Neutral Citation Number: [2021] EWHC 2563 (QB)

Case Nos: CC-2019-MAN-000066 & 000068

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Manchester Civil Justice Centre
1 Bridge Street West, Manchester M60 9DJ

Date: 24 September 2021

Before :

HHJ CAWSON QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) ALASTAIR GRAHAM KNIGHTS **(2) EVERGREEN TREES AND SHRUBS LTD** **(3) KNIGHTS INVESTMENT MANAGEMENT LTD**	**Claimants**
- and -	
TOWNSEND HARRISON LTD	**Defendant**

- -
- -

PAUL CHAISTY QC (instructed by **FS Legal Solicitors LLP**) for the **Claimants**
BEN ELKINGTON QC and **BEN SMILEY** (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 19-23, 26-29 July 2021, and 3 September 2021 for submissions

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APPROVED JUDGMENT

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

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Covid-19 Protocol:

This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to BAILII.

The date and time for hand-down is deemed to be 10.30 a.m. on Friday 24 September 2021

HHJ Cawson QC :

A. Introduction

1. By these two sets of proceedings, the Claimants seek damages against the Defendant, Townsend Harrison Ltd ("**THL**"), a company carrying on business as a firm of Chartered Accountants, in respect of losses alleged to have been suffered as a result of the THL having introduced the Claimants to three tax schemes ("**the Tax Schemes**"), and to an investment in an FX trading scheme ("**the CWM Investment**"). Two of the Tax Schemes failed to achieve the desired tax savings, and the other tax scheme appears likely to fail in the same way. The CWM Investment resulted in a total loss of the funds invested as a result of it being, in all likelihood, a Ponzi scheme.

2. In short:

   i) In the claim in respect of the Tax Schemes ("**the Tax Schemes Claim**") the Claimants allege that THL owed a common law duty of care to the Claimants in making the introductions to the providers of the Tax Schemes, that THL provided advice in respect of the entry into the Tax Schemes in respect of which they owed a duty of care, and that THL acted in breach of these duties of care so as to cause the Claimants to enter into the Tax Schemes as a result of which they have suffered loss and damage;

   ii) In the claim in respect of the investment in the FX trading scheme ("**the CWM Claim**"), the Claimants allege that THL agreed to, but failed properly to carry out due diligence in respect of the investment, that THL, in any event, owed to the Claimants a duty of care to carry out due diligence in respect of the investment, but failed properly to do so, and further acted in breach of a duty of care owed to the Claimants in making statements about the investment which were not correct. It is alleged that the matters complained of caused the Claimants to commit funds to the investment, which have been lost.

3. The essence of THL's defence is that although it was engaged as the Claimants' accountants, it acted as a mere introducer of the Tax Schemes and the CWM Investment to the Claimants, and made clear in its terms of business and in limitation of liability letters that it was not and could not provide advice in respect thereof. Consequently, THL denies that any duty of care arose in respect of any of the introductions, and further denies that THLT agreed, or was under any other obligation to carry out due diligence in respect of the investment, or gave any incorrect advice, or made any incorrect statements in respect of the Tax Schemes or the CWM Investment. THL further denies that the Claimants were entitled to or did rely on THL or that the matters alleged were causative of any loss, or that the loss sought to be recovered is sufficiently proximate to be recoverable.

4. The trial was listed to commence as a face-to-face hearing on 19 July 2021. The agreed trial timetable provided for the trial to conclude with submissions on 30 July 2021, after the parties had had the previous day to prepare closing submissions. Unfortunately, the first named Claimant, Alastair Graham Knights ("**Mr Knights**"), was taken ill on the first day of the trial, when he was due to start his evidence. He was, on the same day, *"pinged"* by the NHS Test and Trace Application. It was, however, possible to avoid an adjournment of the trial by the Claimants calling their other witnesses, and the expert witnesses then being called, allowing Mr Knights to give his evidence on Monday and Tuesday, 26 and 27 July 2021, by when he was sufficiently recovered to give evidence having obtained a negative PCR test for Covid 19. Mr Knights was followed by THL's only witness, David Elliott ("**Mr Elliott**") briefly on 27 July and continuing on Wednesday and Thursday, 28 and 29 July 2021.

5. Although witnesses were therefore taken out of the usual order, I do not consider myself to have been in any way materially disadvantaged thereby in determining the case.

6. Unfortunately, however, the delays occasioned by Mr Knights' illness meant that it was only possible to conclude the evidence, and no more, within the existing trial timetable. Given the parties' other commitments over the following weeks, it was necessary to stand over oral closing submissions to be heard on 3 September 2021.

7. The Claimants were represented by Paul Chaisty QC, and THL by Ben Elkington QC and Ben Smiley. I am grateful to them for their helpful written and oral submissions, and for their assistance provided during the trial in dealing pragmatically with the difficulty created by Mr Knights' illness.

B. Key Participants

Claimants

8. Mr Knights (known as Graham), was born on 10 April 1961 and previously had a career selling motor accessories (from 1980), and subsequently (from 1986) in the financial services industry, working latterly for Australian Mutual Bank. Mr Knights sold life assurance products for about 12 months, but then became a sales manager responsible for recruiting, training and administration. He was made redundant in 1995, when required to move to Wales.

9. Mr Knights is married to Angela Knights ("**Mrs Knights**"). Whilst working for Australian Mutual Bank, Mr Knights came up with the idea of setting up in business, initially renting but then selling, artificial plants, trees and foliage for decorative purposes. To this end, Mr and Mrs Knights set up together in business in partnership trading under the name *"Evergreen"*.

10. The second named Claimant, Evergreen Trees and Shrubs Ltd ("**Evergreen**") was incorporated in 2002 to carry on business in succession to the partnership business previously carried on by Mr and Mrs Knights. Mr and Mrs Knights are both directors of Evergreen, and hold 49.5% each of the issued share capital thereof. The remaining issued shares are held by Mr and Mrs Knights' daughter. Although Mrs Knights has played an active role as a director of Evergreen, dealings with THL, and in respect of the Tax Schemes and the CWM Investment have been handled by Mr Knights on behalf of himself and the other Claimants.

11. Evergreen has been extremely successful. Its turnover has increased significantly over the years, increasing from £419,061 in the accounting period 2009/10, to £1,485,613 in the accounting period 2016/17. Evergreen has consistently made profits, which has enabled it to generate significant funds. The Claimants have therefore had an interest in seeking to minimise the corporation tax that Evergreen pays, and potentially the tax that would be payable on remunerating Mr and Mrs Knights and/or paying dividends to them. Further, to the extent that profits were retained, the Claimants have had an interest in looking for beneficial investments with high rates of return.

12. So far as Evergreen's turnover and profitability is concerned, the position between 2009 and 2017 can be summarised as follows from the figures set out below taken from Evergreen's accounting records or, where an alternative figure is shown, from tax returns or corporation tax computations that have been disclosed:

Accounting period	**Turnover**	**Profit before tax**	**Tax**
2009/10	£419,061	£89,882	£19,068
2010/11	£512,987	£104,821 / £101,005	£23,041 / £20,788
2011/12	£675,850	£232,644 / £230,027	£48,970 / £46,529
2012/14[1]	£1,132,103	£761 / £101	£36 / £20
2014/15	£1,126,110	£23,309 / £22,295	£4,881 / £4,459
2015/16	£1,274,961	£174,550 / £162,508	£35,730 / £32,502
2016/17	£1,485,613	£322,484 / £340,204	£37,627 / £39,748

[1] The company changed its accounting year end, so this period ran from 1 September 2012 to 28 February 2014.

13. Despite the apparent modest level of reported profits of Evergreen, Evergreen and Mr Knights were, as a result of the underlying profitability of Evergreen, able to generate funds that included the following:

    i) In June 2013 Evergreen paid £250,000 into the OneE Scheme referred to below;

    ii) In October 2014 Mr Knights and Evergreen each provided £200,000 to Knights Investment Management Limited, ("**KIML**") (paid via Mr Knights' bank account), which KIML used to invest in the CWM Investment;

    iii) In December 2014 Evergreen provided a further £200,000 to KIML – which KIML used to invest in the CWM Investment;

    iv) In July 2015 Evergreen paid Mr and Mrs Knights a total of £541,736 by way of adjustment to their directors' loan account, apparently in connection with the Qubic Scheme referred to below;

    v) In September 2015 Mr Knights invested £100,000 in further FX trading with Beta 2 Limited ("**Beta 2**");

    vi) According to the Claimants' letter of claim, between January 2016 and May 2019 Evergreen (and to a much lesser extent Mr Knights) invested a total of £1.8m into property bonds, and the evidence suggests that, thereafter, further investments into property bonds and shares have been made totalling some £940,000.

14. As set out in more detail below, a settlement has been reached with HMRC in respect of the OneE Scheme and the Qubic Scheme referred to below, and it is likely that tax will have to be paid in consequence of Mr Knights' entry into the Elysian Scheme referred to below, but subject thereto Evergreen has mitigated the amount of tax that it has paid by avoiding over the relevant periods a liability for any corporation tax. Further, figures in respect of Mr and Mrs Knights show them to have paid very little by way of income tax over the same periods of time.

15. KIML was incorporated in 2014 as the vehicle through which to make investments in the CWM Investment, and out of concern that if Evergreen were to be used for this purpose, it might prejudice its status for tax purposes as a trading company.

16. It was Mr Knights' evidence, at least in his witness statements prepared for the trial, that he was not financially experienced or sophisticated in any way, and that his attitude to risk was *"conservative"*. These assertions are challenged by the THL.

The Defendant

17. THL carries on business as a firm of chartered accountants and business advisers, and is based in Malton, North Yorkshire.

18. THL's directors include Mr Elliott and Simon Harrison ("**Mr Harrison**"). Mr Elliott was THL's only witness of fact.

19. At all relevant times, THL also employed a Compliance Manager, Suzanne Guy ("**Ms Guy**").

20. Further, between June 2009 and May 2015, THL employed Kristian Wright ("**Mr Wright**") as a *"Senior Accountant"*, which involved him acting as a client manager. Mr Wright gave evidence on behalf of the Claimants.

21. THL was not, at any material time, authorised by the Financial Services Authority ("**FCA**") to conduct investment business. THL was therefore subject to the *"general prohibition"* set out in s. 19 of the Financial Services and Markets Act 2000 ("**FSMA**"), which prohibits a person from carrying on a regulated activity unless that person is either an *"authorised person"* or an *"exempt person"*. On this basis, THL was not permitted to recommend a particular investment.

22. THL was, however, licensed by the Institute of Chartered Accountants in England and Wales ("**ICAEW**") to provide limited investment services complimentary to, or arising out of the professional services it was providing to clients. THL was therefore entitled to provide advice on investments in general, and to refer clients to third parties.

23. THL was first formally instructed as Mr and Mrs Knights' accountants in respect of their personal and business affairs, and as Evergreen's accountants in 2011.

Other Participants in the Events

24. THL introduced Mr Knights and Evergreen to a number of parties in respect of the Tax Schemes, and the CWM Investment, namely:

    i) OneE Tax Ltd ("**OneE**"), a company that promoted Employer Financed Retirement Benefit Schemes ("**EFRBSs**") and EFRBS type tax schemes, including the OneE Scheme referred to below entered into by Evergreen in June/July 2013. This was a *"disguised remuneration"* scheme intended to enable Mr and Mrs Knights to obtain the benefit of money from Evergreen (either by the extraction of the same in cash, or by crediting the same to a directors' loan account with Evergreen so as to leave the cash in the latter) in a way which gave rise to the mitigation of

corporation tax without any PAYE or NIC being paid. OneE entered into creditors' voluntary liquidation on 20 February 2015.

ii) Newport Financial Management LLP ("**Newport**"), a pension planning adviser, which promoted the Elysian Scheme referred to below. This was a *"pension liberation"* scheme that Mr Knights entered into in December 2013 and which was designed to enable Mr Knights to obtain tax free access to funds in his pension schemes before he reached the age of 55. Newport was authorised to give investment advice being an appointed representative of Thompson Brown Financial Management Limited, which was authorised and regulated by the FCA.

iii) Square Mile North East Ltd ("**Square Mile**"), a company established in order to provide introductions to investment opportunities, and which marketed those opportunities through firms of accountants. One of these opportunities was the CWM Investment, which KIML invested in in late 2014. At all relevant times until it was dissolved on 1 March 2016, the directors of Square Mile were Nicola Locke ("**Mrs Locke**"), Colin Ronald Robson ("**Mr Robson**"), and Stephen Trevor Skipsey ("**Mr Skipsey**"). Mrs Locke and Mr Skipsey had both previously had careers at a fairly senior level in banking. Mr Skipsey gave evidence on behalf of the Claimants.

iv) Qubic Tax Limited ("**Qubic**"), a company carrying on business as a firm of Chartered Accountants licensed by the ICAEW, which promoted the Qubic Scheme referred to below, being another *"disguised remuneration"* scheme, entered into by Evergreen in July 2015, which was intended to enable Mr and Mrs Knights to again obtain the benefit of money from Evergreen (either by the extraction of the same in cash, or by crediting the same to a directors' loan account with Evergreen) in a way which gave rise to a reduction in corporation tax and without any PAYE or NIC being paid.

25. The CWM Investment was made with CWM Ltd ("**CWM**"), a company incorporated in the British Virgin Islands, but operating from offices in London.

26. As mentioned in paragraph 13(vi) above, it is a feature of this case that Mr Knights and Evergreen have invested significant sums in property bonds. The Claimants called as a witness Paul Robert Hole ("**Mr Hole**"), the Compliance Director of Propiteer Capital Plc and Propiteer Ltd. Mr Hole's witness statement simply exhibited correspondence from Mr Hole to Mr Knights and Evergreen providing details of the amounts invested with Propiteer (through property bonds and by purchasing shares), including a letter dated 15 June 2021 that stated that from 9 November 2016 to date a total of £4,020,000 has been *"invested/re-invested"* with Propiteer Ltd, and that to date, £287,218.88 had

been paid as interest on investments that have matured, equating to a return on investments of 30.02%. The letter further maintains that Propiteer Ltd has had a 100% track record for return of investments and interest with no projects failing or falling short of their contractual obligations. A subsequent letter from Mr Hole dated 15 June 2021 states that from 14 October 2020 to date, a total of £160,000 has been invested with Propiteer Capital Plc, and it is maintained that these investments are live and *"on track"*, and that they will return an average of 22.5% per annum. Mr Hole was cross examined at some length by Mr Elkington QC.

Expert Witnesses

27. In addition to the witnesses of fact (Mr Knights, Mr Wright, Mr Skipsey and Mt Hole on behalf of the Claimants, and Mr Elliott on behalf of THL), the parties called the following expert witness, namely:

    i) In the Tax Schemes Claim, the Claimants called Dominic Arnold ("**Mr Arnold**"), a Tax Partner with BDO LLP, and THL called Michael Stean ("**Mr Stean**"), a chartered accountant and consultant with RSM UK Tax and Accounting Ltd, to give expert evidence in respect of :

        a) The standards ordinarily observed by accountants acting as introducers/intermediaries at the times relevant and by reference to the claims;

        b) The standard to be expected of a reasonably competent accountant in advising and/or recommending to a client that he enters into the Tax Schemes; and

        c) The likelihood of HMRC pursuing the Claimants for tax or other liabilities as a result of their entering into the Elysian Scheme, and the likely level or extent of any such liability.

    Mr Arnold produced a report dated 16 April 2021, and Mr Stean produced reports dated 14 April 2021 and 30 April 2021. In addition, Mr Arnold responded to questions raised by the THL on 14 May 2021, and Mr Arnold and Mr Stean produced a joint report dated 24 May 2021.

    ii) In the CWM Claim, the Claimants called Simon Greaves ("**Mr Greaves**"), a chartered accountant and partner with BDO LLP specialising in risk management and risk advisory work, and THL called Nicholas Antoniou ("**Mr Antoniou**"), a qualified accountant and a Fellow member of the Association of Chartered Certified Accountants, to give expert evidence as to the steps a reasonably competent accountant would be expected to take when carrying out due diligence

in respect of an investment scheme such as the CWM Investment, and as to what would be discovered by due diligence.

Mr Greaves produced a report dated 30 April 2021, Mr Antoniou produced a report dated 29 April 2021, and Mr Greaves and Mr Antoniou produced a joint report dated 26 May 2021.

iii) In addition reliance is placed upon the joint report dated 24 April 2021 of Michael Jones ("**Mr Jones**"), a stockbroker, providing single joint expert evidence in respect of bond yields. On 29 May 2021, Mr Jones provided responses to questions posed by THL.

C. Narrative Background

Evergreen

28. I have already dealt with the background to Evergreen, and Mr and Mrs Knights' involvement therein.

Engagement of THL

29. THL was engaged as Evergreen's and Mr and Mrs Knights' accountants in September 2011. Mr Knights has described how, prior thereto, they had been looking for a more regular accountancy firm of reasonable size in the North Yorkshire area. Mr Knights recalls having met up with Mr Elliott, who he describes as having come across as not being *"the usual stuffy standard accountant"*. Mr Knights describes Mr Elliott as having been very informal, approachable and personable, and to Mr Elliott's pitch to him as having been along the lines of: *"any Tom Dick or Harry can balance your books. What we can do is provide you with so many more options in terms of how to deal with your finances and tax liabilities. We can help you get to the next level"*. Mr Knights recalls having spoken with Mr Elliott in these initial discussions not just about finances and possible tax mitigation, but also day-to-day business matters.

30. On 8 September 2011, Mr and Mrs Knights signed by way of agreement thereto, on behalf of Evergreen, THL's engagement letter dated 6 September 2011. On the same day, Mr Knights signed THL's engagement letter dated 6 September 2011 in relation to his own affairs. Both of these engagement letters incorporated THL's Standard Terms of Business. At clause 2.1 of the latter it was provided that although THL was not authorised by the FCA to conduct Investment Business, it was licensed by the ICAEW to provide certain limited investment services where these were complimentary to, or arose out of, the professional services THL was providing. Clause 2.2(a) went on to provide that, in particular, THL might *"advise you on your investments generally, but not recommend a particular investment or type of investment."*

31. As to what THL might have been expected to advise upon, it is to be noted that during the course of his cross-examination in respect of the CWM Investment, Mr Knights accepted that he knew that THL was not an independent financial adviser, and that THL was not permitted to give advice on specific investments. Further, Mr Knights accepted that THL was entitled to proceed on the basis that Mr Knights knew that.

32. THL having been engaged, Mr Knights was introduced by Mr Elliott to Mr Wright who, it was explained, would be dealing with accountancy issues on a day-to-day basis. Thus Mr Wright became the main contact, and first port of call at THL. As a result, Mr and Mrs Knights built up a good relationship with him. Mr Knights explained that although Mr Wright became the main point of contact for day-to-day general accountancy issues, and initially the CWM Investment, it was principally Mr Elliott, and to a more limited extent Mr Harrison, with and by whom tax planning and investment matters were discussed and dealt with.

The OneE Scheme

33. Although it had been Mr Knights' recollection for the purposes of Particulars of Claim, as now reflected in paragraph 5 of the Amended Particulars of Claim in the Tax Schemes Claim ("**the Tax Schemes Claim PofC**"), that possible entry into the OneE Scheme was first raised by Mr Elliott in June 2013, it can be seen that by an email dated 5 October 2012 Mr Wright wrote to Mr and Mrs Knights setting out the *"possible savings"* that might be obtained from making an EFRBS contribution. By email dated 26 October 2012, Mr Knights responded to the effect that he was not 100% convinced that this was the right option *"despite the obvious savings"*, and that they would wait to review matters again the following year. It was Mr Knights' evidence, which I accept, that he had not been involved with tax planning of this kind before.

34. That THL was, at this time, marketing the OneE Scheme by offering introductions to OneE to its clients is shown not only by the above exchange of correspondence, but by the contents of an email exchange between Mr Wright and Mr Harrison on 21 November 2012, referring to a decision in favour of the taxpayer at an early stage of the *"Rangers"* litigation ("**the *Rangers* Litigation**"), that ultimately reached the Supreme Court in 2017 (*RFC 2012 Plc v Advocate General Scotland* [2017] 1 WLR 2767), as *"bloody good news"*. I refer to the *Rangers* Litigation in more detail below.

35. In May 2013, THL organised a seminar for its clients in respect of the OneE Scheme. As I see it, this seminar was plainly arranged in order to promote the potential advantages of the latter to THL's clients, mindful that THL would stand to benefit from the entry of its clients into the OneE Scheme through the receipt of commissions. Documentation produced by THL shows one

representative of Mr and Mrs Knights and Evergreen as being on the attendance list for this seminar. However, it was Mr Knights' evidence that he has no recollection of attending the seminar, although he does recall attending a subsequent seminar in respect of the Elysian Scheme. Nothing ultimately turns on this.

36. It is Mr Knights' evidence that the subsequent entry into the OneE Scheme in mid-2013 followed a general catch up meeting with Mr Elliott at THL's offices at which Mr Elliott had raised again the possible entry into an EFRBS, by introducing Evergreen and Mr and Mrs Knights to OneE. It is Mr Knights' evidence that Mr Elliott said to him at this point that he would only ever propose tax schemes to clients that were conducted *"by the book"*. He says that Mr Elliott informed him that HMRC would most likely become involved *"as standard"* as they would write letters enquiring into the same, and that the scheme was not necessarily guaranteed to work, but that there was absolutely nothing to lose by entering into the scheme because the worst case scenario was that even if HMRC did successfully challenge the scheme, the only consequence would be that any corporation tax that might have been reduced or mitigated would simply become payable at a later date. He says that Mr Elliott was very clear that there was nothing to lose, and that there were no downsides. Mr Knights said that this was absolutely key to entering into the OneE Scheme, and indeed the other two Tax Schemes. He says that it was clear to him at the time that Mr Elliott was very positive about schemes, and recommending and encouraging him to enter into the schemes given that there was nothing to lose. He says that Mr Elliott may have mentioned the *Rangers* Litigation, observing that schemes such as the OneE Scheme were *"very safe"* because HMRC had pursued them in the Courts and *"ultimately lost"*.

37. Mr Knights essentially stood by the evidence set out in paragraphs 16 and 17 of his witness statement under cross-examination. However, there was one important exchange under cross-examination when it was put to him that he would still have entered into the OneE Scheme even if Mr Elliott had explained that PAYE and NIC may in due course become payable if the scheme failed. After having observed that he thinks that he would have asked Mr Elliott in those circumstances as to whether he thought that entry into the scheme was *"a risk too far"*, he was pressed as follows:

> *"Q. If you had known of that risk, that PAYE and NIC might be payable, you would still have entered into the scheme?*
>
> *A. May be not.*
>
> *Q. You would still have entered the scheme?*
>
> *A. We may not have done.*

Q. But you may have done?

A. We may have done, yes.

Q. I suggest to you that you would have done, because it was a way for you to save corporation tax straightaway, receive cash transferred from the company to you straightaway, and you have the right to use that money tax-free for the next few years?

A. Well, I don't know, because I don't know what alternatives there may have been at that time had we not done that."

38. Mr Elliot emphatically denies that he did anything to positively encourage Mr Knights to enter into, or rather to cause Evergreen to enter into the OneE Scheme. His position was that he had merely introduced the Claimants to OneE, and thus the OneE Scheme, as a possible way of mitigating tax. He utterly rejected the suggestion that he had advised Mr Knights that he/Evergreen had nothing to lose by entering into the OneE scheme, or either of the other two Tax Schemes, or that he had advised that the worst that could happen might be that Evergreen might be liable for corporation tax. In re-examination, albeit in relation to the Qubic Scheme, Mr Elliott provided an explanation as to why he would not have advised that the only potential liability would be for corporation tax, saying:

A. "Because we didn't know that. It could have been any taxes that would have been payable on that money ultimately, as we stated in our letters.

Q. Why could it be any tax?

A. Because it was an extraction of monies from the business and we didn't know what legislation was going to be passed in the future."

39. It is to be noted that THL, had, itself, entered into the OneE Scheme, and I have already referred to the dialogue between Mr Wright and Mr Harrison with regard to one of the early decisions in the *Rangers* Litigation. In this context, Mr Elliott might reasonably have been expected to have been aware that one of the consequences of the OneE Scheme failing as a disguised remuneration scheme would be that a PAYE/NIC liability would arise.

