[2021] UKFTT 131 (TC)

TC08112

INCOME TAX - Whether certain large payments made to the Appellant were taxable as income? - With one exception (the Holiday Payment) yes, were taxable as income

DISCOVERY ASSESSMENTS- Whether discoveries were made to justify the bringing of assessments? - Yes, including under the extended time limit for fraud

VALUE ADDED TAX (treated as CUSTOMS DUTY) - Whether a Post Clearance Demand form C18 issued in relation to diamonds brought into the UK from Switzerland was issued within a reasonable time, even if not within three years of the importation? - Yes

CAPITAL GAINS TAX - Whether jewellery belonged to the Appellant or to his wife for taxation purposes? - To the Appellant - Whether Appellant entitled to claim CGT losses when that jewellery was stolen? - Yes

PENALTIES - Payments not declared on income tax returns - TMA 1970 section 95 - Whether conduct fraudulent, or negligent? Fraudulent; FA 2007 Schedule 24 - Whether conduct deliberate, or careless? With the exception of one payment, deliberate

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/02572

BETWEEN

MR STEPHEN J MULLENS **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR JULIAN STAFFORD

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 2-6, and 9 March 2020

David Goldberg QC and Michael Firth, both of Counsel, instructed by Streets Specialist Tax Dispute Resolution Services, for the Appellant

Akash Nawbatt QC, Christopher Stone, and Bayo Randle, all of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION AND OVERVIEW

1. For many years, the Appellant taxpayer Stephen Mullens was extensively engaged in the business affairs of Mr Bernie Ecclestone, those of the Ecclestone family, and what can loosely be described as the Ecclestone family interests.

2. Between 1999/2000 and 2012/13, Mr Mullens received a number of very substantial payments, coming overall to just under £40 million.

3. These payments were as follows (and adopting the descriptions in HMRC's Schedule):

(1)	1999/2000	£1.2m	(Payment 1; but noting that this is at some points described as £1.25m, but it being clear that the same payment is meant)
(2)	2001/2001	£1.05m	(Payments 2 = £750,000; and 3 = £300,000)
(3)	2006/2007	38m USD	(Payment 4, part) (converted to £21,500,000)
(4)	2006/2007	£346,200	(Payment 4, part)
(5)	2008/2009	19.5m USD	(Payment 5) (converted, latterly, to £10,015,005)
(6)	2008/2009	217,000 EUR	('Holiday Payment') (converted to £187,271)
(7)	2012/13	£5.0m	(Payment 6)

4. The main issue in this appeal is the appropriate tax treatment of those payments.

5. Although the sums are very large, and there is a lot of tax at stake, the heart of the issue is straightforward. Put shortly, Mr Mullens contends that none of these payments were taxable as income.

6. He says that Payments 1, 2 and 3 arose from discussions between himself and an Ecclestone company, Bambino Holdings Ltd, in the middle of 1999 to the effect that he would be paid £2.25m in order to induce him to resign his then-partnership in a law firm so as to be able to offer his services uniquely to Formula 1.

7. He says that Payments 4, 5, 6, as well as the Holiday Payment, were gifts made to him by or at the direction of Mrs Slavica Ecclestone by reason of a "personal relationship of friendship and affection" between him and her. He argues that payments made "from friendship, as a thank you wholly outside and distinct from any business relationship between the taxpayer and the payer" are not, and never have been, taxable.

8. For much of the period under consideration, Slavica Ecclestone was still married to Bernie Ecclestone who, for many years, had been the dynamic and entrepreneurial moving spirit behind the global expansion and success of Formula 1 motor racing. But Slavica Ecclestone was also a well-known figure in her own right, and, by virtue of her beneficial interests under a number of trusts established by or at the direction of Mr Ecclestone, was herself an extremely wealthy woman, able to draw down an annual disposable income of tens of millions of pounds.

9. Why would Mrs Ecclestone have given this money to Mr Mullens? This is colourfully captured in the written submission made by Mr Goldberg QC and Mr Firth on behalf of Mr Mullens:

> "Born in Croatia, Mrs Ecclestone became a woman of vast wealth with the habit, quite common among people of her class and type, of making what, to most, would seem to be huge payments for no particular reason, rather as a rich aunt might give big presents to her nieces, nephews and close friends."

10. Mr Goldberg QC and Mr Firth provided us with an admirably succinct "Taxonomy of Voluntary Payments", which sought to differentiate payments "which are earned rather than deserved" (taxable) from those which are "deserved rather than earned" (it is said, non-taxable).

11. Although their industry and ingenuity are commendable, the identification of whether a particular payment was a gift for the purposes of this appeal is not something which, in our respectful view, turns on any fine point of law. In any event, the dichotomy which they seek to establish, although elegant and at first blush attractive, is not a true one, because "earned" and "deserved" are not necessarily mutually exclusive, and payments can be made, and received, for mixed motives.

12. We were referred to an array of reported decisions. But, when it comes to the resolution of this appeal, those decisions are of limited assistance. In some instances, Courts and Tribunals decided that particular payments were gifts, and in some they did not. Some of the cases are admittedly engaging and colourful. But, unsurprisingly, the decisions are ultimately fact-sensitive and depend on an objective assessment of the circumstances.

13. HMRC contends that all the payments made to Mr Mullens are taxable as income - either as trading income, or, if not, as miscellaneous income. The thrust of HMRC's case is that these sums were given to Mr Mullens as consideration for his services to the Ecclestone family interests.

14. Although this decision will necessarily make reference to certain aspects of the personal, legal, tax, and business affairs of Bernie and Slavica Ecclestone, we must be clear that this appeal does not directly concern the tax affairs or tax status of either of them. Neither of them gave a witness statement in these proceedings, and we did not hear oral evidence from either of them. We heard only from Mr Mullens in support of his appeal.

15. Whilst the correct tax treatment of the large payments received by Mr Mullens (and any corresponding issues of penalties) is the main issue, it is not the only issue. There are other issues relating to interest on foreign bank accounts, a customs debt on diamonds imported from Switzerland, and Capital Gains Tax in respect of losses claimed, but disallowed by HMRC, from a jewellery theft.

16. The total amount of tax in dispute, excluding penalties and interest, is approximately £17.2 million. Penalties and interest take that to well over £20 million.

17. As to the main issue - the payments - we have decided that (for the reasons set out more fully below) Payments 1, 2, 3, 4, 5 and 6 were taxable as income, and that HMRC made discoveries which entitled it to assess those payments when it did. But we have allowed Mr Mullens' appeal in relation to the so-called 'Holiday Payment',

THE ASSESSMENTS

18. These are the assessments and closure notices which are the subject of challenge in this appeal:

(1)	1999/2000	27 September 2016
(2)	2000/01	27 September 2016
(3)	2003/04	27 September 2016
(4)	2004/05	27 September 2016
(5)	2005/06	27 September 2016
(6)	2006/07	6 March 2013 (6A) and 27 September 2016 (6B)
(7)	2007/08	27 September 2016

(8)	2008/09	6 March 2013 (8A) and 29 September 2016 (8B)
(9)	2010/11	17 October 2016
(10)	2011/12	27 September 2016
(11)	2012/13	27 September 2016

19. These are all discovery assessments, with the exception of 2011/12 and 2012/13.

20. In relation to the discovery assessments, HMRC (as it accepts) bears the burden of proving that these were validly given, including that these were given in time, in accordance with sections 29 and 36 of the Taxes Management Act. Section 36(1) sets down the 6 year limit from the end of the year of assessment where the loss of tax has been "brought about carelessly". That is extended to 20 years where the loss of tax is brought about "deliberately": section 36(1A).

21. If HMRC satisfies the discovery provisions (and if the discoveries have not gone 'stale') then the assessments (as is conventional) "stand good" and the burden shifts to Mr Mullens to show that the assessments should be cancelled or made in some different sum: section 50(6) of the Taxes Management Act 1970. He has to prove that the Payments were made for the reasons which he alleges. HMRC does not have to prove a negative.

22. The standard of proof in relation to disputed facts is the civil standard, namely the balance of probabilities (whether something is likelier than not).

23. We have approached our overall analysis in the same sequence as the parties. We shall first consider the nature of the payments. If the payments were not taxable, then there was nothing relevant for HMRC to discover, and hence the need to consider the statutory conditions falls away.

24. For the sake of completeness, we also record:

(1) A discovery assessment issued on 21 February 2014 for 2009/10 in respect of income tax of £86,184 and Class 4 NICs of £1,140 (totalling £87,324) was withdrawn by HMRC;

(2) HMRC invites us to make certain adjustments to the entry marked 6B. On 27 September 2016, HMRC issued an assessment (the second for 2006/2007) both for additional income tax of £154,955.60 and Class 4 NICs of £218,462. HMRC invites us to find that assessment 6B is reduced to £218,462 (i.e., to treat it only as an assessment for Class 4 NICs and not for the additional income tax). We do accordingly;

(3) HMRC invites us to make certain arithmetic adjustments to the entry marked 8A. HMRC used the wrong exchange rate to convert 19.5m USD into GBP. The payment received should have been converted to £10,015,005 and not £13.1m. In consequence, the amount of tax in dispute in relation to that payment was not £5.24m but was £4,006,002. We accept, as a matter of arithmetic, HMRC's recalculated figure of income tax of £4,277,090 for 2008/09, being £4,006,002 (Payment 5), £74,908.40 ('Holiday Payment'), £13,843.60 (De Pfyffer interest), £180,094 (Border & Cie interest), and £2,242 (Klondike interest). The entry marked 8B (being import VAT of £327,354 on diamonds imported from Switzerland) assessed in September 2016 is unaffected by this analysis;

(4) In relation to the entry marked 8B, HMRC is withdrawing the VAT assessment made on that date in relation to Payment 5;

(5) In relation to 2010/11, HMRC has now accepted a late claim for losses of £29,711, with the consequence being that the additional gains assessed are £309,504, with CGT of £86,661.12 alleged to be due.

25. In its Statement of Case (7 August 2017) HMRC intimated that it proposed to assess Mr Mullens for Class 4 NICs and CGT for 2008/9, and CGT for 2009/10. No such assessments are before this Tribunal in this appeal.

26. On 27 September 2016, HMRC issued a penalty determination for the years 1999/00 to 2007/08 in the sum of approximately £5.269m.

27. On 29 September 2016, HMRC issued a C18 Post Clearance Demand for £327,354 in relation to the importation of diamonds.

BACKGROUND

28. Mr Mullens was admitted to the Roll of Solicitors in July 1973 and is still a Solicitor of the Senior Courts of England and Wales. From the outset of his career, he specialised in tax. In the early 1970s, he started to do legal work with de Pfyffer & Associes, Avocats at the Geneva Bar, who have offices in Geneva. He came to work closely with one of its principals, Luc Argand. Latterly, he also came to work closely with Mr Argand's wife, Emmanuèle Argand-Rey, who was also a lawyer at de Pfyffer.

29. In the mid 1980s, Mr Mullens was one of the founding partners of Marriott Harrison LLP, a firm of solicitors in London. The best evidence is that, in the late 1980s, Mr Argand introduced Mr Mullens to Mr Ecclestone. From about 1994, and following a request by Mr Ecclestone, Mr Mullens worked for Mr Ecclestone.

30. In the mid-1990s, Mr Mullens was instrumental in devising a re-structuring of the Ecclestone family finances: **'the Restructuring'**. As Frederique Flournoy, a director and (from 1997) company secretary of BHL told the High Court in the "Constantin Medien" litigation (see Paras 62-68 below), Mr Mullens "was uniquely well equipped to provide advice (to the trust companies) as he had been involved in the settling of the trusts, so understood the make-up of Bambino, and he knew all about the workings of Formula 1."

31. The thrust of this Restructuring was that Mr Ecclestone's shares in three companies related to motor racing were transferred to companies owned by Mrs Slavica Ecclestone, thereby, on the face of it, leaving Mrs Ecclestone as the owner of those shares and not Mr Ecclestone.

32. Mr Ecclestone's shareholding in Formula One Management Limited ('**FOM**') passed through a connected company, Valper Holdings Limited ('**Valper**') to a Jersey company, SLEC Holdings Limited ('**SLEC**'). SLEC's shares were in turn owned by another Jersey company, Bambino Holdings Limited ('**BHL**').

33. BHL was wholly owned by the trustees of a trust named the 'Bambino Settlement' (**'the Bambino Settlement'**), which was settled by Mrs Slavica Ecclestone on 8 October 1997. Its beneficiaries included Mrs Ecclestone, her children, and remoter issue. One of the two "protectors" of the Bambino Settlement was Luc Argand of de Pfyffer Avocats.

34. Mr Mullens was BHL's representative on the boards of SLEC (from December 1999); FOM (from 2002); and other companies.

35. By way of a written agreement dated 11 August 1999 (**'the August 1999 Agreement'**) between BHL ('the Company'), FOM ('the Subsidiary') and Mr Mullens ('the Consultant'), Mr Mullens was engaged to 'continue' to provide services for BHL and FOM as a 'consultant legal adviser'.

36. On 31 October 1999, Mr Mullens formally resigned his partnership in Marriott Harrison LLP.

37. On 1 November 1999, Mr Mullens began to trade as the sole proprietor of 'Mullens & Co'.

CASE MANAGEMENT - APPLICATION TO EXCLUDE EVIDENCE

38. On the second morning of the hearing, after Mr Goldberg QC's opening, but before the hearing of any evidence, we heard an application by the Appellant that the Tribunal should exclude (and hence have no regard) to documents contained in five lever arch files (together marked as "Part 5") prepared at a relatively late stage by HMRC. That application was not made by way of application notice, but was foreshadowed in the parties' skeleton arguments. That application was presented by Mr Firth, and was opposed by Mr Nawbatt QC.

39. After deliberation, we decided to dismiss the Application. We decided to consider those documents and said that we would set out our reasons in this decision. Those reasons can be set out very briefly. The documents appeared on HMRC's List of Documents in January 2018 (albeit that HMRC said that some of them would call for redaction). Thereafter, it took almost two years – until the end of November 2019 – for the Appellant's representatives to respond substantively. They prepared and circulated a draft index on 3 January 2020.

40. The papers were eventually provided on or shortly before 3 February 2020 – i.e., several weeks before the hearing. Despite some sparring over the bundles, these documents were in circulation for that period during which the parties would have been preparing in earnest for the hearing of the appeal. The documents were also before the Tribunal, and we did not apprehend any genuine prejudice to the Appellant.

41. As matters turned out, and notwithstanding their admission, very little reference ended up being made to these five files. This was not entirely surprising. Files 1, 2 and 3 are 'selected transcripts' of the Constantin Medien litigation. They are of limited utility. Newspaper reports about the ups and downs of Formula 1, and about Mr Mullens, are likewise of little if any probative value in determining the issues in dispute in this appeal. We have considered the documents at page 1723 onwards, but these largely relate to Mr Mullens' role in the Restructuring and thereafter in the affairs of various trusts, which already appear with sufficient clarity in the other evidence, both documentary and oral.

CASE MANAGEMENT - APPLICATION FOR SPECIFIC DISCLOSURE

42. On the fifth day of the hearing, and following the conclusion of the oral evidence of the first of HMRC's two witnesses (Mrs Jamieson) Mr Goldberg QC applied for an order that HMRC disclose notes of any meetings which had been held between HMRC and the legal representatives of Mr and/or Mrs Ecclestone in relation to the investigations into their affairs which were conducted by HMRC. In the course of submissions, this application was refined to the extent that, if the primary (wider) application did not succeed, HMRC should nonetheless be ordered to give (narrower) disclosure of a meeting which was alleged to have taken place between Mrs Ecclestone's solicitors, Macfarlanes, and HMRC, perhaps attended by Officer Jamieson, at which (it was alleged) Officer Jamieson, or one of her colleagues, had been told about the payments which are the subject matter of this appeal. That application was presented by Mr Stone. It was opposed by Mr Nawbatt QC and, after deliberation, we decided to dismiss it (even on the narrower footing).

43. We announced our decision at the hearing, and said that the reasons would follow in this decision.

44. This is a matter of case management where the Tribunal has a broad discretion. It did not seem to us that it would have been fair or just or otherwise in accordance with the overriding

objective for us, at that stage, to have ordered further disclosure. Further delay would have been caused. We may have had to adjourn to hear submissions on behalf of Mrs Ecclestone because on any view the immediate subject matter of any such meeting would have been her tax affairs, and not those of Mr Mullens. Ultimately, Mr Mullens had already had ample opportunity to marshal the evidence he wanted, including obtaining evidence from Mrs Ecclestone.

