APOC, means that the defined concepts of the original POC - HCP and the Structures and Relevant Payments - are expanded to include many more entities and many more payments, as the red ink pages of proposed new Schedules 2b and 2c show. He says the need for proposed new Schedule 6 further demonstrates the widening of the claim. In addition AAP and HCP Next Gen are added as entities.

35. Mr Hubble says that the effect of the amendments if allowed would mean:

(i) the case as a whole would concern many new entities and a broader definition of Structures;

(ii) the alleged duty would extend to advice in relation to the more broadly defined Structures as well as "related companies"; the scope of the appropriate questions, the alleged awareness by the second defendant of HCP Services and AAP and the second defendant's duty to consider HCP Services, AAP and the entities in the redefined Structures would be wider;

(iii) the breaches would encompass additional alleged failures as to the extent of the "relevant persons" and wider enquiries about payments or transactions made to "relevant persons";

(iv) the causation pleas would involve significant new counterfactual elements concerning the restructuring of HCP Services, not making payments to AAP and the way in which HCP Next Gen would have paid for investment services;

(v) the re-writing of the case on loss with the correction of what was Schedule 2 as Schedule 2a, and the introduction of Schedules 2b and c and the consequent re-calculations of loss.

36. Mr Hubble's submissions in summary are that the proposed amendments are objectionable because:

(i) there is a reasonably arguable limitation defence;

(ii) the amendments seek to a add a new cause of action to the claim;

(iii) the amendments do not arise out of the same or substantially the same facts as those already in issue; and

(iv) the second defendant has a contractual limitation defence.

37. For those reasons Mr Hubble says that the right course is not to allow the amendments but to leave the claimants to commence new proceedings, which may then be case managed and tried with the existing proceedings. He says that this avoids conferring on the amended claim the benefit of the relation back effect of section 35 of the Limitation Act.

The Law

38. Section 35 of the Limitation Act 1980 provides relevantly that:

> *(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced…*
>
> *(b) in the case of any other new claim, on the same date as the original action.*
>
> *(2) In this section a new claim means … any claim involving …*
>
> *(a) the addition or substitution of a new cause of action…*
>
> *(3) Except as provided … by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above… to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim…*

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
(5) The conditions referred to in subsection (4) above are the following—
(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action…

39. CPR 17.1 provides relevantly

(2) If his statement of case has been served, a party may amend it only -
(a) with the written consent of all the other parties; or
(b) with the permission of the court.

40. CPR 17.4 provides relevantly:

(1) This rule applies where –
(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
(b) a period of limitation has expired under –
(i) the Limitation Act 1980;
(ii) the Foreign Limitation Periods Act 1984; or
(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

41. Mr Lawrence and Mr Hubble are in agreement that there is a four-stage test to apply in considering whether an amendment challenged on limitation grounds should be allowed as set out by John Kimbell QC *Hyde v Nygate* [2019] EWHC 1516 (Ch):

"Q1. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If the answer is yes, go to Q2. If the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b). (Stage 1)
Q2. Do the proposed amendments seek to add or substitute a new cause of action? If the answer is yes, go to Q3; if the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b). (Stage 2)
Q3. Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the court has no discretion to permit the amendment. (Stage 3)
Q4. If the answer to Q3 is yes, the court has a discretion to allow the amendment. (Stage 4)"

Contractual Limitation Period

42. There is a further point which is that the second defendant claims that there was incorporated into its retainer by the claimants a contractual limitation period at clause 24 of its standard terms and conditions as follows:

> *"Any claim in respect of any Damage suffered or alleged to have been suffered must be made within the period permitted by law and in any event within three years of the date by which the claimant became aware of the facts which give rise to the claim or potential claim."*

43. The definition of damage within the terms and conditions is:

> *"…all losses, damages and costs suffered or incurred, directly or indirectly, by you and any Addressees in respect of the subject matter of this engagement including as a result of breach of contract, breach of statutory duty, tort (including negligence), or other wrongful act or omission…"*

Is it reasonably arguable that any new claim made by the amendments is statute-barred

44. For the purposes of the present application it is agreed that the relevant statutory limitation period is that in section 14A of the Limitation Act 1980 which provides as follows:

