Case No: HQ10X02724

Neutral Citation Number: [2013] EWHC 1500 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2013

Before :

MR JUSTICE SILBER

- -

Between :

HOSSEIN MEHJOO	**Claimant**
- and -	
(1) HARBEN BARKER (A FIRM)	**Defendants**
(2) HARBEN BARKER LIMITED	

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Mark Simpson QC and Isabel Barter (instructed by **Wragge & Co LLP**) for the **Claimant**
Giles Goodfellow QC and Jonathan Bremner (instructed by **Eversheds LLP**) for the **Defendants**

Hearing dates: Hearing dates: 20, 21, 26 to 30 November and 4 to 7, 14, 17 to 21 December 2012,
16 to 22 and 24 January 2013, 13 and 14 March 2013
Written submissions served until 10 May 2013.

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Judgment

MR. JUSTICE SILBER:

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A. INTRODUCTION

(i) Overview

1. Mr Hossein Mehjoo ("the Claimant") is claiming damages against his former accountants who were first the firm of Harben Barker, and second Harben Barker Limited, which in 2003 took over the firm of Harben Barker. I will refer to which of the entities was acting as accountants for the Claimant at any particular time as "the Defendants".

2. The Claimant, who was born in Iran, had built up a clothing business which he merged with the similar business of his great friend Mr Andy Scott in February 2003.

They sold their shares in the merged business, Bank Fashion Limited ("BFL") for about £22 million in April 2005. The Claimant's share of this disposal was £8,508,586.50 and his liability for Capital Gains Tax ("CGT") on this sum was 10% of that figure. This case is concerned with the steps which the Claimant claims that the Defendants should have advised the Claimant to take in order to eliminate or to reduce this liability.

3. The case for the Claimant is that:-

(a) In September and October 2004, the long-standing retainer of the Defendants included an obligation prior and subsequent to the sale to advise and to assist the Claimant in relation to his personal financial and tax affairs, including identifying and advising the Claimant of possible methods by which the Claimant could minimise his tax liability, including giving the Claimant CGT tax-planning advice relating to the proposed sale of his shares in BFL without being expressly requested to do so;

(b) Any reasonably competent chartered accountant in the Defendants' position would have been obliged to advise the Claimant first that he had or very probably might have the status of being regarded as not domiciled in this country ("non-dom") and second that this status carried with it very significant tax advantages and third that in consequence, the Claimant should have been told by the Defendants to obtain tax advice from a firm of accountants or tax advisers who specialised in advising individuals who had or might have non-dom-status. It is common ground that the Defendant did not specialise in this field, but were generalist accountants who practised in Warwickshire;

(c) Even if the Defendants did not have an obligation to give tax-planning advice to the Claimant without being requested to do so, then they accepted such a responsibility when they advised him at a meeting on 2 October 2004 of ways of avoiding paying the very large amount of CGT due on the sale of his BFL shares;

(d) The Claimant would then have consulted such an adviser, who specialised in advising individuals who had or might have non-dom-status;

(e) If the Claimant had sought advice from an accountant or a tax adviser specialising in dealing with non-doms, he would have been advised to enter into a Bearer Warrant Scheme ("BWS"); which is sometimes called Bearer Warrant Planning ("BWP") and this was a tax-saving programme only available to non-doms;

(f) The Claimant would then have accepted this advice and he would then have been able to enter into BWS before blocking legislation was introduced by the UK Government in relation to Bearer Warrant Schemes with effect from 6 March 2005 which was the date of the UK budget (section 275(d a) of TCGA introduced by section 34, Schedule 4, part 1 para 4(1) and (4) of the Finance (No.2) Act 2005); and then

(g) The Claimant would then have saved the large amount of the CGT, which he would otherwise have had to pay and which he did have to pay on the sale of his BFL shares.

4. Each of these contentions is disputed by the Defendants. The Defendants contend among other things that:-

(i) they were not obliged to give the Claimant tax-planning advice unless they were expressly asked to do so;

(ii) they were not required to advise the Claimant to obtain tax-planning advice from a non-dom specialist;

(iii) even if that advice had been given to the Claimant, he would not have gone ahead with BWP because of the warnings about it which he would or should have been given by the non-dom specialist;

(iv) in any event, the Claimant could not have effected BWP before the blocking legislation took effect; and that

(v) in any event, he would have been worse off as a result of implementing BWP than if he had just paid the CGT.

5. In consequence of the Defendants' failure to refer the Claimant to a non-dom specialist, the Claimant did not enter into BWP, but instead he was advised, but not by the Defendants, to enter into a Capital Redemption Plan ("CRP") which he duly did at substantial cost and which failed and in consequence he has had to pay penalties and substantial interest for late payment. The Claimant seeks in these proceedings to recover those costs of embarking on CRP and other sums, which he contends, were incurred by him as a result of the Defendants' wrongful conduct. He now accepts that he cannot recover the penalties that he paid.

6. I will set out the nature of BWP and of CRP in some detail in Section E below, but the main features of them are that:-

(a) BWP was only available to non-doms and could only be used prior to a sale of shares. There is no evidence of Her Majesty's Revenue and Customs ("HMRC") ever challenging any of those schemes and so there is no evidence that any of them has failed to save CGT for the instigator of them; and

(b) CRP could be used by people domiciled both in the United Kingdom and abroad and could be invoked after the sale of shares. It created an artificial loss and was blocked by legislation In addition, a scheme on which it was based (the second-hand life insurance policy scheme) was held to be ineffective. In consequence, the Claimant was compelled to pay CGT as well as penalties and interest to HMRC.

(ii) The Pre-Merger Chronology

7. On 15 October 1959, the Claimant was born in Tehran to parents of Iranian origin where he spent the first 12 years of his life before moving to the United Kingdom

where he attended a boarding school in West Yorkshire. After he left school, he became a squash professional, and for around 9 years, he played squash at the highest level in tournaments around the world.

8. As a result of playing squash, the Claimant met Alan Purnell, who was a Chartered Accountant and with whom he started playing squash regularly in about 1981. At about this time, the Claimant had to contest an attempt to deport him back to Iran and he was eventually given leave to remain by the Home Office in 1982.

9. The Claimant and Mr. Purnell soon became good friends. In consequence, Mr Purnell was aware that the Claimant had a family in Iran and he met the Claimant's family on a couple of occasions. Mr Purnell also knew that the Claimant's father sent funds into a bank account in the United Kingdom which the Claimant could use. A time came when Mr Purnell asked the Claimant whether he had an accountant because he needed one as he was beginning to make money through a combination of his roles as a squash professional, a squash coach and his retail business.

10. Initially the Claimant retained Mr Purnell to complete his annual tax returns, but his evidence was that he quickly came to rely on Mr Purnell for not only for just an annual tax return but also for advice on all aspects of his business and personal financial affairs including tax. The Claimant had originally operated from October 1983 through a company called Hossein Sports Limited ("HSL"), which was based in a small shop within the Cofton Squash Club, but in around 1998 he moved to retail premises in Birmingham. In March 1995 HSL changed its name to Hoss Ventures Limited ("HVL").

11. In 1998, the Claimant suffered a back injury and was unable to continue playing squash; so he thereafter concentrated on his business career. The Claimant and Mr Purnell regularly met and there is evidence that Mr Purnell was giving the Claimant tax advice on the treatment of company cars, the payment of expenses through a company Visa card, a consultancy on new mail order companies and the auditing of HVL. The Claimant contends that this advice included advice on tax-planning, which was given by Mr Purnell without the Claimant requesting it. One of the important disputed issues in this case concerns the Claimant's submission that there was a course of conduct in which the parties worked on the basis that even when not expressly asked to do so, Mr Purnell would give advice to the Claimant on tax matters, including advising the Claimant on possible methods by which the Claimant could reduce his liability for CGT on selling his shares in BFL.

12. The Claimant described Mr Purnell's role as being proactive because when the Claimant told Mr Purnell what he was doing with his personal affairs, Mr Purnell without being requested to do so would then immediately look at the financial or tax implications of what the Claimant had told him, and if he did not know the answer, he would state that he would look into it or talk to one of his colleagues. In about 1991, Mr. Purnell's firm Purnell & Co merged with the First Defendants, but he told his clients that nothing would change from their perspective and that he would still be in charge of their accounts, which was the case and their business relationship continued as before.

13. Thus after this merger Mr Purnell continued to act for the Claimant and HVL performing the same services as he had done hitherto. Mr Purnell explained that

occasionally the Claimant asked him on a personal basis what he thought about what he was doing, but in the opinion of Mr Purnell, the Claimant was not seeking advice, but instead obtaining a kind of a reassurance and that the Claimant told various people about his business and sought similar reassurances from these people. This is an issue to which I will return.

14. The Claimant said that from time to time Mr Purnell referred him to other financial advisors such as a life assurance person. He also said that Mr Purnell advised him on issues such as the VAT treatment of a boat purchase with Mr Purnell being keen to ensure that the purchase was structured in the most tax-efficient way possible.

15. The Claimant explained that during this period Mr Purnell advised him and his company on a wide variety of matters including auditing, general financial and business advice as well as tax advice on his company and ways of minimising the tax bills.

16. On 22 July 1999, Mr Purnell sent the Claimant a copy of its engagement letter ("the 1999 Retainer Letter") which the Claimant signed and returned. It referred to the Defendants giving the Claimant:-

> *"general tax-planning advice on the best use of reliefs"* and that the Defendants would be *"willing to provide, if we are not already doing so, a more extensive tax and personal financial planning service taking into account all forms of taxation and personal financial planning".*

17. The Claimant said that he was surprised to receive this letter but that when he raised it with Mr. Purnell, he was told that it was just a formality. The evidence of the Claimant was that Mr. Purnell was already providing him with the more extensive service including "*all forms of taxation and personal financial planning*".

18. It is noteworthy that in a letter dated 28 September 2001, Mr Purnell explained that:-

> *"I have gradually become less of a processing accountant and more of a business and tax advisor using the resources of my firm. This is a role that I enjoy and I feel is better suited to my talents"*.

(iii) The Merger

19. HVL was beginning to grow with four shops at that point with both its turnover and its profit rising. The profits were being put back into the company.

20. The Claimant said that he had always intended to sell his business and in his letter of 28 September 2001, Mr Purnell referred to potentially working within the business and wanting to take the business "*to market*". The Claimant explained that in about 2001, he had his first developed thoughts about a merger which he saw as a risky move, but one which would enable him to further the chances of eventually selling his business. His reasoning was that in order to attract a venture capitalist purchaser, who would buy the business for a substantial profit, the pre-merger company of HVL

would (unless it merged with another company) be too small to be on the radar of such venture capitalist or other trade buyers.

21. In September 2002, the Claimant then decided to merge HVL with BFL, which had been formally known as AG Sports Limited and which belonged to Mr Andy Scott, who was a long-standing friend of the Claimant and with whom he shared ambitions for their retail businesses. Both of them wished eventually to sell their merged business.

22. The Claimant and Mr Scott trusted each other implicitly, as was shown by the fact that the Claimant did not undertake full due diligence in relation to the merger and that they decided to proceed without warranties except as to £50,000 relating to lease obligations. The purpose of the merger was to build and sell the business and the merger was eventually completed on 28 February 2003 on a share-for-share basis with Mr Purnell attending the completion meeting which took place at the office of Wragge & Co ("Wragges"). The Defendants continued to act for the Claimant, but another firm acted for the merged business.

23. As I have explained, in March 2003, the business of the First Defendant was taken over by the Second Defendant. The Second Defendant, through Mr Purnell, continued to advise and assist the Claimant generally in relation to his personal, financial and tax affairs, including according to the Claimant identifying and advising the Claimant of possible methods by which he could minimise his tax liability. The Claimant kept Mr Purnell abreast of how BFL was doing in telephone conversations and meetings with him, diary extracts show that they met on nine occasions in 2003. Mr Purnell was therefore aware how BFL was progressing. Further, in 2004, Mr Purnell and Mr. Paul Stanford advised the Claimant on tax implications relating to his boat.

24. The purpose of the merger was, as I have explained, eventually to sell the business, but Andy Scott was initially reluctant, but by early 2004, he was ready to sell. This was partly because there had been interest in the business, namely from Republic, and partly because BFL was having cash flow problems. The merged business thereafter had interest from JD Sports, and USC and the Claimant told Mr. Purnell about this.

(iv) The Disposal of the Claimant's Shares in BFL

25. Mr Scott and the Claimant got in touch with corporate finance advisers Ford Campbell by May 2004. The Claimant cannot recall precisely when he told Mr Purnell about Ford Campbell, but he says that is that it was inconceivable that he would not have kept Mr Purnell posted. The Claimant's diary for 2004 has been lost, but it is clear that in 2004, Mr Purnell and the Claimant met on at least four occasions prior to September, including one five hour meeting on 6 August 2004, and they also talked on the phone frequently. The Claimant's case is that Mr Purnell would have been aware in the summer of 2004 that it was highly likely the Claimant would receive a large sum of money from a sale of his shares in BFL.

26. By September 2004, the Claimant and Andy Scott were in more serious discussions with Ford Campbell about a sale. On about 28 September 2004, BFL instructed Wragges to act for BFL in relation to the sale. By late September 2004, there was much interest in purchasing BFL in arrangements in which the Claimant would have received a large sum of money and which would have necessitated him paying very

substantial sums by way of CGT The Claimant called Mr Purnell in late September 2004 to discuss the upcoming sale.

27. Following that conversation, Mr Purnell met with Mr. Paul Stanford, his tax partner, on 1 October 2004 which, according to the Claimant's case, was to discuss CGT saving measures for the Claimant. They put together a list entitled "*Potential Chargeable Gain when shares in Bank Fashion are disposed of"* dated 1 October 2004 in advance of a meeting due to take place between Mr Purnell and the Claimant. Domicile was not mentioned on that list, which did not include BWP of which the Claimant and Mr. Purnell were not aware. No criticism is made of the fact that the Defendants as generalist accountants were not aware of BWP.

28. On the afternoon of 2 October 2004, a meeting took place at the home of Mr Purnell between him and the Claimant and, as I will explain, I have concluded that they discussed CGT tax saving measures in general. An important aspect of the Claimant's case is that the Defendants should at this stage then have advised the Claimant, who they knew or should have known was a non-dom to take advice from a non-dom specialist. After this meeting, the Claimant expected Mr Purnell to investigate tax-saving in more detail. He explained that he would not have asked Mr Purnell to investigate any specific schemes, because he did not know enough about such schemes to be able to ask Mr Purnell to do that. The Claimant's case is that Mr Purnell was aware that the Claimant needed tax-planning advice and that Mr Purnell knew that he was expected to give it without a request at the meeting held on 2 October 2004. By the time of the meeting, there was much interest in purchasing BFL and Wragges had sent on that day an e-mail to the Claimant giving a fee estimate with an estimated completion date in February 2005.

29. A list of potential Venture Capitalists was put together by 14 October 2004, and the Information Memorandum for the sale was sent out by 15 November 2004. Meetings with Venture Capitalists were held in the week beginning 15 November onward. In November and December 2004, BFL received a number of offers including an offer from Phoenix Equity Partnership ("Phoenix") in the sum of £22m, an offer from SandAire in the sum of £28m, an offer from Inflexion in the sum of £20m, and an offer from Advent International in the sum of £27.5m. Mr Purnell was aware of these offers and he commented on them. During this time, Mr Purnell was also advising as to VAT and the Claimant's boat.

30. At some point, the Claimant asked Mr Purnell to contact John Joyce, whom the Claimant had met about a year before, because Mr Joyce had suggested that the Claimant should call him if BFL was to be sold. Mr Purnell wished to be kept informed about the sale in order to be able to advise the Claimant properly. This was apparent from Mr. Purnell's email of 10 January 2005, "*I shall need to be kept informed as to the type of purchase […] The above is important if I am to advise you about the prospects of tax saving*". A similar approach was adopted in Mr. Purnell's email of 20 January 2005, which stated that "*I really need to be clear when you will make the gain […] so keep me informed. I also have some investment ideas that could save further tax*". He also suggested that the Claimant and he should meet to discuss matters and to make a decision.

31. By the end of January 2005, there were two buyers remaining, namely SandAire and Phoenix. On 31 January 2005, Phoenix wrote to confirm its strong interest in BFL and

to ask BFL to enter into an exclusivity agreement until 31 March 2005. A final offer letter was sent on 7 February 2005 and signed by the Claimant, Andy Scott and Damian Scarlett, who was an associate of Mr. Scott, on 8 February 2005.

32. Mr Purnell contacted Paul Draper, of Ford Campbell. The Claimant did not put Mr Purnell in touch with Paul Draper. He thinks it is possible first that Ford Campbell asked him (probably sometime after Christmas 2004) something like "*what are you doing about tax saving*", second that he made them aware that Mr Purnell was looking into tax, and third that they would have asked to speak to Mr Purnell. Mr Purnell had evidently spoken to Paul Draper by 1 February 2005, and both of them were aware of his non-dom status as is apparent from his email to Paul Stanford of the same date in which he said *"I also have information from a firm called Ford Campbell in Manchester who have ideas to use offshore loan notes to take advantage of Hoss's status as non domiciled."*

33. Mr Purnell was anxious to ensure that any tax-saving planning was carried out in the appropriate tax year. He continued to gather information about potential tax-saving schemes. He was in communication with Jane Goodall, Administration and Marketing Director of MTM (Midlands) Ltd from at least 2 February 2005. He met with John Joyce on 2 February 2005 (with Paul Stanford), and again on 4 February 2005 and 8 February 2005. He asked for further information from Paul Draper in an email dated 3 February 2005, namely (1) a résumé of his idea, (2) a schedule of potential costs and (3) Counsel's opinion. Paul Draper called Mr Purnell on 3 February 2005. By 4 February 2005, he had spoken to Mr Purnell more than once, in which they had discussed "*some ideas to reduce Hoss's tax bill*". Mr Purnell must have received some further information from Paul Draper because in an email dated 4 February 2005 he said that Paul Draper was not the cheapest option in terms of fees "*so we shall have to make careful choices"*.

34. Mr Purnell insisted that the Claimant and he should meet in the near future to ensure that a decision was made before the end of the tax year on tax saving and that they duly did so on 11 February 2005, when tax saving was discussed.

35. The Claimant and Mr Purnell continued to discuss tax saving throughout February 2005. On 16 February 2005, the Claimant wrote to Mr Purnell to say that "*Obviously until we are 100% sure that the deal will go through I think it is dangerous that I commit myself to any scheme and then there is the consideration of what is the total tax on the deal – has to be worth it!"*. The Claimant continued to take steps in relation to tax scheme planning. He agreed to set up a trust and open a bank account, as suggested by Mr Purnell's "*tax-planning contact"* which was MTM, but the Claimant was unaware of this at the time. The Claimant stated that he continued to rely on Mr Purnell for advice as to what to do.

36. Prior to 3 March 2005, Phoenix had a "*wobble"*, owing to some "*bad numbers*" as a result of stock write-offs and a loss of profit owing to exceptionally bad weather. Phoenix agreed to continue with the deal, but they provided that the Claimant and Andy Scott deferred £2 million of consideration. The Claimant expected Mr Purnell to advise about the deferred consideration and its tax implications. Mr Purnell clearly thought this was part of his role with him reassuring the Claimant on 23 March 2005 that he was in touch with Wragges about it. Mr Purnell asked Paul Stanford to provide advice about the same topic in emails dated 22 March 2005 and 24 March 2005,

which Mr Stanford duly did. By this time, the blocking legislation had come into force ending the possibility of the Claimant using BWP although at that time neither the Claimant nor Mr. Purnell were aware of its existence and its potential.

37. Phoenix extended the exclusivity deal with the Claimant on or around 5 April 2005, after which negotiations continued. Mr Purnell advised the Claimant on his consultancy agreement. On or about 19 April 2005, the Claimant sold his interest in BFL to Phoenix for the sum of £8,875,500. After deduction of expenses associated with the sale and the net acquisition cost, the capital gain upon disposal in the Claimant's interest in BFL of £8,508,586 and he was due to pay 10% CGT on this.

(v) The Montpelier Scheme

38. After the sale, the Claimant wanted to consider tax-saving schemes, and in an email on 24 April 2005 the Claimant responded to the question of tax savings raised by Mr Purnell by saying "*I am very keen to go for it*".

39. Mr Purnell met with Jane Goodall of MTM in order to ensure he had information to provide to the Claimant, and he promised to "*chase"* the Claimant in relation to MTM's offer. Indeed, Jane Goodall, the Claimant and Mr Purnell met on 14 June 2005 because the Claimant wished to discuss what experience MTM had in relation to these schemes in order to decided whether to use it.

40. Mr Purnell also met with the Claimant on numerous other occasions during this period. Paul Stanford was also asked to provide advice in relation to the MTM tax scheme. Mr Purnell and the Claimant also met with representatives of Wenham Major on 13 June 2005 to find out more about the planning. Mr Purnell met with John Joyce again on 17 June 2005.

41. In relation to Barclays, Mr Purnell phoned Mark Bearcroft for details of the first meeting on 17 May 2005, which Mr Purnell had not attended. On 1 June 2005, Mr Purnell analysed the offer proposed by Barclays in relation to the capital gains scheme, and presumably discussed it with the Claimant at their meeting on 2 June. Mr Purnell then attended the second meeting at Barclays on 9 June 2005, at which domicile was raised. The meeting note recorded that (with emphasis added) that:-

> *"It transpired that he [the Claimant] has duel [sic] Iranian and UK citizenship. He was born in Tehran of Iranian parents and has lived here since he was a child. I then talked him through the domicile issue.* ***It is likely that HM could successfully assert that he has an Iranian domicile****. Alan Purnell has not discussed with HM and indeed professed that he was not an expert on the matter. […] Obviously the ASI CBIB would not be an ideal vehicle for a non-dom and I need to discuss with HM whether he wants to go ahead with this whilst his domicile status is being clarified".*

42. Following this meeting, Mr. Purnell emailed Mr. Paul Stanford on 13 June 2005 asking him to confirm the position relating to the Claimant's domicile.

43. On 21 June 2005, Mr Purnell and the Claimant met with Watkin Gittins (the Director of MTM), shortly after which the Claimant decided to go forward with MTM, stating that he hoped Mr Purnell agreed. On 27 June 2005 Mr Purnell wrote to Jane Goodall to say that the Claimant would use MTM's scheme, which was a CRP scheme.

44. The Claimant carried out the necessary steps relating to the MTM scheme in August 2005. The purpose of it was to cause a capital loss to arise so as to avoid the Claimant's liability to pay CGT on the gain which he realised from the disposal of his interest in BFL. The Claimant paid a fee of £200,000 to MTM in relation to the Montpelier Scheme. The Claimant claimed as part of this scheme to have an allowable capital loss of £10.5m on his personal tax return for the 2005/2006 tax year.

45. Once the issue of domicile was raised with him, the Claimant wanted to explore it. Mr Purnell wrote again to Mr Chalkley on 27 June 2005 in relation to the Claimant's domicile. However, Mr Purnell did nothing about it, as Mr Chalkley noted in his third meeting with the Claimant on 17 October 2005.

46. The way in which HMRC decide if somebody is entitled to non-dom status is by considering their answers to a form called DOM1. Mr Purnell finally sent the Claimant a DOM1 on 3 January 2006, which the Claimant completed on 8 January 2006. Mr Purnell actually sent the DOM1 on 1 March 2006. The Claimant's position as a non-dom was confirmed by HMRC on 26 April 2006.

47. The CRP schemes were based on schemes using second hand insurance policies in respect of which blocking legislation had been introduced in 2003 ending the future use of these schemes and I will explain this in greater detail in paragraph 225ff. An issue, which remained after the CRP blocking legislation came into effect, was whether existing schemes were effective. HMRC sought a ruling that this was the case. In *Drummond v HMRC* [2008] STC 2707 (Ch) and [2009] STC 2206 (CA), HMRC succeeded. Although that case involved second hand insurance policies, the reasoning in it had a similar application to the CRC schemes, because HMRC had argued that the wording in the legislation had to be analysed on a realistic basis rather than solely with regard to the wording of the legislation. In consequence, the courts decided against Mr Drummond at all stages. This led to an acceptance that CRC did not work as a way of avoiding CGT.

48. After the Court of Appeal had handed down its judgment in *Drummond*, HMRC informed the Claimant that it was investigating him on 19 October 2010. The Claimant understood that other tax-payers had settled with HMRC. The Claimant then took steps to deal with the matter. He took professional advice and he instructed Deloittes. Deloittes enquired as to what HMRC considered to be the outstanding tax and interest for 2005-06 on 14 October 2010, and HMRC responded in December 2010. The Claimant obtained further papers from the Defendants in order to provide more detail of the advice given to him as part of disclosure in this case. Deloittes asked on 5 April 2011 for HMRC to meet with the Claimant. This meeting took place on 9 May 2011. Negotiations followed that meeting in September and October 2011. The Claimant reached an agreement with HMRC on 23 May 2012 under which the Claimant was obliged to pay a penalty and interest to HMRC. The Claimant is seeking to recover in these proceedings, among other matters, the interest that he has paid to the tax authorities but not the penalties.

The Hearing and Its Length

49. I am very grateful for all the excellent help that I have been given by all Counsel and their Solicitors in this case; they all worked exceedingly hard. The Claimant has been represented by Mr. Mark Simpson QC and Ms Isabel Barter while the Defendants have been represented by Mr. Giles Goodfellow QC and Mr. Jonathan Bremner. They have produced an enormous number of helpful documents often at very short notice.

50. Their closing submissions and supplementary documents total more than 700 pages. In this judgment, I have not been able to deal with every conceivable point raised by them in this judgment, but I have considered all the relevant points. In particular I should explain that there are many articles, extracts from books, counsel's opinions and notes of telephone conversations in the papers. Insofar as they were considered relevant, they were put to the experts by counsel I have taken all the answers into account in reaching my conclusions. I have not considered it necessary or appropriate to set out all the material put to the experts or all the massive material in the articles and other documents which were not put to the experts. So the mere fact that a particular point has not been specifically referred to in this judgment does not mean that it has not been considered.

51. This was never going to be a short trial with, for example, very many files of expert evidence and more than 50 files of evidence and the initial 5 files of expert evidence which were supplemented by much further material. The length of the hearing of this case has been greatly extended by a number of procedural matters, which in many cases should have been dealt with before the trial started.

52. First, there were very large amounts of disclosure given during the course of the trial by third parties relating to matters including evidence given in previous proceedings by the experts in this case as well as documents showing how Grant Thornton (which was the firm of which Mr. Michael Warburton, the Defendants' expert was a partner) and KPMG (which was the firm in which the Claimant's expert Mr David Kilshaw was a partner) had dealt with BWP for their clients and the warnings given to their clients as well as numerous opinions from Counsel. This led to some delays and extended cross-examination. Grant Thornton gave much disclosure. A letter was sent by the Defendants' solicitors late in the trial to KPMG seeking disclosure of their BWP files, but they were apparently not produced and I was not asked to make an Order probably because the request was made so late.

53. Second, at the outset of the hearing there was an application made by the Defendants to Re-Re Amend their Defence. This required the Defendants to produce a skeleton argument and a witness statement and an adjournment of the hearing. In consequence, about 2 ½ days of the time allotted for the trial was lost. The Defendants should have pleaded this issue well in advance of the hearing especially as the claim had been issued in July 2010.

54. Third, there was a further very substantial and detailed application made to re-re-re amend the Defence in a very material manner and which was made almost at the close of the lay evidence, even though there had been the application referred to in the last paragraph and which had been made about two weeks earlier. Some of the application was agreed, but I refused to accede to the Defendants' application in respect of the disputed matters for the reasons which I later explained in a judgment

dated 21 December 2012 and with the neutral citation number [2012] EWHC 3682 (QB). The reasons why I rejected the application included my conclusions that first the application was made too late, and second that if the application was granted it would have required further investigations, a recall of witnesses, and an adjournment of the trial. It is regrettable that these matters were not pleaded well in advance of the hearing.

55. Fourth, another difficulty arose later during the trial when Mr. Goodfellow was about to call the last witness at the trial who was to be Mr Michael Warburton, the Defendants' accountancy expert, because he sought to adduce two further witness statements from Mr. Warburton containing much information. The admission of some large parts of it was disputed by the Claimant and I refused to accede to the Defendants' application in respect of the disputed allegations for reasons which I later explained in a judgment with the neutral citation number [2013] EWHC 291 (QB).

56. Fifth, and a matter which added greatly to the length of the trial arose because I became very concerned as the evidence emerged, first that the Defendants had very surprisingly not raised in cross-examination a substantial number of issues on which they had relied in their pleadings, and second that a number of issues had been raised by the Defendants when evidence was being given, but which had not been pleaded. After all the evidence had been given, a lengthy contested hearing then took place at which I made rulings first defining the issues which could be pursued in the light of the Defendants' pleaded case and second specifying the matters which had not been challenged by the Defendants' counsel in cross-examination and so could not be relied on by the Defendants. The Defendants were at fault for not raising in cross-examination many of the maters raised in their pleadings.

57. This led to an application from Mr Goodfellow that the Claimant should be recalled to the witness box to be cross-examined on a substantial number of issues raised in the pleadings which should have been put to the Claimant but which had not been put. This application was contested but I acceded to that request. I later set out my reasons in a judgment in relation to that which has the neutral citation number [2013] EWHC (QB) 290. A list of issues was then determined which could be pursued in the light of the pleadings and they form the basis of the present judgment.

58. In order to prevent yet further very lengthy disputes between counsel in this exceptionally heavily contested case relating to the extent of the cross-examination of the Claimant which would be permitted when he was recalled, I required the Claimant to produce a further witness statement before he was recalled so that I could determine clearly the issues, which could be the subject of cross-examination. I held that some parts of it were inadmissible. This statement also assisted the Defendants as it ensured that the cross-examination of the Claimant when recalled covered all the outstanding issues but in addition that it did not go any further and that it was properly focussed. I was anxious to avoid further prolonged disputes on the scope of cross-examination. This procedure led to a focussed cross-examination of the Claimant when he was recalled.

59. A further matter which caused delay was that many issues raised during the trial by the Defendants related to some issues of tax law of which I had no previous experience and indeed some of which the expert accountants were not aware or supportive. This meant many matters had to be explained at much greater length than

if this case had been started in the Chancery Division and heard, as it should have been, by a Chancery Judge with very extensive previous experience of tax law. In addition, my task was made more difficult as I was required to deal with tax issues on the legality of BWP and the effect of various tax statutes without the benefit of hearing the views of HMRC. My task was made more difficult by the surprising failure of the Defendants to explain their stance on tax issues at the appropriate time. An example of this was that they failed to explain even in their closing submissions why the Claimant was not entitled to recover from the Defendants the penalties paid by the Claimant to HMRC as it was only after prompting by me that the Defendants finally explained their position setting out the basis on which penalties can be recovered in a document two months after closing submissions took place and this led to the Claimant abandoning his claim to recover the cost of the penalties paid by him to HMRC. There are other examples of the Defendant failing to explain or put forward issues of tax law when they should have done so.

60. Finally, I should admit that I did not seek to limit cross-examination but that was because I was repeatedly given time estimates by counsel no doubt in good faith but which proved to be drastically wrong. In consequence, this case overran. In addition, there was a gap of almost two months between the close of the evidence and the final submissions.

B. THE ISSUES AND THE WITNESSES

(i) The Issues

61. Apart from making findings on the reliability and honesty of the witnesses, the other issues to be determined fall into the following broad categories:-

(a) Whether the Defendants' retainer prior to and at the start of October 2004, extended to advising and assisting the Claimant generally in relation to his personal financial and tax affairs including advising the Claimant of possible methods by which the Claimant could minimise his tax liability, including giving the Claimant CGT tax-planning advice on the proposed sale of his shareholding in BFL, even though no express request had been made by the Claimant for such advice and assistance ("The Retainer Issue") (See Paragraphs 117-174);

(b) Whether (A) the Defendants had a contractual or concurrent tortuous duty in October 2004 to advise the Claimant that (i) he had, or very probably, (or alternatively might have had) non-dom status; (ii) non-dom status carried with it very substantial tax advantages; and (iii) he should therefore take advice from a firm of accountants or tax advisers who specialised in advising individuals who had or might have non-dom status ("a non-dom specialist") and (B) if having received such advice, the Claimant would then have decided to seek further advice at that time ("The Referral Issue") (See Paragraphs 175-221);

(c) What other advice and warnings the specialist non-dom adviser would have given to the Claimant in relation to entering BWS and the risks of (i) the possibility of a change in law between the time when the Claimant was intending to put the shares into trust and the disposal by the trustees; (ii) the potential loss of Business Asset Taper Relief; (iii) a successful

challenge by HMRC to his domicile status or on *Young v Phillips* grounds; (iv) the loss of control of the proceeds when they were put into trust; and (v) the costs relating to implementing and using BWP, including stamp duty ("The Warning Issues") (See Paragraphs 222-342);

(d) Whether any reasonably competent non-dom specialist would have advised the Claimant to enter into BWS or into CRP and what advice would this adviser have given as to the advantages and disadvantages of the CRP scheme? ("The BWS/CRP Issue") (See Paragraphs 343-370);

(e) Whether the Claimant had been advised to enter the BWS, he would have taken the advice and if so whether he would have reached the stage of taking the shares offshore prior to 16 December 2004 ("The BWS Timing Issue") (See Paragraphs 370-419);

(f) Whether a decision by the Claimant to implement BWS would have affected Mr Scott's personal tax position so that he would have refused consent? ("The Mr Scott Issue") (See Paragraphs 420-452);

(g) Whether if the Claimant had engaged in BWP, it would have been successful in saving him CGT or whether it would have made him worse off because of (i) a successful challenge by HMRC; (ii) the diminution in value factor; or (iii) a charge to Income Tax under the Employment Related Securities legislation? ("The BWP Advantage Issue") (See Paragraphs 454-514);

(h) If the Claimant succeeds on the liability issues, what damages he can recover ("the Damages Issue") (See Paragraphs 515-539); and

(i) Whether the Claimant's claims are statute-barred? ("the Limitation Issue") (See Paragraphs 540-564).

(ii) The Witnesses

62. A critical issue in this case is the reliability of the three witnesses of fact who were the Claimant, Mr Alan Purnell, and Mr Stanford. Mr Lawton Smith also gave evidence but, as I will explain, his evidence was not of great importance. Correctly in my opinion, no suggestion was made that any of these witnesses of fact was not honest but the reliability of some of their evidence was in issue.

63. There were three expert witnesses. The Claimant's accountancy expert was Mr. David Kilshaw a partner in KPMG while the Defendants' accountancy expert was Mr. Michael Warburton, a partner in Grant Thornton. The Defendants also called a corporate lawyer who was Ms Jane Haxby, a solicitor and partner in Squire Sanders (U.K.) LLP who gave evidence on corporate law.

64. I now turn to comment on these witnesses.

(iii) The Claimant

65. After having read the Claimant's witness statements, and having listened to him being examined and cross-examined on many issues and having considered all Mr. Goodfellow's detailed criticisms of the Claimant and of his evidence, I was, and am,

quite satisfied that he was a careful and reliable witness who was telling the truth and whose evidence I should accept. In reaching that conclusion, I appreciate that he was not giving evidence in his native tongue and that his evidence related to matters which had taken place very many years earlier and which had occurred at a time when he could not, and would not, have realised that he would questioned about them in very great detail many years after the events in question.

66. He quite correctly accepted that on occasions his memory was incomplete, such as in relation to the critically important meeting between him and Mr. Purnell which took place on 2 October 2004. It is true that the Claimant did ask from time to time where Mr. Goodfellow's cross-examination was going, but I am satisfied that he answered all the questions put to him honestly, accurately and to the best of his ability.

67. It was noteworthy that he was prepared to accept a good point when it was put to him such as that he accepted that he was at fault in not purchasing tax deposits when he should have done so. He also did not pretend to remember the meeting on 2 October 2004 even when a document relating to it was produced. A less honest witness might not have resisted the temptation to use this document as an opportunity to give additional evidence on this important document in support of his case, but he did not do so.

68. There were other areas in which his evidence was ultimately supported by contemporaneous documents. His evidence was logical and clear as well as not being undermined by any contemporaneous documents.

