[2021] UKFTT 126 (TC)

TC08107

INCOME TAX – loss relief – whether appellants carrying on a trade – no - whether any trade carried on a commercial basis with a view to profit – no - whether discovery assessment validly made - yes– whether deliberate behaviour - yes – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2015/03404
TC/2015/03405

BETWEEN

ANTHONY OUTRAM
ROSS OUTRAM **Appellants**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: MICHAEL BELL

The hearing took place on 4 and 5 March 2021. With the consent of the parties, the form of the hearing was the Tribunal video platform.

Jeremy Woolf, of counsel, instructed by Barnes Roffe LLP, for the Appellant

Sadiya Choudhury, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. By Directions and Decision issued on 12 October 2020, Judge Sinfield directed that:

   (a) There should be a hearing of the preliminary issue as to whether the appellants' conduct was deliberate or not,

   and it should be listed for hearing together with

   (b) HMRC's application for strike out of three of the Grounds of Appeal.

The Preliminary issue

2. At the commencement of Closing Submissions Mr Woolf confirmed that, having heard Officer Reilly's evidence he was no longer taking any point on the validity of the discovery assessments. It is therefore common ground that the only issue between the parties is whether there had been a deliberate inaccuracy by the appellants that extends the assessment window under Section 36 Taxes Management Act 1970 ("TMA"). HMRC correctly concede that the burden of proof is upon them to establish that issue.[1]

3. HMRC argue that that deliberate inaccuracy on the part of each appellant was the inclusion in their self-assessment income tax returns ("SATRs") for 2005/2006 of claims for loss relief. The losses arose in relation to what we define below as Pendulum Contracts which HMRC describe as a tax avoidance scheme.

The strike out application

4. HMRC's application was to strike out Grounds 1, 3 and 4 of the appellants' appeals under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") on the basis that they have no reasonable prospect of success following the decisions of the First-tier Tribunal in *Thomson & Others v HMRC*[2] ("Thomson") and *Sherrington & Others v HMRC*[3] ("Sherrington").

5. At the commencement of Closing Submissions Mr Woolf confirmed that the appellants had conceded that those Grounds of Appeal were no longer relied upon. Accordingly, those Grounds of Appeal are struck out.

The Hearing

6. Both the appellants had lodged identical appeals with the Tribunal so the appeals were heard together. There were only minor differences in the underlying facts.

7. At the outset of the hearing Ms Choudhury argued that, given that the Tribunal was conversant with the law and had read the relevant documents, there was no need for Opening Submissions by Counsel. Mr Woolf disagreed. We decided that since we had spent time reading into the appeals, and having due regard to Rule 2 of the Rules, that it was appropriate to proceed to the evidence without the need for Opening Submissions.

8. We heard oral evidence from Officer Reilly and from the appellants. We had the Bundle for the hearing, a supplementary bundle of correspondence, an Authorities Bundle and a supplementary Bundle of Authorities lodged by the appellants which was not in fact referred to in Submissions.

9. When cross-examining Officer Reilly, Mr Woolf argued that it was relevant to ask the officer about what he had done in terms of deliberate behaviour in other appeals involving the

[1] Burgess and Brimheath v HMRC 2016 STC579
[2] 2018 UKFTT 396 (CC)
[3] 2020 UKFTT 128 (TC)

same tax avoidance scheme. It is not. Furthermore, we observe that Judge Sinfield made that point not only in his Directions released on 12 October 2020[4] but also in a letter from the Tribunal to the parties dated 4 November 2020 where he stated:

> "…the reasons (if any) why HMRC did or did not allege deliberate conduct in other cases are irrelevant to the Appellants' appeals. The only issue in relation to deliberate conduct that is relevant in these proceedings is whether the Appellants' conduct was deliberate or not."

We agree.

10. On 15 January 2021, Barnes Roffe LLP ("BR"), the appellants' agent, wrote to HMRC formally confirming that, provided the evidence of Mr Matthew Woolf and Mr Edward Watkins Gittins was not to be challenged, the appellants conceded that "…the scheme was ineffective". They wished Officer Bradley to be available for cross-examination although, in the event, his witness statement was not challenged. HMRC had agreed.

