Neutral Citation Number: **[2021] EWHC 159 (Comm)**

Case No: HC-2016-003050

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

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

Date: 02/02/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) CHRISTOPHER HUGH GOSDEN	
(2) JANE SHIRLEY KAYE	**Claimants**
- and -	
(1) HALLIWELL LANDAU (A FIRM)	
(2) PHILIP LAIDLOW	**Defendants**

- -
- -

Ms Teresa Rosen Peacocke (instructed by **Blake Morgan**) for the **Claimants**
Ms Katherine McQuail (instructed by **BLM**) for the **Defendants**

Hearing dates: 12 January 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the trial of the quantum aspects of this claim. The detailed facts are set out in paragraphs 1-59 of my earlier judgment ([2019] EWHC 155 (Ch)) which should be treated as authoritative subject to the contents of the Court of Appeal in its judgment referred to below.

2. In summary, the claim is brought by the claimants against the first defendants, a firm of solicitors and the second defendant, a solicitor who was at all material times a partner in the first defendants, for damages for professional negligence in the implementation of a proprietary tax mitigation scheme known as an Estate Protection Scheme ("EPS"), by which it had been intended that a property (8 Denny Crescent, London SE11 4UY ["Property"]) owned by Dr Jean Mary Weddell Deceased ("Deceased") would pass on her death to the first claimant, or (at the option of the Deceased) a class of intended beneficiaries consisting of the claimants and their children, with substantially less tax (mainly Inheritance Tax ["IHT"]) being payable than if the Property had been disposed of by will. At no stage did the Deceased opt for anyone other than the first claimant to receive the Property on her death and this assessment has proceeded on the basis that the first claimant was the beneficiary who would have been entitled to receive the Property on the death of the Deceased had the EPS taken effect in accordance with its terms.

3. The Property remained registered in the sole name of the Deceased but was subject to a trust of which the claimants and Deceased were trustees which was created for the purpose of carrying the EPS into effect. The Property was sold in 2010 by the Deceased in breach of trust without the knowledge or consent of either claimant, each of whom, together with the Deceased, were trustees of the Trust.

4. In my earlier judgment, I concluded that the defendants had been negligent in failing to register a restriction at HM Land Registry in order to protect the interest in the Property of the beneficiaries of the EPS, but that they had not established that this negligent omission had caused them any loss since, I concluded, if they had been approached by the Deceased for consent, the claimants would have consented to a sale of the Property free of the EPS. On appeal by the claimants, the Court of Appeal ([2020] EWCA Civ 42) overturned that conclusion on the basis that, contrary to the submissions made on behalf of the defendants, causation and damages were to be approached on the basis that had the solicitors registered the restriction in accordance with the duty of care which they owed to the claimants, no sale could have taken place without the claimants' consent, not on the basis of the loss of a chance to persuade the Deceased not to sell the property. On that basis, damages fall to be assessed on a conventional rather than a loss of a chance basis. The Court of Appeal remitted the assessment to me and this is that assessment.

5. It is common ground that but for the breach of duty of the defendants the scheme would have taken effect in accordance with its terms and on that basis the Property would have passed to the first claimant on the death of the Deceased subject to any need for it to be sold in order to meet any IHT payable by the Deceased's estate. Whether there would have been any such need is in dispute.

6. No new evidence has been adduced by the parties, who rely on the evidence adduced at the earlier trial. There is valuation evidence from a single joint expert which is agreed save in one respect.

The Claimants Damages Claim As Pleaded

7. The Particulars of Loss as pleaded by the claimants in their amended Particulars of Claim is in the following terms:

> "PARTICULARS OF LOSS
>
> 18. At the time of the deceased's death in March 2013 the market value of the Property was approximately £875,000, which was the price achieved on its sale. The Claimants' loss is at least that sum, together with interest as pleaded below.
>
> 19. The Claimants further claim and are entitled to recover interest pursuant to section 35A of the Senior Courts Act 1981 on such sums as may he found due as damages and at such rate and for such period(s) as the Court shall think fit.
>
> 20. The current market value of the Property was estimated as at 22 June 2017 (the date of the original Particulars of Claim) to be approximately £1,250,000 and has risen since that date. In the alternative to paragraphs 18 and 19 above and on basis that the Claimants would have retained he Property as beneficial owners after the deceased's death, their loss would fall to be calculated as:
>
> 20.1 the loss of the net rental income to be derived from the Property from March 2013 together with interest thereon as pleaded in paragraph 19 above; and
>
> 20.2 the market value of the Property as at the date of trial."

The Prayer to the amended Particulars of Claim states that damages were claimed on the basis pleaded in paragraph 20 alternatively as pleaded in paragraph 18 set out above.

Application For Permission to Amend the Amended Particulars of Claim

8. Counsel for the claimants, Ms Rosen Peacocke, made clear that her case was that the claimants claimed the loss of rental income in the event that damages were assessed as claimed in paragraph 18 as well as if assessed as claimed in paragraph 20. As is apparent from both the terms of paragraphs 18-20 as amended and the prayer that is not how the claim has been pleaded. Counsel for the defendants, Ms McQuail, submitted that it was not open to the claimants to claim alleged loss of rental income if and to the extent that damages were assessed in accordance with clause 18 on the basis of the pleadings as they stood. I asked the parties about this point at the outset of the trial and suggested that Ms Rosen Peacocke consider the need for an amendment over the short adjournment.

9. In the event no application was made at that stage, Ms Rosen Peacocke completed her substantive submissions shortly after the end of the lunch adjournment. Ms McQuail was entitled to assume that the claimants had decided not to apply to further amend the Particulars of Claim. Ms McQuail then made her substantive submissions.

