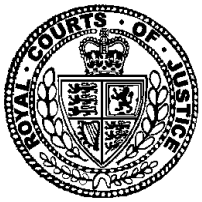

Neutral Citation Number: [2017] EWHC 1079 (QB)

Case No: B40MA037

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MERCANTILE COURT

Date: 19/05/2017

Before :

HHJ MOULDER
sitting as a Judge of the High Court

- -

Between :

MICHAEL HALSALL **DAVID MCDERMOTT** **VIVIENNE ANNE HIGGINS** **(as executrix of the estate of the late BERNARD VICTOR HIGGINS)** **PAUL STANTON**	**Claimants**
- and -	
CHAMPION CONSULTING LIMITED **CHAMPION ACCOUNTANTS LLP** **CHAMPION BUSINESS SOLUTIONS LIMITED** **CHAMPION CHARTERED ACCOUNTANTS (a Firm)**	**Defendant**

- -
- -

Paul Chaisty QC and Andrew Grantham (instructed by **Waterside Legal Solicitors**) for the **Claimants**
Graham Chapman QC and Christopher Greenwood (instructed by **Plexus Law**) for the **Defendants**

Hearing dates: 14 March 2017-31 March 2017, 24 April 2017

- -

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.

.....

HHJ MOULDER

HHJ Moulder :

Introduction

1. This is a claim brought by four claimants Mr Halsall, Mr McDermott, Mr Higgins and Mr Stanton. Unfortunately Mr Higgins has since died and his widow now brings the claim on behalf of his estate. The claims are brought against four defendants, Champion Consulting Ltd ("CCL"), Champion Accountants LLP, Champion Business Solutions Ltd and Champion Chartered Accountants (a firm). The fourth defendant, Afortis Ltd is in liquidation and no claim is now pursued against it. Accordingly references in the judgment to the "defendants" are to the Champion entities referred to above.

2. The claimants' case is that they were negligently induced to invest in two tax schemes which for convenience are referred to as the "charity shell" schemes and the "Scion" film scheme. A claim was also made in respect of alleged breaches of fiduciary duty but is no longer pursued.

3. The claimants are solicitors and at the time of entering into the tax schemes were partners in the firm of solicitors, Michael W Halsall Solicitors.

Background

4. The claimants' case is that Mr Dallimore on behalf of Champion Consulting Ltd introduced the claimants to the charity shell schemes in July 2003 and at meetings in July 2003 and October/November 2003 Mr Dallimore assured the claimants that the charity shell scheme would work effectively, would reduce their tax liability and improve their overall financial position as well as being able to benefit charities of their choice.

5. The claimants' case is that (so far as the tax benefits were concerned) the charity shell scheme was promoted to them on the basis that they could obtain tax relief through the mechanism of gift aid. In summary it involved the investors initially subscribing for shares in a shell company with a further subscription in the event that the shell was floated. The shell company then acquired a target company and the shares of the shell company would be listed on AIM or the Channel Islands Stock Exchange. The investor would decide whether to gift all or part of his shares to a charity and would claim tax relief on the value of the shares so gifted. The amount of tax relief claimed would be on the basis of the value of the shares at the time of gift which in turn was claimed on the basis of the value on listing.

6. The claimants allege that in addition to giving the assurances, the defendants failed to advise the claimants that the valuation of the shell upon flotation was critical and there was a significant risk that the value of the shell post flotation would be successfully challenged by HMRC.

7. The Scion film scheme in summary involved a film studio selling the distribution film rights to a film to a Scion film rights company. That company would then sell or license the film rights to the investors. The investors as sole traders would be trading in the purchase and sale of film rights. The purchase would be funded partly from the investors' own resources and partly from a loan arranged by Scion. The investor would provide not less than 21% of the total funding. The loan would be made available by a Scion lender on limited recourse terms that is limited recourse as to

capital but full recourse as to interest. The terms of the sale of the film rights would be for a share of profits supported by a minimum annual payment sufficient to meet the interest obligations under the loan. The investor would sell the film rights in return for a share of the revenues arising from the exploitation of the film rights; the investor would use a proportion of the sale proceeds to repay the loan and would retain approximately 45% of the revenues leaving it with a trading profit. As to the tax benefits the loss resulting from the fees and expenditure on the film rights acquisition was to be available for sideways loss relief and the interest on the loan was anticipated to be deductible.

8. The claimants' case is that the defendants advised the claimants that the film scheme was robust with the prospects of success being 75/80%, that the Scion tax schemes had a history of successful implementation and if the film scheme failed the maximum loss would be the amount of cash invested. The claimants say that that advice was negligent and as a result they suffered loss and damage.

Issues for the court

9. This judgment deals with the following issues which appear to be the principal issues pursued at trial and advanced in closing submissions and thus falling for determination by the court.

The Charity Shell Schemes:
I What statements did Mr Dallimore make to the claimants with regard to the charity shells?
II What was the scope of the duty? What is the effect of the engagement letter on the duty? What is the standard of care? Was it an advisory duty?
III Breach of duty – did the assurances which Mr Dallimore gave amount to a breach of duty? Did the failure to warn of specific risks amount to a breach of duty?
IV Causation: did the breach cause the loss? Did the claimants rely on the advice which was given?
V Contributory negligence
VI Are the claims statute barred -section 2 and section 14A of the Limitation Act
VII Is any breach excluded by Clause 13 of the defendant's terms of business? UCTA
VIII Loss

The Film Schemes
I What representations were made?
II What was the scope of the duty?
III Breach of duty. Contributory negligence
IV Causation. Did the claimants rely on the advice?
V Limitation
VI Loss

Counterclaim – clause 9 of the defendant's terms of business

Evidence

10. I heard evidence for the claimants from the following witnesses of fact: Mr Halsall, Mr McDermott, Mrs Higgins, Mr Stanton, Mr Alfred Thompson, Mr Richard Hemingway and Miss Gabrielle McParlin.

11. Mr Alfred Thompson is a partner in the accountancy firm of Lonsdale & Marsh and from December 2005 he acted for Mr Higgins in relation to the completion of his tax returns.

12. Mr Richard Hemingway is the managing director of Ludlow Wealth Management Ltd. Ludlow provide financial planning advice to clients and each of the claimants was a client of Ludlow in the relevant period. Ludlow did not provide advice in relation to tax matters.

13. Ms McParlin is an executive director in Tax Controversy and Risk Management at Ernst & Young LLP. In 2014 she was instructed by the claimants in connection with their negotiations with HMRC under the charity shells and in relation to their exposure under the film schemes.

14. For the defendants I heard from the following witnesses of fact: Mr Dallimore, Ms Molloy, Miss Morris, Mr Robert Thompson and Mr Currie.

15. Mr Dallimore joined Champion Consulting Ltd in around December 1999 as the Group Tax Director, a position which he held until he left Champion in September 2006.

16. Ms Gill Molloy (formerly Burns) is an accountant and a chartered tax adviser. She joined Champion Consulting in November 2003 as a tax planning manager. She had no involvement with the claimants until Mr Dallimore left Champion in September 2006 at which point she took over his role as Group Tax Director.

17. Miss Jill Morris is a chartered tax adviser. She joined Champion Consulting Ltd in July 2001 as a member of the compliance team, working under the supervision of Mark Langslow. After qualifying as a chartered tax adviser in 2004 she became more involved in the tax planning team based at Champion's Manchester office.

18. Mr Robert Thompson is an accountant who worked for the firm of Jones Harris which in May 2003 merged with Champion Business Solutions Ltd. The claimants were clients of Champion Business Solutions at the date of the merger and until 2004 were looked after by Mr Colin Walton. On Mr Walton's retirement in 2004 Mr Robert Thompson took over as the claimants' relationship manager, preparing the accounts of the claimants' business, Michael W Halsall solicitors. The practice also prepared the personal tax returns for the claimants other than Mr Higgins who used Lonsdale & Marsh.

19. Mr Ian Currie is an accountant by background but then became a stockbroker. He set up Zeus Partners, a corporate finance house, with Messrs Hughes, Salisbury and Clarkson in 2002.

20. I also heard from four experts: for the claimants, Mr David Brookes of BDO LLP and Miss Sally Longworth of Longworth Forensic Accounting Ltd; for the defendants I heard from Mr Michael Avient of UHY Hacker Young LLP and Mr Gordon Hodgen of HSNO.

21. As well as hearing the live evidence and oral closing submissions, in writing this judgment I have had the benefit of being able to refer to the transcript of the evidence as well as the written submissions of counsel.

The Charity Shell Schemes: what statements did Mr Dallimore make to the claimants with regard to the charity shells?

22. The first issue is the factual question as to what information or advice Mr Dallimore gave to Mr Halsall, Mr Higgins and Mr Stanton in 2003 in relation to the Charity Shell schemes.

Evidence

23. There were three key meetings on 15 July 2003, 21 July 2003 and October/November 2003.

Meeting on 15 July 2003 between Mr Halsall, Mr Dallimore and Mr Walton

24. On 15 July 2003 Colin Walton, the claimants' accountant for a number of years, attended a meeting at Mr Halsall's offices and introduced Mr Halsall to Mr Dallimore.

25. At paragraph 36 to 37 of his witness statement Mr Halsall said that at that meeting Mr Dallimore described the charity shell scheme as a "*government sanctioned scheme*" and a "*no-brainer*". [D/54/883 – 4] Mr Halsall's evidence was that Mr Dallimore described how the charity shells scheme operated but said he "*did not really take in all of the details*" [paragraph 36 of his witness statement].

26. In cross-examination it was put to Mr Halsall that Mr Dallimore did not use the word "*no-brainer*". Mr Halsall insisted that Mr Dallimore said:

"*I've got this scheme for you, it's called charity shells, you gift money to charity and you gift that money and they buy shares and the charity will benefit. You will benefit from tax. It's a scheme that is bound to succeed, it is government backed*" and "*it's a no-brainer*". [Day 4/96]

27. Mr Halsall said at the July meeting Mr Dallimore said it was a "*no-brainer*" and that to him was a guarantee. He compared it with not putting a pound on the Grand National horse X. *"It's a no-brainer if you don't do it. That's the same as it's a guarantee."* Mr Halsall said Mr Dallimore said "*you can't lose*".

Meeting on 21 July 2003

28. At a meeting on 21 July 2003 Mr Dallimore met Mr Stanton. Mr Stanton's evidence at paragraph 35 to 42 of his witness statement [D/57/996 – 998] is that Mr Dallimore described the concept as a "*vanilla scheme*" by which Mr Stanton understood him to mean that this was not a controversial or aggressive scheme. Mr Stanton said it was a "*no risk*" proposition as Mr Dallimore described it. Mr Stanton said that Mr Dallimore said he would undertake due diligence on the targets to ensure they were "*all good bets".*

29. In cross-examination it was put to Mr Stanton that Mr Dallimore didn't use the word *"vanilla*" or say that the schemes were government promoted or widely accepted. Mr Stanton replied that the way it was put to him was that there was a government promoted scheme, gift aid and if they followed the process that was suggested they would get the relief that was promised. Mr Stanton said that Mr Dallimore didn't say risk-free as such but he used the word "*vanilla*" and it was the first time he'd heard it.

30. It was put to Mr Stanton that none of the other claimants recollected Mr Dallimore saying that Champion would carry out due diligence on the companies that would be acquired. Mr Stanton insisted that Mr Dallimore had said it to him. Mr Stanton's evidence was that they had all been given the same information generally; he said Mr Dallimore:

"*didn't come with the script and read the script to each of us. We had all been "sold" the procedure, the product, whatever you want to call it. We had all been sold it presumably in slightly different ways. It would be artificial if he came and told every single person the same thing."* [Day 2/53]

31. Mr Stanton's evidence in his witness statement was that Mr Dallimore:

"did not point out to us the fundamental weakness of the scheme which was to become apparent some years later. That was of course the fact that the value placed on the company at the time of flotation could be challenged by HMRC and if challenged successfully, the whole scheme could fail…" [Paragraph 42]

32. Following the meetings letters explaining the schemes were sent to Mr Higgins, Mr Stanton and Mr Halsall's wife. [K/3008/3011/3025] Mr Dallimore acknowledged in cross-examination that these were standard letters which may have been changed slightly to tailor for an individual's needs. [Day 7/31] The letter to Mr Stanton was dated 22 July 2003 [K/3011]. It referred to the recent meeting and stated, so far as material:

"*as I explained, it is possible to make a gift aid claim if you make a gift of shares to an unquoted company…. The gift aid claim is calculated by reference to the market value of the shares on the date the gift is made and that value effectively becomes a tax credit which can be used against income in the same tax year. This could result in a refund of tax deducted at source i.e. under the PAYE regime or alternatively avoid tax payments due for the self-employed or in respect of P11D benefits in kind."*

It then set out an example of how an investor would subscribe for the shares, the shell company would acquire a trading company and apply for a listing on AIM. The letter continued:

"… Tax legislation in the UK currently provides that if an individual gifts shares in an unquoted company to charity then a gift aid claim may be made and income tax relief given. The claim is based on the market value of the shares at the time the gift is made and that value effectively produces a tax credit at the donor's marginal rate of tax. If therefore you were to gift your holding in Newco to a number of charities then you would be entitled to gift aid of £207,500. This would be claimed on your 2003/2004 tax return and should therefore result in a repayment of income tax to you by the Inland Revenue of around £83,000 in say July 2004 or the avoidance of on accounts tax payments in July 2003 and or January 2004."

<u>Meeting in October/November 2003</u>

33. In late October/early November 2003 there was a further meeting, this was attended by Mr Halsall, Mr Higgins and Mr Stanton with Mr Thompson and Mr Dallimore

present. In his evidence Mr Dallimore said that Mr Thompson was not a member of the tax team describing him as a "*general practitioner*". [Day 6/173].

34. During this meeting the claimants assert Mr Dallimore said that the promised tax relief would be achieved and he said "*if this does not work, I will pay the tax*".

35. Mr Stanton's evidence in cross-examination was that the "guarantee" was given at the meeting in November 2003 and not earlier. Mr Stanton's evidence was that he understood Mr Dallimore to be guaranteeing the schemes would work and if not, the claimants had an indemnity. He said he understood it would be the tax relief that he was promised which he understood to be four times. [Day one 137 – 139].

36. Mr Stanton's evidence was that at the meeting in late October or early November 2003 Mr Dallimore said something to the effect of "*if it doesn't work, I'll pay the tax*" [Day 2/111].

    He said in that meeting Mr Higgins was feeling *"a bit more cynical about it because it did seem a little bit too good to be true, so he was looking for more reassurance from [Mr Dallimore]….[Mr Dallimore] said… If you put the money in, you claim your gift aid, it can't be challenged, off you go." And then at the end of that, he said, "look if it fails or you don't get your tax relief, or whatever, I'll pay the tax"*.

    Asked whether that meant they would get every penny of the tax relief that they ought to get on a four time increase, Mr Stanton replied "*effectively yes*". [Day 2/112]

37. In his witness statement Mr Halsall said that "*Bernard was seeking some reassurance on the efficacy of the charity shells before he made the proposed investment of £123,000 into Readymatch*" [paragraph 57]

    Mr Halsall said [paragraph 58]:

    "*when Bernard raised this with Mr Dallimore, Mr Dallimore responded by saying that he was absolutely certain, beyond any doubt whatsoever, that the tax relief that he had promised would be achieved. I'm not sure if he repeated the phrase which he had used in July, namely that going into the schemes was a "no-brainer" but he was extremely forceful in the way he expressed himself. I recall him saying "if this does not work, I will pay the tax!"…. Both I, Bernard and Paul all took this as Mr Dallimore not simply expressing his certainty that the schemes would be successful but also Mr Dallimore's guaranteeing that, on behalf of Champion the tax relief would be achieved. What we understood was that if the scheme did not deliver as promised, Champion were guaranteeing to indemnify us for any shortfall in the reliefs that were achieved as against what Mr Dallimore promised*." [Emphasis added]

38. Mr Halsall's evidence in cross-examination was that at the meeting in October or November Mr Dallimore went "*even further*".

    "Not only did he say, "you can't lose, it's a no-brainer" when Bernard, who was very, very cynical about the whole thing – – he said – – Mr Dallimore said "we'll guarantee the tax for you, it's bound to win." [Day 4/105]

    Evidence of Mr Dallimore

39. The evidence of Mr Dallimore in cross-examination was that he could not remember word for word what he said in 2003. He could only say how he "*would have explained*" the transaction to the clients and that was set out in his witness statement "*albeit in more detail than perhaps I would have said in the meetings*". [Day 6/156].

    It was put to him that he did not tell the claimants at any stage during the initial meetings "*this could be subject to challenge*" and he replied "*I believe I would have done yes*".

40. It was pointed out that there was nothing in Mr Dallimore's witness statement that he told the claimants that the schemes might be subject to challenge by the Revenue. Mr Dallimore replied:

    "I would have explained the process, which was that you acquire the shares, gift the shares, you put a claim on your income tax return, you file your income tax return, HMRC have a period of time to open an enquiry, if they open an enquiry, then we'll deal with that enquiry without adjustment to your return." [Day 6/196]

41. He was asked what would be the basis of a challenge by the Revenue and he said it would be whether the structure was carried out correctly and secondly the market value. Asked whether he told the claimants that, he replied:

    "I believe I would have done yes".

42. Challenged further, Mr Dallimore said he would have said that HMRC could review the market value. He was asked how Mr Stanton reacted when told this to which Mr Dallimore said:

    "I believed I had confidence in what I was saying about the structure the parties involved" [Day 6/199]

    He was asked how Mr Stanton reacted when told it could be subject to a challenge and Mr Dallimore said he could not remember "*the specifics*". Asked how Mr Halsall reacted, again Mr Dallimore said he could not remember the "*specifics*". He said:

    "*I would have given them confidence that we could deal with it*".

43. Asked if he told Mr Higgins about the risk of a challenge he said:

    "*I believe I would have explained the process which would have included dealing with the HMRC challenge*".

44. In his witness statement Mr Dallimore denied that he guaranteed that the schemes would produce "*precisely the return we expected".* [Paragraphs 42 and 44]

45. It was put to him that the explanation was "*all positive*" and Mr Dallimore said: "*that's how I would have explained it yes. I would have been very positive about it*." [Day 6/203]

46. It was put to him that Mr Halsall said that Mr Dallimore said it was a "*no-brainer*". Mr Dallimore said that he did not believe he used that term

47. It was put to Mr Dallimore in cross examination:

"you were always, weren't you, from the very beginning, extremely, supremely confident that the charity shells would work?"[emphasis added]
To which he replied "*yes".*

48. It was put to him "*there's no reason at all, is there, why you wouldn't have shared that enthusiasm and confidence with the likes of Mr Halsall when you went to meet with him in July 2003?*"

Mr Dallimore replied "*I did share that enthusiasm, yes*." [Day 6/181].
It was put to him specifically that he had said to the claimants: "*this is a no-brainer, it will attract tax, they'd be mad not to do it".*

Mr Dallimore denied that he had said this. He said:

"*I would have been very, very confident and would have expressed that confidence that if they participated in the structure they would be able to claim gift aid.*"[Day 6/194] [emphasis added]

He repeated this evidence later stating:

"*I don't believe I used the term "no-brainer" but I would have come across very confidently in that meeting, yes*". [Day 6/210]

It was put to him that he advised the claimants to enter into the scheme and did not point out any problems or risks or qualify his advice in any way. Mr Dallimore said that he pointed out that the gift aid claim

"*could be subject to HMRC challenge*".

He said however he would have been "*extremely confident that that challenge would have been dealt with without any amendments to the return."* [Day 6/195].

49. In cross examination Mr Dallimore was asked to give the gist of the advice that he gave to Mr Halsall. He said he would have explained the opportunity and how individuals could invest in a shell company. He would have explained how individuals had the opportunity to gift shares to a qualifying charity "*and if they gifted shares, they could claim tax relief based on the market value of the shares at that time…"* [Day 6/203]

"…I would have said "if you've gifted shares away, we'll claim income tax relief on your tax return, we file your tax return, HMRC have the normal enquiry window to enquire into the return. If there is an enquiry we'll be able to demonstrate or support the market value that you claimed…"

50. Mr Dallimore was taken to paragraph 36 of Mr Stanton's witness statement [D/996] where he described the meeting on 21 July 2003 in his office with Mr Dallimore and Mr Walton. Mr Stanton said:

"Mr Dallimore… opened the discussion by referring to the fact that we were and had been for some time, earning substantial sums of money and as a result were paying a substantial amount of tax. Mr Dallimore said that rather than paying tax to the

government where it would be taken up by the government bureaucracy and "wasted", there was an alternative where we could benefit good causes and at the same time give ourselves some tax benefits."

51. Asked whether he remembered saying that, Mr Dallimore responded:

"*I do remember – – I can't remember the specific words but that's the sort of comment that I would have said, that there was an opportunity here to save money that would otherwise be wasted by the government and go to charitable causes, yes*" [Day 7/7]

He said however that he did not recall using the term "*vanilla*" and did not believe he said "*no risk*".

52. Mr Dallimore was taken to an email on 24 September 2003 to Peter Sprung. The email relates to the fees in relation to the charity shells earned by Champion. Amongst others it refers to Readybuy and Readymarket. The email includes the sentence:

"*the system now is that I warm them up and then Mike Morley will do all the signing up visits*".

Mr Dallimore said that the comment would refer to him doing the initial introductions to gift aid. It was put to him that it was a sales pitch, that he was looking for business so he could make his commission. He was asked what he meant by the phrase "*warm them up*" and he admitted it was an "*unfortunate phrase*". He insisted that it meant explaining the structure to the clients and getting the clients in a position where they wish to go ahead. He said that having explained how the Revenue might challenge the market value he would have carried on and said how confident he was that the valuations could be supported. He was asked whether he would have said "*but don't worry I am confident this can all be overcome*" and he replied:

"*I have said that repeatedly, yes."* [Day 7/55]

53. In cross-examination Mr Dallimore said that he did not believe he had pointed out the issue of "thin trading" to the claimants [Day 6/184]. He acknowledged that he was aware that trading was thin on most AIM shares but he said he relied on the entities involved that were listing the companies and WH Ireland's role and Zeus' role.

54. Later in cross-examination Mr Dallimore said that he would have explained that there was an enquiry window that gave the opportunity for the Revenue to question the valuation. He said:

"I would have explained that as far as any challenge, the principal starting point would be the market value is the date of the – – is the listed price. So the price on the stock exchange. If that's questioned, then we've got sufficient evidence and support from Zeus and WH Ireland, who I had the utmost confidence in, to demonstrate market value was the quoted price."

However when challenged that this description was not in his witness statement Mr Dallimore said he could not remember specifically what he said in the meeting. [Day 7/44]

Mr McDermott

55. Mr McDermott's evidence as set out in his witness statement is that he was not involved in these meetings in 2003. He was informed by Mr Higgins and Mr Stanton of the charity shell schemes and their meetings with Mr Dallimore and met with a Mr Tamlyn Stone around February 2004. At that meeting Mr Stone explained how the charity shell scheme worked, Mr McDermott said he was very interested and Mr Stone said he would prepare the paperwork and come back to him. Mr McDermott then was given the paperwork for the charity shell company which became Floors2Go in which he invested around £21,000.

Discussion

Credibility of witnesses

56. Mr Dallimore's evidence in cross-examination was that he could not remember word for word what he said in 2003. He could only say how he "*would have explained*" the transaction to the clients. [Day 6/156].

57. As to whether he warned the claimants of the valuation issue Mr Dallimore accepted that he could not remember specifically what he said in the meeting and therefore his statement in cross-examination that he did raise it has to be viewed with caution especially when coupled with the fact that he did not address the issue in his witness statement, even though this is raised in the particulars of claim as an issue. Further his assertion is contrary to the evidence from a number of witnesses that Mr Halsall was not a man interested in matters of detail for example paragraph 33 of Mr Stanton's witness statement. As to Mr Stanton himself his evidence in his witness statement and in cross examination was that Mr Dallimore explained the proposition but he made no mention of the valuation of the shares being subject to a possible challenge, merely referring to the listing price of four times the original subscription price [paragraph 38 and 42]. Further, there was no reference to the significance of the valuation or any risk of challenge arising out of the valuation issue in the letters which were sent out by Champion immediately following the meetings.

58. There were inconsistencies in the claimants' evidence. One example of this is the inconsistency between the Part 18 replies which alleged a meeting between the three claimants (Messrs Halsall, Stanton and Higgins) and Mr Stanton's evidence in cross-examination. It was pointed out that in the replies to the Part 18 requests [A/11/174] which asked for particulars of the advice that was given, the claimants referred to a meeting between Mr Dallimore, Mr Halsall, Mr Higgins and Mr Stanton. The replies state:

"*the claimants recall that the discussion lasted around 30 minutes. The claimants were advised by Mr Dallimore verbally at the meeting that they could not lose and that the scheme was a no-brainer."*

Mr Stanton accepted that it could not be the July meeting because that was only with Mr Halsall and Mr Stanton saw Mr Dallimore separately so the only time that the three claimants saw Mr Dallimore was in the meeting in November. Mr Stanton was asked why his memory had improved in relation to what was said at the July meeting.

Mr Stanton said that his memory had not changed that had always been his instructions. [Day 2/50].

59. Another example, which was accepted by Mr Stanton in cross-examination, was the reference to 2002 in paragraph 18 of the particulars of claim: Mr Stanton accepted that the earliest that the claimants were introduced to the schemes was in July 2003.