69. Mr. Goodfellow made a number of criticisms of the Claimant's evidence but Mr. Simpson has a good answer to those matters. In any event, it is not surprising that the Claimant does not have an accurate recollection of these matters.

70. The simple fact is that the Claimant emerged unscathed from a careful, thoughtful and detailed cross-examination by Mr. Goodfellow. The Claimant struck me as an energetic, determined and intelligent businessman, which is not surprising in the light of his successful business career. I have no hesitation in regarding the Claimant as an honest and a reliable witness, whose evidence I can and do accept.

(iv) Mr. Andrew Lawton Smith

71. He was a partner in Wragges until 2009, who had been acting as solicitors for the Claimant at the time of the merger and the sale in respect of his dealings with prospective purchasers. He was required to make a witness statement relating to an undated handwritten note relating to a meeting which occurred on 3 December 2002. There was some uncertainty about it and so he was asked to make a witness statement relating to this. His statement which was made on 4 December 2012, which was the eighth day of the trial, went wider than the purpose for which it was required as it dealt with other matters. So I said that I would disregard the parts which dealt with matter other than the meeting of 3 December 2002.

72. There was a dispute about whether he should be called to give evidence and Mr. Simpson said that Mr. Lawton Smith would only be called if he would only be cross-examined about the events of 3 December 2002, but if cross-examination was to go wider than that, he would not be called. On that basis, he was called and I did not

permit Mr. Goodfellow to cross-examine on matters other than what happened at the meeting on 3 December 2002. There was after all no need for him to give evidence once he had made his witness statement other than to deal with the matter for which his statement was required. The time for serving witness statements in this case had long passed and the witness statement of Mr. Lawton Smith was only required because of his recollection of the events of 3 December 2002. His evidence was limited to considering those events.

73. As it is, I do not attach any importance to what happened at that meeting as it does not assist me in determining this case, but that is not an adverse reflection on Mr. Lawton Smith, but merely a consequence of the way in which the issues have developed.

(v) Mr. Alan Purnell

74. Mr. Simpson correctly accepts that Mr. Purnell was doing his best to recollect matters of importance when he gave evidence. He had retired shortly before he gave evidence and not surprisingly and quite understandably, he felt that he should not have been spending his retirement preparing for this case and then ultimately giving evidence in it. He too would have had no reason to believe when the events in question took place that he would be questioned about them many years later. It is also clear that he had tried very hard and with success to help his friend and client, the Claimant, over very many years.

75. His evidence really fell in two parts. In the first part, he was giving evidence in accordance with his witness statements and the Defence of the Defendants. In the second part, when he had obviously had an opportunity of considering many of the documents, he did not pursue many of the allegations that the Defendants had previously put forward on issues such as the retainer, save that he did not agree that he should have advised the Claimant to consult a non-dom specialist.

76. In my view it was the second part of his evidence that was reliable and which I should accept. I have no doubt that he is an honest, decent and competent accountant, who was always striving to help the Claimant but my task is to decide if he complied with his duties in relation to the Claimant's CGT liability and whether he, as a generalist accountant should have advised him to consult a non-dom specialist.

(vi) Mr. Paul Stanford

77. He is the tax partner in the Defendants and a person to whom Mr Purnell turned to for advice on a number of tax matters relating to the Claimant. In those circumstances, his involvement in the case and his contact with the Claimant and his affairs was very much more limited.

78. He was questioned at great length about the circumstances in which he signed the Statement of Truth at the end of the Re-Re-Re Amended Defence and the Claimant now accepts that nothing that he did or signed was dishonest. Indeed I regarded him as an honest witness who was trying to tell the truth, but who had little contact with this Claimant and who had very little reason to recollect in his evidence a brief discussion which took place about eight years earlier at a time when he would have had no reason whatsoever to predict that he would be questioned about it in Court at all and certainly not so many years later.

(vii) Mr. David Kilshaw (The Claimant's Accountancy Expert)

79. Mr Kilshaw was successively an Articled clerk, a Solicitor and a partner with Theodore Goddard from 1980 until 1991 when he moved to KPMG LLP where he was a Manger, a Senior Manager and where he has been a Partner since 1996.

80. Mr. Kilshaw is Head of KPMG's Capital Taxes group, which focuses on tax-planning including assisting clients in mitigating their tax liability on the disposal of share holdings in companies. He has worked with clients in executing a wide variety of tax-planning strategies and also in dealing with Inland Revenue inquiries into such strategies. Many of his clients are domiciled outside the United Kingdom. Mr Kilshaw has had a great deal of experience of advising on and implementing BWS, as well as on lecturing widely on CGT planning strategies both for external conference providers and at KPMG seminars for their clients and staff.

81. Mr. Kilshaw was very frequently able to substantiate his answers by referring to cases in which he had been involved to show clearly and cogently how he and his firm had solved problems connected with the use of the BWS, such as first where one seller of the shares was a non-dom wishing to use this scheme while the other seller being domiciled in the United Kingdom was unable to use this regime, and second how to deal with purchasers of shares subject to the BWS.

82. The Defendants contend that his evidence was inadmissible because, as is the case, he was not a Chartered Accountant but a lawyer. It is said that he was not qualified to give evidence relating to the practices of general practice accountants both because he had not worked in such a practice and more importantly because he was not a Chartered Accountant. Mr. Goodfellow referred to judicial statements such as that of Coulson J who observed in *Pantelli Associates Ltd v Corporate City Developments Number Two Limited* [2011] PBLR 12 (QB) that:-

> *"Save in cases of solicitors' negligence where the Court of Appeal has said that it is unnecessary (see Brown v Gould & Swayne [1996] 1 PNLR 130) and the sort of exceptional case summarised at paragraph 6-009 – 6-011 of Jackson & Powell, Sixth Edition, which does not arise here, it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view?"*

83. Mr Goodfellow accepts correctly that there may be exceptions to that approach such as where an accountant has failed to file a client's tax return before the 31 January deadline and the reason for those exceptions is so clear that expert evidence would not normally be required to show that the accountant was negligent. His point is that in the present case, the position was different as expert evidence was required and such evidence had to come from "*those within the same profession as to the standards of expected on the facts of the case and the failure of the professionally qualified man to*

measure up to that standard' (per Butler-Sloss LJ in *Sansom v Metcalfe Hambleton* [1998] PNLR 542, 549).

84. I do not think that Mr. Kilshaw's evidence can be rejected on those grounds for three reasons. First much of his evidence related to issues such as first, what advice a reasonably competent specialist non-dom adviser (who need not necessarily have been a Chartered Accountant) would have given to the Claimant if he had been referred to him in 2004; second, how speedily BWP could have been implemented; and third, how much CGT would have been saved by implementing BWP after taking account of the costs of implementing and using it.

85. Mr. Kilshaw was clearly a well-qualified non-dom adviser with much experience of implementing BWP, who was well-qualified to give evidence on such critically important issues which formed the bulk of his evidence. In relation to this case, those issues related to:-

(a) The advice that a specialist non-dom adviser should have been given to the Claimant about (i) the *Young v Phillips* issue; (ii) whether the Claimant's non-dom status would or could be challenged; (iii) whether the Claimant should have engaged in BWP or CRP; (iv) the risk and consequences of the potential loss of Business Asset Taper Relief; (v) the prospect of changes of law coming into force so as to thwart the use of BWS; (vi) the loss of control of the bearer shares when they were in the control of the trustees; (vii) the stamp duty costs and costs of professionals and trustees in implementing BWP; (viii) the effect of the shares being held as bearer warrants on a prospective purchaser; (ix) the costs of Mr. Scott; (x) the effect of BWP on Mr Scott, who was domiciled in the United Kingdom; (xi) the Company reconstruction point; and (xii) the effect of Devaluation argument and the Employment Related Securities legislation;

(b) Considering whether the Claimant could have implemented BWP in sufficient time before the blocking legislation came into effect;

(c) The mechanics and timings in implementing BWP as well as the risks of using trustees; and

(d) The amount of CGT that would have been saved by the Claimant by implementing BWP after taking account of costs and any additional tax which the Claimant might be liable for.

86. In respect of those matters, the fact that Mr. Kilshaw was not qualified as a Chartered Accountant but was a non-dom tax expert would not have had any effect on the admissibility or reliability of his evidence because he had the relevant experience on BWP to deal with these matters. I found his evidence on these matters logical, careful and sensible after taking account of his qualifications (including the fact that he was not an accountant) and experience. I do not think that his evidence on these issue would have carried more weight if he had been an accountant, whether a generalist or not.

87. The second reason why I have concluded that Mr. Kilshaw was qualified to give expert evidence is that the important issue of whether the Defendants were obliged to

have advised the Claimant to take advice from a nom-dom specialist is an issue of law with very little scope for expert evidence. Oliver J in *Midland Bank Trust Co Limited v Hett, Stubbs & Kemp* [1979] Ch 384 observed in a case in which the parties sought to rely on expert evidence on an issue relating to the extent of a legal duty that:-

> *"I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the Defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."*

88. On the facts of this case there is little scope for expert evidence on this issue to which I will return.

89. The third reason why I have concluded that I can accept Mr. Kilshaw's evidence as an expert is that he is adequately qualified to give evidence is related to what a reasonably competent generalist Chartered Accountant would have *known* on issues such as ascertaining whether the Claimant had or very probably had or might have had non-dom status and knew that non-dom status carried with very significant tax advantages. The fact that Mr. Kilshaw was not a Chartered Accountant does not automatically mean that he is not qualified to give any evidence on these issues which relate to the knowledge of accountants of which he had acquired much knowledge; those issues do not relate, for example, to the accounting skills of the competent accountant. In any event, I did and will appraise the evidence of Mr. Kilshaw bearing in mind that he was not a Chartered Accountant.

90. The way in which Mr. Kilshaw has acquired knowledge of what generalist accountants know was because he had much experience of working with Chartered Accountants and knowledge of their practices and expertise. He has explained convincingly first that he had spent the last 20 or so years working together with accountants, and second that prior to that time when he was in practice as a solicitor, he worked with them as his clients.

91. In addition, he explains that he now spends a large amount of his time working with smaller firms and that KPMG had an initiative entitled "Professional Advice for Solicitors and Accountants" which meant that he has lectured and carried out in-house training for accountants on the kind of issue with which this case was concerned. He had also been voted Private Client Accountant of the Year some years ago. To my mind, he had adequate knowledge and experience to give evidence on what a reasonably competent generalist Chartered Accountant would have *known* on the issues of whether the Claimant had or very probably had or might have had non-dom status and knew that non-dom carried with very significant tax advantages. Similarly

an experienced Harley Street consultant would be able to give evidence about the proper *knowledge* of a competent GP dealing with a problem which arose frequently in the consultant's area of expertise because he would have acquired the knowledge from getting referrals over many years.

92. I am fortified in reaching those conclusions in respect of the issues of what the generalist accountant would have known because Mr. Kilshaw's evidence on these issues was corroborated and supplemented by that from Mr. Purnell and Mr. Stanford, who both accepted that they knew in 2004 that being a non-dom carried some potential tax advantages even if they did not know about BWPs. In addition Mr. Purnell accepted that the probability was that the Claimant was a non-dom and his emails in 2005 to Barclays Private Bank (to which I refer in greater detail in paragraph 183 below) state that "*we are as clear as we can be without applying to the Revenue, that he retains his Iranian domicile albeit with dual nationality*". So I can take into account Mr. Kilshaw's evidence on these issues especially as the evidence from Mr. Purnell and Mr. Stanford is a form of admission of this part of the Claimant's case.

93. In addition, it must be remembered that the authorities do not require the expert in a court case to have the *identical* experience to the allegedly negligent Defendant. Indeed, Mr. Warburton is a partner in the fifth largest firm of accountants in this country with massive facilities and access to much advice but even as Head of its Cheltenham Office, he does not work in what Mr. Goodfellow describes as a "*small generalist firm*" with the much more limited facilities and experience of the Defendants. Having considered the evidence of Mr. Kilshaw in the light of Mr. Goodfellow's objections, I still consider that I should consider him to be qualified as an expert but I will bear in mind the fact that he is not an accountant in considering his evidence.

94 Another particular criticism that was made of Mr Kilshaw was that his evidence in this case was different from that with which he gave in the case of *Chandrasekaran v Deloitte & Touche Management Ltd* [2004] EWHC 1378 (Ch). It is true that Mr Kilshaw's evidence in the present case was different from that which he gave in the *Chandrasekaran* case, but what is of great importance is that in the present case, he was dealing with the practice in the latter part of 2004 while in *Chandrasekaran* he was dealing with the state of affairs which prevailed in 1997 – 1998. Mr. Kilshaw very properly included as an appendix to his first report the evidence from Mr. James Kessler QC which indicated concerns about BWP and in particular that the Revenue was attacking those arrangements "*with a zeal that is inappropriate, having regard to the technical arguments*" these comments and statements by Mr. Stephen Brandon QC were the subject of cross-examination of Mr. Kilshaw who are answered those comments and disabused me any of my concerns.

95. It must be appreciated that between those two dates BWS had been used without any successful challenge on many occasions and both experts acknowledged that the *Young v Phillips* risk had diminished between 1997 and 2004 given that there were no challenges by HMRC let alone successful ones. Not surprisingly, that fact justified Mr. Kilshaw reaching the different conclusion which he did in 2004 with the support of the absence of the challenge. It is noteworthy that there are many factors which justify Mr. Kilshaw's conclusion and which I set out in paragraph 275 below and which include that

(a) When Mr. Warburton met with Mr. Kilshaw at their experts' meeting, it was agreed that the warrants needed to be held offshore before being placed into trust and "*that there was no stated minimum or maximum period for these purposes but that as advisers we would have been comfortable with a period of about 3 months*";

(b) Grant Thornton initially saw *Young v Phillips* as a potential risk in the 1990s, but the BWS cases implemented by Grant Thornton was conducted on the basis that there was an insufficient risk even to require a three month gap between the export of the bearer warrants and the settlement into trust. In Section 11 of Mr. Warburton's first report which was drafted by his partner Mr. Loebl, there is a discussion of the mechanics of BWP and it mentions advice from counsel on time gaps. What is significant is that it does not mention any advice from counsel that there should be gaps between export and entry of the warrants into trust as Mr. Warburton accepted. This suggests first that Mr. Loebl, who had undertaken BWP, did not see *Young v Phillips* as a risk; and second that Grant Thornton had not received opinions from counsel stating that it was a risk; and

(c) KPMG thought that the *Young v Phillips* risk could be met by allowing a gap of between one and three months between export of the warrants and the settling into the trust. I did not see any reference in any of the contemporaneous KPMG advices about the reasoning in *Young v Phillips* being a material risk to BWP schemes.

96. Mr. Goodfellow criticises Mr. Kilshaw for working on the assumption that the advice he gave to his clients was that of the reasonably competent non-dom specialist. Even if this was so, his evidence could be and was tested in cross-examination and at the end of it, I was satisfied that Mr. Kilshaw had given correct evidence relating to the approach of the reasonably competent non-dom specialist.

97. Having taken account of Mr Goodfellow's criticism of Mr Kilshaw and the fact that he was not a Chartered Accountant, I was still particularly impressed with the balanced and thoughtful nature of Mr Kilshaw's evidence which showed not only the careful and appropriate preparatory work he had done before giving evidence, but also his expertise, great experience and knowledge of BWS and CRP. In these areas, his evidence was much superior to that of Mr. Warburton about whose evidence I have had very serious concerns as I will explain. All in all, I regarded Mr. Kilshaw as a very reliable witness whose evidence I should accept. In reaching that conclusion, I have taken account of all Mr. Goodfellow's complaints about his evidence.

(viii) Mr. Michael Warburton – (The Defendants' Chartered Accountancy Expert)

98. The Defendants' expert was Mr Michael Warburton who has been a Chartered Accountant since 1977 and a member of the Institute of Tax since 1980. He joined Grant Thornton in 1980 and became a Tax Partner in 1984. In 1992, he was appointed Head of UK Tax Services becoming the firm's Senior Tax Partner in 1996 before becoming tax director in 2009. He is his firm's main spokesman on tax matters.

99 He was cross-examined over six days and the length of it was partly due to the late disclosure during cross-examination of files showing first how different people at Grant Thornton (but not Mr. Warburton) had warned about the risks of BWP, second how they implemented them and also third what Mr. Warburton had said in a previous case. It was repeatedly stated by Mr. Simpson to Mr. Warburton that aspects of his evidence were not honest. I unhesitatingly reject that contention which Mr. Simpson withdrew in his closing submissions.

100 I have, however, had certain concerns about his evidence because although he is a private client tax specialist who has been in practice for many years and who has been involved in consultations with HMRC, he had only ever implemented two CRP schemes both of which were for clients domiciled in the United Kingdom.

101 In addition, perhaps a little surprisingly for an expert in a case dealing with how, at what cost and in what time frame BWPs should be implemented as well as their robustness and weaknesses, he explained that:-

> *"I am not claiming to be a specialist in Bearer Warrant Planning because I have never implemented a Bearer Warrant Scheme"*

102. Nevertheless Mr Warburton had possibly advised on the merits of BWP on three occasions, but none were implemented. The fact that Mr. Warburton had little experience of BWP was not a major problem provided that he had carried out much research so as to make up for his lack of practical experience but, as I will explain, sadly this was not the case.

103. Moreover, in relation to these three occasions, Mr. Warburton did not know what steps he had taken beforehand or what discussions he had at the time with his colleagues at the time about the possibility and the desirability of implementing BWPs. Further, he accepted that he had no memory of the contemporaneous approach to BWPs. He did, however, consider BWPs to be "*high risk*", but that was on the basis of a "tax flash" from his firm of 20 May 1997, which apparently has been updated although it is, as I will explain, contrary to the firm's later practice in using BWP. In a follow-up of 30 November 1998 to the tax flash, it was stated of BWPs (with emphasis added) that: -

> *"This scheme **is high risk** and you must not proceed without contacting GT National Tax*
>
> ***Positive Counsel's opinions** have been received by the firm from both Kevin Prosser QC and David Ewart in relation to this scheme."*

104. Mr Warburton could not recall whether he had read the "*positive Counsel's opinions*" relating to BWP referred to in the tax flash, but these documents were the basis of his view that GT was "high risk". In any event, the tax flash was based on the situation prevailing when it was issued many years previously. Very importantly since then, there have been a number of BWP schemes entered into but there was no evidence that HMRC had challenged (let alone challenged successfully) any of them by 2004 or indeed since then. There are a number of concerns that I have about Mr. Warburton's evidence which have to be considered in the light of the fact that he had

never implemented BWP and that unlike Mr. Kilshaw, he was "*not claiming to be a specialist in [BWP]*".

105. First, Mr Warburton did state that he had "*looked at a number of counsel's opinions on Bearer Warrant Planning*", but he was unable to remember which ones he had read when preparing his report. He said that he felt able to write the report on the basis of what he had seen and from discussions with his colleagues. My difficulty about accepting this evidence was first that the Grant Thornton disclosure of BWP documents showed that Mr Warburton had not received any such opinions from his colleagues, and second that there was no such material on his files or in his email archive going back as far as 2000. Even if Mr Warburton actually saw and read any of those opinions by Counsel, his memory of them was so vague as to greatly undermine the reliability of his reports and of his evidence in so far as they purported to be based on those opinions. So I had to conclude that Mr. Warburton's views on BWP were neither corroborated by his practical experience nor did they have the benefit of Grant Thornton's experience.

106. Second, he had not reviewed any of the underlying documentation relating to the seven BWP schemes Grant Thornton had implemented even though such a review would have helped him to reach a conclusion on matters, such as the factors about which they considered it necessary to warn a client if he or she was thinking of embarking on BWP.

107. Third, Mr Warburton had relied on one of his colleagues Mr Loebl to draft key sections of his report relating to the implementation of BWP, but very surprisingly Mr Warburton had not reviewed any of the supporting information used by Mr Loebl to compile these sections.

108. Fourth, Mr Warburton could not recall either asking Mr Loebl the critical question as to whether he had considered in 2004 BWP "*high risk*", which was the description given to it in the tax flash or indeed asking any of his other colleagues their views on whether they considered BWP "*high risk*".

109. Fifth, my concern about the accuracy of his evidence increased when Mr Warburton accepted that the colleagues who gave information to him were themselves relying on their memories and they had not obtained the information from revisiting the files.

110. Sixth, Mr Warburton accepted that he had failed to summarise in his report the information provided by his colleagues.

111. Seventh, when during the trial, Grant Thornton produced the documents showing how that firm had implemented BWP, they revealed that Grant Thornton regarded BWP as *"robust"* rather than *"high risk"* tax-planning. In an attempt to reconcile the disclosure from Grant Thornton with the very different approach set out in his own report, Mr Warburton criticised his colleagues and counsel instructed by Grant Thornton for opinions which he described as "*wrong"* and as *"incorrect".* In addition, these documents showed that although Mr Warburton said that a DOM1 should have been obtained before proceeding, Grant Thornton were happy to let their clients proceed without it.

112. Eighth, I was troubled by various other aspects of his evidence, such as his assertion that BWP was "*little known*" in 2004 when it became quite clear that this was not the case, probably because he had omitted to consider significant research material from his reports which he ought to have included. Mr Warburton did state in respect of a person who was assumed to be a non-dom *"we accept that he is currently classified as non-dom in 2004 had he implemented a Bearer Warrant Scheme I believe it would have worked".*

113. Ninth, Mr Warburton accepted that he was unable to say that he had read all the material documents or all the relevant evidence submitted by Mr Kilshaw even though he should have read it to see if it might have influenced, supported or changed his views.

114. So I concluded that although Mr. Warburton was an experienced accountant, his lack of experience of BWP and the matters to which I have referred meant that I could not attach much weight to Mr Warburton's evidence on BWP. I was left with the clear impression that Mr Warburton's views on BWP were not underpinned by his experience or by adequate research on his part and that surprisingly they was at variance with the considered approach of those in his firm who had much greater knowledge and experience of BWP than he did. These failings also undermined my confidence in the remainder of his evidence.

115. I have also concluded that his evidence was in marked contrast with the cogent evidence of Mr Kilshaw, which had the merit of being based on his great experience of BWP and careful research. I had no doubt in deciding that insofar as there was a conflict between the evidence of Mr. Warburton and Mr. Kilshaw, I should prefer the evidence of Mr. Kilshaw for many reasons including his greater experience of BWP and his careful and logical evidence which was underpinned by his research and much experience.

Ms Haxby

116. She is a corporate finance lawyer who is a partner at Squire Sanders (UK) LLP and she commented on the company law aspects of BWP strategy. She had qualified as a solicitor in September 1995 and became a partner in the predecessor firm of Squire Sanders in 2001, but she had never herself implemented BWP. She was clearly an honest and accurate witness but in the light of the way in which issues developed, her evidence was of very limited importance.

C. THE RETAINER ISSUE

(i) Introduction

117. The issue, which I have now to consider, is whether the Claimant is correct in contending that the Defendants' retainer in October 2004 extended to advising and assisting the Claimant generally in relation to his personal and financial tax affairs, including identifying and advising the Claimant of possible methods by which the Claimant could minimise his tax liability including giving the Claimant CGT planning advice on the proposed sale of his share holding in BFL, even though the Claimant had not expressly requested the Defendants to do so. The alternative way in which the case is put is that by the time of the meeting on 2 October 2004, the Defendants

accepted responsibility to advise the Claimant on tax-planning matters even when not requested to do so when the circumstances required it.

118. The Claimant focused on the period between September and December 2004, and in particular, on the position as at 2 October 2004 when a meeting took place at Mr. Purnell's home at which the Claimant was being advised as to how he could minmise his CGT liability on the sale of his BFL shares. That is because it is said by the Claimants that the Defendants, even though not expressly requested to have given him advice on how to eliminate or to reduce his CGT liability, were obliged to do so. Mr. Simpson submits that in the light of the prospect of the Claimant having to meet a large CGT bill, the Defendants ought pursuant to that obligation to have advised the Claimant first, that he had or very probably had (or alternatively might have had) non-dom status; second, that non-dom status carried with it potentially very significant tax advantages; and third, that he should therefore take tax advice from a firm of accountants or tax advisers who, unlike the Defendants, specialized in advising individuals who had (or might have) non-dom status.

119. Mr. Simpson contends that this obligation to give advice on tax-planning arose because of a course of conduct in which the parties worked on the basis that even when not expressly requested to do so, Mr. Purnell would give advice to the Claimant on his personal and financial tax affairs, including identifying and advising the Claimant of possible methods by which the Claimant could minimise his tax liability. Mr. Simpson relies particularly on a meeting which took place between Mr. Purnell and his tax partner Mr. Stanford on 30 September 2004. He says that this meeting was in preparation for a meeting in which Mr. Purnell was to advise the Claimant at Mr. Purnell's house on the afternoon of Saturday 2 October 2004 on the ways in which the Claimant could eliminate or reduce very substantially his liability for CGT on selling his shares in BFL.

120. It is common ground that the Defendants had not been asked to give the Claimant tax advice, but his evidence was that there was no need to do so because it was the common understanding between him and Mr. Purnell that Mr. Purnell would give such advice. The Claimant said that on tax matters Mr. Purnell "*would take the lead in whatever I needed to be told*". Thus, according to the Claimant, Mr. Purnell would, in the absence of a request from the Claimant to do so, have given him advice on tax-planning and tax strategies in relation to the proceeds of the sale of his BFL shares including "*considering identifying and advising the Claimant of possible methods by which the Claimant could minimise his tax liability".*

121. As I will explain, Mr. Simpson attaches importance first to the answers given by Mr. Purnell when cross-examined relating to his understanding of his duty to advise the Claimant on how to reduce his tax liabilities even when not requested to do so; and second to the purpose of the meeting between him and Mr. Purnell on 2 October 2004, which Mr. Simpson says was to advise the Claimant on how to reduce or eliminate his impending substantial CGT liability arising on the sale of his BFL shares.

122. The Defendants' case is first that they did not have such an obligation or a *general* retainer to give the Claimant advice in relation to potential tax-planning or avoidance strategies when as happened prior to the 2 October 2004 they were not requested to do so; and second that they had agreed with the Claimant that when expressly requested

by the Claimant to do so, they would give him tax advice on an *ad hoc* basis in relation to specific issues with such scope and the terms of advice normally recorded in a letter or a note of the meeting. The Defendants rely on a number of different matters to establish such terms, including first the terms of the 1999 Retainer letter; second the absence of any letter evidencing the nature and terms of the retainer relied on by the Claimant; and third, the role of the Claimant's other advisers in providing him with tax-planning advice.

123. There has been some controversy as to what is meant by the term "*tax-planning*". I accept the definition or description of it given on behalf of the Defendants by Mr. Warburton and which was accepted by Mr. Purnell as -

> *"considering whether the incidence of tax can be mitigated* ***by embarking upon one or more different transactions*** *which might have the similar economic effect to what the tax payer is already doing but attracts a lower rate of tax"*

I will assume that this is how the witnesses understood the term "*tax-planning*", save where it appears to have different meaning.

(ii) The 1999 Retainer Letter

124. The Defendants attach importance to the only possible contractual document relating to the Defendants' obligations, which is the 1999 Retainer Letter, and which stated that:-

> *"The purpose of this letter is to set out our understanding of the terms of our engagement as accountants and tax advisers to you."*

The letter went on to state that:-

> *"1. We will assist you in fulfilling your annual obligations in respect of income tax and capital gains tax. It is, however, a legal requirement that completed returns are approved and signed by you personally.*
>
> *In particular we will be responsible for:*
>
> *(a) preparing your annual tax return for your approval and signature;*
>
> *(b) conducting all correspondence with the Inland Revenue on your behalf;*
>
> *(c) attending to assessments received from the Inland Revenue;*
>
> *(d) determining and agreeing with the Inland Revenue on your behalf taxation liabilities and codings;*
>
> *(e) advising you as to payments on account of tax and the settlement of your taxation liabilities;*

(f) other routine compliance matters as necessary;

(g) giving you general tax-planning advice on the best use of reliefs;"

Paragraph 1 of the Retainer Terms also made clear that:-

> *"In addition we would be willing to provide, if we are not already doing so, a more extensive tax and personal financial planning service taking into account all forms of taxation and personal financial planning such as:-*
>
> *-Inheritance tax*
>
> *-Capital Gains Tax*
>
> *-Life Assurance*
>
> *- Pensions School Fees planning"*

The Retainer Terms also noted that:-

> *"2. As required, we will be pleased to help with any other matters such as negotiations with your Bankers, VAT returns, etc."*

125. The 1999 Retainer Letter did not impose any obligation on the Defendants to give advice to the Claimant relating to possible methods by which he could minimise his tax liability in the absence of any request from the Claimant to do so. I accept the Claimant's account of the circumstances in which this letter was sent to him and signed by him which was that was that he received it without prior explanation or prior notice , but that Mr. Purnell explained that it was just a formality and so he signed it. I accept that this was correct and that the 1999 Retainer Letter was not a negotiated agreement.

126. To establish an obligation on the Defendants to provide tax-planning advice even without a specific request to do so, the Claimant would need to show facts to establish that obligation. It is clear first in the words of Laddie J in *Credit Lyonnais SA v Russell Jones &Walker* [2002] EWHC 1310 (Ch) [28] that "*a solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer*", and second that there is no such thing as a general retainer of a professional adviser. Indeed, Oliver J in *Midland Bank Trust Co Limited v Hett, Stubbs & Kemp* [1979] Ch 384 had to consider a submission that the Defendant's solicitor was under some form of general retainer imposing a duty to consider all of the Claimant's interests whenever he was consulted.

127. In rejecting that submission, Oliver J explained at pages 402-403 that:-

> *"There is no such thing as a general retainer in that sense. The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" in establishing any general*

> *duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do."*
>
> (See, also to the same effect, *Regent Leisuretime Limited v Skerrett* [2006] EWCA Civ 1184 [34]).

128. In the present case, in order to establish the obligation of the Defendants to give tax advice even when not requested to do so, the Claimant relies on a course of dealing in which Mr. Simpson says that it was agreed and understood between him and Mr. Purnell that the Defendants would advise him on ways of saving tax without being expressly asked to do so. The Claimant's case is that the retainer letter did not reflect the true relationship between the parties. He explained that if during his regular meetings with Mr. Purnell, he told Mr. Purnell that he was thinking of doing something, Mr. Purnell would immediately consider and explain the financial and tax implications of it, without being requested to do so.

129. It is settled law that that it is clear that a term may be implied where the parties have consistently on previous occasions adopted a similar course of dealing (see, for example, *Chitty on Contracts* (31st Edition) (Vol. 1) Para 13-023). In this case, Mr. Simpson contends that the duty of the Defendants to give the Claimant tax-planning advice arose as a result of the acceptance by the Defendants over a long period of their duty to give tax-planning advice to the Claimant even when not requested to do so. This duty or understanding, he says, became part of the Defendants' duty to use skill and care. As I will explain, it is also said that even if there was not that duty on the Defendants, a duty to give advice arose at the meeting on 2 October 2004 because first Mr. Purnell was giving advice to the Claimant at that meeting on reducing his CGT liability without a specific request to do so and second he was then obliged to consider all ways in which the Claimant could reduce his tax liabilities.

(iii) The Pre-Merger Position

130. There is clear evidence that the role of the Defendants had ceased to be merely that of reporting accountants and had also become that of a tax adviser. Thus Mr. Purnell wrote to the Claimant on 28 September 2001 expressing a wish to join the Claimant's business. Mr Purnell explained his role at that time in relation to the Claimant as that he had (with my emphasis added):-

> *"gradually become less of a processing accountant and more of a **business** and **tax adviser** using the resources of my firm. This is a role that **I enjoy** and I feel is better suited to my talents".*

131. There is further evidence of much less value that the Defendants performed the function of giving advice on tax-planning. So at a meeting with Kevin Lowe of Wragges on 27 September 2001, Mr. Purnell had raised the idea of selling the Claimant's shares to an offshore trust so as to reduce his tax liability. These matters provide very limited support for the Claimant's view of the role of the Defendants as his tax-planning advisers.

132. To succeed in establishing that there was an obligation on the part of the Defendants to give tax-planning advice, the Claimant had to go further than merely showing that Mr. Purnell gave tax-planning advice because he would also have to establish that that the Defendants' obligation to give such advice arose without the need for a specific request from the Claimant to do so. The Claimant says that this was Mr. Purnell's duty and in support of this contention, Mr. Simpson gives two examples of Mr. Purnell pursuing tax-planning matters on the Claimant's part without any request from him to act in this way and both of them occurred prior to the merger on 28 February 2003.

133. First, on about 29 October 2002, Mr. Purnell saw it as his duty to advise the Claimant on a tax liability and the need for tax-planning even when he had not been specifically asked by the Claimant to do so at a time when various ways of achieving the merger were being discussed which would, or which could, lead to the Claimant incurring a substantial tax liability. A note of a telephone conversation between Mr. Purnell showed that he, that is Mr. Purnell, had:-

> *"explained to Hoss that I needed to speak to him as his business ideas appeared to introduce a substantial tax liability if cash or profits are taken out of the business. On the other hand if a share for share transaction was carried out for the whole of the business, tax should only be paid on dividends and bonuses as and when they were provided".*

134. Mr. Purnell was asked about this in cross-examination when Mr. Simpson said to him:-

> *"You explain to Hoss you needed to speak to him as his business ideas appeared to introduce a substantial tax liability. So as I put to you earlier, and I think you accepted, you have spotted what I call a heffalump trap, and you are warning him about it.*
>
> ***A. The merger plans were potentially to create a tax liability, that's correct.***
>
> *Q. You saw it as your role to warn about such a thing?*
>
> *A. Yes."*

135. Another example occurred when Mr. Purnell of his own volition approached Berry Birch & Noble for advice relating to the ways in which the Claimant could reduce his liability for CGT in relation to the proposed merger at a time when it was thought that it might lead to a large capital gain for the Claimant. Mr. Purnell stated in evidence that he did this without being requested by the Claimant to do so. I am quite satisfied that he did this in order to help the Claimant. The letter of advice to Mr. Purnell from Berry Birch & Noble dated 10 February 2003 had the client reference "HM" and concerned advice relating to CGT and "*your client's windfall profits*" related to his success. This advice was not pursued because of the way in which the merger was to be achieved was changed so that no such tax liability would, or indeed, did arise.

136. I know that Mr. Purnell said that one of his reasons for communicating with Berry Birch & Noble was to test their ability, but I have no doubt that another reason for the approach of Mr. Purnell to Berry Birch & Noble relating to the Claimant's tax liability occurred because Mr. Purnell saw himself as duty -bound to advise the Claimant of ways to reduce his tax liability, even when he had not been requested to do so. This approach to a third party for advice on tax-planning to pass on to the Claimant has some similarities to the approaches made by Mr. Purnell to his partner Mr. Stanford for CGT planning advice, which he could then subsequently explain to the Claimant at their meeting on 2 October 2004 and to which I refer in greater detail in paragraph 157 below.

137. This evidence of the Claimant showed that on many occasions, Mr. Purnell of his own volition and without being asked to do so took it upon himself to advise the Claimant on the tax implications of what the Claimant was proposing to do including considering ways in which the Claimant could reduce or avoid a substantial tax liability. Mr. Purnell indeed gave such advice relating to the tax treatment of the Claimant's first boat.

138. So in the absence of any contrary evidence, I am satisfied that prior to the merger of the Claimant's business with that of Mr. Scott on 28 February 2003, there was a clear and mutually accepted understanding between the Claimant, on the one hand, and Mr. Purnell, on the other hand, that Mr. Purnell was always required to consider the Claimant's best tax position and to give appropriate advice including on how to reduce his tax liability, even when such advice had not been expressly requested. This was a result of their long-standing close personal and business relationship and it constituted a variation from the terms of the 1999 Retainer Letter. This was the position even though the Claimant had on occasions sought tax-planning advice from others such as Wragges in 2001.

(iv) Post-Merger Period

139. After the merger, the Defendants, who had previously been the corporate accountants for the Claimant's business, were replaced as Joscelyn & Co, who thereafter acted as accountants and auditors for the merged business. The Defendants remained as the accountant for the Claimant and, as I have explained, very closely concerned with many aspects of his financial affairs. As I have explained, the purpose of the merger was to build up a business, which unlike the individual businesses of the Claimant and Mr. Scott, would become large enough to attract the interest of prospective purchasers.