11. We also had the unchallenged witness statements of Messrs Keith Mason and Duncan Stannett of BR.

12. We have referenced both *Thomson* and *Sherrington* not because we are bound by them, as we are not, but as Ms Choudhury pointed out the mechanics of the contractual arrangements and much of the documentary evidence were very similar, so the findings of the FTT in those cases were relevant if this Tribunal agreed with those findings. She adopted as submissions the arguments at paragraphs 171 and 172 of *Sherrington* and paragraph 65 of *Thomson*.

Findings in Fact

Summary of the Background to the Discovery Assessment

13. We set out more detail under the heading Discovery Assessments below but simply set the scene here.

14. On 29 September 2010, HMRC searched premises belonging to Montpelier in the Isle of Man and the UK as part of an ongoing criminal investigation into both Montpelier and Mr Gittins (see paragraphs 39 and 96 below).

15. During those searches HMRC recovered a large number of documents ("the raid") which showed that the appellants had been users of what HMRC believed was a mass marketed undisclosed tax avoidance scheme. On 23 April 2013, Officer Reilly was allocated the appellants' cases. After a review of the appellants' tax affairs, on 1 July 2013, HMRC opened Code of Practice 9 investigations on the grounds of suspected fraud arising from the submission of incorrect tax returns containing loss claims believed to be knowingly incorrect.

16. On 31 July 2013, the appellants declined HMRC's invitation to enter the Contractual Disclosure facility and make a full disclosure with a view to securing immunity from prosecution.

17. Following separate meetings with each of the appellants on 13 November 2013, for which both HMRC and BR kept notes which are not materially different, correspondence ensued and HMRC, in a letter of 3 December 2013, enclosed schedules of documents and information sought covering the period 6 April 2005 to 5 April 2008 and that by 17 January 2014. That deadline expired without a response.

18. On 28 January 2014, further material was furnished to Officer Reilly from the materials that had been seized in the raid. That included two undated loan agreements with Mandaconsult

[4] Paragraphs 20, 21 and 23

AG signed by the appellants but not counter-signed by Mandaconsult AG. Those were in the sums of £186,000 and £465,000 for Anthony and Ross Outram respectively.

19. On 21 and 25 February 2014 further documentation relating to Ross and Anthony Outram respectively were furnished by BR.

20. Further correspondence ensued including the issue of Notices under Schedule 36 Finance Act 2008 ("Schedule 36") by HMRC.

21. After analysing the materials furnished by BR and the material that had been seized, on 18 December 2014, Officer Reilly came to the view that the appellants had claimed losses on their tax returns for 2005/06 which had led to a repayment of tax that he decided ought not to have been made. He wrote to the appellants summarising his reasons why he considered there was a discovery and a summary of what he considered to be their deliberate behaviour. Formal notices of assessments were issued on 24 February 2015 and appealed to the Tribunal on 11 March 2015.

The appellants' 2005/06 tax returns

22. The trading losses claimed by both the appellants were stated to relate to the period from 18 April 2005 to 31 March 2006.

Anthony Outram

23. In his SATR for 2005/2006, which was lodged with HMRC on 31 January 2007, he claimed for losses sustained as a self-employed options trader to the value of £216,273. Of those losses £20,405.13 was claimed as set off against other income in the year 2005/06. The rest of the losses were then carried back to set off against income in preceding years as follows: 2004/05 - £55,091; 2003/04 - £69,204 and 2002/03 - £71,573.

24. A revised version of his SATR was submitted on 4 April 2007 and a third version on 23 July 2007. The different versions did not alter the amount of overpayment or the amount of loss to be carried back. None of the returns contained "white space" entries, being the box on the return where additional information can be disclosed to HMRC, beyond identifying the quantum of the losses that were sought to be utilised.

25. The SATR showed previous employment with Refco Overseas Limited ("Refco") in the year to 5 April 2005 and reduced employment income in the year to 5 April 2006. HMRC's PAYE records show that employment income ceased on 18 April 2005. He confirmed that he had frequently traded in oil futures firstly as an employee and then on his own account. He had taken a Trading Exam. He had worked in oil futures for Refco until he was made redundant in the spring of 2005. Between April and December 2005 he traded in futures on his own account but it was not profitable.

26. The bulk of the loss claimed by him in the SATR is said to be created as a result of a financial contract with a Seychelles Incorporated Company, Pendulum Investment Corporation ("the Pendulum Contract" and "Pendulum").