60. However in oral closing submissions counsel for the defendants confirmed that any challenge to the evidence of the claimants (with one notable exception in relation to the evidence of Mr Stanton and the letter sent by Mr Halsall in 2009 which I deal with in relation to the issue of Limitation below) was on the basis of a failure of memory rather than deliberate lies. I take into account the likelihood that the memory of the witnesses for both sides may well be unreliable given the time elapsed, being in relation to the original meetings a period of some 13 years. However counsel for the defendants also acknowledged that he did not assert that the claimants had conspired to agree their evidence and where therefore the claimants independently give evidence to a similar effect, it seems to me that this does provide corroboration for matters which might otherwise be regarded as unreliable due to the time elapsed. In addition where there is a conflict in the evidence, I weigh the oral evidence of both sides against the documentary evidence having particular regard to the contemporaneous documentation.

61. In relation to the evidence of Mr Halsall counsel for the defendants referred to Mr Halsall's acknowledgement of a "failing memory" and also suggested that in some of his answers he was inclined to "shoot from the hip". It seems to me that one example of this was Mr Halsall's vivid description in cross-examination of how Mr Dallimore agreed at the meeting in October that the liability clauses could be deleted from the terms of business. His evidence was that at the meeting in October

"*Mr Higgins said, "well, if you're so confident, Geoff cross out the thing that you can't be sued". And Geoff said, "fine, we're going to win this. Cross it out". And I crossed it out, Paul did, Bernard did, …"* [Day 4/133]

Counsel for the defendants pointed out to Mr Halsall that this incident was not recorded in his witness statement. However Mr Halsall insisted that it was

"*not a new recollection. I've had this recollection from day one"*.

However after Mr Halsall had been taken to the relevant correspondence and it was put to him that there was nothing in the documentation which supported Mr Halsall sitting in the meeting with Mr Dallimore striking through the clauses and him agreeing that Mr Halsall would be allowed to do that, Mr Halsall in effect withdrew his earlier evidence. Mr Halsall said:

"no you're right. It was after he had gone, obviously, he has struck it out because of the undertaking he'd given." [Day 4/136]

However in assessing the credibility of Mr Halsall, Mr Stanton and Mr McDermott, I take into account that each of them is a solicitor and as such have professional obligations as to how they conduct themselves. I also note the evidence of Mr Thompson that Mr Halsall was a very honourable man.

62. Bearing in mind these factors, in resolving therefore the conflicting oral evidence of what assurances Mr Dallimore gave to the claimants I take into account both the contemporaneous documentation and the subsequent conduct of the parties.

Contemporaneous documentation

63. The letters sent to Mr Higgins, Mr Stanton and Mr Halsall's wife following the meetings made no mention of the possibility of a Revenue challenge about market values. [K/3008/3011/3025] Counsel for the defendants submitted that the letter was conditional in its terms. The material part stated that:

"*…. The gift aid claim is calculated by reference to the market value of the shares on the date the gift is made and that value effectively becomes a tax credit which can be used against income in the same tax year. This could result in a refund of tax deducted at source i.e. under the PAYE regime or alternatively avoid tax payments due for the self-employed or in respect of P11D benefits in kind." [Emphasis added]*
And
"*If therefore you were to gift your holding in Newco to a number of charities then you would be entitled to gift aid of £207,500. This would be claimed on your 2003/2004 tax return and should therefore result in a repayment of income tax to you by the Inland Revenue…" [Emphasis added]*

64. I do not accept this interpretation of the letter as suggesting that gift aid was conditional. It seems to me that the letter states that the tax credit "*can be used"* against income and assuming the shares are gifted, there will be an entitlement to gift aid of the specified sum. Further it was put to Mr Dallimore in cross-examination that there is no hint in that letter of the possibility of a Revenue challenge about market values. [Day 7/31] Asked why this was the case, Mr Dallimore replied:

"*I don't know*".

The letter sent by Mr Higgins on 19 November 2003

65. On 19 November 2013 Mr Higgins sent a letter to Champion Consulting Ltd at the offices in Manchester referring to the assurance that Mr Dallimore had given [K/88/3088].

The material part read:
"…I return herewith the signed copy of your letter concerning Readymatch plc. I have struck out the caveat you have mentioned on the second page concerning details with the Inland Revenue as you have expressly warranted not only to myself but indeed to Michael and Paul a 100% assurance that our tax liability will be reduced as a result of this investment. I note in particular that you have assured all of us on a number of occasions that our tax bill will be reduced by precisely the amount that we invest in these companies and then transfer to a nominated charity." [Emphasis added]

The letter gave details of the charity to which the shares were to be gifted and also referred to stock transfer forms being enclosed.

66. Mr Dallimore's evidence is that he did not recall having seen the letter and did not believe that he saw it at the time because he would have remembered a letter of that nature and would have responded to it, probably in writing, if he had done so. He

also stated that he did not give the guarantees asserted by the claimants. [paragraph 44 of his witness statement].

67. In support of Mr Dallimore's evidence that he did not believe that he saw the letter at the time, counsel for the defendants submitted that the letter is not addressed personally, contains no reference and returned documents of an "administrative nature".

68. However the evidence of Ms Molloy tends to suggest that this letter would have been received at the offices of Champion in Manchester and passed to Mr Dallimore. Her evidence was that there were six people in the tax department at that time, the post would be opened by the "ladies on reception" unless it was marked "strictly private and confidential". They would bring the post up and it would be passed to somebody within the tax section. If it was marked "Dear Sir" her evidence was that it would depend on who the client was, she said it was a small department so you tended to know what other people were dealing with. She confirmed that the claimants were Mr Dallimore's clients but that even if he had passed a matter onto one of the more junior members she would expect them to pass on a letter which contained an important assertion such as "you have guaranteed me success on this". Her evidence was:

"I think that they would know it was important enough to pass on, yes." [Day 8/176]

Further I do not accept that the stock transfer forms enclosed with the letter can be dismissed as of an administrative nature and there is no correspondence disclosed suggesting that the stock transfer forms enclosed with the letter were mislaid. In my view it is likely that this letter was received by Mr Dallimore and there is no response from Mr Dallimore responding or objecting to the letter.

69. It is in my view strong evidence, being contemporaneous documentary evidence from November 2003, that Mr Dallimore had given a "*100% assurance*" that the scheme would succeed. Moreover that such an assurance had been given *"on a number of occasions".* I have no evidence which would tend to suggest that Mr Higgins deliberately misrepresented the position and I accept the submission that there is little scope for misinterpretation of the letter on its face.

70. I also note the evidence of Mrs Higgins in her witness statement where she states:

"… I remember [Mr Higgins] telling me that he had had a meeting with Mr Dallimore and the other partners in the firm about the tax shell planning. I had the impression that Bernard was somewhat less keen on the tax planning schemes than the other partners and Bernard told me that he had questioned Mr Dallimore about the schemes and that in response to Bernard expressing some concern, Mr Dallimore had said that if the charity shell schemes were not successful, that he would pay the tax himself. He said that <u>he would guarantee the effectiveness of the schemes</u> and on the basis of that assurance, Bernard was prepared to continue to make charity shell investment." [Paragraph 24] [emphasis added]

Whilst this evidence is hearsay, in assessing the value of this evidence I take account of the fact that, notwithstanding that she now brings this claim on behalf of her husband's estate, as stated in her witness statement, Mrs Higgins has been a magistrate and Mrs Higgins was not challenged as to her memory of this exchange.

On this basis I accept this evidence as reliable and lending support for the position being as expressed by Mr Higgins in 2003 in his letter.

71. Counsel for the defendants submits that the letter from Mr Higgins is inaccurate because it suggests that the tax bill will be reduced by the amount invested.

The letter refers to the amount that is invested and transferred to a nominated charity. Whilst this does not refer to the uplift in the value of the shares between the initial investment and gift, I do not accept that this description of the transaction in the letter is such as to negate the substance of the letter which is very clear that a 100% assurance has been given "*that our tax liability will be reduced as a result of this investment"*.

Other documentary evidence

72. Counsel for the defendants refers to other correspondence which he submits is inconsistent with an assurance having been given. In particular an email of 29 September 2003 which was sent to Mr Stanton from Mr Dallimore which refers to the opportunity to invest in Readymatch and states that a higher rate taxpayer who subscribes and gifts all their shares to charity "*should*" get a tax refund. [K/3070]

Further on 21 May 2004 Mr Halsall wrote to Erika Holden asking "*have you as yet obtained the tax relief on the £50,000 that I invested in the above company*?" [K/3158] and on 24th May he wrote to Ms Morris asking her to "*confirm whether or not the scheme has now been formally approved by the Revenue*" [K/3159] [emphasis added]

Miss Holden responded to Mr Halsall on 10 June 2004 [K/3162]. The material part of that letter states:

"I understand that you have queried when we will receive Revenue approval, for the income tax relief and as Bob indicated, the Revenue generally have 12 months after the filing date of the tax return to raise an enquiry. Our view has always been, and remains, that the planning will stand up to any enquiry.
You may find it useful if Geoff Dallimore and myself come out to meet with you, to discuss charity shell planning further and in particular to run through tax counsel's opinion, with you. Since you last met with Geoff, we have obtained a further positive opinion from Kevin Prosser QC." [Emphasis added]

73. The defendant submits that the absence of any reaction to the letter is inconsistent with any guarantee having been given and supportive of Mr Dallimore having given the explanation that he says he did. However in my view it is consistent with the claimants' case in that it reiterates that the planning will stand up to the enquiry and offers the additional comfort of the "*further positive opinion"*.

74. On 27 May 2004 Ms Morris wrote to Mr Stanton setting out that in respect of Readybuy Mr Stanton had achieved less than the four times uplift. [K/88/3161] Miss Morris wrote:

"if you recall we were seeking to obtain a value approximately four times your original contribution plus the further 23% contributed which purchased shares at the

date the company listed. The aim was a value therefore of £423,000 for your total investment of £123,000. Unfortunately, we were slightly below the anticipated value due to the delay in gifting your shares. The shortfall has been more than covered by the extra relief obtained by the gifting of your shares in Readymarket plc… and Readymatch plc…."

It was put to Mr Stanton in cross examination that this letter shows that Mr Stanton knew that he had not obtained as much tax relief as had been aimed for and if he had been given a guarantee this would have set alarm bells ringing. Mr Stanton denied this saying that they were never promised four times the listing. He said that for him the donation of £420,000 to charity plus a reduction in his tax liabilities combined would not make him question it any further. [Day 2/144]

I accept this explanation as credible. Further the letter makes no reference to any issue with the valuation being raised, the decrease being due to a delay in gifting the shares.

75. On 17 June 2004 Ms Holden wrote to Mr Stanton. [K/3163] she referred to 2 new charity shell opportunities and stated:

"the Inland Revenue have 12 months from the filing date of your tax return to raise an enquiry. No advance approval is given by the Inland Revenue in respect of this transaction. We do have tax counsel's opinion which Geoff Dallimore and myself will be happy to run through with you at a meeting."

On 8 September 2004 Mr Higgins wrote to Mr Langslow stating that he would not be paying the relevant fee note in effect "*until we know definitely the Revenue will be accepting this scheme*". [K/3224] [emphasis added]

Mr Dallimore responded to Mr Higgins on 14 September 2004 [K/3225] stating that the fees agreement was for the fees to be billed in two instalments.
He stated:
"as far as the planning is concerned, this is now in its third year and we have received sizeable refunds and indeed agreed returns. Whilst this in itself does not guarantee that the Revenue have accepted the planning, one can assume that the Revenue will have looked at the arrangements since it is not unreasonable to assume that they would not issue large refunds without understanding first why those refunds are due.…

You will be aware of the discussions I have had with Mike and Paul and quite clearly in the event that the planning was not successful you would simply claim a reimbursement of the fees in any event..." [emphasis added]

76. In closing submissions counsel for the defendants placed particular emphasis on the letter of 14 September 2004. The defendants submit that this is consistent with Mr Dallimore's oral evidence that he would have explained the enquiry process, that he would have given the clients confidence that he could deal with the enquiry, that he would have explained that the enquiry window gave the opportunity for HMRC to question the valuation and if questioned they had sufficient evidence in support from Zeus and WH Ireland.

The suggestion that the agreement was that the claimants would receive a reimbursement of fees is inconsistent with Mr Dallimore's later explanation (set out below) to Ms Molloy in 2007 that a (higher) contingency fee was discussed but rejected. The explanation of the process, in particular the process of opening an enquiry, is not inconsistent, in my view, with an assurance having been given and the letter does express confidence in the success of the planning referring to the receipt of "*sizeable refunds*".

Further I note the letters which were sent out by Miss Morris setting out the details which would be entered on the tax return, for example the letter of 27 May 2004 [K/3160]. The material section of the letters relied upon by the claimants, states:

"*as you know you are entitled to tax relief under the gift aid scheme for the shares you have gifted to charity during 2003/04"* [emphasis added]

It is clear from the evidence that Ms Morris dealt with the administration of the tax returns. However it was consistent with the advice which the claimants say was provided by Mr Dallimore.

Subsequent conduct

77. Counsel for the defendants further relies on the fact that when the guarantee was raised with Mr Dallimore by Ms Molloy in January 2007 and Mr Higgins in December 2009, Mr Dallimore denied having given such guarantee.

Ms Molloy's email of 2 January 2007 states [L/3438]:
"… I need you to tell me what you told the Halsall's (all four of them) with regards to the charity shell investments.
Particularly

- *how guaranteed they were…*
- *And what you said to them when they returned the shell engagement letters to us having carved out the limitation of liability section and the disclosure about guaranteeing the planning success.*

I'm getting the usual grief from them about the shell enquiries and they make sniddy [sic] comments about how we have "indemnified them" against any failure of this planning."[emphasis added]

Mr Dallimore responded, so far as material to this issue:

"I did not "guarantee" their success – nor do I believe that the engagement letters as amended constituted indemnifying them – we did however discuss that and I mentioned that for that to happen we would be working on a contingency basis and the going rate for contingency jobs was 25% of the tax saved – as you can imagine they did not want to entertain that."

78. On 4 December 2009 Mr Dallimore sent an email to all shareholders including Mr Higgins enclosing letters to the Revenue. He wrote:

"there is basically nothing further they need nor can ask. Our view remains that the price is the price.…

The purpose of the letter… is simply to bring out a dialogue on a without prejudice basis regarding a deal to settle without going before the tribunal. They will not want to go to the tribunal and we may be able to draw a modest discount offer from him to settle." [M/3668]

Mr Higgins responded on the same day and the material part reads:

"*any concession re tax will be your personal responsibility given <u>your undertaking</u> before we entered the schemes that <u>you would indemnify me entirely if tax relief in any amount was not obtained</u> such indemnity also extending to any penalty charges, interest etc."*

Mr Dallimore responded:

"<u>I gave no assurance regarding tax relief</u>. I was and am still not able to give any assurance regarding the amount of relief that may or may not be available. My personal view is and always has been that tax relief is due in relation to the shares gifted following the flotation and the amount of relief you have claimed is in my view correct. That said I'm not able to guarantee that… For the record I do not agree I have any personal liability in this matter nor I might add do Champion" [M/3667] [emphasis added]

79. I also take into account the evidence of the other witnesses such as Ms Molloy and Mr Thompson who referred to the ongoing confidence of Mr Dallimore in the schemes throughout the period.

<u>Conclusion</u>

80. I have set out at some length extracts from the evidence of Mr Dallimore in cross-examination. The striking feature of his evidence was the degree of confidence which Mr Dallimore stated in evidence to the court he expressed at the time in 2003/4 and which he continued to express as reflecting his current view in relation to the charity shell schemes. Taken with the independent accounts of Mr Halsall and Mr Stanton whose evidence was that Mr Dallimore described the schemes as a "no-brainer" and "government sanctioned" in my view, on the balance of probabilities Mr Dallimore did provide an assurance to Mr Halsall and Mr Stanton at their respective meetings that the charity shell schemes would work effectively. Although counsel for the defendants placed emphasis on the description by Mr Halsall of "*no-brainer*" as equivalent to putting a pound on a Grand National horse I do not accept that that response in cross-examination can form a basis for departing from the remainder of the evidence as to the level of confidence which I find Mr Dallimore expressed at the meetings.

81. In relation to the meeting with Mr Higgins in November 2003, on the evidence I accept that his letter of 19 November reflected what was said at that meeting by Mr Dallimore namely an assurance that the scheme would work and a guarantee from Champion if it did not. The clear terms of Mr Higgins letter sent on 19 November 2003 closely following the meeting is evidence which I accept as representing a contemporaneous note of what occurred and the correspondence which followed over the next year and referred to above, does not in my view persuade me to a contrary view. That subsequent correspondence does not refer to the specific meetings and any inference which can be drawn does not persuade me that Mr Higgins letter was

misrepresenting what had occurred. In my view although the subsequent correspondence indicates for example that Mr Halsall was aware of the process for obtaining approval from the Revenue, it is not inconsistent with a guarantee or assurance having been provided by Mr Dallimore in the terms alleged by the claimants.

82. Mr Higgins was a solicitor and I see no reason why he would have written in those terms at that time unless it were true. My conclusion is supported by the exchange between Ms Molloy and Mr Dallimore in 2007, the significance of the exchange in relation to the factual question of what Mr Dallimore said in 2003, lies not in the denial from Mr Dallimore but the fact that the claimants were asserting at this time to Ms Molloy that Mr Dallimore had agreed to indemnify them against any failure of the planning. I further take into account the evidence of Mr Robert Thompson regarding the subsequent conduct of the claimants. In his witness statement [paragraph 23] he stated that he found it hard to believe that anyone at Champion would have guaranteed the success of the tax planning. However he was not at the initial meetings so cannot assist with direct evidence. Moreover in cross-examination Mr Thompson said that once the enquiry started and became prolonged, the claimants were quite concerned where things were going and the reasons for the delay and Mr Thompson said it came up "*several times*" that Mr Dallimore had guaranteed the product. He said it was mentioned on more than one occasion. [Day 11/111] In my view Mr Thompson's evidence shows that the claimants have over a period of time maintained a position that Mr Dallimore guaranteed the product and this evidence lends support to their case in this regard.

83. The fact that it was denied by Mr Dallimore in December 2009 is of little weight being made at a time when negotiations with the Revenue had started and the possibility of a negotiated settlement or going to the tribunal was being canvassed and it may be inferred that Mr Dallimore may well have wanted to protect his position.

84. A point arises as to which defendant Mr Dallimore was acting for when he gave the assurances. Mr Dallimore said that he would be wearing "his CCL hat" when he visited the claimants offices and I accept this evidence being consistent with other evidence that CCL handled the tax advisory work.

85. Counsel for the defendants submitted that the "guarantee" was that Mr Dallimore would make up the difference through the "guarantee" not that there was "100% prospects of success". In support of this submission counsel referred to Mr Halsall's letter of 6 May 2014 recording that it was "*his understanding that if the scheme was not successful I would just have to pay the original tax together with interest…*" [M/3858] However this sentence just quoted does not in my view support the proposition advanced by counsel. The sentence is extracted from a paragraph in which Mr Halsall is explaining the costs that he has incurred as a result of investing in the schemes. The letter goes on to reiterate that the defendants "*have always expressed the view that the scheme was 100% watertight and could not be challenged by the Inland Revenue…"*

Counsel for the defendants also refers to Mr Stanton's cross-examination as supporting his interpretation. However Mr Stanton's evidence was to the effect that Mr Dallimore was "*guaranteeing the schemes would work and if not we had an*

indemnity". [Day 1/138] I do not infer from his answers that it was a guarantee to make up the difference. Counsel took Mr Stanton to the email sent by Mr Higgins to Mr Dallimore on 4 December 2009 [M/3668] suggesting that the "guarantee" was to make up the difference. I do not make this inference from the email. In the email Mr Higgins said:

"any concession re tax will be your personal responsibility given your undertaking before we entered the schemes that you would indemnify me entirely if tax relief on any amount was not obtained such indemnity also extending to any penalty charges, interest etc."

As set out above, this email from Mr Higgins was in response to an email in which Mr Dallimore had suggested that a discount might be agreed with the Revenue in order to reach a settlement. It does not relate to the nature of the assurance but rather to the indemnity which Mr Stanton said was also given in the event the scheme did not work.

86. Counsel for the defendants also refers to the evidence in cross-examination of Mr Alfred Thompson as the "best and most contemporaneous evidence" in his recollection that Mr Higgins told him that if the schemes failed Champion would make up any shortfall in the tax relief claimed. Mr Thompson said:

"*Mr Higgins always indicated to me that he thought I'd been told the schemes were good and would be successful*".

It was then put to Mr Thompson that he understood him to be acknowledging that if the risk materialised Mr Higgins might have "*recourse against Champion*" to which Mr Thompson said "*yes*".

Mr Thompson was not present at the meeting between Mr Higgins and Mr Dallimore. It is not therefore contemporaneous so far as the crucial meeting is concerned. He only became involved in the charity shell schemes in about 2005 when he started to act for Mr Higgins. However his evidence is not inconsistent with the evidence of the claimants which again was that an assurance was given that the schemes would succeed failing which the claimant had an indemnity. For the purposes of this judgment it is not necessary to decide the existence or validity of any such indemnity.

87. Accordingly I find on the evidence that

(i) in 2003 Champion Consulting Limited by Mr Dallimore advised Messrs Halsall, Stanton and Higgins to participate in the Charity Shells. In so doing, he gave them a 100% assurance that their tax liability would be reduced as a result of this investment. I accept the description set out in paragraph 8.4 of the Reply that Mr Dallimore represented that the schemes would work effectively and would reduce their tax liability and improve their overall financial position as well as enabling them to benefit charities and that these words amounted to "*100%" assurance that this would be so …and that the schemes were… not susceptible to successful challenge by HMRC*."

(ii) Mr Dallimore did not advise the claimants that the accuracy and soundness of the valuation upon flotation was pivotal to the success of the Charity shell schemes or

that there was a significant risk that the purported increase in the value of the shell company post flotation would be challenged and successfully challenged by the Revenue.

What was the scope of the duty of care?

The retainer

88. Paragraph 7 of the Particulars of Claim asserts that the defendants acted pursuant to a retainer by the claimants to provide advice and it was an implied term of such retainer that the defendants would exercise reasonable skill and care in giving their advice. The claimants accept that the duty of care in negligence was coextensive with the duty in contract.

89. Counsel for the defendants referred me to the case of *Mehjoo v Harben Barker* [2014] EWCA Civ 358 in which at paragraph 69 Lewison LJ refers to the well-known dictum of Oliver J in *Midland Bank Trust Co Limited v Hett Stubbs and Kemp*:

"*there is no such thing as a general retainer in that sense. The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" in establishing any general duty… The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.*"

The facts of *Mehjoo* are very different to the facts of this case and therefore the case provides little assistance other than as a statement of the general principle set out above.

Engagement letter/ terms of business

Submissions

90. The defendants submit that in respect of each of the companies (other than Chartersea, the claim in respect of which is no longer pursued) the relevant claimant entered into a written contract for services with CCL. The relevant documents are alleged to be the engagement letters which had standard terms of business attached.

Under the heading "*Dealings with the Inland Revenue*" the engagement letters contained the following statements:

"*In any dealings with the Inland Revenue, we shall follow the guidelines issued by the relevant professional bodies in connection with the disclosure and presentation of information.*
It is not possible to guarantee, however, that any such shelter/recovery can be achieved. Any advice which we give in relation to the opportunity will be based on the law as it stands at the date that the advice is given... It is not possible, however, to predict whether a challenge will be made and if so whether or not it would be successful." [Emphasis added]

91. Counsel for the claimants submits that there was one overarching contract for all charity shell schemes. As set out in paragraph 14 of the Reply the claimants deny that the relevant paragraph was incorporated into any retainer of the defendant. The claimants say the term is inconsistent with the oral assurances provided by Mr

Dallimore and rely in particular on the letter from Mr Higgins of 19 November 2013 and Mr Dallimore's letter of 14 September 2004.

92. The claimants assert that the terms and conditions were not provided at the outset of their retainer and they dealt with the defendant on terms that the efficacy and success of planning was guaranteed and the terms of the retainer were never varied so as to include the term relied upon by the defendants.

Evidence

93. It would appear to have been the practice of the defendants to send out an engagement letter in respect of each separate charity shell. In most cases the relevant engagement letter has been located and was signed by the relevant claimant. The engagement letter would have the terms of business attached and in most cases this was also signed by the relevant claimant.

94. In the case of Mr Higgins the engagement letters for Readymatch dated 11 November 2003 [K/3086] and Crucial Plan dated 21 July 2004 made an amendment to the "*dealings with the inland Revenue*" section by deleting the second paragraph but the engagement letter dated 19 August 2003 [K/3046] for Readymarket was signed without any deletions or amendments.

95. In the case of Mr Halsall the engagement letter for Readybuy dated 22 July 2003 is unsigned. The engagement letter for Readymarket dated 14 August 2003 is signed but no deletions are made. The letter for Readymatch has not been located. The engagement letter for Crucial Plan [K3172] is signed by Mr Halsall but the relevant section dealing with the Revenue is deleted and initialled as is the reference in the engagement letter to the limitation of liability in sections 9 and 10. In the terms of business clauses 9 – 13 (inclusive) have been deleted.