10. Ms Rosen Peacocke then delivered her reply submissions. Towards the end of her reply submissions, I asked her about the impact on the claimants' case of the way in which the claim had been pleaded, Ms Rosen Peacocke then applied to further amend the amended Particulars of Claim so as to add a sentence to paragraph 18 to the effect that the alleged loss of rental income referred to in paragraph 20.1 of the amended Particulars of Claim was claimed in addition to the market value of the Property at the date of the death of the Deceased. Ms McQuail opposed the application on the basis that the application was made very late, after all her substantive submissions had been completed and in circumstances where the issue had been considered at case management stage as I explain in more detail below. I indicated that I would reserve judgment on this application and determine it at the same time as I determined the other issues that arose.

11. It necessarily follows that if I accede to the application, I will have to give Ms McQuail the opportunity to make additional substantive submissions in answer to this new alternative case. I address that issue further below. If I was to permit that course, it is likely that the costs of such an exercise will have to be borne by the claimants since the application for permission to amend could and should have been made after the lunch adjournment and before Ms McQuail commenced her submissions. However, the costs issue can only finally be determined after any additional submissions have been made.

12. In order to decide whether permission to further amend the Particulars of Claim should be granted, it is necessary that I start by tracing the procedural development of the claim for loss of rental income.

13. Ms McQuail told me and I accept that this issue had been the subject of debate before the Master who case managed this claim down to trial. She told me that when the question of expert evidence came to be considered, it was suggested on behalf of the claimants that that the expert evidence should not merely address valuation at each of the dates identified by the parties but should also address the rental income that could have been obtained had the Property been leased out after the death of the Deceased by the first claimant. Ms McQuail informed me and I accept that the Master refused to include the rental income issue within the list of issues in respect of which the expert was to give evidence because there was no pleaded issue to which the question of rental income was relevant. It is clear that that is likely to be what happened from the Order the Master made at that the CMC on 6 March 2018. It is clear from paragraph 15 of the Master's Order that the expert's report was to be confined to three issues, each of which was concerned with the value of the Property on defined dates being (a) the date of the sale, (b) the date of the death of the Deceased and (c) the date of the expert's report. There was no mention of any issue concerning rental value.

14. The Master was clearly correct to take the view she did because at that stage paragraph 20 was in its unamended form and sought only the market value of the Property at the date of the trial. The effect of what took place before the Master was that there could be no doubt that it was not open to the claimants to advance any claim for lost rental income unless and until they obtained permission to amend the

Particulars of Claim and then only to the extent that the Particulars of Claim were amended so as to include such a claim.

15. Thereafter, the claimants applied to amend paragraph 20 of the Particulars of Claim materially in the terms set out above. The defendants consented to that application and the amendments were duly made pursuant to a consent order made on 30 August 2018. The consent order permitted the defendants to amend their defence consequentially and the defendants duly amended paragraph 23 of their defence so that (as amended) it read:

> "It is admitted that the price achieved on the sale of the Property in 2013 was some £875,000 and acknowledged that an expert will be instructed to provide a current valuation of the Property before trial, save as aforesaid paragraphs 17, 18 and 20 are denied."

I was told that there was a subsequent order that varied the Master's 6 March order so as to permit expert evidence on rental income to be obtained. Following the hearing Ms Rosen Peacocke informed me by email that no Order had been made whether by consent or otherwise varying the terms of the Master's Order made at the CMC. Technically therefore there is no permission to either party to rely on evidence concerning the rental value of the Property following the death of the Deceased. It was not suggested by Ms McQuail by way of following email that this should be treated as an impediment to the admissibility of that evidence however and therefore I do not. However I make clear that this sort of disregard of procedural orders particularly in relation to the scope of expert evidence where there is a duty to confine the scope of such evidence is entirely unacceptable. As things stand, I consider that had the Master been asked for a variation of his Order she would have varied it only to the extent made necessary by the amendment that had been made – that is to paragraph 20 of the Particulars of Claim. It follows that the defendants were entitled to assume that the claim for lost rental income was being advanced exclusively on the basis pleaded and therefore if damages were to be assessed as claimed in paragraph 18 of the Particulars of Claim as amended, damages in respect of alleged lost rental income were not being claimed.

16. In deciding whether to grant Ms Rosen Peacocke's application for permission to further amend, it is necessary to consider whether the application is either late or very late. It is not suggested, nor could there be any sensible suggestion, that this is not a late application. A very late application technically is one that if granted would endanger the trial date. There is no question of that being so here – not merely was the application made when the assessment hearing was all but completed but Ms McQuail did not suggest that if the application was granted it would be necessary for her client to adduce, or consider adducing, further evidence. As Ms McQuail said in response to the application to further amend, the issue was that it was not made after the lunch adjournment as it should have been so that she was entitled to assume that it was not being made and proceeded with her submissions on that basis. It is obvious as I have said that Ms McQuail would have to be given an opportunity to make any further submissions she considered appropriate if I grant the application.

17. Thus whilst it is not the case that the trial date would be endangered if I grant the application, it is the case that there will have to be a further round of submissions and thus the cost of the assessment exercise will be increased. This would have been entirely avoided had the application for permission to amend been made as and when it should have been. Leaving to one side whether the application should have been made many weeks or months earlier than the hearing before me, in my judgment it is plain that the application could and should have been made by no later than the resumption of the hearing after the lunch adjournment. I had drawn the difficulty to Ms Rosen Peacocke's attention, had ascertained from Ms McQuail that she was disputing any entitlement to recover rental income on the assumption that an assessment of loss was to be carried out either at the date when the Property was sold (as the defendants maintain it should be) or the date of the death of the Deceased (as the claimants and defendants accept it might be) and it was plain that if the clients were to contend that they should recover loss of rental income assuming the date at which loss was to be assed was the date of death of the Deceased then that needed to be pleaded.