45. Mr Firth invited us to consider and apply the guidance of the Upper Tribunal (Judges Tim Herrington and Thomas Scott) in *Kyriakos Karoulla t/a Brockley's* Rock [2018] UKUT 255 (TCC) and especially at Paragraphs 31-32. We respectfully agree with the Upper Tribunal's comments, but those deal with a different and materially distinguishable scenario - disclosure (in the context of a best judgment assessment) of the taxpayer's own documents which he himself had provided to HMRC. It was not a case of disclosure of documents relating to a third-party taxpayer (namely, Mrs Ecclestone). We do not consider that HMRC are, in this appeal, and in this regard, doing what HMRC were criticised for doing in *Kyriakos* - namely, 'hiding behind the absence of a Tribunal order for disclosure to argue that the evidence could have been disclosed with reasonable due diligence' [by the taxpayer].

THE EVIDENCE

Mr Mullens

46. Mr Mullens' written evidence was made in a witness statement dated 18 May 2018. This witness statement is fairly lengthy (49 pages) and, at first blush, ostensibly quite forthcoming. But upon careful reading and re-reading, and having heard it explored in cross-examination, it became increasingly clear that the witness statement is very carefully crafted so as to give only an impression of candour. In reality, it is not candid at all. It is superficial and lacking any real factual detail. His position on Payments 4 onwards is that "they came from the fraternal association which I formed with [Mrs Ecclestone] and not from anything else." In relation to payments amounting to tens of millions of pounds, that amounts to no more than the barest assertion.

47. We also heard Mr Mullens give oral evidence, and he was cross-examined by Mr Nawbatt QC.

48. There was no evidence from Mrs Ecclestone, Mr Ecclestone, or the two Swiss lawyers most intensively involved with the matters in dispute - Mr Luc Argand and Mrs Emmanuèle Argand-Rey. They would all have had useful evidence to give.

49. The absence of evidence from Mrs Ecclestone, the payer, is especially striking. We are not persuaded that she was genuinely unavailable to give evidence, or that she had a good reason not to give evidence. Therefore, and as part of our overall evaluative exercise, we apply the guidance set out by the Court of Appeal (Brooke LJ, with whom Roch and Aldous LJJ agreed) in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 (itself founded on the guidance of Cockburn LJ in *McQueen v Great Western Railway Company* (1875) LR 10 QB 569) that, if HMRC makes out a prima facie case to answer, capable of being displaced, and if the party against whom it is established might by calling particular witnesses displace that prima facie case, but does not call them, then the inference fairly arises (but of course only as an inference and not as a presumption) that the omission to call witnesses amounts to something, and not to nothing.

50. We recognise that not calling witnesses can be a legitimate tactical move in our adversarial system of litigation, but a person who makes that move cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which that person has chosen to withhold: see Lord Diplock in *Herrington v British Railways Board* [1972] AC 877 at 930F et seq.

51. In all instances, the gateway condition for an analysis of this kind is whether there is a case to answer. This depends on the individual case and the allegations in question. Even if that gateway is passed, inferences cannot be general, but must be specific: see *HMRC v Sunico A/S and others* [2013] EWHC 941 (Ch) per Proudman J at [98].

HMRC's witnesses

52. We also heard evidence from two officers of HMRC: Evelyn Jamieson (who was the case owner from July 2012 to November 2015, and who subsequently has retired from HMRC) and her successor as HMRC's "case owner", Alex Baines.

53. Their evidence is principally relevant to the issue of discovery and the timing of the raising of the assessments in issue.

54. Mrs Jamieson's written evidence is contained in a witness statement dated 12 June 2018. At the time of events, she had been working with HMRC for about 40 years, latterly with its Fraud Investigation Service. She was the person who, with approval from her manager, had invited Mr Mullens to enter into a Contractual Disclosure Facility ('CDF') in July 2012. The CDF did not come about in a vacuum - it flowed from Officer Jamieson's existing awareness of a long-standing and close business relationship between Mr Mullens and the Ecclestones - but her evidence was that this awareness did not give rise to any knowledge of insufficiency of tax on the part of Mr Mullens. She reviewed Mr Mullens' outline disclosure when it was made in September 2012. Her evidence was that, in September 2012, she formed a view that there was an insufficiency of tax in relation to some matters (principally, the earlier payments), but that, in relation to payments described as gifts (i.e, Payments 4-6) there *may* have been an insufficiency of tax. She attended a meeting in November 2012 but, even then, and notwithstanding the outline disclosure, was still trying to establish (for example) the exact date in April 2006 when the payment of $38m was received "as this would impact on the year of assessment." Two further reports from BDO, acting for Mr Mullens, followed: July 2013 and August 2014. The latter encountered some minor delay because of the absence of mandatory certificates, which were provided in October 2014 and 18 December 2014.

55. Mrs Jamieson was cross-examined by Mr Goldberg QC. Despite his great skill and courtesy, he was unable to make significant inroads on Mrs Jamieson's evidence.

56. We consider her to have been a truthful witness, and an accurate one, and we accept her evidence.

57. In broad terms, from September 2012 onwards, there was clearly an iterative process (or, put colloquially, a to-and-fro) between Mrs Jamieson and Mr Mullens' representatives, BDO, seeking to explore and clarify matters which had been raised. The outline disclosure given in September 2012 was just the start of what, on any view, was likely to be (and which ended up being) a lengthy process. Indeed, that process carried her through to her retirement (preceded by a period of accrued leave) in December 2015.

58. We are satisfied that the steps which she took (each of which introduced an element of delay) were rational, and proportionate, and did not mean that the assessments which were issued should have been issued sooner. The fact that she asked HMRC's High Net Worth Unit in March 2013 to make assessments for 2006/7 in the sum of £8.6m (being £21.5m x 40%) and for 2008/9 in the sum of £5.24m (being £13.1m x 40%) did not mean that she was obliged, at that point, to assess in relation to any other payments, in any other year. She was continuing to investigate, and that process, even if sometimes antagonistic between BDO and HMRC, could still fairly be described as collaborative, with information being sought, and information being provided (albeit sometimes sketchily, and after lengthy delay).

59. Mr Baines' written evidence is contained in a witness statement dated 14 June 2018. He became involved with Mr Mullens' affairs in February 2014, and eventually took over from Officer Jamieson.

60. He was cross-examined by Mr Goldberg QC.

61. He was a truthful witness and we accept his evidence. He had inherited the investigation from Mrs Jamieson. This was a complex and far-reaching investigation, involving the consideration of large volumes of material of different kinds, and was still continuing. He was engaged, in our view properly, in settlement discussions with Mr Mullens' representatives but, when it became clear that the dispute would not settle, he was obliged to refer the case to HMRC's Tax Disputes Resolution Board for internal 'sign-off' to proceed with the assessments. Thereafter, there was still further work to be done in drawing up the assessments, having them checked, and (given that the assessments were not just for income tax) liaison with colleagues. All these steps were rational and proportionate given the size of this dispute, and its complexity.

THE CONSTANTIN MEDIEN LITIGATION

62. HMRC invited us to have regard to the decision of Mr Justice Newey in the civil case of *Constantin Medien AG v Ecclestone, Mullens, Bambino Holdings Ltd and Gribkowsky* [2014] EWHC 387. As the title shows, Mr Ecclestone and Mr Mullens were both parties: Mr Ecclestone was named as the First Defendant and Mr Mullens was named as the Second Defendant.

63. In that case, the judge heard Mr Mullens give oral evidence over 2 and a half days in November 2013, much of which was occupied with detailed cross-examination. In his reserved judgment, he expressed firm views as to the reliability and truth of Mr Mullens' evidence. He was unable to view Mr Mullens "as a reliable, or even a truthful, witness", regarded some of his evidence as "straining credibility", considered he had knowingly given false evidence in certain respects, and concluded that Mr Mullens had conspired with Mr Ecclestone to bribe a Dr Gribkowsky, the Fourth named Defendant, who was an employee of a German bank.

64. Although the characterisation of Mr Mullens by Mr Justice Newey is relevant, to a degree, it is not determinative when we come to assess Mr Mullens' truthfulness or credibility. We are not bound by Newey J's observations, albeit they must be afforded some weight as coming from a judge of the High Court who had the opportunity to hear and assess Mr Mullens give evidence.

65. We have had the same opportunity. We heard Mr Mullens give evidence, also subject to detailed cross-examination, for two days. Our task is that we must make our own assessment of Mr Mullens' credibility, founded on the evidence which he has given us. We are not sitting as a court of appeal from the decision of Newey J; nor was the trial in Constantin Medien a dress rehearsal for this appeal.

66. Reliance is placed by HMRC on the decision in Constantin as evidence that Mr Mullens, having entered (as was there found) into a corrupt arrangement with Mr Ecclestone and Dr Gribkowsky, has a propensity (i) to deliberately conceal the true nature and payments associated with and emanating from the Ecclestone family's business interests, and (ii) a failure thereafter to tell the truth about it.

67. Insofar as we are invited to draw these inferences from the findings in Constantin, we do not consider that we need to go so far. Again, and although the judicial findings of fact in Constantin (which was not a criminal case) stand, and are admissible, they are not probative. They are simply another species of evidence, to be weighed up alongside all the other evidence which is before us.

68. However, different considerations apply to the written evidence provided by Mr Ecclestone (as First Defendant) and Mr Mullens (as Second Defendant) in their witness statements in Constantin, standing as their evidence-in-chief, and supported with Statements of Truth in that litigation.

THE 2010 PROCEEDINGS BETWEEN MRS ECCLESTONE AND MR MULLENS

69. In the course of Mr Goldberg QC's opening, the Tribunal was taken to a claim form, issued in June 2010 in the Chancery Division of the High Court of Justice, by Mrs Ecclestone as Claimant against Mr Mullens as Defendant. The 'Brief Details of Claim' given on the face of the claim form read that Mrs Ecclestone sought *"A declaration that a loan dated 27 July 2009 (or thereabouts) for £15m be set aside by reason of the Defendant's breach of fiduciary duty and/or his procurement of the loan through his undue influence over the Claimant"* as well as associated remedy and relief.

70. We were informed that this claim had eventually been settled. But although the Claim Form was before us in evidence, neither the Particulars of Claim nor the Defence had been placed before us or disclosed. This omission was canvassed with the parties. On the morning of the second day, we were shown a copy of an order made on 9 September 2010 in the Chancery Division pursuant to Civil Procedure Rule 5.4C whereby the Statements of Case etc in the claim were not to be produced to any party "without the consent of [Mrs Ecclestone], or failing that, leave of the Court." After consultation, Mr Goldberg QC indicated that his client was content for the Particulars of Claim (in fact, an unsigned document described as a draft Particulars of Claim) and the Defence to made available, but only if the Tribunal so ordered. We did so order.

71. The claim related to the sum of £15m. It sought a declaration that a loan and/or any other agreement reached between Mrs Ecclestone and Mr Mullens on 20 July 2009 be set aside. The Particulars of Claim alleged:

> "Over a 25 year period culminating in 2009 ... the Claimant came to repose trust and confidence in the Defendant to such an extent that the Defendant had ascendancy over the Claimant and owed the Claimant fiduciary duties not to allow his interests to conflict with hers and not to profit from his relationship with her. The Defendant ... was at all material times a tax advisor to the trustees of various offshore trusts of which [Mrs Ecclestone] is a beneficiary; provided general assistance to [Mrs Ecclestone] in relation to her financial affairs, to the extent that he was the primary source of information for her accountant, would have known what her available resources were at any time and was accustomed to giving instructions on her behalf in relation to her bank accounts to her attorney..."

72. Mr Mullens' defence to that claim, drawn up on his instructions by a QC specialising in commercial law, instructed by an internationally known firm of London solicitors, denied the claim in its entirety. It was supported by a Statement of Truth in the usual form at the time ('I believe the facts stated in this Defence are true') which was personally signed by Mr Mullens on 6 September 2010.

73. The Defence asserted that Mr Mullens had been legal adviser to the trustees of certain trusts, settled by Mrs Ecclestone between 1997 and 2000, since the formation of each of the trusts, as well as to BHL and Valper, 'as well as to other companies within the Trusts'.

74. But the allegation made against him and set out above was denied. Mr Mullens (as the Civil Procedure Rules required him to do) went beyond a bare denial. He said that "Between 1995 and 2008 (when divorce proceedings were commenced ...) [Mr Mullens] met [Mrs Ecclestone] on only a limited number of occasions. [Mr Mullens'] contact with [Mrs

Ecclestone] during this period was limited to providing information and assistance (but not advice) to [Mrs Ecclestone] and to her accountant ... [Mr Mullens] also met [Mrs Ecclestone] from time to time, at the request of the Trustees, to brief [Mrs Ecclestone] on developments in relation to the Trusts. Additionally during the period of a tax inquiry by the Inland Revenue into the tax affairs of [Mrs Ecclestone] and Mr Ecclestone (between 1999 and 2008) [Mr Mullens] also met with [Mrs Ecclestone] periodically at the request of the Trustees to inform her of the status of the tax inquiry and the Trustees' strategy in relation to it." Other 'occasional' meetings were described, said to have been for professional and advisory purposes.

75. Mr Mullens denied that Mrs Ecclestone had come to repose trust and confidence in Mr Mullens to such an extent that he had ascendancy over her and/or owed her fiduciary duties, whether as alleged or at all. Mr Mullens expressly denied that he had ever had an 'ascendancy' over Mrs Ecclestone. He denied that he had ever given her 'general assistance' or 'acted as a broker' in the Ecclestone divorce proceedings.

76. There are obvious inconsistencies between the Defence which Mr Mullens signed in 2010 and the substance of Mr Mullens' case before us as to the nature and extent of his relationship with Mrs Ecclestone.

MR MULLENS' CREDIBILITY

77. Credibility is important in this case and resolution of this appeal calls for assessment of Mr Mullens' credibility.

78. Mr Nawbatt QC mounted a determined challenge to Mr Mullens' credibility.

79. In our view, and in large measure, that challenge succeeds.

80. Taking the above, there is glaring inconsistency between the case advanced by Mr Mullens in 2010, and that advanced in this appeal. In 2010, Mr Mullens said one thing about the nature and intensity of his relationship with Mrs Ecclestone, but said something completely different in 2018. It is factually impossible for both things which he said to be right. Moreover, neither thing was said casually. Both things are said in formal legal documents, each supported with a Statement of Truth, and each was signed as the truth by Mr Mullens.

81. It is appropriate here to set out a short passage of Mr Mullens' cross-examination:

> Mr Nawbatt QC: (Reading Paragraph 7 of the Defence) "Between 1995 and 2008 (when divorce proceedings were commenced by the Claimant) the Defendant [Mr Mullens] met the Claimant [Mrs Ecclestone] on only a limited number of occasions" Yes?
>
> Mr Mullens: I'm - I'm embarrassed by this. It doesn't reflect the entire story.
>
> Mr Nawbatt: Sorry, you say it doesn't reflect the entire story and you're embarrassed by it?
>
> Mr Mullens: Yes
>
> Mr Nawbatt: You're a solicitor. You understand the significance of a statement of truth on pleadings; correct?
>
> Mr Mullens: Well, I don't do litigation."

82. We have no hesitation in rejecting that explanation. The Statement of Truth is not couched in arcane, obscure or ambiguous language. It is meant for all litigants in all cases. It

is deliberately plain and simple. It simply asks the maker to confirm that they are telling the truth. Telling the truth is not a concept encountered only in the context of litigation. Moreover, when he signed the Statements of Truth, Mr Mullens was a solicitor of the Senior Courts of England and Wales: a profession which is subject to a Code of Conduct which is permeated by the obligation to tell the truth, and not to knowingly or recklessly mislead or deceive any Court or Tribunal. It is simply incredible that he did not understand the Statement of Truth. We did not believe him. His answer to us was a lie, and was given so as to seek to undermine what he had said, and subscribed to, in 2010.