96. In the case of Mr Stanton by way of example, the engagement letter dated 15 August 2003 in respect of Readybuy is signed but no deletions are made, in relation to Readymarket the letter dated 20 August 2003 is again signed and no deletions are made, in relation to Crucial Plan in the letter dated 21 July 2004 the section "dealings with the Inland Revenue" is not deleted but there is a reference to amendments in the terms of business and clauses 9 – 12 have been deleted. In cross-examination Mr Stanton was taken to the letter of 15 August 2003 and to the section "*dealings with the Inland Revenue".* It was put to him that by signing the engagement letter he agreed to the terms. Mr Stanton acknowledged that he signed it but denied that he agreed to what was said there. He said:

"*no, I agreed that the scheme was a process that there was nothing that could go wrong and therefore that paragraph in particular didn't matter.*" [Day 2/90]

It was put to him that his evidence was inconsistent with the engagement letter. Mr Stanton said that:

"*it was probably I trusted my accountants and the advice I was given rather than the paperwork.*" [Day 2/91]

Discussion

97. The overall picture is a lack of consistency in the documentation. The fact that the section, or the relevant paragraph, was deleted by Mr Higgins in the case of Readymatch and Crucial plan is consistent with the claimants' case and in particular the letter sent by Mr Higgins on 19 November 2003 but the Readymarket letter was not. Similarly the deletion of the clause by Mr Halsall from the Crucial Plan letter is consistent with an agreement between the defendant and the relevant claimant that the limitation in respect of the advice set out in the engagement letter did not apply to the relationship although I accept that no deletion was made in the case of Readymarket.

98. There was some evidence that suggested the defendants agreed to make the deletions on behalf of the claimants. Mr Halsall in cross-examination said that Mr Dallimore agreed at the meeting in October that the liability clauses could be deleted from the terms of business. However as set out above this evidence was later withdrawn.

99. Taken as a whole, the evidence does not support a finding that the defendants agreed themselves to make amendments on behalf of the claimants to the terms of business. However the evidence would suggest that the amendments would not have gone unnoticed; the evidence of Ms Morris was that the paperwork was carefully monitored by Mr Stone. If the defendants had been concerned that the deletions did not reflect the terms of the retainer one might have expected Mr Stone to have reacted to the deletions. The evidence of Ms Morris in her witness statement [paragraph 20] was:

"*I can't believe that Tamlyn Stone would have allowed any of the investments to go ahead without all the necessary documents in the pack being signed by each claimant. He was thorough in requiring all relevant paperwork to be completed fully to the point of being annoying."*

In cross-examination Miss Morris said that Mr Stone from her recollection was "*meticulous about having everything in order.*" [11/63]

100. It was put to her if there had been amendments, manuscript amendments to the letters of engagement by the claimants or if they had crossed out clauses in the terms of business, did she think he probably would have seen that? Miss Morris replied "*I would have thought so*".

101. Counsel for the defendants submits that the relevant section of the engagement letter was written in clear English and irrespective of whether the claimants failed to read the documents, any breach of duty was corrected in writing prior to the claimants committing themselves. [Paragraph 94 of closing submissions] Counsel refers to the case of *Peekay International Ltd v Australia and New Zealand Banking Group Ltd* [2006] 1 CLC 582 and in particular, paragraph 43 where Moore-Bick LJ said:

"*one of the factors that distinguishes the present case from those to which I have referred so far is that the true position appeared clearly from the terms of the very contract which the claimant says it was induced to enter into by the misrepresentation. Moreover, it was not buried in a mass of small print but appeared on the face of the document as part of the description of the investment product to which the contract related. It was accepted that a person who signs a document*

knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not...."

102. Counsel for the claimants seeks to distinguish *Peekay* as turning on its own facts and the legal rulings as having no application.

103. The claim in that case was a claim for damages for misrepresentation under section 2 (1) of the Misrepresentation Act 1967. In that case the claimant asserted that Mr Pawani, a director of the claimant, had a conversation with a manager acting on behalf of the defendant in which she described the proposed investment and Mr Pawani's case was that he had been led to believe that he would obtain an interest in the underlying financial instrument. Mr Pawani was then sent "final terms and conditions" (FTCs) which described the investment. Mr Pawani looked over the documents briefly but did not read them assuming that they reflected what he had been told previously. The Court of Appeal did not interfere with the finding of the first instance Judge concerning the representation but the Court of Appeal did interfere with the conclusion that Mr Pawani was induced to sign the documents by what the manager had previously told him.

At paragraph 52 Moore-Bick LJ said:

"in my view the judge's conclusion cannot be sustained… no doubt Mr Pawani had been led to expect documents relating to an investment of a certain kind, but he was aware that the FTCs contained the only formal description he would receive of the investment in which Peekay was being invited to participate. The description he had been given by [the manager] was at best informal and, as the judge found, "rough and ready". The FTCs were the first and only opportunity he was given to satisfy himself that the nature of the investment and the terms relating to it were consistent with the broad description she had given him and that it was satisfactory to him in all other respects. He may not have been expecting the documents to contain any nasty surprises, but only by reading them could he satisfy himself that the product was what he had been led to expect. In those circumstances the only conclusion open to the judge in my view was that Mr Pawani was induced to sign the document and enter into the contract not by what [the manager] had told him, but by his own assumption that the investment product which they related corresponded to the description he had previously been given." [emphasis added]

104. In this case, insofar as the "*dealings with the Revenue*" section of the engagement letter is concerned, it is not a situation where there has been an "*informal, rough and ready"* description which is then followed up by a formal description. Here I have found that an assurance was made by Mr Dallimore as to the tax product and a statement to the contrary in the engagement letter was a very different factual situation from *Peekay*. Further given that *Peekay* was a claim for misrepresentation and the issue was whether Mr Pawani had been induced by the representation, the dicta of the court relied on by the defendants are not authority for the proposition that any breach of duty in tort could be or was "corrected" in writing prior to the claimants committing themselves to the charity shell schemes.

105. In closing submissions counsel for the defendants submitted that he relied on the case of *Peekay* by way of analogy and it shaped the scope of the advice. As I have indicated, I see no relevant legal principle which can be derived from *Peekay* which

would affect the oral assurances and the liability which attaches in respect of those assurances.

106. I also reject the submission that the failure to amend the terms and introduce an express term that the success of the planning was guaranteed has any effect on the retainer. The retainer in my view was concluded on the terms agreed at the meeting.

Conclusion

107. Although some of the engagement letters do not have the relevant paragraph deleted the evidence does not suggest that the parties agreed to vary the scope of the retainer in the course of the relationship. Although there was no continuing obligation on any of the claimants to participate in the charity shells and in that sense each decision to participate and to pay the applicable fees was in my view a separate contract, the tax advice given at the outset, in my view, did not change over the period of the charity shell transactions. Accordingly even in those charity shells where the section "dealings with the Revenue" was not deleted in the engagement letters, the inclusion of the paragraph in the engagement letter does not have the effect of amending the retainer or "correcting" the oral assurances that Mr Dallimore gave to the claimants in relation to the charity shell schemes at the outset.

Standard of care

108. The defendants contend that the applicable test is whether no reasonably competent tax planner/adviser could have acted as the defendants did: *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 220.

"*No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made."*

109. Counsel for the defendants referred to the case of *Altus Group (UK) Ltd v Baker Tilly Tax and Advisory Services LLP [2015] STC 788* at paragraph 67 as a specific application of this test in the case of tax advisers.

110. Counsel for the claimants refers the court to paragraph 69 of the judgement where the court in that case referred to a dictum of Laddie J in *Credit Lyonnais v Russell Jones and Walker:*

"… The solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However, if in the course of so doing that for which he is retained, he becomes aware of a risk or potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns as a result of, and in the course of, carrying out his express instructions … If in the course of carrying out his instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him …".

That case concerned information which was outside the scope of the retainer and the dictum must be read in that light. It is not clear to me that the facts of this case concern risks which were outside the scope of the retainer. In this case the defendants provided tax advice on the charity shell schemes and would be liable if they have acted in a way which no reasonably well-informed and competent tax adviser would have done.

111. Counsel for the defendants submitted that the proper approach to the standard of care is the "Bolam" test: that is if a significant body of reasonable practitioners would have acted as the defendants did, then there is no breach of duty even if some other advisers might have acted differently for example by giving more detailed advice: *Bolitho v City and Hackney HA [1998] AC 232 at 239.*

112. Counsel for the claimants submit that the exponents of the body of opinion has to satisfy the court that any relevant opinion has a logical basis. In cases involving the weighing of risks against benefits the court has to be satisfied before accepting a body of opinion as being reasonable or respectable that *"the experts have directed their minds to the question of comparative risks and benefits and reached a defensible conclusion on the matter."*

113. In his judgment Lord Browne-Wilkinson referred to the Bolam case itself where McNair J stated that the defendant had to have acted *"in accordance with the practice accepted as proper by a "responsible body of medical men"* and referred to *"a standard of practice recognised as proper by a competent reasonable body of opinion."*

At page 241H Lord Browne-Wilkinson said:

"the use of these adjectives – responsible, reasonable and respectable – all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

He continued at 243B:

"... In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.
I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgement which a judge would not normally be able to make without expert

evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported…." [Emphasis added]

In closing submissions counsel for the defendants explained that the defendants rely on *Altus* and its adoption of the *Bolam* test for the proposition that the court has to be satisfied on all the evidence including the expert evidence that the response that these particular defendants provided was outside of the competent range. He said that he was not adopting the position that because Mr Avient expressed a view as an expert the court was obliged to accept his views. He said that the defendants rely on *Altus* for the proposition that there are a number of reasonable and competent responses that a professional can give in a particular situation and it is not a "*one size fits all, detailed explanation and nothing else will do*".

Advice/information

114. Counsel for the defendants submits that although it is accepted that the defendants did provide advice to Mr Halsall, Mr Stanton and Mr Higgins, it places them in Lord Hoffmann's "*information*" rather than "*advice*" category. *SAAMCO v York Montague Ltd* [1997] AC 191 [Paragraph 124 of the closing submissions]

115. Lord Hoffmann [at 214D] of the judgment in *SAAMCO* said:

"[*the principle] is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong.…*
The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong." [Emphasis added]

116. Counsel for the claimants submit that the advice falls within the "*advice*" category because Mr Dallimore took it upon himself to evaluate all the advantages and disadvantages attendant upon entry into the charity shells and on the basis of that analysis advised the claimants to participate. [Paragraph 67 of the claimants' closing submissions] Counsel referred to Lord Sumption in *BPE Solicitors v Hughes – Holland [2017] UKSC 21* at paragraph 40.

[40] "In cases falling within Lord Hoffmann's "advice" category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or

misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against. The House of Lords might have said of the "advice" cases that the client was entitled to the losses flowing from the transaction if they were not just attributable to risks within the scope of the adviser's duty but to risks which had been negligently assessed by the adviser. In the great majority of cases, this would have assimilated the two categories. An "adviser" would simply have been legally responsible for a wider range of informational errors. But in a case where the adviser is responsible for guiding the whole decision-making process, there is a certain pragmatic justice in the test that the Appellate Committee preferred. If the adviser has a duty to protect his client (so far as due care can do it) against the full range of risks associated with a potential transaction, the client will not have retained responsibility for any of them. The adviser's responsibility extends to the decision. If the adviser has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client would not have entered into the transaction on a careful assessment of its overall merits, the fact that the loss may have resulted from risks B, C or D should not matter.

The position of the adviser is to be contrasted with the "information" category. Lord Sumption continued*:*

[41] "By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers)…."[emphasis added]

Counsel for the claimants also referred to paragraph 44 of the judgement*:*

"...categorisation is inevitably fact sensitive...a valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated…"

117. Counsel for the defendants in oral closing submissions submitted that this case fell between the two extremes. He submitted that there was a "very real danger" if tax planning advice was characterised as falling within the advice category because then not just tax advisers and accountants but the solicitor who is advising on tax planning from an inheritance planning point of view will be falling within the advice category. He submitted that this was a case where the defendants said that the scheme "worked" and the client was then left with the decision whether to do it or not. Accordingly he says that this makes it an information case.

118. I accept that the question depends on the factual circumstances and the labels may not assist. However Lord Sumption makes it clear that the test is whether the adviser is responsible for "*guiding*" the whole decision-making process. Lord Sumption did not suggest that in order to fall within the "advice" category the adviser had to take the decision. In all cases the client has ultimately to take the decision, the distinction is between the situation where the professional adviser contributes a limited part of material and the client then takes this into account, identifying other relevant considerations and making an overall assessment of the merits of the transaction and the case, as here, where the client has not retained responsibility for assessing the full range of risks but is guided entirely by the adviser. As Lord Hoffmann stated in *SAAMCO* the difference lies "*between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take".* On the facts of this case it seems to me that the defendants were clearly acting as an adviser responsible for advising the claimants as to what course of action they should take. This was not a case where the defendants merely contributed a limited part of the material on which the claimants would rely in then pulling together other relevant considerations and forming a view on the overall merits. Mr Dallimore as an experienced tax adviser was guiding the whole decision-making process. Accordingly it does not in my view fall into the "information" category identified by Lord Hoffmann but into the category of "advice".

119. A point was raised on clause 1.2 of the engagement letter that by its terms the defendants were not under any contractual duty to provide advice. Clause 1.2 of the engagement letter states:

"we will not advise you on the suitability of any investment projects. The suitability of investments is the responsibility of Champion Financial Management or your financial adviser and not Champion Chartered Accountants.
With regard to this opportunity, we would draw your attention to the detailed prospectus relating to the company, a copy of which has been provided to you. Providing you with this prospectus or any other information concerning the company or any other information does not constitute advice or a recommendation concerning its investment merits By Champion Financial Management or Zeus Partners Ltd… You are recommended to seek your own financial advice regarding the proposed investment from a person who is duly authorised under the Financial Services and Markets Act 2000."

120. In my view clause 1.2 is irrelevant to the issue of the scope of duty in this case. It is clear on the evidence that the purpose of the Charity shells as they were promoted by Mr Dallimore to the claimants was for tax purposes, that is to take advantage of the gift aid provisions, and not for investment purposes. At the time of initial subscription the claimants did not know the business in which the charity shell would invest – the evidence of Mr Currie was that this had to be kept confidential at this stage – even though when making the initial subscription the claimants had to commit to a further subscription at the higher listing price. Accordingly this clause is not applicable to the tax advice; it relates to advice on investments. This was a tax scheme as far as the claimants were concerned and not an investment. This is the case notwithstanding the evidence of Mr Stanton that he was also attracted by the element of charitable giving which was not insignificant in his case and the fact that in some cases not all the shares were gifted and some were retained as an investment. Even if

clause 1.2 were applicable, I accept the submission of counsel for the claimants that irrespective of whether the defendants were under any contractual duty to provide advice, the defendants did in fact provide advice. Thus , on either basis, clause 2.1 of the engagement letters does not define the scope of the duty owed to the claimants.

Breach

Did the assurances given by Mr Dallimore amount to a breach of duty?

121. I have found as a matter of fact that Mr Dallimore did provide an assurance to Messrs Halsall, Stanton and Higgins that the charity shell scheme would work effectively.

122. Each counsel criticised the findings of the expert instructed by the other party. However both Mr Brookes and Mr Avient accepted that if a professional adviser gave a guarantee he would not regard it as reasonable. At paragraph 11 of the joint report [I/2503] Mr Brookes said that if the defendants were providing tax advice then there would be a minimum expectation to advise on how the scheme was intended to operate, how HMRC would view it, in this case the importance of the valuation, the risks of HMRC challenge and the worst-case scenario in the event of a successful challenge. Mr Avient accepted in cross examination that if a professional adviser gave a guarantee he would not regard it as reasonable. [Day 13/136]. He also agreed that if the guarantee was in the context of "*come on, it's so good, if it doesn't work I'll pay the tax"* that would not be reasonably competent advice. [Day 13/137] Mr Avient also agreed that if what was said was "*this is a tax scheme, I've reviewed it and you going into is a no-brainer*" then that would not be advice that a reasonable adviser would give. He did qualify his answer by saying that his answer was in the context in which he had been asked to consider it. However in my view the question was fairly put by counsel for the claimants and reflected the assurance which I have found that Mr Dallimore gave.

123. Accordingly it seems to me that it is clear that no reasonably competent tax adviser could have acted as Mr Dallimore did in giving such an unconditional assurance and in so doing, the tax advice that Mr Dallimore gave to Messrs Halsall, Stanton and Higgins was negligent. The fact that some of the companies succeeded and that some of the schemes went unchallenged by the Revenue is in my view irrelevant to the question of whether the reasonably competent tax adviser would have given an unconditional assurance that the charity shell scheme would work effectively.

Did the failure to warn of specific risks amount to a breach of duty?

124. Since in my view the issue of breach is settled by the finding of fact as to the assurances which were given by Mr Dallimore, the question of whether the failure to give particular risks and warnings would have amounted to a breach of duty does not arise. However for completeness I will deal with the issue as it was advanced in closing submissions (and not with all matters which were asserted in the pleadings). The issue can in my view be distilled into the failure to give the advice concerning the importance of the share valuation and what is alleged to be the "artificial" increase in the share price [POC 38.11].

Submissions

125. Counsel for the claimants submitted that: the overwhelming likelihood was that an enquiry would be made by HMRC; in any such enquiry, the value of the shares at the time of gift would be of crucial importance; there was a substantial risk that in such enquiry the value of the shares at such time would be successfully attacked; specifically, given the thin nature of trades in the shares, there might well be an issue

as to market value, as identified by Mr Kessler in his opinion and if there were a limited number of trades the Revenue would question the value as identified by Mr Prosser.

126. Counsel for the defendants submitted that the defendants were tax planners not valuation experts and the court should guard against hindsight. Counsel for the defendants denied that there was any artificiality about the increase in value suggesting that the claimants' case is that the increase in value was so artificial to the point that the companies and the arrangements made in relation to them were shams created only for the purposes of seeking to obtain gift aid relief. Counsel for the defendants referred to evidence that a number of companies were successful and gift aid claims were approved. Counsel further submitted that the target businesses were genuine aspiring or trading businesses which stood real prospects of success when purchased and listed. Counsel relied on the witness evidence of Mr Currie that from the perspective of Zeus, this was a corporate finance scheme. Counsel submitted that the schemes and the valuations were not "artificial" because the characteristics of the companies changed between first acquisition and subsequent gifting, from a shell company with no assets to a company which had purchased one or more businesses and floated on the stock exchange. Counsel also pointed to the role of the Nomad, WH Ireland in the valuation at the time of listing.

Evidence

127. Mr Dallimore was asked in cross examination about the note produced in relation to Taskcatch entitled "*Charity Shell Companies. Income Tax Planning*". [M/3892.34] It dates from around March 2003. Mr Dallimore accepted that it was a Champion document and said it would have been a note to his fellow directors or to the tax team. It sets out the process whereby individuals "seeking tax shelter" invest into the shell company, Taskcatch, at 7p per share, the shell company acquires the share capital of another company, Skylark Thornton Ltd, Taskcatch is listed on AIM at a listing price of 28p per share and further shares are issued to the investors, the individuals then gift their shares to a number of charities giving an income tax credit at the market value of 28p per share.

The note states:

"*clearly the 28p value on listing will decrease to the true value of the business i.e. the value Skylark but this will take time to happen and is under the control of WH Ireland. At the listing point they are happy to list it at 28p per share since they are only seeking to raise £105,000 and they have buyers at that price*.

The above numbers were simply those that applied to Skylark and very much depend on the following:
-value of the business being bought by Newco
-how much equity the existing shareholders are willing to give up in return for the cash injection." [Emphasis added]

Mr Dallimore's evidence was that this document was prepared*:*

"pretty much immediately after I've had my first meeting with Zeus and it's clearly based on a misunderstanding of how the procedure works." [Emphasis added]

He said it was his misunderstanding, that the true value of the business is the listing price because Zeus had put forward a valuation and WH Ireland have confirmed they are happy to accept it at that price. He said:

"the only way the share price would collapse is if there was significant activity in the share price post listing, and it's impossible to confirm whether that would happen or not or predict whether that would happen or not. So I think it's very much a misunderstanding of how the structure worked." [Day 7/60]

Mr Dallimore said that the document would have been amended at a later stage when he fully understood the structure.

128. Mr Dallimore was asked in cross-examination about the opinion of Mr Kessler dated 2002 provided to Mr Dallimore by Zeus. Mr Dallimore confirmed that he read the counsel's opinion at the time and referred him to page 2990 where it stated that:

"*the amount of the relief where the disposal to the charity is a gift is:*
1 the market value of the qualifying investment at the time when the disposal is made and the incidental costs of making the disposal incurred by the person making it.
The important question is the market value of the shares."

Mr Dallimore confirmed that he was aware of that at the time he went to see Mr Halsall.[Day 6/182]

He was then referred to paragraph 11 of the opinion concerning the AIM market which reads:

"*the valuation on the AIM market at the time of the gift to the charity is the best evidence of the market value at that time."*

The opinion goes on to say:

"this assumes that there are a reasonable number of sales and purchases on the AIM on the relevant day, the date of the disposal…. It could in theory happen that trading was done on that day, but the volume of trading in this company was so thin that the price struck did not really represent genuine market value. This would be a difficult point for anyone to sustain, they would be saying that they knew better than those working in the open AIM market what the open market value was." [Emphasis added]

129. In the notes of the conference held in May 2004 Mr Prosser stated (at 3165) that:

"the relevant amount for the purposes of section 587 is determined by 273, which provides that the market value is determined by the price that the asset might reasonably be expected to fetch on a sale in the open market. Counsel felt that in general, and subsequent to any special circumstances, the starting point for determining market value would be the listing price and the price subsequently quoted on AIM.
Where there are a number of trades at or around the quoted price, that would provide further evidence that the quoted price is the market value. Counsel believed that where there were only a small number of trades in respect of a small number of

shares the quoted price may not be conclusive or indeed good evidence of the market value".

Mr Dallimore stated that trading is thin on most AIM shares so he relied on the entities involved that were listing the companies and WH Ireland's role and Zeus' role. [Day 6/189].

130. Mr Dallimore was referred to the paragraph where counsel said:

"the Revenue would be interested to understand the background behind any trade where the trading is thin to establish whether they are unconnected arm's-length trades. The Revenue would want to explore the background having regard to the underlying purpose. Why is the transferor being so generous to the charity? Why give away shares worth 100 just to get tax relief at 40? Are the shares genuinely worth 100 or might they be worth substantially less?"

Further counsel stated "*given the issues surrounding the determination of market volume, it would be advisable to observe a reasonable period of time to allow the market for the shares to establish itself and to demonstrate a number of genuine third-party trading transactions at the quoted price."* [Day 6/190]

Mr Dallimore was asked whether he explained to the claimants that Mr Prosser had provided this advice and that the Revenue would ask the sorts of questions that counsel was posing. Mr Dallimore said that he did not believe he did because he did not believe it was necessary as he remained "*confident in the overall structure and how the companies had been floated"* (day 6/191).

131. Mr Dallimore said that both counsels' opinions supported that a gift aid claim could be made and market value is important. He said his support was the evidence that would be provided by Zeus and WH Ireland. In paragraph 21 of his witness statement Mr Dallimore said:

"Mr Prosser's advice was categorically that the disposal of the shares would attract gift aid. Provided they were gifted to an unrelated party, they would attract that relief." [Day 6/193].

However, in cross examination Mr Dallimore admitted that "*categorically*" was the wrong term and he should not have used that term.

132. It was put to Mr Dallimore that the price at listing is totally artificial because there is no genuine trading and a company that was worth 1 million say three weeks earlier does not suddenly become worth 4 million or 5 million 3 weeks later. Mr Dallimore said that this was a misunderstanding of the structure, that counsel was comparing a shell company immediately pre-listing to a company that is listed with Zeus importing directors into the business, Zeus probably having a plan to cut costs in the business that they have just acquired and increase turnover within the business, introduce it to their network, so to fund the expansion of the business. That valuation on listing is based on the forward projections, the profits of the company, so it was comparing apples with pears. [Day 7/61]

133. It was further put to Mr Dallimore that the advantage of a two-year lock in was that there wouldn't be any other trading that could have disrupted the share price as listed. Mr Dallimore responded that it wasn't uncommon for AIM flotations to have a two year lock in.

134. Mr Dallimore was asked how he thought the value of the shell would get to 28p. He said Zeus had a very good track record of building growth and of funding and building growth companies. [day 7/68] He said he didn't appreciate the fact that Zeus would fund future growth in the business and that they would introduce revenue streams to the business. He said he did appreciate that they would go on the board. [Day 7/70]

135. Mr Currie's evidence (paragraph 14 of his witness statement [D/1094]) was that his main aim was "*to achieve a profit from these transactions*."

He says that "*as far as Zeus was concerned, the shell transactions were genuine corporate finance opportunities*."

And "*whilst Zeus obtained no direct advantage from any tax efficiencies, it was a fortunate byproduct which assisted with attracting retail (rather than institutional) investors*". [Paragraph 15 of his witness statement]

Mr Currie denied that the shell transactions were "*purely artificial*" and "*solely created with the aim of providing tax advantages for investors"*. He said that Zeus made its money from floating companies which went on to be successful and grew in value. He said the tax advantages were "entirely an aside". He referred to the fact that a number of the companies which were acquired are no longer trading but states that AIM is a market

"*specifically targeted at entrepreneurial companies which are new to the market and seeking relatively early stage capital investment. It is therefore an understood feature of AIM that a significant number of companies will fail.*" [Paragraph 17 of the witness statement]

136. Mr Currie said that Zeus carried out its own research regarding the market sector and the viability of increasing the target company's performance with the benefit of an AIM listing. [Paragraph 21]

137. Asked about the valuation at 4 times, Mr Currie's explanation was that this was their target. In cross-examination he said that the investors returns

"*were as fixed as we could be. Some of them weren't some of them were two times."*

138. In relation to the role of WH Ireland, Mr Currie referred to the obligation on the NOMAD to consider the suitability of a company applying to be listed on the market. He stated that the NOMAD would have scrutinised any company proposed for listing. He said that Zeus approached WH Ireland with the details of the company applying for admission and "*while WH Ireland would always consider the valuation proposed by Zeus it always prepared its own valuation*." [Paragraph 33 – 36 of his witness statement]

Mr Currie said that WH Ireland "*did not simply accept Zeus' proposed valuation*" but challenged Zeus on the price which resulted in "*robust, informal discussions between Zeus and WH Ireland*." [paragraph 38]

139. As far as trading was concerned, it was a requirement of the listing that the company had a "market-maker" which typically in the transactions with which the court is concerned, according to Mr Currie was Winterflood. Mr Currie stated that no market-maker would agree to purchase shares if it believed that the listing price was too high as there could be no interest in those shares. If no market-maker was prepared to trade a company's shares at the proposed listing price, it could not list at that price. [Paragraph 42]

140. In relation to listing on the Channel Islands Stock Exchange ("CISX") Mr Currie stated that there was little or no difference between listing a company on AIM or CISX except that CISX utilised a sponsor rather than a NOMAD but he said that the sponsors and NOMADS performed materially the same function and conducted the same level of due diligence. [Paragraph 45]

141. Mr Currie said that once they succeeded in buying the business they would look at floating it and in the main they went to WH Ireland and tried to agree a valuation with them "*which sometimes we did sometimes we didn't*". [Day 12/page 22

Expert Evidence

Mr Brookes

142. In Mr Brookes's view the defendant should have given a risk warning because the valuation was so fundamental to the success of the tax scheme. Mr Brookes referred in the joint report in particular to the note from Mr Dallimore where he said "*clearly the 28p value on listing will decrease to the true value of the business*" suggesting that Mr Dallimore had "concerns" about the valuation potentially being higher than the "true value" at the time of gift and this risk should have been expressed to the claimants.