140. There was evidence, which I accept, first that in the post-merger period the Claimant kept Mr. Purnell informed about of how BFL was doing and second that Mr. Purnell duly advised him on his personal tax affairs. They had, for example, six meetings after the merger but prior to 10 October 2003 as well as many telephone conversations. This level of contact continued and so, for example, the Claimant told Mr. Purnell in 2004 of the approaches being made for BFL by prospective purchasers. The Claimant was also receiving advice from Mr. Purnell relating to the tax treatment of the purchase of his second boat and how he should structure the deal so as to be most tax-efficient, even though there was no evidence that this advice had been expressly requested.

141. The Claimant and Mr. Scott had sought the advice of Ford Campbell, a firm of accountants and corporate finance advisers, concerning the sale of BFL. The Claimant's evidence was that he would have kept Mr. Purnell informed of these developments. The Claimant's diary for 2004 has been lost, but there is evidence first that he and Mr. Purnell met on four occasions prior to September 2004 (including a meeting lasting 5 hours on 6 August 2004), and second that they spoke on the phone regularly. I accept the Claimants' evidence that Mr. Purnell would have appreciated that by Summer 2004 that the Claimant was likely to receive a large sum from selling his shares in BFL and that this would have led to a large CGT liability for the Claimant.

(v) The Role of Other Advisers of the Claimant on tax-planning

142. It is now appropriate to consider the submission of Mr. Goodfellow that the Claimant was not looking to the Defendants to give tax advice in relation to his tax liabilities as a consequence of the sale because in and after about October 2004, the Claimant sought professional advice from a wide range of sources and he was asking Wenham Major, Ford Campbell and Barclays Wealth to put forward tax-planning proposals as well as dealing directly with Montpelier following the Defendants' introduction. So the case for the Defendants is first, that the Claimant had a team of professional advisors consisting of accountants, solicitors and due diligence specialists acting for him and Mr. Scott in relation to their sale of shares in BFL; second that significantly those advisers did not include the Defendants; and third that the circulated documents prepared by Ford Campbell had a circulation list which did not include the Defendants, as the Claimant must have known.

143. In those circumstances, I have sought to ascertain what role, if any, Mr. Purnell had at that time in advising the Claimant on tax-planning. As I have explained, the case for the Claimant relates to the failure of the Defendants in early October 2004 to appreciate that the Claimant was or might have been a non-dom and so he should have been advised to take advice from a non-dom expert accountant or tax adviser. So if the Claimant had relied on other organisations (other than the Defendants) for *all* his tax-planning advice or *most* of it at this time, that fact would be a highly relevant, if not a decisive, factor in resolving the present issue.

144. Mr. Simpson's answer is to remind me that I had refused during this trial in a judgment with the neutral citation number [2012] EWHC 3682 (QB) to allow an application made by the Defendants after the Claimants had closed its case on factual issues, but shortly before the Defendants were to close their case on factual issues to further re-amend their Re-Re-Amended Defence so as to contend that because of the engagement of these other advisers by the Claimant that:-

> *"…it was reasonable for the Defendants to believe that the Claimant was already receiving specialist tax advice (including tax advice as to his personal tax position in relation to the chargeable gain arising on the disposal of his shares in BFL) and/or that the Claimant was not looking to the Defendants to provide tax-planning advice in relation to the proposed sale of the Claimant's shareholding in BFL or to suggest that further advice in relation thereto should be sought."*

145. I refused that application for a number of reasons set out in detail in that judgment including that to have allowed the Defendants' application would have caused a substantial adjournment of the trial and the recall of witnesses in circumstances in which there was no good reason why the application to make this amendment could not have been made and should not have been made much earlier. The point that Mr. Goodfellow is now seeking to make on this issue is in the words of paragraph 32 (3) of the Defendants' Response to the Claimant's Comments on the Defendants' Closing Written Submissions that:-

> *"the impression given by [the Claimant] to [Defendants] was that if he wished to take advice in relation to the sale he would be seeking it from within his own professional team and not from [the Defendants]".*

146. It seems to me that this point is not now open to the Defendants on the present pleadings, but even if it was, there is no merit in it because Mr. Purnell gave evidence that he considered himself to be retained to consider the Claimant's *"best tax position*", including at the important meeting on 2 October 2004 when he gave much tax-planning advice.

147. Mr. Purnell explained first that the Claimant and Ford Campbell did not tell him that they were doing the Claimant's personal tax; and second, that he did not believe Wragges were giving the Claimant personal tax advice. Mr. Purnell considered that neither Wragges nor Ford Campbell's involvement precluded him from dealing with the Claimant's personal tax. These admissions were not surprising in the light of the evidence and, in particular, as to what happened in the lead-up to the meeting at Mr. Purnell's house on 2 October 2004 and the meeting itself at which the Claimant was advised as to how he could reduce or eliminate his CGT liability without any request having been made by the Claimant for such advice to be given. No other reason for this meeting has been given and in the excerpt of cross-examination which I will shortly cite, Mr Purnell accepts this point.

148. Mr. Purnell explained in his evidence that he had to deal with the Claimant's personal tax-planning and that obligation included giving advice to the Claimant on issues relating to CGT. He did not contend that the involvement of any other firm or entity somehow absolved the Defendants from any obligation to advise the Claimant on reducing his tax liability. Indeed in an important passage during his cross-examination, Mr. Purnell accepted that he was "*always required to consider Mr. Mehjoo's best tax position*", including in October 2004.

149. There was also much evidence that Wragges did not provide personal tax advice to Claimant. Wragges explicitly stated they were *not* advising on personal tax, as their email of 28th September 2004(CB3/1664) states that Wragges will negotiate the "*tax deed*" and "*co-ordinate with the input of <u>other advisers</u> (tax)*" (emphasis added). Both the Claimant and Mr. Scott were billed precisely the same amount by Wragges. Similarly, Ford Campbell on 7 October 2004 wrote to the Claimant to say "*I've amended (sic) the letter as we discussed on Monday to state that we will not issue separate terms of business re personal tax advice in relation to the transaction".*

150. I am quite satisfied that the fact that other advisers were retained by the Claimant in the lead-up to the sale of BFL did not on the facts of this case absolve the Defendants

from their duty to give advice on the way in which the Claimant could reduce his liability to pay taxes even when not requested to do so. Indeed, as I will explain, even if these other entities were advising the Claimant on tax matters, this would not mean that at the meeting on 2 October 2004, the Defendants did not have a duty to advise the Claimant on reducing his CGT liability once they had started discussing it. In any event, even if the Claimant had more than one adviser on tax , that fact did not absolve Mr. Purnell from giving proper advice at the meeting on 2 October 2004.

151. The Claimant agreed with my understanding which in my experience happens frequently when joint owners of a company sell their shares, which is that there would be two separate matters being considered by the sellers' advisers in the run-up to the sale, of which the first matter concerned how, to whom and on what terms the company in question (in this case BFL) was to be sold and the second matter concerned the ways in which a participant, which in this case is the Claimant, could reduce his CGT and other tax liabilities. The role of the Defendants related to the latter matter while the other advisers of the Claimant, such as Wragges dealt with the former functions.

152. Not surprisingly, when he was being cross-examined, Mr. Purnell explained the duty of the Defendants in this way :-

> *Q. So you accept that in October of 2004, moving forward, that it was your responsibility to give Mr. Mehjoo tax planning advice?*
> ***A. October 2004 going forward --***
> *MR SIMPSON: I'm moving forward. I'm trying to cut to the chase, as it were, and do think carefully because to explain our case --*
> *MR JUSTICE SILBER: Can you just answer the question? October 2004: can we just take up the position at that stage?*
> ***A. I was always required to consider Mr. Mehjoo's best tax position. So October 2002, 2004 I was still required to consider his best tax position.***
> *MR SIMPSON: That does mean that I can probably cut a considerable amount of what I'm doing with you because I'm asking lots of questions about the merger to set up questions about October 2004 but if you accept that in October 2004 you would have been under the obligation to give Mr. Mehjoo tax-planning advice, I can cut all that.*
> ***A. Okay. We were his personal accountants and we did deal with his tax, so if he'd asked to us deal with tax planning we would have helped him.***
> *Q. The big bit of contention that I've had with you in the last hour or two is even if he didn't you'd look round corners for him?*
> ***A. If we knew there were circumstances where he was paying or liable to pay tax then we would look to help him.***
> *MR SIMPSON: I understand"*

153. Mr. Purnell then developed this point in this way:-

> *" MR. JUSTICE SILBER: If you knew there were circumstances where he would have to pay tax?*
> ***A. Yeah, we would look to help him assess the situation and give advice if we thought it was appropriate.***
> *MR JUSTICE SILBER: Yes.*
> *MR SIMPSON: I'm jumping forward here to see what I can miss out. That's why, for instance, you met Mr. Stanford when you found out about the disposal?*
> ***A. Yes.***

154. Mr. Goodfellow submits that the Claimant was by October 2004 an experienced and successful businessman who made his own decisions and who decided what advice he needed. That submission ignores the true position, which was that the Defendants would look to help the Claimant in this way if there were circumstances in which he could be liable to pay tax even when not requested to do so and the Claimant expected this.

155. Indeed the evidence of Mr. Purnell satisfies me that:-

(a) The Defendants had accepted that they had a duty to give the Claimant advice on tax matters, including on tax-planning because in his words "***If we knew there were circumstances where he was paying or liable to pay tax then we would look to help him"***;

(b) This duty was not dependent on a prior request having been made by the Claimant because that answer was given when Mr. Purnell had been asked about the situation when no request had been made. That was a shared intention. I should add that even if the Claimant had other advisers on tax-planning, this was the shared intention of the Claimant and the Defendants;

(c) Mr. Purnell did not regard any other advisers as having that duty to advise the Claimant;

(d) This duty, which was illustrated by the ways in which Mr. Purnell had been involved in tax-planning for the Claimant and to which I have referred, had replaced the position stated in the 1999 Retainer letter, if this ever reflected the true legal relationship between the Claimant and the Defendants; and

(e) That is why Mr. Purnell (as I will explain) took steps to see Mr. Stanford on 30 September 2004 to investigate what was the appropriate tax-planning advice to be given to the Claimant at their meeting which was to take place on 2 October 2004, notwithstanding that Mr Purnell had not been asked by the Claimant to do so and notwithstanding the terms of the 1999 Retainer Letter.

156. That is why, as is common ground, the Claimant did not specifically request Mr. Purnell to give him tax advice on the ways in which he could reduce his CGT liability and why I have found that Mr. Purnell duly gave that advice prior to 2 October 2004.

(vi) The Meetings on 30 September and 2 October 2004

157. This last answer in the extract of evidence set out above relates to the meeting between the Claimant and Mr. Stanford, the tax partner of the Defendants, on 30 September 2004 in advance of a meeting that Mr. Purnell was due to have with the Claimant, which was to take place and which did take place at Mr. Purnell's home on the afternoon of Saturday 2 October 2004. By then, the Claimant had received an email timed at 11.30 on that day from Wragges, who were acting on the sale of BFL, explaining that the completion of the sale was assumed for the purpose of giving a costs estimate to take place by the end of February 2005. By this time, there was a high probability that the Claimant would receive a price for his BFL shares which would lead to him having to pay a large amount of CGT.

158. The Claimant explained first that for Mr. Purnell to make time to see him in his own home on a Saturday and for the Claimant to do likewise, it would have to have been a meeting to discuss "*very important*" issues; and second that Mr. Purnell would naturally look after the Claimant's interests even though not specifically asked to do so. I have no difficulty in accepting this evidence of the Claimant as being accurate.

159. Mr. Purnell accepted that he anticipated that the Claimant might wish to discuss tax-saving at that meeting. He knew from his regular conversations with the Claimant that he was likely to receive a large sum of money for his shares in BFL on which he would have to pay very substantial amounts of CGT. Therefore, Mr. Purnell met Mr. Stanford, who was the tax partner at the Defendants, to discuss the CGT liabilities that would arise on the sale of the Claimant's BFL shares and, in particular, how the Claimant could reduce or eliminate his CGT liability.

160. The evidence of Mr. Stanford is that the issues, which he discussed with Mr. Purnell, included topics for Mr. Purnell to raise with the Claimant. He accepted that Mr. Purnell was going to see the Claimant so as to discuss with him what tax implications there might be on the sale because, as I have explained, it was anticipated that the Claimant was going to make a large capital gain on the sale of his BFL shares. Mr. Purnell was going to look at a list of topics that he could raise with the Claimant or if the Claimant raised those issues with him, Mr. Purnell could have thought about them in advance as Mr. Purnell was only acting for the Claimant. No cogent evidence has been put forward to show that the purpose of Mr. Purnell's Saturday afternoon meeting with the Claimant was to do anything other than to discuss how to reduce the Claimant's predicted substantial CGT liability. This important preparatory work was being conducted by the Defendants without having received any specific request by the Claimant for tax-planning advice and this is common ground.

161. After that meeting, Mr. Purnell then created a document on 1 October 2004 and this sets out a list of wide ranging tax saving option and which included: -

> *"3. Sale could consist of cash, loan notes, or shares in exchange.*

4. Loan notes and shares would postpone the tax […]

6. Gain could be deferred by reinvesting in an EIS-no limit […]

8. There is a 3 year time scale for EIS and a max of 30% of the equity capital.

9. A VCT could be purchased to give 40% relief in the year of the disposal only

10. If gain is postponed via an EIA it may be possible to go abroad after 3 years and escape the gain

11. Going abroad to escape the gain is possible? Belgium

12. Various tax saving schemes may be available subject to up front (sic) fees and uncertainty regarding Government action".

162. Mr. Stanford accepted correctly in my view that the points on this list of topics were all ways of reducing a CGT liability. Mr. Warburton also agreed that these topics constituted different ways in which the Claimant's CGT liability could have been postponed or reduced. Mr. Purnell accepted that this list of topics was a list of all the possible CGT-saving schemes that he and Mr. Stanford could come up with at the time and that is plainly right.

163. When the Claimant was cross-examined, he accepted that he had not asked the Defendants to advise on CGT planning, but he stated that "*I would not do that, that is the sort of thing that Alan would propose to me*". The Claimant explained in his evidence that it was not necessary for him to ask Mr. Purnell to advise him on what he should do from a tax perspective, because Mr. Purnell would take the lead in whatever was needed and that he would then make proposals to the Claimant.

164. I should add that Mr. Purnell and Mr. Stanford charged the Claimant for their meeting on 30 September 2004. It appears, although it is not clear, whether Mr. Purnell also charged for his meeting with the Claimant on 2 October 2004. When it was suggested to Mr. Purnell in cross-examination that he, that is Mr. Purnell, "*charged legitimately*" for meeting the Claimant on 2 October 2004, Mr. Purnell replied by saying "*I accept what you say*". This suggests that he agreed that he did charge.

165. Although there has been much argument over whether this charge was made for the meeting on 2 October 2004, this is not a crucial point because neither Mr. Purnell nor anybody else has stated or even suggested that the Defendants were not entitled to charge for the meeting held on 30 September 2004 and it is difficult to see why (if that was the case) Mr. Purnell was then not also entitled to charge for the meeting on 2 October 2004.

166. Turning to the meeting that took place between the Claimant and Mr. Purnell on 2 October 2004, the Claimant did not refer to it in his first witness statement, but in his oral evidence the Claimant candidly stated after being shown the list of CGT saving

measures drafted by Mr. Purnell, that he still could not recollect the meeting. Mr. Purnell said first that it was probable that he discussed some of the matters in the list of CGT saving measures with the Claimant, and second that it was possible that they discussed all of them. I am satisfied that the matters set out in that document were discussed as Mr. Purnell had sought the advice of Mr. Stanford on these matters and that Mr. Purnell had then produced the list of CGT saving measures in preparation for the meeting. All this took place at a time just after Mr. Lawton Smith of Wragges had sent an email to the Claimant timed at 11.30 on that morning stating that completion of the sale was assumed for the purpose of his costs estimate to be taking place in February 2005 and the Claimant was then confident of receiving a price for his shares which would generate a large CGT liability.

167. I cannot accept Mr. Goodfellow's submission that the fact that the Claimant and Mr. Purnell do not have clear recollection of this meeting on 2 October 2004 shows that it could not have had the significance which Mr. Simpson now attaches to it. This argument fails to appreciate first that at the time of the meeting, neither the Claimant or Mr. Purnell could or would have appreciated that they would be required to be questioned about it in Court more than eight years later, and also second, that it appears that the Claimant was not interested in any of these ideas as he did not take any of them forward and instead wished to adopt a more radical way of eliminating his tax liability, as later transpired to be the case. I am not surprised that the Claimant was not interested in any of the ideas put forward by Mr. Purnell because in my view, he only appears to have been interested in a scheme which would prevent him paying any CGT because that would appear to be one of the reasons why he selected the Montpelier Scheme later. Of course, it is clear that at this time the Claimant wanted to remain in the United Kingdom and so he would not have been interested in moving abroad, which he would not have wished to move abroad which was one of the Defendants' suggestions.

168. So I have concluded against that background that:-

> (a) Mr. Purnell was anticipating advising the Claimant on ways to reduce his CGT liability at the meeting on 2 October 2004 because offers had been coming in and the significance of that for the Claimant was a substantial tax liability. No other cogent evidence was put forward to justify any other purpose for this urgent meeting which was taking place on a Saturday afternoon with completion assumed to be taking place before the end of February 2005 with a substantial CGT liability being in store for the Claimant as the Defendants knew;
>
> (b) This was the reason why Mr. Purnell met Mr. Stanford, his tax partner, to obtain his advice as Mr. Purnell accepted in the extract of his cross-examination set out above;
>
> (c) In consequence Mr. Purnell prepared the List of Issues on 1 October 2004 which related to a variety of ways of reducing or eliminating the Claimant's CGT liability;
>
> (d) He passed on this information relating to ways of reducing the Claimant's CGT liability to the Claimant at the meeting at Mr. Purnell's house on 2 October 2004;

(e) The Claimant had not specifically requested this advice which Mr. Purnell gave on 2 October 2004 or the Defendants' preparations for that meeting;

(f) Mr. Stanford and Mr. Purnell charged the Claimant for their meeting on 30 September 2004 to discuss CGT saving schemes for the Claimant and it appears at least possible that Mr. Purnell charged also for his meeting with the Claimant and there was no other cogent reason why he could not do so;

(g) The Defendants regarded themselves under an obligation to give that advice because as Mr. Purnell said about the Claimant.

"*If we knew there were circumstances where he was paying or liable to pay tax then we would look to help him.*" and, ***"We would look to help him assess the situation and give advice if we thought it was appropriate."***

(h) In any event, even if (contrary to my conclusion) the Claimant had other advisers on his personal tax-planning, there was no reason why the Defendant should not also have had that obligation to give the Claimant advice on tax-planning without being specifically requested to give it; and

(i) As I will explain, even if there was no pre-existing duty on the part of the Defendants to give advice to the Claimant on tax-planning without a specific request to do so, then the Defendants had such a duty at that meeting.

169. I am satisfied that certainly as at the run-up to and at the meeting between the Claimant and Mr. Purnell on 2 October 2004, the position of the Defendants was, as Mr. Purnell accepted in cross-examination, that he was "*always required to consider Mr. Mehjoo's best tax position*" which meant "*we knew there were circumstances where he was paying or liable to pay tax then we would look to help him*". In other words, Mr. Purnell shared the Claimant's expectation that Mr. Purnell would give tax-planning advice to the Claimant even when not requested to do so as the Defendants had a duty, in Mr. Purnell's words to "*assess the situation and give advice if we thought it was appropriate*", even if he had not been expressly asked to do so by the Claimant. Of course, my findings relating to what happened at that meeting on 2 October 2004 clearly support this pre-existing obligation of the Defendants to give advice to the Claimant on tax-planning without being expressly asked to do so.

170. I must add that even if there had *not* been any pre-existing duty on the Defendants to give tax-planning advice to the Claimant without being requested to do so in all tax-planning matters by the time of the meeting on 2 October 2004, then in any event on the occasion of that meeting, there was such a duty imposed on the Defendants as there is no other sensible explanation for the meeting and the nature of Mr. Purnell's preparation for it other than that the Defendants had this obligation to advise the Claimant on how to eliminate or to reduce his substantial CGT liability without being requested to do so. In other words, even if previously the Defendants did not have a general duty to give unrequested tax-planning advice, when they gave advice in relation to reducing or eliminating the Claimant's CGT liability on 2 October 2004,

they then assumed an obligation to use all due skill and care in giving the Claimant advice on steps open to him to reduce or to extinguish his CGT liability at that meeting.

171. I cannot discern any purpose for Mr. Purnell's attendance at that meeting or in his preparation for it other than to give advice on how the Claimant could eliminate or reduce his CGT liability. So if Mr. Goodfellow is right and Mr. Purnell only had an obligation to provide tax-planning advice when requested by the Claimant to do so, such a request must have been at least implied in relation to the meeting on 2 October 2004 as otherwise Mr. Purnell would not have gone to the lengths first of consulting Mr. Stanford; second of preparing the List of Issues on 1 October 2004; and third of having a session advising the Claimant on tax-planning matters on Saturday 2 October 2004. The duty imposed on the Defendants as to the precise nature of tax-planning advice that should have been given by Mr. Purnell raises issues as to as which I will return when considering the Referral issues.

172. In reaching this conclusion, I have not overlooked any of the contrary submissions of Mr. Goodfellow, such as that:-

(a) If the Defendants had agreed to advise the Claimant on any matter concerning tax-planning, they would have confirmed it in writing, but that is not what happened, for example, in respect of a significant meeting relating to tax-planning held on 11 February 2005. In addition, Mr. Purnell did not make this point that there was a need for written confirmation when giving evidence even though he had the opportunity to do so;

(b) The absence of any follow-up by the Claimant to the meeting of 2 October 2004 has significance, but I have concluded that the Claimant rejected all the suggestions made at that meeting as he did not want to move abroad at that time and none were implemented or discussed again and he wanted something more radical, such as to extinguish his liability to pay CGT as was the aim of the CRP, which he finally pursued;

(c) The absence of a specific request from the Claimant for tax-planning advice shows that there was no obligation to give such advice but that fails to appreciate that such advice was given on 2 October 2004 without a specific request to do so; and that

(d) The Claimant was happy with the CGT rate payable by him of 10%, but that ignores the fact that he implemented CRP at a cost of £200,000, the Montpelier scheme and that he spent much time and costs weighing up the alternatives.

(vii) Conclusion

173. So I conclude that the Defendants' retainer prior to and subsequent to the merger extended to advising and assisting the Claimant generally in relation to his personal and financial tax affairs, including identifying and advising the Claimant of possible methods by which he could minimise his tax liability including giving the Claimant CGT tax-planning advice on the proposed sale of his share holding in BFL *even* when he had not been requested to do so. This relates to the position as at 2 October 2004

when it is said by the Claimant, the Defendants ought to have given him the advice first, that he had or very probably had (or alternatively might have had) non-dom status, second, that non-dom status carried with it very significant tax advantages, and third, that he should therefore take tax advice from a firm of accountants or tax advisers who, unlike the Defendants, specialised in advising individuals who had (or might have) non-dom status.

174. In any event, even if there had *not* been such a retainer at an earlier time, the Defendants' duty on 2 October 2004 was to use all proper skill and care to give tax-planning advice on that occasion for the reasons set out above (including what Mr. Purnell said in evidence as quoted at the end of paragraph 152 and in paragraph 153 and the amount of CGT potentially payable) so as to reduce or eliminate his liability to pay CGT on the sale of his BFL shares even though not requested to do so.

D. REFERRAL ISSUE

(i) Introduction

175. I now turn to consider the Claimant's case that: -

(A) The Defendants had a contractual duty or concurrent tortious duty as reasonably competent generalist accountants in October 2004 to advise the Claimant that: -

a) He had, or very probably (or alternatively might have) had, non-dom status;

b) Non-dom status carried with it very significant tax advantages; and

c) He should therefore take tax advice from a firm of accountants or tax advisers who specialised in advising individuals who had (or might have) non-dom status); and that

(B) Having received such advice, the Claimant would have decided to seek further advice at that time.

176. The Defendants dispute in particular the obligation to advise the Claimant to consult a non-dom specialist and also whether, if that advice had been given, the Claimant would have taken that advice.

(ii) Did the Defendants have a contractual duty or concurrent tortious duty to advise the Claimant that he had or very probably (or alternatively might have) had non-dom status?

177. There is some common ground between the parties, because it is accepted that the Claimant had an Iranian domicile of origin, but the issue here is whether he had subsequently acquired a domicile of choice in the United Kingdom. Mr. Warburton accepted first that in order to lose a domicile of origin, the taxpayer's intention must be to live in the United Kingdom permanently or indefinitely, having no real intention to live anywhere else; second that this test is very strictly applied; and third that the courts regard the acquisition of a foreign domicile as a very serious step which is only to be imposed on clear and unequivocal evidence. This is clearly right because I noted that Dicey Morris and Collins on Conflict of Laws (15th Edition (2012)) explains that:-

i) According to Rule 7 "*an existing domicile is presumed to continue until it is proved that a new domicile has been acquired*";

ii) "*the prevailing view is that of Scarman J. That 'two things are clear – first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists; and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or causal words'* (In the Estate of *Fuld* (No.3), [1968] 675, 686) and

iii) "*Cogent and clear evidence is needed to show that the balance of probabilities has been tipped, and this is true whether the issue is the acquisition or loss of a domicile of choice*" with the authorities for that proposition being Irvin v Irvin [2001] 1 F.L.R. 178: followed in *Re Chow Kam Fai David* [2003] 1205 HKCU".

178. The case for the Claimant is that the Defendants had such a duty as reasonably competent generalist accountants as reasonably competent generalist accountants in October 2004 to advise the Claimant that: he had, or very probably (or alternatively might have) had, non-dom status and that there is no evidence of the standard required to show that he had acquired a domicile of choice in England.

179. This submission is supported first by the evidence of the Defendants which shows that they had actual belief that the Claimant had or very probably was a non-dom and second by the expert evidence as well as third by the fact that when the Claimant submitted his DOM1, HMRC accepted that he was a non-dom.

180. Mr. Purnell, who by October 2004 had known the Claimant for more than 12 years and the Claimant had become a friend as well as a client of his, explained in evidence that *"the probability is he [that is the Claimant] was a non-dom*". Mr. Stanford, who had had at this time very limited contact with the Claimant, said that there was a possibility that the Claimant was a non-dom but that he, unlike Mr. Purnell, had had very limited contact with the Claimant. I therefore attach much less weight to his evidence than that from Mr. Purnell, who was much more conversant with all aspects of the Claimant's life, his plans and his aspirations.

181. The Defendants did not carry out inquiries to ascertain the Claimant's domicile status until June 2005, but by that stage they had little doubt that he was a non-dom and Mr. Purnell accepted (as appeared to me to be the case) that the matters relevant to determining the Claimant's domicile had not changed between October 2004 and June 2005. In emails from Mr. Purnell to Mr. Phillip Chalkley of Barclays Private Bank of 21 June 2005, he stated that "*we expect* [the Claimant] *to have kept his domicile of origin and on that basis you may be able to advise him on the most tax effective investments*". Six days later, Mr. Purnell sent another email to Mr. Chalkley in which he stated that they had discussed the Claimant's domicile position with him and that "*we are as clear as we can be without applying to the Revenue that he retains his Iranian domicile albeit with dual nationality*" If a generalist accountant defendant knew that his client claimant was a non-dom, this is surely at the lowest very strong evidence as to what the reasonably competent non-dom specialist would have decided.

182. Similarly, I am unaware of any changes in matters relevant to ascertaining the Claimant's domicile between October 2004 and the time in early 2006, when HMRC decided to accept that the Claimant was a non–dom after submitting his DOM1 form in early 2006. To my mind, this evidence from Mr. Purnell together with HMRC's decision to accept the Claimant as a non–dom individually and cumulatively satisfy me that the Claimant was very probably or possibly might have been a non-dom in October 2004 and that he should have been so advised by the Defendants.

183 The expert evidence provides additional and alternative support for my conclusion that the Claimant should have been advised that he was very probably a non–dom in October. This evidence came first from Mr. Kilshaw who explained that a reasonably competent accountant should have raised the topic of domicile with his client. Mr. Kilshaw noted in paragraph 4.6.6 of his report that the Defendants were aware that the Claimant was originally from Iran, that he had moved to the United Kingdom as a schoolboy and that he did not want to return to Iran because he had avoided being called up by the army and would be subject to imprisonment.

184 Mr Kilshaw then said in evidence that "*I really believe a reasonably competent accountant would regard, notwithstanding the points that counsel [for the Defendants] has made, that the Claimant was non-dom*" and the fact that the Claimant's name (Hossein Mehjoo) was not an English-sounding name in itself should have been enough to alert the Defendants to the possibility of the Claimant being a non-dom. He stressed the need for the reasonably competent adviser to look at the intention of the individual whose domicile is in issue. Mr. Kilshaw explained that it is a common occurrence when a client with a domicile of origin from abroad says that he would leave the United Kingdom when his children have finished their education, that they would still remain as a non-dom. This was incidentally what the Claimant said was his position.

185 Mr Warburton explained that if an accountant had a tax-planning retainer (which I have concluded that the Defendants had) and his or her client had a large sum of money coming in, he would put on the agenda for discussion with his client the issue of whether the issue of his domicile should be investigated. Having been told that Mr. Purnell had concluded that the Claimant was domiciled in Iran, Mr. Warburton accepted that this was a "*reasonable conclusion"*.

186 In addition in his first report, Mr. Warburton explained that "Based on this information, I think it would be reasonable for any chartered accountant to take the view that the Claimant *was, or probably was, domiciled in the United Kingdom because, although probably he did have an Iranian domicile of origin, he had lived in the UK for all his adult life, built a business here, established a family life here and so had probably formed the intention of living here permanently or indefinitely".* I find this evidence unconvincing because:-

(a) It is clear that the Claimant had an Iranian domicile of origin and not "probably" had one as stated by Mr Warburton, who therefore had the wrong starting point;

(b) Mr Warburton accepted that he had not spoken to Mr Purnell or Mr Stanford and the emails referred to in this section from Mr Purnell might be some of the evidence which he should have read but had not read. So he reached his conclusions on inadequate material;

(c) Mr. Purnell sent an email to Mr. Chalkley dated 21 June 2005 in which he said that "He [that is Mr. Mehjoo] says he has not decided on where he will reside but for the foreseeable future it is the UK". Mr. Warburton accepted correctly in my opinion that if this was a true answer, then a crucial condition for the Claimant to be domiciled in the United Kingdom (namely an intention to remain in the United Kingdom permanently or indefinitely) was not satisfied. It was not put to the Claimant and certainly not proved that first he had not told Mr. Purnell this fact and second that what he had said to Mr. Purnell and what was then communicated to Mr. Chalkley was untrue; and

(d) This evidence has to be considered against the background of other evidence which satisfy me that at its lowest, the reasonably competent generalist accountant would have concluded that the Claimant **might** have been a non-dom and this evidence.

187. In reaching this conclusion, I have not overlooked Mr Warburton's suggestion in his evidence that there may have been a time prior to 2004 when the Claimant might have formed an intention to remain permanently or indefinitely to remain in the United Kingdom so as to acquire a domicile of choice in the United Kingdom. The Defendant cannot rely on this evidence to show that the Claimant had acquired this domicile because it was not put to the Claimant that he had formed this intention. Indeed, I have concluded that the Defendants as reasonably competent generalist accountants would have had a contractual duty or concurrent tortious duty in October 2004 to advise the Claimant that he had or very probably (or alternatively might have) had non-dom status, because this should have been a matter to have been discussed.

(iii) Did the Defendants have a contractual duty or concurrent tortious duty in October 2004 to advise the Claimant that non-dom status carried with it very significant tax advantages?

188 Mr. Purnell agreed that he knew in 2004 that if a taxpayer was a non-dom, he had certain tax advantages, which were potentially significant. He accepted that it was possible that there might be schemes to benefit the Claimant if he was a non-dom, and he was aware that there were certain advantages of offshore tax investment for those who were non-doms. There is no need for there to be knowledge of the precise benefits but merely that that there were be might be benefits open to those with a non dom status.

189 Mr. Stanford appreciated that in 2004 being a non-dom could carry certain tax advantages that were potentially significant. This evidence is supported by the evidence of Mr. Kilshaw whose evidence was that a reasonably competent generalist accountant would have been aware that "*a non-dom was a favoured status (to be cherished) which brought with it tax advantages*". When giving evidence, he said that:-

> *"if we were talking about a firm who was not holding itself out as a non-dom experts, I would expect them in 2004, if they were advising a non-dom, to know that non-dom carried favoured tax status, that offshore trusts generally were perceived as having a magical status, and, therefore, know that there was some sort of opportunity there, an opportunity would then result".*

190 Later, he said of a firm in the position of the Defendants that:-

> *"I believe a reasonably competent accountant in that position would still be of the view in 2004 that offshore trusts offered advantages and that it was possible to get those shares into an offshore trust".*

191 Mr. Warburton does not agree, but I consider that I should accept the evidence of Mr. Purnell and Mr. Stanford, who are generalist accountants, who concede that they knew that non-dom status carried it with the advantages which I have described. I have no reason to believe that their knowledge is greater than that of the reasonably competent generalist accountant. In addition, it is consistent with that of Mr. Kilshaw, who I appreciate is not an accountant, but who has and has had, as I have explained much contact with and knowledge of what is and was known by generalist accountants and would have been familiar with their knowledge on these issues from his dealings with them.

192 In consequence, I conclude that the Defendants had a contractual duty or concurrent tortious duty in October 2004 to advise the Claimant that non-dom status carried with it potentially significant tax advantages. For the purpose of completeness, I should add that if, which is not the case, I had been in any doubt about this conclusion, I would have been surprised if it was a case that a generalist accountant did not know that non-dom status conferred tax advantages because they would have known first of the question on the tax return requiring a non-dom to state that was his or her position; and second of the need to apply for a decision by completing the DOM1 form. These matters presuppose and at assume that there must be some tax benefits in being a non-dom.

(iv) Did the Defendants have a contractual duty or concurrent tortious duty to advise the Claimant that he should take tax advice from a firm of accountants or tax advisers who specialised in advising individuals who had (or might have) non-dom status?

193 As I have explained, it is common ground that the Defendants were not non-dom specialists. The Defendants contended that there was some uncertainty as to what is meant by the term "*non-dom specialist*". I was surprised that this point only emerged in the Defendants' closing submissions, and that it had not been the subject to a request by the Defendants in their RFI which had 79 requests. In any event, it is clear that the term means "*someone who specialises in advising individuals who have (or might have) non-dom status*".

194 The case for the Defendants is essentially that:-

a) There was no rule of professional conduct or professional guidance which required a referral by the Defendants to a non-dom specialist;

b) This was not a case in which the Claimant was facing some unforeseen liability as he had only to pay the greatly reduced CGT rate of 10% as a result of the availability of Business Asset Taper Relief;

c) There was no adequate expert evidence from a professional that the Defendants' failure to refer the Claimant to a non-dom expert was negligent;

d) The tax advantage which was available to a non-dom was only relevant in relation

to non-UK situs assets and so the Claimant's case could only succeed if a reasonably competent generalist accountant should have been aware that a scheme was available to shift the situs of the BFL shares from the United Kingdom to a low-tax offshore jurisdiction; and that

e) Any duty to refer to a non-dom specialist could only arise if it was known to the generalist accountant that it could have at least a reasonable chance of success.

195 Mr. Simpson says that there was a duty imposed on the Defendants to advise the Claimant that he should take tax advice from a firm of accountants or tax advisers who specialised in advising individuals who had (or might have had) non-dom status. As I have explained, the issue of whether there was a duty on the part of the Defendants to advise the Claimant to take legal advice from a non-dom expert is a question of law. I have already stated in paragraph 87 that Oliver J observed in the *Midland Bank* case (supra) expert evidence does not assist when an issue of law is being resolved.

196 In this case, there is evidence of the requirements of a relevant professional institute because the Chartered Institute of Taxation's Code states that "*A member who does not have the expertise or the staff resources available to meet his client's needs should refer his client to another professional adviser*". The case for the Claimant is that Mr. Goodfellow's response is that Mr. Purnell was not a member of that Institute, but no good reason was put forward as to why there should be a different duty for Chartered Accountants who are members of the Chartered Institute of Taxation (like Mr. Stanford), and those who are not, such as his partner, Mr Purnell. In my view, the Institute's requirement does no more than set out what should be implied in the retainer of any professional person particularly where the issue is of substantial importance to the client. I stress that it is of great importance that the amount of CGT was over £800,000 and the cost of consulting a non-dom specialist would be about £500 and probably less.