> *(1) This section applies to any action for damages for negligence… where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued…*
> *…(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.*
> *(4) That period is either—*
> *(a) six years from the date on which the cause of action accrued; or*
> *(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.*
> *(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff … first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.*
> *(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—*
> *(a) of the material facts about the damage in respect of which damages are claimed; and*
> *(b) of the other facts relevant to the current action mentioned in subsection (8) below.*
> *(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for*

damages against a defendant who did not dispute liability and was able to satisfy a judgment.
(8) The other facts referred to in subsection (6)(b) above are—
(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
(b) the identity of the defendant…
(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

45. The claimants say that the chronology of their acquisition of relevant knowledge as follows:

(i) As a result of the negligence of the defendants the claimants were unaware of remittances giving rise to tax liabilities, until alerted by an email from Mr Baylis of the second defendant on 13 April 2018 that there might be an issue;

(ii) the defendants investigated the position and with the claimants' authority on 28 September 2018 the second defendant filed protective disclosures under the Worldwide Disclosure Facility (**WDF**) in relation to the Original Remittances;

(iii) the claimants lost confidence in the first defendant and consulted Mr Golden, then at Linklaters. Mr Golden and the second defendant worked together in preparing WDF disclosures on behalf of the claimants;

(iv) the second defendant prepared the first draft of the second claimant's disclosure letter dated 3 December 2018, and Linklaters sent amended versions of drafts for both the claimants to the second defendant on 9 January 2019. Both Linklaters and the second defendant then made suggestions for further amendments on 15 January 2019;

(v) On 1 February 2019 the second defendant submitted the claimants' WDF disclosure of the Original Remittances. In each case the letter commenced:

> "The purpose of this disclosure is to make a full disclosure on behalf of our client Mr [forename] Høegh in respect of offshore tax matters."

(vi) The Original Remittances were the subject of the WDF; the Further Remittances were not disclosed at that time because although they were known about by the claimants they were not understood to give rise to tax liabilities.

(vi) Following the termination of the second defendant's retainer in September 2020, Pricewaterhouse Coopers LLP (**PwC**) was appointed in the second defendant's place. From about late April 2021 onwards, while reviewing the claimants' tax affairs, PwC advised that the Further Remittances gave rise to tax liabilities;

(vii) The claimants' present solicitors formally disclosed the Further Remittances to HMRC in late 2021;

(viiii) The POC included the Original Remittances but did not include the Further Remittances.

(ix) By the APOC the claimants seek to include the Further Remittances within the proceedings.

46. The claimants rely on the following evidence as to the time of their knowledge that the Further Remittances gave rise to tax liabilities:

(i) Ray-Smith 3 paragraphs 32-38 contain Mr Ray-Smith's description of how the liabilities arising in respect of the Further Remittances came to light from late April 2021 onwards;

(ii) In Golden 1, at paragraphs 20 and 56, Mr Golden confirms that, as at 1 February 2019, the claimants were not aware of the facts underlying the claimants' proposed amendments.

(iii) In Morten 1, at paragraph 8(a) the first claimant gives direct evidence that although he knew about the payments now identified as the Further Remittances in 2018, he did not know they were taxable remittances and could not have done so without expert advice before about April 2021. He makes the point at the conclusion of his statement:

> "Clearly had I been aware of the Further Remittances they would have been included in my disclosure to HMRC dated 1 February 2019 prepared by Moore Stephens. I would not knowingly have allowed Moore Stephens to submit an incomplete disclosure to HMRC."

(iv) In Thomas 1, the second claimant gives his own direct evidence that he only came to understand that there were additional amounts that should have been included in the disclosure to HMRC on 1 February 2019 in the period March to July 2021.

47. Mr Hubble says that the second defendant does not have access to all the documents at this stage and therefore does not know the whole story. Mr Hubble referred in his skeleton argument and took me at some length to evidence indicating that the first defendant, Mr Golden while at Linklaters and David Ewart QC gave taxation advice to the claimants in late 2018 and that PwC gave further advice in the period from 2020 through to 2021. There can be no dispute that these persons gave the claimants advice at these times, but the claimants maintain privilege in that advice. Mr Hubble says that while the claimants maintain privilege in advice, including advice of Mr Golden, the court should be cautious in accepting the evidence of the claimants and Mr Golden that they did not have relevant knowledge before about April 2021. Accordingly he says that the claimants' evidence fails to demonstrate that there is no arguable limitation defence.