143. This view reflected the summary of his conclusions in his main report dated 16 November 2016 where he states at paragraph 9.3 [E/1218]:

"*The charity shell planning was particularly aggressive tax planning which the large accounting firms would not have been willing to be involved in due to the risk to their reputation, amongst other things. It appears to me from the note prepared by Mr Dallimore… that it was known that the float price, on which gift aid was claimed, was higher than the true market value and the claimants were unknowingly involved in a scheme which was artificial and which HMRC could potentially have viewed as being fraudulent. This was not advised to the claimants*."[emphasis added]

144. At paragraph 5.5 -5.7 of his main report Mr Brookes stated:

"With regard to charity shell planning, BDO LLP were aware of and reviewed the variants of this planning in the market in the years 2003 to 2006 and my firm took the decision that the schemes were abusive and BDO LLP would not promote any of them. I, and BDO LLP generally, had a concern regarding the valuation of shares donated which appeared to be artificial and based on a small number of transactions with connected parties to set the quoted price at a high level prior to gifting the shares to charity. [emphasis added]

I and BDO LLP were concerned that where share prices were being manipulated to increase the gift aid tax relief, HMRC could argue this was fraudulent behaviour.

In order for the planning to work the shares would have to be worth three or four times more at the time of the gift than at the time of the subscription a short time before. It was difficult to see how the promoters could be so sure the share price would increase this much without some related parties paying more than the market value for some shares and then using this price as the basis for the value…."[emphasis added]

145. It was put to Mr Brookes that Mr Currie's evidence was that there was a negotiation between Zeus and WH Ireland about the float price and he was asked whether he had considered it before reaching his conclusion that the scheme was artificial. He replied:

"it could be an incredible coincidence, I admit yes."

146. It was also pointed out that Mr Brookes had not mentioned WH Ireland or the role of the Nomad in his report. It was put to him that their involvement provided another degree of reassurance. It was put to him that nothing lists on AIM at any particular price without the nominated adviser's approval and the nominated adviser has a regulatory duty to protect the market.

Mr Brookes said his understanding was that to avoid the embarrassment of floating a company at too high a price that would not attract the investment required and in this case the investors were already lined up with an agreed price and therefore he would imagine WH Ireland's role was more straightforward because they already had the investors lined up.
It was put to him that WH Ireland would not be happy if it was all preordained and Mr Brookes responded:

"*I don't see why they wouldn't be because they have the investors there so the float would go ahead*" [Day 12/112]

147. It was put to Mr Brookes that Mr Currie's evidence was that he was targeting a particular return and Mr Brookes's response was:

"*I'm sure they can achieve a four times return I'm not saying that couldn't be the case but it just seems unlikely that they would all be there or thereabouts four times you would expect to see much more of a range."[emphasis added]*

148. It was put to him that he seemed to "*hang*" his opinion on Mr Dallimore's internal note. Mr Brookes responded that that was the thing that caused him

"*most concern*".

149. It was put to Mr Brookes that once as a tax adviser you have identified that the valuation at the date of gift is key, the adviser needs to understand how Zeus are going to achieve that valuation and support that valuation. It was put to Mr Brookes that Zeus identified a suitable target company, the company had potential which was acquired at an attractive price and funds are made available or would be made available to help the company release that potential and that Zeus would provide other assistance on a consultancy basis and possibly as directors. The company

would be listed on AIM and as a result, would have all the benefits of listing. Viewed as a whole, that justified Zeus' belief that they could achieve the type of increase in value of around four times.

150. Whilst Mr Brookes agreed that this was a structure which had very few moving parts and the availability of the relief in principle was not in dispute, he said that the risk revolved around the valuation area [12/77] and when asked whether the involvement of Zeus and its track record justified Zeus's belief that they could achieve the type of increase of around four times Mr Brookes said:

"… Either they could pretty much guarantee more than the three times to go over the tipping point, and if they couldn't guarantee and it was just a case of "we have a track record and we think we can always beat four" then I think the defendant should in that case have just stressed the risk that if it didn't reach this tipping point that they could actually lose money" [12/110]

and later in cross-examination when it was put to him that he would be entitled reasonably to rely on what Zeus told him because what Zeus were telling him about their track record and how they successfully secured listings at increased values made sense and was reasonable, Mr Brookes replied:

"I think if you step back though and think that someone pays 10p a share and then a few days later, they're saying the shares are worth 40p, due to listing on the market with very few trades, that still doesn't quite make sense to me…." [Day 12/144]

151. It was put to him that there was nothing unreasonable in taking Zeus at their word and Mr Brookes accepted that. [Day 12/110]

152. Mr Brookes was not aware of Floors 2 go and other shells where the valuation was not challenged.

153. Mr Brookes was asked about paragraph 11 of Mr Kessler's opinion [K/2991] which stated that the valuation on the AIM market is the best evidence of market value at that time and that even if the volume of trading was thin it would be difficult for anyone to say that the price did not really represent genuine market value. Mr Brookes said there was still a concern there and gave an example of where there were share options of an AIM company and they had agreed with the Revenue a discount to the listed price on the basis they were thinly traded so he said it was "*not unusual*" to not use the listed price and to get a discount. [Day 12/119]

154. Mr Brookes said that the other thing that the relevant paragraph did not cover is share transactions with connected parties. It was put to him that leaving aside the question of related party transactions, a tax adviser reading this advice considering this type of gift aid planning, would take away that counsel was giving "*robust and confident advice that the most likely approach to valuation is going to be the market price at the time of the gift"* Mr Brookes agreed although he said it did depend on the question asked of counsel. He acknowledged that the methodology that counsel went through was a "*confident explanation"* [Day 12/124]

Evidence of Mr Avient

155. In cross-examination Mr Avient said that if a reasonably competent adviser was to give tax advice, then the explanation would be that the valuation delivered the tax outcome. [Day 13/142]. He also said that if a reasonably competent adviser

considered there was a likelihood of enquiry, one of the questions that the Revenue would have looked at would be the valuation. So if the reasonably competent adviser believed that there would be a chance of enquiry, then they would have stated that one of the elements the Revenue would have looked at would have been the valuations. He also stated that an adviser would say that the valuations could not be guaranteed because they are outside of the adviser's knowledge.

156. He was asked whether the reasonably competent tax adviser would have felt any concern about the fact that it would seem that the shells had to always increase in value approximately four times to make it worthwhile. Mr Avient said that the reasonableness of that would depend upon the work that was undertaken by the adviser to ascertain the basis on which that was to be achieved.

157. Mr Avient was taken to the note in relation to Taskcatch and asked whether if the working example had been provided to a reasonably competent adviser, he would have queried how the 7p share would become worth 28p on listing. Mr Avient said it would be appropriate if the valuation is to deliver the tax outcome for the reasonable adviser to ask how that might come about. [Day 13/150]

Discussion

158. The experts' view as set out in the joint statement dated 27 January 2017 as to what would constitute reasonable advice in the circumstances of this case was dependent on the court's finding of fact on the arrangement between the parties. In my view as set out above on the evidence it is clear that Champion were not acting as introducers but were advising on the tax products. Mr Avient placed reliance on the "dealings with the Revenue" paragraph in the engagement letter but as discussed above, this cannot in my view contradict or negate the assurances which I have found that Mr Dallimore gave in relation to the scheme.

159. I note that both experts are agreed that the structure of the planning, aside from the valuation of the shares at the time of gift, is non-contentious. Both experts agreed that the valuation of the shares is the critical point for the tax outcome. [Paragraph 8 of the joint statement]

There is however a divergence of views between the two experts. Mr Avient took the view that it was reasonable for the defendants to rely on the experience of Zeus and their professional advisers such as the Nomad. Mr Brookes took the view that the defendant should have given a risk warning because the valuation was so fundamental to the success of the tax scheme. Mr Brookes referred in particular to the note from Mr Dallimore where he said "*clearly the 28p value on listing will decrease to the true value of the business*" suggesting that Mr Dallimore had "concerns" about the valuation potentially being higher than the "true value" at the time of gift and this risk should have been expressed to the claimants.

160. Whether the valuation would be considered reasonable depended, according to Mr Avient, on whether Zeus was capable of finding companies that could be valued at four times the cost of contributing to the scheme on flotation and, according to Mr Brookes, whether Zeus could guarantee a four times valuation in every case and if so a reasonably competent adviser would want to understand and explain how they could have preordained that this would happen in every case failing which a reasonably competent tax adviser would have to warn clients of the risk of losing money.

161. Based upon the information provided by Zeus and its reliance on AIM listing safeguards, Mr Avient considered that an increase in price four times would not be sufficient to have triggered concern that the valuation was beyond legitimate expectations.

162. Mr Brookes considered that if one of the companies had increased in value by four times this could have been reasonable but where there were a wide range of companies to all be valued at four times the earlier price that gave a flavour of some kind of manipulation of the price. However, regardless of whether there was any manipulation of the share price, if there was any chance that the four times valuation would not be achieved in every case then the risk and the consequences should have been pointed out to the clients. [Paragraph 16 of the joint report I/2505]

163. As discussed above, the proper approach to the standard of care is the "*Bolam*" test and whether a significant body of reasonable practitioners would have acted as the defendants did. In Bolam the reference is to "a standard of practice recognised as proper by a competent reasonable body of opinion". However it appeared to be common ground that the court should not accept the evidence of an expert unless it withstood logical scrutiny and counsel for the defendants relied on the case of *Altus* for the proposition that there is a range of responses which would fall to be upheld as reasonable and the court has to be satisfied on all the evidence that it falls within the range.

164. Counsel for the claimants submitted that Mr Avient was partial in his approach and was evasive in his answers in cross examination. I do not go so far as to say that Mr Avient was biased but in qualifying his answers by reference to various alternatives he appeared evasive even if this was not his intention. By adopting the approach of giving his opinion on the detailed allegations made by the claimants, he had of necessity to stray into areas of evidence and make assumptions as to whether or not this evidence would be accepted by the court. As a result although his conclusions as to what a reasonable practitioner would do are detailed, it seems to me that his opinion cannot be said to represent a standard of practice recognised by a competent reasonable body of opinion. It can be no more than his opinion having formed the view based on the evidence as he saw it. To the extent that his views are capable of being said to represent the practice of a reasonable practitioner, it seems to me that it is necessary to consider whether the views that he expressed are capable of withstanding logical analysis and to examine why he reaches a different conclusion to Mr Brookes.

165. In relation to the evidence of Mr Brookes, I accept the criticisms levied at Mr Brookes in relation to the articles to which he made reference in his report. However they were in my view only relevant as background appearing in his report under the subheading "*Context – Charity Shells*" and did not affect the thrust of what he was saying in his report.

166. Mr Brookes was also criticised for his reliance on the Taskcatch note which referred to the value on listing decreasing to the true value of the business. It was suggested that this demonstrated a failure to understand WH Ireland's role because post listing trades were not under WH Ireland's control and showed his lack of first-hand knowledge of gift aid relief schemes. Although Mr Brookes accepted in cross examination that he was not aware that Mr Dallimore had said that the note reflected a misunderstanding on his part, when it was put to him that the note did not

accurately reflect how the companies were going to work and therefore was not a "safe departure point" for his analysis he replied:

"*I still wouldn't want to promote the scheme to investors, even without this comment to be honest. But the reason I put it was very concerning is because I felt this could lead to more of a fraud type situation, where someone was aware that they were temporarily high, so that would make me more concerned, but I would still have concerns even without that comment."* [Day 12/141]

He went on:

"… if that comment is incorrect then it takes it away from being fraud but… I still think that the price is being inflated." [Day 12/142]

167. I also take into account that Mr Brookes was unaware of the role of the Nomad, WH Ireland. However the significance of this omission has to be considered. When it was put to Mr Brookes in cross examination that WH Ireland could simply be satisfied with "we want to list this share at £1 and I've got five shareholders prepared to pay £1 for that share, therefore you don't need to worry about the true value is", Mr Brookes replied:

"*I'm not an expert in that area. I would hope not but I don't know*" [day 12/129]

The most that counsel could say was to put it to Mr Brookes that it was unlikely that a Nomad would behave in that way but there was no evidence which in my view established this proposition. WH Ireland did not give evidence. The evidence of Mr Currie was that WH Ireland *"did not simply accept Zeus' proposed valuation*" but challenged Zeus on the price which resulted in "*robust, informal discussions between Zeus and WH Ireland*."

However for reasons discussed below the evidence of Mr Currie is evidence to which I attribute little weight.

It was pointed out to Mr Brookes in cross-examination that there was evidence that WH Ireland did push back and say that they were not prepared to list a company at a particular price. Counsel therefore put it to Mr Brookes that the view that it was all preordained was not borne out by this evidence.

Mr Brookes said:

"*it certainly has the flavour that that was the case.… I looked at the multiples and they were all very close to the four, whereas in a genuine market I would have expected more variation in those float prices*" [Day 12/ 114]

It was put to him that if as a corporate finance house they were targeting a return of around four it was hardly surprising that they were successful if they were subject to scrutiny from WH Ireland. Mr Brookes acknowledged that it was possible. However I do not infer from this response that Mr Brookes had changed his overall view.

168. I do not accept the submission that Mr Brookes' approach in his report and in his evidence was effectively to equate the use of these schemes with the Vantis scheme.

In his report at paragraph 5.7 Mr Brookes clearly considers the facts of the charity shell schemes noting that:

"*in order for the planning to work the shares would have to be worth three or four times more at the time of the gift than at the time of the subscription a short time before. It was difficult to see how the promoters could be so sure the share price would increase this much without some related parties paying more than the market value for some shares and then using this price as the basis that the value*."

It was expressly put to Mr Brookes in cross examination that he came to these companies viewing them through his "*Vantis fraud glasses*" but he insisted that *Vantis* only came to light later on and that they had these concerns before they knew anything about the outcome of *Vantis*. He said there were variations on the theme but they were all very similarly expressed and sold in the market. [Day 12/115]

169. Counsel also submitted that Mr Brookes's only disagreement with Mr Kessler's approach was that he had ignored related party trading. Mr Brookes was asked in cross-examination about Mr Prosser's opinion and it was put to him that it was only where there had been very little trading or some related party trading that may cause further questions to be asked. It was put to him that if the adviser had answers to those questions from Zeus, the advice from counsel was that the valuation at the date of gift could be supported. Mr Brookes replied:

"I don't think Zeus could answer why was the transferor being so generous to the charity and why give away shares worth 100 to get relief of 40. I don't think these are really questions for Zeus to answer." [day 12/127]

It was put to him that Zeus had a track record in identifying target companies, in purchasing them at the right price, in then sourcing and providing them with finance and listing them successfully on the market. That was then supported by WH Ireland. Mr Brookes replied:
"yes, but the trades in these examples do fall into both of these categories of being thinly traded and with related parties, so I think you'd have more questions to answer still." [Day 12/128].

170. I also note the general conclusion of Mr Brookes on the float price

-*"it could be an incredible coincidence."*- "*I'm sure they can achieve a four times return - you would expect to see much more of a range."*

171. Mr Currie insisted that the shell companies were "*genuine corporate finance investments created with the sole aim of making a profit for the shareholders*." However the weight which I attach to Mr Currie's evidence is affected by two matters: firstly that Mr Currie has been involved in a number of these schemes and therefore may have a motive in distancing himself from any tax challenges which are now being made and secondly he damaged his credibility by his failure to answer even the most straightforward of questions in cross-examination. In cross-examination Mr Currie's answers at times seemed evasive or implausible in the face of the other evidence. By way of example I note the following parts of his evidence: It was put to Mr Currie that Mr Dallimore became aware of the tax product as a consequence of being approached by Zeus. Mr Currie denied that he was aware of

this. Responding to the question whether Zeus provided Mr Dallimore with the opinion from Mr Kessler, Mr Currie said that they had not "*obtained*" the opinion but accepted they "*had*" the opinion. Further when it was put to him that he provided a copy of the opinion to Champion, Mr Currie replied that Mr Salisbury may have done. It was put to him that Mr Salisbury was speaking to Mr Dallimore and explaining to Mr Dallimore the potential benefits of the product for tax purposes. Mr Currie initially responded that he did not "*have any issue with people actually gifting shares*", then saying that counsel would need to ask Mr Dallimore and finally that "*a hundred percent of the reason for the companies and the investment was to acquire the companies and to float them*". [day 12/page 10] Asked why Zeus provided a copy of the Kessler opinion to Champion he replied:

"I wouldn't know. It's probably of interest to them. I don't know."

I accept the evidence of Mr Dallimore that Mr Currie was not the "*day-to-day contact*" at Zeus for Champion [paragraph 40 of Mr Dallimore's witness statement]. However this latter response of Mr Currie in cross-examination can in my view and in light of the other evidence only be described as incredible. Mr Currie was one of the four partners of Zeus and was clearly on the evidence heavily involved in the schemes: Mr Dallimore's evidence was that he met with Mr Salisbury but also had conversations with Mr Currie "*to discuss the opportunity in more detail*." [Paragraph 19 of Mr Dallimore's witness statement]. I have no reason to doubt the evidence of Mr Dallimore on this point.

172. Mr Currie was referred in cross-examination to Taskcatch note. He accepted that it was a document around March 2003 and it was put to him that it was a summary according to Mr Dallimore of the information he received about charity shell companies from Zeus. It was put to Mr Currie that the information concerning the structure came from Zeus. Mr Currie replied:

"I wouldn't know he may have derived it himself" [Day 12/page 42]

It was put to Mr Currie that somebody at Zeus had told Mr Dallimore that this was the way the scheme works. It was put to him that this was the pitch that was being made by Zeus to Champion to which Mr Currie responded:

"that may have been the pitch that Champion were actually making to their clients, I don't know" [Day 12/page 42]

Mr Currie did not accept that the information was coming from Zeus suggesting that the information may have come from Taskcatch and stating he did not recall seeing the document. Again for the reasons stated above I prefer the evidence of Mr Dallimore that Mr Currie was involved in the schemes and his response that he "personally" did not pitch, whilst it may be correct in that he did not participate in the face to face meeting is an evasive response to the question of what Zeus did. In the absence of any evidence to support the proposition that Mr Dallimore had independently prepared the pitch or that the information had come from Taskcatch, the natural inference is that this document was prepared using information provided by Zeus.

173. Mr Currie was asked in cross examination about the AIM market. Asked about "thin" trades on AIM he said:

"I'm heavily involved and still quite heavily involved in the AIM market so I appreciate what a thin market is". [Day 12/page 14]

He said it was "*basically where there aren't many trades*".

However, having stated that he understood the term in this reply, later in cross-examination whether "thinness" was an issue in these companies, Mr Currie said "*it was of no relevance to us, but I'm not sure whether thinness – thin isn't a technical term*"

and then in answer to the question, "it seems to be a term that is used quite regularly though amongst people involved in this sort of transaction",

he replied:

"*it probably means different things to different people"* [Day 12/page 16]

These varying responses demonstrate in my view an attempt to evade what he knew to be a significant issue in the case.

Conclusion

174. The evidence from the experts was that the charity shell scheme was straightforward in relation to the claiming of gift aid and the only issue was the valuation. The opinion of Mr Brookes as set out in the joint report of paragraph 11 is that there would be a minimum expectation to advise on how HMRC would view the scheme, the risks of HMRC challenge and the "worst case" scenario in the event of a successful challenge. Mr Avient's view as expressed in that paragraph is that the level and detail of the advice would be determined by where the engagement sat on the "spectrum" of advice which could potentially be given. Since I have found that Mr Dallimore was providing tax advice Mr Avient's view is of no assistance. I accept that as Mr Avient stressed in cross-examination, a professional may discharge their duty to advise in different ways by a detailed note or simply an overview giving for example a percentage degree of success depending on the client. However in this situation, I accept the opinion of Mr Brookes that a reasonably competent tax adviser would have pointed out that the scheme was open to challenge and explained the consequences of such a challenge.

175. I accept that the characteristics of the company changed between initial acquisition of shares and subsequent gifting in that the company acquires a trading business and is listed. Mr Avient referred to the advantages of a listing: the ability to access capital and borrowing but given the diverse range of businesses, in my view this still did not explain why the result would be an uplift which is so uniform and the evidence that there were a small number which failed to achieve the targeted valuation and did not proceed, does not demonstrate in my view that the valuation of those companies which did proceed was a genuine reflection of value.

176. I accept the shell transactions were real companies which were identified and promoted through the listing and that some such as Floors2Go were successful. The claimant's case does not depend on establishing that the companies and the arrangements made were shams but on failure of the defendants to advise the

claimants on the risks which were inherent in the scheme where the valuation of the shares at the time of gift was around four times the original subscription price.

177. Counsel for the defendants submitted that if the claimants wanted more detail or advice on the prospects of success they could and should have asked. Counsel submits that the prospect of an HMRC challenge, a successful challenge was always in plain view and they refer to the expert report of Mr Avient. Mr Avient expressed the view at paragraph 153 of his report that it would have been clear to the claimants at the time of the introduction of the scheme that the valuation was central to the delivery of the desired outcome and that "*little or no financial sophistication in my opinion was required to understand the mechanics of this structure*" [paragraph 153 – 154]. I do not accept this view. This was a tax scheme which was being introduced to the claimants and with which they were unfamiliar, they were professional people but they were not tax experts, they were entitled to receive advice from their adviser; where the adviser has chosen to give a verbal explanation but not mention the sole issue (which the experts are agreed upon) namely the valuation, it is no answer to say that the lay client could have worked out for himself that a challenge was possible and should therefore have asked for more detailed advice on the prospects of success.

178. As to the submission that the valuation on listing reflected a genuine value which was meeting a target set by Zeus and accepted by an independent third party in the form of the sponsor, I did not hear evidence from WH Ireland and the evidence of Mr Currie that WH Ireland challenged the price is not persuasive for the reasons already given in relation to his credibility. Mr Brookes had not considered the impact of the Nomad when he wrote his report but his oral evidence was that WH Ireland would be happy for the floatation to go ahead at a preordained price. Mr Avient said that his experience was with listing of companies on the full Stock Exchange. He was taken to the rules about being satisfied that it was an appropriate company to list but this did not expressly address any responsibility placed on the sponsor for the price on listing.

179. The evidence in my view leads to a finding that the breach of duty lay not in the fact that no advice was given in relation to the risk that trading was "thin": Mr Brookes acknowledged that Mr Kessler was "robust" on this element. Nor in my view was it the limited number of trades as this was only identified by Mr Prosser in his opinion which was obtained in May 2004 after the initial investment. On the evidence as discussed above, the failure on the part of the first defendant lay in not explaining that the valuation was pivotal to the success of the scheme and how this wide range of companies could all be valued at four times the initial subscription and this failure amounted to a breach of duty.

Causation

Did the breaches cause their alleged loss? Did the claimants rely as a matter of fact on the assurances of Mr Dallimore?

Mr McDermott

180. Mr McDermott's evidence is that he relied on advice in February 2004 from Mr Stone. This is not his pleaded case in that paragraph 19 of the particulars of claim refers to an assurance having been given to the claimants by Mr Dallimore, Mr Thompson and Ms Molloy. Counsel for the claimants accepted that Mr McDermott cannot establish that he was party to the advice given by Mr Dallimore in July or October/November 2003. Mr McDermott's application, at the start of the trial, to amend the particulars of claim to refer to having received an assurance from Mr Stone, was refused for the reasons set out in that judgment. He then lodged a fresh claim but his application to have his fresh claim heard together with this claim was also refused.

181. In closing submissions counsel for the claimants advanced his case on the basis that Mr McDermott would not have participated in the charity shell schemes had he been advised of the matters referred to in paragraph 17 and 23 – 25 of the particulars of claim and in particular the terms of counsel's advice.

182. The scope of the duty depends on whether the defendant was acting as an adviser or as an introducer. In the case of Messrs Halsall, Stanton and Higgins the evidence is clear (as I have found) that they received assurances from Mr Dallimore and I have found that he was acting as an adviser. In the case of Mr McDermott, the claimants have not established that Mr McDermott received assurances from the defendant and that the defendant was acting as an adviser rather than an introducer. Even if the defendant was acting as an adviser Mr McDermott's pleaded case is that he relied on the assurances from Mr Dallimore, Ms Molloy and Mr Robert Thompson (paragraph 20 of the Particulars of Claim) but the evidence is that Mr McDermott did not receive assurances from Mr Dallimore or, prior to his investments in the charity shell schemes, Ms Molloy or Mr Thompson.