18. It is not in dispute that I have jurisdiction to permit amendments even if they are applied for in the course of reply submissions. The only question is whether the amendment should be permitted as a matter of discretion. Whilst I have very little sympathy for the claimants in the position they find themselves in, with a great deal of hesitation, I have come to the conclusion that I should permit the amendment. My reasons for reaching that conclusion are as follows.

19. First, whilst I accept that (a) the defendants were entitled to proceed on the basis that the claim they had to meet concerning damages was that which had been pleaded down to the start of this hearing given the procedural history set out above and (b) they were further entitled to do so when Ms McQuail made her submissions because no application to amend had been made prior to her commencing those submissions, as in the circumstances there should have been, it is not suggested that (i) any further evidence is or may be required if the amendment is permitted or (ii)) that the defendants do not understand the alternative case that the claimants seek to advance – which is simply that they are entitled to recover damages in respect of lost rental income on the same basis and in the same amount as they would be entitled to recover such losses on the assumption that damages were to be assessed on 22 June 2017 as pleaded in paragraph 20 of the amended Particulars of Claim. The only difference would be that if damages were assessed at the date of the Deceased's death the loss of rental income would be prospective. However that does not obviously make any difference since the loss has to be assessed by reference to the hypothetical intentions of the claimants and the same expert evidence as to what rental income could have been earned, whichever assessment date is selected. In any event that issue can be catered for by permitting Ms McQuail to make any submissions she considers appropriate in relation to this issue. Following the circulation of this judgment in draft, Ms Rosen Peacocke informed me that the claimants no longer maintained the claim for loss of rental income given my conclusions concerning how IHT would have been paid had the property been retained until the death of the Deceased. In those circumstances, whilst I give permission to amend, no claim is maintained by reference to the head of claim to which the amendment relates.

The Issues other than the Rental Income Issue

Date of Assessment of damages

20. It is common ground that the first claimant is entitled to recover the value of the Property by way of damages. The issue between the parties is the date at which the Property's value should be assessed.

21. It is common ground that the default position is that damages should be assessed at the date the wrong occurs, which in relation to the tort of negligence, where damage is of the essence of the tort, is when the loss caused by the breach of duty occurs – see Smith New Court Securities Ltd v Scrimgeour Vickers [1997] AC 254 *per* Lord Brown Wilkinson at 265H-266C – but equally it is common ground that a court can and should depart from that rule where it is necessary in order adequately to compensate the claimant for the damage suffered by reason of the defendant's wrong – see, specifically in relation to the tort of negligence, Dodd Properties Ltd. v. Canterbury City Council [1980] 1 W.L.R. 433 and more generally, County Personnel (Employment Agency) Limited v. Alan R Pulver & Co [1987] 1 WLR 916 *per* Bingham LJ (as he then was) at 925-6; and Smith New Court Securities Ltd v Scrimgeour Vickers *per* Lord Brown Wilkinson at 265H. Although Ms McQuail submitted that the facts of this case are different from any reported case where such a departure had been permitted, I do not consider that to be material. The point of principle to be decided in each case is whether it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong to depart from the default rule. Each case where this question arises involves a fact sensitive analysis of the position.

22. It is common ground that if the default rule applies damages are to be assessed at the date when the property was sold by the Deceased.

23. If a departure from the agreed default position is justified then the defendants submit that damages should be assessed at the date of the death of the Deceased but no later for that was the date when the claimant would have been entitled to inherit the property but for the negligent omission of the defendants to register a restriction that if registered would have prevented the sale of the Property otherwise than with their consent. The claimants submit that this is the earliest date when damages are to be assessed but their primary case is that if full effect is to be given to the *rationale* for permitting a departure from the default position then damages should be assessed at the date of the trial but in fact the date of the experts report since there is no valuation evidence for any date thereafter.

24. In my judgment it is appropriate that I assess loss as at the date of the death of the Deceased. My reasons for reaching that conclusion are as follows.

25. First, in my judgment this approach reflects the fact that had the EPS taken effect in accordance with its terms, the first claimant would not have been entitled to receive the Property (or the proceeds of sale of the Property that remained if a sale was necessary in order for the Deceased's estate to meet any IHT liability – an issue I return to below) until after the Deceased died. The fallacy of assessing loss as at the date when the Property was sold is illustrated by the defendants' approach to the assessment of interest. Ms McQuail submits on the one hand that damages should be assessed at the date when the Property was sold but on the other than no interest is

recoverable on the sum so assessed from any date earlier than the date of the death of the Deceased because " … *the Claimants would not have been entitled to the proceeds of sale until after the Deceased's life time entitlement had ended with her death*." – see paragraph 44 of Ms McQuail's written submissions. In my judgment this illustrates clearly why it is necessary to adopt the date of death of the Deceased as the appropriate date for assessment since it illustrates very clearly how an assessment at the date of sale will fail adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong.

26. Assessing loss on the date of sale will mean that no account at all will be taken of the fact that had the Property been retained by the Deceased as it should have been its value is likely to have fluctuated over the period between the date of sale and the date of her death, whereas an assessment at the date when the Property was sold will take full account of that fluctuation whether upwards or downwards. It is common ground that the object of the assessment of damages is to place the claimant as nearly as can be achieved in the position he, she or they would have been in had the breach of duty not occurred – see Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, per Lord Blackburn at 39. An assessment at the date of sale of the Property would not achieve this objective, assuming the Property rose in value between then and the date of the Deceased's death and would over compensate the claimant in the event that the value of the Property dropped, in each case because had the breach not occurred the first claimant would have been entitled to receive the Property in March 2013, when the Deceased died, not October 2010 when the Deceased sold the Property. That would only not be so if the value of the Property remained exactly the same throughout the period between the two events. Here contracts for the sale of the property were exchanged on 22 October 2010 and the sale was completed on 29 October 2010 but the Deceased died on 10 March 2013. The expert concluded that at the date of the sale of the Property it was worth something within a range of £710,000 to £785,000 depending on a variety of factors but was worth £875,000 in March 2013. This last figure is agreed between the parties.