83. Although Mr Mullens did acknowledge what he repeatedly described as 'embarrassment', he nonetheless was unable to reconcile his differing positions in any satisfactory way. He did not provide any satisfactory explanation as to why he had (in his own words) not told 'the full story' in 2010, when faced with a multi-million pound claim by Mrs Ecclestone, who, on Mr Mullens' later account, was already his benefactor to the tune of tens of millions of pounds. Nor could he satisfactorily explain why, if he had not told the full story then, in those circumstances, and when he had asked the Court to believe that he was telling the truth, we should *now* believe that he was now telling *us* the full story, and asking *us* to believe that he was *now* telling the truth. We reject his explanation that the 2010 claim was dealing with a particular claim against him in his capacity as a solicitor and it didn't actually go into the full personal relationship with Mrs Ecclestone. That explanation was improvisatory and entirely unconvincing. What he had said in 2010 about the level and nature of his contact with Mrs Ecclestone was at stark variance with what he said in his witness statement to us: both could not be right. Mr Mullens accepted that his account of a close fraternal relationship with Mrs Ecclestone was based largely on his word, and was not corroborated by contemporary documents.

84. We have taken account of a letter written by Mr Mullens to Mrs Ecclestone on 27 July 2009 which sets out his request for the loan of up to £15 million which later ended up as the subject matter of the claim brought against him by Mrs Ecclestone. It supports the position that he was on first name terms with Mrs Ecclestone, and that she had expressed a wish to help Mr Mullens and his family move house. It does give a picture, to some degree at variance with the pleadings in that claim, as to the relationship between Mr Mullens and Mrs Ecclestone, and that it was perhaps somewhat closer that suggested in the pleadings. But the letter, read objectively by us, is still not supportive of an overall relationship of the kind which Mr Mullens seeks to portray – namely one where Mrs Ecclestone was so actuated by philanthropic sentiment that she would give Mr Mullens tens of millions of pounds, in a series of unexpected bolts from the blue. In our view, the letter in reality tends to the contrary – the relationship was one where Mrs Ecclestone wanted to help but only for a particular stated reason. Mr Mullens was willing to accept that help, but that help was to be given by way of loan and not by way of gift, it was subject to a written loan note, and Mr Mullens had made it clear that if Mrs Ecclestone had any reservations about the proposed arrangements, Mr Mullens would not wish to proceed. In short, the letter of 27 July 2009 is business-like, albeit business between two people on first name terms.

85. In the course of his oral evidence, Mr Mullens impressed us as a man of great charm and courtesy. Nonetheless, this did not conceal a keen and steely commercial intellect beneath. We consider that he is a commercially and financially sophisticated individual of an extremely high order. We are sure that he is (and was at all times material to this appeal) a skilled and profound strategist, not only in terms of protecting and promoting the Ecclestone family interests, but also - when opportunity has arisen - his own. We are sure that the trust and confidence reposed in him by the Ecclestone family over many years to deal with their legal and financial affairs,

and to offer them counsel and advice, was actuated by a well-founded perception of Mr Mullens' intelligence, insight, and loyalty to them and their interests.

86. His oral evidence to us was not very forthcoming. In some respects (for example, the home invasion) this was understandable and we do not draw any adverse inference from it. But in other regards, it was less understandable. In our view, there was a pervasive want of candour through his oral evidence which we consider reflects a wish to continue to protect the Ecclestone family and their interests, and his own, from undue scrutiny, and to say as little as possible about either.

87. His oral evidence to us was also marked with evasiveness, and a resistance to making obvious and sensible concessions when faced with contrary contemporary documents. One example of this, explored in cross-examination was in relation to the so-called 'Consultancy Agreement' entered into by Mr Ecclestone with Bayerische Landesbank (and discussed more fully below). Another example was Mr Mullens' evidence that he had genuinely believed that he was being interviewed in Germany (on three separate occasions) by the German prosecuting authorities as a witness, and not as a suspect. He never can have held any such view genuinely, or honestly, because the documents (in English) recording what was said in those interviews show that it would have been overwhelmingly clear at the time, even to someone unfamiliar with German criminal procedure, that he was being treated as a suspect and as a potential co-defendant to Dr Gribkowsky and Mr Ecclestone. We do not believe that Mr Mullens ever genuinely believed that he was not a suspect, and his evidence about this to us (for example, 'Well, it wasn't clear to me') was simply not credible, especially from a person of his professional standing and acuity. We reject it as untrue. The untruthfulness in this regard is difficult to understand, because the matter of his status in the German proceedings - whether witness or suspect - does not seem to us to be consequential to any of the issues which we have to determine in this appeal. But in our view, what it does show - consistently with the broad tenor of much of his other oral evidence - is that Mr Mullens was prepared to adopt an untruthful or misleading position even in relation to matters where concession would not have undermined his credibility.

88. When pressed on this point in his oral evidence, Mr Mullens' sought to advance, by way of explanation, his response to the home invasion which he and his family had suffered in 2009. He said that he had been on medication and that he was suffering from PTSD. But there is no medical evidence to support what he said, and it is in any event difficult to accept that what had happened to him and his family in April 2009 caused him to fundamentally misunderstand what was being said in interviews in Germany in May 2011 (especially when, at the outset of the interviews, he was asked about his health, and confirmed that he was healthy). Likewise, although he said to us in his oral evidence that he could not remember at all times what was going on, no medical evidence was placed before us as to any cognitive or memory difficulties which he had suffered, or was continuing to suffer. This would have been extremely difficult to reconcile with Mr Mullens' ostensibly extremely detailed factual recall when seeking to explain what had been said in various documents.

89. The inconsistencies between Mr Mullens' Defence in the High Court and his witness statement to this Tribunal are powerful evidence in showing that Mr Mullens is capable of putting forward - even in the context of formal legal proceedings, and described as the truth - a version of the facts which happens to suit the moment. This goes well beyond working from a single set of facts, but giving them different emphasis or slant from time to time. His evidence to us on this point in our view was decidedly improvisatory. It shows us that he is prepared to obfuscate or mislead - again, as the circumstances and what he perceives as being his own financial interests require.

90. We have concluded that we cannot safely regard Mr Mullens as a witness of truth. We must therefore approach his evidence - both written and oral - with appropriate caution.

91. There is a further aspect to this. The inconsistencies in the Defence and the Witness Statement, treated as documents, show that Mr Mullens is capable of framing documents to suit whatever his purposes might be from time to time, and that documents which he has drafted or had a hand in drafting cannot safely be treated as an accurate and truthful record of what is said in them.

92. This is important in the context of this appeal because Mr Mullens invites us to consider and give evidential weight to several documents said to have been composed by him or at his behest and signed by or on behalf of Mrs Ecclestone and/or (it is said) composed by Mrs Ecclestone.

93. The challenge to those is that Mr Mullens is someone who is capable of deliberately framing documents to give a misleading impression of the true nature of the transaction.

94. We agree. This is a fair characterisation of Mr Mullens. One instance of this is the so-styled "Consultancy Agreement" between Bayerische Landesbank and Bambino Holdings of the one part and Mr Ecclestone (described in the heading and throughout as 'Consultant') of the other part (appearing at page 2248 of the appeal bundle) which Mr Mullens had drafted, but which was thoroughly misleading as to the true nature of the rights and obligations arising under it. After sustained close cross-examination by Mr Nawbatt QC, Mr Mullens eventually suggested that the agreement was "confused." Even later, he accepted (as he was bound to do) that the agreement mischaracterised the true position. This was a good example not only of Mr Mullens failing to make sensible concessions, but also of him continuing - in this appeal, before us - to maintain through his evidence positions which did not carry obvious strategic advantage for him in his appeal, but rather to answer questions in a way which, in our view, was designed to serve Mr Ecclestone's interests.

95. Accordingly, we need to be very cautious in automatically accepting at face value documents prepared by or at the behest of Mr Mullens.

THE CODE OF PRACTICE 9 INVESTIGATION OF MR MULLENS

96. Except for the white space in his 1999/2000 tax return (signed on 29 January 2001) Mr Mullens did not tell HMRC anything, at the time, about Payments 2-6, or the Holiday Payment, or the other matters in dispute.

97. On 17 July 2012 Officer Jamieson wrote to Mr Mullens under Code of Practice 9 ('**COP 9**') ('HMRC investigations where we suspect tax fraud'). The letter is prominently headed "HMRC Investigation of Fraud Letter". Even if it had not, and as the body of the letter made very clear, the COP 9 procedure is used by HMRC in cases of suspected fraud. As the letter makes clear, HMRC's investigation was to cover "all" of Mr Mullens' "tax affairs."

98. Mr Mullens was invited to cooperate with HMRC, but he did not need to. He had a choice - "to wish to co-operate" or to "not wish to co-operate". The incentive to co-operate was that HMRC formally offered him a Contractual Disclosure Facility ('**CDF**') opportunity meaning that, if he fully disclosed tax fraud, HMRC would "contractually undertake not to commence a criminal investigation with a view to prosecution, for any tax fraud disclosed under the contract." The offer was made "in the expectation that at all stages throughout the CDF process your disclosures to HMRC will be full, open and honest and you will provide accurate, timely and complete information to the best of your ability."

99. We are satisfied that Mr Mullens had been provided with the text of COP 9 (February 2012 edition) which makes clear that the CDF is suitable "only if you have committed **tax fraud** [and] wish to fully disclose the **tax fraud** you have committed" (bold is emphasis added

by us). The text is clear that the CDF "is not appropriate for people who want to disclose only careless errors, mistakes, or avoidance arrangements." Section 2.5 of COP9 reads as follows:

> "**What is the effect of entering into a contract?**
>
> To comply with your undertaking, you will be admitting that tax has been lost due to your deliberate actions. This means we may be able to seek recovery of evaded tax, interest and associated penalties for as far back as 20 years.[...] "

100. Appendix 1 of COP9 is a 'CDF Decision Tree'. Question 1 is "Do I accept that I have committed tax fraud". The answer to that can only be "yes" or "no". If "no", it is still open to the taxpayer - as it was to Mr Mullens - "to engage with HMRC" (as opposed to "disclosing my tax fraud under CDF terms") but that route (described as 'the Denial Route') involves signing a so-called 'denial letter'. Mr Mullens did not take the Denial Route. He took the CDF Route.

101. He took the CDF Route when, on 27 September 2012, he accepted HMRC's offer of a Contractual Disclosure Facility, and on that same day made an "Outline Disclosure" (being the first stage of the procedure). We are sure that he knew what he was choosing, and what he was not choosing.

102. His signed acceptance of the CDF said:

> "I accept your offer dated 17 July 2012 made under the Contractual Disclosure Facility.
>
> I confirm I have read, understood, and agree to the terms and conditions set out in the [sic] Code of Practice 9.
>
> I understand that the offer by HMRC is made in the expectation that at all stages throughout the CDF process my disclosures to HMRC will be full, open and honest and I will provide accurate, timely and complete information to the best of my ability."

103. This was accompanied by a completed "Outline Disclosure" form. The first sentence is that "As part of my Contractual Disclosure Facility undertaking, which I signed on 27/09/12, I admit that I have deliberately brought about a loss of tax through conduct which HMRC may suspect to be fraudulent." He then goes on to populate the boxes which are headed "Description of Fraud."

104. Insofar as the same is subject to challenge in this appeal, we emphatically reject any suggestion that Mr Mullens did not understand the CDF, did not understand his rights under it, or how it worked, or did not understand what he was saying to HMRC. He was being advised not only by BDO but also by Burton Copeland, who are a well-known firm of solicitors specialising in criminal law. Mr Mullens is himself a lawyer of very considerable skill who had dealt with intricate and extremely high-value transactions.

105. In reality, there was nothing complicated to understand. The word 'fraud' is an ordinary English word. There cannot be any doubt but that Mr Mullens knew full well that he was accepting that his conduct was fraudulent. In the particular context of COP9, and the abstention of prosecution incentive, it is clear that fraud meant conduct which could be criminal.

106. His Outline Disclosure, in September 2012, disclosed only the following things:

(1) Interest "that may have been payable" on Payment 2

(2) Interest "that may have been payable" on Payment 3 (both described as "the second and third tranches of a payment to encourage me to resign as a partner of Marriott

Harrison" and "capital sums from a signing-on fee"). He said that he "believed interest may have continued to be payable until at latest April 2012";

(3) The omission to make a return in relation to a payment of around £200,000 received in late 2007 from a Lebanese company (which was Klondike Investments SA);

(4) Use of those funds to purchase shares, which were said to have made a gain relatively recently;

(5) The purchase of diamonds in 2008 and/or 2009 in Switzerland for about 3m USD and their import into the UK.

107. We do not consider that the Outline Disclosure was a full, open and honest disclosure; and we consider that Mr Mullens - at the time - would have known that. Standing back, he was carefully and selectively disclosing only things which now seem relatively inconsequential in the overall context of his financial and tax affairs - interest (unquantified), receipt of funds from Klondike, some share purchases, and some diamonds.

108. In Part B of the Additional Information box, he declared Payments 1, 2 and 3, as "receipts of capital which have not been disclosed on my tax returns because I did not and do not believe that they should be subjected to UK tax law." He said that this was because they were "what might be described as a signing-on fee." In his oral evidence, Mr Mullens sought to distance himself from this sentence in three ways: (i) by saying that he did not think that Payments 1, 2 and 3 were a signing-on fee, (ii) by saying that it was BDO who said it, and not him; and (iii) by pointing to the fact that BDO had said 'may'. None of this is convincing, and we reject it. What BDO said there was subscribed to by Mr Mullens.

109. He said that he had declared Payment 1 on his return at the time. He also said that he had received, as gifts, Payments 4, 5 and 6.

110. A long meeting took place between Mr Mullens, his advisers, and a team of officers from HMRC on 22 November 2012. HMRC made a note, which was provided to Mr Mullens, who then submitted two schedules, signed and dated by him on 15 February 2013, "setting out various points of clarification". One was "Factual corrections" and the other was "Points of Clarification." These are careful schedules, and show an extremely close attention to detail on his part. We are confident that Mr Mullens, and his advisers, had considered HMRC's note of the meeting, and in February 2013 took issue with everything they wanted to, on a line by line basis. This finding is particularly relevant to our treatment of Payment 6, below. We do not consider that Mr Mullens had been open, honest or transparent with HMRC in that meeting. For example, he did not tell HMRC anything about the letters in October 2005 which had preceded Payment 4 (and which, for reasons we set out below, we consider represent the true reason for that payment). Those letters were not provided to HMRC until January 2015. Nor (even if he did not have copies of those letters, or indeed even if he had forgotten about their existence) did he give any information as to the request for payment which those letters had made. Instead - in our view, falsely and misleadingly - he advanced the position that the $38 million received from Mrs Ecclestone was a gift, for which she had not even given any reason. We consider that, even at that point, he was deliberately concealing those facts from HMRC.

111. In July 2013, Mr Mullens, through BDO, submitted a Disclosure Report, dated 22 July 2013, addressing Payments 4, 5 and 6, and the Holiday Payment all described as "gifts made by Mrs Ecclestone to Mr Mullens". That report, it was agreed with HMRC, was only to address the gifts made.

112. Mr Mullens submitted a further Disclosure Report, dated 27 August 2014, addressing all matters other than Payments 4, 5 and 6, and the Holiday Payment. On 14 October 2014, he

signed a 'Certificate of Full Disclosure' certifying the accuracy of schedules of bank accounts and other assets.

THE PAYMENTS

113. We have considered each payment individually, but also paying such regard as we think appropriate to the fact that consideration of each payment in isolation does not give the fullest picture where there are a series of payments ostensibly made, according to Mr Mullens, for different reasons and with different motives (one reason and motive for Payments 1-3, another for Payments 4-6, and the Holiday Payment).

THE AUGUST 1999 AGREEMENT

114. The background to Payments 1, 2 and 3 is said by Mr Mullens to have been the August 1999 Agreement wherein Mr Mullens was engaged, as a 'consultant legal adviser', to 'continue' to provide 'continuous business support' for BHL and FOM. The plain wording of the agreement was that it represented some continuity.

115. The annual fee was to be not less than £400,000 plus VAT 'or such additional sum as may be agreed between the parties.' Payment was to be made against invoices. The Agreement was to operate for an initial term of three years from the agreed start date but was to continue at the end of such period "when the fee will be renegotiated in good faith but shall not be at a level less than the fee for the initial period."