48. Both Mr Lawrence and Mr Hubble referred me to the case of *Haward v Fawcetts* [2006] 1 WLR 682. The key passages from the judgment of Lord Nicholls are as follows:

> "9. …knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence… In other words, the claimant must know enough for it to be reasonable to begin to investigate further….
> 10…it is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim…In *Spargo v North Essex District Health Authority* [1997] PIQR P235 Brooke LJ referred to "a broad knowledge of the essence" of the relevant acts or omissions…Hoffmann LJ said section 14(1)(b) requires that "one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based"…
> 12…knowledge of fault or negligence is not necessary to set time running. A claimant need not know he has a worthwhile cause of action…
> 19… a claimant must know there was a real possibility the damage was caused by ("attributable to") the acts or omissions alleged to constitute negligence…
> 21… For time to start running there needs to have been something which would reasonably cause Mr Haward to start asking questions about the advice he was given…
> 22… The relevant date was not when Mr Haward first knew he might have a claim for damages. The relevant date was an earlier date, namely, when Mr Haward first knew enough to justify setting about investigating the possibility that Mr Austreng's advice was defective."

49. In the same case Lord Mance said at paragraph 119:

> "a claimant cannot postpone the running of time almost indefinitely by reference to detailed factual points which often only become known in the course of investigation of a possible claim, or during litigation itself… The Court of Appeal was right in *Broadley v. Guy Clapham &* Co. to disapprove a test adopted by Hirst J in *Bentley v. Bristol & Weston Health Authority*…, in so far as it would have required a claimant to know <u>all</u> factual matters necessary to establish negligence or to draft a fully and comprehensively particularised claim"

50. In the recent case of *Witcomb v J Keith Park Solicitors* [2021] EWHC 2038 Bourne J concluded from his review of the authorities that:

> "… where the essence of the allegation of negligence is the giving of wrong advice, time will not start to run under s.14A until a claimant has some reason to consider that the advice may have been wrong.
> Similarly, where the essence of the allegation is an omission to give necessary advice, time will not start to run under s.14A until the claimant has some reason to consider that the omitted advice should have been given."

51. Bourne J also stated that:

> "The extended time limit under s.14A does not start to run until a claimant has both of the types of knowledge referred to in subs.(6).
> The nature of the "damage" is fundamental to both types of knowledge. The first type is knowledge of such facts about the damage as would lead a reasonable person to consider it sufficiently serious to justify instituting proceedings. The second is knowledge that the damage was attributable to the allegedly negligent act or omission … the damage must be carefully and precisely identified.
> That is not least because knowledge of the damage and knowledge that the damage is attributable to an act or omission of a defendant can merge into one another…
> However, the two parts of the test are separate. In some cases a person may acquire both types of knowledge simultaneously. In others, he will not."

52. Counsel are agreed that the burden of proof is on the claimants to show the limitation defence is not reasonably arguable.

53. In the case of *Ballinger v Mercer* [2014] 1 WLR 3597 Tomlinson LJ said:

> "In a case where section 14A of the Limitation Act 1980 is in play, it must also be remembered that the court is concerned not just with the claimant's actual knowledge at a certain date but also with knowledge which he might reasonably have been expected to acquire, including knowledge ascertainable with the help of appropriate expert advice where it would have been reasonable for him to seek such advice."

54. In *Abbey Life Trust Securities Ltd v Blake Lapthorn* 27 January 2014 Deputy Master Nurse accepted evidence from the claimant's solicitor as to the date on which the claimant acquired the relevant knowledge required to make its claim. The defendant argued on appeal that the Deputy Master had been wrong to accept the claimant's evidence at face value, but Simon J held :

> "In my view, the Deputy Master was not only entitled to that view, he was right to come to it. The defendant's contrary argument is no more than a hope that something will turn up in the course of disclosure or, failing that, they may be able to elicit some favourable answer at trial. It amounts to a hope without a realistic foundation. It was a matter that was rightly decided in my judgment in the claimants' favour summarily."

55 In the present case, for the second defendant to have a reasonably arguable limitation defence there would need to be material which could form the basis of an argument that time began to run against the claimants under section 14A more than three years before

the date of the order made on the present application following the hearing before me on 27 January 2019. There is nothing in the evidence which suggests the claimants' state of knowledge increased in any material way at any time during February 2019.