40. The OneE Scheme that I have been referring to was known as the *"Lazarus"* Scheme. It is relevant that, at this time, Evergreen also entered into a scheme with OneE known as *"Joshua"*. Whilst this latter scheme was entered into, Evergreen subsequently extracted itself from it in circumstances which were not explored during the course of the trial. However, it is of some significance that Mr Knights did not recall Evergreen's entry into the Joshua Scheme at all until

recently reminded of it, notwithstanding the detailed evidence that he has given with regards to the entry into the Lazarus Scheme.

41. It is important to consider the context in which Mr Knights/Evergreen might have been considering tax mitigation in May/June 2013:

    i) In the year ended 31 August 2010, Evergreen had a turnover of £419,061 and made a profit before tax of 89,882, on which it paid corporation tax of £19,068;

    ii) In the year ended 31 August 2011, Evergreen's turnover increased to £512,987 and it made a profit before tax of £104,821, on which it paid corporation tax of £23,041, and out of which dividends of £70,000 were paid.

    iii) In the year ended 31 August 2012, Evergreen's turnover increased to £675,850 and it made a profit before tax of £230,027, on which it paid corporation tax of £48,970, and on which dividends of £63,000 were paid.

    iv) During the year to 31 August 2013, Evergreen's turnover continued to increase as demonstrated by the table referred to in paragraph 12 above, which shows a proportionately increased turnover in the extended accounting period which ended on 28 February 2014. Consequently, subject to tax mitigation, it faced a substantial corporation tax liability, and the recipients of any dividends faced a substantial income tax bill.

    v) There were thus good reasons, by May/June 2013 if not earlier, for Mr and Mr Knights and Evergreen to consider any tax mitigation options which might have been suggested by THL/Mr Elliott.

42. Over and above its terms of business, which I have referred to, THL also seeks to rely upon documentation generated prior to the entry into the OneE Scheme as defining the relationship between THL on the one hand, and Mr and Mrs Knights and Evergreen on the other hand, with regard to the introduction to OneE so as to absolve THL from any duty of care, or any responsibility for advising the latter in respect of the OneE Scheme and the entry into the same.

43. Particular reliance is placed upon *"limitation of liability"* letters ("**Limitation of Liability letters**") sent to Evergreen (dated 11 June 2013, signed on 9 August 2013, and stamped as received on 13 August 2013), and to Mr and Mrs Knights (dated 17 June 2013 and signed on 20 June 2013).

44. The following parts of this Limitation of Liability letter are of particular importance:

"There are a number of risks associated with tax avoidance schemes, which we would like to bring to your attention before you enter into any contractual obligation with OneE:

a. *It is highly likely that HMRC will commence an enquiry into your tax affairs. This enquiry may not necessarily be limited solely to the planning strategy implemented for you, but may also cover other elements of your financial position.*

b. *HMRC may interpret the applicable law in a different way to OneE Limited, with the result that the tax strategy may fail to deliver the anticipated result.*

c. *HMRC are actively looking at ways to increase their taxation revenues, and in particular to address legal loopholes and anomalies in existing taxation law which can be exploited by tax avoidance schemes. For this reason, future legislation changes may cause the tax planning strategy to fail, or to deliver lower than anticipated savings.*

d. *Whilst tax avoidance may be legal, the boundary between legal tax avoidance and tax evasion is not always clear.*

e. *There is a growing concern in the UK that everyone should pay their "fair share" of the total taxation burden. You should carefully consider whether you would suffer any reputational damage, if the existence of your tax planning strategy were to become public knowledge.*

We cannot and do not give advice or guarantee as to the success or otherwise of any tax planning strategy and the risk that the strategy may fail, HMRC may enquire into it or HMRC may interpret the applicable law in a different way to OneE Tax Limited.

Whilst we may provide generic information on the range of strategies available to you, in some areas our knowledge of the complex technical legal and taxation matters associated with these strategies is limited.

For this reason, all advice in relation to the …

1. ***Corporation Tax relief on the Employer Financed Retirement Benefit Scheme payment***
2. ***Inheritance tax and income tax implications of loaning monies from the offshore trusts***

and the legal and tax aspects of these transactions will be dealt with by your tax advisers, OneE Tax Limited.

You are strongly advised to discuss all aspects of the tax planning strategy with OneE Tax Limited, so that you understand the nature of

> ***the strategy, the upfront and ongoing costs and the potential risks involved.***
>
> ***We confirm that you are relying solely on OneE's advice in connection with these matters.***
>
> *We may assist you by providing generic information on the available strategies. We may also assist you and/ or OneE in completion of administrative functions and related services. For example, we may certify documents, provide copies of information in relation to anti money laundering regulations, prepare supporting cash flow and / or management account information. These support services (which for the avoidance of doubt, do not constitute advice on the products themselves) will be agreed with you in advance and charged in accordance with our normal scale of fees.*
>
> *OneE Tax Limited may pay my firm an introductory fee in respect of this business.*
>
> *We anticipate that the amount received by us will be 30% of the gross fee payable by yourselves to OneE Tax Limited.*
>
> *We are required to account to you for this commission. We shall write to you to confirm the actual amount received and you agree that we shall retain 75% and remit the remaining 25% to you.*
>
> *...*"

45. Although initially responding under cross-examination to say that he probably would not have read this letter, when pressed Mr Knights accepted that he might have done so in the case of this letter, but not subsequent such letters in relation to the subsequent Tax Schemes. However the position adopted by Mr Knights was that he said that he was led to believe from conversations with Mr Elliott that letters such as this letter were produced to be signed as a matter of formality for internal administration and compliance purposes only, such that he did not therefore regard them as having any particular significance. It was disputed by THL that Mr Knights was given any such impression, and it was Mr Elliott's evidence that he explained the substance of this first Limitation of Liability letter to Mr Knights, even if subsequent such letters in relation to the other Tax Schemes were not specifically discussed between Mr Elliott and Mr Knights.

46. Reliance was also placed by THL on the fact that Mr Knights received and signed the following further documents, namely:

    i) A letter of engagement dated 20 June 2013 with OneE; and

    ii) An advice letter from OneE dated 20 June 2013 setting out OneE's advice in respect of the OneE Scheme.

47. It is said by THL that the documents referred to in the previous paragraph expressly advised that:

    i) Entry into the OneE Scheme carried risks;

    ii) As a result of entering into the OneE Scheme, Evergreen: *"... may be liable for a greater amount in tax than would otherwise have been payable had you not entered into the Planning"*;

    iii) One outcome might be that full liabilities to Income Tax and NIC might arise as if Evergreen had paid cash bonuses to employees instead of implementing the planning; and

    iv) Evergreen might have to pay interest and penalties in respect of the tax not paid.

48. OneE's letter of advice contained the following sentence at the end thereof, immediately above Mr Knights' signature: *"Please sign to acknowledge that you have read and fully understand the potential risks and rewards of the Planning."* Other scheme documentation subsequently signed by Mr Knights contained similar wording, against which he placed his signature. At the beginning of his cross-examination, it was put to, and accepted by Mr Knights that he would not sign something knowing it to be untrue. It was thus put to him that he is either lying when he now says that he would not sign something that was untrue, or, if he is now being truthful, he must have read and understood documentation such as OneE's advice letter. This is an issue to which I shall return.

49. In paragraph 26 of his witness statement, Mr Knights says that he would not have read OneE's advice letter, at least in any detail, and suggests that he was never asked to do so, commenting that: *"The expectation was that I would just sign and return what I was told to."* Under cross-examination, he accepted that he should not have signed the letter to say that he had read and fully understood it unless he had read and fully understood it. When then pressed, he said that he could not specifically recall reading this advice letter, but *"may well have done"*. He then said: *"I was aware of the risks involved"*. He was then pressed as to whether he was aware that one of the risks was that there would be no corporation tax but that that there would be PAYE and NIC. He responded: *"Not PAYE and NIC because that would have only applied if we had taken incomes."*

50. THL places reliance upon the fact that in an email dated 21 June 2013, Mrs Knights wrote to Mr Wright to say that she was just *"waiting for Graham to read through the documents - I will email once we have signed them ...*"

51. It is fair to observe that the letter of engagement and advice letter ran to some eight pages each of fairly small type, and contained, particularly in the case of

the letter of advice, fairly complex technical language. They give the impression of being standard form documents produced to be signed as a matter of routine on entering into the OneE Scheme rather than being tailored to individual entrants to the latter. It is the Claimants' case that, in the circumstances, Mr Elliott cannot have believed that this advice, and other advice subsequently provided by Qubic in respect of the Qubic Scheme would be relied upon by Mr Knights.

52. It is THL's case that by signing the letter of engagement with OneE on 21 June 2013, Evergreen became committed to paying OneE the sum of £5,000 (plus VAT) immediately. This is said to be relevant to the limitation issue that arises in the present case as identifying when Evergreen first suffered loss in relation to the cause of action as against THL in relation to the entry into the OneE Scheme.

53. It was against this background that Evergreen entered into the OneE Scheme, which was an EFRBS involving the establishment of a discretionary trust for the benefit of Evergreen's employees (which included Mr and Mrs Knights) and, as understood, the creation of sub-trusts for the employees and their wider issue. The mechanism was that Evergreen would make payments into the trust, and these payments would be allocated to each sub-trust which would then make loans to the beneficiaries of the sub-trust (which it was not anticipated would be repaid). The overall intention was that Evergreen would treat the payments into the trust as expenses to be offset against its corporation tax liability, and the sums loaned out of the sub-trusts would be received tax free by the employees in question with neither them nor Evergreen accounting for income tax, PAYE or NIC to HMRC.

54. EFRBS were a refinement of earlier *"disguised remuneration"* arrangements, and promoted against the background of anti-avoidance legislation introduced by the Finance Act 2011, as Part 7A of the Income Tax Earnings and Pensions Act 2003 ("**ITEPA**") ("**Part 7A**"), to tackle the avoidance of tax on employment income through the use of *"disguised remuneration"* arrangements. The rules under Part 7A sought to ensure that there was an income tax charge as soon as the employer decided to allocate funds for a particular employee by earmarking what was in substance a reward or loan in connection with the employee's employment, or making a payment or loan directly, by providing that the amount concerned should count as a payment of employment income, thus requiring the employer to account for PAYE and NIC accordingly. EFRBS sought to get around this legislation essentially by the use of a sub-trust, an approach that was, in the *Rangers* Litigation, initially accepted in the taxpayer's favour by the First-Tier Tribunal Tax Chamber in October 2012 and by the Upper Tribunal (Tax and Chancery Chamber) in July 2014, only for HMRC to succeed with an appeal to the Inner House of the Court of

Session in Scotland in November 2015, and ultimately in the Supreme Court in July 2017.

55. Further, it is relevant to note that EFRBS had been under HMRC's "Spotlight" since as early as 2010 as demonstrated by HMRC's *"Spotlight 5" – "PAYE and NICs, Corporation Tax and Inheritance Tax: Using Trusts and Similar entities to reward employees"*, and *"Spotlight 6" – "EFRBs"*, both dated 5 August 2010. In addition since the introduction of the new legislation by the Finance Act 2011, HMRC has focused heavily on tackling all *"disguised remuneration"* tax avoidance arrangements, and new measures have subsequently been introduced to target the ongoing use thereof such as the introduction of the *"loan charge"* in the Finance (No 2) Act 2017, the effect of which was to impose a tax charge on outstanding loans under EFRBSs.

56. It is thus clear that Evergreen entered into the OneE Scheme against a contentious background, despite the early success of the taxpayer in the *Rangers* Litigation.

57. The effect of Evergreen entering into the OneE Scheme was, in essence, as follows:

    i) Evergreen paid £250,000 into the Evergreen Trees & Shrubs 2013 EFRBS;

    ii) As a result of this payment, Evergreen charged £247,500 against its profit on ordinary activities for the accounting period 1 September 2012 to 28 February 2014. The effect thereof was to reduce its profit before tax to only £741, so that only £36 was payable by Evergreen in corporation tax.

    iii) Each of Mr and Mrs Knights received the sum of £125,000, as understood, technically by way of loan from a sub-trust created under the relevant EFRBS. Evergreen did not pay PAYE/NIC, and Mr and Mrs Knights did not pay any income tax.

58. As THL point out, the effect of the above, subject to HMRC's subsequent challenge, was to reduce Evergreen's profit, and thus its liability to corporation tax, to a negligible amount, and to allow Mr and Mrs Knights to extract from Evergreen, and to have the use and enjoyment of £250,000 from July 2013 onwards.

59. The following events, amongst other, subsequently occurred:

    i) On 28 November 2014, OneE emailed Mr Knights noting that the latest decision in favour of the taxpayer in the *Rangers* Litigation was under appeal. Under the heading *"Going Forward"*, the email commented that

OneE did not know which taxes HMRC would seek to charge via an APN (advance payment notice). The email continued: *"it could, for example, just be a Corporation Tax charge. Alternatively, HMRC might seek a full PAYE/NIC charge."*

ii) Having previously contacted Mr Knights in March 2017, in September 2017, OneE Group Ltd[2] informed those that had entered into the OneE Scheme, including Evergreen, that there had been two developments which jeopardised the success of the OneE Scheme as a tax avoidance device. Those developments were:

a) The publication of a draft of the legislation that ultimately led to the introduction of the loan charge, i.e, the Finance (No 2) Act 2017; and

b) The decision of the Supreme Court in the *Rangers* Litigation.

iii) On 13 October 2017, HMRC issued a Notice of Decision requiring Evergreen to pay the PAYE and NIC that would have been payable had the £250,000 been paid as salary to Mr and Mrs Knights.

iv) In March 2018 OneE Group Ltd informed its clients (including Evergreen) that the Finance (No 2) Act introducing the loan charge had been enacted, with the result that the outstanding loan to Mr and Mrs Knights would be subject to a charge to tax in any event. OneE Group Ltd recommended that its clients should enter into settlements with HMRC.

v) OneE Group Ltd provided further information in respect of the options open to Evergreen on 1 May 2018.

vi) Against the above background, in June 2019, Evergreen entered into a settlement with HMRC in respect of both the OneE Scheme and the Qubic Scheme, under which Evergreen agreed to pay:

a) The PAYE and NIC that would have been payable had the monies received by Mr and Mrs Knights been paid as salary; and

b) Interest thereon.

vii) Under the settlement agreement, and as referred to in more detail below, Mr and Mrs Knights succeeded in negotiating terms that provided for payment of part of the settlement sum to be deferred upon the payment of interest payable at a comparatively small rate. This enabled Mr

[2] OneE Tax Ltd was by then in liquidation.

Knights/Evergreen to invest the amount agreed to be deferred in property bonds yielding a rate of return considerably in excess of the interest rate payable to HMRC in respect of the outstanding sum.

60. Mr Knights only first raised a complaint with THL with regard to Evergreen's participation in the OneE Scheme in July 2018.

The Elysian Scheme

61. It is common ground that in late 2013 THL introduced Mr Knights to Newport, a pension planning adviser, which was promoting the Elysian Scheme. It is also common ground that Mr Knights attended a seminar at Malton Golf Club on 5 November 2013 at which Newport gave a presentation that included the Elysian Scheme. THL's written opening refers to representatives of THL simply having been present at this presentation, but this rather plays down THL's role therein. Mr Elliott, despite what he said in his witness statement, all but accepted under cross-examination that the event could properly be described as having been jointly hosted by THL and Newport, and he further accepted that THL would have paid for the event, or at least for the refreshments provided thereat, it being common ground that Mr Harrison would have said something by way of introduction at the beginning of the event.

62. As understood, it is THL's case that Mr Knights' interest in the Elysian Scheme followed on from the presentation on 5 November 2013. However, it was Mr Knights' evidence that there was a discussion between himself and Mr Elliott in or around September 2013 during the course of which Mr Knights casually mentioned pension interest rates and annuity returns not being good, in response to which Mr Elliott mentioned what Mr Elliott is said to have described as an *"exciting"* scheme to enable funds to be released from a pension on a non-taxable basis and which also had great growth potential. Mr Knights said that he could recall Mr Elliott using the expression *"exciting"* in the context of Mr Elliott saying that he had taken advantage of this scheme himself. Paragraph 24 of the Amended Particulars of Claim in respect of the Tax Schemes Claim ("**the Tax Schemes Claim PofC**") refers to Mr Elliott having said that the Elysian Scheme was *"something we* [i.e. THL] *have done for ourselves"* and that he would recommend Mr Knights invested in it as well given his general concerns about his current pensions and annuity rates. It is to be noted that, under cross-examination, Mr Elliott accepted that the reason that he referred to himself/THL having taken advantage of the Elysian Scheme was to provide Mr Knights with some comfort in relation thereto.

63. Mr Knights' evidence was that the Elysian Scheme was particularly attractive to him because it meant that he could take out his entire pension fund and use or invest it as he liked, rather than being tied to purchasing an annuity at the appropriate time - he was then yet to reach the age of 55.

64. Although not pleaded, there being no mention thereof in the APofC and the first mention being in Mr Knight's witness statement, it was his evidence that Mr Elliott had also *"effectively said"* during the initial discussion with regard to the Elysian Scheme in or about September 2013 that there would be nothing to lose through entering into the same because even if the scheme did not get approval from HMRC, any tax reduced or mitigated would simply be repaid, i.e. that the worst case scenario was that the mitigated tax would have to be paid at a later date if the scheme failed. Mr Knights said that it was during the course of this conversation that Mr Elliott mentioned the forthcoming presentation at Malton Golf Club.

65. Apart from his concession regarding providing comfort to Mr Knights by mentioning that he/THL had entered the Elysian Scheme, Mr Elliott emphatically denied that he described the latter as *"exciting"* or otherwise recommended the same to Mr Knights, whether by suggesting there was nothing to lose or otherwise.

66. As explained by Mr Arnold in his report dated 16 April 2021:

    i) The Elysian Scheme was set up by Future Capital Partners ("**FCP**") who are well-known for establishing tax avoidance arrangements such as the Eclipse 35 Film Partnership Scheme, aimed at certified High Net Worth Individuals ("**HNWI**") and self-certified sophisticated investors.

    ii) The scheme was sold as a renewable energy (bio-fuels) investment whereby investors were offered the opportunity to purchase unlisted shares, with the promise of listing at a later date. The individual would become a member of a partnership and would be allotted a certain number of shares in Elysian Fuels, a corporate member of Elysian Fuels LLP. The shares were purchased for £1 with the assistance of a third party loan with the individual contributing 16.6% of the share price i.e. 16.6p.

    iii) Investors were advised to transfer existing pension funds into a Self-Invested Pension Plan ('**SIPP**'). The SIPP then acquired the Elysian shares for a cash payment, resulting in the extraction of their pension funds (before retirement) without paying any tax. In most cases, the net outcome for the customer was the receipt of £83,400 from their pension funds in the SIPP (less 3-5% fees), whilst their SIPP held 100,000 Elysian Fuels shares with a nominal value of £100,000.

67. It was Mr Knights' evidence that following the presentation on 5 November 2013, he followed the matter up with Mr Elliott who was *"very encouraging"* about Mr Knights wanting to invest in the Elysian Scheme, mentioning that Newport had a few scheduled dates coming up in the area to meet and sign up

prospective clients, which resulted in 4 December 2013 being fixed up as a date for Mr Knights to meet up with representatives of Newport.

68. Before considering the further steps regarding Mr Knights' entry into the Elysian Scheme, I note that on 31 October 2013 Ms Guy sent an email to Mr Harrison and Mark Stanton of THL, copying in Mr Elliott, that was headed: *"Due Diligence Newport capital et al."* This set out various findings that Ms Guy had come to having made various enquiries in respect of Newport prior to clients of THL being introduced to the latter.

69. On 3 December 2013, THL sent to Mr Knights a Limitation of Liability letter referring to the fact that it was understood that Mr Knights was considering entering into a pension planning strategy with Newport and, having stated that THL was not authorised to advise in relation thereto, explaining that THL was unable to provide him with any advice in relation to the pensions planning strategy in question. The letter went on to state as follows:

> *"We cannot and do not give advice or guarantee as to the success or otherwise of any pension planning strategy, the risk that the strategy may fail, that HMRC may enquire into it or HMRC or the Pensions Regulator may interpret the applicable law in a different way to [Newport].*
>
> *We understand that you have elected to be treated as a Higher Net Worth Individual for the purposes of this pensions planning strategy and you have accordingly signed a Higher Net Worth Individual Statement outlining the implications of this election.*
>
> *We understand that [Newport] are not providing any advice in relation to this specific strategy.*
>
> *You are strongly advised to discuss all aspects of the pensions planning strategy with Newport Financial Management LLP, so that you understand the nature of the strategy, the upfront and ongoing costs and the potential risks involved.*
>
> *If you are in any doubt as to inter alia the suitability of the strategy, its effectiveness, the legal or tax implications and potential risk, or require further guidance, you are strongly advised to appoint an Independent Financial Advisor to review the strategy and provide you with appropriate advice."*

70. THL also sent a further Limitation of Liability letter dated 3 December 2013 in similar terms to the Limitation of Liability letter sent in respect of the OneE Scheme, and a further letter dated 3 December 2013 setting out the basis upon which THL would receive commission in respect of the introduction to Newport, and remit part thereof to Mr Knights.

71. Whilst the letters dated 3 December 2013 referred to in the two previous paragraphs were signed by Mr Knights, the date upon which they were so signed is not indicated.

72. It was Mr Knights' evidence that a meeting did take place on 4 December 2013 at THL's offices at which he met with Mr Elliott, who introduced *"various members of the Newport team who were signing up clients"*. He recalls that one of the participants at the meeting was a Mr Adrian Douglas from Newport. It was his evidence that, by this stage, he was *"already sold on the product because it had been recommended to me by David Elliott who had convinced me that it was suitable, that it was an exciting product that had no downsides and that David and THL had already invested in it themselves."* He said that it was his recollection that having introduced the representatives of Newport, Mr Elliott came back in towards the end of the meeting after he had gone through the paperwork, *"to ask him any questions"*.

73. Whilst it is not in dispute that Mr Knights met with representatives of Newport at this time, and whilst nothing probably turns upon it, it is not entirely clear that the meeting took place on 4 December 2013, rather than earlier in that there is documentation that was signed by Mr Knights bearing the date 3 December 2013, namely the following:

    i) Mr Knights signed a Client Agreement (running to some 8 pages of small text) and a Service Proposition & Engagement letter with Newport, the latter document bearing the date of 3 December 2013 by the side of Mr Knights' signature;

    ii) Mr Knights signed what looks like a standard form letter addressed to Newport bearing the date 3 December 2013 and referring to a recent meeting with Philip Porter and Nick Wood of Newport by which Mr Knights stated that he wished to make an investment of £200,000 on an *"execution only"* basis into Elysian Fuels 2013 No 36 Ltd, i.e. the Elysian Scheme.

74. However, Mr Knights also signed two documents bearing the date 4 December 2013, namely:

    i) A *"Statement of Certified High Net Worth Individual"* in which he confirmed that he was a HNWI, and that he understood that by signing the statement he might lose significant rights, which bore the date 4 December 2013 by his signature; and

    ii) A notice bearing the date 4 December 2013 confirming that he wished to be treated as an execution only client.

75. Against the above background, Mr Knights entered into the Elysian Scheme with the consequence that Mr Knights:

    i) Was admitted as a member of Elysian Fuels 36 LLP and became the owner of 200,000 shares in Elysian Fuels 2013 No 36 Ltd;

    ii) Transferred three existing pensions into a SIPP;

    iii) Received a cash payment of £200,000; and

    iv) In his self-assessment return for the financial year ended 5 April 2014, claimed a partnership loss of £276,333.

76. It is relevant to note that on 19 February 2014, Mr Knights emailed Mr Wright and Mr Elliott, stating in the first paragraph of the email that he would like them to arrange for the Claimants to do some additional tax planning for the year ending February 2014. The email went on to express concern *"over the limited communication and clarity from yourselves concerning the pension transfer and investment that we are doing through Future Capital Partners"*. The email then continued: *"I know that it is not your position to give advice on these products but I think more explanation of their fees and complex paperwork completion was necessary. I am fully up to speed with the investment itself, and am quite happy with the risks associated with the investment, it is just the technical stuff that I need help with. "* THL, understandably, relies upon this as demonstrating that Mr Knights was well aware, not least from the Limitation of Liability letters, that THL had not assumed responsibility to advise with regard to the entry into the Elysian Scheme.