183. Accordingly for these reasons Mr McDermott's claim must fail.

Mr Halsall, Mr Higgins and Mr Stanton

184. It seems to me on the evidence that the assurances of Mr Dallimore to Mr Halsall and Mr Stanton in July 2003 and to Mr Higgins in November 2003 did cause Messrs Halsall, Stanton and Higgins to believe that the charity shell schemes would be advantageous for them and would enable them to achieve tax mitigation and in reliance on these assurances they entered into the charity shell schemes.

185. However Mr Higgins made an investment in Readymarket in August 2003 that is prior to his November meeting. The engagement letter [K/3046] and terms of business were signed and the clause in the engagement letter entitled "dealings with the inland Revenue" was not deleted. Although there was evidence that Mr Higgins was told about the meeting with Mr Dallimore in July 2003 in my view the claimants have not established that he entered into the Readymarket shell in reliance on the assurance of Mr Dallimore. However in my view the evidence establishes that he did

enter into the Readymatch charity shell in reliance on the assurances of Mr Dallimore as his letter of 19 November is returning the Readymatch documentation and refers to the assurances that he received.

186. As to the position in relation to the investments in 2004 and subsequently, in my view the claimants continued to rely on the assurances of the first defendant as the defendant continued to give assurances as to the success of the schemes. Although the claimants became aware that the Revenue had raised an enquiry and the claimants subsequently queried whether the tax relief had been obtained, the evidence establishes that the first defendant continued to reassure them. By way of an example, on 24 May 2004 Mr Halsall wrote to Jill Morris concerning Readymarket, the material part of which reads:

"could you please confirm whether or not the scheme has now been formally approved by the Revenue and how much will I be saving in tax in January 2005"

Erica Holden wrote to Mr Halsall on 10 June 2004 concerning "*further charity shell opportunities"*. The material part of her response read:

"I understand that you have queried when we will receive Revenue approval, for the income tax relief and as Bob indicated, the Revenue generally have 12 months after the filing of the tax return to raise an enquiry. Our view has always been, and remains, that the planning will stand up to any enquiry.
You may find it useful if Geoff Dallimore and myself come out to meet with you, to discuss charity shell planning further and in particular to run through tax counsel's opinion, with you. Since you last met with Jeff, we have obtained a further positive opinion from Kevin Prosser QC." [Emphasis added]

I reject the submission that the claimants were contemplating that the schemes might fail; in my view the evidence is that the claimants were asking whether or not the formalities had been completed and were receiving strong assurances that the planning would stand up to any enquiry and to back that up, they were being told that a further "*positive opinion*" of counsel had been obtained. A similar message was given to Mr Stanton [K/3163] on 17 June 2004 referring to the tax counsel's opinion.

Mr Higgins did write to Mr Langslow on 8 September 2004 [K/3224] stating that he would arrange payment of the relevant fee notes once he knew the Revenue "*will be accepting this scheme*". However Mr Dallimore replied on 14 September 2004 [K/3225] reassuring Mr Higgins in the following terms:

"as far as the planning is concerned, this is now in its third year and we have received sizeable refunds and indeed agreed returns. Whilst this in itself does not guarantee that the Revenue have accepted the planning, one can assume that the Revenue will have looked at the arrangements since it is not unreasonable to assume that they would not issue large refunds without understanding first why those refunds are due.…
You will be aware of the discussions I have had with Mike and Paul and quite clearly in the event that the planning was not successful you would simply claim a reimbursement of the fees in any event."

187. Although counsel submitted that the reference to "*not guarantee*" suggests Mr Higgins was being told the scheme was not assured, I do not think it is inconsistent with the claimant's case that Mr Dallimore assured them that the scheme would be effective and is evidence in my view that the claimants continued to rely on the defendants' assurances as to the prospects of success of the scheme in deciding whether to enter into the subsequent charity shell schemes.

Did the defendants owe any duty in respect of the loss flowing from the claimants acting on such assurance and was such loss reasonably foreseeable?

Defendants' submissions

188. Counsel for the defendants submit that it is insufficient for the claimants to say that they interpreted Mr Dallimore's words as a guarantee or assurance and proceeded on that basis. Rather they must show that the defendants are legally responsible for the consequences of proceeding on that basis. Counsel submits that the defendants should not be liable if the claimants have unreasonably interpreted Mr Dallimore's words as a guarantee and proceeded on that basis, ignoring the documentation making clear that no guarantee or assurance could be given.

189. Counsel for the defendants submitted that the defendants do not owe any common law duty of care on the basis that one ingredient of the test for a duty of care is whether reliance by the claimant was reasonable. Counsel relies on *Williams v Natural Life Health Foods Ltd* [1988] 1WLR 830 at 837:

"the test is not simply reliance in fact. The test is whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company." [Emphasis added]

190. I do not accept that *Williams*, which counsel submits is "the leading authority" on assumption of responsibility, is the relevant authority for the test of the duty of care when applied to the present facts. *Williams* was a case where it was sought to establish personal liability on the director of the company under what was described as the application of the "*extended" Hedley Byrne* principle. Lord Steyn referred to the need to show that there was a special relationship between the plaintiff and tortfeasor which he described as an assumption of responsibility such as to create a special relationship. He then dealt with the issue of reliance by the plaintiff upon the assumption of personal responsibility and set out the test quoted above upon which the defendants now seek to rely. It seems to me that that case and the principle advanced by counsel has no application to the facts of this case where it is not sought to impose any personal liability on Mr Dallimore.

191. Counsel also refers to *Charlesworth and Percy on Negligence* at paragraph 2 - 194 in relation to the "three stage" test for a duty of care where it is stated:

"it must be reasonable for the claimant to rely on what the defendant has said, and certainly the courts recognise that reasonable reliance causing foreseeable harm is a requirement in all cases."

192. The relevant paragraph in *Charlesworth and Percy* set out above continues as follows:

"so a statement made on a social or an informal occasion or in the course of a casual or perfunctory conversation may not be actionable. But the statement of a solicitor

acting as executor under a will gave rise to an action, even though it was gratuitous. Again, it may not be reasonable to rely on a response to an important business enquiry which is merely given over the phone rather than in writing, it was unreasonable for a solicitor to have relied upon the statement of an unnamed official of the local planning authority who, in a short telephone conversation, without notice, responded to an enquiry about a proposed development by saying, erroneously that it would not be in breach of planning control…".

It seems to me that the authorities as summarised in *Charlesworth and Percy* demonstrate that the principle of "reasonable reliance" is looking at the circumstances in which the statement is made. In this case the statement was made by a tax adviser in the course of his business advising clients and for which he was receiving a fee. The advice was given in a meeting, the purpose of which was to promote the charity shell schemes and to encourage the claimants to participate in the schemes. The assurances given were not in any way incidental to the purpose of the meeting. Given the circumstances it is in my view reasonable to impose a duty of care in this case.

193. Alternatively counsel for the defendants submit that any loss flowing from the claimants proceeding on the basis of Mr Dallimore's words as a guarantee or assurance would fall outside the scope of the defendant's duty of care. Counsel refers to a dictum in SAAMCO at page 212 that the scope of the duty is that which the law regards as best giving effect to the express obligations assumed by the professional: neither cutting them down so that the client obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the professional liability greater that he could reasonably have thought he was undertaking. Counsel submits that the scope of the duty cannot extend to losses caused by placing unreasonable reliance on words used.

194. I do not believe that this dictum is authority for the proposition for which counsel contends. In particular the dictum when set out in full refers to:

"the scope of the duty in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer…" [Emphasis added]

Further Lord Hoffmann went on in the following paragraphs of his judgment to consider the losses for which the valuer should be liable. At page 214 he concluded (as set out earlier in this judgment in full) that where the duty is to advise and the adviser is negligent, he will be responsible for "*all the foreseeable loss which is a consequence of that course of action having been taken."*

I have already concluded that on the facts of this case Mr Dallimore was in the category of giving "advice" rather than "information" and therefore the scope of the duty in the sense of the consequences for which the adviser is responsible is, as set out by Lord Hoffmann, all the foreseeable loss which is a consequence of his negligence. The passage relied on by counsel is not authority for limiting the losses by reference to any concept of "unreasonable reliance".

195. Counsel for the defendants also submits that alternatively the loss was too remote and/or not reasonably foreseeable and/or is not the type of loss for which the defendants should reasonably be taken to have assumed responsibility. Counsel refers me to *The Achilleas* [2009] 1 AC 61. That case sets out the general principles in relation to the recoverability of losses in contract and provides no assistance. It seems

to me unarguable that in the context of a tax adviser giving tax advice in relation to a tax scheme the losses suffered by the claimants when the tax scheme failed to deliver the promised tax savings is not too remote.

196. I accept however that any loss in relation to shares not gifted shortly after listing is not caused by any alleged breach by the defendants and is not recoverable.

Counterfactual: what if the defendants had not acted in breach of duty

197. Counsel for the defendants submits that the court has to consider what the defendants would have done if they had not acted in breach of duty and whether that would be negligent. Counsel refers to *Bolitho* at page 240.

198. However I accept the submission of counsel for the claimants that *Bolitho* was a case of negligence by omission. The relevant paragraph of the judgment is at page 239F:

"where, as in the present case, a breach of a duty of care is proved or admitted, the burden still lies on the plaintiff to prove that such breach caused the injury suffered… In all cases the primary question is one of fact: did the wrongful act cause the injury? But in cases where the breach of duty consists of an omission to do an act which ought to be done (e.g. the failure by a doctor to attend) that factual enquiry is, by definition, in the realms of hypothesis. The question is what would have happened if an event which by definition did not occur had occurred." [Emphasis added]

199. Similarly the case of *Altus* to which the defendants refer, was a case where the allegation was that the defendants failed to give advice and as a result the claimants lost the opportunity of implementing a restructuring. That too was a case of omission. In the present case where the negligence is a positive act in that Mr Dallimore provided an assurance, it seems to me that the question is did the assurance cause the loss and it is not necessary for me to consider the counterfactual position.

200. If I am wrong on that, counsel for the defendants submitted that the claimants failed to prove that had they been properly advised they would not have made the same investments. In cross-examination the claimants were asked what they would have done had they been told the prospects of success were good and Mr Stanton refused to answer the question saying that he would not speculate. [T2/190]. Mr McDermott merely answered that "*it depends on the definition of good"*. Mrs Higgins said that Mr Higgins would not have proceeded in the absence of the guarantee given in October 2003 [witness statement at paragraph 24] but Mr Higgins participated in Readymarket prior to the October 2003 meeting.

201. Counsel for the claimants submits that the counterfactual which should have been put to the claimants would have identified that the valuation was crucial, there was a real risk that it would be successfully challenged and if it were, the claimants would effectively lose the money paid for the shares acquired and be required to pay the tax with interest and possibly penalties. Had such advice been given none of the claimants would have participated. I accept this submission as reflecting the correct analysis of the counterfactual position.

202. Counsel for the defendants submitted that the claimants would have participated in any event. He pointed to a lack of interest on the part of the claimants in the detail of the schemes however I infer from the written closing submissions that counsel accepts that this point is of no relevance given my finding that the breach was a

positive assurance. In relation to the failure to mention the valuation risk, this was not a question of detail but went to the heart of the scheme.

203. Counsel for the defendants also relies on the claimants' risk profile and asserts that the claimants had a desire or need to reduce their tax bill.

204. Mr Halsall was asked in cross-examination about his other investments. Mr Halsall's evidence was that he invested £50,000 in a start-up business for a friend and there was another one which he said Mr Dallimore persuaded him to go into, Lealta and a third one a venture capital trust with Investec where one of the Investec partners persuaded him to put some money in. In his witness statement Mr Halsall said that he regularly invested his own money in traded stocks shares bonds and other assets but that he relied on Ludlow and co and Rensburgs (now Investec) to guide him. He said that he believed approximately 98% of his investments were in top 100 companies. [Day 4/44] Mr Halsall accepted that he had a screen on his desk but he said he took advice from his advisers and when his advisers rang him up and suggested a share Mr Halsall would look at the screen. Mr Halsall accepted that he undertook options trading and he accepted it could be high-risk. He said however it was done by a person who advised him and he didn't do it "*on my own back*". [Day 4/47] He also had a self invested pension plan (SIPP) managed by Ludlow and co and now managed by Rensburgs. It was put to Mr Halsall that he himself was in effective management of the SIPP. Mr Halsall said that he did not manage it but discussed things with Mr Ludlow who "*knew a lot more about what to invest in"*.

205. Mr Halsall is a wealthy individual and he clearly had other investments during the period. He is no stranger to investments in the stock market and had invested in some tax planning schemes. However this evidence does not establish that Mr Halsall would have invested in the charity shells and I accept his evidence that he was "*a complete novice*" in relation to these types of schemes. The evidence is that he had a number of advisers and that he took their advice. Mr Thompson was asked in cross-examination whether if he made a recommendation to Mr Halsall, Mr Halsall would respect his views and act accordingly, Mr Thompson replied:

"he would take a considered view, but yes he would take the view of his advisers". [Day 11/87]

206. Mr Stanton's evidence was:

"up until 2003, when Mr Walton introduced myself, Bernard and Michael to Mr Dallimore, we had not engaged in any form of tax planning or avoidance whatsoever.… As far as I was concerned, the more tax I was paying the more money I was making and I was content with that. In addition, I have always been somewhat risk averse and the idea of engaging in any form of risky tax planning would not have appealed to me then, any more than it does now. I understand that the Champion defendants have suggested that, even if proper advice and warnings as to the risks of failure that the schemes introduced to us by Champion entailed had been given to us, we would have still proceeded. I refute that allegation completely. Prior to a meeting with Mr Dallimore, none of us had any interest in or inclination to enter into schemes designed to avoid or mitigate the impact of income tax and had we not been advised by the Champion defendants in the confident terms I describe below, we would simply have continued to pay our tax as it fell due, in the manner in which we had always done" [paragraph 30 of his witness statement]

207. Mr Stanton invested in mezzanine finance but the mere existence of an investment in a different tax scheme is not in my view evidence that Mr Stanton would have participated in the charity shells in any event. I also do not accept the submission that the approach which the claimants took to the investment in Scion provides a "valuable insight" into the level of risk. In cross-examination in answer to the question whether he was saying his attitude to risk changed Mr Stanton replied:

"yes. Of course it did because Champion had brought me a scheme where I saved a fortune in tax, I converted it into shares for charities and I gave those away to charities and had the enjoyment of giving them. It then saved me some money as well… You have to understand what was in my head in 2007 and "how delighted we were with all of our investing money, you have your letter of entitlements, here is your tax relief that we gave you, haven't we done well?" That must surely change someone's perception of how good your advisers are. Had they cost me money in 2003, 4, 5, 6, and then turned up in 2007 and said, "you fancy this investment?" No chance. But the opposite is also true…" [Day 3/35]

208. Mr Higgins participated in Enterprise Investment Schemes according to the witness statement of Mr Alfred Thompson but this was for the year to April 2012 and Mr Thompson said that such investments were "*encouraged by the government…"* and Mr Higgins was advised from an investment point of view by Ludlow and co. [paragraph 16 of his witness statement] Mr Alfred Thompson who acted for Mr Higgins from December 2005 and said he knew him "*very well*", described Mr Higgins as a "*very cautious individual*" and that in response to the allegation that Mr Higgins was financially sophisticated with a large appetite for high-risk investment properties, he said: [paragraph 6 of his witness statement]

"I can say that from my knowledge of Bernard gleaned over a number of years, that this was not the case."

Mr Thompson also said that he became aware of Mr Higgins' participation in the charity shells schemes

"he told me that he was slightly apprehensive about the schemes, I cannot recall the precise date, but he explained to me that he and his partners took a great deal of comfort from the fact that the charity shells schemes have been so strongly recommended by Champion. Bernard also told me that Champion had guaranteed the efficacy of the charity shells schemes…"

209. In closing submissions counsel for the defendants referred me to paragraph 24 of the witness statement of Mrs Higgins submitting that it was curious because it suggested that Mr Higgins would not have proceeded absent the alleged guarantee given in October 2003 whereas Mr Higgins participated in Readymarket prior to the October 2003 meeting. However in paragraph 24 the relevant sentence refers to the meeting that Mr Higgins had with Mr Dallimore and states:

"[Mr Dallimore] said that he would guarantee the effectiveness of the schemes and on the basis of that assurance, Bernard was prepared <u>to continue to make charity shell investments.</u>" [Emphasis added]

210. I have dealt above with the issue of reliance in relation to Readymarket. In relation to the subsequent tax schemes including Readymatch, taken together with the evidence from Mr Alfred Thompson, a witness entirely independent in this matter, I

do not accept that Mr Higgins would have been prepared to proceed with the tax schemes, if no assurances had been made to him.

211. In relation to the financial impact of the firm paying referral fees, Mr Thompson's evidence was that the need to diversify was raised by the Royal Bank of Scotland around August or September 2004 and therefore although in paragraph 10 of his witness statement he referred to increased demand on the cash flow being a reason for embracing the concept of tax planning, in cross-examination he said that this was in relation to the Scion investment not the charity shells. He said there were no cash flow issues connected with the shells .[Day 11/96]

212. Mr Stanton's evidence was that the payment of referral fees did not cause any cash flow issues. He said that the referral fees were introduced in late 2004 and the charity shells commenced in 2003. He said by then he'd have done six of his nine shells so it could not have been the driver. In terms of the firm's overdraft although there was an overdraft in the years to 2005 2006 and 2007 the firm had no overdraft on 31 July 2008, 2009 and 2010. He also pointed out that 31st July was the year end so they had a large income tax bill in July when they had to pay their VAT so as a snapshot it was the worst case scenario. He also pointed out that they were making about £6 million a year. It was put to him that there were overdrafts in 2004, 2005 and 2007 and that that indicated cash flow issues in those years. Mr Stanton's evidence was that this was a snapshot of one month in the year and that they were all financially well off and could have reintroduced capital had it suited. He said there was never a cash flow issue. [Day 2/6] He said that if they needed to they could simply have stopped paying referral fees and taken less work but as they were growing the business that was not what they wanted to do.

213. Mr Halsall was pressed in cross examination concerning the use of the firm account as his current account and the possibility of cash flow pressures on him personally affecting the firm. Mr Halsall was categoric that he was never under cash flow pressure [Day 4/40]. Mr Halsall did acknowledge that he lost £5 million in around 1997 but denied that he had suffered other substantial losses of comparable magnitude [Day 4/63]. Mr Thompson confirmed that in around 2003-2007 Mr Halsall was worth something in the region of £30 million and that if he needed to access a few hundred thousand pounds Mr Thompson thought he could lay his hands on that amount. Mr Thompson's evidence was that Mr Halsall used to treat the business bank account "*a little bit like his own bank account*". Mr Thompson said there was nothing wrong with that, any private expenditure was charged to drawings, but similarly when he reintroduced funds they were credited to his capital account. So there were quite large drawings and similarly quite large injections of capital. [Day 11/97]

214. In relation to Mr Stanton Mr Thompson agreed that he may well have had £2 or 3 million sitting in a bank account at that time.

215. It seems to me that the evidence of Mr Halsall, Mr Stanton and Mr Thompson all support the conclusion that the firm did not have cash flow issues. The referral fees paid were substantial but they were not paid until late 2004 and as Mr Stanton indicated, it would have been open to the firm to reduce the amount of business that they were doing had they experienced cash flow issues but the evidence is that no such issues were being experienced. The use of an overdraft viewed against the background of a profitable and growing firm does not establish the contrary and I

accept the evidence of Mr Halsall and Mr Stanton supported by Mr Thompson's evidence as an independent accountant, that the firm was not experiencing cash flow issues. I do not therefore accept that the claimants had a financial need to enter into the charity shells schemes.

216. In conclusion therefore if it is necessary for the claimants to prove the counterfactual, in my view there is sufficient evidence to infer that Messrs Halsall, Stanton and Higgins would not have participated in the charity shells (excluding in relation to Mr Higgins, Readymarket) had they not received the assurances which they received from Mr Dallimore.

Contributory negligence

217. Counsel for the defendants submitted that if the claimant wanted a more detailed explanation of the potential risks or an assessment of the prospects of success they should have asked for that detail and the failure to do so amounted to contributory negligence. However I have found that a "guarantee" or absolute assurance was given and accordingly this is not a case where certain risks have been disclosed and the claimants failed to ask for an explanation of those risks or failed to make appropriate enquiries.

218. The defendants also pleaded that the claimants failed to take reasonable care in the management of their financial affairs and submit that the failure by the claimants to read the documentation contributed to their loss. The claimants admitted that they did not read the documentation but in the circumstances reading the prospectuses and the risks disclosed in the prospectuses would not have enabled the claimants to form their own view on the likely success of the tax scheme or identified or explained the valuation risk identified by the experts. Mr Stanton gave the following explanation in response to the question why he did not read the prospectus including the risk factors:

"because it was of no interest, I'd already had the scheme explained to me. All of the standard warnings and whatever else of what can and can't happen didn't matter because the way of the gift aid scheme was described to me. It didn't matter, it wasn't part of a weaker link in the chain or a potential issue. Had Geoff said to me, "listen, these companies could all fail you might want to read the prospectus carefully when I give it to you." It was a case of, "you'll do the process. You'll have your gift aid relief. The charity then get a load of shares. Some may go up, some may go down, but they will make more money than if you don't do the scheme because they will get something rather than nothing." [Day 2/103]

219. In the circumstances therefore it seems to me that on the evidence the defendants have not established contributory negligence on the part of the claimants.

Limitation; Charity shells

Section 2 of the Limitation Act 1980

220. Section 2 of the Limitation Act 1980 provides:

"an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

221. Counsel for the claimants submits that the claimants did not suffer damage within the meaning of section 2 of the Act until the decision in *Green v Revenue and Customs Commissioners* in April 2014.

222. The defendants submit that the claimants suffered damage when they contracted to purchase the shares. At that point they became contractually bound to purchase the shares and on the claimants' case they were in a materially worse position because the subscription shares were worth less than they paid for them. Counsel for the defendants rely on *Pegasus Management Holdings SCA v Ernst & Young [2010] EWCA Civ 181* and *Shore v Sedgwick Financial Services Ltd [2008] EWCA Civ 863.*

223. Pegasus concerned a claim for damages for professional negligence in respect of the alleged failure of Ernst & Young to give the claimants proper tax planning advice. Ernst & Young advised Mr Bradbury to set up the claimant company in order to qualify for tax relief which Mr Bradbury did in March 1998. The claimant company then acquired a business and the alleged negligence was failing to advise the company that it should acquire the businesses through another route.

At paragraph 81 - 83 of the judgment Rimer LJ said:

[81] "it is correct that even without such a structure, there was no certainty that Mr Bradbury would suffer the Adverse Consequence. He could have sought to ensure that all Pegasus's purchases of qualifying trades were by way of asset purchases rather than share purchases. There must, however, be an uncertainty that he could achieve that in the case of every acquisition; and to the extent that it could not, the risk of the Adverse Consequence remained. The alleged flaw in the E & Y 's advice was therefore a material one, which immediately reduced Mr Bradbury's flexibility. It left him in a materially worse commercial position that he ought to have been in by inhibiting the way in which he might go about acquiring qualifying trades. He was so disadvantaged immediately upon the completion of the transaction. He was so disadvantaged not because his shares in Pegasus were then worth less than he paid for them; but because the shares did not give him the control of a company with characteristics that would be proof against the Adverse Consequence.… Moreover, once April 6, 1998… was passed, the defect was incapable of cure. Mr Bradbury was not thereby inevitably doomed to suffer the Adverse Consequence; but he was thereby tied into a commercially disadvantageous straitjacket." [Emphasis added]

[82] Did E & Y's alleged failure cause Mr Bradbury actual damage for the purposes of completing the tort of negligence that forms the basis of his claim?… There is a clear line of Court of Appeal authority that damage sufficient to complete the tort of negligence will or may be caused in a "wrong transaction" case by the fact that, as a result of the defendant's negligence, the claimant has not received what he ought to have received. It is, in particular, not necessary to show that the claimant is

immediately put into a position in which he is financially worse off than he would have been had the defendant not been negligent….

[83]….I agree….that the "wrong transaction" cases do not represent any exception from the general tort principle that actual damage must be suffered before the tort is complete."

224. In *Shore* Dyson LJ said at paragraph 42:

"… I do not accept that the transaction cases can be distinguished as [counsel] contends. It is true that none of them concerned a transaction in which it was possible that the claimant would be better off financially as a result of the negligence than he would have been but for the negligence. But the essence of the reasoning in those cases is that the fact that the risk to which the claimant was exposed by the defendant's negligence might not eventuate did not mean that the claimant did not suffer loss as a result of being exposed to that risk…. The fact that the financial benefits accruing to Mr Shaw from the PFW scheme might not be less than those accruing to him from the Avesta scheme did not mean that he did not suffer loss when he invested in the scheme and was then and there exposed to the risk that they might be less. It is the possibility of actual financial harm that constitutes the loss. That possibility is present even if there is also the possibility that the claimant will be financially better off as a result of being exposed to the risk…."

225. I accept the defendants' submission that it cannot be the case that actual damage is not suffered until an HMRC tribunal decision. This was rejected in *Integral Memory Plc v Haines Watts [2012] STI 1385* at paragraph 32:

"… The claimant's liability to pay interest on the unpaid NIC to HMRC was in no relevant sense contingent. A contingent liability is a liability which, by reason of something done by the person bound, may or may not arise depending on the happening of a future event… That was not the position in the present case. There was either an actual liability to pay NIC and interest on arrears or there was not. The existence of such liability is not contingent on HMRC succeeding or failing in a tax tribunal… All the tribunal or court is deciding is whether or not there is an actual liability...The fallacy...is demonstrated by [counsel's] submission that where a debt is incurred, but disputed, and court proceedings follow, the liability is contingent until the court gives judgment in favour of the creditor… That submission is clearly wrong."