27. The signed Statement of Income and Expenditure dated 27 January 2007 for the 2005/06 SATR discloses contracts for difference ("CFD") sales of £87,850 and purchases of £283,944, of which £200,000 related to the Pendulum Contract. The margin on the other CFD sales, which he described as small and as to which there are no details was £3,906. In the Bundle there were two undated Statement of Income and Expenditure which included no CFD sales. The second version is the same as the dated version with the addition of the CFDs.

28. In evidence he conceded that it was possible that the smaller CFDs might have been completed after he had completed the Pendulum Contract. However, at a meeting with HMRC

on 13 November 2013, although he stated that he had not completed any CFDs whilst employed, he had been vague about when and with whom the small CFDs had been transacted. He has not traded in CFDs since March 2006 stating that they did not "suit" him. In summary, at most, his only transactions in CFDs took place in the space of less than four months but in all probability in the space of less than one month.

Ross Outram

29. In his SATR for 2005/2006, which was lodged with HMRC on 31 January 2007, he claimed for losses sustained as a self-employed options trader to the value of £506,370. Of those losses £122,380.90 was claimed as set off against other income in the year 2005/06. The rest of the losses were then carried back to set off against income in preceding years as follows: 2004/05 - £131,383; 2003/04 - £135,507 and 2002/03 - £117,099.

30. A revised version of his SATR was submitted on 4 April 2007 which did not alter the amount of overpayment or the amount of loss to be carried back. Neither return contained "white space" entries, being the box on the return where additional information can be disclosed to HMRC, beyond identifying the quantum of the losses that were sought to be utilised.

31. The SATR showed previous employment with Refco Overseas Limited ("Refco") in the year to 5 April 2005 and reduced employment income in the year to 5 April 2006. HMRC's PAYE records show that employment income ceased on 18 April 2005. We note that in his witness statement he stated that he had been employed by Refco Futures Limited. That discrepancy has not been explained but is not material. He confirmed that he had worked in oil futures for Refco until he was made redundant in the spring of 2005. Between April and December 2005 he had worked for a company called Nymex.

32. The signed Statement of Income and Expenditure for the 2005/06 SATR includes CFD sales of £327,653 and purchases of £817,865, of which £500,000 related to the Pendulum Contract. However, in the Bundle there was also an analysis entitled "Misc CFD Trades 2005/06" showing total purchases of £317,808 and sales of £317,653 between 17 March 2006 and 3 April 2006. BR are unable to reconcile the discrepancy in sales of £10,000 and purchases of £57. However, in oral evidence he conceded that the small number of other sales had produced a loss of £155.

33. As was the case with his brother, in the Bundle there were two undated versions of the Statement of Income and Expenditure, neither of which included CFDs. The first version is the same as the signed version with the addition of the CFDs – see paragraph 36 below.

34. In evidence he conceded that he was not aware of any trade in CFDs prior to 17 March 2014. In summary, his only transactions in CFDs took place in the space of less than one month.

The appellants' contact with BR

35. The uncontested witness statements of Messrs Mason and Stannett of BR confirmed the following:-

(a) Mr Stannett attended a meeting at Montpelier with his client, Mr Matthew Woolf, in 2005 where the Pendulum Contract was discussed in relation to Mr Woolf. Mr Woolf knew the appellants and subsequently introduced them to BR.
(b) On 16 January 2006 BR issued a letter of engagement to Mr Ross Outram and on 28 February 2006 a letter of engagement was issued to Mr Anthony Outram.

(c) On 20 February 2006, Mr Stannett met with Mr Ross Outram at which meeting what he described as "the planning" was briefly discussed.
(d) On 23 February 2006, Mr Ross Outram emailed BR asking for Montpelier's contact details which were provided on the following day.
(e) On 6 March 2006, at the appellants' request, BR provided money laundering information to Montpelier.
(f) After the end of the 2005/06 tax year, BR wrote to the appellants requesting information for the SATRs for 2005/06. Most of the information was furnished by summer 2006 although details of the Pendulum Contracts were not made available until significantly later. At the time of preparing the SATRs, BR had the Acceptance Confirmation Note, the Pendulum Notice of Obligation to pay and the Repurchase Offer Letter.
(g) They found the information complex and difficult to follow but knew that it was "..a tax planning scheme via Montpelier, and that Montpelier had maintained that it was trading and that they had positive counsel's opinion on it."
(h) BR had received no information from Montpelier in relation to the appellants.