77. When cross examined on this email dated 19 February 2014, Mr Knights sought to explain that in referring to it not being *"your position to give advice"*, he was referring simply to Mr Wright, rather than THL as a whole. However, I am bound to say that this does not rest easily with the contents of the email as a whole, which is concerned with the position of THL, and its actions, and nor does it rest easily with the contents of paragraph 41 of Mr Knights' witness statement where, having set out the terms of the email dated 19 February 2014 in the previous paragraph, he makes no mention of it being limited to Mr Wright, and observes: *"I was aware THL were not my (sic) formally my financial adviser and so were not providing formal advice. However, David did in fact do so and I relied on that advice."*

78. There were a number of exchanges under cross-examination with regard to Mr Knights' understanding in respect of the Elysian Scheme:

    i) Firstly, Mr Knights was referred to scheme documentation that he had signed confirming that he had understood and agreed promotional materials, including an information memorandum. It was put to him that

those materials made it clear that there were risks associated with the scheme, which Mr Knights accepted. It was further put to him that there was no guarantee that the scheme would work as intended, which again Mr Knights accepted.

ii) Shortly thereafter, Mr Knights confirmed that he was aware that there was a risk that if the scheme failed, then tax would be payable on the monies that had been extracted.

iii) Later, Mr Knights accepted that if HMRC pursued the matter, they would charge him for the tax that would have been payable on the pension liberation, that he always knew that was a risk, and that he didn't know what the amount of tax would be.

79. In a sense the Elysian Scheme did achieve the objective of enabling Mr Knights to release cash from his pensions before he reached the age of 55, which he reached on 10 April 2016. It is true that HMRC has not specifically sought any payment from Mr Knights as a result of his entry into the Elysian Scheme. However, HMRC has opened enquiries in respect of the relevant periods, and in correspondence in July 2018 stated that it is committed to challenging the scheme, consistent with its commitment to challenge such tax avoidance schemes. In the circumstances, both Mr Arnold and Mr Stean are agreed that HMRC will ultimately and successfully pursue the matter and seek to recover the appropriate tax charge, which is liable to turn upon the current value (if any) of the shares acquired pursuant to the scheme. As to this, the experts were agreed that HMRC was likely to proceed on the basis that the relevant shares were worthless, and therefore that there would be a full charge to tax, Mr Stean being constrained to accept that was likely to be the case.

80. By letter dated 15 July 2015, HMRC indicated that it would check Mr Knights' tax return for the year 2013/14. THL wrote to Mr Knights on 25 August 2015 stating: *"Unfortunately and as previously explained in our correspondence with you, we are unable to provide you with any specific advice in relation to the arrangements involving Elysian Fuels, your reliance being on the 'Scheme Provider'"*. Mr Knights did not then challenge this, but rather joined the Elysian Action Group, and appointed Newport Tax Management to advise and act as his agent in respect of the position with HMRC.

81. No claim was intimated against THL in respect of the Elysian Scheme until 2018.

CWM Investment

82. Interest in the CWM Investment initially arose as a result of Mr Wright being contacted by Mr Skipsey by email in December 2013 after Mr Skipsey had been

introduced to Mr Wright through a mutual acquaintance. Ultimately, this led to Mr Wright and Mr Skipsey meeting on 20 February 2014. Neither of them can recall whether there was any discussion with regard to the CWM Investment prior to this meeting, although both accept that it is possible that there was. Although Mr Wright and Mr Skipsey gave differing accounts as to where the meeting took place, they were agreed that in addition to discussion of an *"EMTN"* product, the CWM Investment was discussed, and discussed in terms of it being a foreign exchange investment that had high interest fixed monthly returns, and in respect of which the invested capital was secure. Mr Skipsey subsequently emailed Mr Wright on 21 February 2014 and 6 March 2014. In the latter email, Mr Skipsey stated that sign off had by then been obtained in respect of the CWM Investment, which he described as having been *"briefly discussed"* when he and Mr Wright had met, which he suggested that Mr Wright would find *"significantly interesting"*, and which Mr Skipsey described as being similar to the EMTN product and having *"excellent capital secure features, excellent returns and also has tax-free features attached."* The email concluded by suggesting a discussion and a meeting.

83. The suggested meeting was arranged for 14 April 2014 at THL's offices, and was attended by Mr Skipsey and Mr Robson on behalf of Square Mile, and Mr Harrison, Mr Elliott and Mr Wright on behalf of THL. Mr Skipsey and Mr Wright both said that Mr Robson did most of the talking because he knew most about the product. It is not in dispute that Mr Robson gave a further fuller description of the CWM Investment, and it is reasonable to infer that this would have been a fairly comprehensive description of the product and what it had to offer, given that Square Mile would, one would have thought, have been keen to develop the interest of THL therein. It is further common ground that there would have been some discussion at that point with regard to the commission that THL might hope to receive for introducing clients to Square Mile and, through Square Mile, to the relevant investment opportunity.

84. Plainly, sometime prior to the meeting on 14 April 2014, Mr Wright will have discussed the CWM Investment with Mr Elliott and/or Mr Harrison.

85. Both Mr Skipsey and Mr Wright referred to the meeting on 14 April 2014 as having been followed by email exchanges that led up to a meeting on 18 June 2014, when Mr Robson and Mr Skipsey met with Mr Knights at THL's offices.

86. The CWM Claim PofC allege that at a meeting on 19 February 2014 Mr Wright advised Mr Knights that there was an amount of *"dead capital"* within Evergreen that *"wasn't working for him"*, and that Mr Wright then proceeded to inform him that THL was working with Square Mile, an introducer, in relation to the CWM Investment, it being explained by Mr Wright that CWM traded on foreign exchanges, that it was not unusual for investors to generate returns as much as 15-20% per month, and that the investment guaranteed

returns of 5% per month. Nothing further is pleaded with regard to discussions until the meeting on 18 June 2014.

87. However, in his witness statement, Mr Knights puts matters somewhat differently than as pleaded in the CWM Claim PofC in that it is said that, during the meeting on 19 February 2014, Mr Wright merely said that he had a possible investment opportunity with a guaranteed return and that he would come back to Mr Knights with further details. It is then said that Mr Wright did come back to Mr Knights with more details in March or April 2014, Mr Knights being unable to recall whether this was at a meeting or over the telephone. In very much more detail than pleaded in the CWM Claim PofC, Mr Knights then says that Mr Wright explained that THL was *"working with"* a brokerage company - which he subsequently came to understand to be Square Mile - rather than explaining that THL was acting as an introducer to Square Mile. Mr Knights says that Mr Wright went on to explain that CWM was a highly successful company which operated a highly sophisticated trading business on the foreign exchanges market into which it was possible to make an investment that could generate returns as much as 15% to 20%, and that it would be possible for him and other investors to invest funds and achieve a guaranteed return of 5% per month. Further, Mr Knights says that Mr Wright said that this was a highly secure form of investment and that the security was achieved by the investors' capital being placed in a secure ring fenced deposit account with a major bank. Mr Knights also says that he believes that mention was made of Deutsche Bank or Commerzbank, and that mention was made of a 10% stop loss, the effect of which was that the most that Mr Knights could possibly lose would be 10%. Mr Knights says that he had no experience or understanding at all of the foreign exchange investments, and that Mr Wright and THL would have been fully aware of that.

88. Mr Wright said under cross-examination that he would have explained matters to Mr Knights exactly as matters were explained to him in his meeting with Mr Skipsey. It was put to him by Mr Elkington QC that what he was doing was to pass on to Mr Knights what he had been told by Mr Skipsey, which Mr Wright accepted. Mr Wright also accepted that it was likely that Mr Knights would have appreciated that what Mr Wright was doing was passing on what he had been told by Mr Skipsey.

89. Mr Knights says that he recalls speaking to Mr Elliott with regard to the CWM Investment at some point prior to the meeting on 18 June 2014, during the course of which such conversation Mr Elliott repeated what Mr Wright had told him about the CWM Investment and the guaranteed returns and security of capital. Mr Knights says that Mr Elliott was *"very positive"* about the investment, and suggested that if an investment was to be made, then a separate

company should be established for the purpose thereof, and that it was pursuant to that advice that KIML was incorporated on 24 June 2014.

90. It is clear from an email dated 29 May 2014 from Mr Wright to Mr Elliott that Mr Knights was chasing progress with regard to the CWM Investment in that Mr Wright refers to Mr Knights *"getting keen to progress as his pension money was received today"* - as I understand it, a reference to the money paid to him under the Elysian Scheme, which he was keen to invest on favourable terms.

91. During the course of his cross-examination, Mr Wright observed at one point that THL would not *"take on"* any introducer to tax schemes and investments, to whom THL's own clients would be introduced, *"without doing the background work behind it first"*. This is consistent with Ms Guy's email dated 31 October 2013 relating to *"Due Diligence"*, as that email expressed it, in respect of Newport prior to Mr Knights' entry into the Elysian Scheme.

92. Mr Elliott referred in an email to Mr Wright dated 9 June 2014 to the fact that he was *"trying to look into the company that does the FX trading and also the bank where the cash would be held."* Under cross-examination, Mr Elliott confirmed that the company in question was CWM, and he stated that he was seeking to find out who they were, and to confirm *"things that Mr Skipsey had said to us"*. He must, as I see it, have been doing this by way of the type of *"background work"* that Mr Wright referred to.

93. I note that Mr Elliott also touches upon this email exchange in paragraph 26 et seq of his witness statement. In paragraph 27, he refers to reading documents provided by Mr Wright, and carrying out Google searches in respect of CWM involving searching against names, including the key individuals concerned with CWM of whom he had been made aware.

94. Mr Elliott was pressed under cross-examination as to why he carried out this exercise, and why THL was concerned to check that what Mr Skipsey had said was correct, to which he responded that it was for his own *"peace of mind"*.

95. When later pressed under cross-examination with regard to why he needed to get involved bearing in mind that it is THL's case that it was a mere introducer passing on information provided by representatives of Square Mile, he responded as follows:

> *"Because we had made the introduction, so from our point of view, from our limitation of liability letters and compliance, we needed to have some kind of understanding as to who we are dealing with."*
>
> ....

"What I'm saying is before we can make an introduction we need to know whether we can make an introduction."

96. There was another intermediary involved sitting between Square Mile and CWM, namely Michael Wanless of The Victus Solution ("**Mr Wanless**"). By 11 June 2014, Mr Wanless had arranged for representatives of THL to visit CWM. The purpose of this visit was explained in an email dated 11 June 2014 from Mr Elliott to Mr Harrison in which he explained that it was: *"only to see them and how they trade and what protections they put in place for the investor etc."* Mr Harrison responded to the effect that he thought that he had a number of interested parties, commenting: *"something we may need to push for clients and our income stream."*

97. Mr Knights met with Mr Robson and Mr Skipsey on 18 June 2014 at THL's offices. It was Mr Knights' evidence that the meeting only lasted half an hour or so, its purpose being essentially for Mr Elliott to introduce Mr Robson and Mr Skipsey to Mr Knights. It was his evidence that Mr Robson and Mr Skipsey effectively repeated and told him what he had already been told by representatives of THL, namely that CWM was a foreign exchange broker in London generating high returns from which they could guarantee to pay investors a 5% per month return, and do so with almost complete security of capital. He says that he was told by Mr Robson and Mr Skipsey that returns such as this were not unusual within the foreign exchange trading market, because of the very high returns that were being produced in that market that enabled traders to share these with investors. Mr Knights says, however, that he did not regard these representatives of Square Mile as giving him advice in respect of the CWM Investment.

98. Mr Knights says that towards the end of the meeting, Mr Elliott, who had left having made the introductions to Mr Robson and Mr Skipsey, re-joined the meeting. Mr Knights says that Mr Elliott remained enthusiastic about the *"exciting"* CWM Investment, and he, in response, said that he was interested given the guaranteed returns and what appeared to be the secure nature of the investment. Mr Knights says that he commented that the investment looked almost *"too good to be true"*, and that the others present agreed with that sentiment, but that Mr Elliott said that he was convinced that it was a legitimate and genuine product. Mr Knights says that Mr Elliott continued by explaining that CWM operated from very prestigious offices in London, and was a very reputable foreign exchange brokerage. Mr Knights says that Mr Elliott also repeated how capital was secure with just a 10% stop loss, and funds were held in a segregated account.

99. Mr Knights says that Mr Elliott went on to say that he was planning to travel to London to meet with CWM to check the product out himself, and that he would update Mr Knights again when he had done so, Mr Elliott saying something

along the lines of: *"I have got a number of clients interested, so I'm going to go down and do the necessary checks and report back."* Mr Knights accepted during the course of cross-examination, that the expression *"due diligence"* was not used in the course of this discussion.

100. It is to be noted that the CWM Claim PofC make no mention of Mr Knights having commented at the meeting on 18 June 2014 that the investment looked almost *"too good to be true"*, or of the others present having agreed and of Mr Elliott then saying that he was convinced that it was a legitimate and genuine product.

101. Mr Knights says that as a result of his discussions with Mr Elliott, he understood the returns to be guaranteed at 5% per month, with the invested funds being held in the segregated account, and that although he appreciated that the capital was not fully secured, his understanding was that his maximum loss would be 10% of his capital because if the capital dropped below 10%, then trading would be suspended and the capital would be returned.

102. Further, Mr Knights accepts that he was informed that THL would receive a 0.75% monthly commission payable such that on receipt of the 5% per month, Mr Knights/KIML would rebate 1% to Square Mile, who would then redirect that 1% to THL who would, in turn, rebate Mr Knights 0.25%, meaning that THL kept 0.75% of the commission.

103. Mr Elliott's evidence in respect of the meeting on 18 June 2014 was to the effect that he did not in any way endorse the CWM Investment, did not describe it as *"exciting"*, and did not otherwise actively encourage Mr Knights/Evergreen to invest, and to the extent that he may have contributed to the discussion, was merely passing on or repeating information provided by the representatives of Square Mile. He emphatically denied that he said that he was convinced that the product was legitimate and genuine, or that he explained that CWM operated from very prestigious offices, or that CWM was a very reputable foreign exchange brokerage.

104. Mr Elliott accepts that there was discussion at the meeting on 18 June 2014 with regard to his planned trip to London and the offices of CWM the following day, but under cross-examination he, initially at least, took exception to the suggestion that he had said that he was going to London to *"check the product out"*. His response was that the reasons that he would have given Mr Knights for going to London would have been consistent with the reasons for his visit expressed in his earlier email exchanges with Mr Harrison. Under cross-examination, Mr Elliott was pressed by Mr Chaisty QC as to the extent of the differences between his evidence and that of Mr Knights as to the reasons given to Mr Knights for his visit to London. It was suggested to Mr Elliott that it was pretty likely that he said to Mr Knights something along the lines of: *"I am*

going down to do the necessary checks and report back". Mr Elliott accepted that it was likely that he did so. It is to be noted that in paragraph 38 et seq of his witness statement, Mr Elliott referred to the visit to London as a *"marketing visit"*, and said that he went *"because I wanted to learn more about what CWM was offering and how the investment worked in a general sense."*

105. In an email sent at 7:56 AM on 19 June 2014, Mr Elliott informed Mr Wright that the meeting the previous day had gone *"very well"*, and informed him that after his meeting in London that day, he would be chatting to Mr Knights the following day, observing that Mr Knights: *"seems pretty set on going for the FX investment and putting everything that he can in."*

106. Mr Elliott did attend at CWM's offices in London on 19 June 2014. In an email sent to Mr Skipsey at 15:49 PM on 19 June 2014, Mr Elliott informed Mr Skipsey that he had had: *"a good meeting with Matthew and Phil today and they all seem very open and keen to accept investors as much as they can. I'll certainly be passing this message back to clients and am speaking to Graham tomorrow so no doubt he will be making his decision very shortly."*

107. The *"Phil"* referred to in the latter email was Philip Barnett, a Solicitor who also appears to have been a shareholder in CWM, who featured when Mr Elliott subsequently took up with CWM various queries raised by Ms Guy.

108. Immediately following the meeting, Mr Elliott did pose a number of questions to *"Matthew"* as set out in an email sent at 20:40 PM on 19 June 2014, including, amongst other things, as to the identity of the liquidity provider and the management team/owners. These enquiries were responded to by way of annotations on Mr Elliott's email by Mr Wanless. These responses identified Anthony Constantinou ("**Mr Constantinou**") as *"major owner"*. Under cross-examination, Mr Elliott said that he seemed to remember *"looking up"* Mr Constantinou, but that this did not turn up anything adverse. That Mr Constantinou should have been identified as the *"major owner"* is of potential significance in that Mr Constantinou had been associated with a company called Aixia Ltd ("**Aixia**") in respect of which the FCA had issued a warning on 11 March 2014 that referred to it as providing financial services without FCA authorisation, and suggesting that readers should: *"Find out why to be especially wary of dealing with this unauthorised firm."*

109. It is not now in issue that shortly thereafter Mr Elliott did report back to Mr Knights, Mr Knights referring to the relevant conversation in paragraph 29 of his witness statement. Mr Knights' account is that Mr Elliott telephoned him and told him that he had completed his enquiries and that *"all was OK"* with regard to the CWM Investment, and that whilst Mr Elliott could not *"officially advise him"*, Mr Elliott thought that it looked like *"a very good product"* and said words to the effect of: *"if I had any spare cash I would do it."* Mr Knights

further alleges that the final thing that Mr Elliott said to him in this phone call was *"fill your boots"*.

110. Mr Elliott's recollection was that the relevant telephone call took place the day following the meeting in London, and he accepted under cross-examination that he would have said to Mr Knights something along the lines that he was satisfied that everything that they had been told *"added up"*. However, Mr Elliott emphatically denied having told Mr Knights that it looked like *"a very good product"* or that he would *"do it"* if he had any spare cash, or that he suggested to Mr Knights that he should *"fill his boots"*.

111. It is to be noted that there is a significant disparity between the version of events given in Mr Knights' witness statement, and the case as pleaded as to when, and the circumstances in which Mr Elliott reported back to Mr Knights:

i) The CWM Claim PofC referred, in paragraphs 6 to 8 thereof, to the meeting on 18 June 2014, and at paragraph 7(f) it is pleaded that Mr Elliott orally agreed with Mr Knights that THL would carry out *"due diligence"* on CWM and the investment that was being offered.

ii) However, in paragraph 11 of the CWM Claim PofC, it is pleaded that Mr Elliott attended the offices of CWM in late July/early August 2014, after which he telephoned Mr Knights and informed him that he had seen the trading screens, and carried out most of the due diligence and *"it all looks good"*, but that he still needed to complete the due diligence.

iii) In paragraph 12 of the CWM Claim PofC, it is then alleged that a few days later Mr Elliott telephoned Mr Knights, and informed him that *"all was okay"*, and that it was then that Mr Elliott said that whilst he couldn't officially advise him and that it was a decision for Mr Knights as to whether he wanted to invest or not, it looked a very good product and *"if I were you I would do it"*, as well as saying *"fill your boots"*.

112. Mr Knights remained enthusiastic that he and/or Evergreen should invest in the CWM Investment, and, as mentioned, KIML was incorporated on 24 June 2014.

113. Ms Guy had become involved in the process in her capacity as THL's Compliance Officer. On 11 July 2014, Ms Guy wrote to Mr Elliott raising a number of concerns in respect of the proposed CWM Investment. The relevant email began by saying: *"This is really quite horrid!"*. It went on to raise questions as to whether one was concerned with an investment or something else and as to the terms of the proposed contract with CWM a copy of which had been provided to THL, as well as raising various issues with regard to risk touching on, amongst other things, the use of leverage and the nature of the stop loss to be applied. The email concluded as follows:

> ***"Our Introduction / limitation of liability letter***
>
> *We need to play it safe here & to assume that this arrangement could be interpreted as an investment arrangement and therefore subject to the DPB rules.*
> *This means avoiding all advice on the specific product.*
> *Given my comments re risk above, I do wonder whether there is a conflict between the avoidance of advice & a "duty of care" to the client, so I would try to incorporate some wording into our letter to explain at least what leveraged forex is, whether the client [or CWM] is exposed in the event of a loss, and what the stop loss can / cannot do.*
> *We probably also have a duty to investigate my comments re the way that the contract is worded with regard to the 5% & possibly to consider the taxation implications [is the 5% return on investment, interest, etc and is the 1% capable of being offset for tax purposes … I suggest not]*
> *I havent attempted to re-draft the letters – it won't take much time to do that once we've bottomed these other points."*

114. In an email dated 16 July 2014, Ms Guy expressed to Mr Elliott the importance of Mr Knights not signing up with CWM until he had seen and signed THL's Limitation of Liability letter relating to CWM Investment.

115. Mr Knights had a meeting with representatives of Square Mile on 17 July 2014, and a further meeting with Mr Skipsey on 20 August 2014, without any representative of THL being present at these meetings. It was Mr Knights' evidence these meetings simply dealt with administrative matters, and it is certainly correct that at the first of these meetings Mr Knights signed an application for the CWM Investment. Reliance is placed by THL on the fact that Mr Knights attended these meetings with representatives of Square Mile alone and without involving THL as illustrative of the fact that THL had been a mere introducer to Square Mile, and that it was the latter who had taken on responsibility for signing up Mr Knights to the CWM Investment. Reliance is also placed by THL on the fact that Mr Knights subsequently contacted CWM directly in relation to certain queries.

116. On 9 September 2014, Mr Skipsey emailed Mr Knights and Mr Elliott with a further version of the proposed agreement between KIML and CWM. Mr Elliott forwarded this on to Ms Guy asking her to complete her review so that he, Mr Elliott, could arrange for Ms Guy to speak to the *"CWM lawyer"*. In an email dated 15 September 2014 to Mr Elliott, Ms Guy made a number of observations on the proposed contract. She concluded this email with the following:

> *"… the wording of this agreement suggests a 5% per MONTH return - so a client would expect to get a return of£100k for every £200k invested, after a period of just 10 months. I understand the funds are leveraged, but this is*

a hefty return & we should approach it with a degree of scepticism [if it looks too good to be true etc.]".

117. At this time, Mr Elliott drafted a number of queries for CWM to answer, picking up upon concerns that Ms Guy had expressed. These queries were set out in an email sent by Mr Elliott to Ms Guy on 17 September 2014. Ms Guy reverted by email with some revisions the same day. Although the intention appears to have been that Ms Guy should speak to Phil Barnett at CWM, Mr Wanless became involved. In an email dated 19 September 2014, Mr Elliott said that he would get Ms Guy to ring. However, Mr Wanless responded the same day to say that it was Mr Elliott that he needed to speak to, stating that: *"You are not going to get any answers on email that Suzanne [Guy] is looking for. We cannot explain the product in an email."*

118. It is clear that, by this stage, Mr Knights had become impatient with progress in that on 18 September 2014, Mr Wright emailed Mr Elliott to say:

"Just had Graham on very disgruntled again. He said that the questions that Suzanne has asked to CWM are not able to be answered by CWM. He mainly mentioned the question that she has asked if the product is regulated and Graham said that it was explained to everyone as an unregulated product so he is unsure why she is asking these questions."

119. In the event, Mr Elliott discussed the queries that had been drafted as revised by Ms Guy with Mr Wanless. These queries raised a number of issues going well beyond the issue specifically touched upon by Mr Knights in his email dated 18 September 2014 as to whether the product was regulated or unregulated. Mr Elliott then annotated answers in red on Ms Guy's email dated 17 September 2014 (that had set out the queries as revised by her), and he forwarded this to Ms Guy on 23 September 2014 at 1:14 PM stating: *"I have just spoken to CWM/Michael Wanless and have the following answers."* Two of the answers so annotated by Mr Elliott were in the following terms:

"Only 1% of the client funds are used in the trade which are then leveraged up by 10:1 and so a 10% loss on the £1000 would be limited to 10% of the actual investment. This is then topped up at the end of each month from the retention account. This is put in place with a contract by the liquidity provider (who allows CWM to trade). If any more than 1% of the client funds was attempted to be used then CWM would not be allowed to trade. The remaining 99% will sit in the client bank account unused."

……

"There is a guaranteed stop loss (in the contract with the liquidity provider) and a guaranteed trailing stop loss. The deals are made several times day and each time a deal is made the stop is re set as the price changes and profit is made this is "locked in" and the 10% stop loss is re-calculated."