56. On the claimants' own evidence they knew about the Further Remittances the subject of the amendments in 2018. However, what they did not know until April 2021 on their evidence is that the Further Remittances meant they had tax liabilities which is the loss or damage of which they now complain. Mr Ray-Smith and Mr Golden's evidence is to the same effect.

57. The claimants say that they did not have actual knowledge for the purposes of subsection 6(a) or 6(b) before about April 2021 when they obtained PwC's advice in 2021. Nor they say, in circumstances where they were being advised by the second defendant and Linklaters about making disclosure to HMRC in early 2019, can subsection (10) constructive knowledge be attributed to them any earlier than that, as they were clearly taking steps to obtain and act on advice about remittances. They can have had no reason to suppose that that earlier advice was incomplete until they received PwC's expert advice in 2021.

58. To suggest as Mr Hubble does that it is possible advice given by Mr Golden and David Ewart QC extended to advising that the Further Remittances gave or might give rise to tax liabilities is no more than speculation which would involve disbelieving Mr Golden's witness evidence and that of the claimants. It would also make little sense of the terms of the letters of 1 February 2019 making disclosure to HMRC, to conclude that the claimants had actual or constructive knowledge that the Further Remittances were the cause of the damage of which they now seek by their amendments to complain. It would also make little sense of the

Further Remittances not having been included within the claimants' 33 page letter of claim dated 22 September 2020 or within the POC.

59. As the Deputy Master said in the *Abbey Life* case:

> *"…while of course anything can be arguable, particularly by an experienced advocate, the argument in this case is not one that can be classified as reasonably arguable, but rather it is more in the realms of being fanciful. It is not supported by any actual evidence. There is really no factual dispute, because the defendants have produced no alleged facts to contradict those alleged by the claimants."*

60. In my judgment in this case there is no reasonable argument that the claimants' knowledge actual or constructive pre-dated February 2019 because there is no evidential basis for it. To conclude otherwise would involve rejecting the clear evidence of the claimants themselves and of two solicitors and attributing to a mere hope on the part of the second defendant that something turns up the basis for a reasonable argument.

Do the proposed amendments seek to add or substitute a new cause of action?

61. If I am wrong that there is no reasonable argument that the amendments are statute barred I must consider the second question identified in *Hyde v Nygate* case: is a new cause of action being added?

62. In *Necessity Supplies Ltd v PricewaterhouseCoopers LLP* [2021] EWHC 1479 Ms Lesley Anderson QC cited and summarised the Court of Appeal's exposition of the relevant principles in *Co-Operative Group Ltd v Birse Developments Ltd* [2013] EWCA Civ 474:

> "First, a cause of action is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".
> Secondly, in the quest for what constitutes a "new" cause of action, it is the essential factual allegations upon which the original and the proposed new or different claims

> are reliant which must be compared. This is to be abstracted from the "bare minimum of essential facts" rather than instances or particulars...
> Thirdly, when an amendment involves pleading a duty which is different from that pleaded in the original action, it will usually assert a new cause of action...
> Fourthly, where different facts are alleged to constitute a breach of an already pleaded duty, the courts have more difficulty in deciding whether a new cause of action is pleaded and the question is then one of fact and degree...
> Fifthly, if the new breach does not arise out of the same or substantially the same facts as those already in issue on a claim previously made in the original action it is likely to be a new cause of action..."

63. In *Berezovsky v Abramovich* [2011] 1 WLR 2290 Longmore LJ said:

> "A new claim, according to section 35(2) of the 1980 Act, is a claim involving the addition or substitution of a new cause of action. A cause of action is that combination of facts which gives rise to a legal right. A cause of action in tort has, as its essential ingredients, a plea of duty, breach of duty and consequent damage to the claimant."

64. Longmore LJ went on to say:

> "…the addition or substitution of a new loss is by no means necessarily the addition or substitution of a new cause of action. For a cause of action to arise in tort there must be a breach of duty which causes loss but it is permissible to add or substitute further losses if they all stem from an original breach of duty which has caused some loss."

65. *Berezovsky* and *Birse* both cited Millett LJ in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 where he said:

> "…only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."