197 As Oliver J explained, the views of experts on whether a term should be implied are of very limited value and so I would not attach much weight to it. Mr. Simpson, however, points out that Mr. Purnell accepted in evidence that if an accountant does not have sufficient expertise to advise on something which he knows can be beneficial to a client, then he should advise the client to seek specialist advice elsewhere. Mr. Stanford took a similar line. When giving evidence, Mr. Purnell accepted that if a person who was obviously a non-dom came into his office and had a large CGT liability, dealing with such a person would have been beyond his experience and that he would have discussed with Mr. Stanford as to whether they could identify someone to advise this non-dom.

198 The views of these accountants are important for two reasons. First, Mr. Purnell and Mr. Stanford are generalist accountants and their evidence as to how such accountants deal with the problem of how to handle situations where they do not have adequate specialist expertise is of importance for that reason and also because what they have said amounts to something approaching a concession on their part against their interests.

199 Second, and perhaps more importantly, their approach is consistent with the Chartered Institution of Taxation Rules and Practice Guidelines, which I have just quoted. Mr.

Stanford accepted that this was correct but he added that the obligation only arose on the Member "*if they are aware that circumstances required*". It cannot be correct that the fact that the Second Defendants is a company means that its directors who are members of that Institution are somehow outside the scope of its rules.

200 Mr. Warburton considered that a duty to advise a client to seek advice from a non-dom specialist about BWP could not arise unless the Defendants should have been aware of the BWP and "*should have realised that it could have at least a reasonable chance of success*". In other words, the Claimant should not have been advised to take advice from a non-dom specialist unless there was a reasonable chance that taking advice from such a person would have enabled the Claimant to reduce or eliminate his liability to pay more than £800,000 in CGT.

201 I consider for four reasons that Mr. Warburton has set too high a threshold in so far as he requires the referring accountant to have some knowledge of what the non-dom specialist could offer before he could be obliged to advise a client to seek the advice of a non-dom specialist.

202 First, if Mr. Warburton was right, the less the knowledge possessed by the generalist, the lower would be the duty to advise the client to consult a nom-dom expert. His test, which I suppose must apply to all professionals, would have the possibly alarming consequence that if a GP has a patient with a serious but obscure fatal illness, then he would be under no obligation to advise the patient to consult a specialist unless he knows that the specialist would be able to give some treatment which has *"at least a reasonable chance of success*". Surely if the GP knows that there *might possibly* be types of treatment known only to specialists which might assist the patient that should trigger a duty to advise to refer irrespective of his views on the prospects of success.

203 Second, the duty to advise the Claimant to take advice from a non-dom expert is neither time-consuming nor difficult for the generalist accountant. This must be weighed against the possible advantage to the Claimant. Mr. Warburton, correctly in my view, accepted that if there was a large amount of money being received by the client, this might mean that matters should be investigated to determine how tax could be saved.

204 Third, I cannot understand why the duty to advise the client to consult a non-dom specialist where there is £800,000 at stake is not part of the duty described by Lightman J in *Hurlingham Estates Ltd v Wilde & Partners* [1997] STC 627, 634 in this way and with emphasis added:-

> *"The test to be derived from the authorities is whether, having regard to the terms of the retainer in all the circumstances which were known or should reasonably have been known by [the solicitor], [the solicitor] should reasonably have appreciated that [the client] needed his* ***advice and guidance*** *in respect of the tax liabilities which entry into the transaction would expose''.*

205 In this case, the amount of CGT in issue was £800,000 . This should have been a factor when considered with the facts first that the generalist accountant would have appreciated that the Claimant might well have been (at its lowest) a non-dom; and second that this status might have had (at its lowest) significant tax advantages . It

should have meant that a duty would be imposed on the generalist accountant to advise the Claimant to take advice from a non-dom specialist. To use the language of Lightman J, the generalist accountant should have appreciated that the Claimant "*needed his guidance"* in respect of his CGT and this required him to advise the Claimant to seek advice from a non-dom specialist which is, as I have explained, what Mr. Purnell said that he would have done. If this was not done, the Claimant would have been deprived of knowing what his options were.

206 Fourth, Mr. Goodfellow fails to explain why the duty of generalist individual accountants should be lower than that for those accountants who are subject to Chartered Institution of Taxation Rules and Practice Guidelines, which I have quoted. As I have already explained, the work done by those subject to those guidelines is very similar to and indeed overlaps with the work done by generalist chartered accountants. No good rational reason has been put forward as to why Mr. Stanford, a partner in the Defendants and a member of the Institution, would be bound to refer in circumstances set out in the Guidelines but his partner Mr. Purnell would according to Mr. Goodfellow's submission, not have that obligation. I could not see why there should be this difference as they would be doing very similar work but with different duties to their clients.

207. A. I must also deal with the contentions of Mr. Goodfellow that:-

a. The duty to refer could only arise if a reasonably competent generalist accountant should have been aware that a scheme was available to shift the situs of the BFL shares from the United Kingdom to a low-tax offshore jurisdiction. There was no basis given for this submission, which fails to appreciate that the Defendants had the duty to ensure that the client had the opportunity to obtain and access to full information on remedies open to him so as to be able to make an informed choice. As I have explained, it is too much to expect the generalist accountant to have precise details of how a non-dom specialist could help the Claimant and if he did, the generalist would himself have to be a kind of non–dom specialist. In my view, the Claimant should have been advised especially in the light of the amount involved to take advice from a non-dom specialist even though the Defendants would not have known of the particular tax-planning matters open to the Claimant if a non-dom;

b. There cannot be a duty to refer somebody in the Claimant's position to a non-dom expert, as there was no rule of professional conduct or professional guidance, which required a referral by the Defendants to a non-dom specialist. A duty can be imposed on a professional even though there is no rule of professional conduct because the duty of the Courts is to determine if such an obligation should be imposed as part of the professional's duty to use appropriate skill and care. Indeed, it cannot be right that the absence of a rule of professional conduct or professional guidance means that the Courts are somehow barred from imposing a duty and not surprisingly, no authority has been cited in support of this contention; and

c. The fact that the Claimant was only liable to pay the reduced CGT rate of 10% as a result of the availability of business asset taper relief somehow absolved

the Defendants from a duty to refer. That rate, however, did not deter that Claimant from entering into the expensive Montpelier scheme.

B. I conclude that the Defendants had a contractual duty or concurrent tortious duty to advise the Claimant especially in the light of his large potential CGT liability that he should take tax advice from a firm of accountants or tax advisers who specialised in advising individuals who had (or might have) non-dom status. This duty flowed in the circumstances of the case (including the amounts of CGT involved) from the duty of the Defendants to exercise skill and care as was the duty in the Chartered Institute' Guidelines set out in paragraph 196 above. If this was not the position, the client would be in the totally unsatisfactory position that he did not have the right to be told first that the professional who he consulted lacked the expertise to advise him; and second that somebody with the relevant expertise might be able to give that advice. I cannot see why the duty in the Chartered Institution of Taxation Rules and Practice Guidelines on referrals should not apply to all chartered accountants certainly where substantial sums of money are involved.

(v) If the Claimant had been advised by the Defendants that he should take advice from a firm of accountants or tax advisers who specialised in advising individuals who had (or might have had) non-dom status, would the Claimant have decided to seek further advice at that time?

208. The Claimant's case is that he would not have needed to have known of the significant advantages of having non-dom status in order to have decided to seek a referral. His case is that he would have sought specialist advice if he had known first that he was possibly a non-dom; and also second that there were tax advantages that went with being a non-dom. His evidence was very clear and convincing to the effect if Mr. Purnell had told him that there might be tax advantages in being a non-dom, he would then have definitely instructed a non–dom expert adviser on tax very speedily. In particular, he said that if Mr. Purnell had told him that there were some tax advantages available to him in being a non-dom in October 2004, then "*I would have pushed him if he hadn't pushed me to come on Alan, let's go and meet somebody or you set it up for me*".

209. It must not be forgotten that before the meeting on Saturday 2 October 2004, the Claimant had received an email at 11.35 am from Mr. Lawton Smith of Wragges stating that completion was predicted before the end of February 2005 for the purpose of an estimate of costs. What is important is that shows that there was at least a good prospect of a sale and of course the Claimant was very conscious of the great interest shown in BFL by potential purchasers and what his likely CGT liability would be.

210. The Defendants' case is that even if the Claimant had been advised to seek the advice of a non-dom specialist, there is no reason to believe (and the Claimant has certainly not proved) that he would have followed that advice, either at all or in sufficient time to enable the BWS to be implemented without being negated by the blocking legislation introduced on 16 March 2005. In essence, Mr. Goodfellow submits that the Claimant would not have sought advice from a non-dom specialist at the time if he had been told by the Defendants that he should take such advice.

211. Mr. Goodfellow develops his submission by contending that:-

i. The Claimant would not have known in October 2004 and nor would he have been able to foresee that blocking legislation would come into force in March 2005 so as to prevent the use of BWS or that any non-dom specific tax-planning measure would be needed to be implemented before the sale of shares in BFL;

ii. There was no certainty that there would be sale of the Claimant's BFL shares as at October 2004;

iii. If the Defendants had advised the Claimant to seek the advice of a non-dom specialist in October 2004, there is no reason to suppose that he would have acted any way other than the way in which he actually did which was to wait until the Spring of 2005 when the sale of BFL had been completed;

iv. It was much more likely that in October 2004, he would have waited because he had been continuing to explore his options in the run-up to the sale and after the sale, as it was only after he had secured and received the receipts of sale of his shares in the Summer of 2005 that he sought to put in place tax-planning measures;

v. The Claimant did not seek specialist tax advice to shelter the 10% CGT until January 2005, and even then he was reluctant to incur costs in pursuing such ideas;

vi. Between October and December 2004, the Claimant did not make any contact with Mr. Purnell in relation to potential tax saving measures even though some of them were, as I have explained, discussed at the meeting on 2 October 2004;

vii. In late 2004, the Claimant was working flat out on Project Claudia in his attempts to sell his shares in BFL as well as running BFL's business which had expanded substantially since the merger. There is no reason to believe that the Claimant would have found time to seek the advice of a non-dom specialist bearing in mind that at this time he could not find time to see the VAT specialist from whom Mr. Purnell was seeking advice in relation to the purchase of a yacht; and that

viii. The Claimant would not have known that there was a non-dom specific solution which would or might have allowed him to avoid paying CGT.

212. There are four factors which individually and cumulatively satisfy me that the Claimant would have sought tax advice very speedily and which I will now set out in no order of importance.

213. First, I have concluded for reasons which I have explained that the purpose of the meeting of 2 October 2004 was to see how the Claimant could avoid paying CGT as he was very anxious to ascertain and to investigate the options open to him. As there was nothing further subsequently discussed about the matters set out in Mr. Purnell's List of Issues, I have concluded that the Claimant was not interested in any of those matters as I believe that he intended to continue to reside in the United Kingdom in the short term and he was only interested in a scheme which would have ensured that

he did not have to pay any CGT, which is indeed actually what he hoped to achieve when he chose to use the Montpelier Scheme even though it cost him £200,000 to do so. The Claimant demonstrated up until the time when he entered this Scheme that he was anxious to avoid paying the CGT of 10% contrary to Mr. Goodfellow's point that he was not concerned about this rate.

214. Second, the importance that the Claimant attached to eliminating or reducing his CGT liability on the sale of his BFL shares is shown by the fact that exceptionally he arranged to discuss CGT saving with Mr. Purnell at Mr. Purnell's home on Saturday 2 October 2004. This shows first that he regarded finding ways of reducing his CGT liability as very important and deserving high priority even though no sale had been agreed or negotiated; second that he was not deterred from spending time doing this by his other commitments; and third that he was anxious to find a way of eliminating or reducing his tax liability. Indeed this was shown again when he had further meetings with Mr. Purnell on CGT saving as I will now explain.

215. Third, after the meeting on 2 October 2004 the Claimant remained keen to explore more tax-saving schemes. For example, he asked Mr. Purnell to contact Mr. John Joyce, who the Claimant had met on a charity trek, in order to discover if Mr. Joyce could come up with a tax-planning proposal. In addition, the Claimant followed up various avenues of investigation with Mr. Purnell including Mr. Draper of Ford Campbell, MTM (Midlands) Limited with Mr. Purnell gathering information from Mr. Joyce, Mr. Draper and Mr. Goodall of MTM in early 2005.

216. The Claimant also continued to talk to people about tax saving and he asked Mr. Purnell what he thought of their ideas at a meeting on 11 February 2005 to discuss tax saving. There was then much further communication between Mr. Purnell and the Claimant to discuss tax-planning.

217. Fourth, and perhaps most importantly, it is of some importance to bear in mind how the Claimant reacted when after HMRC had accepted his DOM1 application to be a non-dom, he was then told in 2010 that there were advantages for him in being a non-dom. His evidence, which I accept, was that within minutes of receiving this advice and a list of non–dom specialists, he, that is the Claimant, had made an appointment to see a non-dom expert later that week even though the CGT rate was 10%. I have no reason to think that the Claimant, who I regarded as an honest and reliable witness as well as being a focused and energetic business man, would not have done the same in October 2004 and immediately sought to consult a non-dom specialist speedily if he had been advised by the Defendants to take tax advice from a non-dom specialist as there were or might be potentially significant tax advantages for him as a non-dom. This is an answer to Mr. Goodfellow's point that he would not have acted speedily if told of the advantages of being a non-dom. The cost of such a meeting with a non-dom expert would have been low, the Claimant said he would have gone to KPMG and I have no reason to doubt his evidence as he had a contact there who would then have charged £500 or perhaps much less or nothing for an initial meeting. Indeed if the Claimant had not been able to go to KPMG, I am sure that with the help of Mr Purnell and Mr Stanford, he would have been able to find another non-dom specialist within a few days.

218. As I explained after Phoenix's "wobble" when reconsidering whether to pursue their wish to purchase BFL, the Claimant asked Mr. Purnell to advise about deferred

consideration and its tax implication as appears from the email of 17 March 2009. Mr. Purnell did this with Mr. Stanford's assistance. My clear impression of the Claimant was that he was a very determined man who was keen at every opportunity to see if there were tax-planning opportunities especially with the prospect of him having to pay more than £800,000 in CGT. I have no doubt that if he was told that he was or might have been a non-dom and then offered even a possibility of tax saving advantages only open to a non-dom, he would have seized the opportunity to have obtained such advice as quickly as possible and that he would have made an appointment very speedily.

219. It is true that the Claimant did not act speedily when he was asked in Autumn 2004 to meet a VAT expert with a view to saving £200,000 VAT, but his explanation, which I accept, is that the boat was only being delivered in June 2005 and the scheme could have been implemented a few weeks before delivery. The fact that the meeting with the yacht expert was not urgent is shown by the fact that Mr. Purnell had told the Claimant in an email dated 12 November 2004 "*I expect you will want to fix a meeting on or after Project Claudia*" in which he pointed out to the Claimant that the proposed scheme might be more appropriate for somebody who was not resident in the United Kingdom. In addition, I do not consider that the Claimant would have been inhibited from paying the few hundred pounds needed to obtain tax advice from the non-dom specialist.

220. Having had to consider various aspects of the Claimant's business life during this trial, I repeat that I am convinced that he is a very determined man who is well able to fit many things into his life and as he explained, he had a staff of almost 70 people at BFL's Head Office to help him. Against that background, I am quite satisfied that the Claimant would have done what he said he would have done which was to follow it up immediately and that he would have made time in his busy timetable to do this. Indeed, I have explained how speedily he arranged to see a non-dom expert in 2010 within minutes of being told that there were advantages in being a non-dom. So I am quite satisfied that the Claimant would have sought advice from a non-dom specialist very speedily as he was determined to ascertain ways of eliminating or reducing his CGT liability if he thought there were or might be potentially significant tax advantages for him as a non-dom.

(vi) Conclusion

221. I am satisfied that:-

a. The Defendants had a contractual duty or concurrent tortious duty as reasonably competent generalist accountants in October 2004 to have advised the Claimant that (i) he had, or very probably (or alternatively might have) had, non-dom status; (ii) non-dom status carried with it potentially significant tax advantages; and (iii) he should therefore take tax advice from a firm of accountants or tax advisers who specialised in advising individuals who had (or might have) non-dom status; and that

b. Having received such advice, the Claimant would have decided to seek further advice very speedily if he knew there were or might be potentially significant tax advantages for him as a non-dom.

E. THE WARNINGS ISSUE

222. The issue that now has to be considered is what other advice and warnings the specialist non-dom adviser would have given to the Claimant concerning BWS:-

i. Having regard to the circumstances (bearing in mind all the facts relating to the Claimant's background and that it would not be possible to get a DOM1 clearance before entering into the BWP) whether he would have advised the Claimant that there was a substantial risk of a successful challenge by HMRC to his domicile status;

ii. Whether there were substantial risk that BWS entered into by the Claimant would be successfully challenged by HMRC on *Young v Phillips* grounds;

iii. The possibility of a change in the law between the time the Claimant was intending to put the shares into trust and the disposal by the trustees and the effect that this might have on the Claimant;

iv. Whether Business Asset Taper Relief ("BATR") might be lost on the disposal by the trustees of the Claimant's bearer warrants, including the circumstances in which the loss might occur, the likelihood of those circumstances coming about, the element of the sale price which will be vulnerable to this restarting and an estimate of the tax that would then be due and when it would be due;

v. Which element of the sale price would be vulnerable to a restarting of the taper relief clock;

vi. The risk of the loss of control of shares/proceeds because the shares/sale proceeds would be held by trustees in an offshore trust and the Claimant would then only have the limited rights of an interest in possession;

vii. Whether entering into BWP would have made the shares less attractive to a prospective purchaser; and

viii. What advice would have been given as to the likely accountants costs, the solicitors and counsel's costs and the trustee costs in relation to BWP, the costs of Mr Scott, and the stamp duty that was likely to be payable.

223. The issue that has then to be considered is whether if the Claimant had been advised to enter into the BWP, he would have taken the advice and if so whether he would have reached the stage of taking the shares offshore prior to 16 December 2004.

Would the specialist non-dom adviser acting competently and having regard to the circumstances (bearing in mind all the facts relating to the Claimant's background and that it would not be possible to get a DOM1 clearance before entering into the BWP) have advised the Claimant that there was a substantial risk of a successful challenge by HMRC to his domicile status?

(i) Introduction

224. The significance of this issue is that the Claimant accepts that he would not have undertaken BWP if the non-dom specialist would have advised him that there was a *substantial* risk of a successful challenge being made by HMRC to his non-dom status, which is a pre-requisite for using BWP. So I will have to focus on whether there was such a "substantial risk".

225. The reason for that was the serious adverse consequences that would have been suffered by the Claimant if he had undertaken BWP and if he had then been held to be domiciled in the United Kingdom. These consequences were explained by Mr. Goodfellow in his closing written submissions in this way:-

a. If the Claimant was held to be UK domiciled and a sale of the shares fell through, he would then have been left with a substantial CGT liability and no sale proceeds with which to pay it. The CGT liability would have arisen because the BWS would necessarily have involved a disposal of the shares by the Claimant to the trustees of the settlement which the Claimant would have established. This disposal would have led to a charge to CGT at 10 per cent of their open market value as at the date of the transfer into trust. This would, according to Mr. Goodfellow, have led to a so-called "*dry tax charge*", which would be a tax liability of in the region of £425,000 based on a valuation of the Claimant's shareholding in BFL of around £4.25m. This tax would have needed to be paid to HMRC regardless of whether the sale of BFL completed, and therefore regardless of whether the Claimant had received the sale proceeds; and also because

(b) Even if the Claimant's shares had been sold, the overall tax charge as a result of (i) the disposal by the Claimant; and (ii) the disposal by the trustees both of which the Claimant would have been required to pay in the event that he was UK domiciled would have been higher than on a straightforward sale of the shares. The reason for that was that the trustees would *not* have had the benefit of business asset taper relief ("BATR") on the gain realised upon the sale of the shares. The trustees' gain would have represented the difference between the open market value of the Warrants when transferred into trust and the price paid for such Warrants by the third party purchaser. In short, a substantial proportion of the chargeable gain would have been subjected to a higher rate of tax (40%) than on that which would have applied in the event that the Claimant had simply sold the shares himself, which would amount to an effective rate of 10% after the application of BATR to the entire gain.

226. It is important to stress that at this stage the issue under consideration is not as a matter of law whether or not there would have been a substantial risk of a successful challenge by HMRC to the Claimant's domicile, but the rather different question of how a *specialist non-dom adviser acting competently* would have advised the Claimant on this issue in late 2004.

227. There is a dispute between the parties as to the approach to be adopted to this issue. Mr. Goodfellow contends that it is matter of law in which the views of experts are not relevant. He relies on Oliver J's observations in the **Midland Bank** case which I have quoted and his conclusion that issues of law are for the Court to decide without the help of experts.

228. Mr. Simpson disagrees, and he stresses that the issue is what a reasonably competent non-dom specialist would have advised on domicile, and not what the domicile of the Claimant actually was. In my view, this is correct because the inquiry is focussing on what a reasonably competent non-dom specialist would have advised the Claimant on the risk of first a challenge by HMRC to the Claimant's non–dom status, and second on whether such a challenge would have been successful. The significance of this issue is to ascertain the advice which would have been given by the reasonably

competent non-dom specialist which will assist in determining if the Claimant would then have decided to engage in BWP; that entails first ascertaining what the Claimant would have been advised by a non-dom specialist. It is the risk which is important and that entails considering the reasonably competent non-dom specialist's view including the prospect of a challenge and then its outcome.

229. It would be relevant in determining this first issue if, for example, there was a policy decision known to all non-dom specialists that HMRC would never have challenged a claim to non-dom status either at all or in certain circumstances. In other words, expert evidence could be adduced on these matters but, as I will explain on the facts, it does not matter whether I accept the approach advocated by Mr. Simpson or by Mr. Goodfellow because in this case, the answer is the same and the advice would be that there was no substantial risk of a successful challenge by HMRC to the Claimant's non-dom status.

(ii) The proper approach to acquiring a domicile of choice.

230. As I have explained, it is accepted that the Claimant had an Iranian domicile of origin and so the issue here is whether he had subsequently acquired a domicile of choice in the United Kingdom. Mr. Warburton accepted first that in order to lose a domicile of origin, the taxpayer's intention must be to live in the United Kingdom permanently or indefinitely, having no real intention to live anywhere else; second that this test is very strictly applied; and third that the courts regard the acquisition of a foreign domicile as a very serious step which is only to be imposed on clear and unequivocal evidence. This is clearly right because as I have already explained, *Dicey Morris and Collins* on Conflict of Laws (15th Edition (2012)) explains that:-

i) According to Rule 7 "*an existing domicile is presumed to continue until it is proved that a new domicile has been acquired*";

ii) "*the prevailing view is that of Scarman J. That 'two things are clear – first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists; and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or causal words'* (In the Estate of *Fuld* (No.3), [1968] 675, 686); and

iii) "*Cogent and clear evidence is needed to show that the balance of probabilities has been tipped, and this is true whether the issue is the acquisition or loss of a domicile of choice*" with the authorities for that proposition being *Irvin v Irvin* [2001] 1 F.L.R. 178: followed in *Re Chow Kam Fai David* [2003] 1205 HKCU".

231. This need for "clear and cogent evidence" is important as it shows the onus imposed on the Defendants to show that there was a substantial risk of a successful challenge to the assertion that the Claimant had kept his domicile of origin. I will start by considering how the reasonably competent non-dom specialist would have advised the Claimant that there was a substantial risk of a challenge being made by HMRC to his non –dom status and will then consider whether as a matter of law there was such a substantial risk.

(iii) The Defendants' Case

232. Mr. Goodfellow submits that the non-dom specialist would have advised the Claimant that there was a substantial risk that by late 2004 he was domiciled in the United Kingdom, because by the time of the potential sale of his shares in October 2004, the Claimant had become a long-term resident of the United Kingdom, who had formed the intention to reside in the United Kingdom permanently or, at least, for an indefinite period of time, with the result that he no longer had his domicile of origin, but that instead he had by then become domiciled in the United Kingdom.

233. Mr. Goodfellow attaches importance to the Claimant's history noting that he came to the United Kingdom aged 12 in around 1971, and he then attended Silcoates Boarding School in West Yorkshire. When he first came to England to go to school, his father had told him that he should go to Church if he had to, and also that he should eat pork if he had to. In other words, the Claimant was told that he should immerse himself in the British way of life.

234. By 1980 or 1981, the Claimant had overstayed on his student visa and he had refused to return to Iran for military service. This occurred at a time after the Shah had fallen from power and when Iran had been invaded by Iraq. The Claimant accepted that his decision not to return to Military Service in Iran was a serious matter, but that he was terrified of the consequences of being returned there because he would then have faced execution, imprisonment or being sent to the front line. The Claimant was successful in his immigration appeal and he was then permitted to remain in the United Kingdom where later he was given indefinite leave to remain as well as asylum. His indefinite leave to remain continued until 1996 when he was given British citizenship which entailed taking the British Oath of Allegiance. In the meantime, the Claimant's Iranian passport had elapsed and he was only able to regain an Iranian passport in 1998.

235. After the Claimant stopped being a competitive squash player in the late 1980s, his career was devoted to seeking to further his retail business. He duly bought a home in the United Kingdom and he moved up the property ladder. From the year 2000, the Claimant lived with his partner Therese, who has never been to Iran, and by 2004, they had had one son with a second son being born in 2006. All the Claimant's business interests were in the United Kingdom. The house of his parents in Iran was in his name and that of his siblings and this had been done as a matter of tradition. The Claimant had not lived there since his school days, but he had returned there as a fairly regular visitor and had then stayed in that house.

236. The case for the Defendants was that great significance should be attached to the facts first, that the Claimant had been given indefinite leave to remain in the United Kingdom; second, that by 2004, he had resided in the United Kingdom for 33 years by which time he was then 45 years of age; and third, that he had therefore abandoned any wish to leave the United Kingdom.

237. Reliance is placed by Mr. Goodfellow on Rule 13(1) in *Dicey Morris and Collins on Conflict of Laws* (which was approved by Nourse J in *IRC v Duchess of Portland* [1982] Ch 314,318) and which states that:-

> *"A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely, and not otherwise".*

238. Mr. Goodfellow also relied on other passages in *Dicey Morris and Collins* and notably passages at:-

(a) Paragraph 6-040 which states that:-

> *"A person who determines to spend the rest of his life in a country clearly has the necessary intention even though he does not consider his determination to be irrevocable. It is, however, rare for the animus manendi to exist in this positive form: more frequently a person simply resides in a country without any intention of leaving it, and such a state of mind may suffice for the acquisition of a domicile of choice. The fact that a person contemplates that he might move is not decisive: thus a person who intends to reside in a country indefinitely may be domiciled there although he envisages the possibility of returning one day to his native country. If he has in mind the possibility of such a return should a particular contingency occur, the possibility will be ignored if the contingency is vague or indefinite…but if it is a clearly foreseen and reasonably envisaged contingency, for example the termination of employment, or the offer of an attractive post in the country of origin… it may prevent the acquisition of a domicile of origin"*
> and;

(b) Paragraph 6-061 because the Claimant was at one point a refugee and this passage explains that the relevance of the Claimant's refugee status which is that:-

> *"If a political refugee intends to return to the country in which he fled as soon as the political situation changes, he retains his domicile there unless the desired political change is so improbable that his intention is discounted and treated merely as an exile's longing for his native land, if his intention is not to return to the country even when the political situation has changed he can acquire a domicile of choice in the country to which he has fled."*

239. Neither of these passages was relied on by either expert in their many reports as being matters which would have been considered as relevant by the non-dom expert when advising somebody in the Claimant's position as to whether HMRC would regard them as a non-dom. Mr. Simpson complains that the Defendants did not put these matters to Mr. Kilshaw as setting out the correct approach which the non-dom expert should and would have adopted when advising somebody in the Claimant's position.

(iv) The Claimant's Case

240. The case for the Claimant is that the reasonably competent non-dom specialist would have advised the Claimant that there was no material risk of a successful challenge by HMRC to his domicile status. The starting point for his case is that in response to a DOM1 form completed by the Claimant in January 2006, HMRC accepted that the Claimant was a non-dom without raising any queries. That ruling has not been challenged, and it remains in force.

(v) The significance of the HMRC ruling

241. So I will start by considering whether the Claimant can rely on HMRC's decision to show that he was a non-dom. To my mind, this is very strong evidence of what a reasonably competent non-dom specialist would have advised the Claimant which was that he would be regarded as a non-dom. After all, the non-dom expert was having to consider whether the HMRC would have regarded the Claimant as a non-dom and it must be of prime importance to me that about 18 months later on very similar (if not identical) information as was available in late 2004, HMRC decided that the Claimant was a non-dom and thus enabled him to take advantage of all the advantages which go with that status.

242. Significantly, the DOM1 had been received by the Defendants from the Claimant for onward transmission to HMRC, but it was not checked by Mr. Purnell at the time. He has explained that having seen the DOM1 subsequently that although he did not know the answers to some of the questions on that form, none of the Claimant's answers appeared to be inaccurate or incomplete. Mr. Goodfellow's response is that the important issue is whether the information on the DOM1 is accurate or not and in order to determine this, it is not relevant for that purpose to know if it has been checked by his accountant or not. I agree with this response.

243. The case for the Defendants on the DOM1 form is that it gave insufficient information on the Claimant's circumstances to enable HMRC to give full consideration to his domicile position and so the response of HMRC to hold that the Claimant was a non-dom is no guide to his true position or what the non-dom specialist would have advised. The Defendants have failed to adduce cogent evidence to show what further information was needed. After all, it is the information on the DOM1 form which HMRC regards as crucial in determining if a person is a non-dom. Furthermore, it must not be forgotten that if insufficient evidence is adduced on a DOM1 form, HMRC can, and indeed does, request further information as appears from the real case papers of other BWP cases, but they did not feel the need to make such a request in the Claimant's case.

244. The next submission made by Mr. Goodfellow is that the answers of the Claimant relating to the circumstances in which he would cease to live in the UK were either inaccurate or misleading. One relevant question, which he was asked and answered, was:-

> *"19 a. What are your intentions for the future?*
>
> *b. if you do not intend to stay permanently in the United Kingdom, when and in what circumstances do you envisage that your residence here will cease?"*

245. The Claimant responded to questions (a) and (b) respectively by stating "*Hopefully have a home in France/Spain as well and live there*" and "*When my consultancy business ends*". The Claimant said in evidence that he would also keep a home in England, but there is nothing incorrect in that answer especially as he said that he had sold a property of his in Spain in which he had stayed and that he hoped to buy another for which he was actively looking. The Claimant explained that his wish to live in France/Spain was "*on hold*" until his children were 16 or 18 and they did not

need medical treatment. Mr. Goodfellow criticises the Claimant's use of the word "*Consultancy*", but the Claimant explained that Mr. Purnell suggested that those words "*property consultant*" should be used and that he was buying and selling property.

246. Further, Mr. Purnell when questioned about his notes for the Claimant's tax return for early 2005, which stated that the Claimant had "*New business as property consultant. Partnership with Therese O'Connell*". Mr. Purnell explained that this was because the Claimant was letting his house out with that lady and that he was happy with the Claimant describing himself as a property consultant. In answer to the question as to why he came to the United Kingdom, the Claimant said correctly that it was for his education. He was cross-examined about it, but that answer is correct.

247. Next, Mr. Goodfellow submits that the Claimant's answers relating to his property interests in Iran were exaggerated. The Claimant had stated first in his answer to question 11 on the DOM1 form that his connections with Iran were that "*I have property and mother & father & brother living in Iran*", and second, in answer to question 13 that his business, personal, social or other connections with Iran were "*Property/family*" with his property being described in answer to question 12 (b) as "*Home/apartment/villa*". He explained in evidence that he stayed there when he visited Iran and it was in his name and that of his siblings. The Claimant stated in answer to question 15 on the DOM1 form that he had spent most of the previous 10 years in the United Kingdom, but that he had visited Iran regularly.

248. Unfortunately, this allegation of exaggerated property interests in Iran is not fully particularised or explained, let alone established. The evidence shows that the Claimant was the registered owner of his father's house in Iran while a plot of land was bought in the names of the Claimant and his brother, before being developed in the late 80s or early 90s when the Claimant's parents and family lived there. This information shows that the Claimant's answers relating to his property interests in Iran were not exaggerated. In addition, I believe that the Claimant stayed there during his fairly regular trips to Iran.

249. In any event, nothing has been put forward which shows that the HMRC ruling was based on incorrect or incomplete information on any relevant factor. I have not overlooked the fact that Mr. Goodfellow contends that the Claimant did not himself choose to put his father's house in his name or in fact pay for it. The important point is that I am satisfied having heard the answers given by the Claimant when questioned about his answers on the DOM1 form that he did not give any inaccurate or incomplete answer on this point or any of the other matters. I should add that Mr Warburton criticised some of the Claimant's other answers, but I have no reason to believe that they were incorrect, especially as in some cases the Claimant had not been asked about them when he was cross-examined.

250. The furthest that Mr. Warburton would go is that the HMRC decision on the Claimant is a domicile ruling given without full information, but this again had not been put properly to the Claimant. In any event, nothing has been put forward which shows that the ruling was based on incorrect information on any relevant factor.

251. The final point made by the Defendants is that it would not have been worthwhile for HMRC to check the Claimant's domicile position because he only had a trivial

amount of foreign income and gains when the DOM1 was submitted. I find it difficult to accept without expert evidence the Defendants' assertion that HMRC did not, and does not, scrutinise DOM1 forms in much detail if the amount of foreign income or gains of the applicant concerned was small. After all, the decision of the HMRC after considering a DOM1 and determining that an individual is a non-dom gives comfort and encouragement to the taxpayer to take advantage of the tax breaks open to a non-dom. Otherwise, it is difficult to ascertain any purpose of submitting a DOM1.

252. I have concluded that if the non-dom expert had been required to consider whether HMRC would conclude that the Claimant was a non-dom in late 2004, he or she would have reached the same conclusion as was the result of the Claimant's DOM1 application which was that the Claimant was a non-dom and that there was not a substantial risk of a successful challenge by HMRC to his domicile. There is nothing before me which suggests, let alone establishes, that the Claimant's position was different in late 2004 from what it was in early 2006 or that there was any material error in DOM1 form filed by the Claimant.

(vi) Other Evidence

253. If, which is not the case, I had been any doubt about this conclusion, I would have reached it for another reason which is that the Claimant gave evidence of his intention when he explained in paragraph 6 of his second witness statement (with emphasis added) that:-

> *"Certainly by 2003, if Alan had asked me whether I wanted to live abroad in the future, I would have said that I was willing to consider living abroad. Besides which, the question of ultimate intention to live abroad would obviously have been a different proposition if I had been told it would potentially offer significant tax advantages by being a non-dom. If I had been told about this and then asked whether I was willing to consider living abroad as a result,* ***I would have said that I would definitely live abroad ultimately (though for the immediate future I would live in the UK).*** *This, in fact, was broadly my position when I was told about the advantages of being a non-dom in June 2005. My position was that I had not decided where I would reside ultimately, but for the foreseeable future it was the UK, (see from Alan's email to Philip Chalkley dated 21 June 2005]). However, I was prepared to live abroad (see Barclays' Meeting File Note dated 12 October 2005 and Barclays' Meeting File Note dated 7 December 2005 In my DOM1 form dated 8 January 2006 I said that hoped to live in France/Spain when my consultancy business ended (i.e. that ultimately I intended to live abroad).* ***I still intend to move to France, Spain or Italy in the foreseeable future once my youngest child reaches the age of 16. However, my two children have required major surgery during the past few years and as a result I have delayed my move abroad****."*

254. Mr. Goodfellow submits that, as *Dicey Morris and Collins* explained in paragraph 6.051, the courts will view an interested party's statement of intention with "*suspicion*". He also relies on the case of *Gaines & Cooper v HMRC* [2008] STC

2617 (Ch), in which the Court did not accept the statements of the person whose domicile was in issue, but there is no absolute and unconditional rule to that effect. Indeed, *Dicey Morris and Collins* proceeds in the same paragraph 6.051 to state that in some cases, the Courts have to some extent relied on declarations of intent in deciding issues as to domicile, and in one case it was even regarded as decisive.