120. Almost immediately thereafter, and before any response from Ms Guy, Mr Elliott emailed Mr Knights at 1:33 PM on 23 September 2014 informing him that he had: *"finally spoken to CWM who have answered my questions satisfactorily but I just have one thing to sort out at my end with regards to the "introduction" to you as it is now clear that this will be classed as an investment."*

121. On 25 September 2014, Ms Guy emailed Mr Elliott saying that she had had a go at a revised Limitation of Liability letter for Mr Knights, and then stated:

> *"I am still very nervous about the whole thing - a return of 5% per month, when only 10% of the capital [albeit leveraged 1:10] is invested is a very high return & I'm still in the "it looks to good to be true …".*
>
> *Put it this way, I wouldn't put £100k of my own money in … Which is probably why I'll never be loaded [or bankrupt, depending on your perspective]".*

122. Mr Elliott did not raise these continuing concerns on the part of Ms Guy with Mr Knights. He was asked under cross-examination why he did not do so, and stated that he considered that the various outstanding issues had been satisfactorily answered in his conversation with Mr Wanless as reflected in his annotated notes.

123. On 26 September 2014 Mr Knights signed the agreement with CWM on behalf of KIML, the contract actually being dated 9 September 2014. This was emailed by Mr Knights to Mr Robson and Mr Skipsey the same day.

124. On the same day, 26 September 2014, Mr Elliott emailed Mr Knights at 8:57 AM stating that he would be: *"… sending out our "usual" limitation of liability letter to you today along with a high net worth statement for you to sign stating that you have assets more than £250k and you are not getting financial advice for this opportunity."* As he had said that he would do later that day, Mr Elliott subsequently sent to Mr Knights two copies of a Limitation of Liability letter and a High Net Worth Individual Certificate, which Mr Knights accepted under cross-examination that he received prior to the CWM Investment being made.

125. The Limitation of Liability letter sent to Mr Knights at KIML stated that:

i) Whilst THL might provide generic information on the range of strategies available to Mr Knights/KIML, THL's knowledge of *"the complex technical, legal and taxation matters associated with the strategies is limited"*, with the consequence that THL was unable to provide any advice in relation to the specific financial planning strategy that Mr Knights/KIML was entering into, i.e. the CWM Investment;

ii) THL could not and did not give any advice or guarantee as to the success of the investment; and

iii) KIML was strongly advised to discuss all aspects of the investment with Square Mile and, if it was in any doubt as to the suitability of the investment, then KIML was strongly advised to appoint an IFA to provide it with the appropriate advice.

126. This Limitation of Liability letter was not signed by Mr Knights until 19 January 2015, and was stamped as received back by THL on 21 January 2015. There is no suggestion that Mr Knights was taken through this letter by Mr Elliott or any other representative of THL, and Mr Knights' evidence was that he did not read it. However, Mr Knights accepted under cross-examination that the key passages in this letter were clear and would have been understood if they had been read.

127. The fact that THL did not promptly chase up a signed copy of this letter, and that it was not signed until January 2015 is relied upon by the Claimants as evidence that Limitation of Liability letters of this kind were dealt with as a matter of mere formality by THL, or at least that that was the impression conveyed to Mr Knights as to THL's regard for the same. As against that, one can see from the email correspondence to which Ms Guy was party between July and September 2014, that she was concerned to ensure that a Limitation of Liability letter was properly in place.

128. On 6 October 2014 KIML entered into an agreement with Square Mile that was signed on behalf of KIML by Mr Knights. This agreement provided for KIML to pay fees in return for services provided by Square Mile that were ill-defined apart from specifying in clause 4.1 that Square Mile should: *"take all reasonable steps to make introductions to allow the Client to participate in the FOREX program"*. Clause 7.1 provided that Square Mile gave no warranty as to the performance or profitability of the *"FOREX program"* or any part of it or that the investment objectives would be achieved, and that Square Mile could not guarantee that investments and other assets acquired for the Portfolio would not depreciate in value or that they would not be affected by adverse tax consequences.

129. Under cross-examination, Mr Knights was taken to the agreements between KIML and Square Mile, which he accepted that he would have read, and specifically to clause 7.1. He accepted that he knew therefrom that Square Mile was giving no warranty as to the performance of the CWM Investment. He further accepted that given that Square Mile was closer to CWM than THL, it followed that THL could not give any warranty as to the performance or profitability of the CWM Investment.

130. Mr Knights and Evergreen each provided £200,000 to KIML, the £200,000 contributed by Evergreen being channelled through Mr Knights' bank account to KIML. KIML then, on 14 October 2014, invested £400,000 in the CWM Scheme.

131. Evergreen subsequently provided a further £200,000 to KIML, and, on 2 December 2014, KIML invested a further £216,000 in the CWM Scheme. Of the £216,000, £16,000 was provided out of returns that had been received on the investment of the £400,000.

132. The overall impression that I got from the evidence is that no real consideration was given at the time by Mr Knights as to the basis upon which the monies were provided to KIML, and that this was a matter to be reviewed when accounts were subsequently prepared. In fact, £200,000 was subsequently treated as loan to KIML, and written off in Evergreen's accounts although there is some suggestion that this write-off was subsequently reversed and the loan written back in. I will return to this as appropriate.

133. Between November 2014 and February 2015, KIML received payments as expected of £20,000 (being 5% of £400,000) on 24 November 2014, 23 January 2015 and 23 February 2015, and of £10,800 (being 5% of £216,000) on 12 January 2015 and 10 February 2015. These monies were received from a company called Capitis Fora LLP rather than from CWM itself.

134. However, no subsequent payments were received.

135. In March 2015, the City of London Police raided CWM's offices. Although no criminal charges have subsequently been brought, the evidence suggests that the CWM Investment was an elaborate Ponzi scheme. KIML was amongst several hundred investors in the CWM Investment who lost out, losing between them several million pounds. The other investors included Mrs Locke of Square Mile and her husband.

136. Thereafter, Mr Knights liaised with Mr Skipsey in an attempt to secure the return of the monies that had been invested.

137. In July 2016, Mr Knights and KIML joined with some 317 investors (including Mrs Locke and her husband) in commencing a class action against CWM and DMS Bank and Trust Ltd brought in the Grand Courts of the Cayman Islands.

138. Reliance is placed by THL upon the fact that, in the Statement of Claim in those proceedings, it was alleged that:

> *"CWM presented itself as a substantial and reputable organisation. It employed a number of staff working from offices in the Heron Tower in the City of London. It published daily videos reporting on the FX markets. It also had a high profile as a major sponsor of sporting and leisure events,*

including as sponsor of the 2015 CWM FX London Boat Show, sponsor of the CWM FX LCR Honda MotoGP racing team, and as Chelsea Football Club's 'online forex trading partner.'"

139. In the event, a settlement of the class action was reached, as a result of which £87,450 was received by the Claimants, the relevant sum being paid into Mr Knights' personal bank account. His evidence was that approximately £40,000 of this sum has been transferred to Evergreen.

140. Subject to this recovery, and the receipt of returns up to March 2015, the total investment of £616,000 invested has been lost.

141. There was no contemporaneous complaint by Mr Knights or the other Claimants with regard to any due diligence or advice provided by THL in relation to the Claimants' involvement in the CWM Investment when things went wrong in 2015, as might have been expected once the *"guaranteed"* 5% per month ceased to be paid, and it became apparent that the capital invested had been lost. Mr Knights and the other Claimants continued to retain THL until November 2018, and it was only thereafter, some four years after things had gone wrong, that a claim was first intimated against THL in respect of the CWM Investment after Mr Knights had been told about the possibility of a claim in the circumstances that I refer to below.

The Qubic Scheme

142. In, or shortly prior to, November 2014 THL introduced Mr Knights to the Qubic Scheme.

143. As I have mentioned, Qubic carried on business as a firm of chartered accountants. In essence, the Qubic Scheme was a further refined *"disguised remuneration"* arrangement whereby the imposition of a transaction involving the sale and purchase of gold bullion was intended to get around the legislation that I have referred to above that sought to prevent the effective operation of such arrangements. As with the other Tax Schemes, the Qubic Scheme was held out as being supported by the advice of leading tax Counsel.

144. It is Mr Knights' evidence that discussion in relation to the Qubic Scheme first arose during the course of a catch up meeting between Mr Knights and Mr Elliott when the discussion turned to consideration of the next tax planning opportunity that might be available. In this context, it is relevant to note that Evergreen continued to increase its turnover, and to trade profitably.

145. Mr Knights' evidence was that Mr Elliott mentioned that the Qubic scheme involved the purchase and next day sale of gold via an offshore employee benefit trust, which had the potential to result in significant corporation tax benefits, and that Mr Elliott again said that if HMRC rejected the tax planning

scheme, then all that would be required would be the payment of the corporation tax that would otherwise have been payable had Evergreen not entered into the Qubic Scheme. According to Mr Knights, the only risk that was identified by Mr Elliott was in respect of the overnight purchase and sale of gold pursuant to the scheme, where there was what was considered to be an acceptable risk that the price of gold might decrease overnight between purchase and sale.

146. In paragraph 42 of the Tax Claim PofC it was further alleged that Mr Elliott told Mr Knights that the possible requirement to pay corporation tax was the absolute *"worst-case scenario"*, and that in the meantime *"while the unpaid tax was sitting there in the Company's bank account it would be earning interest and so effectively, he was told, it was a win/win. He would either benefit from the corporation tax saving, or have to pay the tax at some point later down the line but benefit from any interest that would have been accrued in the meantime that he probably would not have accrued anyway."* This was not repeated in Mr Knights' witness statement. When cross examined in relation to the reference to absolute *"worst-case scenario"*, Mr Knights accepted that if Mr Elliott had really said those words, then they would have appeared in his witness statement but he sought to put any discrepancies down to *"terminology"*.

147. Mr Knights' evidence was that at that time of his involvement with the Qubic Scheme, neither he nor Mrs Knights had any need or desire to draw down monies from Evergreen by way of salary or dividend, and the intention was that the relevant monies should remain within Evergreen, the principal aim of the exercise being to save corporation tax, rather than income tax, PAYE or NIC in respect of any salary or dividend. However, when cross examined in relation to the operation of Mr and Mrs Knights' directors' loan account with Evergreen, Mr Knights was unable to seriously challenge the proposition that the evidence showed that a sum of some £80,000 odd had been drawn down therefrom, and thus extracted from Evergreen, over a period of no more than some eight or nine months.

148. Again, Mr Elliott denies that, apart from the risk in respect of the overnight purchase and sale of gold, he informed Mr Knights that the only risk involved was that Evergreen might be liable to pay the corporation tax that would otherwise have been payable in the event of HMRC successfully challenging the Qubic Scheme.

149. By email dated 16 November 2014, Mr Harrison wrote to Mr Knights informing him that THL were working with Qubic: *"to assist with the administrative implementation of the employee incentivisation for the current year."* The email continued: *"In order to meet the deadlines set by Qubic for 'in year' incentivisation you will need to instruct Qubic Tax and have signed the usual Limitation of Liability letter by Wednesday 19th November at the latest."*

150. On 17 November 2014, THL sent Evergreen a Limitation of Liability letter containing much the same language as used in the Limitation of Liability letter sent in respect of the OneE Scheme, and which set out that:

i) THL could not and did not give any advice or guarantee as to the success of the Qubic Scheme;

ii) All advice in relation to the Qubic Scheme would be dealt with by Qubic;

iii) Evergreen was strongly advised to discuss all aspects of the tax planning strategy with Qubic; and

iv) Evergreen was relying solely on Qubic's advice.

151. Although Evergreen sent the Limitation of Liability letter dated 17 November 2014, Mr Knights did not sign or return it. Rather, on 18 November 2014, he emailed Mr Harrison to inform him that he was *"still in two minds"* with regard to the Qubic Scheme.

152. On 19 November 2014, Qubic sent the directors of Evergreen a confidentiality agreement and a detailed 12 page engagement letter, the latter of which included provision for Qubic to provide tax advice. Neither of these documents were signed or returned by Evergreen/Mr Knights, and Evergreen did not proceed with the Qubic Scheme prior to the expiry of the relevant tax year.

153. Although Mr Knights says that has no recollection of any such meeting, the contemporaneous documentation, including a letter sent by Chris Mitchell the following day, suggests that Mr Knights did meet with Chris Mitchell of Qubic on 11 June 2015. When pressed on the point under cross-examination, Mr Knights did not dispute this.

154. THL has contended that Mr Knights held back from committing Evergreen to the Qubic Scheme until he had met Chris Mitchell, but this is denied by Mr Knights. In any event, on 11 June 2015, Mr Knights signed on behalf of Evergreen a confidentiality agreement with Qubic.

155. THL maintains that on 15 June 2015, it sent a further Limitation of Liability letter to Mr Knights at Evergreen in like terms to that sent on 17 November 2014. Mr Knights has no recollection of the receipt of this letter, and he maintains that there is no evidence that it was received. No copy of this letter signed by Mr Knights has been produced by THL, and the evidence suggests that even if it was received, it was not signed and returned. The Claimants maintain that this is, again, consistent with THL's lax attitude towards Limitation of Liability letters. The sending out of the Limitation of Liability letter was recorded in a register maintained by THL.

156. On 19 June 2015, Qubic sent a further 12 page engagement letter to the directors of Evergreen in like terms to that sent on 19 November 2014. This was signed by Mr and Mrs Knights the following day.

157. Further, on 19 June 2015, Qubic sent a lengthy (11 pages of small text) and technical letter of advice to the directors of Evergreen. Amongst the detail thereof, this letter of advice stated that Qubic, *"alongside tax counsel"*, had identified an opportunity that *"may"* allow Evergreen to reward employees in a tax efficient manner, as well as stating that it was likely that HMRC would enquire into the arrangements.

158. On 20 June 2015 Mr Knights signed to confirm that he had read and understood Qubic's letter of advice. Notwithstanding, it was Mr Knights' evidence that he had not read the detail of the documentation that had been sent to him by Qubic. Further, it was a feature of the entry into this particular tax scheme that Evergreen/Mr Knights was prepared to forego a rebate of part of the commission payable to THL in return for THL providing assistance in relation to the completion of the complex documentation relating to the Qubic Scheme.

159. On 2 July 2015, Qubic rendered an invoice to Evergreen for £2,750 for the professional services it had provided to Evergreen.

160. Against this background, in July 2015, Evergreen entered into the Qubic Scheme. In consequence thereof:

    i) Mr and Mrs Knights each received a benefit of £275,000, seemingly by way of credit to their directors' loan account with Evergreen, in July 2015. No tax was paid thereon in that Evergreen did not pay PAYE or NIC thereon, and Mr and Mrs Knights did not pay any income tax thereon.

    ii) For the tax period ending 28 February 2015, Evergreen claimed a tax deduction of £300,000, thus avoiding corporation tax on that amount, and reducing its tax bill.

    iii) For the tax period ending 28 February 2016, Evergreen claimed a tax deduction of £250,000, again avoiding corporation tax on the same and reducing its tax bill.

161. Thus, subject to HMRC's challenge, and the subsequent settlement with HMRC, the effect of the Qubic Scheme was to reduce Evergreen's profit (and hence its liability for corporation tax) in each of the 2014/15 and 2015/16 tax years, and to allow Mr and Mrs Knights to have the benefit of £550,000 from Evergreen tax-free, thereby enabling Mr and Mrs Knights to have the use and enjoyment of that sum from July 2015 onwards.

162. As with the OneE Scheme, HMRC subsequently challenged the Qubic Scheme. As referred to above, the settlement concluded with HMRC in June 2019 encompassed the tax liabilities arising in respect of both the OneE Scheme and the Qubic Scheme, with the liabilities in respect of the two schemes being settled on the same basis and thus, in the case of Qubic, such that agreement was reached to pay the PAYE and NIC that would have been payable had the £550,000 been paid as salary to Mr and Mrs Knights, together with interest thereon.

163. Evergreen was not required to pay corporation tax, and, as referred to above, the settlement provided for the sum to be paid on deferred terms at a modest rates of interest, which allowed Evergreen/Mr Knights to invest the relevant sums in the meantime at more advantageous rate of return through investment in property bonds.

Other dealings by Mr Knights

164. Notwithstanding the difficulties that had by then been encountered with the CWM Investment, with returns ceasing to be paid and the police raid in March 2015, in June 2015 Mr Skipsey introduced Mr Knights to another FX product called Beta 2. THL were not involved in this transaction in any way, and Mr Knights accepted under cross-examination that although Mr Skipsey had introduced him to this product, Mr Skipsey did not give him any advice in relation to it, and that Mr Knights himself had gone to London to meet the promoters of the Beta 2 scheme, and had himself asked questions to find out how the product worked.

165. Under cross-examination Mr Knights provided an explanation as to how he had been able to satisfy himself that this was a completely different product to the CWM Investment, and worth investing in, albeit in a more modest amount. Further, Mr Knights, when asked what *"due diligence"* he himself did, explained that he had looked at the company, its directors, its registration, how long it had been operating, and whether it was regulated - which it was, by the Financial Services Compensation Scheme. Mr Knights was thus able to satisfy himself that: *"it all stacked up"*.

166. Mr Knights invested £100,000 in Beta 2, which was again lost. However, given that it was a regulated product, he was able to obtain compensation. Significantly, he was not slow to take up the claiming of compensation from the FCA.

167. Mr Knights' involvement with Beta 2 is relied upon by THL as demonstrating a reasonable degree of financial sophistication on Mr Knights' part, and a considerably less conservative approach to risk than Mr Knights has sought to portray. This is said to go against the suggestion that Mr Knights relied upon

THL for advice in respect of the Tax Schemes and the CWM Investment, or that it was reasonable for him to do so.

168. Mr Knights was also cross examined with regard to another potential investment with TJM Partnership Plc being considered in or about September 2015. So far as this is concerned, Mr Knights explained that this was a similar kind of product to Beta 2, that he had sat down and had a meeting to discuss a potential investment with TJM Partnership Plc, but was less impressed with their operation and decided that Beta 2 was the better of the two. Again, these were enquiries that Mr Knights carried out himself, not relying upon any advice from THL, or indeed Mr Skipsey or anybody else.

169. Similar considerations arise in relation to the investment made by Mr Knights of his and Evergreen's funds in bonds, and in particular property bonds issued by Propiteer Ltd.

170. Initially £100,000 was invested in a bond issued by Cauta Capital in January 2016. Thereafter, investments of some £2.7 million odd have been made into property bonds and shares issued by Propiteer Ltd, producing, according to the documentation exhibited to Mr Hole's evidence, interest on investments of some £287,218.88 equating to a return on investments of 30.02%. As Mr Hole confirmed, the bonds represented, effectively, loans to development company SPVs, and the shares issued were shares in the SPVs themselves.

171. Mr Knights accepted under cross-examination that whilst he had been introduced to Propiteer Ltd by Mr Skipsey, he had taken his own advice as to whether or not to invest with Cauta Capital and Propiteer Ltd, and had carried out his own enquiries in relation thereto, including meeting the directors of Propiteer Ltd, relying significantly upon what he had been told by the latter, and looking at company records, assets and liabilities. The underlying property developments in which the investments were made were diverse, and in one instance extended to the development of a boatyard in Antigua.

172. Mr Knights had to self certify as either a HNWI or a sophisticated investor. According to his evidence, he did so as the former. Further, as Mr Hole confirmed, Mr Knights would have had to have passed an appropriateness test, which would have asked him questions such as *"do you understand you could lose all your capital?"* and *"do you understand this is a sophisticated investment?"*. As Mr Hole further accepted, in answering these questions, Mr Knights was *"acknowledging that he understands what the inherent risks are, and he also understands that this is a product for a sophisticated person. It's not your retail product."* Mr Hole further explained that Propiteer always advises investors that they should seek financial advice before making any investments. In addition, it is to be noted that Propiteer Ltd's website contained a risk warning in the following terms: *"Risk Warning. Your capital is at risk.*

The value of your investment may go up as well as down. Past performance does not indicate future performance. There is no right for compensation in respect of poor investment performance and your investment is not covered by the UK FSCS. Propiteer Limited does not provide any advice in relation to the investment opportunities..."

173. Although the evidence of Mr Hole and Mr Jones has been to the effect that the property bonds in question have, in recent years, performed well producing attractive returns, I accept Mr Hole's evidence that investments in property bonds and shares such as those offered by Propiteer Ltd are investments suitable only for sophisticated investors given the underlying risks involved.

174. In addition, it is to be noted that the tax planning with which Mr Knights was involved did not end with the Qubic Scheme. This is illustrated by the fact that on 13 October 2016, Mr Elliott emailed Mr Knights in relation thereto mentioning, amongst other things, a *"OneE investment"*. On 6 January 2017 Vivian Ross of OneE Group Ltd emailed Mr Knights, copying in Mr Elliott and Mr Harrison, referring to a conversation between Mr Knights and Neil Walker of OneE Group Ltd the previous day, and referring to her understanding that Mr Knights wished to proceed with an investment into Nemaura Pharma. Mr Knights then electronically signed on 16 January 2017, on behalf of Evergreen, an advice letter issued by OneE Group Ltd in relation to *"R&D LLP Project"*. As I understand it, this is a tax planning strategy that was taken up by Evergreen, and which has not been challenged by HMRC.

Late intimation of claims

175. It is a feature of the present case that THL's engagement by Evergreen, Mr and Mrs Knights was not brought to an end until November 2018, and letters of claim in respect of the CWM Claim and the Tax Schemes Claim were not sent until 25 May 2019 and 9 January 2020 respectively.

176. This is notwithstanding that matters had gone wrong with the CWM Investment by March 2015, and that it was clear some considerable time prior to the determination of THL's engagement that HMRC's challenge in respect of the OneE Scheme and the Qubic Scheme was likely to be successful and that HMRC was seeking to recover PAYE and NIC.

177. The lateness of the determination of THL's engagement, and late intimation of claims against THL is relied upon by THL as demonstrative of the fact that Mr Knights had not, and knew that he had not, relied upon the advice of THL in entering into the Tax Schemes and the CWM Investment, on the basis that otherwise he would have more immediately complained about the way that THL, Mr Elliott, had dealt with matters, and on the Claimants' case, given them bad advice on all these matters, and misled them.

178. When cross-examined in relation to this point so far as it concerns the Tax Schemes Claim, the gist of Mr Knights' response was to the effect that matters unfolded and developed incrementally, and that it was only late in the day that it became apparent that HMRC were likely to succeed with their challenge, and that that would lead to a liability to pay PAYE and NIC. In this context so it is said, the delay is quite understandable.

179. So far as the CWM Claim is concerned, it is again said that matters developed incrementally, but the following exchange during the course of Mr Knights' cross-examination is instructive:

> *"A. ....it was an accountant to his client saying "I'll go and check it out for you, Graham, and I will report back", and we relied on that information.*
>
> *JUDGE CAWSON: But when that turned out not to be correct, didn't you want to react to that?*
>
> *A.. Yes, my Lord. I accept that we should have thought in those terms right then, and to be honest, I don't know why we didn't pick up on that. I think it was maybe, you know, later when we spoke to our current legal team that they said that you -- and others who have had similar experiences, you talk to people and they say "You have been misrepresented there, Graham. You need to look into that."*
>
> *MR ELKINGTON So it was someone else's idea to bring a claim, was it?*
>
> A. *It wasn't somebody else's idea. It was somebody who had been in a similar situation and they advised me to take legal advice and put it to them as to whether they thought you had been misrepresented."*

D. Credibility and reliability of the witnesses

Correct approach

180. It is a significant feature of each of the Tax Schemes Claim and the CWM Claim that they are significantly based upon oral discussions that took place some six to eight years ago in circumstances in which the discussions are unrecorded and un-documented, and where claims were first intimated against THL some years after the event.

181. In the circumstances, it is necessary to bear firmly in mind the much repeated observations made by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit*

Suisse Limited [2013] EWHC 3560 (Comm) at [15] – [22] with regard to the unreliability of memory, and his caution to place limited, if any, weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

182. Of particular concern in the circumstances of the present case is the ability of a witness, in seeking to recall events that took place some time ago, to falsely do so, but with genuine conviction and belief that the recollection is accurate. Thus as Leggatt J cautioned in *Gestmin* at [22]: *"… it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."* Allied to this is a concern that a witness seeking to recall events over a significant period of time is liable in reconstructing those events in his or her own mind, to do so in a way that inaccurately recalls those events in his or her favour, and to exaggerate perceived advantages to his or her own case, and do so without deliberately giving false evidence.