66. In *Savings and Investment Bank Ltd v Fincken* [2001] EWCA Civ 1639 Peter Gibson LJ commented on Millett LJ's dicta in *Paragon Finance*:

> "As I see it, the exercise which is required is the comparison of the pleading in its state before the proposed amendment and the pleading in its amended state. I do not think that it assists to look at the endorsement on the writ… What must be examined is the pleading of the essential facts which need to be proved. To define the cause of action the non-essential facts must be left out of account as mere instances or particulars of essential facts. That is what I understand Millett L.J. to have meant by stating that the selection of material facts must be made at the highest level of abstraction."

67. Mr Hubble says that the APOC seek to add new facts at each point of the analysis. He says that taken together, the proposed amendments include at least one whole new category of claim, namely of a failure to advise on, identify and prevent remittances which arose from payments made to relevant persons and goes further in respect of the degree to which the factual essentials – including the entities involved, the steps that should have been taken, and the counterfactual consequences of such steps – are different. The amendments he says add a new cause of action.

68. In my judgment at the highest level of abstraction the essential factual allegations are contained in the summary of the duty owed by the second defendant, the breach and the loss as set out in paragraphs 8.2, 8.4 and 8.5 set out at paragraph **[13]** above.

69. The essential gist of the claim is that the second defendant failed to advise the claimants for whom it was preparing tax returns of the ramifications of the Remittance Reforms, by failing to investigate and advise whether there had been remittances caught by the terms of Remittance Reforms in relation to the claimants and loss was suffered as a result.

70. In my judgment the main amendments are simply further instances or particulars of essential facts of a claim already pleaded and some further factual background.

71. Mr Lawrence asked rhetorically whether Mr Hubble would be saying not just that there was one new cause of action but that there was one new cause of action for each Further Remittance added to the proposed amended schedules. Consideration of Mr Lawrence's

question in my judgment demonstrates that the Further Remittances are further instances or particulars of the already pleaded cause of action.

72. In answer to Mr Hubble's particular complaint that payments to relevant entities are only newly included and that that must therefore be a new and separate cause of action I note that the POC already does by its terms encompass remittances to relevant persons as well as by relevant persons both in the summary at paragraph 8.2 and in paragraphs 13.1 by reference to the terms of the FA 2008 and in paragraphs 58.2, 64.3, 69.3, 71.2, 72.3 and 87. No instances of remittances to relevant persons were included in the POC because they had not been identified as causing any damage.

If I am wrong that it is not a new claim, does it arise from the same or substantially the same facts?

73. In *Ballinger v Mercer* [2014] EWCA Civ 996 the Court of Appeal cited with approval dicta by Colman J in *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549 relating to the purpose of the limitation imposed by CPR 17.4(2):

> "52 ….the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim…"
> 53. In *Lloyds Bank plc v Rogers* [1997] TLR 154 Hobhouse LJ said of section 35: "The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts."
> 54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts.

74. In *D R Jones Yeovil Ltd v Drayton Beaumont Services Ltd* [2021] EWHC 1971 HHJ Russen QC observed that:

> "No difficulty arises in testing whether the new claim arises from the same facts as those already in issue. However, the phrase "substantially the same" necessarily carries with it a degree of flexibility."

75. The judge further observed that:

> "In *Ballinger v Mercer* the court went on to say that "substantially the same" does not mean the same as "similar" and to endorse other earlier judicial observations to the effect that whereas in a borderline case the court's resolution of the point will largely be a matter of impression, in others it must be a question of analysis.

76. In *Akers v Samba Financial Group* [2019] EWCA Civ 416 McCombe LJ (with whose judgment the other members of the Court of Appeal agreed) said:

> "…in the vast majority of cases what is "in issue" in an existing claim will usually be determined by examination of the pleadings alone. It will be the primary, and probably the only, source of material for deciding the question."

77. I consider that the facts that are at present in issue in the claim include whether the second defendant made appropriate enquiries about the claimants' affairs and those encompassed by the meaning of the claimants' relevant persons and gave the advice they should have done concerning the impact of the Remittance Reforms so that the claimants' tax returns were completely and accurately prepared. Insofar as the APOC pleads a new claim which extends the scope of the relevant persons and the appropriate questions that new claim arises out of the same or substantially the same facts.

78. Any amendment to a pleading necessarily says something new and as said by the Court of Appeal in *The Convergence Group v Chantrey Vellacott* [2005] EWCA Civ 290 will "inevitably allege facts not already pleaded".