36. We observe from the Bundle, although we were not referred to it, that on 25 September 2006 both appellants met with BR and the notes of meeting records that they discussed the SATRs for 2005/06. There was no mention of any CFD trades. That explains why, in the papers provided to HMRC, the first two undated Statements of Income and Expenditure for each of the appellants did not include CFD trades.

37. In summary, in preparing the tax returns, BR state that they relied on what the appellants had told them about what Montpelier had said, including the fact that there was a beneficial Opinion of Counsel. There was nothing in writing, either to BR or to the appellants. BR did act for others who had also used Montpelier.

38. We note that there was an internal discussion in BR, apparently not communicated to the appellants, to the effect that there was a possibility that HMRC might challenge the CFD losses but that nevertheless they deemed it "appropriate" to submit the returns on the basis that the appellants had engaged in a trade in CFDs.

The Pendulum Contract

39. The arrangements entered into by the appellants were originally devised by a Mr Michael Darwyne and later refined and marketed by Montpelier Tax Planning (Isle of Man) Limited (previously known as MTM (Tax Consultants) Ltd), part of the Montpelier Group of companies ("Montpelier"). Mr Darwyne was at certain material times the sole shareholder and controlling director of Pendulum. Mr Gittins acquired control of Pendulum by purchasing the entire share capital in September 2005[5].

40. The principal of Montpelier was Mr Gittins, who was intimately involved in designing the arrangements with Mr Darwyne. The FTT held in both *Thomson* and *Sherrington* that the arrangements constituted a marketed tax avoidance scheme. We agree.

41. In summary, that scheme sought to create an artificial trading loss for tax purposes which the scheme users would be able to set against their general income.

42. The Pendulum Contract was designed to operate by reference to movements on the Financial Times Stock Exchange 100 Index ("FTSE"), potentially over a 25 year period. If the

[5] Paragraph 47 Sherrington

FTSE reached pre-determined values at certain points over the life of the Pendulum Contract, a profit based on percentages set out in the Pendulum Contract would be paid out.

43. The Pendulum Contracts are described as CFDs, but in *Sherrington* it was accepted by Mr Gittins that this was not a correct description as a CFD is based on a movement in a share price or an index multiplied by the stake. The Pendulum Contract was a simple bet that the FTSE would have moved up or down from its level at the date of the contract by a specified range of points at specified dates in the future. The functioning of the Pendulum Contract for the appellants was largely the same as for the taxpayers in *Thomson* and *Sherrington*.

44. In the scheme, as described in *Thomson* and *Sherrington,* before entering into the Pendulum Contract the appellant would have entered into a "Master Agreement" with Pendulum which was not itself the Pendulum Contract but rather set out template contractual terms that would apply to the Pendulum Contract documented under it. Those template terms and conditions would be applied to specific financial terms agreed following the service of an Offer to Trade and Acceptance Confirmation Note.

45. Any CFD entered into under the Master Agreement was expressed to be subject to the law of the Seychelles and to be subject to the jurisdiction of the Seychelles courts.

46. The appellants have not been able to produce a signed copy of the version of the Master Agreement which governed their Pendulum Contracts. The appellants have been able to produce a generic copy of Version 10 of the Master Agreement. That was also the version for one of the appellants in *Thomson*. It is agreed that nothing turns on any differences in wording in the various versions considered in *Thomson* and *Sherrington*.

47. The Master Agreement is described in *Thomson* at paragraph 30 and *Sherrington* at paragraph 91 as providing the following contractual framework to apply to Pendulum Contracts documented under it:-