183. Nevertheless, I take into account the importance stressed by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] of making findings by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each.

184. Further, in testing what has been said by a witness, it is plainly appropriate to do so as against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

The witnesses of fact

Mr Knights

185. Mr Knights came across to me as an honest witness recalling conversations and events as he genuinely now recalls them. Thus he was prepared to make concessions from time to time, for example accepting that his recollection was not good relating to when Mr Elliott mentioned the OneE Scheme to him. However, as illustrated by this concession, and other matters to which I will refer, I have concluded that Mr Knights' recollection has been significantly affected by the passage of time and the factors identified by Leggatt J in *Gestmin*, and my concern is that Mr Knights has, without intending to mislead the Court, reconstructed events in his own mind in his own favour in a way that renders him inherently unreliable as a source of evidence in respect of the conversations that the Claimants base their case upon.

186. My concern is highlighted by a number of considerations, including the following:

i) The significant differences between the Claimants' case as pleaded in the Tax Schemes Claim PofC and the CWM Claim PofC, and events as described in Mr Knights' witness statements in the two claims and under cross-examination. In particular, there were a number of matters dealt with in Mr Knights' witness statements that were of such importance and significance that one might have expected them to have been dealt with in the relevant Particulars of Claim. I have dealt with a number of matters in the above narrative, but one particular matter is the suggestion that at the meeting on 18 June 2014 with regard to the CWM Investment, Mr Elliott said that he was convinced that it was a legitimate and genuine product. This is of such potential importance that had it been said, one would have expected it to have been pleaded. The concern that I have is that this is an example of a number of embellishments that have been made to Mr Knights' case as the case has progressed, as he has sought to reconstruct events in his own mind.

ii) I regard it as significant that Mr Knights had forgotten, until more recently reminded about it, about OneE's Joshua Scheme. It may be that Evergreen ultimately extracted itself from the latter, but nevertheless I regard it as telling that Mr Knights had no recollection thereof whilst professing a pretty detailed recollection of the conversations leading to the entry into of the OneE Lazarus Scheme.

iii) I regard Mr Knights' explanation as to why a claim was not pursued in respect of the CWM Investment more promptly after matters went wrong in 2015, and the circumstances as to which he ultimately did come to intimate and bring a claim as described in the extract from the transcript referred to in paragraph 179 above as very telling. The difficulty revealed thereby is that several years after the event, the thought was clearly put into Mr Knights' mind that a claim may lie, and that will have required him to think back over a significant number of years to construct a case largely based on conversations with Mr Elliott. This was liable, as I see it, to give rise to many of the forensic difficulties identified by Leggatt J in *Gestmin*.

187. Reliance was placed by THL on the apparent inconsistency that I have referred to above between Mr Knights saying that he would not sign a statement that he knew to be false, and his evidence that he did sign documents without reading the same notwithstanding that the latter contained a declaration stating that he had read and understood the documents. THL invites me to find that Mr Knights should be taken to have acted honestly at the relevant time in signing the relevant declarations, and that I should put the inconsistency down to a failure

of recollection as to having read and understood the relevant documentation. However, I am not convinced that this particular issue can *necessarily* be analysed in this binary way, particularly having regard to the fact that when asked to explain the inconsistency under cross-examination, Mr Knights said this:

> *"I think you will find there's quite a number of matters that we have signed over the years that our disclaimers and letters of liability, et cetera, which I'm sure you will go into some later stage, but these are letters that were kind of brushed aside as compliance letters needed for files, not something that you need to read or get hung up about."*

188. There is one particular aspect of Mr Knights' evidence that requires to be considered in more detail at this stage, namely his evidence that although he was a fairly experienced businessman, he was not financially experienced or sophisticated in any way, and that his attitude to risk was conservative, and is still *"relatively conservative"*.

189. It may well be that Mr Knights had not involved himself with tax schemes prior to his conversations with Mr Elliott in late 2012, but I am satisfied that, given the particular financial circumstances of Evergreen, Mr Knights did have an appetite for seeking to avoid tax through the entry into the Tax Schemes, and an appetite for some element of risk in relation thereto. This is demonstrated by, for example, his acceptance under cross-examination in relation to the Elysian Scheme, that he was prepared to enter into the same notwithstanding the risk that an unquantified amount of tax might become payable.

190. Further, so far as appetite for investment risk is concerned, I consider it significant that notwithstanding the failure of the CWM Investment, Mr Knights still had an appetite for FX trading investments, and for investments in property bonds and shares issued by Propiteer, that were only really suitable for sophisticated investors. Further, so far as Mr Knights' sophistication as an investor is concerned, I further consider it significant that Mr Knights was someone who was prepared to embark on these further investments without advice, and as a result of making his own enquiries and investigations, and committed very significant sums indeed to these investments. Whilst this might have been after the event, it does in my judgment provide cogent evidence as to his more general attitude to investment risk, and his sophistication.

191. In the circumstances, whatever Mr Knights' own perceptions might be, and reinforced by my own impression of him as a witness, I consider that Mr Knights significantly downplays his own sophistication as an investor, and his attitude to risk, even going back to his initial discussions with Mr Elliott in respect of the OneE Scheme.

192. In all the circumstances, and even though Mr Knights may have been giving his evidence quite honestly, it is necessary, in my judgment, to treat Mr Knights' evidence with a significant degree of caution.

Mr Elliott

193. I regret that I did not find Mr Elliott to be an entirely satisfactory witness. He was extremely defensive in the way that he gave his evidence, to the point of coming across on a number of occasions as being evasive. Whilst there are others, particular examples are provided by the following:

    i) It was Mr Wright's evidence that THL was very commission driven so far as the promotion, as introducers, of tax schemes and investments were concerned. Mr Elliott was cross examined in relation THL's attitude and approach to commissions, and the proportion of its income generated thereby. Mr Elliott was extremely reluctant to answer the questions put to him in respect thereof, and was very defensive in the answers that he gave.

    ii) Likewise, Mr Elliott's evidence in respect of the reasons for his visit to the offices of CWM in London on 19 June 2014. As already touched upon, in his witness statement, Mr Elliott dealt with this under the heading: *"The CWM marketing visit in Heron Tower"*, but, as I see it, Mr Elliott was unable to satisfactorily explain why he so described it. When pressed under cross-examination in respect of the reasons for the visit, he was again very defensive in the answers that he gave and it was only after considerable pressing by Mr Chaisty QC that he accepted that he said something to Mr Knights along the lines of *"I'm going down to do the necessary checks and report back."*

194. Again, I take into account that Mr Elliott was, like Mr Knights, faced with the difficulty of trying to recall events going back nearly nine years, and having to do so in respect of claims only intimated very much more recently. Mr Elliott will, of course, have the further difficulty of recalling events in respect of his dealings with one particular client, when he would no doubt have been dealing with many other clients at the same time. It is thus highly likely that Mr Elliott's own memory has been subject to the same flawed reconstructive process as Mr Knights would have been subject to, with a propensity to recall events in THL's favour.

195. Although I was, at times during the course of his evidence, concerned that Mr Elliott was deliberately misleading the Court, on reflection, I consider it more likely that the defensive approach that he took was down to the inherent difficulty in dealing with the evidence so long after the event, and his own idiosyncratic way of dealing with this difficulty.

196. Nevertheless, I consider that, given its inherent unreliability, I also need to treat Mr Elliott's evidence with a significant degree of caution.

197. Given the inherent difficulties that I have identified, I do not consider that the present case turns on whether I prefer the evidence of either Mr Knights or Mr Elliott over the other, but rather that any conflicts between them, and the other factual issues that arise for determination require to be resolved by reference to the documentation (insofar as it assists), the inherent probabilities of the situation, and where the burden of proof lies.

Other witnesses

198. Mr Hole gave evidence in respect of more recent matters concerning Mr Knights' and Evergreen's investments in property bonds marketed by Propiteer Ltd that are comparatively well documented, and in respect of Propiteer Ltd's business model and operation. Mr Hole was cross examined at some length by Mr Elkington QC, and I have identified above where I found his evidence under cross-examination to be of assistance. I found Mr Hole to be a reliable and truthful witness.

199. I found Mr Wright and Mr Skipsey both to be honest and truthful witnesses doing their best to assist the Court. Again, as with Mr Knights and Mr Elliott, they were having to recall events that took place some considerable time ago, although they would have had no obvious subconscious motivation to reconstruct events in their own mind in a way favourable to their own position.

200. THL's written opening made some play of the fact that Mr Wright had been *"summarily dismissed for dishonesty"*. Mr Wright explained under cross-examination that at a time when he had considerable dissatisfaction with his position at THL, he had misled the latter with regard to his daughter being ill in order to take time off, and that that had led to his dismissal. He said that he had claimed unfair dismissal, and that his claim had been settled. In light of this explanation, and having regard to his evidence as a whole, I do not consider that any adverse inferences require to be drawn so far as the reliability of Mr Wright's evidence is concerned, and I did not detect any particular animus towards THL as influencing his evidence.

201. On behalf of the Claimants, Mr Chaisty QC submits that adverse inferences ought to be drawn from the fact that the THL did not call either Ms Guy or Mr Harrison to give evidence, and that THL has provided no explanation for not doing so, even in the case of Ms Guy who had made a statement for the purposes of the CWM Claim but was not ultimately called. Mr Chaisty QC specifically identifies the following matters that it is said they might have been expected to give relevant evidence in respect of for the purpose of drawing adverse inferences:

i) What is said to be the hunger of THL for commission income, and thus the significance of the latter as a motivating factor in persuading clients to enter into tax schemes and investments;

ii) Mr Elliott's enthusiasm about the CWM Investment;

iii) Mr Elliott's failure to heed warnings from Ms Guy and his intention to push on regardless, and what are said to be likely further damning exchanges between Ms Guy and Mr Elliott; and

iv) Insight generally into Mr Elliott's approach to tax schemes and investments.

202. Mr Chaisty QC relies upon *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 as authority in respect of the drawing of adverse inferences through failure to call a witness. However, reference must now be made to the recent decision of the Supreme Court in *Royal Mail Group v Efobi* [2021] UKSC 33, and to Lord Leggatt's comments therein at [41], where Lord Leggatt stresses the need to identify the particular issue or issues in respect of which an adverse inference is asked to be drawn, and to the requirement for the Court to then adopt a common sense approach in respect thereof. I have sought to bear these considerations in mind when assessing the evidence – see in particular, paragraph 325 below regarding not calling |Mr Harrison, and paragraph 327 below regarding not calling Ms Guy.

Expert witnesses

203. Ultimately, as demonstrated by the limited reference thereto in closing submissions, the expert evidence has not played a particularly significant part in the resolution of the two claims.

204. So far as the Tax Schemes Claim is concerned, I found Mr Arnold and Mr Stean both good and helpful witnesses with regard to the duties that an accountant might be subject to in introducing a client to a tax scheme, and there ultimately did not appear to be a great deal of difference or disagreement between them in respect of any key issues.

205. So far as the CWM Claim is concerned, it is important to bear in mind that the expert evidence in respect of this claim was supposed to be directed at the steps a reasonably competent accountant would be expected to take when carrying out due diligence in respect of an investment scheme such as the CWM Investment, and as to what would be discovered by such due diligence. Unfortunately, the experts, Mr Greaves and Mr Antoniou approached the task from very different angles. Mr Greaves' expertise is in the world of investment, and thus he was able to give evidence as to what would have been required in order to carry out proper due diligence in respect of the CWM Investment, and

as to what might be discovered thereby, from the perspective of an accountant with the requisite expertise. On the other hand, Mr Antoniou gave evidence from the perspective of a general practitioner accountant, but without any expertise as to what due diligence exercise might have been required, and what would have been discovered thereby. In his closing submissions, Mr Chaisty QC described Mr Antoniou's evidence as *"simply embarrassing"* and of *"no value"*. Despite these criticisms, I am satisfied that both experts were doing their best to assist the Court, but the difficulty it seems to me is that the value of their evidence turns upon what, if any, *"due diligence"* exercise was anticipated would be carried out by Mr Elliott following the meeting on 18 June 2014. If a full detailed due diligence exercise of the kind identified by Mr Greaves was anticipated, then his evidence would be of assistance. Otherwise, his evidence is, as I see it, of more limited assistance, and the evidence of Mr Antoniou might be of more assistance.

206. It is to be noted that the expert evidence in the CWM Claim was not directed at what duties may have been owed by an accountant such as Mr Elliott in introducing a client to an investment, and whether, and to what extent and in what circumstances (if any), an accountant should advise his or her own client as to the risks involved in respect of the investment.

E. The Tax Schemes Claim

207. I will deal with the Tax Schemes Claim before going on to determine the CWM Claim.

The Claimants' Case

Duty of care

208. The essence of the Claimants' case is as follows:

i) In the course of its retainer as the Claimants' accountants, THL would introduce the Claimants to tax planning opportunities being offered/promoted by third parties. Mr Elliott knew that insofar as any introduction was made and coupled with a recommendation by Mr Elliott as to the opportunities being introduced, Mr Knights was liable to follow that recommendation, Mr Knights having complete trust and confidence in Mr Elliott and the recommendations that he made.

ii) In consequence, THL owed a common law duty of care to the relevant Claimant to whom the introduction to the third party was made. Paragraph 4 of the Tax Schemes Claim PofC pleads nothing further as to the scope or extent of that duty of care.

OneE Scheme

209. Reliance is placed by the Claimants upon Mr Elliott, during the course of the catch up meeting with Mr Knights referred to in paragraph 36 above, being very positive about the OneE Scheme and saying that THL would only propose tax schemes that were conducted *"by the book"*, that there were no downsides and that the Claimants would have nothing to lose by entering into the OneE Scheme because if it were to be successfully challenged by HMRC, then Evergreen would only be liable to pay the corporation tax that would have been payable in any event had the scheme not been entered into.

210. It is alleged that Mr Knights relied upon this advice in committing Evergreen to the OneE Scheme as referred to above, and that had THL not introduced the Claimants thereto, then Evergreen would not have entered into it.

211. The case is put in two ways:

i) Firstly, that by introducing the Claimants to the OneE Scheme, THL acted in breach of the common law duty of care alleged in that the OneE Scheme was a Spotlight Scheme and/or a highly artificial and contrived scheme to circumvent the disguised remuneration taxation rules, such that the reasonably competent professional in the position of Mr Elliott would not have introduced the same to the Claimants or to any other client.

ii) Further or in the alternative, what was said by Mr Elliott to Mr Knights amounted to advice by Mr Elliott (on behalf of THL) to the Claimants, Mr Elliott making a value judgment on the OneE Scheme, its suitability for the Claimants, the risks inherent therein and the tax consequences in the event that the scheme was successfully challenged by HMRC. It is alleged that, in these circumstances, THL owed a common law duty of care to the Claimants in providing the advice in question, and that THL acted in breach of that duty of care because:

a) The advice given was wrong because, in the event of a successful challenge by HMRC, Evergreen would be liable to pay PAYE and NIC on the sums paid to the EFRBS, and the reasonably competent professional in the position of Mr Elliott would have known this, or so informed themself, before giving the advice that was given, or they would not have given such advice;

b) The reasonably competent professional in the position of Mr Elliott would have concluded that the OneE Scheme was plainly a disguised remuneration scheme and that it would *"inevitably"* be found to be such, and thus that HMRC would *"inevitably"*

successfully challenge the same such that there was no benefit to Evergreen in entering into it.

Elysian Scheme

212. It is the Claimants' case that in the circumstances referred to in paragraphs 61 to 64 above, Mr Elliott described the Elysian Scheme as an *"exciting"* pension investment opportunity that would be beneficial to Mr Knights from a tax point of view, and also enable him to release non-taxable funds from his pensions, and recommended the same to him saying that this was something that THL had done for itself. Although not specifically pleaded in the Tax Schemes Claim PofC, as set out in Mr Knights' witness statement, reliance is further placed upon Mr Elliott having said that there would be nothing to lose through entering into the Elysian Scheme because even if the scheme did not get the approval of HMRC, any tax reduced or mitigated would simply have to be paid at a later date.

213. It is alleged that in consequence of THL's introduction to Newport, and in reliance on the strength of the positive advice, recommendation and encouragement of Mr Elliott, Mr Knights decided to enter into the Elysian Scheme, retaining Newport and becoming a member of Elysian Fuels 2013 No 36 LLP thereupon, in the circumstances referred to above.

214. It is then alleged that THL acted in breach of the common law duty of care referred to above in two ways:

i) By introducing Mr Knights to the Elysian Scheme when no reasonably competent professional in the position of Mr Elliott would have done so because:

a) The scheme was obviously a highly artificial or contrived scheme to circumvent the taxation rules on withdrawals from pension schemes;

b) It had been devised and managed by FCP whose other schemes had failed; and

c) Elysian Fuels had been suspended from the Channel Islands Stock Exchange in September 2013.

ii) Further or alternatively, what was said by Mr Elliott to Mr Knights amounted to advice on the part of Mr Elliott (on behalf of THL) that Mr Knights should invest in the Elysian Scheme and that it was suitable for Mr Knights, Mr Elliott making a value judgment on the Elysian Scheme and its suitability for Mr Knights. It is alleged that, in these circumstances, THL owed a common law duty of care to the Claimants

in providing the advice in question, and that THL acted in breach of that duty of care because:

a) Mr Elliott did not inform himself of the high risk profile of the Elysian Scheme, the standing of the *"persons"* behind the same, the risks of the challenge by HMRC, or the financial consequences in the event that a challenge was successful;

b) Mr Elliott did not appreciate and/or advise Mr Knights that the Elysian Scheme was a high-risk unregulated investment, was likely to be investigated by HMRC as it was seeking to circumvent the tax rules on withdrawals from pension schemes, and had been devised by FCP who had devised and managed previous failed tax avoidance schemes that have been successfully challenged by HMRC, and/or that Elysian Fuels had been suspended from the Channel Islands Stock Exchange in September 2013;

c) Mr Elliott did not consider and/or advise Mr Knights of the possible consequences to him in the event that the Elysian Scheme was investigated by HMRC.

d) Mr Elliott advised Mr Knights to proceed with the Elysian Scheme and that it was suitable for him notwithstanding the above matters, and in circumstances where there was no basis upon which to properly conclude that it was suitable for Mr Knights.

e) Mr Elliott advised Mr Knights to proceed with the Elysian Scheme and that it was suitable for him notwithstanding that there was, at the very least, a high risk that Mr Knights would lose the value of the pension funds that he transferred to the relevant SIPP.

215. The Claimants allege that but for the breaches alleged, Mr Knights would not have entered into the Elysian Scheme.

Qubic Scheme

216. The Claimants' case is that in the circumstances referred to in paragraph 142 et seq above, Mr Elliott told Mr Knights that, apart from the risk of a fall in the price of gold overnight referred to in paragraph 145 above, the absolute worst case scenario if Evergreen were to enter into the Qubic Scheme was that, if HMRC rejected the same, then Evergreen would have to pay the corporation tax that would have been payable had the scheme not been entered into, Mr Elliott identifying no further or other risks.

217. Again, it is said that in consequence of the introduction by THL to Qubic, and in reliance upon Mr Elliott's advice, Mr Knights chose to cause Evergreen to enter into the Qubic Scheme.

218. The case against the Defendant is, again, put in two ways:

i) Firstly, it is alleged that THL acted in breach of the duty of care at common law referred to above in introducing the Claimants to Qubic and the Qubic Scheme as the latter was a Spotlight Scheme and/or a highly artificial and contrived scheme to circumvent the disguised remuneration rules, and thus the reasonably competent professional in the position of Mr Elliott would not have introduced the same to the Claimants or any other client;

ii) Secondly, and further or in the alternative, that what was said by Mr Elliott to Mr Knights amounted to advice on the part of Mr Elliott (on behalf of THL) that Mr Knights should invest in the Qubic Scheme and that it is was suitable for him, Mr Elliott making a value judgment on the Qubic Scheme and its suitability for Mr Knights. It is alleged that, in these circumstances, THL owed a common law duty of care to the Claimants in providing the advice in question, and that THL acted in breach of that duty of care for essentially the same reasons as in the case of the OneE Scheme as referred to in paragraph 211(ii) above.

219. The focus of the evidence at trial, and the cross-examination of the witnesses was upon the advice actually alleged to have been provided by Mr Elliott to Mr Knights in respect of the Tax Schemes. It was therefore unsurprising that in the course of his closing submissions Mr Chaisty QC confirmed that the Claimants' *"case on advice is our primary position"*, although Mr Chaisty QC did go on to submit that there is not necessarily a clear dividing between introduction on the one hand, and advice on the other hand. This is consistent with the expert evidence of Mr Stean as to the position of an introducer once the latter begins to give advice and make endorsements.

Loss and Damage

220. The Claimants maintain that the breaches alleged caused loss and damage.

221. So far as the OneE Scheme and the Qubic Scheme are concerned, Evergreen seeks damages of £344,841.41, plus interest, being the sum paid in settlement to HMRC (£504,841.41), but giving credit against the same for the amount of corporation tax that would have been paid on the amounts invested at a rate of 20% (£160,000).

222. So far as the Elysian Scheme is concerned, and on the basis that HMRC might seek to levy tax at a rate of 55%, Mr Knights seeks 55% of the total investment

of £207,500, namely £114,125, alternatively he seeks an indemnity against the relevant tax liability.

The Defendant's Case

223. THL's case in respect of the Tax Schemes Claim is as follows.

Limitation

224. THL maintains that any claim that Mr Knights and Evergreen may have had against THL in respect of the OneE Scheme is statute-barred on the basis that:

i) The Claimants engaged OneE by letters of engagement dated 20 June 2013, which were signed on 21 June 2013. The latter committed Evergreen to pay a fee immediately of £5,000 plus VAT. That represents non-negligible actual damage (being a liability incurred) and thus reflects when loss was first suffered and the relevant six year limitation period first accrued, reliance being placed on *Nykredit v Edward Erdman* (No. 2) [1997] 1 WLR 1627 at 1630D-E, where Lord Nicholls spoke in terms of the relevant damage being *"any detriment, liability or loss capable of assessment in money terms …"*.

ii) The Claimants cannot circumvent the statutory limitation period by seeking to claim only for other fees or risks which they say they subsequently incurred – see *Khan v Falvey* [2002] PNLR 623 at [23]. The key question, THL says, is whether the loss that was incurred outside the relevant limitation period was caused by the same negligent act in question that caused the loss incurred within the limitation period.

No duty of care

225. THL maintains that its role, as Mr Knights (and so also Evergreen) well knew, was restricted to that of a mere introducer (and intermediary between Mr Knights and Evergreen and the relevant third parties offering/promoting various investment and tax planning opportunities).

226. Thus, so it is argued, THL, as a mere introducer and intermediary, did not owe any common law (or contractual) duty of care to Mr Knights and/or Evergreen in merely introducing them to such third parties. In support thereof, it said by THL that:

i) Properly applying the relevant legal principles referred to below for establishing whether a duty of care has arisen and, if so, the scope and extent thereof as most recently considered by the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2021] 3 WLR 81, there was no *"special relationship"*, no assumption of responsibility,

no reasonable foreseeability of reliance, and no reasonable reliance, so as to give rise to a relevant duty of care;

ii) Mr Elliott did not make any communication which amounted to advice or a value judgment on any of the three schemes;

iii) Mr Elliott never represented, and Mr Knights could not reasonably have been led to believe, that Mr Elliott had applied his professional skills in considering and formulating professional advice or a value judgement on any of the three schemes;

iv) THL are entitled to rely on Mr Knights' email dated 19 February 2014 referred to above whereby Mr Knights expressly acknowledged that it was *"not [THL's] position to give advice on these products"* and that he was *"fully up to speed with the investment itself, and… quite happy with the risks associated".* Although concerned with the Elysian Scheme, this email is said to be of wider application;

v) The Limitation of Liability letters reiterated, confirmed, and/or limited THL's role (to that of a mere introducer and intermediary), obligations, and liability in respect of the three schemes;

vi) In the light of THL's retainer and the Limitation of Liability letters, THL could not reasonably have foreseen that the Claimants would rely on it and there could be no reasonable reliance on THL, since those letters, so it is argued, made clear that:

a) THL was not authorised by the FCA to provide advice;

b) THL's role was limited to that of an introducer;

c) THL could not and did not give advice on the schemes;

d) Mr Knights was strongly advised to take advice from OneE and Qubic in respect of their schemes;

e) Mr Knights was relying solely on OneE and Qubic in respect of their schemes;

f) Mr Knights was recommended to appoint an independent adviser in respect of the Elysian Scheme.