255. I have considered with the appropriate degree of "suspicion" all aspects of the Claimant's evidence both what was set out in his witness statement and what emerged in his oral evidence on his future intentions. I am quite satisfied that what was in his witness statement was an accurate statement of the Claimant's intention, namely that he definitely intended to live abroad ultimately when the education of his sons was completed and they did not need further medical treatment. So the position was that in 2004 if the Claimant had been told that there were tax advantages in being a non-dom, then his wish was to only stay in the United Kingdom for the educational and medical needs of his children and then to move abroad.

256. This would have meant that the non-dom specialist would have concluded that there was not a substantial risk of a successful challenge by HMRC to his domicile status as he had not acquired a domicile of choice in the United Kingdom. This was because the Claimant did not have the requisite intention to acquire a UK domicile which has to be, in the words of *Dicey, Morris and Collins* at paragraph 6-040 from which I have already cited:-

> *"The intention which is required for the acquisition of a domicile is the intention* ***to reside permanently or for an unlimited time in a country****. It must be a residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation"* (emphasis added).

257. In this case, the reasonably competent non-dom specialist would have advised that HMRC would have decided as they did after receiving DOM1. The Claimant's residence in the United Kingdom in 2004 was for a limited period and purpose, and so as a matter of law, the Claimant had not acquired a domicile of choice in the United Kingdom. I stress the relevance of the decision of HMRC when the DOM1 was filed. I am fortified in reaching that conclusion by four further matters.

258. First, the non-dom expert would have known that with the exception of the one case of *Steiner v IRC* [1973] STC 547(CA) and perhaps another one, HMRC had never won a case on domicile against a living taxpayer and that they rarely take on such cases. This would have led the non-dom expert not to find a substantial risk that the Claimant would be held domiciled in the United Kingdom.

259. Second, as I have explained, Dicey Morris and Collins point out that "*Cogent and clear evidence is needed to show that the balance of probabilities has been tipped, and this is true whether the issue is the acquisition or loss of a domicile of choice"* and this test is strictly applied and this shows the high threshold to be reached before a person loses his domicile of origin.

260. Third, he would have adopted the approach stated in Mr. Kilshaw's evidence when he explained that:-

> *"a reasonably competent accountant would be so steeped in non-doms and so aware in 2004 of exactly how the Revenue looked at them and the practice that they would conclude with great confidence and advise the Claimant that it was not a material risk".*

261. Mr. Goodfellow criticises Mr. Kilshaw's evidence because he says that it was characterised by a belief that the views of the taxpayer relating to his intention would determine questions of his domicile. He also criticises Mr. Kilshaw for relying on that factor to the exclusion of all other factors. Mr. Kilshaw, in fact, said that he accepted the relevance of many factors in determining domicile such as making your home here, making your business here, taking citizenship here, forming a relationship here, having children here, bringing up the children in English, having them christened, but that the key factor in determining domicile was the intent of the person concerned. I consider that Mr. Kilshaw did take into account the relevant factors in reaching his conclusions and that he did not rely on irrelevant matters.

262. Fourth, the Defendants themselves considered that the Claimant was non-dom as was shown by their statements made in the emails from Mr. Purnell to Mr. Chalkley of Barclays Private Bank, first of 21 June 2005 which stated "*we expect [the Claimant] to have kept his domicile of origin*" (i.e. Iranian), and second of 27 June 2005 to Mr. Chalkley stating that "*we are clear as we can be without applying to the Revenue, that he retains his Iranian nationality, albeit with dual nationality*". A similar statement was made the email from Mr. Purnell to Mr. John Howard-Smith of 28 November 2005 which stated that "*We have yet to test the domicile with the Inland Revenue but all the correct signs are there to assume that Iran is still his domicile*". This is important supporting evidence,

263. Finally, the Claimant retained his connection with Iran with regular stays in the house which was in his name and those of his siblings. I should add that I have not found anything in Mr. Warburton's evidence on this issue which establishes that there was a substantial risk that HMRC would make a successful challenge to the Claimant's non-dom status. Mr. Warburton, for example, stated in respect of HMRC's ruling that:-

> *"I'm not saying it is a false domicile ruling . I'm saying it is a domicile ruling given without full information which I believe they were entitled to see".*

264. As I have explained, if further information had been sought, it would have been along the lines of the Claimant's witness statement as set out above and this would have fortified the Claimant's case. I conclude that if the non-dom expert had been required to consider whether HMRC would conclude that the Claimant was a non-dom in early 2006, he or she would have reached the conclusion that the Claimant was a non-dom and that there was not a substantial risk of a substantial challenge by HMRC to his domicile status. There is nothing before me which suggests, let alone establishes, that the Claimant's position was different in late 2004 from what it was in early 2006 when the DOM1 was submitted.

(vii) The Claimant's Domicile as a matter of law

265. As a matter of law, the Claimant would not acquired a domicile of choice in the United Kingdom and would have remained domiciled in Iran for the same reasons as would have led the specialist non-dom adviser to reach the same conclusion as I have set out above, namely there was not a substantial risk of a substantial challenge by HMRC to his domicile status as a non-dom

(viii) Conclusions

266. I have reached that conclusion whether (as Mr. Goodfellow contends to be the case) this is a matter of law and the experts' views are irrelevant or whether (as Mr. Simpson contends to be the case) the views of experts should be considered that there was not a substantial risk of a substantial challenge by HMRC to his domicile status as a non-dom.

What advice, if any would the specialist non-dom adviser have given as to whether there was a substantial risk that this scheme would be successfully challenged by HMRC on Young v Phillips grounds?

267. The *Young v Phillips* ground, which as its name indicates is based on the reasoning in *Young v Phillips* [1984] STC 520, is that for an instrument to be treated as situated in the jurisdiction in which it was physically located, the instrument must also be marketable in that jurisdiction. That is important because the success of any BWP depends on showing that the shares in question are situated where they are held and in particular in the jurisdiction outside the United Kingdom to which they were taken for sale in order to avoid a liability to CGT.

268. In *Young v Phillips*, Nicholls J (as he then was) was considering the question of whether renounceable letters of allotment were assets situated in the United Kingdom. He explained at page 533 that:-

> *"For an instrument to be treated as analogous to a chattel for situs purposes more is required of it than mere transferability of title by delivery. What is required is that in practice the value of the instrument can be realised by sale of the instrument for money in the country where the instrument is found"*.

269. In the case before him, there were no grounds for concluding that the value of the letters of allotment could have been realised by the sale of those documents for money "*wherever they were to be found*".

270. Mr. Goodfellow submits that the bearer warrants, which would have been created under BWP, would have represented a non-controlling shareholding and that as in *Young's* case, there was no evidence that a market existed for such shares in the offshore jurisdiction to which they would have been taken and that it should not be assumed that such a market existed. So he contends that the bearer warrants could, and should, not be treated as analogous with chattels so as not to be regarded, located and situated where the bearer shares were located, which would be the place to which they had been taken outside the jurisdiction. In consequence, the shares would not have been regarded as located in the place to which they had been physically moved, but would still be regarded as located in the United Kingdom.

271. Mr. Goodfellow submits that this point is fortified by the facts first, that the warrants created as part of the BWS would have been taken offshore, second, that no attempt would then have been made to sell them in Jersey; and third, that there was no evidence that there was a body of purchasers in Jersey willing to purchase them. Indeed, Mr. Goodfellow says that the warrants would have remained locked in a bank before being transferred to a family trust and so they would not have been marketed for sale amongst any body of purchasers in Jersey.

272. The issue of what advice, if any, a specialist non-dom adviser would have given as to whether there was a risk that the scheme would be challenged by HMRC on *Young v Phillips* grounds depended on expert evidence. Mr. Warburton did mention the *Young v Phillips* marketability risk in the main body of his report when he said that within his firm "*we were concerned about the risks arising from Young v Phillips*". This was not consistent with the disclosure letters obtained from his firm, Grant Thornton, in which the *Young v Phillips* risk is not mentioned at all. Neither was any attention paid to it by that firm in practice when implementing BWS in the sense of requiring a time gap between the export of the warrants and their settlement in trust.

273. Mr. Kilshaw's evidence showed that KPMG were rather more cautious than Grant Thornton about the *Young v Phillips* risk, but still they did not regard it as a material risk. Indeed the contemporaneous KPMG advice did not refer to it.

274. Mr. Kilshaw stated in his report (with emphasis added) that:-

> *"(i) Situs - As I explained above, in order to change the situs of the bearer shares they would have to be held offshore and possibly (the law is not totally clear on this point) also be held in a jurisdiction where the shares were freely marketable. In particular, the case of Young v Phillips (1984), 58 TC 232 was often cited in text books as a potential concern as it suggested renounceable letters of allotment were not regarded as freely marketable because, broadly, they had a short life span. In practice to avoid being caught by this case it was normally recommended that once the bearer shares were offshore they should be held personally for a suitable period before transferring them to the offshore trust. The client would invariably ask how long this period should be. The answer to this was that there was no "right" answer as much would depend on all the circumstances e.g. the timetable of the corporate event) and* ***in practice the usual period was a few weeks or as a maximum three months.*** *It was also recommended that the bearer shares were held in a place such as Jersey as this jurisdiction offered a market for these types of holdings and hence ensured that the freely marketable test (if indeed there was in law such a test) was met.*
>
> *This would have been highlighted to the client as a potential risk, but in practice I never saw the Inland Revenue take the point and as I say it was in any event* ***easily addressed by holding the bearer shares offshore for a short period before placing them in a trust."*** (paragraph 5.4.8(1) of his first report) C/1/238.

275. There is much material which satisfies me that there would have been no risk of BWP failing on *Young v Phillips* grounds in 2004 and that was because:-

a. There had been no challenges, let alone successful challenges, by HMRC on *Young v Phillips* grounds between 1997 and 2004 and so the BWS had a good track record of success. Mr. Kilshaw said "*what was absolutely clear is the Revenue, the profession in 97 had been slightly nervous but that nervousness has not been upheld and the situs point was not being taken by the Revenue*". Mr. Warburton's approach was broadly similar as he said that "*as time went by [the Young v Phillips point] became less of a concern because it wasn't something that was being raised in the negotiations with HMRC. I think the risk was there and remains there*";

b. When Mr. Warburton met with Mr. Kilshaw at their experts' meeting, it was agreed that the warrants needed to be held offshore before being placed into trust and "*that there was no stated minimum or maximum period for these purposes but that as advisers we would have been comfortable with a period of about 3 months*";

c. Grant Thornton initially saw *Young v Phillips* as a potential risk in the 1990s, but the BWS cases implemented by Grant Thornton were conducted on the basis that there was an insufficient risk even to require a three month gap between the export of the bearer warrants and the settlement into trust. In Section 11 of Mr. Warburton's first report which was drafted by his partner, Mr. Loebl, there is a discussion of the mechanics of BWP and it mentions advice from counsel on time gaps. What is significant is that it does not mention any advice from counsel that there should be gaps between export and entry of the warrants into trust as Mr. Warburton accepted. This suggests first that Mr. Loebl, who had undertaken BWP, did not see *Young v Phillips* as a risk; and second that Grant Thornton had not received opinions from counsel stating that it was a risk;

d. KPMG thought that the *Young v Phillips* risk could be met by allowing a gap of between one and three months between export of the warrants and the settling into the trust. I did not see any reference in any of the contemporaneous KPMG advices about the reasoning in *Young v Phillips* being a material risk to BWP schemes; and

e. Ms Elizabeth Wilson, Counsel of Pump Court Tax Chambers did not mention *Young v Phillips* as a risk when considering Grant Thornton's cases 6 and 7.

276. In the Defendants' closing submissions, they referred to the decision of the Privy Council in *Carreras Group Ltd v Stamp Commissioners* [2004] STC 1377, in which *Young v Phillips* is not mentioned, but it does not take the law any further on this issue. In addition its significance was not put to the experts.

277. In reaching the conclusion that the non-dom specialist adviser would have advised the Claimant in 2004 that there was no substantial risk that a BWS undertaken by him could be successfully challenged by HMRC on *Young v Phillips* grounds, I have not overlooked the reliance by the Defendants on the decision of Patten J (as he then was)

in *Chandraskaran v Deloitte & Touche Wealth Management Ltd* [2004] EWHC 1378 (Ch) in which he explained in relation to submissions relating to the applicability of *Young v Phillips* grounds to BWS (with emphasis added) that:-

> *"16. In order to decide the issues in this case, it is not necessary for me to determine whether the decision in Young v. Phillips applies equally to share warrants issued in accordance with s.188 of the Companies Act, and in the absence of full argument I prefer not to do so. What, however, is clear is that there are obvious parallels between renounceable letters of allotment and share warrants issued to bearer, and that the* ***application of Nicholls J's reasoning would obviously cause the prudent tax adviser to be cautious about recommending the Bearer Warrant Scheme where no obvious market in the securities existed in the foreign situs at the date of transfer****".*

278. The Judge in that case was considering the approach that should have been adopted before February 1998, which was more than 6 years before the events with which this case is concerned and significantly during that period, no challenge had been made or has been made since on *Young v Phillips* grounds. It is worth stressing that Patten J said that the prudent tax adviser should be "*cautious*" about recommending BWS where no obvious market in the securities existed in the place to which the securities had been transferred but did not use stronger language. In my view, in the ensuing period, the need for that caution largely evaporated because of the attitude of HMRC. In addition, Mr. Warburton stated (much to my surprise) that the non-dom expert would not have been aware of the decision in *Chandraskaran* in 2004 and its relevance was not put to Mr. Kilshaw.

279. Mr. Kilshaw was an expert witness in *Chandraskaran,* but his evidence, which was different from that which he gave on this issue in the present trial, related to the approach that should have been adopted in 1998, but significantly by 2004, the risk posed by *Young v Phillips* had receded as I have sought to explain as was shown by the approach of Grant Thornton and KPMG and most importantly the absence of any challenge by HMRC on those grounds. I have considered the matters as they stood in October 2004 in the light of the evidence then available including the views of Silks which had been put to the experts Mr. Kilshaw's evidence emerged unscathed after cross-examination. I should repeat that Mr. Kilshaw very properly included as an appendix to his first report the evidence from Mr. James Kessler QC which indicated concerns about BWP and in particular that the Revenue was attacking those arrangements "*with a zeal that is inappropriate, having regard to the technical arguments*" these comments and statements by Mr. Stephen Brandon QC were the subject of cross-examination of Mr. Kilshaw who are answered those comments and disabused me any of my concerns.

280. I conclude that the specialist non-dom adviser would not have given any advice that there was a substantial risk that if the Claimant had engaged in BWS, it could be successfully challenged by HMRC on *Young v Phillips* grounds. For what it is worth, this advice has been borne out by subsequent experience.

What advice, if any would the specialist non-dom adviser have given as to the possibility of the change in law between the time the Claimant was intending to put the shares into trust and the disposal by the trustees, and the effect this might have?

(i) Introduction

281. I agree with the Claimant that it was not pleaded that the specialist non-dom adviser should have given advice on the possibility of the change in law between the time the Claimant was intending to put the shares into trust and the disposal by the trustees, and the effect this might have, although it was referred to in Mr. Warburton's report.. No attempt was made to further amend the Re-Re-Re-Re Amended Defence so this point is not open to the Defendants but in case, I am wrong, I will comment on it.

(ii) The submissions

282. The way in which the point was put by Mr. Goodfellow to the Claimant in cross-examination was that the potentially foreseeable change in the law relied on by the Defendants meant that there would be a new provision to tax non-doms, who were long-term residents in the United Kingdom, as if they were domiciled in the United Kingdom.

283. It is accepted by the Defendants and indeed averred by them in paragraph 43.1 of the Re-Re-Re-Amended Defence that the change in the law introducing the blocking legislation which occurred on 16 March 2006 "*was not anticipated by the accountancy profession and could not have reasonably have been foreseen*". The HMRC had, however, issued a very general warning on 2 December 2003 that changes might be made in the treatment of non-doms in its publication " *Possible Changes in UK treatment of non-UK domiciles".*

284. The case for the Defendants was that a reasonably competent non-dom specialist would have advised an individual contemplating engaging in BWP that the Government was looking at the tax treatment of long-term UK residents, who were non-doms and particularly those who had been resident in the UK for a long time. So the Defendants' case is that the advice that would, and should, have been given to anybody contemplating engaging in BWP was first that there was an appreciable risk that the Government would conclude that such tax treatment, including the CGT treatment for the non-doms who had been resident in the United Kingdom for a long time was too favourable; and second that this treatment could be made less favourable with immediate effect with limited transitional relief. It was also said by Mr. Warburton that after the 2003 Budget, accountants advising on BWP would have been very concerned about the possibility of such changes leaving their clients in worse position through BWP. Mr. Goodfellow's case was that such a change would have led to a tax liability of £1.7 million on the Claimant if he had engaged in BWP, but that figure is strongly disputed by the Claimant.

285. The position in October 2004 was that no conclusion had been reached about this change relating to how non-doms, who had been resident in the United Kingdom for a long time, would be treated for tax purposes, but the matter had not been dropped. Thus, it is said by Mr. Goodfellow that there was an appreciable risk that the Government would conclude first that the tax treatment (including the CGT treatment) was too favourable particularly for long-term UK residents like the

Claimant; and second that any change in the law when announced would normally take effect immediately with limited transitional relief.

286. I find convincing the contrary evidence of Mr. Kilshaw who explained that the non-dom specialist would have considered that "*the Government had been crying wolf for a long time and people were continuing with their life as normal*". This is supported by the approach of Grant Thornton because Mr. Adams, who was supervised by the partner Mr. Hutton and who was copied into the email, and who wrote to a client on 13 February 2004 to say that:-

> *"Last autumn, the Inland Revenue announced another round of consultation, but have not put forward any proposals for change and so it is far from clear that anything would change in the practice as a result".*

287. No proposals had been put forward between the time of that advice and October 2004. A number of letters of advice written by Grant Thornton and KPMG to those considering BWP have been produced in the course of the case, but neither Counsel has identified a warning having been given by those firms in or before late 2004 to any person considering embarking on BWP or indeed any other firm that there might be a change in the law of the kind which the Defendants have suggested. I regard as significant the fact that Grant Thornton and KPMG were firms who were used to appraising the effects of HMRC publications and they have much experience of tax-planning as well as being some of the largest accountancy firms in the United Kingdom.

288. So I consider that (even if the point is open to the Defendants), the specialist non-dom adviser would not have been obliged to have given advice as to the possibility of the change in law between the time the Claimant would have been intending to put his BFL shares into trust and their disposal by the trustees.

What advice, if any, would the specialist non-dom adviser have given as to the loss of BATR on the disposal by the trustees?

289. Goodfellow submits in the words of his written submissions that:-

> *"the specialist non dom adviser would have advised that this was a risk in the event that either (i) the BWS failed, and/or (ii) the law on the tax treatment of non UK domiciliaries changed in the course of the implementation of the BWS but prior to the sale by the trustees and that the result was likely to be a higher tax charge than on an ordinary sale of the shares by [the Claimant]. The element of the sale price that would be affected by the loss of BATR and so subject to the higher rate of tax would be the difference in the market value of the shares between the time of their transfer into trust and the time of the sale to the ultimate purchaser. The tax charge would have been £1.7m (40% of the difference in value, namely £4.25m (i.e. between the market value of the shares upon their transfer into trust, and the ultimate proceeds of sale of c £8.5m). Payment would have been required on 31 January 2006 (in the event that the sale completed in the*

2004/05 tax year), or 31 January 2007 (in the event that the sale completed in the 2005/06 tax year). There was no reason to believe that HMRC would be willing to reduce the amount of this liability. Moreover, if the BWS failed, either because [the Claimant]. was UK domiciled or the warrants were UK situated assets at the time of their disposal into trust, [the Claimant]. would <u>also</u> have been liable to CGT at an effective rate of 10% on the gain calculated by reference to market value of the warrants at the time of their disposal into trust".

290. In so far as the cause of concern relates to a change in the law, as I have explained in the last section of this judgment, the specialist non-dom adviser would not have given any advice as to the possibility of the change in law between the time the Claimant was intending to put the shares into trust and the disposal by the trustees.

291. The position that emerged in Mr. Warburton's evidence is that a Claimant only needed to be warned of the positional loss of BATR when there was a real risk that he had lost his domicile of origin. At a late stage of the proceedings, the Claimant accepted that he would not have entered into BWP if he had been warned that there was a substantial risk of a successful challenge by HMRC to his domicile status. Therefore this issue is no longer of significance.

292. I should add that no cogent reason was put forward by the Defendants to the effect that there was any risk of BWP failing if the Claimant was properly regarded as a non-dom, as there was no reason to believe that there would be a change in the law concerning United Kingdom resident non-doms.

What advice would have been given by the reasonably competent non-dom specialist as to (i) in what circumstances the loss of BATR might occur, (ii) the likelihood of those circumstances coming about, (iii) what element of the sale price would be vulnerable to this restarting namely the difference between the value of the shares at the time of transfer into trust and the value at sale, and (iv) an estimate of tax that would then be due and when it would be due?

293. The circumstance in which there would be a potential loss of BATR on a disposal by the trustees would be a successful challenge by HMRC to the Claimant's domicile status and for the reasons, which I have explained, it was not likely to occur, because he was clearly a non-dom and there were very limited circumstances in which HMRC had challenged the domicile of a living taxpayer, and that they had only done so successfully on, I believe, one occasion.

294. Turning to the question of the tax that would have been due and when it would be due, I accept the starting point for this estimate would be the estimated sale price by the trustees and it was common ground between Mr. Warburton and Mr. Kilshaw that this would have been in the region of £9 and £10 million.

295. There would then have to be an assessment of its market value at the date of the transfer into Trust. Mr. Kilshaw suggested that would be a 5-10% discount about eight weeks before transfer and that was not challenged. The Defendants did not put forward a positive case on this point and are precluded from relying on some new material from Mr Warburton on account of my ruling made on 17 December 2012

which I explained in my judgment of 23 February 2013 with the Neutral Citation number 2013 EWCA 291 (QB) in which I refused permission to the Defendants to adduce from the last witness at this hearing, who was Mr. Warburton, much new evidence which would have necessitated a recall of at least one witness when there was no reason why this evidence had not been served earlier.

296. Therefore, if there is an undiscounted value of £10 million as the starting point there is therefore an extra tax due to any loss of BATR of 30% (being the difference between the BATR rate of 10% and the standard rate of 40%) namely a 10% discount on £10 million and this gives a total of £300,000. The Defendants put forward a different calculation because they say the tax charge would have been 40% of the difference in value between the market value of the shares upon their transfer into the trust of £4.25 million and the ultimate proceeds of about £8.5 million which comes out to a difference of £4.25 million and with the 40% difference that comes to £1.7 million.

297. This is, as I have explained, an academic issue because as I have already emphasised, the Claimant accepts that he would not have entered into BWP if he had been warned that there was a substantial risk of a successful challenge by HMRC to his domicile status. Nevertheless, I consider that on the Defendants' figures, the tax charge would be the difference between 10% and 40% namely 30% which would have given a figure of somewhere in the region of £1.25 million.

298. The case for the Claimant is that HMRC would compromise, with Mr. Kilshaw stating that to be the case. It is noteworthy that the Claimant negotiated a settlement with HMRC on penalty payments.

299. Mr. Warburton accepted that prior to 2007, HMRC would have compromised I suspect that there would have been a compromise and it is common ground that payment would have been required on 31 January 2007 in the event that the sale would have completed in the 2005/2006 year.

In particular what advice would the specialist non-dom adviser have given as to (i) what element of the sale price would be vulnerable to a re-starting of the taper relief clock (on the difference between the value of the shares at transfer into trust and the value at sale); (ii) an estimate of the tax that would then be due and when it would be due and (iii) whether HMRC would compromise?

300. The principle is the same as for the previous issue, apart from the fact that the Claimant would have the benefit of saving CGT on the value of the shares at the date of the transfer into Trust. It would thus appear that even with a 5-10% discount at the date of transfer, the Claimant would still make a substantial net gain from entering into the scheme but, as I have explained, this is now an academic issue because the Claimant accepts that he would not have entered into BWP if he had been warned that there was a substantial risk of a successful challenge by HMRC to his domicile status.

What advice, if any would the specialist non-dom adviser have given as to "loss of control" of the shares/sale proceeds because the fact that the shares/sale proceeds would be held by trustees in an offshore trust and the Claimant would only have the limited rights of an interest in possession beneficiary?

(i) Introduction

301. Mr. Simpson contends that this allegation of "*loss of control*" has not been pleaded because the Defendants only rely on the relevance of the transfer into the trust as a quantum issue in the sense of reducing the Claimant's interest to that of having, in the word of paragraph 43(2)g of Re-Re-Re Amended Defence:-

> *"the limited rights of an interest in possession beneficiary entitled to income thereof during his life and with the possibility of benefitting from the exercise of the trustees' discretionary power over capital".*

302. Indeed when the application was made to make this amendment at the start of the trial, it was described as a loss point which would only become relevant:-

> *"if the Claimant wins on all other points … it is at this point that it becomes what is the loss suffered by [the Claimant] , not by the trust, by [the Claimant] as the beneficiary under the trust".*

303. In my view, there is no material difference between that contention and the issue with which I am now concerned and so the Defendants are precluded from pursuing this issue, but in case I am wrong, I will consider this issue.

(ii) The Submissions

304. Mr. Goodfellow contends that the non-dom specialist would have advised the Claimant that it was inherent in the BWS that he was giving his shares away to independent trustees and therefore losing control. In consequence, the Claimant would only have had the limited rights of an interest in possession beneficiary. Mr. Warburton supports this approach.

305. The response of Mr. Simpson is that this point has no merit and that in any event, it was not put to Mr. Kilshaw that a reasonably competent non-dom specialist would have advised his client about loss of control. It would not be correct to reach a decision adverse to the Claimant on an issue which depended on expert evidence, as this issue was, without putting it to the Claimant's expert. So I cannot accept the Defendants' case that the reasonably competent tax adviser would have advised the Claimant in the way that Mr. Goodfellow suggests.

306. In case I am wrong on this, I will consider the Defendants' case, noting that in Mr. Warburton's first report, he said that he would have expected a non-dom specialist to point out that BWS would involve the Claimant giving away his shares to an independent trustee operating overseas over which the Claimant would have no control.

307. In resolving this issue as with other issues in which the question is what the reasonably competent non-dom expert would have advised, it is of some importance to ascertain what was actually being advised by non-dom experts to those contemplating entering into BWP at the time. Grant Thornton and KPMG have disclosed what advice was being given by them at the time.

308. KPMG did not give any warning on this issue in any of their contemporaneous advice to clients and nor did Grant Thornton. Mr. Warburton put forward one case (Grant Thornton's case 6) in which the client put 82% of his bearer warrants into trust and this suggests that this was not a problem. Mr. Adams of Grant Thornton advised the client with a copy to the partner Mr. Hutton, that in practice the client would be able to ensure the trust operates in the manner desired by him by a careful drafting of the trust deed and by the use of a letter of wishes.

309. It is noteworthy, as Mr. Simpson points out, that in none of the material before the Court from textbooks or from lectures is there any warning of this risk in respect of BWP or any other tax saving scheme involving Trusts. Indeed, Mr. Warburton accepted that he could not at that time find any material in textbooks or lectures in which loss of control was suggested as a material risk, which should have been drawn to the attention of a prospective BWS investor.

310. This all indicates that no warning of the sort postulated by Mr. Goodfellow was required or indeed would have been given by the reasonably competent non-dom expert. This view is supported by Mr. Kilshaw's unchallenged expert evidence, which was that a reasonably competent non-dom specialist would have explained to his client first, that the main reason for creating the trust would be to enable the client to receive the capital in his name in the United Kingdom tax free; second, that the return of the monies to the client would be subject to the discretion of the Trustees, but third, that the Trustees would have regard to the reasonable wishes of the client with the result that in practice the Trustees would always expect to accede to them. Finally, Mr Kilshaw said that he had never been involved in a case where the Trustees had disregarded the reasonable wishes of the settlor because the Trustees were always concerned to understand fully the purpose of the Trust and to respect the wishes of the settler.

311. This has not been challenged and in any event, it seems to me to be eminently sensible and consistent with the approach expected of professional trustees. Indeed Mr. Kilshaw went on to say in unchallenged evidence that a trust could be set up with just one beneficiary. I regard all this evidence as demonstrating that no warning of the kind postulated by the Defendants would or should have been given to somebody embarking on BWP.

(iii) Conclusion

312. I conclude that the specialist non-dom adviser would have given no advice to a person in the position of the Claimant that because the shares or sale proceeds would be held by Trustees in an offshore trust, the Claimant would only have the limited rights of an interest in possession beneficiary and so his interests would be at risk. The most the non-dom adviser might have explained to a person contemplating embarking on BWP was that although the remission to the settlor of the proceeds of sale was in the trustees' discretion, it is well known that trustees would have regard to the settlor's reasonable wishes and that in practice no trustee had chosen to disregard them. Of course, the trust could have a sole beneficiary and most importantly no example has been cited of a trustee disregarding the wishes of the settlor.

What advice, if any would the specialist non-dom adviser have given as to whether entering into BWP would have made the shares less attractive to a prospective purchaser?

313. The case for the Defendants is that the specialist non-dom adviser, would have advised that BWS would have made the shares less attractive to "*some buyers*". The basis of that view is that there was an attendance note of September 2001 in which Mr. Lowe of Wragges advised first, that selling the shares to an offshore trust "*may put some buyers [of the shares] off*"; and second, that such a sale would be likely to make the sale process more complicated because the offshore trust would be unlikely to give any warranties which would lead the Claimant to personally having to provide the requisite warranties.

314. Mr. Simpson submits that the only submission that is open to the Defendants on the pleadings is that embarking on BWS would have made the shares less attractive to the buyer. The wording of Para 43(2) (e) of the Re-Re-Re Amended Defence is that:-

> *"the conversion of… BFL's shares to bearer shares owned by an offshore trust would have made such shares (and the relevant company) much less attractive to any prospective purchaser, and thus less valuable, in turn reducing or extinguishing any CGT saving made".*

315. The case for the Claimant is that there is no merit whatsoever in this point, as there was no expert evidence from a share valuer that bearer shares held in offshore trusts were less valuable in the open market than ordinary shares held offshore and/or that any such reduction in value would have reduced or extinguished the CGT saving of BWP. These points totally undermine the Defendants' submission on this issues.

316. In any event, there is convincing evidence from Mr. Kilshaw who said that the parties, including the non-UK domiciled tax-payer, would be concerned to ensure that tax-planning would not impede the commercial transaction. He explained that in practice this was never a concern because purchasers very quickly understood the planning of BWS, and they realised that it would have no impact on their position. In his experience, BWP did not change the deal structure or the progress of negotiation. An important attraction of purchaser of share subject to BWS was that they would have benefited from the bearer status of the shares as it saved them 0.5% in stamp duty on the value of the shares.

317. In any event, Mr. Kilshaw noted that if any problems had ever arisen in the minds of the purchaser of the shares about BWS, the matter could have been addressed by the reconversion of the bearer shares into registered shares. He accepted that BWP would normally result in a change to the identity of the ultimate owner as the seller would be replaced by offshore Trustees and this might require more work on their part.

318. None of this evidence was properly challenged nor was his illustration of a case where the tax-planning was understood by the advisers of the purchaser, who in that case were Ashursts. Ms Haxby supported Mr. Kilshaw when she said that the position of the Trustees would be just a matter for negotiation.

319. I should add that Mr. Kilshaw gave unchallenged and very persuasive evidence that bearer shares were marketable and that he has never seen or heard of an occasion where the bearer shares issued as part of the BWP prevented the ultimate sale or had led to a discount in the sale price. None of this evidence has been challenged and I accept it, not least because of the substantial experience Mr. Kilshaw has in dealing with BWS and the logical nature of his evidence.

What advice, if any would the specialist non-dom adviser have given as to the likely accountants' costs in relation to BWP?

320. Mr Warburton contended that the specialist non-dom adviser would have advised that the accountancy fees would have been around £30,000 to £40,000 plus VAT, but the Schedule produced by him showed that the average fees charged by Grant Thornton was just under £30,000, but excluding a fee of £100,000 charged for a scheme with a tax saving of £12 million.

321. Mr. Kilshaw's evidence, was that in his experience, fees would be in the region of £20,000 - £30,000 to include the Trustee's fees for creating the trust.

322. The schedule of accountancy fees charged by KPMG (excluding one transaction with proceeds of £70 million) was about £22,000. I consider that the figure which should have been given for these costs is £25,000.

What advice, if any would the specialist non-dom adviser have given as to the likely Solicitors' costs and Counsel's costs in relation to BWP?

323. The Defendants contend that the costs would respectively have been £20,000 for the solicitor and £10,000 for the counsel both plus VAT.

324. This information was based on information given by his colleagues to Mr. Warburton, who had no personal knowledge of how the fees were charged.

325. The figures were not supported by Grant Thornton's disclosure of the fees which it charged because in three of the Grant Thornton cases, corporate legal costs were rolled up into Grant Thornton's fees, while in other cases it was not known what the lawyers charged.

326 Mr. Kilshaw did not mention legal costs in his report but when questioned about them, he stated that the legal costs would certainly be less than £10,000 and not significant.

327. He explained that in the early stages of the use of BWP, KPMG went to counsel but as the firm gained confidence, not surprisingly it implemented most of the BWS without counsel. He did say whether counsel was used depended on the firm concerned. It seems that by 2004, Counsel is unlikely to have been used by a reasonably competent non-dom specialist. The maximum fees charged for Counsel by Grant Thornton was £2,500 and Mr. Warburton believes that in some cases, Counsel's fees were rolled up into Grant Thornton's fees.

328. I have concluded that the specialist non-dom adviser would have advised that the legal costs would have been about £9,000.

What advice if any would the specialist non-dom adviser have given as to the likely costs of trustees in relation to BWP?

329. This issue only relates to the cost of setting up the Trust as there would not have been an annual cost of the trustees as the anticipated sale of BFL was due a few months later than the time of the advice and more specifically at the end of February 2005.

330. Mr. Kilshaw thought the initial cost would be £3000 - £5000, but he explained that his figure of £20,000 and £30,000 overall included the fees for setting up the trust. This evidence was not challenged but it was supported by the disclosed information from KPMG.

331. Mr. Warburton said that the initial cost would be £5000 - £10,000 plus VAT in relation to the establishment of the Trust, but that there was a general shortage of information on this. My view is that the appropriate figure is likely to have been in the region of £5000.

What advice, if any would the specialist non-dom adviser have given as to what Andy Scott's solicitor's costs and counsel's costs were likely to be?

332. It is accepted that if the Claimant had wanted to proceed with BWP, he would have had to pay the additional costs which Mr. Scott would have incurred in obtaining advice on the effect of BWP on him and indeed he said that was a condition to be satisfied before he agreed to cooperate with the Claimant. I do not believe this obligation of the Claimant to be in dispute. So the specialist non-dom adviser would have had to give some advice on how much this would have amounted to.

333. There was no evidence about this and Mr. Simpson says that this item should be ignored. I disagree as Mr Scott's costs would have been incurred if the Claimant had embarked on BWP and so in assessing these costs, I can derive some help from using as a starting-point the fees which the Claimant would have had to pay for the services provided to him.

334. The amount of fees would have depended on which advisers Mr. Scott chose to retain. The case for the Defendants is that it would have been reasonable for the non-dom specialist to have advised the Claimant that the figures would have been about half of those incurred by the Claimant, which would be £34,000.

335. The best estimate that I could give would be one-half of this namely £17,000.

What advice if any would the specialist non-dom adviser have given as to what the stamp duty costs were likely to be?

336. It is common ground that the stamp duty would be 1.5 % of the market value of the shares at the time of the issue of the bearer warrants. There is no dispute about the existence of the charge and its rate, but what is in dispute is the market value of the shares.

337. In their second joint report, both Mr. Warburton and Mr. Kilshaw accepted they were not valuation experts, but Mr. Warburton said that he had experience of both

commercial valuation discussions and negotiations with HMRC Shares Valuation Division.