116. The August 1999 Agreement was subject to periodic revision:

(1) By way of a letter dated "As at 31 May 2002" the August 1999 Agreement was varied so as to add Valper as a party, with effect from 11 August 1999, and on terms that the services set out in the August 1999 Agreement were to include "all the services the Consultant has performed for Valper to date ...". This letter does not set out any figures. It is endorsed in manuscript at the foot on behalf of BHL on 8 August 2002 (an indecipherable signature) and on behalf of Valper (likewise);

(2) By way of a letter dated "As at 1 November 2004", it was agreed that Mr Mullens' fee under the August 1999 Agreement would be increased by £200,000 per annum. That letter is signed by Mme Argand, but it is not dated by her";

(3) By way of a letter dated 6 February 2008, Mr Mullens proposed, and Mme Argand by endorsement of the foot of the letter, accepted, an extension of his existing contract for a further period of 5 years.

117. In September 2012, Mr Mullens prepared and initialled a note setting out what his "fee arrangements" were for "FOM/Bambino/Valper":

(1) "From 1999 to 2000, minimum fee agreed of £400,000"

(2) "From 2000 to 2004, minimum fee agreed of £700,000"

(3) "From 2004 onwards, minimum fee agreed of £900,000."

118. £400,000 is the fee set out in the 1999 Agreement. We accept and so find that the fee agreed was to be not less than £400,000.

119. The 1999 Agreement contemplated that the fee was not to be reviewed until 2002. There is no evidence of any review in 2000. The contract was not varied in writing until May 2002, and the May 2002 variation does not mention £700,000. There is no evidence that a fee of £700,000 was ever agreed. The May 2002 variation says that the 1999 terms were to be varied only as therein set out, and that "All other terms of the Agreement shall remain unchanged except as agreed in this letter or other letters between the parties." Contrary to Mr Mullens' note, we do not believe that a fee of £700,000 was agreed with effect from 2000.

120. The 2004 variation does not mention any base fee figure or any revised fee figure. Although the increase referred to is £200,000 per year, and that is the difference between £700,000 and £900,000, there is no evidence that a fee of £900,000 was agreed. Contrary to Mr Mullens' note, we do not believe that a fee of £900,000 was agreed with effect from 2004. The 2004 letter operated only to vary the 1999 agreement as therein set out, and all other terms remained unchanged.

121. The underlying significance of this is that Mr Mullens uses the figures and timings and progression - £400,000 (1999) - £700,000 (2000) - £900,000 (2004) - as the mainstay of his analysis as to his stated net financial position. But neither those figures, nor those dates, can safely be relied on.

122. As well as that unsatisfactory position, it is difficult to know, even now, with any degree of precision, what services Mr Mullens did in fact perform for Mr Ecclestone, or Mrs Ecclestone, or the Trusts, or the Ecclestone family interests more generally. Much is shrouded in mystery. We have no doubt that the mystery is deliberately inculcated, so as to inhibit forensic scrutiny by third parties.

123. A bullet-pointed list of 12 general areas of work is set out in Mr Mullens' witness statement. But, and regardless of the detail, it is entirely plain that Mr Mullens did provide extensive services, going well beyond those which a solicitor in sole practice would typically provide. Mr Mullens was intimately involved and immersed, over the course of many years, with the legal and business affairs of Mr Ecclestone, Formula 1, and Mrs Ecclestone. Mr Mullens did not have a bit-part in those dealings, nor was he a simply a messenger or intermediary acting between the Ecclestones and (for example) the lawyers in Switzerland. On the contrary, Mr Mullens was a close and trusted adviser and representative. We have no doubt at all that Mr Mullens put his very considerable skill and expertise into his shepherding and safeguarding of the Ecclestone family interests, wherever they happened to lie. Moreover, and as time went on, the value of Mr Mullens' services to the Ecclestones would inevitably have increased because Mr Mullens had not only planned and organised the Restructuring, but will inevitably have become a repository of experience and knowledge about the Ecclestone family interests.

124. None of this is well captured at all by the August 1999 Agreement, which is very brief (one side) and, regardless of brevity, is very vague in its description of 'the Services'. It is not a compendious document by any stretch of the imagination, and it is not one capable of withstanding the sort of forensic scrutiny to which it was exposed during this appeal. Our impression is that the document was drafted very carefully so as to be vague in case it came to be scrutinised by third parties. We are not sure that this document was ever intended to genuinely represent the intentions of the parties to it.

125. The actual operation of the August 1999 Agreement also lacks transparency. These features also feed into our overall assessment of Mr Mullens as an individual who goes to considerable lengths to render his activities and finances opaque and immune from inquiry by the proper authorities.

PAYMENT 1

126. Payment 1 was made by BHL to Mr Mullens in August 1999.

127. At about the same time, Mr Mullens opened a joint bank account in Switzerland with Border and Cie, and on 30 August 1999 he gave written instructions to Border for £1.070m to be transferred to that account.

128. Mr Mullens asserts that Payment 1 was disclosed in his 1999/00 tax return, and he has provided a copy of that return, signed and dated 29 January 2001. HMRC has not retained a

copy of the return and is thereby unable to verify the copy provided. Insofar as the matter remains in dispute, we find that the copy provided by Mr Mullens is indeed a true copy.

129. In Question 22, certain "Additional Information" is provided. Part of this reads: "Payment from Bambino Holdings Ltd. Received £1.25 million in the year 1999/2000 and is not taxable. Please see attached Appendix."

130. In a 2-page 'Appendix' to the 'white space' disclosure, Mr Mullens said that the payment was made by BHL "to encourage me to resign as a partner of Marriott Harrison". He set out a series of 6 numbered "Facts", and "Conclusions":

> "Facts
>
> 1. Payment made by [BHL] to me to encourage me to resign as a partner of Marriott Harrison.
>
> 2. Money received by me in August 1999 without any contractual stipulation imposed by [BHL].
>
> [...]
>
> Conclusions
>
> 1. The payment to me is not emoluments nor income for the performance of services but represents a payment to induce me to give up my professional status as a partner of the firm viz Pritchard v Arundale [1972] Ch 229. i.e. not taxable as income
>
> 2. Section 740 ICTA 1988
>
> (a) There is no liability to income tax pursuant to s 740. I am an individual ordinarily resident in the UK who is not liable to tax under s739 by reference to a transfer and does not "receive a benefit provided out of assets, etc" viz ICTA s740(1)(b) ICTA 1988
>
> I am not a beneficiary of a gratuitous transaction which confers a benefit upon me since the payment was made to induce me to resign
>
> (b) S 740(2) refers to "the amount or value of any such benefit as is mentioned in s(1) above.
>
> As mentioned above no benefit is received where a payment is made for consideration."

131. The size of the payment is given in the "Additional Information" box, but there is no mention of the 1999 Agreement at all. The Additional Information refers only to Payment 1, and does not say anything about Payment 1 being intended to be the first tranche of three payments, with further payments still to come.

132. Substantively, we do not consider that Payment 1 can properly be regarded as falling within the scope of the decision in *Pritchard (HM Inspector of Taxes) v Arundale* [1972] Ch 229; (1972) 42 STC 680. In *Pritchard*, Megarry J declined to interfere, on an appeal by way of Case Stated, with the Special Commissioners' decision that the transfer of certain shares was not something in the nature of a reward for a taxpayer's future services. It does not establish

any principle of universal application. It was a decision which the Special Commissioners were entitled to come to, having (unlike here) heard evidence not only from the taxpayer, but from the transferor. Indeed, Megarry J cautioned (see 690G) that the decision was not to "provide any passport for tax-free emoluments disguised as initial lump-sum inducements to enter an employment: for it is the realities of the payments that matter, and not any disguises or labels with which they may provided."

133. As Upjohn J had recognised in *Hochstrasser v Mayes* (approved by Viscount Simonds [1960] AC 376 at 387), it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from employment. Warner J also recognised this in his treatment of *Pritchard* in *Glantre Engineering Ltd v Goodhand* [1983] STC 1 at 15c. The question of a payment to an employee made at the inception of his employment (and therefore whether it is taxable) is always a question of fact to be decided on a consideration of all the evidence. Hence, in *Glantre*, a payment of £10,000 which was found to be an inducement to a chartered accountant to give up private practice was held to be an emolument from future employment.

134. It does not matter if payments are made in anticipation of services to be rendered (i.e., payment 'up front'): such a payment can still be treated as a taxable emolument: see *Shilton v Wilmshurt* [1991] 1 AC 684, where *Glantre* was treated as 'an illustration of the fact that an emolument from employment may be an emolument for agreeing to become an employee': see p 694 *per* Lord Templeman (with whom Lords Bridge, Brandon, Ackner, and Goff agreed).

135. Focussing on the evidence, we reject Mr Mullens' position, set out in the Appendix, that Payment 1 was made as an inducement as described.

136. The situation which Mr Mullens invites us to accept as the true position is that he was promised an annual fee, as well as a ‘signing on’ fee.

137. In his witness statement, he said that "I proposed to Valper/Bambino an inducement payment to leave MH of £2.25m. My discussions were with Luc Argand."

138. Besides from what Mr Mullens says now, and what was said on the 1999/2000 return, there is nothing by way of contemporary documentary evidence to support this.

139. There is nothing from Marriott Harrison to him, nor vice versa (save for a short note drafted by Mr Mullens setting out the suggested terms of an internal announcement (internal to MH), in circumstances where his departure, on his own evidence, would have stripped the firm not only of one of its senior partners (who was rain-making not only in terms of his own team but other teams at the firm) but also of much of its fee income.

140. On Mr Mullens' own evidence, he was the top billing partner of Marriott Harrison every year after 1986/7 until his departure in 1999, and from 1990 to 1999 was one of the 3 managing partner committee members that ran the firm. His average profit share at Marriott Harrison in the three years ending April 1999 was approximately £760,000, which was about double the average profit share of the next highest earning partner. His profit share in the year ending April 1999 was £957,392. Against these figures, it is simply not credible that an individual of Mr Mullens' stature and ability would have left Marriott Harrison for an agreement to earn £400,000 a year.

141. Nor is there anything from the other persons who are said to have made and/or known of an agreement to pay a 'signing-on' fee, such as Luc Argand.

142. The 1999 Agreement does not say anything about Mr Mullens leaving his firm.

143. It is striking that there is no provision in the August 1999 Agreement for a signing-on payment. We do not believe that this could be caught within "or such additional sum as may be agreed between the parties."

144. Mr Mullens also says that "I was to receive the agreed inducement payment" (here, he was referring to an alleged discussion with Mr Ecclestone earlier in 1999) "on leaving MH, regardless of whether or not I would in fact provide services to the group in the future." He says "...whilst there was a theoretical risk that I might have accepted the inducement payment and refused to work for [the trustees] I believed that they felt that this was an acceptable risk."

145. We reject this evidence. It is inherently implausible.

146. Mr Mullens also suggested, in cross-examination, that Payment 1 was paid without obligation, and that, if Mr Mullens were to have changed his mind about leaving Marriott Harrison, his counterparties would have no recourse to the money because the payment was not conditional on his providing any services. Mr Nawbatt QC criticised that answer as "wholly inconceivable" (see Day 4 Page 119). We agree. It is. We do not believe that any commercially astute individual - let alone Mr Ecclestone - would have paid, or (whether personally, or through his surrogates) would have agreed to pay, Mr Mullens a seven figure sum on a hope and a prayer that Mr Mullens would be able and willing to extricate himself from Marriott Harrison and go to work under the consultancy agreement.

147. As it stands, the only evidence which we have about why Payment 1 was made is that of Mr Mullens, and we have already said that that we treat that evidence with caution except where it happens to be corroborated by independent reliable, third party documentation or evidence.

148. We do not consider that he is telling the truth about Payment 1, and (save for his 1999/2000 white space disclosure) there is no reliable contemporary documentary evidence about it.

149. Mr Mullens therefore fails to discharge the burden placed on him and (subject to any question as to disclosure and timing) his appeal against HMRC's assessment of Payment 1 must fail.

150. But, and insofar as we need to do so, we can go further than that and say that we are satisfied that Payment 1 was actually made in consideration of services which Mr Mullens had already rendered or would be rendering to the Ecclestone family interests. We are sure that Payment 1 was received by Mr Mullens as part of a remuneration package for his services to the Ecclestone family.

151. We are satisfied that a business relationship giving rise to the right to be paid already existed at the time of the August 1999 Agreement, and had already existed for some time previously.

152. This is supported by the wording of the August 1999 Agreement, whereby Mr Mullens agreed to be bound to 'continue' to perform services as a consultant legal adviser. "Continue" must be given its ordinary meaning. This was the language chosen by the parties. In our view, this points to a situation where Mr Mullens was already engaged in August 1999 – that is, his work (whatever it was) had already started – and therefore was a receipt of his trade or profession under Schedule D Case 1.

153. But even if that were wrong, Payment 1 would nonetheless in our view have been chargeable to income tax as miscellaneous income under Schedule D Case VI.

154. Therefore, and subject to any issue of discovery, we are satisfied that Payment 1 was part of "the annual profits or gains arising or accruing … to [Mr Mullens] from any trade, profession or vocation whether carried on in the United Kingdom or not": ICTA 1988 section 18(1)(a).

PAYMENTS 2 AND 3

155. In late 2000, BHL made two further payments to Mr Mullens.

156. Both payments were paid into a de Pfyffer client account in Switzerland, and remained there.

157. There is no contemporary written evidence as to these payments.

158. Neither Payment 2 nor Payment 3 were disclosed or referred to in Mr Mullens' tax returns at the time, or subsequently.

159. We reject Mr Mullens' evidence that, having made the white space disclosure in relation to Payment 1, which was not queried at the time by HMRC, "I assumed they had accepted the non-taxable nature of the inducement payment and accordingly I did not refer to the receipt of the balance in subsequent tax returns." We reject this because, as already observed, HMRC was not told anything in 1999/2000 suggestive that Payment 1 was but the first payment of anything, with an (unidentified) balance still due. We do not believe that Mr Mullens is telling the truth about this.

160. It was not until September 2012, in the course of a Code of Practice 9 investigation, that Mr Mullens told HMRC that he had "deliberately brought about a loss of tax, through conduct which HMRC may suspect to be fraudulent."

161. In the "Description of Fraud", Mr Mullens stated:

> "I omitted to return interest that may have been payable on capital sums of £750,000 and £300,000 received in 2000/01, the second and third of three tranches of a payment to encourage me to resign as a partner of Marriott Harrison."

162. Even later, on 22 April 2013, Mr Argand wrote (in English) a letter to Mr Mullens which is advanced as evidence of these two payments. This letter is opaque. It does not support Mr Mullens' position, but gives an impression of studied vagueness. It is difficult to believe that a lawyer of Mr Argand's seniority and standing (at that time, the 'Ancien Batonnier', or leader, of the Geneva Bar) would have written a letter of such superficiality and lack of transparency (even in a second language) unless he had, for some reason, set out to do so.

163. It is particularly striking that Mr Argand did not, in that letter, say that Payments 1, 2 or 3 were made pursuant to some agreement about a signing-on fee, or as an inducement for Mr Mullens to leave his law firm. Indeed, Mr Argand says nothing at all in that letter as to <u>why</u> Payments 1, 2 or 3 were made.

164. It refers to "various issues discussed" but does not say what those "issues" were, or when discussed. There is no record of any such discussion. This letter says "These moneys originated from clients' funds in my client account." The client is not named, and the use of "originated" is odd.

165. Unfortunately, Mr Argand wrote that he could not provide copies of the account statement "as they have been destroyed automatically after 10 years." It is not clear whether he is talking about paper records, or electronic records, or both. It is not clear whether he is talking about original records or copies. It is not clear when the destruction was: 2010, or some point later. Despite the apparent destruction of "the account statement" Mr Argand was able to confirm that "some interest" was credited to the account in 2009. The source of his information or belief in that respect is not set out. He wrote "Since March 2012 no moneys were left from

the original payments." Again, the source of Mr Argand's information or belief is not stated, and it is difficult to reconcile what he says was the "destroyed" account statement with the things said about interest, and the month in which the payments were exhausted. Mr Argand appears to suggest that some interest had accrued, and remained on account. He said he would "look to confirm the figure quickly". It is not clear why - given that this was his firm, and his firm's client account - that figure could not easily have been provided.

166. This letter undermines Mr Mullens' case rather than supports it. It gives every appearance of having been carefully crafted, so as, at first blush, to ostensibly give information which, on closer analysis, falls apart.