27. Ms McQuail submits that this approach is wrong in principle because the Defendants' duty was to register a restriction, or seek instructions about registering a restriction or advise that no restriction would be entered without express instructions or advise the taking of independent advice and nothing more and that the " … *financial consequence of the step not taken by the Defendants was that the proceeds of sale of the Property at the time it was sold were available to the Deceased free of the EPS*…" She argues that to assess damages at the date of the Deceased's death and *a fortiori* to assess damages at the claimants' preferred date being the date of the single joint expert's report fails to give effect to this analysis. She argues that the scope of the duty was confined to preventing the disposal of a "*gratuitously conferred asset*" and that any assessment that takes account of the rising London property market was not within the scope of the defendant's duty. Ms McQuail submits that a rise in the London property market was not caused by, or would have been a consequence of the registration of a restriction.

28. I consider Ms McQuail's submission that the effect of the retainer being limited in this way is to require damages to be assessed at the date of sale of the Property to be mistaken. Firstly, as I have said already, the first claimant was entitled to receive the Property at, but only at, the date of the Deceased's death and would have done so but

for the negligent failure by the defendants to register a restriction against the title of the Property. The "*... financial consequences ...*" of the defendants' breach of duty was not as described by Ms McQuail but was that the 1st claimant did not receive that which the EPS was intended to deliver namely title to the Property at the date of death of the Deceased. This outcome was the reasonably foreseeable financial consequence of the defendants negligence in failing to register a restriction because if it had been registered it would have prevented the sale of the Property otherwise than with the consent of the claimants. It was common ground at the hearing that had a restriction been registered the Property could not have been sold without the consent of the claimants. It is no longer contended that the claimants would have agreed to the sale of the Property had they been asked to consent in 2010 and could not be in light of the conclusions reached by the Court of Appeal. It follows that the effect of the breach was not that the proceeds of sale became available to the Deceased free of the EPS. It was that a property that should have been incapable of being sold by the Deceased without the consent of the claimants could be and was sold in breach of trust.

29. Secondly, it is implicit in Ms McQuail's submission that the 1st claimant was interested either in the Property or its proceeds of sale but that is not the basis on which the EPS proceeded. The EPS enabled the Property to be sold by agreement of the trustees (the claimants and the Deceased) during the lifetime of the Deceased. If that happened and another property was not purchased, the Deceased would have a life interest in the fund resulting from the sale of the Property and the 1st claimant's interest on the death of the Deceased would be in the fund or what remained of it. However, the key point is that any sale prior to the death of the Deceased had to be by consent. If the claimants had consented to a sale then I agree the 1st claimant's interest would be in the fund but at no stage did the claimants or any of them consent to a sale and would not have done so.

30. Thirdly whilst Ms McQuail submits and I agree that the defendants are responsible for the consequences of a sale happening in 2010, for the reasons I have explained the consequence of a sale happening in 2010 was that the 1st claimant was deprived of title to the Property which he was entitled to have transferred to him on the date of the Deceased's death in 2013. It is for that reason that a valuation at that date is necessary if the 1st claimant is to be compensated for the damage suffered by reason of the defendant's wrong. The point is that he was entitled to the Property as at that date, not the proceeds of a wrongful sale on a date earlier than that or what remained of the proceeds of the wrongful sale at that date. He did not receive what he would have been entitled to had the scheme taken effect in accordance with its terms as a result of the negligent failure by the defendants to register a restriction protecting the interests of those entitled to benefit from the EPS.

31. By the same token I do not accept that it is either necessary or appropriate to assess damages at the primary date contended for by the claimants namely the date of the single joint experts' report. My reasons for reaching that conclusion are as follows.

32. First, I agree with Ms McQuail that it is immaterial when the claimant first knew that the Property had been lost and reject Ms Rosen Peacocke's submission to contrary effect. That was an issue relevant to the limitation issues that I resolved in favour of the claimants and which was upheld by the Court of Appeal. It is not relevant to the date when damages are to be assessed, which, where the cause of action is the tort of

negligence, will be the later of the date when the loss occurred or such later date as it is necessary to adopt in order adequately to compensate the claimant for the damage suffered by reason of the defendant's wrong. Knowledge may be relevant to deciding whether and if so what later date should be adopted in some cases – the issue is an entirely fact specific one - but it is not in this case because the loss crystallised on the date the Deceased died not on a later date when the claimants discovered that the Property had been sold or when they commenced proceedings or the date when a single joint expert delivered his or her report. All these latter events are matters of happenstance and provide an entirely arbitrary basis for identifying the date when damages should be assessed.

33. The first claimant was entitled to receive the Property at the date of the death of the Deceased and assessing loss by reference to its value at that date adequately compensates the 1st claimant for the loss he suffered as a result of the defendants' negligence.

Deduction of IHT

34. The defendants maintain that the sum otherwise recoverable in respect of the value of the Property is to be reduced by the amount that would have been payable by the estate of the Deceased by way of IHT. The claimants maintain that no sum should be deducted because the defendants have failed to prove that any sum would have been payable by way of IHT or that any sum that would have been payable would have to be paid by selling the Property. It goes without saying that in relation to this issue the evidential burden of proving that (a) IHT would have been payable (b) the amount that would have been payable and (c) that such sum as would have been payable could not have been paid by the other assets available in the estate rests on the defendants.