338. Mr. Kilshaw having consulted with colleagues believed that the value would be in the region of £500,000 to £1.2 million in October 2004, which would have meant that the stamp duty would have been in the region of £7,500 - £18,000. Mr. Warburton concluded in paragraph 13.34 of his main report dated May 2012 that after the 2004 accounts were available, the value of the Claimant's shares in BFL in February 2005 would have been approximately £1.2 million, which would have meant that the stamp duty payable would have been £18,000. That was the state of his evidence when the Claimant was cross-examined in this action between 26 and 28 November 2012 and also when Mr. Kilshaw concluded his evidence on 14 December 2012.

339. When Mr. Warburton was about to give evidence as the last witness in this case, he sought to adduce a further witness statement in which he purported to change his evidence so as to state that the value of the BFL shares after the 2004 accounts would have been about £1.2 million, which would have risen substantially once Ford Campbell were appointed to identify potential value possibly up to 50% of the final share value. So he believed the stamp duty payable would have been £64,000. I refused this application to adduce this evidence on 17 December 2012 for the reasons explained in my judgment (Neutral Citation Number [2013] EWHC 291 (QB)), such as that it would have been necessary to recall the Claimant and Mr. Kilshaw and that it was too late to do so.

340. I have come to the conclusion that, as Mr. Simpson accepted, the stamp duty payable would have been £18,000 and the non-dom expert would have so advised.

Conclusion on Fees that were payable

341. The Claimant would have had to pay his own accountancy fees of £25,000, his own legal costs for his solicitor and counsel of £9,000, the trustee costs of £5,000 as well as Mr Scott's legal costs of £17,000. The Claimant was not registered for VAT and so he would have had to pay VAT on this total of £56,000, which would have amounted to £9,8000. In addition, he would have had to pay stamp duty of £18,000. These sums totals £83,800.

342. I should add that even Mr. Warburton was right on the stamp duty issue, the total expenses for the Claimant of embarking on BWP would have been £36,200 more at £120,000, which was very much less than the sum of £200,000 he paid for the Montpelier Scheme.

E. THE BWS/CRP ISSUE

(i) Introduction

343. The Issues that have to be considered are first whether a reasonably competent non-dom specialist would have advised the Claimant to enter into BWP or CRP; and second the advice which the specialist non-dom adviser would have given to the Claimant as to the advantages and disadvantages of the CRP scheme. In order to understand this issue, it necessary to explain the workings of BWP and of CRP. These

issues have to be considered in the light of matters prevailing in October 2004 when on the Claimant's account, the reasonably competent non-dom specialist would have been consulted. There were numerous documents showing the views of various tax Counsel but none gave evidence. These views were put to the accountancy experts and I have taken all this evidence into account.

(ii) The Mechanics of BWP

344. The basics of the key steps in the implementation of the BWP are as follows:-

(a) The first step would be to change the shares from registered shares to bearer shares. This would be achieved by the company passing a special resolution to allow the shares to be held in bearer form. The company's Articles of Association would be amended to give the company power to issue bearer warrants. It should be noted that the creation of warrants would not involve any alteration of the rights of the underlying shares which remained ordinary shares in the company;

(b) The shareholder would then present his registered share certificate to the Company Secretary for cancellation and the Company would issue bearer share warrants to him;

(c) Once the shares were in bearer form, it would then be necessary to change their situs for CGT purposes. As bearer shares pass by delivery, this could readily be achieved by taking and holding them offshore. This would be normally achieved by taking them to Jersey which had the advantage of being a secure financial location close to the United Kingdom. For tax purposes, the client then held non-United Kingdom situs assets as bearer shares are regarded as situated in the place where the warrants are held;

(d) To achieve further tax efficiency, an off-shore trust would then be set up. The trustees would usually be a professional offshore trust company to ensure that the trust was considered a non-United Kingdom settlement for tax purposes;

(e) The client would then gift the bearer share warrants into his offshore trust. This would be achieved by placing the bearer shares in the possession of the offshore trust company. The trustees would for CGT purposes be treated as receiving the bearer share warrants at market value, and there would be no United Kingdom tax on the gift;

(f) The offshore trust company would then hold the bearer share warrants in bearer form or they could easily be converted to registered shares; and

(g) The trustees would then sell the shares and not be subject to CGT as they were outside the scope of United Kingdom tax.

(iii) The Features of CRP

345. The genesis of CRP scheme was its predecessor scheme known as "the second-hand life insurance policy scheme" or "the second hand endowment policy scheme". Mr Warburton observed (with emphasis added) that:-

> *"in essence, this arrangement was designed to create an* ***artificial loss*** *for capital gains purposes through the acquisition and subsequent sale of second hand insurance policies. The scheme relied on the interaction between the legislation in TCGA 1992 which determines the circumstances in which capital gains arising on disposal rights conferred by a life insurance policy interact with the legislation in ICTA 1998 Part XIII Chapter 2 which determines how chargeable event gains are to be calculated on the surrender of life insurance policies".*

346. According to Mr Warburton, the use of second-hand insurance policies became widespread and of concern to the Treasury with the result that in the 2003 Budget delivered on 9 April 2003, blocking legislation was introduced. The background note to the press release at the time of the Budget explained first that under the new legislation, only the true economic costs could be set off against gains and second that capital gains would not escape liability to tax simply because the person concerned had received the policy or the contract as a gift.

347. The effect of the new legislation was to prevent both these events happening so that only the true economic loss was available. The draftsmen in changing this legislation in relation to second-hand insurance policies had failed to notice that second-hand CRPs were taxed in virtually the same manner. In consequence, the blocking legislation failed to mention CRPs and it was therefore inevitable that those arrangements would replace second-hand insurance policy arrangements as a way of avoiding CGT. According to Mr Warburton "*the fact that the Budget Note expressed the view that the arrangements previously worked for second hand insurance policies gave a green light, many believed, to the availability of the CRC scheme as a viable alternative*" Mr Warburton explained that as a result of a Freedom of Information Act request, HMRC had stated that it was aware of 698 redemption schemes for the years 2004-2005 and 2005-2006.

348. It was decided by the Treasury to test these schemes in the Courts and this was done in the case of *Drummond v HMRC* [2008] STC 2707 (Ch) and [2009] STC 2206 (CA) which involved second hand insurance policies in which issues were raised which also could apply to challenge the CRP schemes. In the *Drummond* case, HMRC argued that the wording in the legislation had to be analysed on a realistic basis rather than solely with regard to the wording of the legislation. In consequence, the courts decided against Mr Drummond at all stages on points which would also apply to CRP schemes. On the basis of the decision in *Drummond*, it was accepted that CRP did not work as a way of avoiding CGT. This led to HMRC seeking to recover interest and penalties from the Claimant, who has abandoned his attempt to recover the penalties from the Claimant but still seeks to recover the interest from the Defendants

(vi) The Dispute

349. The case for the Defendants is that a specialist non-dom adviser would have considered that the CRP was more suitable than BWS for a taxpayer in the Claimant's position, particularly having regard to:-

(i) Doubts about his domicile status as a non-dom because CRP, unlike BWS, could be used by United Kingdom-domiciled individuals as well as by non-doms;

(ii) The practical complications which would arise in relation to arranging and implementing the sale of BFL where BWP had been used but which would not arise if the Claimant had selected CRP;

(iii) The absence of the need to implement CRP (unlike BWP) in advance of the sale of BFL;

(iv) The risk to the Claimant of a dry tax charge if BWS had been selected but which would not have been a risk if CRP had been selected; and

(v) The absence of the risk of a challenge to the Claimant on the *Young v Phillips* issue inherent in a BWP, which was not a risk which would have been present if CRP had been selected.

350. The case for the Claimant is that:-

(a) There was no real risk of HMRC successfully challenging the non-dom status or of a successful challenge to the BWP on the *Young v Phillips* issue and therefore of a dry tax charge being imposed;

(b) No complications would be caused in arranging and implementing the sale of BFL, if the Claimant had been involved in BWP, but which would not have existed if he had selected CRP; but that

(c) There was a very substantial risk of the CRP failing with the consequence that the reasonably competent non-dom specialist would have advised the Claimant to enter into BWP.

351. There was a dispute between the parties as to whether it was open to the Claimant to make submissions on the relative merits of CRP and BWS, because Mr Goodfellow contended that the only case which has been pleaded by the Claimant was that any reasonably competent non-dom specialist would have advised the Claimant to enter into the BWP. In my mind, in order to resolve the present issue, it is unrealistic not to consider the alternative scheme to BWP which was available for somebody who wished to reduce his CGT liability and that was to enter into CRP. After all, the non-dom specialist would have to consider the merits and disadvantages of both CRP and BWS in deciding how to advise the Claimant in and after October 2004. So the relative merits of the CRP and BWP schemes will be considered. I will also consider whether the non-dom specialist would have advised the Claimant just to pay the CGT and not engage in either scheme.

352. It is, however, common ground that it is very important to ascertain and appraise the risks of the Claimant entering into BWP. I have explained why the specialist non-

dom adviser acting competently having regard to all the circumstances would have advised the Claimant that there was not a substantial risk of a successful challenge by HMRC on the *Young v Phillips* grounds or to his domicile status notwithstanding that it was not possible to get a DOM1 clearance prior to entering into the BWP. This is the background against which it has to be decided what advice a reasonably competent non-dom specialist would have given the Claimant.

353. That meant the Claimant was eligible for BWP and that there would have been no risk of a dry risk charge. This is an answer to one of the objections to BWP made by the Defendants but I still have to consider the robustness of BWP, and this requires a review of the expert evidence before reaching my conclusion.

(v) The Evidence

354. In appraising the evidence of the two experts, it is striking that Mr Kilshaw had extensive experience of implementing BWP, but in contrast, Mr Warburton explained that "*I am not claiming to be a specialist in Bearer Warrant Planning because I have never implemented a Bearer Warrant Scheme*".

355. I have already explained when commenting on the reliability of Mr. Warburton's evidence on BWP as to why I was very troubled by it and I will not repeat those criticisms which are to be found in paragraphs 98 to 115 above. They included pointing out not merely Mr Warburton's lack of experience in implementing BWPs but also first, his lack of knowledge of the approach to BWP in 2004; second, his apparent failure to ascertain what advice his firm was receiving from Counsel on the robustness of BWP; and third, his reliance on Mr. Loebl for much of his reports without asking Mr. Loebl or any of his colleagues for their views on whether BWP was high risk. In addition, Mr. Warburton's evidence was also at variance with what at the relevant time, Grant Thornton, was and was not telling its clients about the shortcomings and merits of BWP.

356. Indeed although Mr. Warburton was an experienced accountant, his lack of experience of BWP, his failure to question those in his firm who gave him information on BWPs and the discrepancy between his evidence and the practice of his firm together with the matters set out in paragraphs 98 to 115 mean that I cannot attach much weight to Mr Warburton's evidence on BWP when it is not corroborated. This conclusion undermined my confidence in his evidence. I was left with the clear impression that Mr Warburton's views on BWP were not underpinned by his experience or by proper research on his part and were at variance with the considered approach of those in his firm who had much greater knowledge and experience of BWP than he did.

357. Mr Kilshaw's conclusion at paragraph 5.4.1 of his first report was (with emphasis added) that: -

> *"[BWP] was used widely because it was well known**, robust,** easy to execute and wi**th no material downside**. None of the cases executed by KPMG were successfully challenged by the Inland Revenue and I am not aware (whether through publicised cases or by talking to other advisors) of any case which failed. It shows the robustness of the BWP strategy that while the Inland*

> *Revenue eventually changed the law. They did not seek to take a test case (even if the Inland Revenue changed the law they often challenge tax-planning strategies executed under the old law if they consider the BWP strategy to have been flawed. For example, this was their approach in the [CRP] used by the Claimant that they chose not to take any cases against BWP shows that they recognised the robustness of the strategy."*

His original conclusion in relation to BWS was that:-

> *"For the above reason I would expect any reasonable competent accountant (which would include any person familiar with tax-planning for non-UK domicile) to recommend this planning to the Claimant"*

358. Shortly afterwards, he corrected this in his written replies of 24 July 2012, when he stated that he had misstated the position as this comment was "*intended to refer to a reasonably competent accountant holding himself out as having expertise in advising non-doms*" and his conclusion should have stated in relation to BWS that: -

> *"I would expect any reasonably competent accountant holding himself out as having expertise in advising non-UK domiciles to recommend this planning to the Claimant".*

359. He discounted the areas of concern and explained in his evidence that the role of the reasonably competent non-dom advisor was to help a client to assess those risks. Although it appears that the crucial point in Mr Warburton's evidence of BWP was that it was a "*high risk*" strategy, this point did not appear to have been put to Mr Kilshaw. In any event, the evidence (especially of those who had used BWP successfully) was totally inconsistent with this conclusion of Mr Warburton which, as I have explained, was not underpinned by his experience of BWP or by his research into it for the reasons which I have already described. In addition, this evidence of Mr Kilshaw supported by the absence of any challenge (let alone a successful challenge) by HMRC to BWP even though it had been in use for several years totally undermines Mr Warburton's evidence that in late 2004 BWP was regarded as "*high risk*", but on the contrary it shows that BWP worked without a challenge from HMRC. I am not surprised by this as BWP is based on clear statutory provisions and has no artificial or contrived feature about it. Mr Warburton's evidence is clear, which is that if there was no substantial risk of a successful challenge to the Claimant's status as a non-dom by HMRC, a non-dom specialist would have been more likely to recommend BWP than CRP. It is also noteworthy that there was much support in the literature for BWP.James Kessler QC and Peter Vaines in "Tax Planning for Foreign Beneficiaries (3rd Edition) in 1999 described issuing bearer warrants was described as "*effective means of creating foreign property*" as it had been in the second edition of that book. In the 11 January 2001edition of Taxation Magazine, it was described as a *"simple and effective device to avoid capital gains liability".*

360. Turning to CRP, Mr. Kilshaw regarded it as being "*a poor cousin*" to BWP and he noted that it, unlike BWP was not based squarely on the legislation. KPMG never recommended CRP to a non-dom and there is no evidence that Grant Thornton did so.

361. In September 2004, in a telephone conference Mr. James Kessler QC (who Mr. Warburton described in his report as "*often regarded as a leading tax counsel on the tax treatment of non-domiciliary*") said that CRP with its uncertain success should not be necessary for a non-dom. In addition, Mr. Patrick Way of Counsel said of CRP that he disagreed with the promoters of CRP because it "*seems unlikely that the capital loss* [which was an important part of CRP] *would be available*". He also said that the use of BWP would escape CGT, and all these predictions have turned out to be correct. Mr. Way acted for the unsuccessful taxpayer in the *Drummond* case.

362. Mr. Warburton said that a reasonably competent non-dom specialist would advise that CRP was high risk. He also made it clear that if a non-dom specialist advised that the Claimant's domicile was too uncertain to proceed with a BWP, he "*did not know*" whether such a specialist would have recommended CRP instead. Indeed the compelling reasoning in the judgments in *Drummond* proves the serious shortcomings of CRP.

363. The evidence of Mr. Kilshaw was that he executed CRP for clients but only when they already had a gain to shelter and when there were no alternatives open to them. His view that this was "*an on-balance strategy which as I say is not a high endorsement*". He explained that KPMG also asked clients specifically to sign a letter saying that they recognised that a CRP strategy had weaknesses which was a course not adopted for those using BWP, and also that KPMG recommended that their clients should buy certificates of tax deposit to stop interest running if they got a tax charge which again they did not do in the normal course of tax-planning.

364. Mr. Kilshaw also said that he agreed with Mr. Kessler that CRP was "*uncertain*". In my view, CRP was an extremely risky device as it was so wholly artificial that a reasonably competent non-dom specialist would not have recommended it and indeed would have adopted the same approach as Mr Kilshaw.

365. I should add that I consider it to be very important that by October 2004, BWP had been operated for a substantial period of time without any challenge by HMRC and it was based on clear stutory language with any artificial steps. So I would have expected a non-dom specialist in October 2004 to have advised the Claimant to engage in BWP rather than paying the CGT due on the sale of the Claimant's BFL shares.

(vi) Conclusion

366. Pulling the threads together, I am unable to accept the evidence of Mr. Warburton on the strengths and weaknesses of BWS because he, unlike Mr. Kilshaw, lacks the experience of using and implementing it. In addition, he has not underpinned or justified the conclusions of his report with proper research.

367. I prefer Mr. Kilshaw's evidence and I have concluded that I should accept it and in particular his conclusion in relation to BWP that he *"would expect any reasonably competent accountant holding himself out as having expertise in advising non-UK domiciles to recommend this planning to the Claimant".* I will not repeat my reasons but will stress its proven record of robustness and its lack of artificiality which overcomes the views of those who have doubted its efficacy. Indeed, there has still not been any challenge to BWP. I add that, as I will explain, I have concluded that

the fact that the use of BWS by a seller of shares would not deter a prospective purchaser.

368. As Mr. Simpson points out those factors put forward by Mr. Kilshaw ignore the fact that CRP was many times more expensive that BWP, and indeed the Claimant had to pay £200,000 for it. Taking that factor into account would mean that it becomes even clearer that the Claimant would not have been advised by a non-dom specialist to enter CRP because it was very much more risky and much more costly than BWP.

369. For the purpose of completeness, I should add that the reasonably competent non-dom expert would have done what Grant Thornton and KPMG did which was to have advised the Claimant as a non-dom to engage in BWP and not to have embarked on CRP. There is no evidence of CRP being used for a non-Dom. Indeed for such a person, BWP would have been much more efficient than paying CGT.

G. THE BWS TIMING ISSUE

370. The issues that have now got to be considered relate to what would have happened after the Claimant had been advised to enter into BWP. There are two separate aspects to these issues The first is whether if the Claimant had been so advised, he would have taken that advice; and, if so, it then becomes necessary to consider the second issue which is whether the Claimant would have reached the stage of taking the shares offshore prior to 16 December 2004.

If the Claimant had been advised to enter into a BWP scheme, would the Claimant have taken that Advice?

(i) The Claimant's Threshold for Entering into BWP

371. The case for the Defendants is that if the Claimant had been advised to enter into the BWP, he would not have taken that advice unless it was extremely positive in that he was told that the use of BWP had a 90 per cent prospect of succeeding, but that he would have "*considered*" embarking on BWP if it had only a 80 per cent prospect of success. Then it is said by Mr Goodfellow that the evidence would not have reached that threshold of prospects of success for going ahead with BWP, because of the Claimant's questionable domicile status and other matters and that in any event, the Claimant would not have been prepared to pay the costs of BWS before the sale had been finalised.

372. The basis of that submission are the answers of the Claimant in cross–examination when the following exchanges occurred on the issue of whether the Claimant would have gone ahead when different prospects of success for BWP were being put to him by Mr Goodfellow:-

> ***A. If I'd been told it's got a success rate of over 90 percent, I would have took the risk, yeah.***
> *Q. But not otherwise?*
> ***A. I would have considered it -- I would have considered it. If it's 80 percent I would have considered it.***
> *1MR. JUSTICE SILBER: (To Mr. Simpson) Can you just let him finish.*

A. This is --
MR. GOODFELLOW: Would you have acted on it?
A. Yes, I would have. This is an important subject, my Lord, so at that point in time, if I'd known I was a non-dom, if I'd known there were all these advantages available to me, just the fact that I wasn't born in UK and my father wasn't born in UK, my whole persona about talking on these parameters would have been different. You know, at the time I had a bonus of a quarter of a million pounds coming in. I had a boat that was worth 1.2 million, so taking the risk of 100, 250 K, knowing it was robust would have definitely been -- would have definitely been a no-brainer but --
MR. JUSTICE SILBER: What do you mean by no-brainer, dead certainty?
A. Pardon?
MR. JUSTICE SILBER: What's a no-brainer?
A. Dead cert. Almost hundred percent success.*"*

373. Mr. Simpson submits that the Claimant did not actually state what *minimum threshold of success* had to be reached before the Claimant would refuse to become involved in BWS. He points out that the Defendants are attaching great importance to the passage to which I have referred in which the Claimant was asked about certain percentages for risk tolerance. It is true that the questioning was done from the highest levels of success down but Mr. Goodfellow did not explore the lower limits of prospects for success, which had to be reached before the Claimant would have decided that he did not wish to be involved in BWS. So, for example, the Claimant was not asked if he would have gone ahead with BWP if there had been, say, a 70% chance of BWS succeeding.

374. It is noteworthy that in the passage which I have quoted, the Claimant then proceeded to say that if the prospect for BWS "*was robust [it] would have been a no-brainer",* but he was not asked by Mr Goodfellow what he meant by the word "*robust"* or what degree of success was the minimum level which would fall into that category. The Claimant clarified his position in a witness statement adduced before he was recalled for further cross-examination when he explained that "*if my adviser had said to me 'there is no substantial risk of BWP failing", I would obviously have done it. It would have been a no-brainer*". He said that "*I only pick fights I think I can win*". In the previous paragraph of his witness statement, the Claimant had said that he would not have gone ahead with BWP if his adviser had said that "*there is a substantial risk of your BWP failing at the end of the day because the Revenue fights you on domicile and wins*". This evidence was not undermined or successfully challenged in cross-examination.

375. Pulling the threads together, the position is that although the Claimant used slightly different formulations from "*robust*" to "*no substantial risk of BWP failing*", the clear and unchanged position of the Claimant was that his threshold for not embarking on BWP was "*substantial risk of a successful challenge by HMRC*". The Claimant was not asked to explain what the term "*substantial risk*" meant in percentage terms. In

any event, I do not find percentages prospects helpful as they are difficult to apply and I prefer to apply descriptive words such as "*substantial risk*".

376. Incidentally, is also noteworthy that neither Mr. Warburton nor anybody else on behalf of the Defendant had given a percentage risk of BWP failing. When Mr. Warburton was asked to give the percentage of *Young v Phillips* risk, he said quite sensibly that he would not put a percentage on it.

377. As I have explained, there was a discussion about the issues in respect of which the Claimant had to be recalled for further cross-examination at the end of the evidence and the Defendants accepted that in the appropriate issue, the relevant risk threshold should be "*substantial risk*" but Mr. Goodfellow did not seek to pursue exact figures on percentages with him. In those circumstances, I do not consider it to be open to the Defendants to be able to put forward at this stage any particular percentage as the threshold which had to be reached before he could embark on BWP. It follows therefore that if the Defendants are to succeed on this issue, they need to show that any reasonably competent non-dom specialist would have warned the Claimant that there was a "*substantial risk*" of the BWP failing. I now turn to consider a number of individual issues put forward by the Defendants, which might have precluded the Claimant from going ahead with BWP.

(ii) Risk of a Successful Challenge by HMRC to the Claimant's Non-Dom Status

378. The Claimant would not have pursued BWP if he had been advised that there was a substantial risk of a successful challenge by HMRC to the Claimant's non-dom status but for the reasons set out in paragraphs 224 to 266 above, I do not consider that he would have been advised that there was such a risk.

(iii) Young v Phillips Risk

379. The Claimant accepts that if there was a substantial risk of BWP failing because of a successful challenge on *Young v Phillips* grounds, he would not have gone ahead with the BWS but I do not consider that the reasonably competent non-dom adviser would have advised that there was such a risk for the reasons which I have set out in paragraphs 267 to 280.

(iv) Loss of BATR Risk

380. I do not consider that the reasonably competent non-dom adviser would have advised there was such a risk of its potential loss for the reasons set out above. Furthermore I have concluded for the reasons set out above, there was not a substantial risk of the Claimant being found to be UK domiciled.

(v) Change of Law Risk

381. The Claimant accepts that if a reasonably competent non-dom adviser had advised that there was a substantial risk of BWP failing as non-doms would lose their privileged status and would be treated as domiciled in the United Kingdom potentially leading to a higher tax liability, he would not have adopted BWP. For the reasons set out in paragraphs 281 to 292 above, he would not have been so advised.

(vi) Loss of Control Risk

382. The Claimant accepted in his last witness statement that for a trust to be valid, the trustees had to own the assets and had to have complete discretion over the distribution over the capital so that the Claimant would only receive distributions of capital in their discretion. He also explained first, that he understood that the trustees would have regard to his reasonable wishes; second, that in practice the trustees would always be expected to follow his reasonable wishes; but third that although he had no entitlement to the trust fund, as a matter of course, it would be paid to him.

383. The Claimant had noted that Mr. Kilshaw had said that trustees were typically guided by a letter of wishes from the settlor and that if they were reasonable, the trustees would have regard to them. Mr. Warburton said that in practice there was an expectation the trustees would consider the position of the settlor and his reasonable needs, but that the trustees retained a discretion to refuse to comply with it with the result that there was a risk. He explained that in practice, this did not happen if there was a reasonable case for distribution and that offshore trustees were often professional trustees who would be guided by the expression of wishes of the settlor, who in this case was the Claimant.

384. The Claimant said in the light of that advice "*I would have had no hesitation at all in using a trust structure*". He explained his reasons for this approach which were first that he was a businessman, second that he knew people who used trusts for their tax-planning all the time; and third that any firm of specialist non-dom accountants would have set up the arrangement properly so that it would have worked and that he would have trusted them to do it. The Claimant said that if the specialist non-dom tax advisers were happy with the arrangement, then he too would be content. Indeed he explained that he would have trusted the trustees to have regard to his reasonable wishes.

385. When the Claimant was cross-examined about this, he explained that he would not have been reluctant to use a trust and that to do so would not have been a worry to him. He also added that it would not have been a real concern to him if the trust in question had a number of beneficiaries. When it was put to the Claimant that Mr. Kilshaw had given unchallenged evidence, the trust could be set up with the Claimant as the sole beneficiary, then the Claimant said that he would have been happy with that kind of regime. I have also dealt with this in paragraph 301 to 312.

(vii) Costs of BWS

386. I agree with Mr. Simpson first that the effect of warnings on costs must be considered against the background that the Claimant was actually prepared to spend £200,000 on the MTM scheme and second that it has not been suggested that the Claimant would not have been prepared to spend a similar sum on BWP. The Defendants submit that the level of the costs for entering BWP were such that the Claimant would have preferred to use a tax-planning device, such as CRP which would have enabled him to wait until the sale of BFL had been concluded before implementing the planning. The Claimant originally said that he would have been prepared to pay £20,000 to £30,000 to implement the BWS.

387. This point was put to the Claimant when he was recalled when it was suggested to him that he would not have prepared to pay £139,000 the Defendants' "*figure*" together with Mr. Scott's fees even when there was no certainty that the sale would have been completed. The Claimant explained that by the time at which he would have had to make these payments, he would already have met a non-dom specialist and then he would have had all the reassurance probably from KPMG that the BWP was "*robust*" and "*substantially risk free*" so that in relation to the issue of whether to use BWP "*I would have been very comfortable with doing that*". He also explained that there then was such interest in BFL so that he knew one way or another that it was going to be sold.

388. Mr. Simpson submits first that the Defendants' figure of £139,000 as representing the costs of professional advice and of the stamp duty was too high, but second, that in any event this figure of £139,000 would still have been £61,000 less than the costs of the CRP scheme which the Claimant entered. I should add that in any event, as I have explained, the costs actually payable were somewhere in the region of £83,800 including stamp duty and that this would also have been substantially less than the figure of £200,000 which the Claimant spent on the CRP scheme. I should add that the additional costs and complexity of changing the Articles of BFL would not have deterred the Claimant from becoming involved in BWP.

(viii) Risk of BWP Making BFL Shares Less Attractive to a Prospective Purchaser

389. This issue was not put to the Claimant and so this issue cannot be pursued. In any event, I accept Mr. Kilshaw's evidence based on his experience, which was not challenged that the non-dom specialist would not have advised a client that entering BWS made the shares less attractive to a prospective buyer and for the reasons set out in paragraphs 313 to 316.

(ix) The Physical Transfer

390. I do not think that the problems of the physical transfer of the bearer warrants to Jersey and the costs involved would have deterred the Claimant from entering into BWP.

(x) Costs

391. In a letter from Mr. Purnell to the Claimant of 22 February 2005, he said that the Claimant had indicated that he did not wish to undertake any specific tax saving scheme "*until the deal is completed for certain*". The Claimant explained that this comment was made against the background that the only scheme under consideration was CRP planning, which was costing between £200,000 and £400,000, but that if it had *"been explained to me that other more robust planning was available at £20,000 to £30,000 but had to be implemented pre completion, I would have opted for that planning".*

392. I have found all this evidence from the Claimant very convincing and I am quite satisfied that the Claimant would have been prepared to pay the much lower cost of BWP before the sale had been completed when he was very confident that a sale would be completed rather than the more expensive CRP.

393. For all those reasons I am satisfied that the Claimant would have entered into BWP if he had received the advice of the kind to which I have already referred.

Would the Claimant have reached the stage of taking the shares offshore prior to 16 December 2004?

394. The Defendants have not pleaded that that the Claimant would not have reached the stage of taking his BFL shares offshore prior to 16 December 2004. The significance of that date was that the legislation blocking BWS came into force with effect from 16 March 2005. It was agreed between the experts, that *"Bearer Warrants needed to be held offshore before being placed in trust to reduce the risk of argument about situs. We agree that there was no stated minimum or maximum period for these purposes but that as advisers we would have been comfortable with a period of about 3 months".* So that shows the relevance of the Claimant taking his BFL shares offshore prior to 16 December 2004, which was three months before the blocking legislation came into effect.

395. Not only has this allegation (namely that the Claimant would not have reached the stage of taking his BFL shares offshore prior to 16 December 2004) not been pleaded, but also it was only raised late in the cross-examination of the Defendants' last witness, Mr. Warburton, even though it was not in his report. It was not put to the Claimant or Mr. Kilshaw. My instinctive reaction is that this point is not open to the Defendants, but I need not decide that point because, as I will explain, I consider that the Claimant would have reached the stage of taking the shares offshore before 16 December 2004.

396. Mr. Simpson contends that the Claimant would have reached the stage of taking the shares offshore prior to 16 December 2004, while the Defendants' case is that it would have been impossible to have achieved this.

397. Mr. Goodfellow makes not merely the same submissions that he made when contending that the Claimant would not have sought advice from a non-dom specialist if he had been advised to consult such a person by the Defendants as I have set out, but he also makes the additional contentions that:-

a. There was no particular reason to believe that blocking legislation would have been introduced in the 2005 Budget. Therefore the question of how quickly the Claimant would have progressed with any tax-planning had to be addressed by reference to the situation in which none of the relevant participants were aware of or foresaw that there was any particular need for urgency or any reason to suppose that the Claimant would have approached the matter with sufficient urgency to have reached the stage of bringing the warrants offshore prior to 16 December 2004;

b. The Claimant would not have taken the shares offshore before 16 December 2004, particularly because of his wish to avoid the risk of a dry tax charge or the risk of the Claimant being taxed by reference to a significant gain realised by the Trustees on the onward sale when such gain would not qualify for BATR and which would therefore be taxed at a higher rate in the event that a tax charge applied;

c. There would have been a natural tendency on the part of the Claimant to delay the transfer of the warrants into trust until the sale of his BFL shares was highly likely to go ahead in order to mitigate the risk of the dry tax charge and of being deprived of BATR;

d. Embarking on BWP would have involved substantial upfront costs and it would have been far from certain until well into 2005 that BFL would be sold; and that

e. Apart from needing to seek and to obtain the advice of a non-dom specialist, the Claimant would have had to persuade Mr. Scott to consent to the implementation of the BWS. The unchallenged evidence of Mr. Scott was that he would have referred the matter to his corporate solicitors for advice and that would necessarily have entailed delay. So time would have been needed to be spent first in formulating a proposal to put to Mr. Scott; second in Mr. Scott instructing his own advisers and in obtaining their own advice; and third in Mr. Scott considering the advice and then reaching a decision. All this had to take place at a time when nobody knew that there was any particular need for urgency in relation to tax-planning which the Claimant would have been seeking to undertake.

398. I have already explained why I am quite satisfied that the Claimant would have sought advice from a non-dom specialist very shortly after the meeting at Mr. Purnell's house at 5pm on 2 October 2004 as he was determined to ascertain ways of eliminating or reducing his CGT liability. His case is that he would have gone to KPMG where he had a contact for advice and he indicated that he would have done it on the Monday of the following week. I have no reason not to accept this evidence. In any event, the Claimant's case is that even if he had not contacted KPMG, he would have asked Mr. Purnell to recommend a non-dom specialist and he would have followed it up immediately. Mr. Purnell would then have asked Mr. Stanford and he would have recommended Grant Thornton, who I am sure would have been keen to advise the Claimant very speedily.

399. I accept all this evidence and also the Claimant's evidence that he would have been extremely keen to find a way in which this very substantial CGT liability might be extinguished or greatly reduced on the deal which was the culmination of many years of hard work. He attached very great importance to finding ways to reduce or extinguish his CGT liability as is shown by the fact that he did, after all, make time to see Mr. Purnell at 5pm on Saturday 2 October 2004 to discuss potential tax saving schemes, although he must have been very busy at that time. I have already explained that the Claimant acted with great urgency when told in 2010 that his non-dom status would have afforded him advantages as he arranged to see a non-dom expert later that week. I do not think that he would have acted differently if given the advice to consult a non-dom expert in October 2004.

400. I have already explained that the Claimant had other meetings with Mr. Purnell to discuss tax saving on 11 February 2005 and 21 March 2005 at times when he was deeply involved in running and trying to sell BFL. I also accept his evidence that he would have treated pursuing BWP much more promptly than he did the issue of saving VAT on the sale of the boat for the reasons, which I have already explained, which were that there was no urgency about that as the sale of the boat was due to

take place in June 2005 and that the scheme in relation to it could have been implemented "*literally a few weeks before the boat was being delivered*" while the sale of BFL was much more imminent. It is noteworthy that Mr. Lawton Smith had written to the Claimant on 2 October 2004 stating that offers were coming in and that completion of the sale would be assumed for cost purposes to be taking place by the end of February 2005. As I have said, the Claimant was confident in October 2004 of selling his BFL shares.

401. Turning to the time that it would have taken to find an appropriate non-dom specialist, Mr. Kilshaw said he would have been comfortable with a period of three days and it might have been as little as five minutes. I accept his evidence that a non-dom specialist would have been very keen to deal with the matter speedily because they would have realised that they could add value to the client and (perhaps more importantly) that this work would generate substantial fees. Mr. Warburton was much more vague about this and he said in re-examination that it would take "*some time*" to find a non-dom specialist. Bearing in mind that I accept that the Claimant would have approached KPMG and Mr. Kilshaw's evidence, I have no doubt that matters would have moved very speedily for the reasons which he explained.

402. The next issue that has to be considered is how long the rest of the process would then have taken. Mr. Warburton says that if the process had started in October 2004, there could have been a sale of shares by the Trustees in January or February 2005 and he accepted that the papers relating to his firm showed that it could succeed with much shorter gaps. The evidence of Mr. Kilshaw, who unlike Mr. Warburton has much experience of BWP, was that the first question for a non-dom specialist when meeting the Claimant would be to ascertain if he had a non-dom status. He explained that such a person would note first the foreign-sounding name of the Claimant; second that he had a domicile of origin in Iran, third that he had connections with Iran and fourth that he did not intend to stay permanently in the United Kingdom. He would then have made a judgment which, if necessary, could have been supported by a second opinion from Counsel. The Defendants did not put a positive case that it would take longer, but in any event, I accept Mr. Kilshaw's evidence which was based on his very substantial experience and it is logical and sensible.

403. Mr. Goodfellow contends that even if the non-dom specialist had advised the Claimant to implement BWP, the Claimant would not have gone ahead and he pointed out that on 16 February 2005, the Claimant wrote to Mr. Purnell that he thought that it was dangerous to commit himself to a scheme until "*we are 100% sure that the deal will go through*". So it is said that the Claimant would not have committed himself to BWP until he was satisfied that the sale of BFL would proceed.

404. There is, however, an important difference between the scheme being considered in February 2005 (CRP) and the scheme which would have been under consideration in October 2004, which was BWP, because CRP could take place after the sale had been completed while BWP had to be implemented before the sale. I am satisfied that the non-dom expert would have also advised the Claimant that BWP was robust in that it had not been subject to any challenge by HMRC but had to be completed before the sale and then the Claimant would have agreed to press ahead speedily with it especially as there must have been some prospect of a speedy completion as the Claimant clearly thought as was shown by his Saturday meeting at Mr. Purnell's home on 2 October 2004 to discuss ways of reducing his CGT liability and the email

from Wragges of that day which indicated that they were assuming a February completion for costing purposes.