227. It is argued that the Claimants' attempts to deny or circumvent the effectiveness of the Limitation of Liability letters should not be accepted, in the light of the legal principles considered further below. THL maintains that:

i) The Claimants' reliance on the timing of the letters does not assist them on the basis that the letters were ultimately signed by and on behalf of the Claimants, save perhaps in relation to the Qubic Scheme. THL was entitled to proceed on the basis that Mr Knights accepted the contents thereof, even if this was after the Claimants had committed to the schemes, reliance being placed on *Thornbridge Ltd v Barclays Bank* [2015] EWHC 3430 (QB) at [111] per HHJ Moulder (as she then was);

ii) The Claimants ignore the express provisions of the Limitation of Liability letters which make clear that: (A) THL was not advising on the risks of the schemes, and (B) the Claimants were not relying on THL, but rather were relying or should rely on others (Qubic, OneE, and/or an independent financial adviser);

iii) It is wrong for the Claimants to assert that the Limitation of Liability letters ignored the reality of the situation. THL did not in fact provide advice. OneE and Qubic did in fact provide advice in writing. Mr Knights expressly acknowledged that THL was not advising on the Elysian Scheme at least (by his email dated 19 February 2014);

iv) In any event, even if the Limitation of Liability letters were inconsistent with the true factual position, such documents can be effective to *"rewrite history"*, as a matter of law (see *Thornbridge* (supra) at [97]-[111]);

v) In the premises, the Limitation of Liability letters are effective to negate a duty of care should it otherwise have arisen and/or give rise to a contractual estoppel.

No advice given

228. THL maintains that it did not in fact advise, recommend, or otherwise encourage Mr Knights and/or Evergreen to take up any investment or tax planning opportunities, since that was not THL's role (which, again, was confined to that of a mere introducer and intermediary).

No breach of duty

229. THL maintains that it did not breach any common law (or contractual) duty of care to Mr Knights and/or Evergreen, on the basis, so it is alleged, that:

i) THL was acting as introducer passing on information, and did not make the alleged positive statements in respect of any of the schemes. It is said that there is no contemporaneous record to support Mr Knights' case, and that the documentary evidence is inconsistent with that case;

ii) THL expressly informed Mr Knights, both orally and in writing (including in the Limitation of Liability letters), that there were a number of risks associated with the schemes;

iii) THL made clear that it could not and did not give advice or guarantee as to the success of the schemes, the risk of their failure, the risk that HMRC might enquire into them, or that HMRC might interpret the law differently to OneE, Newport and Qubic;

iv) THL complied with all such obligations that it owed, and THL argues that its position is supported by the expert evidence of Mr Stean, whose evidence, it is said, should be preferred to that of the Claimants' expert, Mr Arnold;

v) The Claimants' claim rests, so it is said, on hindsight, and changes in the law several years after THL introduced the Claimants to the three schemes. At and around the material time, HMRC's challenges to similar schemes were failing as evidenced by the decisions in the *Rangers* Litigation in the First-Tier Tribunal Tax Chamber in October 2012, and in the Upper Tribunal in July 2014 referred to above. The landscape was significantly changed by the decision of the Supreme Court in the *Rangers* Litigation in July 2017, and the enactment of the Finance Acts (No.2) 2017 and 2018 with the introduction of the loan charge.

vi) There has been no determination as yet against the Elysian Scheme.

No reliance, causation or loss

230. It is argued by THL that Mr Knights and/or Evergreen did not in fact rely on THL's communications in entering the Tax Schemes. Rather, so it is said:

i) Mr Knights made decisions for himself and/or in reliance on advisers such as OneE or Qubic;

ii) The evidence demonstrates that Mr Knights was able and willing to determine for himself whether or not to take up the opportunities introduced to him by THL; and

iii) Mr Knights and Evergreen would have entered into the Tax Schemes in any event, even if there had been no breach of duty by THL.

231. Further, so it is said, on the Claimants' own case, Mr Knights did not read the written information which THL provided to him in the Limitation of Liability letters. Thus, had THL provided further or different information (or even

advice), then such would not have been taken into account by Mr Knights (and so by Evergreen).

232. Any reliance there was by Mr Knights or Evergreen on THL was, for the above reasons, unreasonable in the circumstances.

233. Further, THL maintains that Mr Elliott's communications were not the effective cause of any alleged losses flowing from the taking up of the Tax Schemes, on the basis that the true effective cause(s) was/were:

i) The financial and tax advice in relation to the schemes received from OneE and/or Qubic;

ii) Any other information and/or advice which Mr Knights and Evergreen received in respect of the schemes, from sources other than THL; and/or,

iii) Changes in the law and the stance of HMRC, which led to the determination of the Claimants' liability.

234. Further, so it is argued, Mr Knights and Evergreen have not in fact suffered any losses in that, so it is said:

i) The Elysian Scheme has not failed. The last communication that Mr Knights or his advisers have received from HMRC was over 3 years ago, in July 2018.

ii) The OneE and Qubic schemes successfully enabled Mr Knights to extract money from Evergreen without incurring an immediate tax liability, and the evidence suggests that the money so extracted has been invested in a profitable manner.

iii) No penalties have been charged by HMRC. The settlement of liability in respect of the OneE and Qubic Schemes was limited to PAYE/income tax, NICs and interest (both past interest, and future interest in respect of the balance paid subsequent to the date of settlement).

iv) Evergreen would always have incurred that tax liability, since the whole motivation for the Tax Schemes was the extraction of monies from Evergreen, which (absent the Tax Schemes) would have been subject to that tax.

v) The profits from the investments made by the Claimants due to the deferment of their tax liability substantially exceed any *past* interest liability.

vi) The liability for *future* interest arises because Evergreen agreed a payment plan with HMRC to avoid paying the outstanding tax in one

lump sum. It is said that this was a deliberate decision taken by Mr Knights to enable him to invest the balance left outstanding in property bonds so as to produce a return significantly in excess of the interest payable to HMRC. On this basis the future interest is not recoverable in any event.

235. Further or in the alternative, so THL maintains, Mr Knights and/or Evergreen caused and/or contributed to any losses suffered by them with the result that the claim should either fail entirely, or the damages recoverable should be reduced pursuant to the Law Reform (Contributory Negligence) Act 1945. This is said to be because:

i) Despite any protestations to the contrary, Mr Knights is a sophisticated individual, who was previously employed in the financial services industry and signed a HNWI certificate;

ii) As a director of the company, Mr Knights owed duties of reasonable care and skill to Evergreen;

iii) On Mr Knights' own case, he did not read or take heed of the documentation which he signed, concerning the Tax Schemes, including Limitation of Liability letters, engagement letters and advice letters;

iv) Mr Knights was keen to extract monies from Evergreen without an immediate tax liability – and did so cognisant of the risks.

236. In any event, so it is said, the Claimants must prove that they reasonably mitigated their loss (and continue to do so).

Issues arising in respect of the Tax Schemes Claims

237. It will be apparent from the above that the principal issues that arise in respect of the Tax Schemes Claim are the following:

i) Has THL a limitation defence to the claim in respect of the OneE Scheme?

ii) Have the Claimants established that THL owed to them, or one or more of them, a duty of care in introducing them to OneE and the OneE Scheme, Newport and the Elysian Scheme, or Qubic and the Qubic Scheme and/or in giving advice in respect thereof and, if so, the scope of that duty of care?

iii) Have the Claimants established that THL acted in breach of the duty of care, if the latter is established?

iv) Have the Claimants established factual and legal causation?

v) Is the loss claimed, or any part thereof, too remote?

vi) Have the Claimants established loss and, if so, what is the quantum thereof?

vii) Were the Claimants or any of them guilty of contributory negligence and, if so, what is the consequence thereof?

viii) Whether Mr Knights is entitled to an indemnity in respect of any liability for tax arising as a result of his entry into the Elysian Scheme.

238. I propose to consider these issues in turn.

Limitation Defence

239. On what I consider to be the proper application of the authorities referred to in paragraph 224 above, I am satisfied that the Claimants' claim in respect of the OneE Scheme is statute barred.

240. To the extent that the Claimants' case is made good, the negligent act in question, or the act constituting the breach of duty, was introducing Evergreen to the OneE Scheme, and providing inappropriate advice in relation thereto, or failing to provide appropriate advice. That then, on the Claimants' case, is what caused Evergreen to suffer loss and damage, with the loss and damage increasing as it became increasingly committed to the OneE Scheme. However, the significant point is that in consequence of the acts complained of it became committed to pay £5,000 by signing the letter of engagement with OneE on 21 June 2013, and thereby suffered some significant loss.

241. It may be that further more significant loss was suffered when effect was given to the OneE Scheme, and Evergreen paid £250,000 into the relevant EFRBS, but the fact is that not insignificant loss had been sustained on 21 June 2013, which was more than six years prior to the standstill agreement entered into between the Claimants and THL extending the limitation period, but only from the date provided for therein. The difficulty from the Claimants' perspective is that the further loss alleged to have been suffered occurred in consequence of the same cause of action as the loss suffered on 21 June 2013.

Duty of care?

Legal principles

242. The approach of the Defendant is to seek to draw an analogy with cases relating to the introduction by banks to services provided by the latter or associated companies of the latter, and where, in this context, an advisory duty of care may arise. Particular reliance was placed by Mr Elkington QC upon the approach

adopted by HHJ Waksman QC, as he then was, in *Carney v Rothschild Investments* [2018] EWHC 958 (Comm), where, at [57] et seq, he identified that in practice, establishing the requisite duty required two things, namely that:

i) The defendant had actually given what could properly be described as advice; and

ii) In doing so, the defendant had assumed responsibility for its advice or the duty of care had arisen by reason of one of the other familiar tests for establishing a duty of care at common law, i.e. the *"three stage"* test and the *"incremental"* test identified in the authorities.

243. HHJ Waksman QC then expressed the view that in this type of case, the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 *"assumption of responsibility"* test was most likely to be the appropriate test to apply and that, so far as this test was concerned, there were essentially two elements to it, namely:

i) Whether the defendant *reasonably* foresaw that the claimant would rely on its advice, and

ii) Whether the claimant did in fact *reasonably* rely on the advice.

244. I accept that an assumption of responsibility test is the appropriate test to apply in the circumstances of the present case, noting that:

i) The other tests have been relegated in importance by the Supreme Court in a number of recent cases, including: *Michael v Chief Constable of South Wales Police* [2015] A.C. 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] A.C. 736. and *NRAM Ltd v Steel* [2018] 1 WLR; and

ii) The closer the relationship is to one of contract, the more likely that the *Hedley Byrne* assumption of responsibility test is likely to assist – see Clerk and Lindsell on Torts, 23rd Edn at 7-112. In the present case, the Claimants retained THL as their accountants and the issue is as to the scope and extent of that retainer.

245. Further analysed, the *Hedley Byrne* assumption of responsibility test requires a *"special relationship"* between claimant and defendant. As Lord Goff put it in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 commenting on the test and the approach to it by the House of Lords in *Hedley Byrne*: *"… it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other…."* (emphasis added).

246. It is in this context that the authorities relating to disclaimers such as those sought to be imposed by the Limitation of Liability letters in the present case require to be considered. As identified by Lord Reid in *Hedley Byrne* itself at 492-493, a disclaimer such as this should not be approached as if it were a contractual exclusion. Rather, it is properly to be regarded as: *"one of the facts relevant to answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement"* – See *McCullagh v Lane Fox & Partners* [1996] PNLR 205 at 237A-C, per Hobhouse LJ. As Hobhouse LJ went on to say: *"The question must be answered objectively by reference to what a reasonable person in the position of [the claimant] would have understood at the time that he finally relied on the representation"* [My emphasis].

247. As a matter of contract law it is possible for parties to a contract to give up any right to assert that they were induced to enter into the contract by misrepresentation, provided they make their intentions clear, and a clause to this effect, if properly drafted, may give rise to a contractual estoppel – see e.g. *Peekay v ANZ* [2006] EWCA Civ 386 at [57], per Moore-Bick LJ, and *Cassa di Risparmio v Barclays Bank* [2011] 1 CLC 701 at [505(1)], per Hamblin J.

248. I did not understand Mr Chaisty QC to disagree with the thrust of the above approach. Mr Chaisty QC did seek to rely upon passages from the judgments in the recent decision of the Supreme Court in *Manchester Building Society v Grant Thornton* [2021] 3 WLR 81, but I consider that the passages in question were directed rather at the scope of a duty of care, rather than whether a duty of care had arisen in the first place, and that it was in that context that the Supreme Court was concerned with the distinction between the provision of information and advice.

249. Mr Chaisty QC did take issue with whether the principles relating to a contractual estoppel could arise in the circumstances of the present case. I consider there to be force in his point that these principles are less readily applicable where an adviser, albeit in the context of a contract of retainer, advises in respect of the entry into a contract with third party. However, I do not consider that the point arises for consideration on the facts of the present case, in that I do not consider that a contractual estoppel would in any event arise in circumstances where the existence of the Limitation of Liability letters would not have negatived the existence of a duty of care in any event.

250. Further, Mr Chaisty QC took issue with the extent to which reliance could be placed upon a passage relied upon by Mr Elkington QC from the judgment of HHJ Moulder, as she then was, in *Thornbidge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB), where at [111] she said:

> *"111. In my view the recent authorities have been very clear that the parties may agree the basis on which they are entering into a relationship. The effect of such a clause is that the party is contractually estopped from denying to the contrary. This is so even where for example parties agree that one party has not made any pre-contract representations about a particular matter and both parties knew that such representations have in fact been made (see Hamblen J in Cassa di Risparmio della Repubblica di San Marino at 505 quoted above). Thus I reject the submission that the test is whether the clause "rewrites history". Nor does anything turn, in my view, on the fact that the confirmation was not received back for some months after the deal was entered into. It was signed by the claimant and returned to Barclays and this is the basis on which the parties agreed to enter into the relationship."* [Emphasis added].

251. I consider that in circumstances where a Limitation of Liability letter of the kind used in the present case is not received back for some time after the relevant advice has been acted upon, then that may be a factor relevant to the objective consideration by the Court as to whether or not there had been an assumption of responsibility, and whether any assumption of responsibility has in fact been negatived by the existence of the Limitation of Liability letter. However, this will depend upon the individual circumstances of the case and that key issue is, to paraphrase Hobhouse LJ in *McCullagh v Lane Fox & Partners* (supra) at 237A-C, what a reasonable person in the position of Claimants would have understood as to THL's position so far as an assumption of responsibility was concerned from the fact that the Limitation of Liability letters had been sent to them, at the time that they committed themselves to the Tax Schemes.

252. Although not a point developed by the Claimants in submissions, I am not persuaded that the analogy with the relationship between a banker and customer is necessarily an appropriate or good analogy to draw with the relationship between an accountant and his or her client. It is, as I see it, more likely that, on the facts of the particular case, a relationship of trust and confidence exists as between the accountant and client, whereby the latter reposes trust and confidence in the latter as an adviser, a position that is likely to be rare as between banker and customer. In the circumstances, it may be that, on appropriate facts, a relationship of reliance exists even though the accountant does not in fact provide affirmative advice so as to give rise to that relationship – provided that that relationship of reliance is not negatived by other considerations such as appropriately worded Limitation of Liability letters.

253. Thus I consider that there may be circumstances in which an accountant, in introducing a client to a tax scheme in the context of an ongoing professional relationship may owe a duty not to introduce an unsuitable client to an unsuitable tax scheme. The experts in relation to the Tax Schemes Claim

recognised as such in their evidence in the case of, say, an introduction to a tax scheme which was not underpinned by professional advice, or the introduction of a patently unsuitable client, such as one that had expressed a negative attitude to risk, to an aggressive tax avoidance scheme.

254. Further, there may, as I see it, be circumstances in which the nature of the relationship was such that it was incumbent upon the accountant to proffer advice in relation to the tax scheme, and the implications of entry into the same. However, this would all be dependent upon showing that the circumstances were such that the accountant had assumed responsibility for such matters, which would in turn depend upon whether the accountant reasonably foresaw that the client would rely upon him in respect of these matters, and whether the client did, in fact, reasonably rely on the accountant in relation thereto.

The present case

255. So far as the Claimants' introduction case is concerned, it is in my judgment significant that although the experts in relation to the Tax Schemes Claim would not have introduced their own clients to these particular tax schemes, there was no support in the expert evidence for the proposition that these were the type of tax schemes that, at the time that the Claimants were introduced to the same, ought not to have been introduced by a general practitioner accountant acting reasonably in any event. Although the legislation was tightening in respect of disguised remuneration schemes, HMRC had, up to that point, been unsuccessful in respect of the *Rangers* Litigation. It could not therefore be said that the OneE and Qubic Schemes would *"inevitably fail"*. Further, the schemes in question, including the Elysian Scheme, were underpinned by legal advice from eminent leading tax Counsel. In the circumstances, I do not consider that it could fairly be said that introductions to the Tax Schemes ought not to have been made in any event.

256. Further, so far as Mr Knights is concerned, whilst the OneE Scheme was the first tax avoidance scheme that he had become involved in, and he had not been involved in relatively aggressive tax planning of this kind before, it cannot in my judgment fairly be said that he was an unsuitable person to at least introduce to promoters of tax schemes like the Tax Schemes at the time that the introductions were made. There were cogent reasons for the Claimants, given the increasing profitability of Evergreen, to consider tax planning, and Mr Knights was an experienced businessman who subsequently at least demonstrated a significant level of sophistication and attitude to risk with regard to investments. There is certainly no evidence to suggest that he was particularly risk averse.

257. In the circumstances, I do not consider that the Claimants' introduction case can succeed, and I consider that Mr Chaisty QC was correct to focus on the advice case.

258. So far as the advice case is concerned, the first consideration must be as to what advice Mr Elliott in fact provided to Mr Knights in respect of the three Tax Schemes. As I have indicated in considering the credibility and reliability of the witnesses, I do not consider the relevant exercise to be simply one as to whose evidence is believed as between Mr Knights and Mr Elliott based upon the credibility of their evidence. Rather, applying *Gestmin* I consider that the focus must necessarily be upon the documentation and the inherent probabilities of the situation, applying the burden of proof but recognising however that things must have been said as between Mr Elliott and Mr Knights prior to Mr Knights causing Evergreen in the case of the OneE Scheme and Qubic Scheme, and himself in the case of the Elysian Scheme, to enter into the same.

259. I am satisfied that Mr Elliott probably did generally encourage Mr Knights to give consideration to the Tax Schemes and, as Mr Elliott accepted under cross-examination, that Mr Elliott mentioned his/THL's involvement in the Tax Schemes in order to provide some comfort to Mr Knights in respect thereof. Further, I consider it quite plausible that Mr Elliott said to Mr Knights that he would only suggest tax schemes that were conducted *"by the book"*.

260. However, I am simply unable on the evidence properly to conclude that Mr Elliott went further, and advised Mr Knights that he/Evergreen had nothing to lose in entering into the schemes, or that the only real risk, in the case of the OneE and Qubic Schemes, was that there might be a liability for corporation tax. My reasons for rejecting Mr Knights' evidence in respect of this are, in essence, as follows:

    i) I consider that this is just the sort of point of detail that is liable to have been falsely created by flawed recollection going back over many years in respect of a claim only thought about very late in the day;

    ii) I consider it inherently unlikely that Mr Elliott would have provided this advice bearing in mind that the first instance decision in the *Rangers* Litigation had been handed down shortly before Mr Elliott first raised the question of the OneE Scheme with Mr Knights, and THL itself, participated in the relevant schemes. I consider that Mr Elliott, in all probability, must have known and appreciated that the whole idea behind disguised remuneration schemes was to avoid PAYE and NIC by seeking to disguise the fact that the payments in question represented remuneration, and thus that if the relevant scheme failed, then a liability for PAYE and NIC would arise. In these circumstances, the Claimants' case would depend upon Mr Elliott having given advice that he knew to

be false. Whatever the criticisms of his evidence that I have, I am not persuaded that Mr Elliott would have provided what he knew to be false advice. I do take into account Mr Elliott's unsatisfactory evidence in relation to THL's attitude to commission, and that THL was more driven by the receipt of commission than Mr Elliott was prepared to accept. I also take into account that matters in respect of commission might more satisfactorily have been explained had Mr Harrison given evidence. However, I am unable to conclude that such considerations would have driven Mr Elliott to provide advice that he knew to be false.

261. The case in respect of the OneE and Qubic Schemes is that Mr Elliott ought not to have advised as he did, but in the case of the Elysian Scheme, as referred to in paragraph 214 above, the case includes allegations that Mr Elliott failed to give advice that he ought to have given. The question thus arises as to whether Mr Elliott ought to have advised in respect thereof. However, I am not persuaded that Mr Elliott had, in the circumstances of the present case, assumed a responsibility to so advise in respect of these matters. Further, in respect of the Tax Schemes as a whole, and to the extent that Mr Elliott provided general encouragement, for example by providing comfort by referring to his/THL's involvement with the Tax Schemes, or indeed proffered any advice, I am not persuaded that Mr Elliott assumed any responsibility in respect thereof.

262. The following are the key considerations that have led me to the conclusion that neither Mr Elliott nor THL assumed responsibility in respect of the matters referred to in the last paragraph:

i) One starts, as I see it, with the engagement letter dated 6 September 2011, and THL's Standard Terms of Business, which made it clear that THL would not recommend a particular investment or type of investment, and the regulatory framework under s. 19 FSMA. It is perhaps unlikely that Mr Knights read THL's Standard Terms of Business, but this and the regulatory framework certainly sets the scene.

ii) The relevant Limitation of Liability letters were sent in respect of the OneE Scheme and, the evidence suggests, signed prior to Evergreen committing itself thereto. These letters relating to the OneE Scheme explained in clear terms, amongst other things, that THL could not advise as to the success or otherwise of any tax planning strategy, and the risks involved, and required the Claimants to confirm that they were relying solely on OneE's advice in connection therewith. Mr Knights accepted under cross-examination that he may have read the first of these Limitation of Liability letters, if not future letters in similar terms relating to the other Tax Schemes. I consider it more likely than not that he did so, not least given that the letters were of no great length or complexity. Further, I do not accept that Mr Knights was informed by

Mr Elliott, or indeed anybody else, that these detailed and obviously carefully reasoned Limitation of Liability letters were a mere formality intended only for THL's compliance purposes. There may have been a degree of laxity in punctually obtaining signed copies, but given the deliberation behind the preparation of these documents, I consider it inherently unlikely that Mr Elliott would have undermined the integrity thereof by leading Mr Knights to believe that they were a mere formality with no consequence. In these circumstances, I consider that Mr Knights was, prior to Evergreen committing itself, made aware that THL was not assuming responsibility for the relevant matters, to the extent that he was not already aware. In respect of the subsequent Tax Schemes, Mr Knights may not actually have read the Limitation of liability letters relating thereto, but he will have been aware from the fact of the sending thereof that THL was dealing with the Claimants on the basis of not accepting responsibility for such matters.

iii) I regard the email dated 19 February 2014 from Mr Knights to Mr Wright to be particularly significant. As explained in paragraph 76 above, I do not accept Mr Knights' explanation that the reference to it not being *"your position to give advice"* was simply a reference to Mr Wright, rather than THL as a whole. I consider this particularly so in the light of the fact that this was said in the context of a complaint about limited communication *"from yourselves"* and that the email went on to explain that Mr Knights was *"fully up to speed with the investment itself, and am quite happy with the risks associated with this investment, it's just the technical staff that I need help with."* Further, in paragraph 41 of his witness statement, Mr Knights appeared to accept that THL were not providing formal advice, his qualification being that Mr Elliott did in fact do so and that he relied on that advice. However, as I have found, no specific advice was provided as alleged.

iv) It is certainly true that the Elysian Scheme was an execution only transaction, under which Mr Knights was not formally provided with any advice. However, as the email dated 19 February 2014 makes clear, and as Mr Knights informed THL thereby, he was *"up to speed"* with regard to the scheme, and understood the risks involved. In respect of the OneE Scheme and the Qubic Scheme, Mr Knights/Evergreen did specifically receive advice in the form of advice letters from the scheme providers which, as we have seen, he signed to say that he had read and understood the same. The fact that Mr Knights/Evergreen did receive such advice from another party is a factor pointing against THL being subject to an advisory duty of care, at least unless THL/Mr Elliott was/were on notice that Mr Knights/Evergreen were not in fact relying upon this advice from the scheme promoters. I note Mr Knights' evidence on this issue, but I

do not consider that the circumstances are such that I can properly conclude that THL/Mr Elliott was on notice that Mr Knights/Evergreen were not relying on the advice of the scheme providers given that Mr Knights had signed the declarations that he did saying that he had read and understood the relevant documentation.

v) Although later on, and set in the context of the CWM Investment, I regard it as also significant that Mr Knights himself refers to Mr Elliott having mentioned that he could not *"officially advise him"*, when Mr Elliott telephoned Mr Knights following Mr Elliott's visit to the London offices of CWM.

vi) Further, there is Mr Knights' evidence, again in the context of the CWM Investment, that he knew that THL was not permitted to give advice in respect of specific investments, and his evidence that he accepted that THL was entitled to proceed on the basis that that was the case.

vii) Finally, there is the point that when it became clear that matters were not working out as hoped for in respect of the Tax Schemes, particularly after the decision of the Supreme Court in the *Rangers* Litigation in 2017, and the introduction of the loan charge at much the same time, Mr Knights did not promptly challenge the advice that he had received from Mr Elliott, or the fact that Mr Elliott had not given advice which is now suggested that he ought to have given. Rather, other avenues were pursued until, very late in the day, the claim as now pursued in the Tax Schemes Claim was intimated.

viii) It is certainly correct that in the case of the Qubic Scheme, there is no evidence that the Limitation of Liability letter was signed. But I do not consider that that affects the position even in respect of the Qubic Scheme, in that the nature of the relationship as between THL and Mr Knights and Evergreen in respect of the introduction to the Tax Schemes was well established by then as being one under which THL had made clear that it was assuming no responsibility towards Mr Knights/Evergreen in respect of the introductions and the provision of advice in respect thereof, and so these were not circumstances in which THL reasonably foresaw that Mr Knights and Evergreen would rely upon it or its advice, or in which Mr Knights or Evergreen did reasonably so rely.