35. I start with what is obvious – assuming that the evidential hurdles to which I have referred can be overcome and it is proved that (a) IHT would have been payable and (b) the sum payable could only have been paid if the Property had been sold then the damages recoverable by the 1st Claimant will be the value of the Property at the date of death of the Deceased less the costs of sale of the Property and the sum that would have been payable by way of tax. This is not in dispute because if the position were otherwise then the 1st claimant would not be placed as nearly as can be achieved in the position he would have been in had the breach of duty not occurred but would be better off. No attempt has been made by the defendants to quantify what the costs of sale would be or even to assert that account should be taken of them. In those circumstances, they must be left out of account but not for any reason other than a failure to prove what if any sale costs would have been incurred.

36. I accept Ms Rosen Peacocke's point that IHT would be payable by the estate and not the 1st claimant so that technically the narrow point decided by British Transport Commission v Gourley [1956] AC 185 does not arise but that is not the point since it is accepted that if IHT was payable by the estate and if the estate did not have sufficient funds available to it at the date of the Deceased's death to meet the IHT charge then the Property would have to have been sold in order to pay the IHT that was payable.

37. Ms Rosen-Peacocke submitted in paragraph 43-44 of her reply written submissions that:

> "… any deduction for IHT from damages recoverable by Cs would require Ds to establish, on the balance of probabilities
>
> (1) that HMRC would have successfully claimed IHT from the Deceased's estate in 2013;
>
> (2) the amount of IHT prima facie recoverable (as to which Ds accept that their evidence failed);
>
> (3) the amount of credit for POAT that would have been given against any IHT charge (as to which Wendy Cook, Ds' witness and Executrix of the Deceased's estate, had access to the Deceased's tax returns and accountant's files);
>
> (4) that the estate in 2013 would have been insufficient to discharge the IHT liability net of credit for POAT;
>
> (5) the extent of the deficiency, which would not be presumed in light of the substantial assets held by the Deceased in 2010;
>
> (6) the net sum HMRC would have successfully recovered from Cs.
>
> 44. Ds failed to establish any of these elements of their proposed deduction of presumptive IHT from an award of damages to Cs. In any event, Ds' calculation of the deduction (at [39] of Ds' Submissions) bears no resemblance to Ds' pleaded case, and they adduced no evidence of it."

38. The first sub issue is whether IHT would have been payable either in law or by agreement between HMRC and the estate or by concession by the estate on the basis that the estate included the Property for IHT purposes. As I have said the onus rests on the defendants to prove on the balance of probability that this was so. Ms Rosen Peacocke submits that there is no evidence that HMRC would have successfully claimed IHT from the Deceased's estate in 2013.

39. The only evidence available was that given by Mr Laidlaw. His evidence is that by 2010, HMRC was systematically challenging the schemes and was doing so even where income tax had been paid by the settlor on the assumption that he or she was entitled to let out the property the subject of such schemes – see paragraph 56 of his statement. In my judgment it is unreal for Ms Rosen Peacocke to maintain that the defendants are entitled to succeed on this point only if it is proved that any challenge by HMRC would have succeeded. This is unreal for the reasons identified by Mr Laidlaw in paragraph 57 of his witness statement – it would be open to HMRC to pursue a challenge not merely through the FTT but onwards through the judicial system. The reality is that given the modest sums at stake here, the costs even of arguing this issue before the FFT would be likely to make resisting such a challenge practically impossible.

40. The figures that are relevant are these: It is agreed that the Property was worth £875,000 at the death of the Deceased's death. If it had been included in the Deceased's estate for IHT purposes, a nil rate band deduction of £325,000 would have been made taking the taxable value of the Property to £550,000. Ignoring any payments of Income Tax by the Deceased for the moment, the tax payable would have been 40% of £550,000 which would have been £220,000. In my judgment it is probable that the costs of contesting the payment of IHT would have equalled or exceeded that sum. That factor together with the risk of losing makes it highly probable that the estate would have sought a compromise with HMRC. The terms that would have been offer on the balance of probabilities are those referred to by Mr Laidlaw in paragraph 57 of his witness statement as being what in his experience had been offered in other cases namely that " … *HMRC would simply treat settlors' properties as part of their estate for inheritance tax purposes and there would be a rebate of the income tax (POAT) that had been paid*."

41. In my judgment it is wrong for Mr Rosen Peacocke to assert that there is no relevant evidence. Mr Laidlaw's evidence is evidence. Had the defendants wished to challenge this evidence they could have sought to do so by adducing expert accounting or estate planning evidence. They chose not to do so. There is no reason for me to reject Mr Laidlaw's evidence on this point and I decline to do so.

42. Two issues remain – one concerning what if any inferences I should draw from the evidence as to what if any Pre-Owned Asset Tax ("POAT") was paid by the Deceased down to the date of her death and whether it has been proved that the estate could have met the notional charge to IHT from other estate assets without resort to the Property.

43. Before turning to that question, there is a pleading point taken by Ms Rosen Peacocke. The defendant's pleaded case was set out in Paragraph 26(x) of the amended Defence in these terms:

> " … had the Property remained in the name of the deceased at the date of her death and had the capital and income of the Property Trust fund then been held on trust for the First Claimant absolutely inheritance tax of approximately £220,000 would have fallen to be paid on the value of the Property by reason of HMRC's attitude to the efficacy of the scheme and the First Claimant would have had to sell the Property to meet that tax liability."

Mr Laidlaw was the only witness proffered by the defendants to speak to this figure and he was unable to explain how it had been arrived at as the following exchange took place:

> "Q. What is the basis for that figure that is in that paragraph? What is the basis of that? How is that calculated?
>
> A. Off the top of my head, I cannot say.
>
> JUDGE PELLING: You might have to do a little bit better than that, because if you look at page 22, you signed a

> statement of truth saying "I believe the facts stated in this defence are true". So I am assuming that you were the source of the information contained in this paragraph, so if you – are – were you the source of the information contained in this paragraph?
>
> A. Well, I wrote it out; I just cannot see the starting point. … I cannot reproduce the computation here, I am afraid."