405. Another point made by Mr. Goodfellow is that the Claimant in his first witness statement said that he would have been able and willing to pay the £20,000 to £30,000 for the costs of BWP, but that has turned out to be an understatement. In oral evidence and in a further witness statement, he said that he would be prepared to pay up to £250,000 for the cost of implementing the BWP. He has also explained that the figures of £20,000 to £30,000 were the initial figures suggested to him. I have no doubt that he would have paid the sums he mentioned for a robust scheme with a unbroken history of success particularly bearing in mind the fact that he paid £200,000 for the Montpelier CRP scheme, which was always less likely to be effective than BWP.

406. Once the decision had been taken that the Claimant was a non-dom, Mr. Kilshaw said that the implementation of the BWP would have been manageable within a week and that it could have taken place within two or three weeks comfortably. Thus his evidence was that in his experience, it would have been possible for the Claimant to have taken the bearer shares offshore in early November at the latest and earlier if he had given the tax-planning greater priority. No positive contrary case was put to Mr. Kilshaw whose evidence was not challenged and in any event, I have found it realistic. Mr. Warburton's evidence was eventually that he was happy to work on the assumption that the shares would have been converted to bearer shares between mid-October and the end of October.

407. I was concerned about the position in relation to Mr. Scott, who was domiciled in the United Kingdom and so was ineligible for BWP but whose consent was needed for the Articles of BFL to be amended so as to allow bearer warrants to be issued. He had the opportunity if so minded to veto the issue of the bearer shares and so to prevent the Claimant embarking on BWP. Mr. Kilshaw explained that he had much experience of the situation in which a non-dom client who wanted to engage in BWP had a joint seller who was United Kingdom-domiciled. He explained that the non-dom client would have been told to go and talk to his joint seller (who in this case was Mr. Scott) explaining that BWS would not harm the joint shareholder and that it was very important for the client for the scheme to go ahead so they could both make money. I add that the Claimant gave evidence that in Autumn 2004, he and Mr. Scott were on very good terms, which has not been disputed by Mr. Scott in his witness statements although his recollection of some events is different from that of the Claimant.

408. Mr. Kilshaw went on to say that the setting up of the Trust could have taken place at the same time when the Claimant was speaking to Mr. Scott while at the same time the amendment to the Articles and the Shareholders Agreement would have taken place. This evidence was not challenged and I have no reason not to accept it as it seems very sensible especially as it is supported by Mr. Kilshaw's experience.

409. Ms Haxby, who was the Defendants' corporate finance expert, said that in her opinion, it would have taken between two to three weeks to reach agreement between the Claimant and Mr. Scott on matters which sufficiently protected Mr. Scott's interests but that this could happen at the same time as the setting up of the Trust. She also accepted that deals could be done very quickly if clients wanted them to be done

speedily and if they were prepared to be available to make decisions. Ms Haxby had had no previous experience of BWP and therefore spoke in a general manner. I rather prefer the evidence of Mr. Kilshaw who has dealt on many occasions with the position where one joint share holder wished to engage in BWP while the other, who was United Kingdom- domiciled, could not do so.

410. I was fortified in accepting the evidence of Mr. Kilshaw by a redacted KPMG report on BWP. In one case, the start date was 22 April 1997 with the predicted export date of the shares being before 1 May 1997, while in another case the start date was 9 February 1998 with the predicted export date being 17 February 1998.

411. In one of the cases handled by Grant Thornton, it is noteworthy that Grant Thornton had been initially approached in early October 2003 with it being noted that there was "*no desperate timetable because this is medium term planning"* and it was thought that the sale would take place *"in say, two years time*". On 3 November 2004, Grant Thornton was contacted by the client to indicate there may be a number of presentations to both the trade and venture capitalists, but that nothing was certain and the commercial deal was still evolving but the vendors were looking to have a paper about bearer shares so that purchasers could at least be on notice of the issue and therefore, it would not be an issue in later negotiations. In response, Grant Thornton produced a timetable on 16 November 2004 which indicated that the bearer warrants would be taken to the Isle of Man on 1 December 2004 which was only two weeks later.

412. All this suggests that if the Claimant had approached a non-dom specialist in early October 2004 saying first, that the sale was likely to go through by the end of February 2005 which was the estimate given by Mr. Lawton Smith to the Claimant on 2 October 2004; second, that the Claimant and Mr. Scott wanted to sell the company, then the reasonably competent non-dom specialist would have advised the Claimant to start implementing the planning immediately so that the warrants would have been taken offshore within two to three weeks.

413. I must now consider the point that has been raised by Mr. Goodfellow that there would have been no sense of urgency in undertaking the planning in October 2004, but this is a new point which was not put to Mr. Kilshaw. It is relevant and surprising that the Defendants did not ask for Mr. Kilshaw to be recalled to be cross-examined for this point to be put to him. Although I have doubts as to whether the Defendants are entitled to pursue this point concerning urgency, there was to my mind sufficient information to show a sense of urgency.

414. In reaching this conclusion it is of critical importance to remember that on 2 October 2004 the Claimant had been told by Mr. Lawton Smith that the sale was assumed for cost purposes to be occurring before the end of February and of course there needed then to be a three-month gap before the warrants were settled in trust. The Claimant would also have known that BWP had to be completed before the sale was completed. In addition, as I have explained, the approach of the Claimant when told that non-doms have advantages was to act speedily. To my mind, this would have led to a great sense of urgency as the there had to be a three-month gap before the warrants were settled in trust.

415. Another reason why there would be a need for urgency was, as Ms Haxby said and which was echoed by the advice given by Grant Thornton in Case 6, that was if BWP was to be used, that she would have recommended that a potential purchaser should be presented with a deal structure with BWP with this already in place; so in other words, there would be a "fait accompli". That would have required speedy action and I believe that the Claimant would have been so advised.

416. In reaching these conclusions I have been fortified by noting that Mr. Kessler QC's advice to his client in September 2004 was that shares should be converted as quickly as possible before the sale was certain. In his words "*any prospective purchaser should be advised that the shares will be converted to bearer shares at the outset to avoid any issues during the sale process*". This seems very sensible advice and would have been given to the Claimant.

417. It is also relevant that in order to ensure that the steps taken in BWP did not look like a series of pre-ordained steps so as to engage *Ramsay*, the Claimant is likely to have been advised that the implementation of the planning would begin and that the shares could and should be taken offshore when the proposed sale was uncertain.

418. I have looked in vain to see if there is anything in the Defendants' case which undermines all this evidence which I find cogent. I was not impressed by Mr. Goodfellow's challenge to the Claimant's evidence that he would have found a specialist within days. Further he did not undermine the Claimant's evidence that he would have regarded CGT tax saving as a priority so as to be on equal basis with selling the company.

419. Standing back I am quite satisfied that the evidence shows that steps would have been taken by the Claimant to ensure that the shares were offshore in a week or by late October or early November at the latest but certainly well before the critical date of 16 December 2004. The Claimant is a dynamic man with much energy.

H. THE Mr. SCOTT ISSUE

(i) Introduction

420. As I have explained, a critical issue in this case was whether Mr. Scott would have consented to the amendment of the Articles of BFL so as to allow bearer warrants to be issued because without his consent, they could not be issued and the Claimant could not then engage in BWP.

421. The pleaded issue concerning Mr. Scott's consent in Paragraph 43(2) (d) of the Re-Re-Re Amended Defence is that he:-

> *"would have been very cautious about giving his consent to any such conversion of the Claimant's shares in the event that it adversely affected his personal tax position"* and that:-
>
> *"In order to determine whether [Mr. Scott's] personal tax position had, Mr. Scott would have sought specialist advice and would have required the Claimant to pay the costs of that advice"*.

422. The Claimant said that he would have agreed to pay Mr. Scott's costs. So the issue relates to whether a decision by the Claimant to implement BWP would have *"adversely affected [Mr. Scott's] personal tax position"* and that explains the formulation of the present issue which is whether BWP would have affected Mr. Scott's tax position so that he would have been "*cautious about giving his consent*", and not that he would have then refused consent.

423. The Defendants, who served two witness statements from Mr. Scott, did not call him nor did they call Mr. Scott's corporate solicitor, Mr. Pysden of Eversheds, who have also acted for the Defendants in this action. Although Mr. Scott disagreed with the Claimant, this related to matters which were not relevant.

424. Indeed what Mr. Scott says does not amount to an assertion that he would not have consented to the implementation of BWP, although he noted that he had read the reports of Ms Haxby and Mr. Warburton. He then says that:-

> *"If Mr. Mehjoo entering into the tax scheme could have adversely affected my personal tax position it would have been unacceptable. I see from Mr. Warburton's report that there was a risk that it could have done. I would have, therefore, sought advice from a tax specialist that Mr. Mehjoo's intentions would not have had adverse impact on my personal tax position."*

425. I ruled that was the proper issue to be considered, and when the Defendant wanted to argue that Mr. Scott would have refused to consent for some other reason, I held that could not be pursued. My reason was that no application had been made (or has now been made) to amend further the Re-Re-Re Amended Defence so as to contend that Mr Scott would have refused to consent for some other reason. The granting of any such amendment would have been very likely to have necessitated the calling of further evidence and further delayed the trial.

426. The case for the Defendants is first that in order to implement the BWS, it was essential for the Claimant to have obtained the consent of his fellow-vendor of the BFL shares namely Mr. Scott; and second that the onus of proving this was upon the Claimant. These contentions are agreed.

427. The Defendants rely on a contention that Mr. Scott would not have consented because of the effect of the Taxation of Chargeable Gains Act 1992 ("TGCGA") and for a series of other reasons, which the Claimant contends have not been properly pleaded and/ or are in any event not supported by evidence.

428. The case for the Claimant is that there is no assertion in either of Mr. Scott's witness statements or in the Defendants' pleadings that Mr. Scott would not have consented. So although Mr. Scott's evidence could have shown that the Claimant could not have engaged in BWS, it did not do so.

(ii) The Company Reconstruction Point and TGCGA

429. In order to show why Mr Scott would not have consented, Mr. Goodfellow attached importance to the structure of Mr. Scott's deal with Phoenix and the impact on

TGCGA on them. He started off by explaining that in order to acquire BFL, Phoenix agreed in the Share Purchase Agreement ("SPA") to pay the Claimant and Mr. Scott consideration, Mr Scott was to receive:-

b. Initial consideration of £4,500,000 in cash and £4,375,000 in loan notes (Schedule 1 of the SPA); and

c. Deferred consideration consisting of £1,018,500 to be satisfied in preference shares (£254,626) and loan notes (£763,874) (Schedule 2 of the SPA).

430. Mr Scott was making a disposal of his shares in BFL and absent the application of section 135 of the Taxation of Chargeable Gains Act 1992 ("TGCGA"), the entirety of the consideration which he received (whether in the form of shares, cash or loan notes) would be chargeable consideration equal to their open market value and so would be potentially subject to CGT.

431. An exception to this occurs where an exchange of shares in one company for shares or debentures in another is treated as not involving any disposal. Similar provision is made for cases involving the issue of securities, as part of a scheme of reconstruction of a company, by TCGA s 136.

432. So it is common ground that, where the requirements of TCGA ss 135 and 136 are satisfied, Mr Scott would in principle be taxed, in so far as he exchanged shares in BFL for (i) shares in Phoenix and (ii) loan notes, as if there had been no disposal. If these provisions were to apply, Mr Scott would then upon the sale of BFL, be treated as making a partial disposal of his share in BFL in return for the cash consideration, but the consideration in the form of shares and loan notes would be excluded from the chargeable consideration. The part of his shareholding in BFL, which was not disposed of in return for cash, would then be treated as having been replaced by shares and loan notes issued by Phoenix.

433. Mr Scott would then be treated as having the same base cost in the Phoenix shares and loan notes as he had had in relation to the equivalent part of his BFL shares. When those loan notes were repaid or the Phoenix shares were sold or otherwise disposed of, Mr Scott would then be treated as making a disposal of those loan notes or, as the case may be, the Phoenix shares.

434. It is important to appreciate that neither TCGA s 135 nor s 136 would apply, however, unless the exchange of shares/debentures:

a. Is effected for bona fide commercial purposes (TCGA s 137(1)); and

b. Does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax (TCGA s 137(1)).

So the position is that, where either requirement is not satisfied, the "no disposal" treatment does not apply, and there would then be an immediate charge to capital gains tax.

435. It would therefore have been essential for Mr Scott to ensure that the provisions of TCGA s 137 did not apply. The reason for that is that if TCGA s 137 was engaged, it

would realise a charge to capital gains tax not only on the cash consideration, but also in the consideration in the form of shares and loan notes, according to their then open market value, and not what Mr Scott ultimately received from such shares or loan notes. This would be another "dry" tax charge in the sense that he would be being charged to tax by reference to a consideration which to a material extent did not represent cash received.

436. It is accepted by all parties that the exchange of Mr Scott's shares in BFL for Phoenix shares and loan notes would have been effected for bona fide commercial reasons. Mr. Goodfellow contends that the difficulty for Mr Scott would have been in establishing that the exchange did not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, would be the avoidance of liability to capital gains tax or corporation tax.

437. This difficulty arose in the present situation, according Mr. Goodfellow from the fact that the BWS which the Claimant claims he would have put in place would be "*plainly a tax avoidance arrangement*". The issue of bearer warrants required Mr Scott's consent. The bearer warrants were being issued with a view to the bearer warrants being sold by the offshore trust to the same purchaser that would be buying Mr Scott's shareholding in BFL as part of the same deal. So Mr. Goodfellow submits that the Claimant's tax avoidance plan was part of the same "scheme or arrangements" as that which comprised the sale of Mr Scott's shareholding partly for cash or for shares. Therefore, unless Mr Scott could show that the avoidance of CGT was neither the main purpose nor one of the main purposes of the scheme or arrangement, s135 would be prevented from applying by s137.

438. Mr Warburton's evidence in his first report is according to Mr Goodfellow supportive of this because he stated (with emphasis added) that:-

> *"If the Bearer Warrant Scheme were being implemented in the lead up to the sale (e.g. after the negotiations with the eventual purchaser had begun) and he had been offered a shareholding in the purchasing vehicle (as I believe was the case), he would have been concerned that the implementation of what was a tax avoidance benefit* ***might*** *prejudice his ability to carry out a tax neutral exchange of his shareholding. The cause for concern would be whether steps in the Bearer Warrant Scheme were part of the same 'arrangements' as Mr Scott's exchange of shares in BFL for shares and/or debentures in the purchase vehicle".*

This would be exactly the scenario which Mr Scott faced on the sale of BFL. Mr Warburton observed in that event that:-

> *"Mr Scott would need to show that the tax avoidance purpose behind the Bearer Warrant Scheme was not one of the main purposes of the arrangements."*

None of this evidence was challenged.

439. It is accepted by Mr Goodfellow that Mr Scott could have sought clearance from HMRC on the ground that it was satisfied that the exchange was affected for bona fide commercial reasons and that the exchange did not form part of any tax avoidance arrangements (TCGA s 138(1)). So Mr Warburton observed (with emphasis added) that:-

> *"It is likely that [Mr Scott] would want to apply for a clearance [i.e. a clearance under TCGA s 138] in relation to the exchange, making full disclosure of the Bearer Warrant Scheme. He would have a* ***reasonable chance of obtaining such a clearance because he was not benefitting from the tax avoidance****, but Mr Scott would not want to tax any risk of HMRC subsequently contending that he had made a chargeable disposal of that part of his shareholding in BFL which he had exchanged in return for the shares/loan notes in the purchaser.".*

440. The case for the Defendants is that the need to obtain this consent would have been a factor which would have dissuaded Mr. Scott from giving consent as it would have entailed the requirement for an additional step in the sale process, which would otherwise have been unnecessary.

441. In my view, these matters, interesting as they are, do not enable me to find that Mr. Scott would have refused consent for the following reasons.

442. First, Mr. Scott has not stated that the need to obtain this consent would have deterred him from giving consent to the alteration of the Articles so as to enable bearer warrants to be created. That is of crucial importance as he alone is the person who could have said how he would have reacted. So Mr Goodfellow's submissions are not supported by any statement by Mr Scott showing how this issue would have affected his attitude to giving consent and that is the critical issue. Indeed he has made two witness statements and had not referred to this issue in either of them even though he had ample opportunity to do so.

443. Second, there is no cogent expert evidence or assertion by Mr. Scott that the need to obtain this consent would have prejudiced his tax position which is the only basis pleaded by the Defendants as showing why Mr. Scott would or might have refused consent.

444. Third, the Claimant has not been given an opportunity to obtain such evidence relating to this issue because this point has not been pleaded as it should have been. The witness statement from Mr. Kilshaw shows that such evidence could well have been available.

445. Fourth, in any event, the Inland Revenue would not have sought to challenge the transactions as not being commercial just because one shareholder had engaged in BWP even if BWP had been executed before the buyer had been identified. Mr Kilshaw, who has very substantial experience of BWP, has explained that in 2004, the practice of the Inland Revenue was to look at the transaction in the round and to ask the question "*is the sale being effected for commercial reasons*?" I agree with Mr Kilshaw that the present sale was an arm's length transaction freely negotiated

between independent third parties, namely the Claimant, Mr Scott and the purchaser (Phoenix). In consequence, it is quite likely that any reasonably competent accountant would have told his client that the Inland Revenue would not be expected to challenge on those grounds.

446. He fortified this point by noting from the papers presented to the Court by Grant Thornton show that they had sought and had obtained from the Inland Revenue a Section 135 TCGA 1992 clearance for a transaction involving BWP which was a case which was handled by Ms. Sue Knight of that firm. Mr Kilshaw says that when he saw those papers, he was not surprised because this accorded with how he would have expected the Inland Revenue to have dealt with the question. Nothing to the contrary has been suggested on this point, which I accept. In this connection, is noteworthy to recall that Mr Warburton in the passage quoted above noted (with emphasis added) that Mr Scott "*would have a **reasonable chance** of obtaining such clearance because he was not benefiting from the tax avoidance*".

447. Fifth, the Inland Revenue would not necessarily have considered that what was proposed would form part of a scheme or arrangement of which the main purpose or one of the main purposes was avoidance of liability to CGT. In my view, it is strongly arguable at least, that BWP was not tax avoidance but tax mitigation. Indeed, the transaction which has to be looked at is the sale to Phoenix and that transaction did not have as its purpose or one of its main purposes the avoidance of liability for CGT or Corporation Tax.

448. I should also add that Mr. Kilshaw points out that Mr Scott would, in any event, have come under close Inland Revenue scrutiny because he had (unlike the Claimant who received cash) exchanged his shares for loan notes and therefore irrespective of whether the Claimant had engaged in BWP, his loan note arrangement would have prompted close Inland Revenue scrutiny. Accordingly a reasonably competent accountant would have advised Mr Scott that a tax clearance under section 137 TCGA would have to be submitted. He would have needed to persuade the Inland Revenue that he did not take the loan notes for tax avoidance motives, particularly when the other shareholder, namely the Claimant, took cash.

449. I accept as correct the evidence from Mr Kilshaw speaking from his experience when he said that the Inland Revenue would need to know whose suggestion it was to pay part of the consideration in loan notes. In other words, the relevant questions are "*did the suggestion originate from the purchaser of the shares or did Mr Scott ask for it?",* and *"If it was Mr Scott why did he do so?"* All these matters would and should have been the subject of a detailed inquiry on Mr Scott.

450. For all those reasons, I am satisfied that the company reconstruction provisions would not, in the critically important words of the Re-Re-Re Amended Defence have "*adversely*" affected [Mr Scott's] personal tax position. Indeed Mr. Scott does not even say so and that fact is fatal to the Defendants' assertions.

(iii) The Defendants' Other Points

451. Mr. Goodfellow contends that:-

a) The unchallenged evidence of Mr. Scott shows that he was nervous about whether any sale of the BFL shares would go through. Indeed Mr. Scott explained in his witness statement that Ford Campbell continuously warned him and the Claimant that until the deal was done, there was a risk that the sale might not go through and that he was never over-confident that the deal was guaranteed to go through. Mr. Scott does not say for that reason, he would not have consented. In any event, this point has not been pleaded and so it cannot be pursued especially as the Claimant has thereby been deprived of the opportunity of calling evidence on this issue;

b) It is relevant that Mr. Scott also said in a witness statement that he would have been cautious about giving his consent to permitting the Claimant to use BWP as it "*may have delayed the deal process and devalued the business… I would have referred the issue to my corporate solicitors for advice*". This fear about BWP delaying the process of sale and devaluing Mr Scott's interest has not been pleaded and it has not been said that Mr. Scott would have refused to consent on these grounds. In any event, Mr Kilshaw's evidence, which I accept, indicates that those fears are not justified and I must repeat that he was the only expert, who had experience of implementing BWP;

c) Mr. Scott is a UK-domiciled individual and he could not possibly have benefited from the implementation of a BWS as it could well have operated to his detriment by jeopardising the potential sale of BFL. This point is not pleaded and Mr. Scott has not said that he would have refused to consent on these grounds;

d) The relationship between the Claimant and Mr. Scott was not as cooperative or as friendly as the Claimant had stated with Mr. Scott feeling that he had been short-changed on the merger and he was pressing for additional compensation. Again this has not been pleaded or put forward by Mr. Scott as a ground for refusing to consent and so cannot be relied on by the Defendants;

e) The evidence from Ms Haxby was that the advice that she would have given to Mr. Scott was not to give his consent unless first he trusted the Claimant and second he received some financial benefit for allowing the BWS to proceed. That is not what is pleaded or what Mr. Scott said which would have been the decisive factor in determining whether to give his consent. So these matters do not assist the Defendants; and

f) There was some form of dispute between the Claimant and Mr Scott. I do not think that it is relevant to the pleaded issue. In case I am wrong the evidence given by the Claimant was first that he and Mr. Scott had been best friends for 20 years; second that in October 2004 Mr. Scott would have given his consent to BWP; and third that he would not have asked for anything in return because he would not have hesitated to help out the Claimant. The Claimant said in response to a question from Mr. Goodfellow suggesting that from October 2004 onwards and in particularly by February 2005, his relationship with Mr. Scott was

not good that "*you are completely wrong in that*". I have no reason to doubt this especially as no contrary evidence was adduced.

So none of the grounds show that Mr. Scott would have refused to consent,

452. I have concluded that there is no basis for concluding that Mr. Scott would have refused to consent because:-

a) The only issue raised in the pleadings is the determinative factor that Mr. Scott would have "would have been very *cautious* about giving his consent to any such conversion of the Claimant's shares in the event that it adversely affected his personal tax position";

b) The highest that the case can be put for the Defendants is that Mr. Scott said that he would have sought tax advice but there has been no evidence given as to what the advice would have been other than the statement of Mr. Kilshaw which was that Mr. Scott would not have been prejudiced by the implementation by the Claimant of the BWP;

c) There has been no assertion by Mr. Scott in either of his witness statements (one of which was served during the trial) or in the pleadings that the use of BWS by the Claimant would have adversely affected his tax position;

d) Most importantly, even though he had many opportunities to do so, there has been no assertion by Mr. Scott in either of his witness statements (one of which was served during the trial) or in the pleadings that he would not have consented to the implementation of BWP or the alteration of the Articles of BFL;

e) Mr. Kilshaw said in evidence that the use by the Claimant of BWP would not have prejudiced Mr. Scott in any way. Nothing has been adduced to the contrary which shows that this is incorrect; and that

f) No other ground has been pleaded or proved which would have shown that Mr. Scott would not have consented to the implementation of BWP or the alteration of the Articles of BWS. Indeed the this appears to be a deliberate decision of Mr. Scott not to state this.

These factors are determinative of the pleaded issue in the Claimant's favour.

I. THE BWP ADVANTAGE ISSUE

453. The issue that now has to be considered if whether if the Claimant had engaged in BWP, it would have been successful in saving him CGT and, if so, how much or whether it would have made him worse off because of (i) a challenge by HMRC to the BWP; (ii) the act of settling the bearer warrants in BFL on trust would have the result that the Claimant would only have the limited rights of an interest in possession beneficiary with the result that his interest would have been devalued to £6,195,099 leaving him worse off by approximately £1.8 million; and (iii) a charge to Income Tax of not less than £1.7 million which would have arisen under the Employment Related Securities legislation.

Challenge By HMRC?

(i) The Correct Approach

454. The case for the Claimant is that BWP would have been effective in ensuring that he would not have to pay CGT unless first, HMRC would have challenged the scheme and second, HMRC would have been successful in challenging the scheme in Court.

455. The response of Mr Goodfellow is that if the BWP would not as a matter of law have been effective, the Claimant cannot recover. In other words, his submission is that the Court should not consider whether HMRC would first have challenged the scheme, because the only question for the Court is to determine whether BWP as a matter of law absolves the Claimant from the need to pay CGT irrespective of whether HMRC would have sought to challenge the BWS undertaken by the Claimant.

456. So in the words of paragraph 214(1) of Mr. Goodfellow's closing submissions:-

> *"the paramount question for the Court is whether it considered that the CGT in question was properly due. Were it otherwise, [the Claimant] would be compensated for tax which he should have paid anyway and that is not a loss which the Court should be prepared to recognise".*

457. He submits that the approach of the Claimant is contrary to principle and to authority in requiring the Court to consider whether HMRC would have challenged the scheme. Mr Goodfellow seeks to derive support from the approach of the Court of Appeal in *Grimm v Newman* [2002] STC 1388 in which it had rejected the contention of the Claimant that he had been given negligent tax advice as it held that the Defendants' advice had been correct in law. The Court in that case addressed the question by making its own analysis of the legislation provisions and the efficacy of the scheme, but Mr. Goodfellow stresses the fact that the Court did not mention, let alone determine, the issue of whether the Revenue might have challenged that alternative scheme as showing how the Court should now consider matters.

458. Indeed, it is correct that Morritt VC and Potter LJ when giving judgment in the *Grimm* case proceeded to consider whether on the basis that tax had been payable under a scheme such as that on which the Defendants had advised, tax could still have been avoided by the implementation of an alternative scheme. The approach of Morritt VC and Potter LJ was to carry out their own analysis of the relevant legislative provisions and then to form their own view of the efficacy of the scheme relied on by the Claimant. They did not consider the question of whether the Revenue might have challenged the alternative scheme and that is the basis of Mr Goodfellow's submission.

459. Morritt VC stated (with emphasis added) at pages 1410 – 1411 that:-

> *"77. If it is right to withhold the application of the principle of Carter (Inspector of Taxes) v Sharon (1936) 20 TC 229 in the one case* ***then it is just as right to do so in the other****. Indeed the interposition of the offshore loan to Mrs Grimm might be regarded as a prime example of the insertion of an unnecessary step simply for tax reasons.*

> *78 It follows that if we had been invited to entertain an application by Mr. Grimm for permission to amend I would have refused it. In those circumstances there could have been no reason to order a new trial. But the consequence is also that Mr. Grimm has failed to prove that the breach of duty by Mr. Newman caused him any loss. Accordingly I would allow this appeal on the alternative ground that Mr. Grimm sustained no loss by reason of Mr. Newman's negligence."*

460. The final stage of Mr. Goodfellow's argument is that if BWP was implemented by the Claimant in the way that he has indicated, it would have been successfully challenged by HMRC, but he stresses that I should disregard the prospects of HMRC challenging any BWP entered into by the Claimant.

461. The riposte of Mr Simpson is that the facts of the *Grimm* case are very different from the present case. In that case, there had been an inquiry by the tax authorities into Mr Grimm's tax affairs from 1994-1999, during the course of which they had sought tax payable on two transactions into which Mr Grimm had entered on the advice of his accountants. The hypothetical question which arose after the Court of Appeal had held that the Defendants in that action had not been negligent was whether there was an alternative scheme or transaction which would have avoided United Kingdom tax. The decision of the Court of Appeal was that there was no such scheme because the alternative scheme would also have been caught by the principle in *Carter v Sharon*.

462. I agree with Mr Simpson that there is a fundamental difference between the *Grimm* case and the present case, because in the *Grimm* case there had been a detailed HMRC investigation into Mr. Grimm's financial position which had led to the challenge and which in turn gave rise to the claim in negligence. So in that case, the Court of Appeal considered the alternative scheme against the unchallenged, but crucially important, background that the HMRC would have challenged the alternative scheme.

(ii) Prospects of HMRC challenging the BWP

463. The present case is very different as there was much evidence in the present case to suggest HMRC would not have carried out a challenge as the evidence adduced in the present case showed clearly that BWP had not been the subject of HMRC challenge.

464. Although there was evidence that HMRC were investigating domicile, there is no evidence to suggest that this would have happened in the Claimant's case or that there would have been a challenge. In addition, the *Young v Phillips* point was not subject of an investigation. Indeed, neither expert was aware of any challenge by HMRC to any BWP and more importantly no mention of any such challenge appears in the large amount of literature and seminar notes on BWP, which have been put before me.

465. The fallacy of Mr Goodfellow's submission is that it would mean if there was a clear policy from HMRC that a particular type of scheme would not be investigated, this point would have to be ignored in determining the validity of a scheme and that cannot be correct. In any event, in case I am wrong, I will consider the issue of

whether a BWP entered into by the Claimant could be challenged on the grounds that the Claimant was domiciled in the UK or on *Young v Phillips*.

(iii) Prospects of Success of a Challenge to BWP

466. The case for the Claimant is that HMRC would have not challenged the planning on either of the grounds put forward by the Defendants which are first domicile, and second the *Young v Phillips* point. It is said by Mr Simpson that no evidence has been adduced from HMRC showing that they would have challenged the Claimant's scheme if implemented and that all the evidence before the court points the other way.

467. As to domicile, Mr Simpson points out the domicile position of the Claimant is clear because HMRC have accepted that he was a non-dom, but that in any event the policy of HMRC was not to challenge the domicile of living taxpayers and when it has been challenged in a few cases, it has only succeeded in one case, which was the *Steiner* case.

468. In my view, even if HMRC had sought to challenge the Claimant's non-dom status, they would have failed because (i) when the facts considered relevant to HMRC were presented in the Claimant's DOM1, HMRC accepted his non-dom status; (ii) there is no reason to believe that the Claimant's position was different in 2006 when the DOM1 was filed from what it would have been when challenged later; (iii) there were no material errors or omissions in the Claimant's DOM1 form; (iv) in his evidence and in his second witness statement, the Claimant explained that he intended to live abroad in France and Spain after his children had finished their education and medical treatment; (v) the retention of a home in Iran in which he continued to stay on his regular visits there; (vi) these matters would have shown an intention not to reside permanently in the United Kingdom; and (vii) the loss of his domicile of origin would have to be strictly proved because as *Dicey. Morris and Collins* have pointed out in a passage set out above "*cogent and clear evidence is needed*" because "*the acquisition of a domicile of choice is a serious matter not to be lightly inferred"* but this has not occurred.

469. Those points would have been determinative irrespective of whether the approach of Mr. Simpson or of Mr. Goodfellow is adopted.

470. With regard to *Young v Phillips*, the expert accountants were unaware of any scheme which had been challenged on that ground. Thus it is said that BWP would have been successful. Mr Simpson's argument is that if, contrary to his submission, HMRC had challenged the BWP which would have been entered into by the Claimant, such challenge would have failed in relation to *Young v Phillips* grounds for the reasons set out above including the fact that it was agreed by the experts that allowing a gap of between one and three months would overcome the problem. The absence of any challenge by HMRC for a long period shows that in the real world that they must have accepted this position.

471. HMRC would not have challenged BWP by the Claimant on *Young v Phillips* grounds or on domicile grounds and if they had, then the Court would have concluded that it was effective. It follows that the Claimant would have saved CGT amounting to £847,858.80 less expenses incurred in implementing CRP.

Diminution in Value

472. The issue that has to be considered is whether implementing BWP prior to the change in law on 16 March 2005 would have left the Claimant worse off as a result of settling the bearer warrants in BFL on trust as he would then only have had the limited rights of an interest in possession beneficiary so that his interest in the proceeds of sale of his BFL shares of £8,875,000 would have been devalued. In consequence, it is said that the Claimant would then have been much worse off than if he had paid the CGT on his gain at the rate of 10%.

473. The Defendants only sought to raise this matter on 16 November 2012, which was the Friday before the beginning of the trial which was scheduled for 19 November 2012. Then they wished to plead for the first time that any reasonably competent non-dom specialist would have warned the Claimant that the saving on CGT that he would have made by using BWP would have been more than extinguished by the reduction in value of the BFL shares caused by settling the shares in trust.

474. When the Defendants raised this application to re-re-re amend their defence, there was no expert accounting or valuation evidence adduced to support this. The case was then adjourned for 2 ½ days so as to allow the Defendants to obtain expert evidence from an actuary showing the alleged extent of the devaluation. Mr Keith Tucker FIA, ASA, who is a Fellow of the Institute of the Fellows of Actuaries in the United Kingdom, then produced a report dated 23 November 2012 in which he concluded that:-

a. The value to the Claimant of an interest in possession in an offshore trust which hold 100% of the sale proceeds of the BFL shares is less than the value of an absolute interest in 90% of the value of the sale proceeds of the Shares;

b. The base calculation value of 69.8% is a reasonable estimate of the value of the Claimant's life interest based on credible information that would have been available in 2005; and that

c. The effect of a variation in expectation of life by plus or minus five years is a range of values between 64.6% and 74.0% which in his opinion was likely to be a reasonable range of expected outcomes.

475. The case for the Defendants is that the Claimant's net proceeds of sale were £8,508,587.50 and the value of the life interest would therefore have been £5,938,994.08 being 69.8% of the total sale proceeds. If the Claimant had simply sold the shares himself, he would have received after paying CGT £7,657,728.75. Thus the argument is that the Claimant's life interest in the trust is worth £1,718,734.67 less than the after tax sale proceeds of the shares.

476. The obvious answer to this is that it was exceedingly likely that the trustees would have paid all the money to the Claimant, Mr. Goodfellow contends that it is not an acceptable answer to this point that there was an understanding to this effect, as the BWP would have failed as being a bare trust or as a result of an application of the *Ramsay* principles. He observes that Asplin J noted in *Vigeland v Ennismore Fund Management Ltd* [2012] EWHC 3099(Ch) [171] that:-

> *"It is trite law that a beneficiary under a discretionary trust has no right to any defined part of the income or capital of the trust fund. The beneficiary's only right is to be considered for the exercise of the trustees' discretion and to compel due administration of the trustees' duties"*

477. The case for the Defendants is that the Claimant would only have had the rights of a beneficiary in a discretionary trust with the limitations set out by Asplin J.

478. A major difficulty for the Defendants is that although Mr. Tucker has provided a witness statement on the devaluation issue, Mr. Warburton has not in his oral evidence or in his written evidence stated that a reasonably competent non-dom specialist would have warned the Claimant that his sale proceeds would have been devalued by over £1.7 million if he had engaged in BWP. So the Defendants have been compelled to abandon the allegation that the Claimant should have been warned. In any event I would have regarded persuasive evidence that the Claimant should have been warned about this point which ignores the reality that the professional trustees, who would have been retained to act for the Claimant, would have complied with their duties and would have paid the proceeds to the Claimant. Indeed there is no probative evidence to the contrary.

479. Nevertheless, the Defendants contend that although the non-dom specialist would not have advised the Claimant then there would be a devaluation of the value of his BFL shares because, this is what would have happened.

480. I cannot accept that submission which fails to appreciate the reality which is that the trustees would have complied with the wishes of the settler, namely of the Claimant as I have already explained. So there would be no devaluation. This is not surprising as two very experienced accountants in Mr. Warburton and Mr. Kilshaw would not have considered themselves bound to advise their clients of devaluation, which would have wiped out the advantages of BWP and left their clients much worse off than if they had just paid the tax. In addition, no evidence has been adduced of any occasion on which this has occurred to a participant in BWP. This claim has no merit and is totally unrealistic.