167. Except for Mr Mullens' own say-so, there is no reliable evidence of any agreement, by anyone, to pay these sums. Nor is there is any evidence that these were the second and third tranches of a payment of £2.25m alleged by Mr Mullens to have been agreed at the time of Payment 1 (but which case we have rejected).

168. For the reasons already given in connection with Payment 1, Mr Mullens has failed to discharge his burden and, save as to any issues of discovery, his appeal against the assessments for Payments 2 and 3 must therefore fail.

169. Insofar as we need to find, we are satisfied that these were payments received from his clients on the 'Ecclestone' side of the line and by way of financial reward for his services, over and above the remuneration agreed on the face of the August 1999 Agreement.

170. We are satisfied that Payments 2 and 3 were made in consideration of services which Mr Mullens had already rendered or would be rendering to the Ecclestone family interests, and were therefore a receipt of his trade or profession under Schedule D Case 1.

171. Therefore (and subject to any issue of discovery) we are satisfied that Payments 2 and 3 were part of "the annual profits or gains arising or accruing … to [Mr Mullens] from any trade, profession or vocation whether carried on in the United Kingdom or not": ICTA 1988 section 18(1)(a).

PAYMENTS 4, 5 AND 6

172. Mr Mullens' position is that Payments 4, 5 and 6 should be considered together, and that they were payments made to Mr Mullens or Mrs Mullens "which arise from [Mrs Ecclestone's] friendship with the Appellant and her wish to provide for him and his family and have nothing to do with any business relationship between [Mr Mullens] and the Ecclestone interests".

173. In relation to Payments 4, 5 and 6, Mr Goldberg QC submits that the history of those receipts revealed by the evidence "is not commercial, but human." We respectfully disagree. In our view, that dichotomy is a false one. But, even if it were not, the commercial and human can co-exist, and to some degree did so here.

174. We accept that there was some rapport or relationship between Mr Mullens on the one part and with Mrs Ecclestone and the rest of the Ecclestone family on the other. That may well have led to the point where Mrs Ecclestone came to confide in Mr Mullens about her personal life and familial difficulties when they arose from time to time, and to treat him as a shoulder to cry on. But that only went so far. At the end of the day, Mr Mullens was not a member of the Ecclestone family, was not related to them, did not routinely socialise with them, and did not move in the same social circles. He had his own family and own interests to look after. He was a trusted and long-serving lieutenant in the service of what may loosely be called the Ecclestone interests. Although Mr Mullens was on any view extremely powerful, trusted, and influential in his conduct of the Ecclestone interests, he was not immune from being sacked by letter (which he was in 2010) or from being sued by Mrs Ecclestone. It is striking that Mr Mullens' position in 2010 was that it was not appropriate to receive £15m from Mrs Ecclestone

as a gift, but only as a loan; but that thereafter the position somehow - inexplicably - changed so that it was then acceptable, on his case, to take money as gifts and not loans.

175. We unhesitatingly reject the suggestion that he was a person upon whom Mrs Ecclestone, like a rich elderly aunt, showered largesse by way of a series of spontaneous gifts in the order of tens of millions of pounds.

176. Mr Mullens invites us to find that there was a pattern to Payments 4-6, with that pattern being one of gifts. We agree that there was a pattern, but it was not the pattern contended for by Mr Mullens. With the exception of the Holiday Payment, we are sure that the pattern was one of large sums of money being advanced to Mr Mullens, from the Ecclestone 'side', in return for services provided by Mr Mullens to the Ecclestone family interests.

177. We reject the submission that Payments 4, 5 and 6 "are of such a size that a claim that they are from a profession or for a service is not credible." We are not attracted by this submission, and do not regard it as well-founded. It appears to proceed on the footing that earned rewards inevitably must be less than gifts (or, vice versa, that gifts inevitably must be larger than earned rewards). No legal or evidential basis has been shown to support that position.

PAYMENT 4

178. This payment was made on 7 April 2006.

179. Mr Mullens did not declare this payment in his 2006/07 tax return.

180. HMRC has assessed Payment 4 to income tax under ITTOIA 2005 section 5 as “profits of a trade, profession or vocation”, or alternatively as miscellaneous income under ITTOIA section 687.

181. Mr Mullens bears the burden of establishing that this payment was a gift. He has failed to satisfy us that it was a gift. He has failed to satisfy the burden placed on him, and his appeal in relation to Payment 4 therefore fails.

182. We have seen a typed letter, dated 23 July 2012, which reads as follows:

> “Dear Stephen
>
> Over the years, you have provided services to me and my trusts and you have been well rewarded for what you have done. Over and above this, you have exhibited great friendship to me for which I have been very grateful. Our financial circumstances are very different and I wanted to help your family. In 2006, and in 2008, I accordingly made gifts to you. The sums paid were gifts and were unsolicited, were made to help you and your family and were not rewards for services. I just wanted to help you. Yours sincerely (signed) Slavica Ecclestone.

183. We decline to give this note any weight, whether in relation to Payment 4 (made in 2006) or Payment 5 (made in 2008). It cannot safely be relied on. It was written years after the events referred to. It was composed and typed by Mr Mullens and presented to Mrs Ecclestone for signature. As with the letter (dated 24 July 2012) relied upon in relation to Payment 6, it was written days after HMRC had issued a COP9 letter to Mr Mullens offering him a CDF. We are satisfied that the catalyst for the letter dated 23 July 2012 (and the letter dated 24 July 2012) referred to below was HMRC's interest in Mr Mullens' tax affairs.

184. In our view, and insofar as we are called upon to do so, the true background to this payment was the proposed sale of shares in SLEC. These had been held by a company called Speed Investments Ltd ('**Speed**') which was in turn owned by a German media group called

Kirch. In 2002, Kirch encountered financial difficulties and the Speed shares were transferred to some banks under the banks' security rights. In August 2005, CVC Capital Partners ('**CVC**') met Mr Ecclestone to discuss a potential sale of the banks' shares in Speed, and submitted an "indicative non-binding offer" of USD 2 Billion. On 19 September 2005, BHL's board resolved to give Mr Mullens authority to negotiate with CVC.

185. This is important in demonstrating the importance of the role which Mr Mullens played in the Ecclestone family interests. He was the person entrusted to negotiate all aspects of a multi-billion dollar deal with CVC. As he accepted in evidence, he was "a very significant part" of the team which carried the deal home. In our view, it went beyond this. We are sure that Mr Mullens was the architect of the overall transaction (rightly described by him as "very, very complicated"). His descriptions of it (both to us, and in 2011 to the German prosecutors) were highly technical, and showed deep insight of its structure.

The letters of October 2005

186. As matters then stood, it was obvious, from the making of the offer (albeit indicative and non-binding) in the summer of 2005 that there was a good prospect of doing a deal with CVC which (as Mr Mullens told the Court in his witness statement in the Constantin litigation) was a large and successful private equity house and were regarded as serious bidders.

187. Mr Mullens detected the commercial opportunity which this offered to him, and, on 2 October 2005, he wrote to Mme Argand proposing that he receive "a success fee of approximately 1% of the net realisation value payable on the completion of the Investment Realisation" (i.e., the sale of BHL's shares in Formula 1).

188. Mr Mullens asked that BHL confirm what he described as an "arrangement" by signing a copy of that letter.

189. The plain intent of this letter was that Mr Mullens was to be rewarded for his endeavours by way of a percentage of the net proceeds. But that payment was not going to be ex gratia. It was expressly linked to Mr Mullens' bringing about a successful sale.

190. Shortly thereafter, on 14 October 2005, Mr Mullens wrote to Mme Argand as follows:

> "Dear Emmanuelle
>
> I refer to our discussions in Geneva last week and your request that I should set out my thoughts in more detail.
>
> As you know I left my law firm in 1999 in order to devote all my time to the Formula One Group and the family trusts. Our primary objective at that time was to achieve an ipo based on the foundations of a successful bond structure.
>
> In the event this was not possible, but nevertheless we will at the conclusion of Project Alpha have realised $3800 without incurring the usual 40% charge to capital gains tax. This has been achieved through my structure and our joint endeavours to preserve the rights we had under the various shareholder agreements.
>
> [...]
>
> In these circumstances, a global fee of 1% would seem appropriate less $10. As previously explained, I have spoken to the Settlor [i.e., Mrs Ecclestone] and she understands that I am talking to you about my personal position in the light of the anticipated conclusion of the sale by Bambino of its interest in F1.
>
> I remain committed to working with the family trusts and Bambino even though the challenge brought by F1 will not be available.

I hope this helps you to confirm the proposed fee arrangement."

191. There is some shorthand in this letter. We find:

(1) $3800 refers to $3800 million (equals $3.8 billion);

(2) 1% refers to 1% of the realisation following the conclusion of the sale to CVC;

(3) 1% of $3.8 billion = $38 million;

(4) "[l]ess $10" is a reference to the outstanding $10 million Valper loan.

192. The letter is obviously corroborative of the fact that Mr Mullens had in mind a percentage payment upon a successful sale. The figures in that letter also align with the payment which Mr Mullens received. Insofar as relevant, we do not consider that the letters of 2 October and 14 October 2015 were meant to refer to different things, and we reject Mr Mullens' evidence that they were.

193. This letter was countersigned by Mme Argand. We reject any suggestion that Mme Argand had countersigned that letter simply to acknowledge receipt. She countersigned that letter to indicate that she agreed to the proposals in it, and we so find. That is consistent with her notarial practice in other regards and is also consistent with what she had been asked to do in the letter of 2 October 2005. The letter of 14 October 2005 is a clear offer, coming from Mr Mullens, coupled with a signature intimating acceptance of that offer, and showing an intention to be bound by it.

194. We reject Mr Mullens' evidence that Mme Argand, in late October 2005, had told him 'it was an awful lot of money and that they weren't able to accept it', and that she had expressly rejected his offer to be paid a global fee of 1% of the eventual realisation. No such suggestion was made by him until his witness statement in May 2018. We reject it as untrue. It cannot be reconciled with Mme Argand's signature to the 14 October letter. Mr Mullens' evidence that his offer had been refused, but that he did not make any counter-proposal because he just had "to get on with life" was unconvincing and improvisatory and we reject it.

195. This letter, although short, was a compelling 'pitch' by Mr Mullens for a substantial payment in return for all the things which he had done for the Formula One Group and 'the family trusts'. To avoid any doubt, we do not consider there to be any material difference in this context between a pitch and a request for payment.

196. Mr Mullens was asking for something - money - in return for and in recognition of the things which he had accomplished. Although he set these accomplishments out in short form, the brevity of description cannot disguise the enormity of those tasks, or the skill and industry which Mr Mullens must have put into them.

197. On any view, he had achieved outcomes which reaped enormous fiscal and commercial benefits for his clients:

(1) The realisation of $3.8 billion without incurring the usual 40% charge to CGT, 'achieved through my structure and our joint endeavours to preserve the rights we had under the various shareholder agreements" (underlined emphasis added by us);

(2) Regaining in 2001/02 "the control we sold in 2001".

198. A sale did in fact take place. The contract was signed on 9 January 2006 and completion took place on 24 March 2006. The detailed circumstances of the sale do not need rehearsal here. They are dealt with by the High Court in Constantin Medien. But for present purposes it is sufficient to note that in May 2011 Mr Mullens (being interviewed as a suspect, and not as a witness) told the German prosecuting authorities that the transaction was "very advantageous" to Bambino, and that the structure was "probably [his] idea". That structure included Bambino

holding onto over $300m of interest-bearing funds for 2 and a half years, thereby gaining Bambino an additional profit of USD $15 million a year (or about $37.5 million over 2 and a half years).

199. On 7 April 2006, Mr Mullens received USD 38 million. The actual payment was USD 28m. USD 10m had been deducted and was used in June 2006 to discharge an unsecured loan for that sum which he had received from Valper Holdings Ltd in October 2002. According to an endorsement by Mme Argand at the foot of the loan agreement, interest of $615,000 was agreed in view of early repayment.

200. In our view, the letters of October 2005 can be relied on as giving a reliable picture of why this payment was made. Those letters were provided to HMRC only on 29 January 2015, it being said that Mr Mullens "did not previously recall these as they were superseded by subsequent events."

201. We have no doubt at all that the payment made on 7 April 2006 was in direct consequence of Mr Mullens' involvement in the sale and was in fulfilment of the terms set out in the letter of 14 October 2005. The payment of $38 million was referable to that letter.

202. As Mr Mullens made clear in his own letter to Mme Argand seeking to justify a payment equivalent to 1% of the deal, the amount was not only to reward Mr Mullens for bringing the sale to a successful conclusion, but also reflected the investment of time and professional expertise which he had made in the affairs of Formula 1 over the years.

203. In our view, it is simply not arguable that this payment had nothing to do with the $3.8 billion deal. In his witness statement (Paras 27-30) Mr Mullens said that "...unsolicited by me [Mrs Ecclestone] said she wanted to make a very substantial gift" and that "over the course of a couple of meetings, she fixed on a sum of $38m...I do not know how Mrs Ecclestone fixed on the amount of $38m or whether it was by way of reference to the proposal I had made to her trustees." That was untrue, and Mr Mullens must have known it to be untrue.

204. Insofar as it is asserted that this payment was “voluntary” we reject the suggestion. This was not gratuitous – in the sense that it was devoid of consideration. The payment was made because the money had been earned: see Templeman J in *McGowan v Browne and another* [1977] STC 342 at 348.

205. It does not make any difference to this analysis that the payment was solicited, as it was. Nor is there any need to identify “the particular service or article of commerce” although we have done so above.

206. The reported decisions in this regard have a generous reach, and extend to taxing payments which are made unexpectedly after the cessation of a trade if referable to the services which have been provided or work which has been done. A non-contractual payment which is made on top of a commercial remuneration for services, and which is made as a reward for excellent performance or for the successful outcome achieved by the performance of those services may be taxable. So, in *Wing v O’Connell (Inspector of Taxes)* [1927] IR 84 a cheque for £400 was sent by a horse owner, one Colonel Charteris, to a jockey, Mr Wing, as a 'present' for the latter's 'very fine riding' of Ballyheron, the winner of the 1921 Irish Derby. The £400 was an emolument which arose or accrued to Mr Wing by reason of his vocation as a jockey and was liable to assessment for income tax. In the Supreme Court of Ireland, the majority, led by FitzGibbon J approved a series of old (but still instructive) English and Welsh authorities in support of the proposition that even the voluntary character of the payment, viewed from the standpoint of the donor, does not necessarily exempt it from liability to tax: e.g. *Herbert v McQuadde* [1902] 2 KB 631 (payment to a priest from the Queen Victoria Sustentation Fund was taxable) and *Cooper v Blakiston* [1907] 2 KB 702 ("There are many professions and

callings in which income is derived from payments voluntarily made. The question is not what is the motive of the payment, but what was the character in which the recipient received it" *per* Buckley LJ). On the facts, this sometimes leads to the payment being styled as non-taxable, as the Tribunal (Judge Howard Nowlan and Mark Buffery) found in the decision (not binding on us) in *Colin Collins v HMRC* [2012] UKFTT 411 (TC) (which considered the "fairly common" question of whether a gratuitous receipt constituted emoluments of employment, and the "uncommon" one of that single payment being $2m: a sum several orders of magnitude smaller than the overall figure being considered in the present appeal, and a single payment - not a succession of them - which, the Tribunal accepted, came "as a bolt from the blue").

207. The character of Mr Mullens' receipt of Payment 4 was as income. It was compensation, and not consolation: see *Rolfe (Inspector of Taxes) v Nagel* [1982] STC 53 at 59b per Fox LJ (with whom Oliver and Lawton LJJ agreed). In *Rolfe,* the Court of Appeal (dismissing an appeal against a decision of Browne-Wilkinson J) held that a payment made in 1969 in relation to work undertaken by the taxpayer between 1964 and 1967 in trying to broker his client's acceptance as an 'active client' by the Diamond Trading Corporation was not voluntary, but was a trading receipt, being inextricably linked to the taxpayer's trade.

208. In arriving at this conclusion, we have considered two documents which we are invited to treat as referable to Payment 4. For reasons more fully set out below, we decline to treat those documents as genuinely reflective of the true nature of Payment 4.