226. Counsel for the claimants submit that a claimant does not suffer damage by reason of his entry into a transaction unless and until it is possible to say that the claimant is worse off and they rely on the authority of *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1997] 1 WLR 1627* at 1631 - 2 and 1638 - 9. It seems to me that this authority does not assist the claimants given the facts of this case. Lord Hoffmann said in the judgment:

"In order to decide when the cause of action arose, it is first necessary to recall, …, precisely what the cause of action was. It was for breach of the duty of care owed by the valuer to the lender, …. Your Lordships identified the duty as being in respect of any loss which the lender might suffer by reason of the security which had been valued being worth less than the sum which the valuer had advised. The principle approved by the House was that the valuer owes no duty of care to the lender in respect of his entering into the transaction as such and that it is therefore insufficient,

for the purpose of establishing liability on the part of the valuer, to prove that the lender is worse off than he would have been if he had not lent the money at all. What he must show is that he is worse off as a lender than he would have been if the security had been worth what the valuer said. It is of course also the case that the lender cannot recover if he is, on balance, in a better or no worse position then if he had not entered into the transaction at all. He will have suffered no loss. The valuer does not warrant the accuracy of his valuation and the lender cannot therefore complain that he would have made more profit if the valuation had been correct. But in order to establish a cause of action in negligence he must show that his loss is attributable to the overvaluation, that is, that he is worse off than he would have been if it had been correct."

227. It seems to me that it was the point at which the claimants entered into the planning that they suffered damage. When they contracted to purchase the shares, they suffered damage, not because the shares were then worth less than the claimants paid for them, but because the purchase of the shares would not give the claimants the result that the defendants had assured the claimants would result i.e. the tax relief. It was not inevitable at that point that they would be denied the tax relief and they may have been financially better off as a result of being exposed to the risk, but it was at that point that they were tied into the "commercial straitjacket". If I am wrong on that, then it seems to me that the claimants suffered damage at the latest when the claimants gifted the shares: at that point the "defect", in the form of the advice to enter into the transaction and with an assurance that it would succeed in obtaining tax relief, was incapable of cure; they had given away the assets and suffered actual damage. Further, if and to the extent when the claimants contracted to purchase the shares in a particular shell, they had not decided whether or not to participate in the gift aid scheme, then in my view the claimants suffered damage at the point when they gifted the shares since at that point they were tied into the scheme.

228. Accordingly for the purposes of section 2 of the Limitation Act the period of six years, for the reasons stated above, runs from the date on which the relevant claimant entered into the contract to subscribe for shares in the relevant shell or at the latest, the date on which the shares were gifted and the claim which was brought on 6 March 2015 was outside the limitation period permitted under section 2 of the Limitation Act.

Section 14A: Charity shells

229. Given my findings in relation to section 2 of the Limitation Act, in order to succeed on the issue of limitation, the claimants will need to show that the claims in tort were brought within 3 years from the starting date pursuant to Section 14A of the Act.

230. The "starting date" is defined in subsection (5) as

"the earliest date on which the plaintiff or any person in whom the cause of action was vested before him 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."

231. The relevant provisions in relation to the interpretation of subsection (5) are as follows:

" (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.[emphasis added]

(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; and…"

Knowledge: legal principles

232. There are two aspects to knowledge for this purpose: the degree of certainty and the degree of detail. As to the degree of certainty the applicable test set out in *Halford v Brookes* was approved by Lord Nicholls in *Haward v Fawcetts[2006] UKHL 9* at paragraph 9 of the judgment:

"*thus, as to the degree of certainty required, Lord Donaldson…gave valuable guidance in Halford v Brookes… He noted that 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 the claim form, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. Suspicion, particularly if it is vague and unsupported, will indeed not be enough but reasonable belief will normally suffice." In other words, the claimant must know enough for it to be reasonable to begin to investigate further." [Emphasis added]*

233. As to the degree of detail, in *Haward,* Lord Nicholls said that the claimant must know there was a real possibility the damage was caused by ("attributable to") the acts or omissions alleged to constitute negligence; in that case the giving of flawed advice. He said that:

" 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". [paragraph 21] [Emphasis added]

234. Counsel for the defendants acknowledge that their Lordships in *Haward* did not all speak with one voice however they submit that Lord Nicholls dicta is the most authoritative and referred to by Lord Wilson in *AB v Ministry of Defence [2012]UKSC 9* and by Tomlinson LJ in *Jacobs v Sesame*.

235. Counsel for the claimants referred to the dicta of Lord Wilson in *AB v Ministry of Defence* on section 14 of the Act at paragraphs 12 and 13:

"the investigation upon which the claimant should reasonably embark is into whether in law he has a valid claim …and if so, how that claim can be established in court.… The focus is upon the moment when it is reasonable for the claimant to embark on such an investigation. It is possible that the claimant will take legal advice before his belief is held with sufficient confidence and carry sufficient substance to make it reasonable him to do so...

[13]…From the fact that the claimant may well need to consult experts after he has acquired the requisite knowledge, it in no way follows that he will have acquired such knowledge by the date when he first consults an expert…"

236. Counsel for the defendants referred me to the Court of Appeal decision in *Jacobs v Sesame [2014] EWCA Civ 1410*. In that case the defendant, a financial adviser, advised the claimant to invest £65,000 in a bond. Its representative led her to believe that there was no chance of her receiving less than £65,000 when the investment period elapsed. The claimant surrendered the bond in February 2012 when its value was approximately £53,000. On the issue of limitation it was asserted that the claimant had sufficient knowledge to bring a claim in July 2009. The claimant contended that it was not until 2012 that she had known either that she had suffered a loss or that she might have received inappropriate advice.

The Court of Appeal held that the starting point of any enquiry whether a claimant could rely upon the special time limit made available by section 14A, was to identify the damage in respect of which indemnity was claimed [paragraph 29 of the judgment].

Damage

237. Following *Jacobs v Sesame*, the starting point of the enquiry is therefore to identify the damage.

238. The pleaded case is that the first defendant acting through Mr Dallimore assured the claimants that the charity shell schemes would work effectively and participation would reduce their tax liability[paragraph 19 POC/paragraph 8.4 of Reply]. Mr Halsall in his witness statement at paragraph 58 says that the scheme had two elements firstly the assurance that the scheme would be successful and secondly that if the scheme did not deliver as promised Champion would indemnify against any shortfall. Mr Higgins' letter refers to "*a 100% assurance that our tax liability will be reduced as a result of this investment*". Therefore applying the principles referred to above, the "damage" in this case, in my view, is the failure of the scheme to work "effectively". I do not accept on the evidence that the case can be recast as advice that the scheme would work "substantially" or in "large part".

Knowledge

239. Counsel for the claimants submitted that the claimants had to have sufficient knowledge that they had suffered a loss by reason of participation and that they suffered such a loss by reason that the advice might be flawed. Counsel submits that in respect of the charity shell companies the claimants could not have knowledge of the material facts about the damage until they had knowledge of the decision in *Green v Revenue and Customs Commissioners* in April 2014. The claimants relied throughout on the advice of the defendants and of Mr Dallimore who up to and after April 2014 were continually reassuring the claimants that the Revenue was

misguided and they would achieve substantial tax mitigation. It was not until after that decision that it became reasonable for the claimants to seek expert advice from any third party.

240. Counsel for the defendants submitted that once the claimants knew the charity shell schemes gave them something less they knew the investments were defective. Mr Stanton was expecting 100%. His evidence was that Mr Dallimore was guaranteeing that the schemes would work. It was put to him when you say "work" by that you mean would working in obtaining for you the tax relief in what, the precise amount? Mr Stanton replied:

*"yes the tax-free relief that was promised, yes" [*Day 1/138]

241. As set out above, the authorities are clear that knowledge does not mean knowing for certain, the claimant must know enough for it to be reasonable to begin to investigate further. Further the damage is not, as counsel submitted, a failure to achieve "substantial" tax mitigation but the failure to deliver an effective scheme. Finally the test is not whether the claimants relied on the continuing assurances of Mr Dallimore but "*whether they knew enough for it to be reasonable to begin to investigate further*." The judgment of Lord Wilson in *AB v Ministry of Defence* does not assist the claimants. Lord Wilson quoted with approval Lord Donaldson in *Halford v Brookes* and confirmed that the test was whether the belief was held "*with sufficient confidence to justify embarking on the preliminaries to the issue of a writ…"* the focus being upon "*the moment when it is reasonable for the claimant to embark on such an investigation".* He noted that it was possible that the claimant will take legal advice before his belief is held with sufficient confidence but the date upon which the claimant first consulted an expert is not on its own likely to assist the court in determining whether by then he had the requisite knowledge.

242. The judgment in Jacobs dealt with the issue as follows at paragraph 31:

" The judge found that in July 2009 Mrs Jacobs realised that the investment product had a defect in that it was concentrated in one market sector. As I have already observed the judge might equally have found that she also realised that it was subject to much greater volatility than she expected or was suitable.

[32] It may be that Mrs Jacobs' irrational belief that she would recover £65,000 after five years is sufficient to demonstrate that she had not in July 2009 appreciated that she had suffered damage.… I am not entirely persuaded by that argument, as Mrs Jacobs by July 2009 realised that she had a flawed product and at the very least by then realised that it was an intrinsic feature of the product that she might at the end of five years recover nothing more than £65,000 whereas had she put her money on deposit she could have expected interest on top. She also realised that the product was of greater susceptibility to market fluctuation than she had either appreciated or than was suitable for her needs,… She was at risk of recovering an amount reflecting market volatility much greater than in the range plus or minus 10% which she expected. It is difficult to see why on orthodox principles Mrs Jacobs did not suffer loss from the moment she invested in a product which, in relation to her requirements, was defective."" [Emphasis added]

243. I accept the submission of counsel for the claimants that in *Jacobs* it was not necessary to resolve the question of actual knowledge because the court held that Mrs Jacobs had acquired the relevant constructive knowledge. However I do not accept

the submission that in effect, an inference can be drawn from dicta in *Jacobs* that if the claimant had gone back to the defendant and been provided with advice or reassurances the position on actual knowledge could be affected. Counsel referred to paragraph 33 of the judgment where Tomlinson LJ said that there were two things which Mrs Jacobs might reasonably have been expected to do, one of those being to ask in her conversation with Legal & General whether she was guaranteed to recover her investment. The court said that the facts were ascertainable by Mrs Jacobs by asking the direct question or by looking at the product literature. However this paragraph was dealing with whether Mrs Jacobs had acquired the relevant constructive knowledge in the sense that she might reasonably have been expected to learn that she had suffered damage and not, as here, with actual knowledge. In my view therefore *Jacobs* is not authority for the proposition that actual knowledge can be affected by reassurances from the defendant.

244. In closing submissions counsel for the defendants referred to paragraph 27 of the judgment where Tomlinson LJ refers to Arden LJ in *Gravgaard v Aldridge & Brownlee*, as to the objective nature of the test that falls to be applied. Again I note that at this point in the judgment Tomlinson LJ was dealing with the proper approach to constructive knowledge under subsection (10). I accept however that the wording of subsection (7) defines "the material facts" about the damage as 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.

245. The question is whether there was something which would reasonably cause the claimants to start asking questions about the advice they had been given, not when they first knew they might have a claim for damages but when each of them first knew enough to justify setting about investigating the possibility that Mr Dallimore's advice was defective. The claimants have the burden of proving that this date was after 5 March 2012.

Evidence

246. On 4 December 2009 Mr Dallimore sent an email to all shareholders in Chartersea including Mr Higgins enclosing letters to the Revenue. He wrote:

"there is basically nothing further they need nor can ask. Our view remains that the price is the price.…

The purpose of the letter… is simply to bring out a dialogue on a without prejudice basis regarding a deal to settle without going before the tribunal. They will not want to go to the tribunal and we may be able to draw a modest discount offer from him to settle."

247. The exchange in December 2009 referred to above resulted in Mr Dallimore emailing Mr Higgins, copied to Mr Halsall and Mr Stanton, on 4 December 2009 saying that he continued to believe that tax relief was due in relation to the shares and the amount of relief claimed was correct.

"I gave no assurance regarding tax relief. I was and am still not able to give any assurance regarding the amount of relief that may or may not be available. My personal view is and always has been that tax relief is due in relation to the shares gifted following the flotation and the amount of relief you have claimed is in my view correct. That said I'm not able to guarantee that… For the record I do not agree I

have any personal liability in this matter nor I might add do Champion" [M/3667) [Emphasis added]

He also stated:

"in the circumstances and given your comments I think it is more appropriate if I do not correspond with you directly and instead I provide updates to Champion who can then discuss matters with you." [Emphasis added]

248. Mr Higgins responded on 7 December 2009 [M/3670]:

"of course I don't think you are being discourteous and I understand the thinking behind your decision not to communicate with me further. However the assurance/indemnity re guaranteed tax relief etc is recorded in writing from me to you. I'm sure as it was given by you whilst director of Champions they will be liable but I thought I should raise it with you as you know as well as I how people can be evasive when things go wrong." [Emphasis added]

249. On 7 December 2009 Mr Halsall wrote to Mr Thompson [M/3671]. The letter is headed "Dispute with Revenue". The material section reads:

"I am very concerned the way the matters are progressing regarding obtaining the tax relief from the Revenue in relation to the Shell companies.

As you are aware these matters have been going on for a number of years and we seem to be making very little progress. The history of the matter is that Geoff Dallimore, when he was employed by Champions, came to see us and clearly on behalf of Champions persuaded us to embark on this tax relief scheme.…

Myself and my Partners are therefore not really happy in Geoff carrying out the negotiations with the Revenue and we suggest that a person is appointed by Champions to be a representative…

May I suggest as a precaution that you do notify your Professional Indemnity Insurers, as clearly if we do not obtain the tax relief then there will certainly be a claim against Champions." [emphasis added]

Mr Stanton's evidence (paragraph 170 of his witness statement) is that he was not aware of Mr Halsall sending that letter and only became aware of it many years later. Mr Halsall's evidence (paragraph 145 of his witness statement) is that he wrote the letter without discussing it with any of the partners and he did not copy them into the letter.

250. On 6 July 2010 Mr Halsall wrote to Mr Robert Thompson noting that Champion had not responded to his letter and suggesting a meeting with himself, Mr Stanton and Mr Higgins so that he could receive "*a full update on all the charity shells*." [M/3676]

Mr Halsall's evidence was that he did not discuss the letter of December 2009 with his partners but he accepted that he would have told Mr Higgins and Mr Stanton at that point in July when he suggested a meeting. [Day 5/94]

251. On 21 June 2011 Mr Halsall wrote to Mr Robert Thompson [M/3693]. The material part reads:

"the Partners have decided that we would like you to come to our office to go through each and every tax avoidance scheme with up-to-date prognosis on each scheme together with an estimate of how long it will take for matters to be concluded.

... Please set out the full schedule of what would be owed to the Revenue if the schemes were not accepted....

At the meeting please also confirm that you have informed your Professional Indemnity Insurers of a possibility of a claim against yourselves in relation to the matter. We hope it doesn't come to this but please confirm that you are insured." [emphasis added]

252. On 27 January 2011 the Revenue sent a letter to Champion concerning Mr Stanton's gift aid claims. [M/3690] The letter was copied to Mr Stanton and the material part of the letter reads:

"I am writing to give you a general update regarding your client's gift of shares to charity. As you may be aware, there are a significant number of other company shares that have been subject to these enquiries, involving many individuals and over a number of years....

Due to the number of companies that have been involved we have identified a number to take forward as "lead" cases. HMRC has commissioned independent valuation experts to prepare valuation report with respect to a number of these companies. The valuations obtained to date lend credence to HMRC's belief that the shares may have been significantly overvalued at the time they were brought to the market.

To date, HMRC has not been able to reach any agreement regarding valuation with the parties involved in the flotation of these companies. Consequently, we have recently issued closure notices in respect of one of the lead companies. We have received a number of appeals against these notices and it is anticipated that ultimately it will be for the tax tribunal to decide matters, although HMRC is willing to negotiate if circumstances allow."

253. As to Mr Higgins, he purchased tax certificates initially in October 2011 and then again in 2012 and 2014. The evidence of Mr Alfred Thompson of Lonsdale and Marsh was as follows [paragraphs 11 - 13 of his witness statement]:

"I am a naturally cautious person and I did not share Bernard's confidence in an ultimately successful outcome. Bernard told me he had been repeatedly assured by Champion that ultimately the schemes would be successful and the reason why matters had not been finalised with the Revenue was that the Revenue had continually procrastinated and dragged matters out over a period of years.

As I have said, I was not so sure about this. I spent quite a lot of time persuading Bernard that it would be a very good idea to "hedge" his position with the Revenue by buying tax reserve certificates. This would help limit the amount of interest that could be claimed if any additional tax became due. Bernard was reluctant to take this step as he believed it was unnecessary and that the tax planning sold to him by Champion would be successful. However, eventually I managed to persuade him to buy a tax reserve certificate in the sum of £500,000 and he did that on 19 October 2011.

As I have mentioned above, Bernard was anything but keen to buy that certificate. One of the reasons that I used to persuade him was that by this time interest rates

were low. Bernard had the cash available and the purchase would not result in a material loss of income so he ultimately gave into my advice and purchased the certificate, although this was for a lesser amount than I recommended." [Emphasis added]

254. In re-examination Mr Thompson was asked about Mr Higgins' reaction to the question of taking out tax certificates and Mr Thompson replied:

"that he saw no reason to do it because he was confident from the information given him by Champion that there would be no liability." [Emphasis added]

255. When asked why he took out tax certificates in October 2011, Mr Thompson responded:

"I can't give you a definite answer. I can only think that, and this might sound big headed, that he was pleasing me to do it because I was so insistent that I felt it was… I think he wanted to comply with my recommendation".

Mr Thompson said the same reason applied in relation to the certificates that he took out in July 2012 but that by 2014 when Mr Higgins took out tax certificates the initiative came from Mr Higgins. [Day 5/168 - 169]

256. On 27 January 2012 Mr Stanton emailed Mr Thompson [M/3759]:

"Bob, Mike was showing myself and Bernard his charity shells summary. Could you email mine to me and Bernard''s to him?"

Mr Thompson responded on 1 February 2012:

"… Yes we will refresh the schedules for the other partners, although I would hasten to add that we do not believe it will come to a position of all the tax having to be repaid – HMRC have conceded that they have a value – just not enough at this time and they have justified their valuation as opposed to that independently placed on the shares by the market." [Emphasis added]

Submissions

257. Counsel for the claimants submitted that the suggestion in Mr Dallimore's email of 4 December 2009 of a settlement with the Revenue at a "modest discount" was effectively a "nuisance offer" and did not indicate the likelihood of substantial loss and would not indicate that any advice given had been flawed. As to Mr Halsall's letters counsel for the claimants submitted that the defendants did not understand them to be an intimation of the claim, the motive for the letter was frustration with the delay, Mr Halsall took no steps to begin investigating the possibility of bringing a claim, the letters are from Mr Halsall alone.

258. Counsel for the claimants further submitted that there is no indication that the defendants did inform the insurers as a result of Mr Halsall's letters. Further if they had told their insurers, it is likely that communications with the claimants would have ceased but that did not happen and the claimants were not told to go elsewhere. Further the claimants were not told to take out tax certificates.

259. Counsel for the defendants submits that before 6 March 2012 the claimants knew that the guarantee was being denied, that they might obtain less than 100 percent of the claim for relief and that relief was not being accepted as a formality. Further counsel submitted that the assertions that Mr Halsall wrote his letter in December

2009 without consulting the other claimants and that they did not know about the letter until proceedings started are not credible. Counsel submitted that the partners discussed the tax planning among themselves at nearly every stage and the December 2009 letter repeatedly use the terms “we” and “us”.

Discussion

260. In his witness statement at paragraph 45, Mr Halsall said that when he wrote the letter in December 2009 he was extremely angry at Mr Dallimore for his email of 4 December to Mr Higgins. He said he suspected that he dictated the letter "*in something of a temper*" and as an "*immediate reaction*" to reading what Mr Dallimore had said about the guarantee. He said he did not discuss it with any of the partners and felt entitled, as the senior partner, to speak on behalf of the other partners and express the fact they were not really happy in Mr Dallimore carrying on the negotiations with the Revenue. He said in relation to the reference to the professional indemnity insurers that it was not his intention to indicate a claim against Champion at that stage. He said he was angry at the "*frankly outrageous position*" being taken by Mr Dallimore but he remained confident in the assurances that he had been given both by Mr Dallimore and Mr Thompson. He said he wanted to raise the point to put some pressure on Mr Thompson and pass that pressure on to Mr Dallimore and Miss Burns in terms of getting a resolution. He said that following the letter he believed he had a conversation with Bob Thompson who said a response would be forthcoming although none was.

261. It seems to me that following Mr Dallimore's email in December 2009, the claimants were aware that not only were negotiations with the Revenue protracted but there was now a suggestion of either going to a tribunal or having to agree a settlement. As discussed above, it is not relevant whether the proposed discount was at a level which could be described as "nuisance" level. The relevance of the correspondence is the inference which can be drawn that the success of the scheme was no longer assured. The test, in the circumstances of this case, as to whether the claimants had the requisite level of knowledge is not whether there was a likelihood of "substantial loss" at this point but whether the claimants knew enough to justify setting about investigating the possibility that Mr Dallimore's advice was defective.

262. I accept Mr Halsall's evidence that he did not intend to bring a claim at that point and was merely reacting to Mr Dallimore's email and seeking to put pressure on Champion to resolve the issue with the Revenue. That this was his position is in my view supported by the evidence that he did not follow up on his letter of December 2009 until he sent a letter on 6 July 2010 to Mr Robert Thompson noting that Champion had not responded to his letter and suggesting a meeting. However even accepting the evidence that his suggestion of notifying insurers did not mean that he intended at that point to lodge a claim, it is evidence which supports an inference that he had sufficient knowledge at that point that a reasonable person would consider it sufficiently serious to investigate the possibility that the advice was flawed.

263. I accept that there is no evidence as to whether the defendants did in fact inform their insurers at that point but given the confidence of Mr Dallimore, it seems to me that this does not assist on the issue of knowledge of the claimants. There is no doubt that Mr Dallimore is and remains confident about the charity shell schemes and this confidence he continued to express to the claimants. The evidence is that Mr Dallimore continued to give reassurance that the scheme would be effective and

continues to maintain that the scheme has been effective. It was put to Mr Dallimore in cross-examination:

"that view, that confidence, that level of confidence, never changed, did it up until the decision in Green? And indeed possibly after Green?"

Mr Dallimore replied *"I still believe that the charity shells will succeed."*

264. There is no doubt on the evidence of Mr Dallimore and other witnesses that Mr Dallimore continued to give assurances that the charity shells would succeed. I note however that in the email exchange referred to above Mr Dallimore did take the view that it was no longer appropriate to correspond directly with the claimants.

265. Even if one were to conclude that Mr Halsall merely had a "suspicion" that the scheme was flawed when he sent the letter in 2009, the matter is beyond doubt in my view by the time he sent the letter of 21 June 2011 set out above. This letter as well as indicating the possibility of a claim by the statement seeking confirmation of notification to the insurers, also clearly states that Mr Halsall is seeking details of what would be owed "*if the schemes were not accepted."*

266. Therefore I find that for the purposes of section 14A Mr Halsall had actual knowledge by 21 June 2011 if not before. By this date, notwithstanding the defendants continuing assurances, Mr Halsall knew enough to justify setting about investigating the possibility that Mr Dallimore's advice was defective.

267. Turning then to the position of Mr Stanton, whether or not Mr Stanton was aware of Mr Halsall's letter in 2009, Mr Stanton was copied in on the email from Mr Dallimore to Mr Higgins of 4 December 2009. In that email Mr Dallimore clearly said:

" My personal view is and always has been that tax relief is due in relation to the shares gifted following the flotation and the amount of relief you have claimed is in my view correct. That said I'm not able to guarantee that…"

It seems to me therefore that Mr Stanton knew at that point that Mr Dallimore's original "100% assurance" that the tax scheme would succeed was no longer the position.

268. At the point at which Mr Stanton received the Revenue's letter of 27 January 2011, he was aware that charity shells were under investigation by the Revenue and in particular the issue of valuation was being disputed by the Revenue. In the circumstances the evidence establishes that at that point he knew that Mr Dallimore himself no longer was giving a 100% assurance and the Revenue were investigating schemes. Accordingly in my view for the purposes of limitation under section 14A, by that date if not before, he had knowledge of the material facts, that is such facts about the damage as would lead a reasonable person to consider it sufficiently serious to justify instituting proceedings. It was not knowledge in the sense of knowing for certain but he knew enough for it to be reasonable to begin to investigate further.

269. Although I accept the evidence of Mr Thompson concerning the tax certificates and in particular that Mr Higgins was confident from the information given to him by Champion that there would be no liability and an "ultimately successful outcome", the question is whether for the purposes of section 14A the "starting date" for calculating the period of limitation was prior to 6 March 2012. Although Mr Higgins

may have believed that ultimately the tax relief would be obtained, the purpose of the section is to determine the period of time within which a claimant is required to start proceedings. Given the exchanges which occurred in December 2009 set out above in which Mr Dallimore is suggesting it is no longer appropriate to communicate directly and Mr Higgins is clearly setting down a marker saying that "*any concession re tax will be your personal responsibility*" and referring to people being evasive "*when things go wrong"* Mr Higgins knew enough at that point for it to be reasonable to begin to investigate further. He knew from those emails that there were negotiations with the Revenue over the schemes, that there was a suggestion that there would have to be a discount in order to settle and avoid going to a tribunal and therefore he "knew enough" to justify embarking on the preliminaries. Even if I were wrong on this, taking into account the evidence of what was happening prior to March 2012 in particular the proposed meeting in June/July 2011 and the preparation of the schedules in February 2012 showing the tax liabilities if the scheme did not succeed, Mr Higgins knew enough for it to be reasonable to investigate further.