> (1) It provided for payments to be made by reference to the performance of the "Designated Index" specified for those purposes and of course that was the FTSE. Payments would be calculated by applying percentages either to the "Designated Issue Value" of a Pendulum Contract or to other figures related to that Designated Issue Value.
>
> (2) It provided that there would be a maximum of five "Phases" to each Pendulum Contract documented under it.
>
> (3) Phase One of a Pendulum Contract commenced on the Start Date proposed by Pendulum's counterparty, in this case the appellant, and accepted by Pendulum. Phase One ended on an End Date agreed in the same manner.
>
> (4) Pendulum's counterparty agreed to pay the "Initial Margin" to Pendulum. The Initial Margin was a percentage of the Designated Issue Value of that Contract with the precise percentage to be determined in the Offer to Trade and Acceptance Confirmation Note described below.
>
> (5) If the Designated Index moved up, or down, by an amount greater than the Designated Swing Movement over Phase One, the Contract would come to an end on the conclusion of Phase One and Pendulum would be obliged to make a payment of "Trade Profit" to its counterparty. The "Trade Profit" was defined as being twice the Initial Margin.
>
> (6) If a Contract did not terminate following Phase One, it would move into Phase Two. The Master Agreement provided that, if a Contract moved into Phase Two, Pendulum would serve a Notice of Obligation on its counterparty requiring the counterparty to pay Pendulum the "Margin Call Balance" (being the balance of the Designated Issue Value

of the Contract less the Initial Margin that had already been paid at the start of Phase One as described at sub-paragraph (3) above). The counterparty was contractually obliged to pay the Margin Call Balance to Pendulum within seven days of service of the Notice of Obligation.

(7) The Master Agreement envisaged that Pendulum and its counterparty would agree, in the Offer to Trade and Acceptance Confirmation Note, how long Phase Two was to last.[6] Payments due to the counterparties under Phase Two would depend on whether the Designated Index was greater than or equal to a specified "Index Target Level" (that Pendulum and its counterparty would agree) at the end of Phase Two. If the Designated Index had a value at least equal to the Index Target Level at the end of Phase Two, the Pendulum Contract would come to an end and Pendulum's counterparty would be entitled to receive a payment of "Trade Profit" from Pendulum.

(8) The Master Agreement provided that, if a Pendulum Contract did not end following Phase Two it would move into Phase Three. A counterparty was not required to make any further payment to Pendulum if a Contract moved into Phase Three (or any subsequent phase) since, as noted at paragraph 13(6) above, the counterparty would have paid the balance of the Designated Issue Value that was due at the beginning of Phase Two. Phase Three was in substance similar to Phase Two: Pendulum and its counterparty would agree how long Phase Three was to last and an Index Target Level applicable to Phase Three. If, at the end of Phase Three, the Designated Index had a value at least equal to the specified Index Target Level, the Contract would come to an end and Pendulum's counterparty would be entitled to receive a payment of "Trade Profit". Otherwise the Pendulum Contract would move into Phase Four, and potentially Phase Five, both of which provided for payments to the counterparty to become due on a similar basis to that applicable to Phase Three.[7] If, at the end of Phase Five, the Designated Index did not have a value at least equal to the specified Index Target Level, the Pendulum Contract would come to an end and the parties would be relieved of all rights and obligations thereunder.

(9) Version 10 of the Master Agreement defined "Trade Profit" for the purposes of Phase One as an amount equal to twice the Initial Margin payment. For the later Phases it was defined as "…in relation to Phases Two, Three, Four or Five (as defined herein) the sum payable to You if the Index Target Level designated on the Acceptance Confirmation Note exceeds the actual level of the Designated Index at the close of business on the last day of the CFD period comprising the number of years indicated on the Acceptance Confirmation Note"[8].

48. Agreement on the key contractual terms to which the template set out in the Master Agreement would apply was achieved by a combination of a "CFD Offer to Trade" sent by Pendulum's counterparty and an "Acceptance Confirmation Note" sent by Pendulum after accepting the Offer to Trade[9].

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[6] Both appellants' Pendulum Contracts stated that the duration of Phase Two would be two years.

[7] Both appellants' Pendulum Contracts stated that Phase Three would come to an end seven years after commencement of the Pendulum Contract, Phase Four would come to an end 15 years after commencement and Phase Five would come to an end 25 years after commencement.

[8] Both appellants' Pendulum Contracts stated that the Trade Profit for Phase Two was 130%, for Phase Three was 210%, for Phase Four was 450% and for Phase Five was 1200%.

[9] *Thomson* at [31] to [33], *Sherrington* at [91] and [92].