209. The first document is (in full) as follows:

> "[Typed] THIS DEED OF GIFT is made on the [blank] day of April 2006
>
> In consideration of his personal care and concern for my family and myself over many years I hereby direct my Trustees to pay the moneys referred to in the letter annexed hereto by way of gift out of the moneys due to me from the Trustees
>
> Executed as a DEED by me SLAVICA ECCLESTONE (signature) in the presence of EMMANUELE ARGAND (printed, manuscript) (signature)"

210. This document is very curious. It is not precisely dated. Nor does it stipulate any figure.

211. Mr Mullens' evidence to us was that he had prepared the draft of this document and had given it to Mrs Ecclestone. In September 2015, his representatives had provided HMRC with a note "providing further context" in which Mr Mullens had written that he was not aware what letter, if any, was annexed to the Deed of Gift. In his evidence to us, Mr Mullens was unable to satisfactorily explain why, in drafting, he had referred to "the letter annexed hereto."

212. We do not consider that this document can be taken as accurately reflecting the true nature of the transaction underlying Payment 4 and we decline to take it at face value. We reject Mr Goldberg QC's suggestion that we can only do this if we find this deed to have been produced as part of a fraud. We cannot make any findings as to the circumstances in which Mrs Ecclestone signed it, or when. We have not heard evidence from her, or from Mme Argand.

213. On any view, it is manifestly inconsistent with the letter of 14 October 2005. In that letter, Mr Mullens was not pitching for a gift or a gratuity. He was pitching for what he described as a "proposed fee arrangement" - that is to say (again, in his own words) "a global fee" - arising from and by virtue of the work which he had done in devising a structure which avoided almost $1.5 billion worth of tax and which recovered control of BHL, and which was expressly calibrated with reference to the $3.8 billion. No part of his proposal sought to refer to any personal care and concern for Mrs Ecclestone (who is not even named in that letter, but identified only as "the Settlor").

214. The second document is "the letter annexed". It does not shed evidential light on the so-styled deed. It reads, in full (in manuscript):

> "To whom it may concern
>
> This is to confirm that the money transferred to you in April 2006 by the Trustees of the SLEC Trust at my direction was by way of gift from me.
>
> I hope this is sufficient for your purposes.
>
> Signed (Slavica Ecclestone)
>
> 20/02/2007"

215. This is a very odd letter, not least since it postdates, by almost a year, the payment made in April 2006. The very fact of the letter is puzzling. The circumstances in which this letter was drawn up are very murky, and its intended purpose is unclear. Mr Mullens' evidence in this regard was most unsatisfactory. He said that when he was handed back the deed of gift, it didn't have anything annexed and was not dated "and I thought that I might need at some stage a clear-cut confirmation that the monies she had authorised to be transferred to me in April 2006 had been transferred to me by way of gift." We reject that evidence.

216. In our view, the letter of 22 February 2007 is entirely contrived. This document was produced by Mr Mullens, at some point, as a fig leaf so as to misrepresent and conceal the true nature of the payment made to him in April 2006 - i.e. to give the impression that Payment 4 was a gift.

217. We cannot make any findings as to Mrs Ecclestone's intent. But the motive of the payer is not in any event determinative: see *Murray v Goodhews* [1978] STC 207 at 215. Even if (i) the Deed of Gift was authentic, and related to this payment; (ii) the letter was authentic, and related to this payment; (iii) the contents were true, and Mrs Ecclestone's motive for payment was entirely benign and as stated, that still would not operate to prevent it being a receipt which is chargeable to income tax in the hands of the recipient if its proper character in the hands of the recipient - as here - was by reference to work done.

218. We reject Mr Mullens' secondary case, said to arise from *IRC v Wattie* [1998] STC 1160, that this payment, if made in a commercial context, related to a number of years, cannot therefore be allocated to a particular year, and therefore must be capital and not income. This argument self-evidently must fail. Payment 4 was income, and not capital: see *Rolfe v Nagel*, above.

219. Having contended that the $38m was not income at all, but was an unsolicited gift from Mrs Ecclestone, and having failed comprehensively in that contention, Mr Mullens cannot now seek - contrary to his own case, and his own evidence - to argue that the income should be allocated to certain years, and, if it cannot be so allocated, must be treated as capital.

PAYMENT 5

220. In May 2008, Mr Mullens received a payment of $19.5m (at the time, roughly equivalent to about £10m) into his Swiss bank account.

221. Mr Mullens did not declare this payment in his 2008/09 tax return.

222. HMRC has assessed Payment 5 to income tax under ITTOIA 2005 section 5 as "profits of a trade, profession or vocation", or alternatively as miscellaneous income under ITTOIA section 687.

223. Mr Mullens bears the burden of establishing that this payment was a gift. In his witness statement (Paras 39-42) Mr Mullens says that Mrs Ecclestone, in a context where he was continuing to meet her regularly "again unsolicited by me and totally out of the blue .. told me that she was going to make a second gift to me ... She said that she wanted to give me £10m".

224. He bears the burden of satisfying us that it was a gift. We are not satisfied that Mr Mullens is telling the truth about this payment and we reject his evidence. Since he has failed to discharge the burden placed upon him, his appeal in that regard must therefore fail.

225. Insofar as we need to do so, we find that the true background to this payment was not as set out by Mr Mullens, but rather was his involvement in tax enquiries by HMRC into the tax affairs of Mr Ecclestone and Mrs Ecclestone, and in particular the Restructuring and the transfer of Mr Ecclestone's interests in Formula 1 to Mrs Ecclestone. As Mr Mullens told the Court in his witness statement in the Constantin litigation, there was a massive amount at stake: "if HMRC had made an adverse finding, a very significant tax liability, possibly running into billions of dollars, could have arisen which would have had to have been met by Mr Ecclestone/Mrs Ecclestone/Bambino." (underlined emphasis added by us). Before us, Mr Mullens accepted that was the case. Consistently with this, he did not dissent from the position that, at the time, the trusts were "awash with cash" and generating "very substantial amounts of interest", in the order even of tens of millions of pounds a year.

226. Those inquiries into Mr and Mrs Ecclestone were opened in January 2000 and went on for several years. Mr Mullens was extensively involved in those enquiries.

227. Although he said that he did not represent Mr Ecclestone, he was certainly - at least from time to time - his eyes and ears. For example, he attended (together with Mr Datoo, Mr Ecclestone's accountant) a long meeting in October 2000 in relation to the investigation into Mr Ecclestone "and associated companies". He told HMRC that he acted for Mrs Ecclestone "and at times for Mr Ecclestone".

228. As to representing Mrs Ecclestone and her interests, Mr Mullens was the person (for example) to whom Mr Ecclestone's accountant directed HMRC to ask about the trusts in which Mrs Ecclestone was interested. In relation to the enquiry into the affairs of Mrs Ecclestone, Mr Mullens was HMRC's main point of contact. He dealt with HMRC. Mr Mullens was advising in relation to matters of value and complexity.

229. Over the course of several years, he attended many meetings with HMRC, both in person and on the phone. He told HMRC that he went to meetings in Luxembourg and Switzerland. He was clearly in contact with de Pfyffer. On several occasions, Mr Mullens provided information to HMRC about the trusts and the Bambino Settlement. He told HMRC about distributions amounting to hundreds of millions of dollars. When HMRC complained to him that they were not satisfied about the information given, he told HMRC that he had spent a great deal of time and energy in trying to get assistance for HMRC from the trustees and their advisers, but that this was difficult because he was dealing with people whose first language was not English "and who operate under different rules and regulations."

230. Mr Mullens was proactive in seeking to resolve the tax enquiry into Mrs Ecclestone's affairs by agreement. Eventually, Mr Mullens' efforts bore fruit. HMRC indicated that it was minded to settle with Mr and Mrs Ecclestone, and on 29 February 2008 sent Mr Mullens a standard-form blank draft letter of offer, advising him that there was a certain amount of flexibility in the wording. There were discussions, involving Mr Mullens, as to the content and form of the Settlement Agreements entered into by HMRC both with Mr Ecclestone and Mrs Ecclestone. Mr Mullens made suggested amendments to the settlement letters, which HMRC adopted.

231. We have been shown the settlement reached with Mrs Ecclestone which is dated 31 March 2008. The letter - in which Mr Mullens had a large hand - settled inquiries for 11 successive years "in relation to which you have been corresponding with my adviser, Mr Mullens", including potential liability for income tax, interest, surcharges, and penalties, for £10 million, with payment to be up to several months later.

232. On 2 April 2008, HMRC sent out letters of acceptance to Mr and Mrs Ecclestone settling the enquiries, although latterly, HMRC came to form the view that the enquiries should not in fact have been settled on the terms that they were, and we are aware of other litigation - not in this Tribunal - concerning that aspect of the overall matter.

233. On 7 April 2008, Mr Mullens, having made some minor typographical alterations to those letters, faxed them back to HMRC.

234. On that same day, 7 April 2008, Mr Mullens drafted and Mrs Ecclestone signed a handwritten note which says "For Steph M £6m net of tax [redacted on what we have seen] Slavica Ecclestone." We give this note no weight in support of any argument that this payment was to be a gift (let alone a gift of $19.5m or a sterling equivalent of £10m, neither of which sum is mentioned in the note). This note does not say why any payment is being made. It does not even (and unlike the 2006 Deed) use the word 'gift'. We reject Mr Mullens' evidence that this "was obvious in the circumstances". If this note was given to Mr Mullens as a mandate to get money from Mrs Ecclestone's trustees, then it is self-evidently inadequate. "Net of tax" simply begs the questions - what tax; what rate; where? In his witness statement, Mr Mullens says (for the first time) that this was intended to refer to Inheritance Tax, on the footing that both he and Mrs Ecclestone had for some time "increasingly spoken about death". We reject this explanation.

235. On 19 May 2008, Mr Mullens received a payment of $19.5m (equivalent to about £10m) into his Swiss bank account.

236. Mr Mullens did not declare or return this payment in his 2008/09 tax return.

237. We are satisfied that Payment 5 was received by Mr Mullens as a reward for services which he had carried out, and in particular the complex and time-consuming discussions with HMRC (conducted by Mr Mullens with great skill) which led to the settlement.

238. We are sure that he would not have undertaken these tasks for nothing, and without any expectation of being paid if (as happened) the matter of the open tax enquiries was brought to a satisfactory (from Mrs Ecclestone's point of view) conclusion. We reject his evidence that the tax settlement "triggered a wish" on the part of Mrs Ecclestone "to express gratitude, but she wasn't expressing gratitude in respect of services I performed. This was a gift." Pressed in cross-examination, he was unable to explain why, in his witness statement for us, he had not said that Mrs Ecclestone's alleged wish to make him a gift occurred in the self-same conversation in which he had told her of the successful completion of the tax investigation. That was a serious omission in his witness statement, and a serious lack of candour, and his oral evidence in this regard was unsatisfactory.

239. We do consider and find accordingly that Mr Mullens had reached an agreement with Mrs Ecclestone that he would stand to be rewarded, monetarily, for his work on her behalf in negotiating the settlement with HMRC. This is a success fee model of a like kind to that which Mr Mullens expressly deployed in relation to Payment 4.

PAYMENT 6

240. On 1 May 2012, Mrs Mullens received a payment of £5m into a bank account at Border & Cie in Switzerland held in her sole name.

241. HMRC has assessed Payment 6 to income tax under ITTOIA 2005 section 5 as “profits of a trade, profession or vocation”, or alternatively as miscellaneous income under ITTOIA section 687.

242. Mr Mullens bears the burden of establishing that this payment was a gift by Mrs Ecclestone to his wife. In our view, he has failed to discharge that burden and his appeal in that regard must therefore fail.

243. He has given materially different accounts of how this came about. His witness statement is that he met Mrs Ecclestone by chance in January 2012, and that, over the course of a series of meetings and discussions during the course of 2012, Mrs Ecclestone "showed extreme remorse for everything my family had gone through and for what she had done herself in turning against me in seeking recovery of the house purchase loan" and "said that she was proposing to give my wife £15m to make good her original promise to gift funds for a new property following the robbery." In his oral evidence he gave a different account of Mrs Ecclestone wanting to make him a gift, but being persuaded by him (on the basis that he had already received gifts of about $60m) to make a gift instead to Mrs Mullens. His account has become more intricate over time. We consider that this is reflective of his account being improvisatory.

244. We reject his explanation that what was written about the circumstances of this payment on his behalf by BDO was "a condensed version of what actually happened." The BDO report was given in the context of the CDF which expressly obliged Mr Mullens, as we are entirely sure he knew and understood, to be candid and not to give a condensed version of anything. We are sure that Mr Mullens also carefully checked that report. The burden on him - arising from his voluntary and open-eyed entry into the CDF - was to tell the full, unvarnished, truth. Nothing stood in the way of him doing that. He had been given assurances - which he had asked for - that confidentiality would be maintained. That went so far as HMRC adopting a code-name for Mr Mullens in its paperwork.

245. We also reject his explanation that he did not think it necessary "to record the full details of that discussion in the witness statement." That was the very place to tell the truth, and to record the full details of any discussion which he said had taken place. His failure to have done so in his witness statement seriously undermines the weight which can be attached to his oral evidence.

246. We are simply not satisfied that either account which he has given is true.

247. We have seen a handwritten note dated 24 July 2012. It reads as follows:

> “I am very sorry that I cause all that problem in the past in connection of the property. Please except (sic) this present of £5 M five milion (sic). I hope that money will make some peace to your family. Your always Slavica G”.

248. We decline to give this note any weight. We reject the submission that this note had nothing to do with Mr Mullens, or that the money was intended to be for Mrs Mullens, and was given to her.

249. In any event, this note postdates Payment 6, but was written a week after HMRC had issued a COP9 letter to Mr Mullens offering him a CDF. Hence, the immediate context of this letter was that HMRC had formally begun to take a close interest in Mr Mullens' tax affairs. We do not consider this to have been a coincidence.

250. We have already referred above to a note dated 23 July 2012, ostensibly referring to payments in 2006 and 2008.

251. There is no good explanation as to why the letter of 23 July 2012 needed to be followed, a day later (or even the same day) with a side note about £5m. The impression is that Mr Mullens went to see Mrs Ecclestone with a typed letter, asked her to sign it, which she did. There were no tax consequences for her. The obvious purpose of the typed letter was to seek to mitigate tax consequences for Mr Mullens. The handwritten note seems to have been written by Mrs Ecclestone, in her own hand, and perhaps of her own composition, but gives the impression of filling a gap which it was realised that the typed letter had left – namely, the £5m.

252. We conclude that letters were being written, in July 2012, to try to give a misleading impression that the payments made were gifts rather than something else. This is not to say that Mrs Ecclestone had any intention to mislead – that would not be a proper finding for us to make. But we are confident that she did want to help Mr Mullens and was prepared to sign and did sign what he had put in front of her, and was also prepared to write a short note about the £5m to seek to give the impression that it was a gift.

253. Mr Mullens has failed to satisfy us that this was a gift by Mrs Ecclestone to Mrs Mullens and his appeal in this regard must fail.

254. Insofar as we need to do so, we find that the true background and motive for this payment was the Constantin litigation and the corrupt payment which was made to Dr Gribkowsky in 2006. Mr Mullens played an important role throughout. Mr Ecclestone had told Mr Mullens of the likely need to make a substantial payment to Dr Gribkowsky from the Bambino Settlement, and Mr Mullens was the person who went to Geneva to tell the trustees of the Bambino Settlement to pay. Mr Mullens met with Mr Ecclestone and Dr Gribkowsky at a dinner at the Rib Room in London in May 2006 where the payment was agreed. Mr Mullens thereafter took steps to facilitate payment, including discussion with Mme Argand-Rey as to the vehicle from which the payment was to be made - an off-the-shelf Mauritius company. It is a fair point that no-one, at the time, probably knew more about what had happened, how, and why, than Mr Mullens. He was not only a messenger but also an organiser.

255. Dr Gribkowsky was arrested in Germany in January 2011, and Mr Mullens was interviewed by the German authorities on three occasions in May 2011.

256. In July 2011, Dr Gribkowsky was indicted by the German authorities, and shortly thereafter Constantin Medien issued proceedings in the High Court of England and Wales against Mr Ecclestone, Mr Mullens, and BHL. The claim was a serious one - that Mr Ecclestone and Mr Mullens had engaged in a corrupt arrangement with Dr Gribkowsky.