263. In short therefore, I conclude that the Claimants in the Tax Schemes Claim have failed to establish the existence of the duty of care alleged.

Breach of Duty?

264. Given the failure to establish the duty of care alleged, it must follow that no breach of any duty of care has been established.

265. In the light of this finding, it is strictly unnecessary for me to deal with the other issues that arise in respect of the Tax Scheme Claim, but I shall briefly do so in the event my findings in respect of the existence of a duty of care, and breach thereof are successfully challenged.

Causation

266. I am not persuaded that even if Mr Elliott did act in breach of a duty of care in advising Mr Knights that there was nothing to lose in entering into the OneE or Qubic Scheme, or that the only risk in doing so was that there might be a liability to corporation tax if the relevant scheme failed, the Claimants have established causation in fact.

267. I have referred in paragraph 37 above to the cross-examination of Mr Knights as to whether, had he known of the risk that PAYE and NIC might be payable, he would still have entered into the OneE Scheme. His initial response was *"may be not"*, and *"we may not have done"*, but he also accepted that *"we may have done, yes"*. Ultimately, the burden of proof is on the Claimants to establish causation on the balance of probabilities, i.e. that on the balance of probabilities they would not have entered the relevant scheme had they not been advised as alleged. On the basis of these responses alone, I cannot be satisfied on the balance of probabilities that this is the case.

268. Given the responses to this line of cross-examination, I consider that the same considerations arise in respect of the Qubic Scheme.

269. The Elysian Scheme is different, in that the nature of the advice given was different as it was not a disguised remuneration scheme, but a scheme intended to enable the release of monies from a pension tax free. However, as we have seen, under cross-examination Mr Knights admitted that he was aware that there was a risk that tax would be payable in respect of the distribution in the event that the Elysian Scheme failed, that he was not aware of the likely quantum thereof, but that he proceeded to enter the Elysian Scheme in any event. On the basis of this evidence, I do not consider that causation in fact can be established respect of the claim relating to the entry into of the Elysian Scheme.

270. There is a further causation point that arises that I deal with in dealing with the measure of damages in paragraphs 278 and 279 below.

Remoteness/Scope of Duty

271. Where a defendant owes and breaches concurrent tortious and contractual duties, then it is well established that the applicable test with regard to remoteness is the contractual one – see *Wellesley Partners LLP v Withers LLP* [2016] Ch 529.

272. Had all the various other ingredients of the cause of action been established, then I would, in principle, have regarded the losses that the Claimants seek to recover damages in respect of to be sufficiently proximate to be recoverable by way of damages applying the rule in *Hadley v Baxendale* [(1854) 9 Exch 341], as subsequently considered and applied in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 and *The Heron II* [1969] 1 AC 350.

273. However, as Lord Hoffmann observed in *The Achilleas* [2009] 1 AC 61 at [21], a party may not be liable for foreseeable losses because they are not of a type or kind for which the defendant can be treated as having been responsible. This requirement to have regard to whether the loss and damage fell within the scope of the duty of care or obligation in question is brought into focus by the recent decision of the Supreme Court in *Manchester Building Society v Grant Thornton* (supra) in which at [6], Lords Hodge and Sales (with whom Lords Reed and Kitchen, and Lady Black agreed) identified six questions which need to be answered in order to determine whether a claimant is entitled to damages for negligence, namely:

> *"(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)*
>
> *(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)*
>
> *(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)*
>
> *(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)*
>
> *(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)*
>
> *(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation*

to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)"

274. At [17] in *Manchester Building Society*, the majority of the Supreme Court clarified that: *"... in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk."*

275. Although not strictly a remoteness question, but rather to use the above terminology, a duty nexus question, a question does arise as to whether the losses in question would have fallen within the scope of the relevant duty of care.

276. Had the Claimants established a duty of care, and breach thereof, then I am satisfied that the loss and damage claimed to have been suffered would have fallen within the scope of that duty.

Measure of Damages

277. The essence of the Claimants' claim in respect of the OneE and Qubic Schemes is that if THL had not acted in breach of duty as alleged, then Evergreen would not have entered into the schemes, and that as a result of having done so, it incurred a liability for PAYE and NIC that was reflected in the settlement with HMRC. However, the Claimants recognise that it is necessary to give credit for the corporation tax that was saved as a result of entering into the schemes, and so the claim is, in essence, for the difference.

278. The essential position of THL is that the purpose behind the entry into the schemes was to extract monies from Evergreen on a tax-free basis, and that had the scheme not been entered into, then the money would still have been extracted upon which PAYE and NIC would have been paid. In response to this, the Claimants say that there was no need to extract monies from Evergreen, and that money would not have been extracted, but would have been invested either by Evergreen itself, or by lending the money to another company in a similar way that funds were provided to KIML in respect of the CWM Investment. However, as against this contention on the part of the Claimants is the fact that, as referred to in paragraph 147 above, the evidence revealed that of the funds that became available through the entry into the Qubic Scheme by way of credits to a directors' loan account, funds were in fact extracted for the benefit of Mr and Mrs Knights.

279. In the circumstances, and on the basis of this evidence, and doing the best that I can on the evidence available to me, I would have concluded that Mr and Mrs Knights would probably have extracted a proportion of the monies in any event

and incurred PAYE and NIC in any event, but limited to 25% of the funds made available through the schemes.

280. The position in respect of the Elysian Scheme is rather different bearing in mind that HMRC is yet to pursue the matter. However, the expert evidence was to the effect that HMRC was likely to pursue the matter, and that if it were to do so, then it would recover tax, probably at a rate of 55%, on the funds advanced through the scheme. Whilst there might be some offset available if the shares acquired through the scheme had value, the expert evidence was to the effect that HMRC would proceed on the basis that the shares had no value, and that there would be no real basis for challenging this, with the result that the full tax was payable. I would therefore have assessed damages on this basis, and would have sought to have arrived at a figure for damages rather than ordering the Claimants an indemnity in respect of the tax liability in the light of the authorities such as *Trans Trust SPRL v Danubian Trading* [1952] QB 297 at 303 and 307, and *Browning v Brachers* [2004] PNLR 28 at [98].

281. Questions then would have arisen as to the Claimants' claim for interest on the damages claim, and as to whether returns made on the monies which the Claimants had the benefit of should be brought into account. This is because, at least until the settlement monies were actually paid to HMRC in respect of the OneE and Qubic Schemes, and until any settlement with HMRC in respect of the Elysian Scheme, the Claimants will have had the benefit of the monies made available by the entry into the schemes, which, as from 2016, have been invested in property bonds yielding the high returns that I have referred to, which such returns were higher than any interest payable to HMRC as a component of the settlement with the latter in respect of the OneE and Qubic Schemes and, in all probability, any future settlement in respect of the Elysian Scheme.

282. As a matter of principle, compensating advantages may be taken into account, but only to the extent that there is a sufficient nexus between the compensating advantage and the breach that gave rise to the loss. So far as the OneE and Qubic Schemes are concerned, the damages claim is limited essentially to the monies that would not have been distributed in any event. Those monies would have remained in Evergreen, and are likely to have been invested in any event. In these circumstances, I do not consider that any credit would require to be given in respect of the high returns. The position is different in respect of the Elysian Scheme. In principle, I consider that the compensating advantage would be required to be taken into account, but only to the extent that the returns exceeded the growth that might have been anticipated in the pension fund had the Elysian Scheme not been entered into and the relevant funds remained in the relevant pension.

Contributory Negligence

283. Given the hypothesis for considering the question of contributory negligence is that the breach of duty claim would otherwise have succeeded, and given that in order for that claim to have succeeded, I would have had to have made rather different findings of fact, I do not consider that I can sensibly reach any conclusion as to whether contributory negligence would, in these hypothetical circumstances, have been established. I do not therefore express a view thereupon.

Overall conclusion in respect of the Tax Schemes Claim

284. In my judgment, the Tax Schemes Claim must fail for the reasons that I have set out.

F. The CWM Claim

The Claimants' Case

285. The Claimants' pleaded case in respect of the CWM Claim is, in essence, that:

i) THL agreed to and/or was under a duty to carry out due diligence in respect of the CWM Investment, which it failed to carry out, or failed properly to carry out, in circumstances in which if THL had done its job properly, or said that it could not do so, then KIML would not have invested the £616,000 that it did, and Mr Knights and Evergreen would not have provided the funds for it to do so;

ii) Further or in the alternative, that Mr Elliott, on behalf of THL, made certain statements to Mr Knights that amounted to the giving of advice and which induced Mr Knights and Evergreen, through KIML, to invest in the CWM Investment in circumstances where Mr Elliott acted in breach of a duty of care owed to the Claimants in making the relevant statements.

Alleged failure to carry out due diligence in respect of the CWM Investment

286. The basis of the relevant obligation or duty owed to the Claimants is put in two ways:

i) Firstly, it is alleged that at the meeting on 18 June 2014, which Mr Elliott attended at the end thereof, Mr Elliott agreed with Mr Knights and Evergreen that THL would carry out due diligence on the investment offered by CWM, and that:

a) It was an implied term of this agreement that due diligence would be carried out with reasonable care and skill; and/or

b) In carrying out the due diligence (including reporting the findings of the same) pursuant to this agreement, THL owed a duty of care to Mr Knights, Evergreen and KIML, in the case of KIML because THL, at the time that it purported to carry out and report back the results of the due diligence, knew that the new company that was to be incorporated to make the investment would be relying upon the same, as would Mr Knights and Evergreen;

ii) Further or alternatively, it is alleged that THL assumed a responsibility to Mr Knights, Evergreen and KIML to carry out such due diligence and report the results of the same to them on the basis that:

a) THL knew that Mr Knights, Evergreen and the new company to be incorporated to make the CWM Investment would rely upon them to carry out the due diligence and report on the same to them, and that what was reported to them by THL would determine whether or not the investment was made, a decision that exposed them to risk of losses being suffered;

b) In those circumstances, THL owed to Mr Knights, Evergreen and the new company to be incorporated to make the investment, a *"common law duty of care"* in carrying out the due diligence and in reporting the results thereof to them.

287. It is then alleged that THL acted in breach of the implied term and/or of the common law duties of care alleged, it being alleged that:

i) THL did not in fact carry out any due diligence of the investments being offered by CWM, a fact accepted by THL itself;

ii) THL failed to take any or any adequate steps to investigate and ascertain the facts upon which investment was being offered (and the credibility of the same), in particular whether or not investments were in fact being made on behalf of investors, that any such investments were generating returns of at least 5% per month, that if such returns were being generated, the returns were being paid to the investor/into the investment, and the reason or reasons why the investments were able to generate returns of at least 5% per month;

iii) Whilst the Claimants initially alleged that THL had failed to identify the person behind CWM, it is now known that Mr Constantinou had been identified as *"major owner"* during the course of the email exchange on 19 June 2014 referred to above. The Claimants maintain the allegation that THL failed to inform itself as to the FCA authorisation, standing, and track record of Mr Constantinou in terms of previous investments

offered, experience of foreign exchanges and investments based on the same, and general credibility in the market. Reliance is placed upon an alleged failure to discover the fact that Mr Constantinou was a director of Aixia, against whom the FCA had issued the serious warning on 3 March 2014 referred to above; and/or

iv) Notwithstanding the above, THL failed to inform the Claimants or any of them as to the matters referred to in sub-paragraphs (i) to (iii) above, but rather advised the Claimants that *"all was OK"* with regard to the CWM Investment and further as referred to in paragraph 109 above.

288. It is the Claimants' case that they relied upon the fact that Mr Elliott had reported back in positive terms in deciding to make the investments that they did in the CWM Investment. It is said that had Mr Elliott reported back as he ought to have reported back, then it would have been reported to the Claimants that Mr Elliott could not confirm the facts upon which the investment was being offered, and/or that there were real concerns about Mr Constantinou, and therefore that Mr Elliott/THL were unable to recommend the investment, in which case the Claimants would not have made the investments that they did, Mr Knights and Evergreen investing through KIML.

Statements

289. The Claimants rely upon the statements alleged to have been made by Mr Elliott in reporting back to Mr Knights as referred to in paragraph 109 above, that is Mr Elliott informing him that he had completed his enquiries and that *"all was ok"* with regard to the CWM Investment, that whilst Mr Elliott could not officially advise him, he thought that it looked like a very good product and said words to the effect of: *"If I had any spare cash I would do it"*, and *"fill your boots"*.

290. The Claimants allege that:

i) The statements amounted to advice as Mr Elliott, on behalf of THL, was making and expressing a value judgment on the investment and its suitability and was recommending Mr Knights, Evergreen and KIML to invest in the CWM Investment.

ii) Mr Elliott made statements and gave the advice when:

a) Mr Knights' clear understanding and impression was that Mr Elliott was recommending, encouraging and advising him to invest;

b) In making the statements to Mr Knights, Mr Elliott intended and expected that Mr Knights and/or Evergreen and/or any company

incorporated pursuant to the advice given by Mr Elliott to incorporate a new company for the purposes of the investment, would rely upon the same in deciding whether or not to invest (because this is the only reason why he would have made the statements) and that an investment could expose them to financial losses.

iii) The fact that Mr Elliott, prior to giving the alleged advice, said that it was a matter for Mr Knights whether or not he invested, and that he could not *"officially"* advise does not detract from the position, because he did actually provide advice.

iv) Further, it is said that it is not open to THL to rely upon the Limitation of Liability letter dated 26 September 2014 sent to Mr Knights and KIML on the basis that this letter was inconsistent with Mr Elliott's own actions and incorrect in stating that he did not owe any obligations in respect of the giving of advice, and in any event the letter had no contractual effect because the date thereof, and the date of signature thereof, both post dated the giving of the advice and therefore the assumption of the responsibility that the Claimants rely upon. Further, as with the Tax Schemes Claim, Mr Knights says that he was led to believe that this Limitation of Liability letter, as with the other such letters, was required to be signed as a matter of formality for THL's internal compliance purposes.

v) Consequently, it is alleged that THL owed a common law duty of care to Mr Knights, Evergreen and KIML when Mr Elliott make the statements that he did, and thereby gave advice.

291. It is then the Claimants' case that THL acted in breach of this common law duty of care in that:

i) THL did not have any basis (sustainable or otherwise) upon which to conclude (amongst other things) that the investment opportunity was genuine, it could generate a return of 5% per month, it was in fact generating returns of 5% per month for investors, and it was paying such returns to investors and had been doing so over a sustained period of time;

ii) THL did not have any basis (sustainable or otherwise) upon which to conclude or advise that the investment was a *"very good product"* and was sustainable.

292. The Claimants invested in the CWM Investment in reliance upon the statements made by Mr Elliott, and his advice. Had such statements not been made, and

such advise not been given, or Mr Elliott reported back that he could not provide the required confirmation, then the Claimants would not have made the investments that they did, Mr Knights and Evergreen making the investments that they did through KIML.

Loss and Damage

293. The Claimants say that the starting point is the £616,000 invested and lost, but deducting therefrom the £16,000 contributed thereto from initial earnings on the sums invested. Mr Knights seeks to recover the £200,000 that he contributed, and Evergreen seeks to recover the £400,000 that it contributed, alternatively it is alleged that KIML is entitled to recover damages of £600,000.

294. It is recognised by the Claimants that credit requires to be given against the £600,000 for the sum of £87,450 recovered in the class action to which Mr Knights and KIML were party.

295. It is further the Claimants' case that they are entitled to recover by way of damages the sum that would have been earned had the £600,000 been otherwise invested, and not lost, it being the Claimants' case that the relevant monies would have been invested in property bonds or similar investment yielding no less than 12% per annum.

The Defendant's Case

296. THL's response to the CWM Claim is, in essence, as follows:

No due diligence agreement

297. THL denies that it entered into any oral agreement to carry out due diligence, and submits that the evidence (and common sense) indicates that it did not do so, on the basis that:

i) There was no discussion with regard to the scope of any due diligence exercise, nor as to the basis for payment for it, and no letter of engagement or written report setting out the results of the exercise;

ii) In these circumstances there can have been no binding or effective agreement to conduct due diligence as a matter of contract, due to lack of certainty (in particular as to the scope of the task involved) and/or consideration (absent agreement that THL should be paid for the task).

iii) The alleged agreement to carry out due diligence and to report thereon is inconsistent with the Limitation of Liability letter dated 26 September 2014 relating to the CWM Investment.

iv) The Claimants' case as to due diligence rests heavily on the steps taken by THL's compliance officer, Ms Guy, but those steps related to THL's internal compliance and not due diligence as said to be explained by THL's expert, Mr Antoniou.

298. THL accepts that, if it did owe a duty to the Claimants to carry out due diligence, then it acted in breach of that duty, since it did not carry out any due diligence. But THL says that the fact that no due diligence was carried out supports THL's case that there was no agreement to carry the same out.

299. THL says that even if the alleged agreement and breach thereof were established, issues remain in respect of causation, loss and contributory negligence.

No advice given

300. Mr Elliott is adamant that he would not have and did not make the statements alleged, and so THL emphatically denies that Mr Elliott made the statements on which the Claimants' breach of duty claim is based. THL relies strongly upon a contention that there is no contemporaneous evidence to support the alleged statements.

301. It is further said by THL that the Claimants' case as to the date on which the advice was allegedly given has changed, and is inherently implausible.

302. In any event, THL maintains that no advisory duty could arise in the light of the Limitation of Liability letter dated 26 September 2014, which was signed by Mr Knights on 19 January 2015, but provided before the Claimants became committed to the CWM Investment.

No reliance, causation or loss

303. It is THL's case that any reliance by the Claimants on THL was unreasonable given THL's limited role as a sub-introducer (i.e. an introducer to Square Mile, which acted as an introducer to CWM), and given the terms of the Limitation of Liability letter dated 26 September 2014.

304. As to the latter, any attempt by the Claimants to deny the effectiveness thereof is misconceived for the same reasons relied upon by THL in respect of the Limitation of Liability letters relating to the Tax Schemes.

305. In any event, THL maintains that the contemporaneous evidence suggests that Mr Knights was not relying on any advice or due diligence report from THL, and/or that he would have invested irrespective of any such advice or report. THL relies, in particular, upon the following said to support its case:

i) Mr Knights was relying on his own knowledge and understanding of CWM, and/or the advice of Square Mile (which promoted and described CWM to Mr Knights, including at the meeting at THL's offices on 18 June 2014).

ii) By email of 18th September 2014, Mr Knights was recorded as being "*very disgruntled"* at the compliance enquiries being made by Ms Guy, that CWM was not able to answer the questions asked by Ms Guy, and that *"it was explained to everyone as an unregulated product so he is unsure why she is asking these questions."*

iii) On the Claimants' own case, Mr Knights did not read the Limitation of Liability letter dated 26 September 2014 from THL, which explained that there were risks involved in such an investment.

iv) A contractual estoppel is said to have arisen whereby Mr Knights has become estopped from asserting any reliance on any advice from THL, having signed the Limitation of Liability letter dated 26 September 2014.

306. THL then submits that the Claimants are unable to prove that any due diligence (if carried out properly) would have revealed the fraud. As to this, it is said that:

i) The Claimants' expert, Mr Greaves, analyses this issue from the perspective of an investment fund manager by reference to guidance issued by the Alternative Investment Management Association, which is irrelevant to the due diligence which might have been carried out by an accountant in the position of THL.

ii) Given the Claimants' case that CWM was operating a fraudulent Ponzi scheme (see paragraph 16 of CWM Claim PofC), and given that in 2014 investors were receiving the promised returns, the likelihood is that any due diligence would not have revealed the matters which subsequently led to the loss of some of KIML's investments.

iii) Several hundreds of investors were successfully defrauded by CWM, as evidenced by the number of participants in the litigation in the Cayman Islands, which included Mrs Locke and her husband, and it is reasonable to suppose that the majority thereof were acting on the basis of advice or recommendations from advisers who were taken in by CWM's sophisticated fraud, as THL would have been had it carried out the due diligence that it is alleged that it should have carried out.

307. THL submits that the only party that suffered the loss of the investment was KIML, being the party that actually carried out the investment into the CWM Investment. However, it is submitted that no duty can have been owed to KIML,

and thus breached, as KIML did not exist at the time of the alleged advice or agreement to conduct due diligence.

308. The loss claimed in respect of lost profit on the alternative property bonds investment, at a rate of 12% per annum, is said to be irrecoverable on several bases, having regard to the legal principles considered further below, and in particular:

i) It is said that it is for Mr Knights to prove as a matter of fact that he or Evergreen or KIML would have made an alternative investment in property bonds, but that the first such investment was made in January 2016, over a year after the investment in CWM. It is submitted that it is inherently improbable that he would in fact have been aware of and/or keen to make such an investment in late 2014. Further, it is said that the suggestion that Mr Knights would have made investments generating returns of 12% per annum is inconsistent with his asserted "*conservative"* investment profile.

ii) It is submitted that the loss of profits from investments in property bonds falls outside the scope of any duty owed by THL. This is on the basis that:

a) The Claimants' essential complaint is that the CWM Investment was riskier than it appreciated.

b) If THL was under an advisory duty, then the risk that the duty was to protect against was the risk of a loss of the capital invested.

c) The claim should therefore be limited to the capital sum lost because the risk of a failure to make profits of 12% on some entirely different investment with which THL had no involvement was not one which THL was obliged to guard against.

iii) It is further submitted that profit from an alternative investment in property bonds is too remote because on the information available to THL at the material time, the reasonable man in Mr Elliott's position would not have realised that the loss of profits from an investment in property bonds was sufficiently likely to result from THL's alleged negligence to make it proper to hold that the loss flowed naturally from the breach, and nor would loss of that kind have been in THL's contemplation.

iv) It is then submitted that the claim for 12% interest on damages amounts to speculation. This is said to be because:

a) The more recent investments made through Propiteer (which commenced in May 2017) are no proper indication as to the return which would have been received by the Claimants in the period from 2014.

b) The expert evidence of Mr Jones as to the 12% is misconceived, being based on an extrapolation from different sorts of investments at a different time (2020/2021).

c) The best evidence as to an alternative investment which Mr Knights might have made is Beta 2, the other FX investment he made, notwithstanding that issues had arisen with the CWM Investment, at the recommendation of Mr Skipsey and Mr Wanless (both of whom had been involved in promoting the CWM product), which failed.