I am not persuaded that this is a proper basis for not making a deduction for IHT if otherwise it is established that IHT was payable and could not be paid by the estate otherwise than by a sale of the Property. First, the principle that the defendants rely on is more than adequately pleaded. Secondly, the fact that a witness cannot recall the basis of the calculation is not a reason for rejecting the principle. Thirdly, it is apparent from what I have said so far that there is a justification for the figure pleaded. Finally, assuming the pleaded figure is erroneous, any mathematical error would not justify not making any deductions at all. Rather it focusses attention on attempting to arrive at as nearly a correct figure as can be achieved on the evidence available. I have already concluded that in practice had the Property not been sold HMRC would have challenged the EPS and on the balance of probabilities the estate would have paid the tax rather than resisting the challenge given the probable costs of resisting such a challenge.

44. Before I turn to the question whether the estate had the means to pay the IHT that would have been payable on this basis, it is necessary to consider the POAT issue since it has the capability to reduce the tax that would otherwise have been payable.

45. POAT was introduced on 6 April 2005 and charged income tax to settlors under schemes such as the EPS on the assumption that the property the subject of such a scheme had been let out at full rental value.

46. The defendants submit that the Deceased opted to pay POAT from 2005 but that it is to be inferred that she stopped paying it at some time later because of Ms Cooke's evidence that no tax returns were filed by either her or the Deceased for 2-3 years. This is not an appropriate inference to be drawn from the evidence that is available because what Ms Cooke said was that she instructed the Deceased's accountant to resolve the issue. There is no evidence as to whether in fact he did so or not. This notwithstanding, the defendants submit that the best estimate that the court should adopt is that the Deceased paid POAT for 4 of the years between 2005 and her death in 2013. That is not appropriate. It was open to the defendants to seek third party disclosure of the Deceased's tax returns whether from her accountant or her executrtrix (Ms Cooke) but in the event did not do so. The onus rested on the defendants in relation to this issue. In those circumstances, POAT must be assumed to have been paid throughout the period.

47. There was no evidence available during the hearing as to how the POAT that the Deceased paid was calculated or how much she paid or when. This leads the defendants to submit that I should carry out a hypothetical calculation. I agree that this is the appropriate course to adopt.

48. Following the circulation of this judgment in draft, for the first time, the claimants challenged the defendants' submission as to how POAT was calculated. This resulted in a new submission from Ms Rosen Peacocke as to the correct approach. I expressed my dissatisfaction with all this at what was meant to be the hearing at which this judgment was to be handed down. Although Ms Rosen Peacocke suggested that this was none of the claimants doing because this issue surfaced only in Ms McQuail's written submissions served before the quantum hearing, that is nothing to the point for two reasons. First, that is no reason for not saying that the defendants' submissions were wrong as a matter of law in the course of the oral submissions made at the hearing and in any event secondly it ignores the fact that Ms Rosen Peacocke filed submissions in reply. This issue could and should have been addressed either in the written reply submissions or in the oral submissions. Emphatically it should not have been left until after a draft judgment was circulated in the hope that I might ignore the POAT issue altogether. Had it been the case that there was a genuine dispute as to the applicable principles I would have left the draft judgment as it was on the basis that the claimant could and should have made their relevant submissions at the hearing. However, very sensibly Ms McQuail made clear that her clients neither agreed or opposed some workings I suggested based on the post hearing submissions of Ms Rosen Peacocke and Ms Rosen Peacocke indicated that her clients accepted those workings. In those circumstances, I am prepared to re-open this issue to the extent of substituting my alternative workings.

49. Ms Rosen Peacocke submits and Ms McQuail does not now dispute that POAT is charged on the notional rent payable by a tenant of the subject premises, not the net income derived by a landlord. The charge is thus based on the notional rack rent payable by a tenant, taxed at the taxpayer's marginal rate. The single joint valuation expert expressed the view that the annual rental yield on real property in 2013 was 3.705%. Ms Rosen Peacocke maintains that is an appropriate notional yield figure to adopt for the purposes of calculating the notional rent by reference to which the Deceased would have been taxed during the period of 8 years between 2005 and her death in 2013 had the Property been retained rather than sold. The range of values attributable to the Property during this period was assessed by the expert values to be between £710,000 when the Property was sold and £875,000 on the date of the death of the Deceased. The average over the period is therefore £792,500. I am satisfied that this is an appropriate value to use for the purpose of calculating the notional rent on which tax would then be calculated. Neither party suggests that the tax rate applicable to the Deceased for any of the relevant years should be other than 40% and I adopt that for the purpose of calculating the sum that should be set against the IHT that would otherwise have been payable of the death of the Deceased.

50. Against that background I invited submissions on the following calculations. In the end and as I have said already Ms Rosen Peacocke adopted the calculations I set out below and Mr McQuail said that she neither opposed or adopted them. In those circumstances I consider they reflect the correct outcome. They lead to the conclusion that there should be credited against the IHT that would have been payable following the death of the Deceased had the Property been retained a total sum of £95,316.70. This sum is calculated as follows:

Average rental value:	£792,500.00 x 3.703 =	£29,345.00

Average annual charge to tax:	£ 29,345.00 x 40% =	£11,738.50
Total POAT Rebate:	£ 11,738.50 x 8 =	£93, 908.08

Interest on rebated sum assuming an average HMRC Repayment rate over the period of 1.4% = £1408

Total POAT rebate inclusive of interest at HMRC rates:

£ 93, 908.08 + £1,408 = £95, 316.70

51. I now turn to the question whether the estate could have paid the IHT payable other than by recourse to the Property. Although it is submitted by the claimants that there is no evidence that the estate could not meet an IHT demand other than by recourse to the proceeds of sale of the Property, I conclude that this element of the defendants' case is established by the documentation available. I have already referred to the description of the net estate in the grant of probate. I accept that this was sought and granted some years after the Deceased's death but there is nothing available that suggests the figure is materially wrong. Although the claimants rely on the contents of the attendance note prepared at the time when solicitors then acting for the Deceased were preparing her will, which refers to assets other than the Property with a value of about £300,000, that predated the sale of the Property and predated her death by in excess of 2 ½ years. It is probable that assets available then would have been spent by the date of the Deceased's death, particularly given the expenditure which was being incurred during this period. There is no evidence that the claimants would have paid the tax notionally due from their own resources and I conclude that in those circumstances the Property would have been sold following the death of the Deceased in order to raise the IHT that would have been payable.