257. In August 2011, Mr Mullens was re-engaged by BHL. Paragraph 123 of HMRC's note of the CDF meeting in November 2012 says that Mr Mullens

> "was to be available to assist with litigation action, but not to undertake any specific work. Mr Mullens is linked to legal action being taken in London and is a witness although may not be needed to do anything. He explained that in the meantime he could not go off and do anything else. It was suggested that BHL were paying him a sort of retainer and Mr Mullens agreed. He explained that the original contract with BHL is for two years but may become a rolling contract depending on how things progress."

258. In his otherwise lengthy and detailed response to HMRC's note, made in February 2013, Mr Mullens did not take any issue with what was recorded in Paragraph 123, whether to correct any factual inaccuracy or to provide any clarification. We are sure, and so find, that Paragraph 123 of the Note faithfully and accurately records what Mr Mullens told HMRC in November 2012. We are entirely sure that Mr Mullens knew what was being suggested to him by HMRC - that his engagement was as 'a sort of retainer' - and knew what he was agreeing to. As he

knew, nothing at the meeting in November 2012 was being said in a casual or informal or passing context, but was being said in the context of the COP9 investigation, and therefore was being said carefully so as to avoid the jeopardy of prosecution by HMRC.

259. What was said in November 2012 is broadly consistent with what was said in §2.2.7 of the July 2013 disclosure report (he was "re-engaged as a consultant" by BHL "on a two-year retainer...[he] is required to be available at all times to assist with the litigation in any way required but does not have any specific duties"). The same observation can be made about the July 2013 disclosure report - inaccurate or misleading content raised the prospect of HMRC treating the CDF as broken, leaving HMRC free to prosecute.

260. There is no reliable contemporary documentation as to this retainer, or its terms.

261. In the course of his oral evidence Mr Mullens sought to distance himself from what had been said in November 2012 and July 2013. He sought to say that these did not express the position entirely clearly. We reject that evidence. Mr Mullens was retained, and we find was paid in relation to that retainer. We reject his oral evidence to us that 're-engagement' "was not the correct word of expressing what happened." It was. We reject his evidence that there was "a general degree of confusion". We do not think that there was.

262. Dr Gribkowsky's trial began in November 2011. Mr Ecclestone gave evidence for two days. Mr Mullens was due to give evidence on 15 November 2011 but refused on grounds of self-incrimination. We decline to make findings as to whether his silence was deliberate, on an alleged basis that his retainer with BHL was a reward for silence. Given our other findings, we do not need to do so. But it is tolerably plain that Mr Mullens' exercise of his right under German law to remain silent in November 2011 was a decision as a matter of principle (*'aus prinzipalen Gruenden'*) which was known to, and supported at the time, by his German counsel, Professor Dr Salditt.

263. In June 2012, Dr Gribkowsky admitted the charges against him and was sentenced to 8 and a half years imprisonment for corruption.

264. Mr Ecclestone's trial in Germany started in April 2014 but was suspended in August 2014 with Mr Ecclestone agreeing to pay a large sum to the German authorities. Mr Mullens did not stand trial.

265. We are satisfied that Payment 6 was not a gift, and insofar as need to do so we find that this payment was rather in connection with the retainer for his assistance with the Constantin Medien litigation.

THE HOLIDAY PAYMENT

266. Our conclusion in relation to the Holiday Payment is different and we allow Mr Mullens' appeal in that regard.

267. We are satisfied that the 217,000 Euros paid in January 2009 was genuinely a gift from Mrs Ecclestone to Mr and Mrs Mullens, and was not taxable in his hands as income (whether as trading income or miscellaneous income). As such, neither Mr (nor Mrs) Mullens needed to declare it to HMRC (and consequently, there was nothing in this regard for HMRC to discover).

268. We do not consider that this payment can properly be treated in the same way as the other payments. It stands out. It has a distinctly different look and feel. It is not part of the pattern. It is the smallest of the lump sum payments, by a considerable margin. It is not a round figure in the same way as the other payments. It was paid into Mr and Mrs Mullens' joint account. Mme Argand organised the payment.

269. We remind ourselves that, even if (as we have found) Mr Mullens has not told the truth about something, it does not necessarily flow that he had not told the truth about anything: see *R v Lucas* [1981] QB 720 (a so-called 'Lucas direction').

270. We believed Mr Mullens and accept his oral evidence that this payment was given to defray the cost of a long (2 1/2 or 3 week) holiday which he and his family - 8 or 9 people in total - had taken in Mauritius, including flights at a standard not less than business class there and back. His evidence in this regard (which was given in response to questions from the Tribunal, and not from HMRC) did not strike us as improvisatory, fabricated or self-serving. It had the ring of truth about it.

271. It is also consistent with a brief note which seems to have been written by or on behalf of Mr Mullens in February 2013, following a long CDF meeting which took place between Mr Mullens and his advisers and a team of HMRC officers in November 2012.

272. We believed that this was the sort of gift of money, of the sort of size, for the sort of reason, which a generous employer could make to a highly-valued employee, as a demonstration of goodwill and solicitude for their well-being and that of their family.

273. A point has been made by HMRC that there is no contemporary documentary evidence before us about this holiday, or its cost, in circumstances where there will have been documentary evidence.

274. But this does not stand, insuperably, in the way of Mr Mullens discharging the burden on him in this regard by way of oral evidence. The mere fact that this is quite a large sum of money does not mean that Mr Mullens should be treated any differently (whether more or less favourably) from any other appellant. We are entitled to assess whether we believe oral evidence or not. In this regard, we believed Mr Mullens.

DISCOVERY

275. The anterior issue is whether the discovery assessments were competent – that is to say, whether the conditions existed for them to be lawfully made.

Payment 1

276. There is no dispute that a tax return was filed, timeously, for this period.

277. Payment 1 was referred to by Mr Mullens, in the Appendix to the 'white space', on his tax return at the time. The "Additional Information" said "Payment from Bambino Holdings Ltd. Received £1.25m in the year 1999/2000 and is not taxable. Please see attached Appendix."

278. That is the best - indeed the only - evidence as to what HMRC was told at the time.

279. We do not consider that the information before HMRC in the 1999/2000 return was such that an officer could have reasonably been expected to be aware of an actual insufficiency to tax for that year: see *Langham v Veltema* [2004] EWCA Civ 193 at [33]-[34] per Auld LJ.

280. Reading the return and the Appendix, all the officer would have been aware of was that a payment had been made to encourage Mr Mullens to resign from MH.

281. The extended time limit of 20 years which would have permitted HMRC, in 2016, to assess for 1999/2000 is only available if Mr Mullens had acted fraudulently.

282. We consider that he did act fraudulently, in the sense that he knew that what he was telling HMRC was not the truth:

(1) We have already decided that Mr Mullens, in his evidence to us, was deliberately not telling the truth about Payment 1;

(2) Although he made a white space disclosure, it was very artful and not genuinely revealing. Much of relevance was left out;

(3) It said that there were "no contractual stipulations". We have found that to be wrong, and that Mr Mullens must have known that to be wrong at the time;

(4) Nothing at all was said about Payments 2 or 3;

(5) The 1999 Consultancy Agreement was not provided (nor, for example, set out in full in the Appendix);

(6) There was no other extrinsic documentary support for Payment 1, explaining in detail what it was for and what was hoped for or expected;

(7) There was no mention that the consultancy was less than 50% of Mr Mullens' most recent earnings with HMRC. There was no mention that Mr Mullens had been more or less employed full-time on Ecclestone business for several years, with Bambino being a major client and more or less Mr Mullens' sole client at MH. Those facts - known to Mr Mullens at the time - were all concealed from HMRC;

(8) Mr Mullens was aware of *Pritchard*, and of the Peter Shilton case, and was therefore aware that there was law which would indicate that Payment 1 might be taxable.

283. Therefore, we consider that HMRC could, in September 2016, lawfully make a discovery assessment in relation to 1999/2000 and the appeal against that assessment is therefore dismissed.

Payments 2, 3, 4, 5 and 6

284. The Grounds of Appeal have not taken any particular point as to timing of the assessments, save to say that they are "out of time" and have put HMRC to proof.

285. Mr Mullens did not say anything about Payments 2, 3, 4, 5 and 6 in his tax returns at the time.

286. Mr Mullens did not formally inform HMRC of these payments, in writing, until his COP9 Outline Disclosure in September 2012, as part of "deliberate bringing about a loss of tax"

287. In July 2013, he submitted a Disclosure Report addressing Payments 4, 5 and 6 (and the Holiday Payment) in more detail.

288. Although Mr Mullens sought to advance the suggestion, set out above in the section of this decision dealing with his application for specific disclosure, that HMRC had been told of these payments earlier, we do not consider that would have materially affected the position. Even if HMRC had been told, in the context of a meeting which concerned the tax affairs of another taxpayer (namely, Mrs Ecclestone) of these payments, we do not think that this would have changed the position as to discovery.

289. Moreover, nothing ever stood in the way, before 27 September 2012, of Mr Mullens putting pen to paper and writing to HMRC about the payments.

290. As matters stand before us, HMRC accepts that there is binding authority which dictates that a discovery should not be allowed to become "stale" before the assessment is raised (and that, if it does, the discovery assessment cannot stand): *HMRC v Tooth* [2019] STC 1316. We are aware that position has recently been considered by the Supreme Court in *HMRC v Tooth* (heard in January 2021, with judgment not yet handed down).

291. "Stale" is a shorthand description for the idea, first emerging with clarity in the decision of Special Commissioner Charles Hellier (adopting the submissions of Miss Simler of Counsel,

as she then was) in *Corbally-Stourton* [2008] STC (SCD) 907 at Para [44] that 'a discovery is something newly arising, not something stale and old'.

292. In *Pattullo v HMRC* [2016] STC 2043, the Upper Tribunal (Lord Glennie) (adopting the submissions of Mr Gordon of Counsel) considered that a discovery had to be acted on whilst it still remained 'fresh'. Whether this 'freshness' has been lost is fact-sensitive. But the broad thrust of the decisions which have considered the issue of staleness is that it would only be in the most exceptional of cases that that inaction on the part of HMRC would result in a discovery losing what has been called its required newness: see *Pattullo* at Para [53].

293. We do not think that any of these assessments were stale.

294. Discovery assessments in relation to each of Payments 4 and 5 were issued on 6 March 2013.

295. The assessment raised in relation to Payment 4 was raised within 6 years of the end of the year of assessment to which it relates, and therefore HMRC has only to demonstrate careless behaviour, and does not have to demonstrate deliberate behaviour.

296. Discovery assessments in relation to Payments 1, 2, 3 and 6 were issued on 27 September 2016.

297. Here, the CDF process was not completed until Mr Mullens formally adopted his full disclosure report in December 2014. The assessments here were made about two years later. That is not stale.

298. Even if that were wrong, we would still not regard - in the circumstances of this appeal - a discovery in September 2012 as becoming stale for the purposes of assessment in 2016.

299. Context is important, especially when there are (as here) ongoing discussions and exploration between the taxpayer and HMRC as to whether matters should be settled without the need for a formal assessment.

300. There is a wider policy imperative which seeks to encourage HMRC and taxpayers to engage co-operatively to resolve their disputes without coming to the Tribunal. It would undermine that process if either HMRC or taxpayers were at risk (i) in the case of a taxpayer, of having to engage in discussions with a discovery assessment already having been made, and the appeal timetable thereby having engaged (which would force the taxpayer to 'twin track' discussions and an appeal, with consequent implications for the taxpayers' resources); and (ii) in the case of HMRC, to be forced to issue a discovery assessment immediately on a discovery lest, at some later time, if the dispute could not settled, HMRC would be confronted with an argument as to staleness.

301. Here, the context was accurately and comprehensively set out in the evidence of Officer Jamieson and Officer Baines. Mr Mullens did not adopt his second disclosure report until December 2014. Thereafter, HMRC (through Officer Jamieson, whose evidence we accept) was in close negotiations with BDO to find more facts and reach an agreed settlement, which included a meeting in February 2015. Thereafter, there was a handover from Officer Jamieson to Officer Baines, who took over in November 2015 (shortly before Officer Jamieson's retirement). Nothing in the fact or the timing of the handover introduced prejudicial delay. There was a further meeting in March 2016. It was only at that point that it became clear that the matter was not capable of being settled and that assessments would need to be issued.

INTEREST

302. There are three sums in dispute:

(1) Interest received on Mr Mullens' de Pfyffer client account between 2003/4 and 2008/9 ('**the de Pfyffer Interest**');

(2) Interest received on a Border & Cie bank account in Switzerland in 2008/09 ('**the Border & Cie Interest**');

(3) Interest received on income arising within an offshore company ('**the Klondike Interest**') between 2008/9 and 2009/10.

303. HMRC's position is that these sums are assessable to income tax.

304. None of these sums were declared on Mr Mullens' tax returns.

305. The only ground of challenge to these assessments is that they are out of time. No substantive challenge is taken against them.

306. These payments were first disclosed in September 2012.

307. We do not consider, for the reasons already set out, that these assessments relate to discoveries which had become stale.

CAPITAL GAINS TAX ON CAPITAL GAINS ARISING WITHIN KLONDIKE

308. This is CGT said to arise on capital gains arising within Klondike ('**the Klondike Gains**').

309. The appeal in this regard is advanced only on the basis that the assessment is out of time.

310. Mr Mullens accepted in his disclosure reports that he had deliberately omitted this income.

311. Given Mr Mullens' acceptance of deliberate conduct, then the assessment relating to this income is not out of time.

VAT ON IMPORTED DIAMONDS

312. This part of the appeal challenges HMRC's decision on 29 September 2016 (upheld at departmental review on 27 January 2017) to issue a "C18 Post Clearance Demand Note" to Mr Mullens for £326,354 on the footing that Mr Mullens fraudulently imported diamonds into the UK without payment of the import VAT due.

313. In the "description of fraud" box, he wrote (amongst other matters) that "I purchased some diamonds in 2008 and/or 2009 in Switzerland and paid Swiss VAT. I did import the diamonds on dates to be ascertained (but some time after the purchase and not later than 2009). I believe I paid in the order of US 3m." The "description of fraud" describes the fraud.

314. In August 2014, Mr Mullens signed a full disclosure report and confirmed that he had purchased five cut and polished diamonds (2 diamonds each about 10 carats, 1 about 6 carats, and a pair each of about 2.4 carats) in Switzerland which he had brought back into the UK without paying UK import VAT. The purchases were between February 2009 and June 2009, and the total value was about £2.068m. HMRC does not know when they were imported, but in each instance has assumed that this was not long after the dates of purchase. The final information necessary for the computations was provided in June 2015.

315. The diamonds, although unmounted and unset, were liable to import VAT at the full rate. Section 16(1) of the VAT Act provides that import VAT is to be treated as customs duty.

316. The only ground of challenge to this assessment is that it is out of time. No substantive challenge is taken against it.

317. Article 217 of the Customs Code provides that duty shall be calculated by the customs authorities 'as soon as they have the necessary particulars'. Article 221(3) provides that

communication of the customs debt to the debtor shall not take place after the expiry of three years from the date on which the customs debt was incurred, but this is subject to Article 221(4) which provides that "Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in Paragraph 3."

318. Fraudulent conduct was accepted by Mr Mullens in the CDF.

319. We are quite satisfied that his acceptance in the CDF means that Mr Mullens had done some act which, at the time it was committed, was liable to give rise to criminal court proceedings. It does not matter that it did not in fact give rise to such proceedings. The criminal court proceedings would have been under section 72 of the Value Added Tax Act which relates to persons who are knowingly concerned in, or had taken steps with a view to, the fraudulent evasion of VAT.

320. In those circumstances, the three year time limit in Article 221(3) does not apply.

321. In *FMX Food Merchants Import Export Co Ltd v HMRC* [2020] UKSC 1, the Supreme Court created a test, in the immediate context of 'the short and innocent sounding' Article 221(4), of whether the communication took place "within a reasonable time" (see Para [46]. The Court (the leading speech being given by Lord Briggs, with whom Lords Reed, Hodge, and Kitchin agreed) did not identify any specific factors which should be considered in applying that test.

322. We consider that the C18 was issued within a reasonable time. The C18 was given within about two years from Mr Mullens' provision of the precise sums paid (which allowed the VAT to be calculated). Again, and as with the discovery assessments, context plays a part. We have already set out the context of ongoing discussions and the underlying policy imperative which, we accept, did play a part in the timing of the C18. As Lady Arden, delivering a concurring speech, remarked: reasonableness is a flexible standard (see Para [65]).