270. As to whether the claimants had knowledge of the identity of the relevant defendant for the purposes of section 14A (a matter of which they assert they were unaware) Mr Higgins addressed his original letter in November 2003 to Champion Consulting and Mr Dallimore's evidence was that when he met the claimants he was wearing a CCL hat and would have given them a CCL business card. The evidence of the Champion witnesses was that it was a small tax team, distinct from the accountancy practice and on the evidence it is clear that the claimants would in my view have known that they were dealing with CCL in relation to tax matters.

271. In the light of my conclusions on actual knowledge is not necessary for me to consider constructive knowledge under section 14 A (10) of the Act and in any event constructive knowledge was not pleaded in relation to the charity shells.

Conclusion

272. Accordingly in my view on the evidence and for the reasons set out above, each of Mr Halsall, Mr Stanton and Mr Higgins' estate have failed to discharge the burden of proof on them that each of their claims in respect of the charity shells was brought within 3 years of the starting date for the purposes of section 14A of the Limitation Act and their claims in respect of the charity shells must therefore fail.

Charity shells: Clause 13 of the terms of business

273. Since I have found against the claimants on the issue of limitation under section 2 and section 14A of the Limitation Act, it is not necessary for me to decide whether the claimants' claims are time barred in relation to the charity shells pursuant to the time limitation period contained in Clause 13 of the defendant's' terms of business. However in case the matter were to go further, I will deal with clause 13 of the defendants' terms of business.

274. Clause 13 provides:

"any claim for breach of contract, breach of duty or fault of negligence or otherwise whatsoever arising out of or in connection with this engagement shall be brought against us within six years of the act or omission alleged to have caused the loss in question."

The claimants' primary case in relation to clause 13 is that the terms and conditions were not incorporated into the retainer for the charity shells. The terms and conditions were post-contractual documents. Counsel for the claimant submitted [paragraph 69.3] that there was a single contract made prior to the receipt of the retainer letters.

275. I do not accept that there was a single contract for the charity shells. It seems likely on the evidence that there was an engagement letter for each of the charity shells; although I accept that engagement letters have not been located in respect of all of the shells and some were unsigned, the significance of this is that it supports an inference that there were separate contracts for each shell. Having made the initial investment in a shell, the claimants had no obligation to enter into further charity shell schemes and although the engagement letters are largely identical there were variations: for example in relation to Arklow Engineering [L/3365] the responsibility for providing investment advice was said to be the responsibility of Trafalgar Wealth Management Limited and Trafalgar Wealth Management was receiving a placing commission of 3%; in relation to fees there were also variations, for example in Crucial Plan 50% of the aggregate fees payable were to be billed in the month listing occurred with the balance of the fees being billed in around October 2004. [K/3173] By contrast in relation to Solar Watch the fees were billed in the month that Solar Watch listed [L/3321].

276. As to identifying the parties to the contract and the reference to "us" in Clause 13, there are inconsistencies both within the terms of the engagement letter, between the letter and the terms of business and in the notepaper used for the various engagement letters. For example the engagement letter sent on 22 July 2003 to Mr Halsall concerning Readybuy has the name "Champion Consulting Ltd" at the bottom left-hand corner of the notepaper. [K/3014] Clause 1.2 of the engagement letter however refers to Champion Chartered Accountants. It states:

"we will not advise you on the suitability of any investment projects. The suitability of investments is the responsibility of Champion Financial Management or your financial adviser and not Champion Chartered Accountants.

However the first sentence of the terms of business refers to Champion Consulting Limited stating:

"the following terms of business apply to engagements accepted by Champion Consulting Ltd".

In my view therefore as a matter of construction it is clear from this opening sentence that the terms of business are dealing with engagements with CCL and the reference to "us" in Clause 13 of the terms of business is a reference to Champion Consulting Limited. This is consistent with the factual matrix: the evidence is that CCL was the arm of Champion which provided tax advisory services and Mr Dallimore was acting for CCL when he advised the claimants in respect of the charity shell schemes.

277. Counsel for the claimants submits that the fact that the claimants routinely deleted provisions of the terms of business when returning them to the defendants demonstrated an intention on the part of the claimants not to be bound by the terms which was accepted by the defendants in that they accepted such deletions without comment and gave rise to a course of dealings whereby the parties indicated an intention not to contract on such terms.

278. However most of the terms of business have been located and were signed and only on two occasions would it appear that clause 13 was excluded: that was in relation to Crucial Plan by Mr Halsall and Mr Higgins. The Crucial Plan terms of business for Mr Stanton were unsigned but reference to amendments is made in the body of the letter and therefore in effect in my view the terms of business were incorporated for the Crucial Plan contract with Mr Stanton and Clause 13 was not deleted in this case. Where the signed documents have been located and the claimants have signed the documents containing contractual terms then those terms were incorporated into their contracts even if they did not read them: *L'Estrange v Graucob* [1934] 2 KB 934. A course of dealing argument fails against a signed document except in the case of estoppel: *McCutcheon v David MacBrayne Ltd*. [1964] 1 WLR 125,234.

279. As to the position where the terms of business have not been located, the claimants' account of being provided with the documentation [reply 8.4] does not establish that clause 13 was incorporated for each charity shell company. The test for incorporation by course of dealing is whether the parties have "*consistently on former and similar occasions adopted a particular course of dealing"* and is a question of fact and degree. Counsel for the defendants refers to the authority of *Lisnave Estaleiros Navais SA and Chemikalien Seetransport GmbH* [2013] EWHC 338 at 24. In the case of Mr Halsall counsel for the defendants submitted that the only relevant retainer for which no signed terms and conditions can be located is Bray Industries and prior to that he signed Storyland, Mount York and Arklow incorporating clause 13. However although Mr Halsall makes no claim in respect of his investments in Readybuy, Readymarket and Readymatch in establishing a course of dealing it seems to me that one has to look not only at the companies which are the subject of the claim but the entire course of dealing. The terms of business were unsigned for Readybuy and Readymarket, they have not been located for Readymatch and in Crucial plan clause 13 was deleted. On this basis I do not accept that it has been established on the evidence that there was a course of dealing that clause 13 was incorporated into the contracts such that it is established that clause 13 is incorporated into the contract for Bray Industries. In relation to Mr McDermott and Mr Higgins the missing documents are for Storyland and Readymatch and no course of dealing argument is advanced. In relation to Mr Stanton the unsigned terms of business are for Readymatch and Bray Industries. His oral evidence was that he

presumed that he signed and sent back an amended version of the engagement letter for Readymatch. [Day 2/122] However in Crucial plan where Mr Stanton amended the terms of business the clauses which he deleted were clauses 9 – 12 dealing with the quantum of liability and not clause 13 dealing with the period for making a claim and accordingly it is to be inferred that the amendments to which he referred related to the quantum of liability and given that no deletion was made in the case of Readybuy and Readymarket, it seems to me therefore that the course of dealing can be said to have arisen in relation to Readymatch and to Bray.

280. Turning then to the meaning of Clause 13. I was referred to *Arnold v Britton* for the principles of the approach to contractual interpretation and I invited supplemental submissions to address the recent decision in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 which I have considered. In *Arnold v Britton* the court said that the court is concerned to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".*

281. In paragraph 9 and 10 of the judgment in *Wood* Lord Hodge JSC said:

"... I do not accept the proposition that the Arnold case involved a recalibration of the approach summarised in the Rainy Sky case.

The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on the parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…

[13] Textualism and contextualism are not conflicting paradigms…the judge when interpreting any contract can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement…some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance"

282. Counsel for the defendants submits that in construing the clause one does not "search for uncertainty": paragraph 18 of Lord Neuberger's judgment in *Arnold v Britton* reads:

"... When it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning…."

283. Counsel further submits that this approach applies as well to exemption/exclusion clauses relying on *Whitecap Leisure Ltd v John H Rundle [2008] CP Rep 31*. At paragraph 20 of the judgment of the Court of Appeal Moore-Bick LJ said:

"one can find in the authorities many statements to the effect that exclusion clauses must be clear and unambiguous if they are to operate effectively, many of which date from the period when courts took a more literal approach to the construction of commercial documents in general than is now generally the case. The modern approach to construction, which applies as much to exclusion and limitation clauses as to other contractual terms, is to ascertain the objective intention of the parties from the words used and the context in which they are found, including the document as a whole and the background to it:… However, in cases where there is uncertainty about the parties' intention and therefore about the meaning of the clause, such uncertainty will be resolved against the person relying on the clause and the more significant the departure is said to be from what are accepted to be the obligations ordinarily assumed under a contract of the kind in question, the more difficult it will be to persuade the court that the parties intended that result."

284. Counsel for the defendants therefore submits that "any claim for negligence" is caught by clause 13. Counsel for the defendants rejects the suggestion that clause 13 is merely declaratory of the general position and submits that there would be no purpose in including it if it was merely declaratory. Counsel for the defendants submits that there is no need for clause 13 expressly to exclude the operation of section 14A in order to exclude its operation and relies on *Dennard v Pricewaterhouse Coopers LLP [2010] EWHC 812 (CH) 85* as an example of a case where the court upheld a limitation clause which was much more restrictive than the present one and did not expressly exclude section 14A.

285. Counsel for the claimants submit that clause 13 operates as an exclusion clause and falls to be construed as such. Counsel therefore submits that the approach is as summarised by Moore Bick LJ in *Stocznia Gydnia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75*. That case contained a clause which provided:

"the purchaser shall not be entitled to claim any other compensation and the Seller shall not be liable for any other compensation for damages sustained by reason of events set out in this article and/or direct consequence of such events other than liquidated damages specified in this article."

At paragraph 21 of the judgment Moore-Bick LJ considered whether the relevant clause excluded liability for damages for loss of bargain. He said:

"… There is no reason, of course, why the parties could not have agreed that Gearbox should have no right to recover damages for loss of bargain in those circumstances, but it is worth bearing in mind what the consequences of doing so would be.… The fact that the contract would, if [counsel] is right, be so unbalanced in relation to the consequences of termination for breach necessarily causes one to question whether that can have been what the parties intended."

Moore Bick LJ went on to refer to Lord Diplock in *Modern Engineering (Bristol) Ltd* where he said:

"one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law and clear express words must be used in order to rebut this presumption"

And at paragraph 23:

"[counsel] submitted that since that decision the approach of the courts to the construction of exclusion clauses has developed in favour of a greater willingness to give them the meaning which the words used would naturally bear. I would accept that, but I would not accept his suggestion that as the law stands today there are two competing approaches struggling for supremacy: one requiring clear express words, the other favouring the natural meaning of the words used. It is important to remember that any clause in a contract must be construed in the context in which one finds it, both the immediate context of the other terms and the wider context of the transaction as a whole. The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that was intended. The more valuable the right, the clearer the language will need to be." [emphasis added]

286. Counsel for the claimants submits that the right to rely on section 14A is a highly valuable right and only clear words will suffice to exclude an entitlement to rely upon it. In relation to *Dennard* counsel for the claimants submit that the meaning of the clause was not in issue so it does not assist or bind the court.

287. In *Dennard* there was a limitation period in the terms and conditions which read as follows:

"commencement of legal proceedings -you accept and acknowledge that any legal proceedings arising from or in connection with the Engagement (or any variation or addition thereto) must be commenced within two years from the date when you became aware of or ought to have become aware of the facts which give rise to our alleged liability and in any event not later than four years after any alleged breach of contract or act of negligence or commission of any other tort"

The issue for the court in *Dennard* was, if the terms of the engagement letter applied to the retainer, whether the time limitation satisfied the requirement of reasonableness. The issue became irrelevant in the light of the findings in the judgment but Vos J did express his views on the position under the Unfair Contract Terms Act. I accept therefore the submission of counsel for the claimants that the case is of no assistance on the issue of the construction of the limitation period in clause 13.

288. I reject however the submission of counsel for the claimants that clause 13 is intended to be declaratory of the law. There is no indication on its face that it is intended to be a summary of the relevant legislation with the additional provisions that would be thereby incorporated.

289. Counsel for the claimants submitted that the terms of clause 13 are relatively unsophisticated, ambiguous and have not been drafted by lawyers acting for both parties and therefore greater importance should be given to context and business common sense.

290. Whilst I accept that where there are rival meanings such that the court can give weight to the implications of rival constructions by reaching a view as to which

construction is more consistent with business common sense: paragraph 11 of *Wood*; the court also pointed out in that paragraph of the judgment that the court must be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest.

291. Clause 13 is not on its face ambiguous and the factual matrix is that although they were standard terms, they were terms which the parties could and did amend (by deletion) in some of the charity shells. They were not drafted by lawyers acting for both parties but the claimants are litigation solicitors and therefore would have been well aware of the issue of limitation and the law relating thereto. Looking therefore at the language of the clause and the factual matrix I do not accept that there is any uncertainty. *Whitecap* is authority for the proposition that an exclusion clause must be clear and unambiguous and where there is uncertainty as to intention it should be resolved against the person relying on the clause. In my view there is no uncertainty either on the language or on the factual matrix. Against the background referred to above I am satisfied that objectively the claimants intended to abandon their rights in respect of section 14A even if with hindsight they may have taken a different course.

292. For the reasons set out above therefore in my view clause 13 does not permit for any extension of the limitation period by reference to section 14A and the period of six years provided for in clause 13 for any claim in negligence operates in respect of those charity shells for which the engagement letter was located, signed and clause 13 not deleted and in respect of those charity shells for which, as discussed above, clause 13 was incorporated through a course of dealing.

UCTA

293. It is accepted that clause 13 is subject to the requirement of reasonableness in section 11 of the Unfair Contract Terms Act since it purports to exclude liability for negligence and was contained within the defendants' written standard terms of business and purports to exclude or restrict liability for breach of contract.

The requirement of reasonableness as set out in section 11 is that the term "*shall have been a fair and reasonable one to be included having regard to the circumstances which were, ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*".

By virtue of subsection 5 it is for the defendant to show that a contract term satisfies the requirement of reasonableness.

294. Counsel for the claimants refers to the guidance provided by Potter LJ in *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* from which I note the following as of relevance in the circumstances of this case:

- the way in which the relevant conditions came into being and are used generally

- the five guidelines as to reasonableness set out in schedule 2 to the Act

- in relation to the question of equality of bargaining position the court will have regard not only to the question of whether the customer was obliged to use the services of the supplier but also to the question of how far it would have been practical and convenient to go elsewhere

- the question of reasonableness must be assessed having regard to the clause as a whole

- the reality of the consent of the customers to the supplier's clause will be a significant consideration

295. Counsel for the claimants submitted that the defendants have failed to discharge the onus on them for the following reasons: the claimants were in reality consumers, they were unsophisticated and lacking in experience of tax planning specialist investments. Counsel also submits that there is no evidence as to the availability of similar services and the claimants demonstrated that they were not content to contract on the basis of such terms.

296. I accept that the issue of reasonableness under UCTA is fact sensitive and the conclusions in *Dennard* on this issue were obiter. I have regard to the factors which appear to be relevant from schedule 2.

297. I have no evidence as to whether or not the claimants could have entered into a similar contract with other persons. As to equality of bargaining power, it was open to the claimants to make the appropriate deletions as they did in the case of Crucial Plan but they failed to do so. The fact that Mr Halsall and Mr Higgins did so in Crucial Plan without objection from the defendants is evidence in my view that it was open to them to negotiate the contract.

298. I reject the submissions as to unsophistication and lack of experience on the part of the claimants. The claimants were successful litigation solicitors and it can be inferred were more than capable of understanding the terms of business and the significance of clause 13. The fact that the contract was in relation to a tax planning scheme is of no relevance to the reasonableness of clause 13 which is dealing with limitation and not peculiar to tax schemes.

299. In my view for the reasons set out above, clause 13 satisfies the requirement of reasonableness under UCTA.

Loss: Charity Shells

300. In the light of my findings on limitation in relation to the charity shells, I do not have to decide the issue of loss. However for completeness I will note some concerns in relation to the way in which the claimants' case on loss was advanced in closing submissions and in particular the defendants' submissions that the claimants have not proved their case on loss.

301. I raised with counsel for the claimants in the course of closing submissions, that it seemed to me that the way in which the claimants put their case on loss changed in the course of the trial. In opening submissions counsel for the claimants advanced the claim for an indemnity not liquidated damages on the basis that the claimants' schedule of loss was the "best figures the claimants could come up with" in terms of what they thought was the reality of what might happen rather than the theoretical possibility based on the valuations from Ms Longworth. In closing submissions counsel for the claimants said that in relation to the charity shells, they put their case on the valuations provided by Ms Longworth. Counsel for the claimants submitted that this was due to the way that the evidence developed. He invited the court either to award the claimants damages on the basis of the values calculated by Ms Longworth or alternatively the higher figures claimed in the schedule of loss on the basis that the court could be satisfied on the figures that would be arrived at by the Revenue (although he noted a concern that this might tie the claimants' hands in their negotiations with the revenue). Finally he suggested that the claimants might seek an indemnity in respect of the losses suffered in respect of the shells.

302. Counsel for the defendants submitted that the claimants must be held to their pleaded case which does not have a claim for an indemnity and their pleaded case of loss was the schedule of loss dated 3 March 2017. That statement of losses is a claim based not on Ms Longworth's valuations but the figures calculated by Ernst & Young based on their negotiations with the Revenue.

303. Counsel for the defendants stressed that the claimants were given an opportunity to clarify their position prior to the trial and there has been no application to amend the pleadings to rely on the case by reference to Ms Longworth.

304. The position therefore is that no application to amend the particulars of claim to rely on the valuations of Ms Longworth as the basis of loss has been made. The schedule of loss is derived from the amounts which Ernst & Young believe reflect the likely settlement with the Revenue but no agreement has actually been entered into with the Revenue. Had it been necessary therefore to decide the matter, I would have invited further submissions on this point, including any application to amend the particulars of claim which the claimants might choose to make.

Scion film schemes

What representations did the defendants make to the claimants?

305. The claimant's case is that the defendants represented and advised the claimants that:

- the Scion film scheme was "robust" and that the prospects of its successfully mitigating the claimants' liability to tax were between 75% and 80%;

-Scion's tax mitigation schemes had a history of successful implementation;

-in the event of failure of the scheme, their losses would be limited to the sums invested in the Scion film scheme and could not exceed the amount of that investment. [Paragraph 34 POC]

306. The evidence of Mr Halsall is that he met Ms Molloy on 16 May 2007 (paragraph 92 his witness statement). At the meeting Ms Molloy described the Scion film scheme and following that meeting sent letters dated 21 May 2007 to Mr Halsall and Mr Stanton enclosing a summary note of the scheme. The material part of the letters are identical and read as follows:

"I have studied the Scion Structure, considered the opinion given by Rex Bretten QC and I believe this to be a <u>well structured</u> planning product.

There are no guarantees that any tax planning will not be challenged by H M Revenue & Customs and I am not able to offer such a guarantee.

However, Scion have <u>historically provided robust tax planning opportunities</u>. They are diligent in the construction of planning and are prepared to support their planning as far as the special commissioners if the Revenue challenges were so strong." [L/3526 and 3529] [emphasis added]

307. Following that letter, Mr Halsall's evidence is that he spoke to Karen Chadwick and raised the question of the "pros and cons" of the scheme with her (paragraph 99 of his witness statement). Ms Chadwick wrote to Mr Halsall on 24 May 2007 [L/3532], the material part of which read:

"… I attach for your attention a spreadsheet illustrating the net cash position depending on the gross investment made.…

I have also set out the worst-case scenario in the event that there is a challenge by HM Revenue and Customs and the loss relief claim is denied.…

Although there is no guarantee that the tax planning will not be challenged by HMRC, having studied the documentation from Scion, their opinion (and indeed the opinion of Rex Bretten QC) is that <u>it does appear to be extremely unlikely that any loss relief claim could be denied</u> because there is a genuine sole trader initiative and a genuine commercial loss will be incurred during the first period of trading.

I know Gill explained to you that the <u>planning appears to be well structured and robust…</u>"[emphasis added]

The schedule attached to the letter showed for an investment of £2 million, a cash investment of £420,000, tax relief in the first year of £680,000 and a net tax relief/saving of £260,000. The schedule also stated that if there was a successful

challenge by HMRC and the loss relief claim was denied the "*net position in cash terms could be as follows"*: net cost £420,000.

308. Mr Halsall then wrote to Ms Burns on 29 May 2007 [L/3535] referring to the two previous letters and asking:

"do you advise me to go ahead? What is the percentage chance of the Revenue accepting the scheme? Please let me know."

309. On 6 June 2007 Mr Thompson emailed Mr Stanton [L/3544] in which he stated that:

"This is a good product both robust from a tax point of view and importantly unlike earlier film products a clear tax mitigation not tax deferral vehicle…

We believe that this is a suitable vehicle and other products are thin on the ground in the current environment."

310. On 19 June 2007 Ms Molloy wrote to Mr Halsall [L/3545] sending him the defendants' summary in respect of Scion together with the Business plan. In this letter Ms Molloy stated that:

"Scion have historically provided robust tax planning opportunities."

311. On 22 June 2007 [L/3547] Ms Molloy wrote to Mr Halsall. She referred to a meeting that day and attached a schedule demonstrating his tax liability for 2007/08 if the Scion scheme was undertaken.

312. On 25 June 2007 Mr Halsall said he was prepared to undertake the Sion scheme. Ms Molloy responded that she would have the documentation prepared for signature at his offices on 29 June. [L/3549]

313. Following that meeting Mr Halsall wrote to Ms Molloy on 29 June 2007 stating:

"Thank you for coming over to the office. You assured me that the scheme has an 80% chance of succeeding and you were going to put this in writing…."

Ms Molloy responded on 2 July 2007:

"… As requested, I have set out below Champions considered opinion with regards to the Scion sole trader business opportunity that you are considering entering into.

As I made clear at our meeting;

I confirm that Champion believe there is a <u>75% chance</u> that the tax planning benefits of entering into the Sion business opportunity to trade as a sole trader in distribution rights <u>will succeed</u>.

Champion has considered the business opportunity being presented by Sion. We have studied counsel's opinion, discussed the product at length with scion and have considered the tax planning opportunities that this business opportunity provides. <u>We are able to recommend it based on these findings</u>."[emphasis added]

314. Mr Robert Thompson was at the meeting. He said he had a "*dim recollection*" of sitting in a meeting in Mr Halsall's office and he thought Mr Stanton was at the meeting although Mr Stanton's evidence was that he was not. He said he remembered Mr Halsall pressed Ms Molloy for a percentage of success. Mr Thompson said Ms

Molloy expressed a percentage "*in the 70 to 80% range"* but he couldn't be precise. He said it was a narrow range it could have been 70 to 75 or 70-80. [Day 11/130]

315. In her witness statement Ms Molloy said (at paragraph 23) that she told Mr Halsall at the meeting that there was around a "*70 – 75% chance".* In cross-examination she said she told him 75%. There was no explanation for this change in her evidence and no real explanation as to why she felt 75% was the appropriate figure rather than 80.

316. Mr Stanton's evidence is that Mr Halsall told him that he had been told by Ms Molloy that there was an 80% chance of the scheme succeeding.

Conclusion

317. I cannot see why Mr Halsall would deliberately put in a letter a figure which he knew to be false whilst expressly asking Ms Molloy to confirm the matter in writing. Mr Halsall's oral evidence was that he would not make up a figure and his recollection was 80%. However Mr Halsall's recollection in cross-examination was shown to be unreliable on a couple of occasions such as in relation to the deletions to the standard terms referred to above and there is no evidence that he subsequently disputed her statement of 75% set out in the letter. He said that even if it had been 75% that to him was a "*very, very good*" chance of succeeding. In my view, even if Ms Molloy did say 80% at the meeting, Mr Halsall then received her letter with the figure of 75% and therefore in terms of relying on a percentage that letter superseded any prior oral assurance which may have been given.

318. As to the potential losses it seems to me that the defendant did not advise that the claimant could lose more than their initial contribution. That is the clear inference in my view from the schedule provided by Ms Chadwick with her letter of 24 May 2007 where she states that she has set out "the "worst-case scenario" in the event there is a challenge and the loss relief claim is denied."

319. The evidence is clear that the defendants did not point out the risk of the additional liability arising out of the outstanding loan and exposure to a tax charge in the event of the loan being written off.

Scope of duty and Standard of care

320. The applicable test is as set out above in *Saif Ali v Sydney Mitchell.*

321. In relation to the role of the defendants in the film scheme the test was set out in *SAAMCO* and is set out above.

The defendants' case is that they admit that CCL provided "*certain advice as to the prospects of success from a tax planning perspective"* but denied that they advised the claimants to enter into the scheme or advised that it was suitable for them and that that remained a "*commercial decision*" for the claimants. [Paragraphs 23 and 72 of the defence]

322. As discussed above in relation to the charity shells there is a distinction between providing information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. This is a case where in my view CCL was responsible for guiding the whole decision-making process. CCL evaluated the advantages and disadvantages attendant upon entry into the film schemes and on that basis advised the claimants to

participate. I do not accept that because Mr Stanton said in cross-examination that he evaluated the risks that this meant that the defendant was only providing information for the purposes of enabling the claimants to decide upon a course of action. This was not a case where the defendant merely provided a limited part of material on which the claimants then relied having taken into account other relevant considerations and making an overall assessment of the commercial merits.