52. In summary and bringing all this together, I accept that it is probable that had the Property remained unsold down to the Deceased's death HMRC would have challenged the EPS and that no one would have considered it sensible to incur the costs and delay involved in resisting a challenge by HMRC and that in consequence HMRC's claim to IHT would have been settled on the basis referred to above – that is by payment of IHT on the assumption that the Property formed part of the Deceased's estate for tax purposes but giving credit for the POAT paid by the Deceased during her lifetime. In arriving at the credit figure to be given for the POAT paid, I assume against the defendants that the Deceased had regularised her tax affairs prior to her death and had paid POAT for the whole period between 2005 and her death in March 2013. I conclude that the IHT payable would be £875,000 - £325,000 (NRB), which comes to £550,000. 40% of that is £220,000 against which £95, 316.70 is to be credited giving a tax payable figure of £124,683.30.

What Rate of Interest should be applied to what sum and for what period.

53. The claimants maintain that pre-judgment interest is payable on the whole of the sum assessed due by way of damages pursuant to Section 35A of the Senior Courts Act 1981 down to judgment and thereafter at the judgment rate until payment pursuant to Section 17(1) of the Judgments Act 1838. The claimants submit that interest should

run at the rate of 4% down to judgment and that I should compel the defendants to pay a penal rate of interest for some or all of the period because of a failure by theme to inform the claimants immediately of their error in failing to register the restriction or that they should seek independent advice. The defendants do not object to the requirement to pay interest in principle but maintain the date contended for by the claimants is too high and that it is wrong in principle and/or on the facts to use interest as a means of penalising the defendants for any aspect of their conduct.

54. *Period*

In is plain that interest on damages should run from the date of the Deceased's death. The 1st claimant would have been entitled to the Property on the date of the Deceased's death or shortly thereafter had the EPS taken effect in accordance with its terms. Interest compensates a successful party for being kept out of its money from the date when it became entitled to it down the date of judgment or sooner payment after the commencement of proceedings. These factors lead inevitably to the conclusion that interest is payable down to the date of judgment being entered following hand down of this judgment. After judgment has been entered interest will run at the judgment rate pursuant to Section 17(1) of the Judgments Act 1838. The court does not have a discretion to depart from that.

55. *Rate*

Although there was some discussion in the course of the hearing as to the correct rate at which pre judgment should be awarded, it is unnecessary that I consider those arguments in any sort of detail. Interest is as I have said compensation for the loss of use of money for parties who are successful in recovering money judgments and is calculated conventionally by reference to the rate at which that party could borrow the amount of the judgment. Absent evidence, a court will assume that the cost of borrowing such a sum for an individual or SME will be higher than for a blue chip company. The whole of the relevant period has been a period of low interest rates and low inflation with inflation during the period averaging at about 2.5%. Taking those factors into account and also taking account of the fact that the 1st claimant (and the 2nd claimant too if that is relevant) are individuals with academic salaries, I consider that the appropriate rate to apply is a rate of 3.5% above Base Rate. This takes account of inflation being at the level I have mentioned, the cost of borrowing being low throughout the relevant period, that the cost of borrowing for an individual will be higher than for a large corporation and that by allowing what is recovered to float with base rate a constant margin taking account of these factors will be maintained.

56. *Penal Interest*

The claimants submit on the authority of Perry v. Raleys Solicitors [2017] EWCA Civ 314 that a court can exercise discretion by increasing the rate of interest payable to a level that is higher than would otherwise be appropriate where a case has been defended inappropriately. In my judgment the usual penalty for conduct of that sort lie is to award some or all of the costs payable by the defendant on an indemnity rather than a standard basis, rather than penalising a party by requiring it to pay interest at a rate that is higher than would otherwise be appropriate. Whilst I accept that the authority relied on by the claimants is authority for the proposition that a court can

increase the rate of interest in that way, it provides little or no guidance as to when it is appropriate to do so. In my judgment the circumstances in which it will be appropriate to take such a course are likely to occur rarely in practice and will be exceptional. In particular I do not accept that it is appropriate to uplift the rate of interest in every case where a defendant refuses to concede that it has acted in breach of duty. It is to be remembered that in every case it is open to a claimant to make a pre-action or post-issue Part 36 Offer that if not bettered at trial has a number of draconian consequences. In my judgment the availability of this powerful tool in the claimant's armoury together with the availability of indemnity costs or to penalise conduct outside the norm will generally be sufficient in most cases to control inappropriate conduct by defendants.

57. Whilst it is true that the defendants failed to advise the claimants to seek independent advice as and when they should have, I do not regard that as justifying the payment of a higher rate of interest than would otherwise be appropriate. Such conduct would not have prevented the claimants from making an appropriate pre-action or post-issue Part 36 offer and interest is recoverable at the appropriate rate through the period when the defendants should have but failed to advise the claimants to seek independent advice. This means that the first claimant will be adequately compensated for being kept out of his money for longer than would have been the case had the claimants been advised as they should have been.

The Rental Income Point

58. In light of the conclusions that I have reached so far Ms Rosen Peacocke accepts that this element of the claim falls away. It is right however that I should set out my findings of fact as to what would have happened to the Property in the event that it had not been sold by the Deceased or by the estate in order to pay IHT whether by agreement with HMRC or otherwise since these issues were fully argued during the hearing.