Employment Related Securities

(i) Background to this Issue

481. Very shortly before the present trial commenced, the Defendants re-amended their Defence to contend that the implementation of the BWS would have involved the issue of employment related securities for the purposes of Part 7 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") (as amended by Section 140 of and Schedule 22 to the Finance Act 2003 with effect from 1 September 2003) with the result that BWS would have converted the whole or part of the value of the Claimant's holding of shares in the company into an asset potentially chargeable to income tax at an effective rate much greater than the 10% effective rate of CGT applicable to a straight forward disposal of the Claimant's shares. In consequence the Defendants' case is that if the Claimant had engaged in BWP, he would have been much worse off than if he had just paid CGT at the rate of 10%.

482. The Defendants contended in the alternative that there was a substantial risk that the implementation of the BWS would have led to such a result, and in the further alternative, that at least some specialist advisers would have a concern that the implementation of the BWS would or could lead to such a result.

483. There are a number of very surprising points about this allegation. First, it had not been raised earlier in either the main expert's report of Mr Michael Warburton or in the joint report of Mr Warburton and Mr Kilshaw dated 29 October 2012 or in any report other than a short statement dated 13 November 2012, which was served just before the trial started. Second, the late emergence of this point is surprising because the Defendants had retained very experienced and very knowledgeable tax counsel, but they had not raised in the pleadings in this action which had started in July 2010 this issue which relates to legislation in force since 2003.

484. In his short statement of 13 November 2012, Mr Warburton explained that his firm Grant Thornton had a few months earlier appointed Mr Anthony Cockman as a director in their National Tax Office. According to Mr. Warburton, Mr Cockman had explained that while in his former job and developing a BWS, he had become concerned that because of the introduction of ITEPA in 2003, bearer warrants might then be regarded as a securities option with the result that they would be subject to an income tax charge under the employment-related securities provisions contained in ITEPA Part 7.

485. According to Mr Warburton, Mr Cockman's fears relating to BWS were confirmed by leading counsel who has not produced a witness statement or a report.. Mr Warburton explained that he was not at the time aware of the concern about employment related securities provision, but he concluded that he agreed with Mr Cockman "*that bearer warrants **could** be regarded as a securities option and this would give HMRC another line of attack against the use of warrants in the BWS*" (emphasis added).

486. A third reason why the emergence of this new point is exceedingly unusual, if not unique, in that it was common ground as shown in supplemental joint report of the expert accountancy witnesses (Mr. Kilshaw and Mr. Warburton) of 6 December 2012 and which post-dated Mr. Warburton's witness statement that neither of the experts:-

a. "*and to the best of their knowledge their respective firms*" considered that the employment related securities legislation when implementing bearer warrant planning;

b. Advised their clients at the time on the possible application of this legislation;

c. Was aware of any lecture or book in which the ITEPA point was discussed in the context of BWP. (I should add that it is clear that tax advisers, who deal with non-dom issues, practice in a world in which any possible concerns about schemes such as BWP are frequently, publicly and regularly ventilated. So the absence of any discussion about the alleged drastic effect on ITEPA on BWS can only be described as extremely surprising); or

d. Are aware of any case in which HMRC took the point.

487. A fourth reason is that Mr. Goodfellow, who is an experienced tax expert, told me that he was unaware of any case in which HMRC has applied ITEPA to a BWS. ITEPA has been in force for almost 10 years since 2003 and therefore overlapped with BWS until the blocking legislation was introduced. The Defendants pursued the ITEPA point in their written closing submissions, but at my request, they developed this in a further note prepared by their counsel to which Mr Kilshaw replied on behalf of the Claimant in a statement and it was adopted by Mr. Simpson as being the submissions of the Defendants. My task would have been made much easier if HMRC had either been represented or had given some form of evidence on their practice in relation to the ERS legislation in relation to Bearer Warrant Planning.

488. This legislation is not easy to follow and Lord Walker in *Gray's Timber Products Limited v Revenue and Customs Commissioner* [2010] STC 782 [2010] UKSC 4 said that the sections with which this case is concerned are "*7…in anything but plain English"* and he has expressed the hope that *"45 …Parliament may find the time to review the complex and obscure provisions of Pt. 7 of ITEPA".* Lord Hope in the same case who gave the only other reasoned judgment agreed with Lord Walker and he described these provisions as:-

> *"56…*
>
> *complex, and it is not easy to draw conclusions as to how the charging provisions in each chapter are to be applied if the overall aim is to achieve consistency".*

489. The Claimant's case, which is set out in a written opinion of Mr. Kilshaw dated 27 March 2013 and which was adopted by Mr. Simpson, is that:-

a. The ERS legislation cannot apply as the Claimant received no new "*value*" as a result of the bearer warrant planning and the ERS legislation is designed to only impose a tax charge on employees, who receive taxable values in return for services ("The No New Value Issue");

b. In any event (even if the BWP Regime envisaged by the Claimant meant that Part 7 was applicable), the HMRC has not raised any claim to date and would not have done so in the Claimant's case with the result that it would have no effect on any BWP used by the Claimant ("The Non-Enforcement Issue"); and

c. In any event, there are relieving provisions which would have precluded any claim against the Claimant based on the ERS legislation if had embarked on BWS ("The Liability Issue").

I will deal with each of these issues in turn.

(ii) The No New Value Issue

490. The case for the Defendants is that the Claimant's case is incorrect, as Part 7 is not part of the "benefits in kind" legislation and the Claimant received a benefit. Mr Goodfellow seeks to derive some support from what has been said in the *Gray's Timber* case and in which Lord Walker explained the history in this way (with emphasis added):-

"4. Part 7 of ITEPA 2003 is headed "Employment income: income and exemptions relating to securities." Its provisions reflect three different, and to some extent conflicting, legislative purposes. First there is Parliament's recognition that it is good for the economy, and for social cohesion, for employees to own shares in the company for which they work. Various forms of incentive schemes are therefore encouraged by favourable tax treatment (those in force in 2003 are covered in Chapters 6 to 9 inclusive of Part 7).

5. Second, if arrangements of this sort are to act as effective long-term incentives, ***the benefits which*** *they confer have to be made contingent, in one way or another, on satisfactory performance. This creates a problem because it runs counter to the general principle that employee benefits are taxable as emoluments only if they can be converted into money, but that if convertible they should be taxed when first acquired…*

6. The principle of taxing an employee as soon as ***he received a right*** *or opportunity which might or might not prove valuable to him, depending on future events, was an uncertain exercise which might turn out to be unfair either to the individual employee or to the public purse. At first the uncertainty was eased by extra-statutory concessions. But Parliament soon recognised that in many cases the only satisfactory solution was to wait and see, and to charge tax on some "chargeable event" (an expression which recurs throughout Part 7) either instead of, or in addition to, a charge on the employee's original acquisition of rights.*

7. That inevitably led to opportunities for tax avoidance. The ingenuity of lawyers and accountants made full use of the "wait and see" principle embodied in these changes in order to find ways of avoiding or reducing the tax charge on a chargeable event, which might be the occasion on which an employee's shares became freely disposable (Chapter 2) or the occasion of the exercise of conversion rights (Chapter 3). The third legislative purpose is to eliminate opportunities for unacceptable tax avoidance. Much of the complication of the provisions in Part 7 (and especially Chapters 3A, 3B, 3C and 3D) is directed to counteracting artificial tax avoidance. There is a further layer of complication in provisions which regulate the inevitable overlaps between different chapters. It is regrettable that ITEPA 2003, which came into force on 6 April 2003 and was intended to rewrite income tax law (as affecting employment and pensions) in plain English, was almost at once overtaken by massive amendments which are in anything but plain English."

491. I am unable to discern from any of these statements or from the statements also relied upon by Mr Goodfellow made by the Upper Tribunal in *UBS AG v HMRC* [2012]

UKUT 320 TCC) paras 11-19 anything which shows that Part 7 is not part of the "*benefits in kind*" legislation. Indeed the statements of Lord Walker are all based on there being a benefit granted to the employee and there is nothing to suggest that the tax regime was being extended to impose a tax in situations in which the employee did not derive any benefit. So that indicates that Part 7 was concerned with taxation of benefits in kind and indeed in *Gray's Timber,* Lord Walker explained that the present legislation derived from the former provisions which applied when "*the taxation of employee benefits were much simpler than it is now*". This shows that the triggering factor for liability is the conferment of a benefit.

492. It is noteworthy that all the provisions referred to by Mr Goodfellow in Part 7 are contained in ITEPA 2003 and section 1 of it provides that:-

> *"This Act imposes changes to income tax on:*
>
> *(a) employment income*
>
> *(b) pension income*
>
> *(c) social security income"*

493. This shows that there had to be a benefit in the form of income given to the employee before he or she would be liable under Part 7.

494. The only textbook to which I was referred was *Tiley & Collison* UK Tax Guide 2013, which was edited by, among others, Professor John Tiley of Cambridge University. This book is described as "*the key to a complete understanding of taxation and is ideal for practitioners*". Chapter 12 of it, which is headed "Employment Income", sets out the tax treatment of benefits afforded to employees and has a subtitle "Particular Benefits". Among those benefits listed in that part of the book is "living accommodation", "relocation benefits and expenses" and significantly "securities given to employees", which are the provisions under review.

495. I considered the Explanatory Notes to ITEPA and paragraph 1798, which contains an overview of Part 7, and which states that it contains the provision "*concerning the income tax treatment of share-related remuneration*" (paragraph 1798). It then sets out different schemes or plans in existence and they all relate to employees obtaining some form of *benefit* in kind so as to amount to remuneration.

496. The Inland Revenue's own manuals also support the view that the ERS legislation is part of the benefits code with a focus on situations where remuneration is obtained as is shown by the facts that it contains statements (with emphasis added) that:-

> *(a) "ERSM 10010*
>
> *This manual contains guidance on the taxation and NICs treatment of securities (which includes shares and options over securities,* ***which are used to remunerate employees****, including directors.* ***These are referred to as employment related securities.****"* and

> *(b) "ERSM20020 Principles: charge on employment–related securities*
>
> *The treatment of **remuneration** delivered through shares and other forms of securities follows the main principle that applies to other forms of remuneration such **as cash and benefits**. That principle is to subject to Income Tax and National Insurance contributions (NICs) the value that the employee accesses as reward for his services at the time he accesses that value."*

497. I am quite satisfied that Part 7 relates to and is based on specific benefits which are obtained by an "employee", and this category would include a director such as the Claimant. In reaching that conclusion, I have taken into account the fact that Mr Goodfellow sought to rely on an internal document prepared by KPMG to support his case.

498. I have been persuaded by paragraph 4.1.9 of Mr Kilshaw's report of 27 March 2013 that the KPMG report relied on by Mr Goodfellow was dealing with a BWP case where a stamp duty scheme was being contemplated and that was different from the BWP regime on which the Claimant would have embarked in this case and which was not a stamp duty scheme. The non-stamp duty version of BWP, which is what the Claimant would have adopted according to his case, would not have involved the issue of shares. I have concluded nothing said in that report assists the arguments for the Defendants.

499. As I have concluded that Part 7 is concerned with taxing benefits, I turn to consider whether the Claimant received any benefit bearing in mind that the fact that the Defendants accept correctly that the Claimant's shares in BFL were acquired on the merger with the Claimant's company on 1 March 2003, and they were not themselves "*employment related securities*". There is no suggestion that if the Claimant had sold his BFL shares without embarking on BWP that his activities would have fallen within Part 7. The case for the Defendants is that conversion of the Claimant's BFL shares into the bearer warrants and their subsequent disposal fall within the relevant provisions.

500. I am unable to agree because, as was explained by Alun James of Counsel in an opinion quoted by Mr Kilshaw:-

> "*the 'conversion' of the shares into bearer shares is something of a misnomer: what is in fact happening has no effect on the shares themselves, which remain ordinary shares in the company*".

501. As a matter of corporate law, I would respectfully agree. Indeed, bearer shares created as part of a BWP regime would have no greater value than any other form of ordinary shares in BFL. Indeed it has not been suggested, let alone established, that bearer shares were in any way more valuable than ordinary shares in BFL. Mr Kilshaw has explained that in his experience a purchaser of bearer shares accepts them in the same way as he would have accepted ordinary shares. So the creation of bearer shares as part of BWP do not constitute the conferment of any benefit so as to fall within Part 7 and so would fall outside it.

502. Further, neither the transfer of bearer warrants into trust nor their ultimate sale would constitutes a conferment of a benefit to the Claimant so as to come within Part 7 as the value of the Claimant's bearer warrants would remain the same as his original ordinary shares in BFL and indeed those which would have been held by Mr. Scott.

503. The purpose of the Part 7 provisions is to tax an employee on the enhanced value he receives from acquiring new shares or having his rights in his existing shares enhanced. By using BWP, the Claimant would not have increased the value of his BFL shares.

504. For all those reasons, I have concluded that if the Claimant had engaged in BWP, it would not have fallen within the scope of Part 7 and so it would not have had any effect on the value of his shares as he would not have been liable to a charge.

(iii) The Non-Enforcement Issue

505. I have determined that if the Claimant had entered into a BWP regime, it would not fall within Part 7, but in case that this analysis is wrong, I must consider whether the Inland Revenue would have applied it to the Claimant in the way Mr. Goodfellow suggests.

506. I have already referred to two extracts from the Inland Revenue manual which shows that they regard the triggering feature for Part 7 as relating to "*securities (which includes shares and options over securities,* ***which are used to remunerate employees****, including directors"* and the *"remuneration".* So even if my conclusion is wrong and BWP would fall within Part 7, it is likely that Inland Revenue would not enforce it as against BWP carried out by the Claimant.

507. This conclusion is fortified by experience to date. Mr. Kilshaw and Mr. Warburton agreed that if a person engaged in BWP, this fact should be entered on the tax return of the person concerned. I assume that many, if not all other accountants, would do the same, but it is common ground that they were unaware of any case in which Inland Revenue has contended that Part 7 applies to BWP. Mr. Goodfellow does not know of any case in which the Part 7 point has been taken by the Inland Revenue in relation to BWP.

508. It is important to remember that HMRC have 12 months in which to raise an enquiry into a tax return from the 31 January of the end of the tax year in which the BWP was executed. So for BWPs entered into the tax year 2005-2006 (which is when the Claimant says he would have done his and the shares sold to Phoenix), the BWP would have been included in his tax return due on 31 January 2007 and Inland Revenue would have had until 31 January 2008 to raise an enquiry. There are limited situations in which the Inland Revenue could also raise a "*discovery*" which would enable the Revenue to reopen the case. Mr. Kilshaw says that it is very rare for this to occur and he says that it has never happened in his experience of advising private clients for over 25 years.

509. The Defendants say the threshold for raising a discovery is lower than that suggested by Mr. Kilshaw, but even on their version, it is noteworthy that there is no evidence of any challenge having been made, even though it is still theoretically possible, but surely unlikely in the light of the delay.

510. Indeed, if there had been a challenge to any BWP on Part 7 grounds, I would have been extremely surprised if it had not come to the attention of somebody on the Defendants' side (whether counsel or experts) or Mr. Kilshaw because, as I have explained, the non-dom specialists, whether accountants, solicitors or counsel, produce many books, lectures and articles in which all conceivable doubts about and challenges to schemes are ventilated and publicised, but again, it is common ground that Mr. Kilshaw and Mr. Warburton are not aware of any lecture or book in which the ITEPA point was discussed in the context of BWP.

511. My conclusion is that the Revenue are not using and will not use Part 7 to challenge BWP schemes entered into in 2004 and so the overwhelming probability is that they would not have challenged a BWP entered into by the Claimant in late 2004. This is another ground for deciding that the Claimant would not have been worse off because of Part 7 by engaging in BWP than by selling the shares and paying 10% CGT. So that is a second ground why if the Claimant had embarked on BWP, he would not have been liable to tax under Part 7.

(iv) The Liability Issue

512. Mr Goodfellow contends that Part 7 applies to impose an income tax charge (and not merely a CGT charge) in certain specified circumstances on "*employment related securities*" or "*employment-related securities options*". He pointed out that one of the purposes of the legislation in enacting Part 7 was to eliminate opportunities for unacceptable tax avoidance as had been explained by Lord Walker in *Gray's Timber* [7] as set out above while Lord Hope [56] noted if there is any theme to different Chapters of Part 7, it was one of anti-avoidance and closing down of perceived loopholes. So Mr Goodfellow says those provisions of Chapters 1 to 5 are to be interpreted broadly and he relies on them in different ways.

513. Chapter 1 deals with introductory matters, Chapter 2 is concerned with conditional interests in shares, Chapter 3 deals with convertible shares, Chapter 4 relates to post-acquisition benefits from shares, Chapter 5 deals with share options, Chapter 6 relates to approved share incentive plans.

514. He develops a detailed case as to why Part 7 applies, but it does not seem appropriate for me to deal with it or the response of Mr Kilshaw because of my clear findings on the no-new value and non-enforcement issues and also because I have not heard full oral arguments. Finally, as somebody with no previous knowledge of tax statutes I am reluctant to deal with complex tax issues on which I have heard no full oral submissions especially as HMRC have not been represented and as I have given other reasons why Part 7 does not apply.

I. THE DAMAGES ISSUE

(i) Introduction

515. The Claimant now only seeks to recover as damages (1) the CGT he has had to pay of £847,458; (2) the cost of entering into the Montpelier scheme of £200,000; (3) interest of £148,549.08 paid to HMRC for late payment of CGT; and (4) interest on these sums.

516. Mr. Goodfellow contends that these sums are irrecoverable, because it would be inappropriate to make the Defendants pay damages as the loss claimed by the Claimant falls outside the scope of the Defendants' duty of care as it was not part of the Defendants' duty to provide sophisticated tax avoidance advice in relation to the disposal of the Claimant's shares in BFL. I add that this is not the Claimant's case, which, is that the Defendants should have told the Claimant that he was or probably was or may have been a non-dom, that this status had very significant tax benefits so that he should have be advised to consult a non-dom specialist. I have already explained what the consequences of this would have been.

517. He relies on the approach of Lord Hoffmann in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 in which he explained at page 214 (with emphasis added) that an appropriate rule for determining the scope of damages is that:-

> *"…. It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.*
>
> *The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the* ***foreseeable loss*** *which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the* ***foreseeable consequences*** *of the information being wrong".*

518. I do not consider that these principles prevent the Claimant recovering damages for the matters which satisfy the foreseeable test of the Defendants' failure to advise the Claimant that first, he was, he had, or very probably (or alternatively might have) had, non dom status; second, that non-dom status carried with it tax advantages; and third, that he should therefore have taken tax advice from a firm of accountants or tax advisers who specialised in advising individuals who had (or might have) non-dom status.

519. This exercise entails comparing first, the position in which the Claimant would have been if he had engaged in BWP, and second, the position in which he is now, but

then to only permit recovery for those losses which satisfy the foreseeability test set out in the previous paragraph.

520. I was troubled as to how the Claimant could justify his claim to recover first penalties of £127,118.82 paid to HMRC in relation to the CGT payment; second, professional fees of £42,000 incurred in negotiating with HMRC in an attempt to reduce the amount claimed for penalties; and third his out-of-pocket expenses of £1900 incurred in similar efforts. I had received no submissions on the appropriate principles. So when I circulated a draft of the judgment, I asked both parties to send me a note explaining the basis on which penalties are charged and why they should or should not be recoverable from HMRC. After the Defendants served a helpful memorandum, the Claimant stated that he would not pursue any of these claims and so I will not say anything more about them.

(ii) CGT

521. The Claimant is entitled to be put in the same position as if the Defendants had not acted in breach of their duties. It was therefore foreseeable that if the Claimant had been advised by the Defendants to go to a non-dom specialist, first that he would have done so; second that he would then have been told that he was a non-dom for whom BWP had an excellent record of success; and third that he would have embarked on BWP which would have been successful.

522. So he would not have had to pay £847,458 CGT, but instead he would have incurred the costs of implementing BWP. These would have been the legal, accountancy and trustee expenses as well as stamp duty and the costs of Mr. Scott, which, as I have explained, would have amounted in total to £83,800. They have to be off-set against the CGT saved leaving a balance of £763,658, which he is entitled to recover.

(iii) Costs of the CRP Scheme

523. Mr Simpson contends that the Claimant is entitled to recover the costs incurred by him in entering into the Montpelier scheme amounting to £200,000, because if the Claimant had been advised by a non-dom specialist, it was foreseeable that he would have embarked on BWP. In those circumstances, he obviously would not have signed up to the Montpelier Scheme and so he would not have had to pay the fee of £200,000. This has to be reduced by £20,000 as the Defendant has repaid to the Claimant commission in this sum.

524. The response of Mr Goodfellow is that the Claimant is not entitled to recover this sum as there is no allegation that the Defendants were negligent in introducing the Claimant to MTM or were in any way responsible for the decision of the Claimant to enter into the Montpelier scheme. Thus it is said that the Defendants are not liable in respect of balance of the fee of £180,000.

525. The Claimant's case for recovering the costs of entering the CRP scheme is not that the Defendants were negligent in causing the Claimant in some way to enter into the Montpelier scheme, but rather that these costs were the foreseeable damage flowing from the Defendants' failure to advise the Claimant to seek the advice of a non-dom expert, who would have advised the Claimant to use BWP.

526. In my view, it was foreseeable that the reasonably competent non-dom specialist would have advised the Claimant to seek to enter into a BWS, which was the only scheme in respect of which I have heard evidence and which would have saved him all his CGT without being unduly risky. I do not consider that a reasonably competent non-dom specialist would have advised the Claimant, who clearly was a non-dom, to enter into a CRP scheme in the light of its obviously artificial nature and the fact that it was based on the second-hand insurance policy scheme which was blocked by the 2003 Budget. Indeed no suggestion to that effect has been made. Indeed no cogent argument has been put forward to the contrary. Moreover, he would have done if the Claimant had embarked on BWP, he would not have used the Montpelier scheme.

527. I also believe that it was foreseeable that a generalist accountant would have known or appreciated (as I have found to be the case) that the Claimant was determined to enter into a scheme which would have avoided the payment of CGT. It certainly was never foreseeable that the Claimant would be content with taking part in some form of planning which would not have sought to enable him to avoid all or a very large part of his CGT liability without changing his residence. Indeed that is what he actually sought to do and that is why I believe that the Claimant had rejected the types of arrangement on Mr Purnell's list of 1 October 2004 which would have reduced, but which would not have extinguished, his total liability to pay CGT without changing his residence and which he did not take further forward. He was looking for a more radical alternative.

528. It was foreseeable first that the generalist accountant would not have known of BWP, but that the Claimant would have entered precisely the sort of CRP scheme which is precisely what he did. It must not be forgotten that CRP was very popular at the time with the Freedom of Information Act response provided to Mr. Warburton showing that HMRC was aware of 698 CRP schemes opened in the tax years 2004-2005 and 2005-2006. There was no evidence of any other scheme which the Claimant could have used to extinguish his CGT liability and which was available to those domiciled in the UK.

529. Thus the Claimant is entitled to recover £200,000 and interest on this sum of £200,000 paid by the Claimant to enter into the Montpelier scheme which would appear to have been paid on 17 August 2005, which was the date on which the Claimant's cheque for £200,000 was presented to MTM's bank subject to any contrary submissions from the Defendants. Hopefully this might be one of those matters on which the parties might be able to agree on the exact amount of interest.

(iv) Interest charged by HMRC in respect of late payment of tax

530. The case for the Claimant is that he is entitled to recover the interest of £229,472.38 which is the interest claimed by HMRC for the period from 31 January 2007 until 4 August 2011 on the basis that he would never have had to pay that tax if he had entered into BWP, because he would never have had any liability for CGT or therefore any liability for any interest on CGT.

531. The Claimant now accepts first that he should have purchased certificates of tax deposit to stop the interest running, and second that his failure to do so was a failure on his part to mitigate his loss. The Claimant is entitled therefore to recover

whatever costs he would have incurred in buying the appropriate certificates of tax deposit.

532. An important factor to be determined is to decide when the Claimant ought to have purchased the certificates of tax deposit. On 10 October 2008, Montpelier raised the issue of tax deposit "*to stop the clock on interest accruing. Our advice however is to wait a few weeks to see if leave to appeal is granted in the Drummond case*".

533. A few days later on 17 October 2008, Montpelier informed the Claimant that they thought they were going to win the *Drummond* case on appeal. The Claimant was then informed in January 2009 that the appeal had been delayed until April 2009. They said that they would advise their clients once the decision had been made public and that they had had a chance to review it. The Claimant does not appear to have been advised to pay anything to HMRC or to buy tax certificates and he said that he did not think that there was any need for him to do so.

534. On 25 June 2009, the Court of Appeal handed down a judgment dismissing Drummond's appeal. This information was passed on to the Claimant by Montpelier on 20 July 2009. On 3 August 2009, they informed the Claimant that Drummond intended to apply for leave to the House of Lords, but they noted in that letter that the Claimant might wish to settle the matter with HMRC or to purchase certificates of tax deposit to "*stop the clock in respect of further interest accruing*". The evidence of the Claimant was that he sent the letter to Mr. Purnell who responded on 14 August 2009 suggesting that the Claimant should write to Montpelier and ask whether they would recommend that he should make payments on account of that stage or whether that would be prejudicial to his case.

535. Mr Purnell also wrote further on 18 August 2009 saying that he would discuss matters with Mr Stanford when he returned from his holiday in September 2009. Pausing at that stage, the Claimant had not been advised to pay anything to HMRC or to buy certificates either by Montpelier or the Defendants and therefore he did not think there was any need to do so and, of course, he had sought advice from his accountants, the Defendants. The Claimant cannot be considered to have acted unreasonably in seeking and then awaiting advice from his accountants on this matter.

536. On 8 September 2009, the Defendants wrote to Montpelier asking their opinion as to whether the scheme would ultimately prove successful and whether the scheme would be caught by the Drummond decision. At about this time, Mr Nick Hopkin at PwC had advised him on 26 November 2009 to buy certificates of tax deposit to cover the tax and stop the interest running. He did not do so but he has recognised that he should have done so within a month by Christmas 2009. In my view, in accordance with his duty to mitigate his loss, the Claimant ought to have bought tax certificates by, say, 20 December 2009 as prior to that time he had not been advised to do so.

537. In my view, it was reasonably foreseeable that there would be a challenge to the CRC scheme and that it might well fail. In considering whether the Claimant has complied with his duty to mitigate, it must not be forgotten that the standard imposed on the wronged party, namely the Claimant, is not a high one as he will not be held disentitled to recover the cost of some measures merely because the party in breach

can suggest that measures less burdensome to him might have been taken (see *Chitty on Contracts* (supra) (Paragraph 26-080)). So in my view there was no duty on the Claimant to buy tax certificates until 20 December 2009.

538. The sum that the Claimant is therefore entitled to recover would be the interest properly charged from the date when it should have been paid on 31 January 2007 until 20 December 2009. Thereafter the Claimant is entitled to the cost of borrowing money to buy the tax certificates or the interest he has lost by having to buy the tax certificates depending on what he would have done. That would have been to borrow the money to do so. Hopefully those figures can be agreed or I might have to consider remitting the matter to a Master.

539. It will be necessary to ascertain what sums can be recovered by way of interest and hopefully, the parties will be able to reach agreement on these matters.

J. THE LIMITATION ISSUE

(i) Introduction

540. Mr Goodfellow contends that the Claimant's claim, which was issued on 19 July 2010, is statute-barred as his cause of action accrued well before 19 July 2004. Mr. Simpson disputes this and he submits that both the claims in contract and tort were brought within the prescribed limitation periods.

(ii) The Claim in Contract

541. The Claimant contends that the contractual claim was brought within the prescribed period of six years from the date of breach. In response, Mr Goodfellow submits that the claim of the Claimant is that the advice that the Claimant "*had, or very probably (or alternatively might have) had non-dom status*" should have been given "*at any time between the incorporation of HSL and the completion of the Merger*" (Paragraph 36 of the Re-Re-Amended Particulars of Claim). Thus, it is said by Mr Goodfellow that on the Claimant's own case, the Defendants were in breach of their duty by at the latest the conclusion of the merger on 28 February 2003.

542. Mr. Simpson submits that the duty of the Defendants was a continuing one and so the breach occurred in the limitation period. Mr Goodfellow's response is that the Claimant cannot rely on a continuing duty as was shown by the reasoning of the Court of Appeal in *Bell v Peter Brown & Co* [1992] QB 495, which was a case in which the Defendant's solicitors had failed to cause the execution of a declaration of trust in respect of the matrimonial home and/or to register a caution at the Land Registry against dealing with the property upon the divorce of the Claimant.

543. As a consequence of this failure, the Claimant lost his interest in the proceeds of sale which had been agreed as part of a divorce settlement and which had occurred in 1978. The claim was not brought until 1987 and the Court of Appeal held that the cause of action in contract accrued in 1978 as that was the date of the breach.

544. Nicholls LJ observed that even though the breach remained remediable until the plaintiff's former wife sold the house, it made no difference that the breach of contract remained remediable for many years. Nicholls LJ explained that:-

> *"despite this it was in 1978 that the breach occurred. Failure thereafter to make good the omission did not constitute a further breach. The position after 1978 was simply that, in breach of contract, the solicitor had failed to do what he ought to have done in 1978 and, year after year that breach remained unremedied".*

545. Mr. Goodfellow says by analogy that the breach in this case occurred at the time of the merger and on the Claimant's case, the Defendants failed to do what it ought to have done in 2003. Therefore what happened after that date was irrelevant because the Claimant's contractual claim was brought outside the applicable limitation period.

546. His reasoning is based on the assumptions first in this case that there was a single breach of contract and not subsequent discrete breaches; and second that this breach occurred at about the time of the merger in 2003. Mr. Simpson challenges those assumptions.

547. I do not accept that there was only one breach of contract because each time the Defendants were obliged to advise the Claimant to consult a non-dom specialist but did not do so; the Claimant then had a separate and new cause of action. So, for example, the failure by the Defendants to advise the Claimant to consult a non-dom specialist in October 2004 is totally separate from any duty to do so earlier and it would give rise to a separate free-standing claim. In other words, the Claimant would be able to put forward a breach to refer in October 2004, which did not depend on an earlier breach and that distinguishes this situation from that which prevailed in the *Bell* case. For that reason, the Claimant's contractual claim is not statute-barred and there is another reason why I have reached this conclusion.

548. That additional reason is that I do not accept that the Defendant had a duty to advise the Claimant to seek advice from a non-dom expert until the fact that the Claimant was a non-dom would have had a significant enough effect on the Claimant's tax position to require this advice and that duty arose when the offers were coming in or were expected in Autumn 2004, which was within the limitation period. As I have explained, I do not consider that the duty of the accountants to advise the Claimant to consult a non-dom specialist arose until the amounts involved justified it. It cannot be the case that every generalist accountants has a duty to advice every client who is probably a non-dom to consult a non-dom expert unless the amounts involved justified it.

549. It is said that the Claimant had £40,000 in cash to invest in 1999, but it has never been part of the Claimant's case that he would have invested or indeed wanted to invest this money offshore. More importantly it was not put to him, as it should have been, if the Defendants intended to rely on it. There were no obvious tax advantages to the Claimant at any stage prior to the anticipated disposal of his shares in BFL in being a non-dom. No appreciable part of his income arose abroad and he had no capital gains.

550. Thus no event had arisen which triggered any obligation on the part of the Defendants to inform the Claimant that he should take tax advice from non-dom specialists until October 2004 when there was a prospect of the Claimant having to pay very large amounts of CGT. So my conclusion is that the Defendants did not have a duty to

advise the Claimant to seek the advice of a non-dom expert until 2 October 2004 which was when the Claimant went to Mr. Purnell's home for tax advice in relation to his liability to pay these very large amounts of CGT.

551. So it comes to this, the Claimant's contractual claim did not arise until October 2004 when he should have referred the Claimant to a non-dom specialist. Alternatively, the Claimant had a series of discrete and separate claims against the Defendants for their failure to advise him to consult a non-dom expert and one of those claims occurred in October 2004 Therefore, I reject the contention that the Claimant's contractual claim is statute-barred.

(iii) The claim in tort

552. Mr Goodfellow's case is that the Claimant's cause of action in tort accrued upon suffering damage and that is common ground. What is in dispute is his contention that the Claimant suffered damage prior to 19 July 2004 because:-

(i) the cost of implementing a BWS would have increased as the market value of the company increased;

(ii) the BWS, even if effective, would not have been succeeded after the amendment of the Employment Related Security Rules with effect from 1 September 2003 with the result that at the very latest the Claimant's loss would have crystallised on 31 August 2003 which was more than six years before the issue of the claim; and

(iii) in every year that the Claimant had investments in the United Kingdom he could instead have made them offshore and would have suffered loss. It is said by way of example that Mr Kilshaw noted that the Claimant had £40,000 in cash to invest in 1999 and had he been able to claim non-dom status the Claimant could have invested this money offshore and benefited from the remittance basis of taxation.

553. I am unable to agree that there is any merit in any of these points. As to (i), the mere fact that the cost of implementing a BWS would have increased as time passed does not seem to be relevant because this is not a question of the Claimant suffering "*damage*" but rather the consequence of the rising value of BFL.

554. As to (ii), I cannot see how this can help the Defendants because if they are right about the effect of Employment Related Securities Legislation, then the claim fails and there will be no need to consider limitation. If, on the other hand, the Defendants' contentions relating to the relevance of Employment Related Securities Legislation are incorrect, then the argument in (ii) fails.

555. Moving to (iii), it has never been part of the Claimant's case that but for the Defendants' negligence he would have invested money offshore prior to 19 July 2004. More importantly it has never been put to him (as it should have been) that he would have wished to do so. So this point cannot be pursued.

556. The stark fact is that the Claimant first suffered damage when it was no longer possible for him to enter BWP which would have been in December 2004, which was

three months before the barring legislation was announced and before it came into effect in March 2005. This would have been well within the limitation period. In consequence I do not consider that the Claimant's tort claim was statute-barred.

(iv) Section 14A Limitation Act 1980

557. As I have explained, the normal limitation period for a claim for negligence, such as the one which the Claimant is pursuing, is a period of six years from the date on which the cause of action accrued. I have already explained why I consider that the claim had been brought within that time period.

558. Even if that is wrong, the Defendants still have to overcome the provisions of section 14A which put forward an alternative limitation period set out in section 14A of the Limitation Act 1980 which is three years from the earliest date on which the Claimant "*first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action*".

559. Mr. Goodfellow puts forward an argument that the Claimant acquired the knowledge for bringing the action at the latest or very shortly after 12 October 2005 which was on the date on which he met with Barclay's Wealth and Mr. Chapple advised him that the advantages of a non-dom status included interest on foreign bank account and income from foreign sources was chargeable on a remittance basis. Mr Goodfellow's argument proceeds on the basis that the Claimant must have known that he was a non-dom or likely that he had been a non-dom and it is said that this precludes the Claimant from relying on section 14A.

560. I have great difficulty in understanding this submission because the critical fact which the Claimant needed to know was that as a non-dom, he could have taken advantage of BWP which would have saved him paying CGT. The arguments of Mr Goodfellow ignore this critical point and for those reasons I cannot accept that the Claimant cannot take advantage of Section 14A if he fails in establishing that the claim was not brought within basic period of six years, which I do not consider to be the case.

561. Mr Simpson has numerous other reasons why the Defendants are wrong in contending that the Claimant cannot take advantage of Section 14A. I consider many of those arguments to be correct but I will not further lengthen this judgment by elaborating on them because I am quite satisfied that the Claimant's claim was brought within the appropriate statutory periods for both claims in contract and in the tort of negligence.

K. CONCLUSION

562. As I have explained I am very grateful for all the help that I have received from all counsel. The Defendants' legal team have challenged the Claimant at every stage and have put forward some very unusual arguments which show their great industry and determination.

563. I know that this judgment will be a great disappointment for Mr. Purnell, who obviously was an accomplished accountant and who was determined to help his clients to the best of his ability. Sadly, he erred by failing to advise the Claimant to

take the advice of a non-dom specialist after many years of successfully helping the Claimant and I hope that he understands why I have reached my decision.

564. I am satisfied that the Claimant has made good his case. Thus the Claimant is entitled to:

a. £763,658.00 in respect of CGT that he has had to pay after giving credit for the sums that he would have had to pay if he had embarked on BWP;

b. The outstanding balance of the cost of entry to the Montpelier scheme of £180,000;

c. A sum in respect of interest charged by HMRC including the cost of borrowing money to buy tax certificates; and

d. Interest where appropriate.