323. We do not consider that anything about the timing of the C18 can be said to be unreasonable. The C18 was issued timeously.

DISALLOWED CGT LOSSES ON STOLEN JEWELLERY

324. The amount in dispute here is £1,610,000. These were CGT losses claimed in 2008/2009 and disallowed by HMRC in relation to the theft of jewellery (in particular, a pair of diamond earrings and two diamond rings - 7.2 carat and 5.5 carats) from the Mullens' home on 1 April 2009. HMRC's disallowance of losses in 2008/09 had consequences for excess losses carried forward into subsequent tax years.

325. HMRC's position here is that Mr Mullens has falsely claimed that he (and not his wife) was the beneficial owner of the stolen jewellery.

326. In our view, Mr Mullens was, for tax purposes, the beneficial owner of this jewellery and (insofar as any different) was the person properly entitled to claim the losses for CGT purposes.

327. It is not in dispute that Mr Mullens bought the jewellery. Mr and Mrs Mullens went to choose the precious stones together (some of which had to match) which were then 'set'. Although Mr Mullens paid for the jewellery, for his wife, with her looks and style especially in mind, and for her (not him) to wear, this was jewellery of a particular kind. It was high-value investment grade signature jewellery bought from Asprey's and De Beers. The pieces were - both figuratively and literally - the "Mullens' family jewels". They were kept for special occasions, in the safe at the Mullens' family home.

328. Unsurprisingly, and as can happen when it comes to the presentation of jewellery between spouses and other romantically attached persons, no-one ever seems to have given concentrated thought, from a legal perspective, as to who 'owned' the jewels. Often (like here) these issues only emerge years later and (unlike here) in the context of a relationship breakdown. There are (at least, arguably) conventions (not rules) governing engagement and wedding rings. But there are no conventions as to the giving of jewellery of this kind. The common law of personal property in England and Wales is, in this view, deficient and inferior to the civil law.

329. In our view, far too much is being made by HMRC of what was said to the police at the time. In the aftermath of an extremely violent and frightening home invasion, none of the Mullens family were engaged in a seminar on the law of personal property or wondering what HMRC might make of matters years down the line. Ownership of the jewels was just not relevant to the task which the Police were engaged in. Jewels (and other things) had been stolen from the Mullens' home. The police were looking for the people who had broken in. The Mullens wanted those people to be caught. It simply did not matter to the police who, as between Mr and Mrs Mullens, happened to be the owner. Nor did the police (understandably) ever consider (for example) whether the jewels were jointly owned.

330. In its review, HMRC sought to rely on a passage in its Capital Gains Manual relating to bare trusts (sic) and the presumption of advancement capable of operating in relation to gifts between spouses, as well as from parents to children. But the point in relation to which HMRC's general guidance fails to have proper regard, and where application of general guidance has brought about error in HMRC's approach to this aspect of the case, is that the presumption of advancement is just a presumption and falls to be displaced by evidence of contrary intent.

331. There was such evidence here, from Mr Mullens. Although Mr Mullens was not telling the truth in relation to Payments 1-6, we consider that he was telling the truth in relation to the ownership of the jewellery.

332. Moreover, the strength (such as it ever was) of the old law which explains the presumption of advancement on the footing of purchasers "under a species of natural obligation to provide" for another (*Murless v Franklin* (1818) 1 Swan 13, per Lord Eldon) or of husbands making gifts to wives "subject to such marital control as he may exercise" (*Re Eykyn's Trusts* (1877) 6 Ch D 115 per Malins V.-C) was judicially doubted as long ago as 1970 when Lord Reid suggested that the only reasonable basis for the presumption had been the economic dependence of wives on their husbands, and that given the change in social circumstances, 'the strength of the presumption must have much diminished': *Pettitt v Pettitt* [1970] AC 777 at 792. Lord Diplock captured the point neatly: it was not appropriate that transactions between married couples should be governed by presumptions "based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the properties classes of a different social era": ibid. We respectfully agree and can but observe that half a century has gone by since then.

333. In the circumstances, we do not consider that there is any inference adverse to Mr Mullens which can properly be derived from the absence of evidence from Mrs Mullens. We know where the jewels came from; we know how they were paid for; and we know what Mr Mullen says about them. The purchase of this jewellery was markedly different in quality to Mr Mullens' dealings with the Ecclestones. The jewels were a matrimonial asset, and a symbol of the natural love and affection between Mr and Mrs Mullens. We simply do not apprehend that any genuinely useful forensic or evidential purpose would have been served by Mrs Mullens coming to give evidence about ownership of the stolen jewellery.

PENALTIES

The 1970 Act Penalties - Payments 1, 2, 3 and 4

334. On 27 September 2016, HMRC issued penalties for the years 1999/00 to 2007/08 pursuant to Section 95 of the Taxes Management Act 1970 ('**the 1970 Act Penalties**').

335. These penalties relate to "Incorrect return or accounts for income tax or capital gains tax". The penalty arises when a person "fraudulently or negligently" submits an incorrect return. The amount of the penalty is gauged by whether the taxpayer's conduct was "fraudulent" or "negligent": in each case, within the proper meaning and effect of the primary legislation.

336. HMRC bear the burden in relation to the penalties. We also remind ourselves that each penalty should be separately considered.

337. As to the 1970 Act Penalties:

(1) Payment 1 was disclosed in the white space on the 1999/00 tax return, in the terms already set out. We have already found that a discovery assessment could be raised under the extended time limit and on the footing that Mr Mullens' conduct was fraudulent;

(2) Payments 2, 3 and 4 were not disclosed in the relevant tax returns;

(3) Payments 1 to 3 were disclosed in the disclosure report with quantification, although Mr Mullens maintained that these were not taxable;

(4) In relation to Payments 1-3 HMRC decided to apply abatements of 20% for disclosure, 40% for co-operation, and 15% for seriousness, totalling 65%

(5) In relation to Payment 4, HMRC decided to apply an abatement of 10% for disclosure, 30% for co-operation, and 5% for seriousness, totalling 45%.

338. We consider that Mr Mullens' failures to declare (in relation to Payment 1, properly; and in relation to Payments 2-4, at all) were culpable, and therefore did properly attract a penalty. In our view, the degree of culpability went well beyond "negligence" (which, for these purposes, we consider to be the standard of care which a reasonable taxpayer, exercising reasonable diligence in the completion and submission of his return, would have done).

339. We consider that Mr Mullens' failure to mention Payments 2, 3 and 4 on his tax returns for those years was a deliberate decision on his part not to disclose, and a high level of culpability. He said nothing at all. He did not even say what he had said in the white space in 1999/2000.

340. In our view, on the evidence, Mr Mullens knew, at the time, (as indeed, any reasonable taxpayer would have known, at the time) that Payments 1, 2, 3 and 4 should have been declared fully and truthfully to HMRC, but instead chose to tell HMRC very little in relation to Payment 1, and nothing in relation to Payments 2, 3 and 4.

341. The position in relation to Payment 4 is particularly compelling. It is absolutely plain, and we are sure that Mr Mullens knew, at the time, that had he declared a payment (howsoever described) of $38 million into an overseas account (and regardless of whether that payment came directly from Mrs Ecclestone, or was made at her direction) that HMRC would take a keen interest and would wish to investigate the circumstances surrounding that payment.

342. In consequence, we find that the return in relation to Payment 1 was made fraudulently, and the failure to declare Payments 2, 3 and 4 were fraudulent, within the proper meaning and effect of section 95 of the Taxes Management Act 1970.

343. We do not see any reason to vary the abatements applied by HMRC in relation to the penalties applied to Payments 1, 2, 3 or 4.

The Schedule 24 Penalties - Payments 5 and 6

344. HMRC also issued penalties for the years 2008/09 to 2012/13, pursuant to Schedule 24 of the Finance Act 2007 ('**the Schedule 24 Penalties**').

345. Again, HMRC bears the burden.

346. As to the Schedule 24 Penalties (from 1 April 2008 and onwards):

(1) Payment 5 was not disclosed on the tax return;

(2) Payment 6 was not disclosed on the tax return;

(3) HMRC has treated those failures as deliberate;

(4) Payments 5 and 6 were disclosed in the First Disclosure Report;

(5) HMRC has treated the disclosure as prompted, giving a penalty range of 35% to 70% of the Potential Lost Revenue;

(6) HMRC has applied a reduction of 10% for 'giving', 20% for 'helping', and 20% for 'giving access', giving an aggregate of 50% reduction in the penalty range for quality of disclosure;

(7) The overall penalty charge is therefore 52.5% (35%, plus 50% of 35% = 17.5%);

(8) The penalty applied to Payment 5 is £1,834,663;

(9) The penalty applied to Payment 6 is £1,365,000.

347. Here, the relevant dividing line is between conduct which is "deliberate" and conduct which is "careless." "Careless" is 'a failure to take reasonable care': see Schedule 24 Para 3(1).

348. "Deliberate" is widely drawn and is a higher level of culpability than careless. It does not rest on any language of honesty or dishonesty. Here, there was a decision not to record these payments in the tax returns. That was deliberate because it was done with the purpose of concealing the payments from HMRC, and with knowledge that those payments should have been declared to HMRC (as Payment 1, albeit in the terms of the white space entry, had been). To that extent, the returns contained an error which was done knowingly. Nor do we believe that Mr Mullens can ever have had any real or good faith belief that the information could be omitted.

349. In our view, the failure to declare Payments 5 and 6 was deliberate.

350. We do not see any reason to vary the reductions applied for the quality of disclosure.

De Pfyffer interest

351. Mr Mullens' position is that he had never had any expectation that the moneys held with De Pfyffer would earn interest, and had never been notified of any interest until receiving Mr Argand's letter of 22 April 2013 (set out above). He says that those were the reasons no interest was included in his relevant annual tax returns.

352. Mr Mullens invites us to consider the 2014 BDO report at Paragraphs 2.4.5 and following.

353. Given that there is no issue as to the discovery, we have to consider whether the omission to declare this interest was deliberate or careless for the purposes of penalty.

354. We consider it to have been deliberate. We reject Mr Mullens' evidence that he did not know that the money in this account was bearing interest.

355. He seeks to rely on a letter from Mr Argand dated 18 September 2013. This letter suffers from the same defects - namely, lack of transparency, and an overarching impression of studied

vagueness - which (as we have already remarked) characterises correspondence from Mr Argand. It makes reference to "earlier correspondence" (which we have not seen) and refers to "possible interest from the moneys held for you on your client account." The "possible" is not readily comprehensible. This should not have posed any conundrum to Mr Argand, one of the most senior members of that firm: either interest was payable, or it was not. It was. The sums are expressed annually, from 2003 to 2009. In most years, they amount to about 40,000 (in an unexpressed currency). The sums are calculated down to the penny/cent/rappen.

356. Whether CHF, GBP or USD, the sums are far from insubstantial. Over the years, the total comes to about quarter of a million (in whatever currency). We simply do not believe that the practice of DePfyffer Avocats was to allow hundreds of thousands in interest to accrue, over several years, without once ever telling, or otherwise notifying, the account holder. This is against the backdrop where, it is said, DePfyffer moved from a practice of not paying interest to paying interest. We are sure that any reputable deposit-taker (even bearing in mind that DePfyffer are not a bank) would have notified its clients of such a change. As he accepted in his evidence, Mr Mullens was speaking to DePfyffer (usually Emmanuèle Argand) virtually every day of the week and very often more than once a day. Moreover, Mr Mullens, over the years, regularly visited DePfyffer and we are sure that the subject of his money on account with them, and the accrual of interest, would have been made known to him.

The Klondike interest

357. HMRC's position is that this interest was assessable to income tax because Mr Mullens had unfettered beneficial access to the assets of Klondike and was therefore assessable on an arising basis on the income of the company.

358. Mr Mullens invites us to consider Paragraphs 2.4.8 and following of the 2014 BDO report.

359. We have to consider whether the omission to declare this interest was deliberate or careless for the purposes of penalty.

360. We consider it to have been deliberate. Klondike Investments SA was the Lebanese company which is referred to in the Outline Disclosure, and where Mr Mullens accepted - as a 'Description of fraud' - his failure to return a payment of about £200,000 in late 2007, and his use of those funds to make two purchases of shares. This sum was the entire total equity recorded in Klondike's accounts (which are expressed in GBP) which reduced from £171,685 as at 31.12.2007 to zero by 31.12.2011.

361. In our view, he was and remains bound by the declaration which he made in his Outline Disclosure. He described what had happened as a fraud. He did not describe it (as he did in relation to other matters) as "a non-fraudulent tax irregularity."

362. For the sake of completeness, and insofar as we are called upon to decide in this appeal, the CGT treatment of capital gains referred to as Klondike gains are, in our view, assessable to CGT.

Border & Cie Interest

363. Mr Mullens accepts that this interest was omitted from his 2008/2009 tax return, but says that this was "patently an oversight as significant foreign income was included in prior and subsequent year tax returns." This is correct. Income and dividends from Bank Bordier in Switzerland were set out.

364. He refers us to Appendix 14 of his statement which sets out, from 1999/2000 onwards, the foreign income returnable in relation to the Bordier & Cie account. The figures for 2006/2007 and 2007/2008 - i.e., the two years immediately preceding this one - were

substantial: hundreds of thousands of pounds in each year. The figure which should have been declared, but which was not, in 2008/2009 was about £450,000. As such, this was not a trivial or inconsequential oversight.

365. Mr Mullens reminds us of the home-invasion burglary to which he and his family had been subjected on 1 April 2009, and says that he was in a "state of complete shock" for several months thereafter, including in August/September 2009 when he faxed information to his accountant in connection with the preparation of his 2008/2009 tax return.

366. Mr Mullens' accountant did not apparently notice the absence of foreign income (when it had been substantial in the two previous years) or (if he did) did not apparently ask Mr Mullens; and Mr Mullens did not notice the omission either.

367. We are confident that the accountant was not told of the amount of the interest, and we are also confident that was not the result of deliberate suppression on the part of Mr Mullens. To have done so deliberately would, as he says, have stuck out. We are confident that the root cause of the omission was some accident in the transmission of the information from Mr Mullens to his accountants. A fax sent on 28 September 2009 by Mr Mullens refers to "a schedule of the Banque Bordier interest", but no such schedule seems to have been attached, or transmitted. Thereafter, and carelessly for this purpose, Mr Mullens' failed to spot the omission when he was provided with the return to authorise its filing in the autumn of 2009.

368. HMRC have treated this as careless.

369. Mr Mullens asks us to find that his failure to spot the omission of foreign income was, in his circumstances, not careless for the purposes of penalty because of the after-effects of the burglary. He says that he was suffering from the post-traumatic stress disorder. However, the difficulty with this evidence is that it relies entirely on Mr Mullens' own assessment. He has not placed any independent contemporary medical evidence before the Tribunal and so there is no sufficiently sure evidential footing upon which we could find (i) that Mr Mullens was suffering from PTSD; and (ii) that this condition explained and exculpated the omission.

370. We agree with HMRC. The penalty in this regard is to be calculated on the footing of careless behaviour.

The Late Payment Penalty

371. HMRC also issued a penalty of £123,138 in respect of late payment for 2012/13, pursuant to Paragraph 3 of Schedule 56 of the Finance Act 2009 ('**the Late Payment Penalty**').

372. As to the Late Payment Penalty:

(1) The appeal against this penalty is parasitic on the appeal against the assessment in relation to Payment 6;

(2) The Notice of Appeal asserts the existence of a reasonable excuse in relation to this penalty, albeit without setting out what that reasonable excuse is.

373. We do consider there to be any reasonable excuse for this. As we have found, this payment was not a gift, and we do not believe that Mr Mullens can ever honestly or genuinely have believed that it was.

OUTCOME

374. The appeal against the assessment of the Holiday Payment is allowed (and, insofar as any penalty has been issued in relation to that payment, that penalty shall in consequence be set aside).

375. The appeal against the disallowed CGT losses on the stolen jewellery is allowed, and all consequential adjustments shall be made.

376. The Appellant's failure to declare the Border & Cie interest in 2008/2009 was careless and not deliberate and the penalty shall be adjusted accordingly.

377. The remainder of the appeal is dismissed.

378. We invite the parties to now and forthwith agree all matters of consequential arithmetic and other adjustments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

379. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 04 MAY 2021