The appellants' contact with Montpelier and Pendulum

49. One of the major problems in this case is that neither appellant has been able to produce anything remotely like a complete set of signed documents. Many documents are in draft and whilst it is conceded that both appellants would have received the same documentation or sent the same letters, in some cases we only have documentation for one appellant and not for the other. Throughout the hearing and for the purposes of this decision we have proceeded on the basis, which was conceded by both appellants, that what one appellant received and/or signed would apply to the other.

50. In his witness statement Ross Outram stated "Prior to entering into the contract with Pendulum, I had never entered into any form of tax planning. I entered into the planning after a fellow trader, Matthew Robert Woolf, recommended Montpelier to me".

51. As we note above, Mr Woolf was also a client of BR and Ross Outram had a discussion with Mr Stannett of BR on 20 February 2006 when the matter was raised. Ross Outram is clear that he did not ask for any tax advice from BR but said that BR had not said that it was in any way inappropriate for him "… to undertake the planning or that Montpelier was not a reputable company".

52. In fact, although not referred to in the hearing, there is in the Bundle a detailed note of that meeting prepared by Mr Stannett. He sent a copy of that note to Ross Outram on 22 February 2006. It is clear that the primary focus of that meeting was Ross Outram's proposed venture into spread betting. The only reference to Montpelier is:

> "Finally, Ross did comment that he is going to meet with Peter Crawford, who is the independent financial advisor who has given advice to Matt Woolf in this area.
>
> Ross will keep me informed of any decision he makes on this activity."

As we indicate at paragraph 35(c) above, Mr Stannett's uncontested witness statement says only that what he also described as "the planning" was briefly discussed.

53. We find that it is clear that Ross Outram was looking for tax planning advice from Montpelier.

54. Following that meeting he contacted BR asking for contact details for Montpelier because Mr Woolf was away.

55. He arranged a meeting with Montpelier.

56. On 27 February 2006, he emailed BR asking for copies of his P60s going back to 2002/03 "…for that thing im (sic) doing with Montpelier". In his witness statement he stated that he needed that so that he could work out "…what losses I could potentially utilise if I made a loss".

57. In his witness statement, Anthony Outram stated that his brother had introduced him to Montpelier but in the hearing, he said that Mr Matthew Woolf and his brother had told him about Montpelier.

58. Montpelier wrote to both appellants on 28 February 2006. That letter was from Montpelier Financial Services Limited ("Finance") in London and it stated that they were writing as Authorised Persons and they were regulated by the FSA.

59. However, more importantly, the letters pointed out that in regard to the information provided about CFDs (presumably Pendulum) that "…this company appears to be offshore and unregulated" and that they would need a sophisticated investor certificate before they could

receive further information. Each appellant was told "You should consult your accountant or a tax specialist" as they, Montpelier, were not giving advice on the tax treatment of CFDs.

60. On 1 March 2006, the appellants each signed and returned a letter sent to them by Montpelier which, apart from noting a number of disclaimers by Montpelier, stated that he understood that if he had any doubts about the "investment" he should consult a "…professional investor specialising in advising on CFD investments." and requesting a certificate as a sophisticated investor. They each confirmed that:

> "I understand that you are not advising me as to me (sic) tax situation in relation to any gains or losses …and that I must seek the advice of an accountant or tax specialist."

They both went on to confirm that they fully understood the contents of the letter.

61. Montpelier, in the guise of Montpelier Tax Consultants (City) Ltd ("City"), emailed both appellants on either 1 or 2 March 2006 stating:

> "Could you let me have the following details so that I can pre populate (sic) the documents that we will be completing at our meeting on Friday…".

We observe from other correspondence that City is not FSA registered.

62. On 3 March 2006 both appellants attended a meeting with Peter Crawford from Finance and Andrew Simpson from City, both of which are part of Montpelier.

63. The appellants' recollection was that they were told that the scheme had been backed by Counsel and that it was legitimate. Anthony Outram said that no detail was given about that Opinion. In cross-examination he conceded that he was aware that Montpelier marketed tax planning and what he called "investments". Neither could remember much else that they had been told although Ross Outram conceded that he had been aware that Montpelier marketed tax planning and that they were tax advisers. He said in cross-examination that Montpelier had marketed both tax planning and "trade" at the meeting. He said that it was "very possible" that tax advice had been given at the meeting. He said that he had been told that the fees were built into the cost of the CFD and that a loan was available to fund the Margin Call Balance ("MCB") if it became payable. In his witness statement Anthony Outram said that he recollected that "…the fees were wrapped-up in the price paid for the CFD contract." In cross-examination he could not remember if it was included in the initial Margin.