79. The proposed amendments do not impose on the second defendant an obligation to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to those facts which the second defendant could reasonably be assumed to have investigated for the purpose of defending the unamended pleading; all the facts and evidence to be looked into are within the ambit of and related to the duty, breach and loss already pleaded.

80. In my judgment both as a matter of impression and analysis the further facts proposed to be pleaded by amendment arise substantially out of the same facts as are already in issue.

81. Even if that impression and analysis were wrong, in the present case the first defendant has consented to the amendments and the facts which are the subject of the amendments are therefore in issue in the litigation: see *Charles Church Developments v Stent Foundations* [2006] EWHC 3158 at paragraph 40.

Contractual Limitation Period

82. The contractual limitation point has yet to be raised by the second defendant in a pleaded defence and the claimants reserve their position on, at least, whether the term was incorporated into the contract of retainer, whether it is enforceable and its true construction.

83. It is now common ground between the parties that the relation back effect of section 35 does not apply to a contractual limitation period. For the purposes of any contractual limitation defence the claimants' amendments are made when they are allowed. Therefore, if allowed in February 2022, the Judge at trial would have to determine, after considering, at least, the questions of incorporation, enforceability and construction, including the question when

the claim was "made", whether it operates to bar the claimants' claim against the second defendant.

84. Mr Lawrence says and I agree that I cannot decide the questions on which his clients reserve their position in this judgment and, in particular I cannot determine at this stage the question whether the contractual limitation period has expired. Mr Lawrence goes on to say that if it were clear beyond doubt that the contractual limitation period had expired and provided a cast iron defence for the second defendants I might refuse permission to amend because the amended claim would have no prospect of success. However, if I am not able to reach such a firm conclusion but accept that the second defendant has an arguable case on the contractual point then the question must be whether granting permission to amend might cause the second defendant prejudice in relation to the contractual time bar point, compared with the position if the claimants were to issue a new claim tomorrow. The answer must be "no" because it is accepted that relation back does not apply. The contractual limitation defence will be determined by the trial judge whether as a result of an amendment or the issue of a new claim.

85. Accordingly in my judgment the possible contractual time bar is irrelevant to the jurisdictional question of whether I should allow the amendments.

Conclusions

86. My conclusions on the *Hyde v Nygate* questions are as follows:

(i) Q1 Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? No and so the amendments fall to be considered under CPR 17.1(2)(b);

(ii) Q2 (If I am wrong on Q1) do the proposed amendments seek to add or substitute a new cause of action? No, again the amendments falls to be considered under CPR 17.1(2)(b);

(iii) Q3 (If I am wrong on Q2) does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? Yes, in which case there is a discretion to permit the amendment under CPR 17.4.

87. The application to amend is made at about as early a stage in proceedings as is possible, after service of the POC, but before any defence has been served. The amended claim appears to have reasonable grounds. As Chief Master Marsh said in *Football Association Premier League Limited v O'Donovan* [2017] EWHC 152(Ch):

> "As a general principle, it is plainly desirable to ensure as far as possible that all the issues between the claimant and the first defendant are resolved in one claim. This principle is reflected in CPR 7.3 which permits a single claim form to be used to start all claims "… which can be conveniently disposed of in the same proceedings", although the inconvenience and cost of starting a second claim and having it consolidated is relatively limited. Support for the approach can also be found in the overriding objective."

88. I conclude that the claimants' amendments as contained in the APOC should be allowed whether under CPR 17.1(2)(b) or under CPR 17.4. My permission to amend includes not only the amendments which concern the Further Remittances, but also to the amendments proposed to Schedule 1 and 2a of the APOC, which in each case are plainly corrective amendments which lower the quantum of the claim against the defendants.

89. Following circulation of my draft judgment the parties have submitted to me and filed by CEfile a final version of the amended particulars of claim clarifying which companies are intended to be referred to in paragraphs 15.3, 28.2, 29.2(a) and 44.1(c) 54.4, 54.5 and 62, making a change of the date in paragraph 8.3(b) to June 2021 and completing paragraph 107A

by including a reference to paragraph 8.3(b). My permission to amend extends to that form of the draft supplied to the Court on 25 February 2022.

89. This judgment will be handed down remotely at 10 am on Monday 28 February 2022. I will make an order in the form agreed between the parties and also submitted to the Court on 25 February 2022. Other consequential matters will need to be dealt with at an adjourned decision hearing to be listed on a separate occasion.