309. The loss of the investment is not £616,000. Credit must be given not only for the £16,000 thereof that derived from returns on the CWM Investment and the £87,450 received on the settlement of the proceedings brought in the Cayman Islands, but also the further sum of £85,600 received as returns on the investment prior to March 2015 (from Capitis Fora LLP).

310. Finally, it is submitted that any loss suffered by any of the Claimants was solely caused by or was contributed to by their own fault, with the result that the claim should either fail entirely, or the damages recoverable should be reduced pursuant to the Law Reform (Contributory Negligence) Act 1945. The same points are relied upon as in respect of the Tax Schemes Claim, but it is said that the position is all the more stark in respect of the CWM Claim, given:

i) Mr Knights' own evidence to the police that he believed the investment to be "*too good to be true",* something also touched upon cross-examination; and

ii) The contemporaneous documentation, which it is said indicates that Mr Knights was pressing for the investment to be concluded in full knowledge of the risks, rather than seeking advice or due diligence from THL.

Issues in respect of the CWM Claim

311. It will be apparent from the above that the principal issues that arise in respect of the CWM Claim are the following:

i) Was a binding and enforceable agreement reached for THL to carry out due diligence in respect of the CWM Investment?

ii) If so, was it an implied term of that agreement that THL would carry out the due diligence with reasonable skill and care?

iii) Whether, arising out of the discussions on 18 June 2014 with regard to Mr Elliott's visit to CWM's offices, THL otherwise assumed responsibility for carrying out due diligence of any kind and, if so, was THL in respect thereof subject to a common law duty of care to carry out the due diligence with reasonable skill and care?

iv) If THL was subject to the implied term or the common law duty of care referred to above, to whom was the relevant obligation and/or duty owed?

v) If THL was subject to the implied term or the common law duty of care referred to above, did THL act in breach thereof?

vi) Did Mr Elliott make the statements alleged by the Claimants to have been made, and did THL thereby or otherwise in respect thereof, assume a duty of care to the Claimants, or any of them, in respect thereof, and the advice conveyed thereby?

vii) If THL did assume a duty of care to the Claimants, to which of the Claimants did it assume the same?

viii) Did THL act in breach of such duty of care as alleged?

ix) If it is established that THL did act in breach of the implied term referred to above, or in breach of the duty of care referred to above, did the same cause the Claimants or any of them to invest in the CWM Investment?

x) If so, did the Claimants, or any of them, suffer any loss or damage and, if so, what loss or damage did they suffer in consequence thereof, and what loss or damage is properly recoverable from THL?

xi) Are the Claimants or any of them guilty of contributory negligence and, if so, what are the consequences thereof?

312. Again, I propose to consider these issues in turn in so far as necessary to do so in consequence of other findings. However, there are a number of preliminary observations that require to be made, and I need to make a number of findings of fact before determining the same.

Scope of the Claimants' case

313. In paragraph 46 of Mr Chaisty QC's opening Skeleton Argument for the trial he maintained that there: *"... was an obligation on the part of the D to warn the Cs of risks and problems of which they were aware."* In support of this proposition

he referred to *Credit Lyonnais v. Russell Jones* [2002] EWHC 1310 at [28], relating to a claim against a solicitor, where it is said:

> *"If in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing 'extra' work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions … If in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him."*

314. This suggested obligation to advise generally as to risks was not developed in submissions, and is not how the Claimants' case is pleaded, but one can see the basis for a case along the lines that:

i) Mr Elliott, as he accepted, reported back to Mr Knights after his visit to London on 19 June 2014 that everything that they had been told *"added up"*;

ii) Having raised the questions that he did, which were answered by Mr Wanless, Mr Elliott informed Mr Knights by email on 23 September 2014 that his questions had been answered *"satisfactorily"*;

iii) However, this was against the background of Ms Guy, as THL's Compliance Officer, having raised serious concerns with regard to the risks involved with the CWM Investment, and it being *"too good to be true"* given in particular the guaranteed 5% per month return, in internal correspondence with Mr Elliott, which such concerns were not passed on to Mr Knights;

iv) The evidence of Mr Greaves, which Mr Antoniou broadly accepted, was that the product offered, with its guaranteed return of 5% per month etc. gave rise to certain *"red flags"*;

v) Mr Chaisty QC extracted from Mr Antoniou under cross-examination that Mr Elliott, at least if he had agreed with Ms Guy with regard to the risks involved with the CWM Investment, might have told Mr Knights about the same, Mr Antoniou further accepting that he would have expected that if a product was perceived to be risky, then it would be brought to a client's attention in circumstances such as the present.

vi) In these circumstances, Mr Elliott ought to have drawn the risks, including Ms Guy's concerns, to Mr Knights' attention.

315. However, as indicated, an obligation to advise generally as to risks, and an allegation that THL owed a general duty of care to the Claimants introducing them to the CWM Investment (as in the Tax Schemes Claim) is not the Claimants' pleaded case and, no doubt, if such a case had been pleaded then expert evidence would have been directed to it, rather than being confined to the narrower issues in relation to due diligence, and a different decision may well have been taken as to the evidence to adduce in particular from Ms Guy.

316. In the circumstances, I consider that I must confine my determination to the pleaded issues as based upon the alleged duty or obligation to carry out due diligence, and as based upon the making of specific statements by Mr Elliott that amounted to the giving of positive advice.

317. In any event, the line of argument considered in paragraph 314 above would still have faced a number of difficulties and objections, particularly in the light of a number of my findings of fact below, e.g. as to whether, in the circumstances, THL/Mr Elliott had assumed a responsibility to the Claimants to give general advice as to risks, not least given Mr Knights' understanding that THL could not give advice in respect of specific investments, the Limitation of Liability letters etc., and further as to the fact and reasonableness of any reliance, and as to causation.

Findings of fact

318. I have considered the relevant factual background in paragraph 82 et seq above. My findings in respect of what I consider to be the key issues are as follows.

319. There was evidence that THL would look into the background to tax schemes and investments, and the individuals behind the same, before making an introduction to clients. This was Mr Wright's evidence, and is supported by the email dated 31 October 2013 relating to *"Due Diligence"* carried out by Ms Guy in respect of Newport prior to Mr Knights' entry into the Elysian Scheme. Further, it is to be noted that in his email dated 9 June 2014, Mr Elliott explained that he was: *"trying to look into the company that does the FX trading and also the bank where the cash would be held."* As referred to above, under cross-examination Mr Elliott explained that he was seeking to confirm what Mr Skipsey had said to THL about the CWM Investment.

320. As to the reason for Mr Elliott's visit to London on 19 June 2014, there are, as I have set above, a number of different and not necessarily consistent ways that Mr Elliott has explained this. However, I consider the most credible explanation to be that provided by the contemporaneous email dated 11 June 2014 in which Mr Elliott explained to Mr Harrison that the visit was: *"only to see them and how they trade and what protections they put in place for the investor etc."*

321. Mr Wright, in his evidence under cross-examination, recognised that prior to the meeting on 18 June 2014, he and/or Mr Elliott had essentially been passing on information in respect of the CWM Investment provided by Square Mile. The purpose of the meeting on 18 June 2014 was so that Mr Knights could meet the representatives of Square Mile and hear from them themselves. It is common ground that Mr Elliott joined at the end of this meeting. In this context, I consider it inherently unlikely that Mr Elliott, himself, provided any further explanation with regard to the investment product at this meeting, although he may well have provided encouragement in a general sense in respect of it. However, I do not accept Mr Knights' evidence that Mr Elliott said at this meeting that he was convinced that it was a *"legitimate and genuine product"*. This was not referred to in the CWM Claim PofC, as one might have expected it to have been if Mr Knights had a genuine recall about this being said. Further, it would be a somewhat odd thing to have volunteered ahead at least of the proposed trip by Mr Elliott to London. Further, Mr Elliott came across as a comparatively cautious man, and I am simply not persuaded on the balance of probabilities that this was said. I consider that it is more likely to be a product of Mr Knights' flawed recollection over a period of time as to what was discussed at this meeting.

322. Mr Knights accepts that the expression *"due diligence"* was not used at the meeting on 18 June 2014. I consider it likely that Mr Elliott did, at this meeting, say to Mr Knights something along the lines of that he was going to visit CWM at its offices in London the following day in order to check them out, and that he would report back when he had done so, Mr Elliott having accepted as much under cross-examination. However, I do not read this as being a statement, let alone an agreement, to the effect that Mr Elliott would carry out due diligence in the detailed sense envisaged by Mr Greaves in his report, but rather a relatively quick check and discussion with representatives of CWM in order that THL could be satisfied that what the representatives of Square Mile said about the product and CWM was correct.

323. Mr Elliott visited CWM's offices in London, and met with Mr Wanless, and perhaps more significantly Philip Barnett, the Solicitor involved in the management of CWM. After the meeting, Mr Elliott raised a number of issues with Mr Wanless, who promptly responded thereto, including by identifying Mr Constantinou as *"major owner"*. Whilst it might have been possible to make enquiries of the FCA that would have revealed the warning in respect of Aixia dated 11 March 2014, there was no real investigation at trial as to how practical this would have been, or as to how readily the association between Mr Constantinou and Aixia might have been established, and I find it difficult to find any fault on the part of Mr Elliott in not establishing this link.

324. Following his visit to London, Mr Elliott telephoned Mr Knights on one, or possibly two occasions, and I am satisfied that during the course thereof Mr Elliott would have informed Mr Knights something along the lines of that it all *"looked okay"*, or that it all seemed to *"add up"*, and that Mr Elliott continued to be encouraging in a general sense. However, I am not satisfied, on the balance of probabilities, that Mr Elliott went further and described the product as a *"good product"*, or said that if he had any spare cash he would *"do it"*, or that he encouraged Mr Elliott to *"fill your boots"*. It is significant that even if he did so, Mr Knights accepts that Mr Elliott said that he could not *"officially advise him"*.

325. In reaching this conclusion as to what was said by Mr Elliott in reporting back to Mr Knights, I have taken into account Mr Wright's evidence as to THL's attitude to commission, and the somewhat unsatisfactory evidence from Mr Elliott in respect thereof. I have also taken into account that the Court might have been assisted by evidence from Mr Harrison as to this, particularly in the light of his response to Mr Harrison's email of 11 June 2014 where he referred to: *"something we may need to push for clients and our income stream."* I recognise that given the very high rates of commission available to THL if clients were signed up to the CWM Investment (1% per month), Mr Elliott and THL had a very real incentive to encourage clients to sign up, and to commit as soon possible to the CWM Investment. However, this is insufficient to persuade me that Mr Elliott made the statements alleged, not least because I consider that if he had done so, Mr Knights would have raised a concern in respect thereof very much earlier on, and in different circumstances, to those in which he has belatedly done so.

326. It is clear that Ms Guy did have concerns that the CWM Investment was too good to be true, and that she expressed this in fairly trenchant terms to Mr Elliott.

327. Questions to CWM were formulated by Mr Elliott, to which Ms Guy made some revisions, and these were discussed with Mr Wanless. In the light thereof, by his email dated 23 September 2014, Mr Elliott informed Mr Knights that he was satisfied with the answers that he received to his enquiries. As referred to in paragraph 119 above, Mr Wanless did provide some fairly detailed explanations in respect of concerns as to the working of the CWM Investment that had given rise to the queries. I am satisfied that Mr Elliott was genuinely satisfied by these explanations notwithstanding Ms Guy's continuing concerns, and in reaching this conclusion I have given carful consideration as to whether Mr Elliott's evidence on this point is undermined by Ms Guy not being called, and have concluded that it is not.

328. Thereafter, on 26 September 2014, Mr Elliott informed Mr Knights that the usual Limitation of Liability letters would be sent, which they were later that

day. It is common ground that THL did not chase for the return thereof, but they were returned signed on or about 19 January 2015, and no objection was taken to them.

329. Other important considerations are, in my judgment, the following:

i) There was, as I have found, an understanding in relation to the Tax Schemes that THL could not provide advice as to the merits of individual Schemes. When questioned in the context of the CWM Investment, Mr Knights accepted that THL was not an IFA, and was not permitted to give advice in respect of individual investments. He further accepted that THL could not give any warranty as to the performance or profitability of the CWM Investment.

ii) Mr Knights did hold separate meetings with Mr Skipsey and Mr Robson of Square Mile following the meeting on 18 June 2014, and I regard this as significant in the context of a situation in which the information that Mr Knights had received in respect of the CWM Investment from THL was information passed on from Square Mile. Although after the event, it is not without significance that when things did go wrong, it was Mr Skipsey to whom Mr Knights looked to for assistance, and that Mr Skipsey subsequently introduced Mr Knights to Propiteer and other FX schemes.

iii) The Limitation of Liability letters dated 26 September 2014 were sent, and there is no suggestion that they were not received prior to the monies being invested in the CWM Investment. As I have said, I do not accept that Mr Knights was led to believe that these were a mere irrelevant formality, and I note that Mr Elliott took the trouble to write to Mr Knights on 26 September 2014 to inform him that the usual Limitation of Liability of Liability letters would be on the way. It may be that Mr Knights might not have read the same, as I have found, he had read the initial Limitation of Liability letter sent in respect of the OneE Scheme, and would, I have concluded, been aware what these Limitation Letters were all about, namely that THL made it clear that they did not accept any responsibility for advice in respect of the relevant tax scheme or investment, as recognised by Mr Knights in, for example, his email dated 19 February 2014.

iv) When things went wrong, Mr Knights did not immediately hold Mr Elliott/THL responsible, and he has only sought to do so many years after the event when the idea of holding Mr Elliott and THL responsible had been put into his head by discussion with others.

v) There were hundreds of other investors in the CWM Investment, including Mrs Locke and her husband, a significant number of whom might reasonably have been expected to have done so with the benefit of financial advice, and all of who were taken in.

Due Diligence

Agreement to carry out due diligence?

330. I do not consider that any such binding and enforceable agreement was concluded for THL to carry out any form of due diligence in respect of the CWM Investment. I appreciate that THL would have been rewarded in a sense for the carrying out of any due diligence by the receipt of commission if the CWM Investment was made, but no agreement was concluded for THL to be remunerated in consideration for the carrying out of any due diligence exercise, and so it is difficult to see that there was any consideration to support the alleged agreement.

331. In addition to the absence of consideration, I consider that there was simply insufficient certainty as to what was to be involved, and what the purpose was behind the exercise of Mr Elliott going to London, and subsequently reporting back to Mr Knights. I note that under cross-examination, Mr Knights said with some conviction that the important aspects of the investment were, from his perspective: *"… the security aspect of it, the fact that it was guaranteed, and the fact that CWM were a legitimate, proper organisation"*, and that he thought that THL were checking out for him: *"CWM as a legitimate organisation, and it was a place that was safe to deposit money."* However, I do not consider that the discussions between Mr Elliott and Mr Knights at the meeting on 18 June 2014 that led to Mr Elliott reporting back after his visit on 19 June 2014 identified the task with sufficient certainty to give rise to any binding agreement.

332. It must follow therefrom that the implied term contended for never existed to be performed by THL.

Did THL otherwise assume responsibility for carrying out due diligence?

333. On the basis of the Claimants' pleaded case, the relevant question is, as I see it, as to whether, on the basis of the discussions between Mr Elliott and Mr Knights on 18 June 2014, Mr Elliott/THL assumed a responsibility to the Claimants or any of them to carry out due diligence and report back to Mr Knights. Applying the relevant principles of law considered in the context of the Tax Schemes Claim, this would have depended upon showing that Mr Elliott reasonably foresaw that Mr Knights would rely upon him to carry out a particular exercise of due diligence and report back in consequence of what might have been said on 18 June 2014, and whether Mr Knights reasonably relied upon him to do so.

334. However, this does, to my mind, again raise the question as to the scope of the exercise that Mr Elliott said that he would undertake in saying that he would report back after his visit to London, and my finding that there was no real consensus as between Mr Elliott and Mr Knights as to the scope of the exercise and what it was to involve, Mr Knights having accepted under cross-examination that he did not know what was to be involved.

335. In the circumstances, I am simply unable to conclude that Mr Elliott had assumed responsibility to carry out a due diligence exercise of the kind that the Claimants now contend ought to have been carried out that would have been concerned with drilling down into the legitimacy and bona fides of CWM.

336. Although my conclusion is not dependent thereupon, I consider that I am supported in the conclusion that I have reached by the fact that the relevant events took place against a background under which Mr Knights has accepted that THL was not permitted to advise in respect of specific investments, could provide no warranty in respect thereof, and had sought to make it clear that it accepted no responsibility for the provision of any advice and more generally in respect of the CWM Investment in the Limitation of Liability Letters sent prior to the Claimants actually committing themselves to the CWM Investment, albeit that the Limitation of Liability Letters were not signed until thereafter.

337. Further, again, had Mr Knights genuinely relied upon Mr Elliott in respect of the matters that he now seeks to contend that he did, then surely once it became clear after March 2015 that things were not as they seemed, he would fairly promptly thereafter have raised the contentions that he now seeks to pursue by the CWM Claim rather than raising them many years after the event when the idea had been put into his head by others? The fact that he did not do so demonstrates to me fairly conclusively that he placed no reliance upon Mr Elliott/THL to provide due diligence of the kind that it is now alleged that Mr Elliott/THL ought to have carried out.

338. In short, therefore, I do not accept that THL did otherwise accept a responsibility for carrying out due diligence following on from the meeting on 18 June 2014.

To whom was any obligation or duty owed?

339. If, contrary to my finding above, a binding and enforceable agreement was concluded to carry out due diligence, then only those entities in existence as at the date of the relevant contract can, as I see it, have had any right to enforce any implied term arising thereunder. Consequently, I do not consider that such implied term could have been enforced for the benefit of KIML, at least unless reliance could be placed on the Contracts (Rights of Third Parties) Act 1999, upon which I had no submissions.

340. So far as any duty of care at common law to carry out due diligence arising out of the discussions on 18 June 2018 is concerned, then I can see more scope for suggesting that the duty extended to the company to be incorporated for the purposes of making the investment bearing in mind that that was in the contemplation of the parties at the time, or that the duty was a continuing one and so extended to KIML once the latter had become a client of THL. I would therefore have been prepared to hold that the duty extended to KIML.

Breach?

341. In view of my findings that no binding and enforceable agreement was concluded to carry out due diligence, and that no other duty or obligation arose in respect of the carrying out of due diligence, the question of breach does not arise.

Statements

Were the alleged statements made my Mr Elliott?

342. The question then arises as to whether Mr Elliott made the statements alleged by the Claimants to have been made when reporting back to Mr Knights following the visit to London, and whether THL, thereby or otherwise in respect thereof, assumed a duty of care to the Claimants, or any of them, in respect of the statements, and the advice conveyed thereby.

343. For the reasons that I have already set out in paragraphs 334 and 335 above, I am unable to find, on the balance of probabilities, that Mr Elliott did make the statements that are complained of. Further, insofar as Mr Elliott did express encouragement so far as the CWM Investment is concerned, I am not satisfied that that he did so in terms that amounted to the making of the statement, or the giving of advice intended to be acted upon.

Was there an assumption of responsibility by Mr Elliott/THL?

344. Even if I had found that Mr Elliott had made the statements in question, I would have had considerable difficulty in finding that Mr Elliott had assumed a responsibility to the Claimants in respect of the making of the statements given the various considerations referred to in paragraph 329 above, and the fact that, on Mr Knights' own case, the statements were made in the context of Mr Elliott saying at the same time that he could not *"officially advise"*.

If assumption of responsibility, to whom?

345. If the statements had been made, and there had been an assumption of responsibility by Mr Elliott/THL in respect thereof, then the question arises as to whether that assumption of responsibility would have extended to KIML.

346. I consider that it would have so extended on the basis that a newly incorporated company was, at the time that the relevant statements are alleged to have been made, contemplated to be the party that would act thereupon in making the investment in question. KIML was, as so contemplated, subsequently incorporated, and did make the investment using funds provided by Mr Knights and Evergreen on, on the Claimants' case, the basis of the statements that were made and not subsequently corrected or retracted.

Breach?

347. It necessarily follows from my findings that the relevant statements were not made, and that, in any event, there was no assumption of responsibility, that the question of breach does not arise. There was therefore no actionable breach.

Causation

348. I shall deal with causation in case it should subsequently be found that I am wrong in finding that there has been no breach of any implied term or duty (whether in respect of due diligence or statements made). However, given this finding, I shall do so briefly.

349. So far as the due diligence allegations are concerned, I am simply not persuaded that if Mr Elliott had done all that a chartered accountant in general practice could reasonably have done in the circumstances, the underlying fraud behind the apparent Ponzi scheme in respect of the CWM Investment would have been discovered. Further, as I have indicated above, I consider there to be insufficient evidence to support the contention that Mr Elliott was at fault in not discovering Mr Constantinou's connection with Aixia and the FCA warning. In these circumstances, I am not persuaded that even if Mr Elliott had done that which it is said that he should have done, the Claimants would not have proceeded to make the investments that they did in any event.

350. It might be suggested that Mr Elliott ought to have said that he was not suitably qualified to carry out any proper due diligence exercise. However, had he done so, then I doubt very much that that would have dissuaded Mr Knights from proceeding with the investment. But that, of course, begs the question as to what Mr Elliott went to London to do and report back on.

351. So far as the statements are concerned, it is evident from Mr Elliott's email to Mr Wright sent at 7:56 AM on 19 June 2014, which must have been prior to Mr Elliott reporting back to Mr Knights, that Mr Knights was keen to proceed in any event given that Mr Elliott had commented that Mr Knights: *"seems pretty set on going for the FX investment and putting everything that he has in."* I am far from convinced that Mr Knights would not have proceeded in any event even

had the statements that are complained of not been made, and that he required no persuading.

Measure of Damages

352. I only consider this issue in case I should be wrong in respect of my findings as to liability. Again, I do so comparatively briefly.

353. The starting point in respect of losses is clearly the total investment of £616,000, but I accept that credit requires to be given against the same for the £16,000 thereof derived from returns on the CWM Investment, £2,000 received as a share of commission, the £87,450 received on settlement of the proceedings brought in the Cayman Islands, and also the further sum of £85,600 received as returns on the investment prior to March 2015, leaving a balance of £424,950.

354. The evidence suggests, to my mind, that no real thought had been given by Mr Knights to the basis upon which the relevant monies were provided by Mr Knights and Evergreen to KIML in order to fund the investment. The evidence is to the effect that the monies were, at least for some purposes, treated as having been made by way of a loan and, as I see it, they can only have been advanced by way of loan or gift, and the second of these alternatives is, I consider, commercially unrealistic. In the circumstances, and given the potential ability of Mr Knights and Evergreen to recover as against KIML, I consider that the better view must be that the losses were properly suffered by KIML, which takes one back to the issues considered above as to whether any obligation or duty was owed to the latter.

355. There would clearly have been entitlement to interest at the usual rate on any damages awarded.

356. However, the Claimants claim that they are entitled to recover the loss claimed to have been suffered because the monies in question were not available to invest in a high earning investment such as a property bond with Propiteer. I am not persuaded that the Claimants, or appropriate Claimant would have been entitled to recover in respect of these alleged losses. Apart from factual issues as to whether, in fact, the monies would have been invested in this alternative way, at least prior to Mr Knights being introduced to Propiteer by Mr Skipsey in 2016, I do not consider that this head of alleged loss properly fell within the scope of any obligation or duty of care that may have been assumed by THL had the Claimants' case been made out, applying the various legal principles in respect of scope of duty considered in the context of the Tax Schemes Claim in paragraph 273 et seq above, essentially for the reasons contended for by THL.

Contributory Negligence

357. Again, given the hypothesis for considering the question of contributory negligence is that the relevant claim would otherwise have succeeded, and given that in order for that claim to have succeeded, I would have had to have made rather different findings of fact, I do not consider that I can sensibly reach any conclusion as to whether contributory negligence would, in these hypothetical circumstances, have been established. I do not therefore express a view thereupon.

Overall conclusion in respect of the CWM Claim

358. For the reasons set out above, I consider that the CWM Claim must fail.

G. Overall Conclusion

359. In view of my findings in respect of the Tax Schemes Claim and the CWM Claim, both claims will be dismissed.