The claimants accepted the advice in the form of the recommendation from the defendant which is encapsulated in the letter from Ms Burns of 2 July in the following terms;

"*Champion has considered the business opportunity being presented by Scion. We have studied Counsel's opinion, discussed the product at length with Scion and have considered the tax planning opportunities that this business opportunity provides. We are able to recommend it based on these findings."*

In my view it is clear that the defendants were advising the claimants as to what course of action they should take and advised them to enter into the scheme.

Breach

323. There are in essence three alleged breaches which fall to be considered: firstly, the advice that the prospects of success of the film scheme were 75%; secondly, failing to advise as to the additional liabilities and thirdly failing to advise as to the maximum liability in the event of failure.

Expert evidence of Mr Brookes

324. The opinion of Mr Brookes was that 75% was outside of the range that any reasonably competent adviser could have advised [Day 12/198]

325. Counsel for the defendants submitted that Mr Brookes' reasons for assessing Scion as high risk did not withstand scrutiny and "each was disproved in evidence". In cross-examination Mr Brookes was taken through the individual risks and it was put to him that this was his view notwithstanding the fact that counsel had gone through the risks and the risk of a successful challenge for each of them was low. Mr Brookes responded:

"*there's support for each of the risks, but because there were quite a few risks and because it was likely to upset government and HMRC, I think to say 75% chance of success would be quite difficult to get*."

He said: [Day 12/199]

"I would think a range that a reasonably competent adviser would give probably wouldn't go more than 50%, just because of the environment at the time and the nature of what was being done. I think it's on the high end of the risk scale." [Emphasis added]

326. Mr Brookes was pressed by counsel on this view given that each of the grounds on which there could be a challenge was one where there was a low risk of successful challenge by the Revenue and he replied:

"...I do think there were just so many different risks that the Revenue would be likely to win on one of them. Yes that would be defendable positions, as we have seen from Mr Bretten's report, but I still think there's a high chance that HMRC, if they put the

time and funds to it, could have--would more likely than not win their argument." [Emphasis added]

327. Counsel for the defendants suggested that Mr Brookes should be careful not to use the benefit of hindsight rather than judging the position in 2007. Counsel put it to Mr Brookes:

"*you've got the best sole trader scheme from one of the best providers with the benefit of advice from DLA and the support of Mr Bretten's opinion, where each of the potential grounds of challenge that the Revenue might alight on that could have been identified at the time is assessed as carrying a low risk of success. That must mean that, on balance, certain it must be reasonable to say that this would stand a better than evens chance of succeeding?"*

Mr Brookes responded:

"no, I don't think so. Just because, as I say, when you look at the environment at the time, they'd already withdrawn the statutory relief and were directing relief to film production companies, because they didn't want individuals to get relief, they also clamped down on part recourse lending for partnerships, thinking that everyone was doing this through partnerships. All the blocks that have been put in place, this particular scheme was sidestepping them, and it was technically quite clever and there were technical responses to any challenges, but I just think because of that combination of factors, it puts it into the high risk category." [Day 12/201] [emphasis added]

328. Finally on this point counsel put it to Mr Brookes that the real risk was not for this scheme it was for the next one because that was the way the Revenue was operating; they would have seen what had happened in this scheme and would then have tightened the availabilities of relief but that wouldn't improve their prospects of turning each of the low risks of successful challenge to this scheme into a high risk. Mr Brookes responded at the end of the day the decision they came to at the time was that that was high-risk because of the environment and although he had not seen Mr Bretten's opinion he had seen other opinions.

Discussion

329. Counsel for the defendants placed particular emphasis on the evidence that Mr Brookes had not seen the Bretten opinion before he wrote the report. Although this was surprising, he was taken through the opinion in detail in the course of cross-examination and in my view he remained firm on his view that 75% was outside the range of a competent adviser and his reasons for that were not based on a particular risk but on the environment at the time and the nature of what was being done. Further I note that Mr Avient in cross-examination referred to having considered similar opinions from leading tax counsel and stated that the opinion of Rex Bretten "did not stand out" in relation to his views on trade and the loans. I do not accept therefore that Mr Brookes' failure to review Mr Bretten's opinion prior to preparing his report affects the validity of his opinion as expressed in cross-examination and as set out above.

330. As to the opinion of Mr Avient, in cross-examination Mr Avient's evidence was far from straightforward on this point. Initially he said there was a range and suggested that "less than 50%" was at the "very bottom end" of what he would regard

as reasonable and 75% was at the "absolute top range of success" at that time [day 13/78]. He was then pressed on what a reasonable adviser would have said and he said it was "*probably between 60 and 75%"* though he "*would not criticise …Mr Brookes for saying 50%..."* In his report he gave his opinion at 70% but said now that he had been asked the clarification he had said 60 to 75%.

331. Mr Avient's range of 60 to 75% [Day 13/79] was clearly consistent with the advice given by the defendant. However his broad range in cross-examination was difficult to reconcile with his figure of 70% in his report. More significantly Mr Avient disclosed in his report that he was present at the conference with Mr Bretten in April 2007. He said that he was asked to attend because he had a good understanding at that time of the approach that the Revenue was taking to particular planning as he was regularly dealing with the Revenue in respect of enquiries in tax schemes. He said that he had "*no input into the design of the scheme and no financial interest in its ultimate success*" describing himself as "*simply an independent consultant explaining what HMRC's view of certain points or arguments might be*." [Paragraph 185] In cross examination his evidence was that he was asked to attend by Scion and he was not paid for his involvement.

Counsel for the defendants submitted that Mr Avient was one of a small number of people with sufficient expertise to assist the court in this area.

Whilst I do not criticise Mr Avient who made it clear to the defendants' solicitors when instructed and at the start of his evidence, to the court, that he had been present at the conference with Mr Bretten, the court has to decide whether or not Ms Molloy's assessment of the risk at 75% was such as no reasonably well-informed and competent member of that profession could have made. Whilst Mr Avient is well-informed and doubtless competent, there must be a significant risk that his opinion as to the chances of success of the scheme was coloured by his involvement at the conference with Mr Bretten. Whether or not Mr Avient believes he had any input into the design of the scheme, in my view he participated in the structuring of the scheme through his attendance at the conference, which means that it is possible, if not likely, that his assessment of the prospects of success is influenced by that participation. In my view this may well explain the significant difference between the assessment of risk between the two experts, Mr Brookes who says not more than 50% and Avient who says 60-75%.

332. For these reasons I therefore prefer the evidence of Mr Brookes on this point. Further in relation to the criticisms of Mr Brookes' conclusion in relation to individual risks I bear in mind the dicta of Lord Browne-Wilkinson in *Bolitho* set out above that whilst the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that their opinion has a logical basis, it will be a "rare case" in which it can be demonstrated that the professional opinion is not capable of withstanding logical analysis. In my view, as illustrated by the extracts from the cross examination set out above, Mr Brookes gave satisfactory answers which appeared to have a logical basis for maintaining his overall conclusion that the assessment of the prospects of success by the defendant was outside a reasonable range.

333. I accept that the assessment of the prospects of success was an exercise of judgment; I do not accept the submission that the assessment as set out in the letter can be dismissed as a "best guess" as there was no such limitation in the letter and if

Ms Molloy was initially reluctant to give a percentage at the meeting, as was suggested in evidence, she could have used the letter to correct the position.

334. The fact that Mr Bretten was acknowledged to be an eminent tax silk with a good reputation does not assist the defendants in this regard. Mr Bretten gave no percentage assessment of the prospects of success and there is no overall conclusion in the note of consultation which draws together his findings.

Conclusion

335. For the reasons set out above in my view the advice of Ms Molloy that the prospects of success of the film scheme were 75% was outside the range open to her and amounted to a breach of duty being advice such as no reasonably well-informed and competent member of that profession could have given.

Failing to advise as to the additional liabilities and failing to advise as to the maximum liability in the event of failure.

336. In the light of my finding on the assessment of the overall prospects of success, I do not propose to deal with the alleged breaches in failing to advise as to the additional liabilities and failing to advise as to the maximum liability in the event of failure.

Contributory Negligence

337. The defendants' allegations in relation to contributory negligence have no relevance to the established breach in relation to the prospects of success. I do not therefore propose to deal with the allegations which related to the other allegations of breach. However should the defendants seek to argue in relation to the prospects of success, that the claimants were partly responsible through their failure to read the documentation I note that I have found that the defendants were acting as advisers and in the circumstances of the Scion Film Schemes the adviser was responsible for guiding the whole decision-making process. Further it was the opinion of Mr Brookes (paragraph 19ii of the Joint Statement) that the defendants ought to have given clear independent tax advice and risk warnings in addition to the information memorandum prepared by Scion. I accept the evidence of Mr Brookes on this issue and I do not therefore accept that the claimants negligently contributed to their own loss by their failure to read the documents.

Causation

338. Given my finding that I accept Mr Brookes' evidence as to what would have been an appropriate range for the prospects of success, there can be no issue that there was any unreasonable reliance on the advice.

339. As to the counterfactual position, the claimants' case is that had the defendants advised the claimants that the Scion scheme had a maximum of 50% prospects of success and if the scheme failed the claimants would be exposed to potential tax liability in writing off the loan, they would not have participated.

340. Counsel for the defendants submits that the claimants would nonetheless have participated due to cashflow issues and relies in particular on the email from Mr Thompson to Mr Stanton dated 6 June 2007 [L/3544] in which he stated:

"we are conscious that this year's tax payments on account have been reduced on the back of last year's charity shells and we need to consider with you how to lock in that tax advantage in this tax year ….in the event the charity shells do not resurface. Otherwise the practice will face very significant tax payments from January 2008 at a time when cash flow is more critical than ever given the requirement to fund an increased number of cases" [emphasis added]

Counsel acknowledged that Mr Thompson in his oral evidence said that the reference to "*critical*" did not mean they were in dire straits but pointed to his evidence that "*significant tax bills would impact on cash flow*". [T11/120]

341. Counsel also referred to the evidence of Mr McDermott that participation in Scion had a positive effect on the firm's financial position.[T5/200]

342. I do not accept that the inference from the evidence is that the claimants needed to do the Scion tax schemes and would therefore have entered into the film schemes if the risks had been no more than 50%. The positive benefit does not establish a financial imperative. The evidence of Mr Thompson acknowledges the impact of significant tax bills but I accept the evidence of the claimants set out above in relation to this issue and the charity shells that they could have introduced capital should they have needed to do so or reduced the level of referral fee business.

Limitation: Scion

Section 2 Limitation Act

343. I have discussed above the authorities on which the parties rely on the question of when damage is suffered for the purposes of section 2 of the Limitation Act. Applying those principles it seems to me that there can be no doubt that the primary limitation has expired in relation to the film schemes: the claimants entered into the contractual documentation for the film scheme in July 2007 and it was at that point that they suffered the damage; at that point the "defect" in the form of the advice was incapable of cure and they were tied into the "commercial straightjacket".

Section 14A

344. The claim was issued against Champion Consulting Limited on 6 March 2015. The issue is whether the claimants can show that the starting date for the purposes of section 14A was after 6 March 2012.

Submissions

345. Counsel for the claimants submitted that the claimants did not have the requisite knowledge until May 2013 when Mr Dallimore first advised the claimants that the film schemes would not be capable of being successfully defended. Even if they had sufficient knowledge upon receipt of the Revenue's email of 3 May 2012 [M3766] that was within 3 years of issue of the claim form. Counsel refers to the reassurances that were given for example in May 2013 and by way of example the email from Mr Robert Thompson [M/3794] that the film scheme was still being "robustly defended".

346. Counsel for the defendants submitted that they knew from the letter giving the "75% chance" advice that in the event of litigation Scion might seek costs from participants [L/3551] therefore they knew at this point that there was a risk of additional payments and time began to run. Alternatively the claimants acquired the necessary knowledge that "something was amiss" prior to March 2012.

Law

347. As in relation to the charity shells the issue is whether the claimants can show as they assert, that they did not have actual knowledge of the damage until after 6 March 2012. I have set out the relevant subsections of section 14A above.

348. The starting point is to identify the damage. I have set out the relevant authorities above when dealing with the charity shells. Applying the principles from those authorities, the damage in relation to the advice was advising that the scheme had a 75% chance of success when in fact, as I have found, the chances of success were materially lower.

349. In relation to the submission that the damage was the litigation costs, the "additional liability" as set out in the claimants' pleaded case is the liabilities to which the claimants were exposed by reason of the borrowing and I do not accept that the costs of litigation are the damage for these purposes.

350. Turning then to the issue of knowledge and applying the test set out in the authorities referred to above, at what point did the claimants know enough for it to be reasonable to begin to investigate further. The claimants do not have to know for certain that the scheme would fail, the claimant must know enough for it to be

reasonable to begin to investigate further; there needs to be something which would reasonably cause the claimants to start asking questions about the advice they were given in relation to the Scion film scheme.

Evidence

351. In January 2011 Mr Higgins received an email from Scion [M/3681] which attached updates received from PricewaterhouseCoopers and BTG Tax who were advising a number of traders in relation to their HMRC enquiries in respect of their trades in the exploitation of film rights. The PWC update refers to a change in strategy in the way the Revenue would be conducting enquiries into film products. The note further records the proposal put forward by the Revenue setting out the basis on which they would be prepared to reach a settlement. The proposal was that any loss attributable to a loan taken out by a trader would only be allowed to be relieved against future profits from the same trade. So where for example, a trader acquired rights for £500,000 by way of a cash contribution of £100,000 and a loan of £400,000, the trader would be restricted to claiming tax relief on £40,000.

352. In June 2011 the Revenue wrote (separately) to Mr Stanton and Mr Halsall outlining the position regarding the enquiry into the sole trader claim for loss relief relating to the film rights marketed by Scion. The letter referred to a recent offer to settle the enquiry and the letter set out the background to the proposal. The letter stated:

"your claim is one of a number resulting from a marketed tax avoidance scheme….Your accounts show large losses and you have claimed relief on your share of those losses against your other income.

HMRC do not accept that you are due any relief. We consider that we have a number of grounds for challenging both the losses and the relief claimed."

353. The letter proposed a basis of settlement which would allow sideways loss relief on an amount of the loss equal to the cash contribution to the scheme. The balance of the losses would be available to carry forward against future profits from the same trade rather than being set off against general income. The letter concluded:

"In the event that you do not wish to settle this enquiry on the terms outlined HMRC would continue with its enquiries with the aim of completing them by way of a closure notice.

Closure notices have already been issued for claims submitted as a result of this scheme, in which I have disallowed the losses claimed. These notices are being appealed against and it is expected will be considered by the First Tier Tribunal in due course. While the circumstances of these claims may differ to yours in some elements, the common issues in relation to the scheme will be considered."

354. On 28 June 2011 Mr Halsall sent an email to Robert Thompson attaching the letter and asking him to ring him "*immediately"* [M/3700]. In fact Ms Molloy responded on 30th June to Mr Halsall's email, by email to Messrs Higgins, Halsall and Stanton pointing out that a meeting was arranged to discuss tax matters and then giving a summary of the position [M/3708]. The material part of the letter read:

"...I appreciate that we are to meet in the next couple of weeks to review the tax strategy positions but I think that it would be worthwhile explaining the sole trader now in view of the Revenues timely letter.

In summary

in 2007/8 you entered into the sole trader business to acquire the territorial film rights over a selection of different films. The acquisition of the film rights created losses that you set against your respective incomes.

After submission of your income tax returns HMRC opened enquiries into the losses generated by the sole trader film business.

All HMRC enquiries have been responded to…

Current position

by the time your income tax returns were submitted, HMRC had already opened number of enquiries into other film trader businesses…

In the last two months the level of negotiation regarding the film sole traders has been significant. HMRC came to PWC and confirmed they were prepared to negotiate.…

At the meeting with PWC in May HMRC placed the current deal being offered by them on the table. HMRC maintained that they had a strong case on the strength of the recent "Tower" case. PWC have argued this point vociferously…

PWC and BTG consider the current offer being made by HMRC to be only the starting point for the negotiations…

In this regard we do not believe it would be in your best interests to accept this offer from HMRC."

355. There was then a further email on the same day from Ms Molloy to Mr Halsall, copying Mr Higgins and Mr Stanton, responding to a request for details of the Revenue's offer. The material part of this email read:

"...the planning involved you contributing 20% of the business investment and the remaining 80% was borrowed by a film studio backed (limited recourse) loan.

All of the monies invested were used to buy those film rights that you were interested in and this expenditure in the films created the tax trading loss that you then used against other income. You created circa £2 million losses, Bernard and Paul circa £1 million each.

HMRC are offering to allow the 20% contribution made as loss relief and then allow the remaining 80% of the losses against future film income only.

That is not a favourable offer not least because the income you may receive from your film investment is not likely to be sufficient to use up these losses.

In real terms it would mean that of your losses of £2 million HMRC would allow you to usefully use £400,000 for Bernard and Paul their useful losses would be £200,000 each.

Whilst HMRC's offer is low at present some comfort must be taken from the fact that they want to negotiate. It does not mean that a tribunal hearing won't have to be

heard if agreement can't be reached but it indicates that HMRC are less certain of their ground... " [emphasis added]

356. Mr Halsall replied on the same day:

"... I still don't really understand what you're saying. Are you saying that I myself got £2 million tax relief and the Revenue are offering £400,000 relief? Would this mean that I would have to pay tax on £1.6 million if so how much would I have to pay?..."

In his witness statement Mr Halsall said that he believed that he then had a telephone conversation with Ms Molloy, she explained the true position and there was no question of him having to pay tax on the £1.6 million sum referred to in his email. His evidence is that the meeting then took place on 15 July attended by Ms Molloy and Mr Thompson at which they discussed the tax planning situation and received the "*usual reassurances*" from Ms Burns and Mr Thompson: *"the Revenue were simply dragging their feet and at the end of the day everything would be resolved in a satisfactory fashion. Their confidence in the planning remained undimmed"*.

357. On 29 July 2011 Mr Stanton sent Mr Thompson an email asking:

"am I right in thinking I do not need to do anything re HMRC's offer on the Scion sole trading arrangement"

Mr Thompson responded to Mr Stanton:

"the offer was just part of HMRC's strategy in fighting the claim. The offer is derisory and the claim will continue to be pursued."

358. On 13 December 2011 Mr Halsall emailed Ms Cooper at Champions asking *"if there was any news on battle with Revenue?"* to which she responded on 14 December 2011 [3748]:

"the last we heard is this from Scion in November:

we understand that BTG and PWC had a meeting with HMRC at the end of September and it appeared that HMRC wanted a further explanation on the flow of money through the sole trader structure and the valuation of film rights. Scion are preparing an analysis for PWC/BTG to discuss with HMRC for their next meeting. We are yet to be updated when a further meeting will be arranged as it appears that HMRC are focusing their resources on encouraging traders to settle and processing those traders who have accepted the settlement."

359. On 11 January 2012 Mr Halsall asked Mr Thompson to look at his tax position and tell him his "*total liability if all the tax is to be paid and on top of this what would be the interest involved*. *Could I make a payment on account to save interest*"

360. On 12 January 2012 Mr Stanton received a letter from the Revenue informing him that the Revenue proposed to open an enquiry into his return for the year ended 2010 "*under the guidance of Specialist Investigations (Fraud & Avoidance)"* and the enquiry would cover his claim to relief for losses arising from the self-employment trade in which the loss was said to be made. [M/3750]

361. On 3 May 2012 Mr Halsall received a letter from the Revenue. [M/3766] It referred to "earlier correspondence" concerning the without prejudice offer made by HMRC and drew Mr Halsall's attention to a recent tribunal judgment in respect of the Eclipse film partnership. The letter pointed out that the tribunal judgment was to

the effect that the film partnership was not carrying on a trade which the letter notes was "*the same decision as with Samarkand and Proteus, the effect being that no loss relief was being able to be claimed by the partners.*"

The letter referred to the "*changing landscape in the avoidance world*".

Mr Halsall sent the letter to Mr Thompson saying that he was "*very worried*" about the contents and would like to discuss exactly what the position is and get some "*proper advice*".[M/3767]

Mr Thompson replied on 9 May 2012[M/3768]:

"*we understand that HMRC have made a lot of capital about that particular tribunal decision… This was only first Tier Tribunal decision and will be appealed by Future, who I understand have won on their other cases in the higher courts.*

We have been in touch with PWC who are running the defence strategy for your Scion scheme and as soon as we get a response we will arrange to come and see you all with a full update"

Discussion

362. Counsel for the claimants referred to the correspondence being "replete with reassurances". Counsel submitted that relying upon these assurances, the claimants had no reason to question whether they would lose any money as a result of participation in Scion or whether the initial advice was flawed. In my view the correspondence in particular the offer to settle from the Revenue referred to in the Revenue's letter in June 2011 is something which would reasonably cause the claimants to start asking questions about the advice they were given in relation to the Scion film scheme. Although the outcome of the negotiations was uncertain, given the Revenue's stance as expressed in its letters, there was sufficient prior to the letter in May 2012 for the claimants to know enough for it to be reasonable to begin to investigate further. The focus is on the moment when it is reasonable for the claimants to embark on such an investigation. As early as June 2011 the Revenue stated that it did not accept that the claimants were due any relief and that they had a number of grounds for challenging both the losses and the relief claimed. Even though the claimants were told by Ms Molloy at that point, that the current offer was only the ""*starting point for the negotiations"* and "*low*" this was sufficient, in my view, reasonably to cause the claimants to start investigating the position. The Revenue's letter in June 2011 was clear that the Revenue's position was that the Revenue did not accept that the claimants were due relief on the losses claimed and closure notices had been issued for some schemes in which the Revenue had disallowed losses. If the implications of that letter were unclear, the import was explained by Ms Molloy in her second email of 28 June 2011 which was sent to Mr Halsall, Mr Higgins and Mr Stanton. Ms Molloy clearly set out in that email that HMRC were offering only to allow their 20% contribution as loss relief and consequently of the losses of £2 million Mr Halsall would only be able to use £400,000 and for Mr Higgins and Mr Stanton the losses which they could use would be only £200,000 against the total loss of £1 million each. Given that clear explanation there was no need for the claimants to consult "experts" in order to understand the position. They did not know for certain that the Revenue's position would prevail but they knew enough for it to be reasonable to begin to investigate further.

363. I reject the submission that the letter in May 2012 should be taken as the starting date as defined in section14A. That letter is merely a continuation of the earlier correspondence concerning the offer that had been made by HMRC and the tribunal judgment which the letter referred to was, as the letter points out, to the same effect as earlier decisions, the effect being that no loss relief was being able to be claimed. The reference to a "changing landscape" is not significant in my view in terms of the claimants' knowledge that the scheme, and thus the advice in respect of its prospects of success at 75%, was flawed.

364. The claimants had the requisite knowledge that the damage that is entering into the film schemes was attributable to the flawed advice from the defendants.

Conclusion

365. For the reasons set out above in my view Mr Halsall, Mr Higgins and Mr Stanton had sufficient knowledge in June 2011 for time to start running pursuant to subsection (5) of section 14A in respect of the Scion film scheme and the claimants have not established that the starting point for the purposes of subsection (5) of section 14A was after 6 March 2012. The claims in respect of the Scion film schemes were therefore brought outside the relevant limitation period and must fail.

Loss

366. In the light of my findings on limitation in relation to the Scion film scheme, I do not have to decide the issue of loss. However for completeness I will note some concerns in relation to the loss which is claimed in respect of the “uncrystallised losses” which will be determined only once the negotiations have been concluded with Scion.

Conclusion on the charity shells schemes and the Scion film scheme

367. For the reasons set out in this judgment and on the evidence, the claimants’ claim is dismissed.

Counterclaim

368. I shall deal with this point shortly on the assumption that Clause 9 of the terms of business was incorporated into the relevant contract for each of the charity shells.

369. The counterclaim asserts that the claimants have brought the claims against the defendants other than Champion Consulting Limited in breach of clause 9.

Clause 9 provided that:

"...any claim ...arising out of or in connection with this engagement shall be brought only against Champion Consulting Limited and that no claims will be brought personally against other persons involved in the performance of this engagement, when actual or deemed servants or agents or not" [emphasis added]

370. Counsel for the claimants submitted that (if the court held that clause 9 was incorporated into the contract), on a true construction it was intended to exclude claims against natural persons who are acting as employees or otherwise on behalf of the defendants.

371. Counsel for the defendants submitted that the term "person" was intended to refer not just to natural persons given that Champion Chartered Accountants was a party to the contract.

372. As noted above the first sentence of the terms of business refers to Champion Consulting Limited stating:

"the following terms of business apply to engagements accepted by Champion Consulting Ltd".

Although Champion Chartered Accountants is defined in paragraph 1 and there is reference to Champion Financial Management in paragraph 17, in my view the use of the term "personally" suggests that the term "persons" was only intended to refer to natural persons. If it had been intended that "other persons" should include not only natural persons but also any other companies then the term "personally" would have no meaning. Looking at the factual matrix these were standard terms of business, this was not a provision arising from an informal document and as part of the standard terms may well have been prepared with considered reflection if not professional assistance (paragraph 13 of Wood). It is to be inferred from the factual matrix and the language that the word "personally" was not redundant but intended to have some meaning and in my view it operates to qualify the term "persons" and limit it to natural persons.

373. For these reasons the counterclaim is therefore dismissed.

Addendum: Counterclaim-clause 13

374. After this judgment had been sent out to counsel in draft form in the usual manner, counsel for the defendants noted that the judgment did not deal with the defendants' counterclaim for damages for breach of contract in respect of clause 13. As this was not a matter on which detailed submissions were made in closing and

goes to the issue of costs, this issue will be dealt with in a supplemental judgment having heard oral submissions on the point at the hearing for handing down this judgment.