59. I am satisfied that it was reasonably foreseeable to the defendants at the date of the breach that the 1st claimant would or may have retained the Property if it had not been sold in order to pay IHT. This much is apparent from one of the few contemporaneous documents that are relevant to the assessment of damages – the Guide for Users prepared by the defendants in respect of the EPS. The scheme structure contemplated that on the death of the Deceased the 1st claimant would become the sole trust beneficiary outright and that at that point the trust would come to an end. Critically for present purposes this document refers specifically to what might happen at the date of the death of the Deceased (who is referred to in the document as the "client"). The alternatives available following her death expressly contemplate either a sale at that point or the retention and transfer of the Property to the beneficiary (in this case the first claimant). Thus it was plainly reasonably foreseeable to the defendants at the time of the breach that the Property would be retained and it was equally reasonably foreseeable at that time that if the Property was retained by the 1st claimant when the Deceased died then either (a) it would be sold or (b) it would be retained and if retained (c) that it would be either (i) occupied by the 1st claimant and his family or (ii) rented out.

60. The next question is what in fact the 1st claimant would have done had the Property been retained by the Deceased down to the date of her death and on the assumption that it was not necessary for it to be sold to meet IHT. The claimants submit and I accept the claimants' evidence at trial that they would have retained the Property and since their main home was in Oxford, it follows that in all probability the Property would have been rented out if retained.

61. There are various threads which together suggest that it is highly likely that the Property would have been retained following the death of the Deceased unless it had to be sold to meet IHT.. First, I accept that there was an emotional attachment to the Property as far as the 1st claimant was concerned by reason of its association with the Deceased which I explain in some detail in my earlier judgment. As the 1st claimant put it in his oral evidence in cross examination "*... The inheritance of the Property was absolutely essential to the scheme"* – see T1/5G. As he added later in his cross examination (T1/13G-14A) "…*The purpose of these – the trust instruments – was to pass down Denny Crescent and - and there was an aspect of tax saving to that, but it was passing down the property that was the important thing.*" That is all entirely consistent with the 1stclaimant retaining the Property after the death of the Deceased, had it not been sold by the Deceased and on the assumption that it did not have to be sold to meet IHT. In his statement in these proceedings, the 1st claimant had stated:

> "If Denny Crescent had been transferred to me on Jean's death I would not have sold it straightaway. Denny Crescent gave me a sense of family continuity that l hadn't had. I associated it very closely with Jean; it was where I met her initially and saw her most often. Jean Was also very keen on being able to leave Denny Crescent to Emily and Jack to continue the family connection and it was important to me that I Would honour her wishes in this respect. The reason why Jean set up the trusts in the first place was to ensure that the asset of Denny Crescent wasn't affected by any tax payable on the remainder other estate; she clearly wanted it to be kept in the family. We had discussed what Jean wanted to do in 2003 and put arrangements in place (as far as we were aware) to ensure that was followed through so there was no need to revisit the situation. Furthermore. retaining the house would have given me the benefit of the general increase in property values in London whilst being able to let out for income a substantial house in a sought after location. Such an income would have been very attractive in the period from 2013 when we had significant expenses to deal with."

None of this was challenged in cross examination, it is consistent with other answers given on other issues in the course of cross examination and I accept this evidence. This evidence was corroborated by the 2nd claimant in paragraph 52 of her witness statement. This was the subject of some indirect challenge in cross examination. So at T1/64-65 the following exchanges took place

> "Q. But there is no likelihood that you or your husband were really going to live in Denny Crescent, was there? You – you are based in Oxford.
>
> A. I – I do not think that you can rule out any possibility. I did not think that I would have started part-time professorship at Melbourne Law School in 2017 and we lived in Melbourne for eight years before we came to Oxford. So I would never rule out anything.
>
> Q. But the reality is that a property is a property which could be turned into cash and it is not the particular property that you were expecting to get from Dr Weddell, it was – it was – it was the money, it was the general inheritance of her estate that you were expecting.
>
> A. I – what was important to us was the house in Denny Crescent. It was important to our family, it was important to Chris, it was where he had first met Jean. We – the concern for us was that this estate protection plan would actually enable Denny Crescent to be inherited. The concern for us was not for money. If - Denny Crescent is far more important to us than money."

In my judgment this is consistent with the intention of the claimants being to retain the Property was at least a period after the death of the Deceased had the Property been retained as it should have been. As she added at T1/69B " *... I thought that Denny Crescent would stay in the family, yeah, through this estate protection ...*".

62. All this leads me to conclude that it was reasonably foreseeable at the date when the breach of duty occurred that the 1st claimant would retain the Property for at least some years after the date of the death of the Deceased and that if retained one of the uses to which the Property reasonably foreseeably could have been turned was as an investment generating rental income. I also conclude that had the Property not been sold by the Deceased or in order to pay IHT whether by agreement with HMRC or otherwise, it would have been retained by the 1st claimant and rented out. However, as I have said already, Mr Rosen Peacocke accepts that this part bof the claim falls away given my conclusions concerning the sale of the Property following the death of the Deceased in order to meet the charge to IHT.

Conclusions

63. In the result, there will be judgment for the Claimants in the sum of £985,299.45, being the figure that it is agreed between the parties carries into effect the various conclusions that I have set out above. It was agreed between the parties that I should issue a separate costs ruling following the exchange of written submissions between the parties in accordance with the following timetable:

i) The Claimants to file and serve written submissions on costs by 4.00pm on 5 February 2021;

ii) The Defendants to file and serve written submissions in response by 4.00pm on 10 February 2021;

iii) The Claimants to file and serve written submissions in reply by 4.00pm on 12 February 2021.