64. In cross-examination Anthony Outram was asked whether Montpelier had marketed the Pendulum Contract to him as a tax planning arrangement and he said that he could not remember.

65. The documents that we know were signed on 3 March 2006, because they are in the Bundle, and they all relate to Anthony Outram, include:-

(a) A Montpelier Group – Isle of Man clients "Know your customer requirements" form in which he put in the box described as reason for engaging Montpelier "tax planning".

(b) A confidentiality agreement relating to information furnished to him by Montpelier Tax Planning (Isle of Man) Limited.

(c) A Professional Services Agreement with Montpelier Tax Planning (Isle of Man) Limited in which at paragraph 2.1 the services provided were defined as "Montpelier will provide taxation advice ('advice') or ('the advice') to the client in connection with matters described in Schedule 1" and Schedule 1 reads:

'The taxation advice is given in respect of the UK tax implications and consequences of the client commencing the trade of purchase and sale of derivative contracts including but not limited to:

(a) General advice on the law;
(b) Specific advice to the client;
(c) Assistance with the preparation of accounts;
(d) Assistance with tax returns and any negotiations with the Inland Revenue.

(d) Schedule 2 states that as Outram agreed to pay Montpelier a fee of £500 plus VAT and:-

"2. Montpelier agrees that in the event that the Inland Revenue determines that the client is not trading in derivatives in accordance with the tax advice per Schedule 1 and the Client appeals against such a determination to the General or Special Commissioners or pursues or defends an appeal from the General or Special Commissioners, Montpelier will at its sole expense pursue or defend an appeal from the General or Special Commissioners to the High Court. The costs of any further appeals to the Court of Appeal or House of Lords will be by mutual agreement between the Parties."

66. Although we refer hereafter to Montpelier Tax Planning (Isle of Man) Limited, the Isle of Man company as "MTP" we have set the name out in full because neither appellant could, or should, have been in doubt that they were dealing with an offshore tax planning company that was not FSA registered. Those documents fly in the face of any suggestion that Anthony Outram did not think that it was a tax planning matter. Ross Outram conceded that he would have signed the same documents.

67. Following that meeting later that day, Montpelier emailed both brothers asking for money laundering identification ("ID"), and a cheque for £500 plus VAT. (We observe that the cheque issued by Anthony Outram carried no payee details or date, the invoice was raised subsequently by MTP and that their records record it as "Income Loss (Derivative Trade)").

68. The email confirmed that Montpelier would contact Pendulum that day and that provided they had received the ID and cheque by the following Monday they would "…send the completed Master Agreement and Passport Application to Pendulum." Once the appellants had the CFD Passport numbers they would be able to trade.

69. Patently, although the same email said that Pendulum would send documentation on the following Monday (see the next paragraph) Montpelier had all of the documentation already, presumably signed by both appellants at the meeting. Ross Outram said that he had signed a lot of documents but could not recall when. Furthermore, in cross-examination, Anthony Outram confirmed that there had only ever been one meeting with Montpelier and every document that he had signed had been signed at that meeting.

70. On 6 March 2006, Pendulum emailed Ross Outram with a copy to Montpelier with what was described as "…a covering letter and Information Pack in relation to our CFD product.". Under the heading "IMPORTANT NOTICE" there were extensive warnings, the first of which was to the effect that Pendulum was not regulated by the Seychelles authorities and at the end of that paragraph it stated that its paid up capital and reserves was €1,000.

71. The covering letter noted that the appellant had furnished them with a sophisticated investor certificate (furnished to the appellants by Montpelier). Pertinently, although it

enclosed two copies of the Master Agreement for signature (stating that one would be returned once executed by them) it stated:

> "If, after reading the Information Memorandum and CFD Trading Passport Application form, and taking appropriate professional advice, you decide to apply….".

The Information Memorandum carries many warnings and again reiterates that Pendulum is not regulated and has capital and reserves of €1,000.

72. There is a signed CFD Offer to Trade purportedly dated 15 March 2006, from Anthony Outram which records that the proposed issue value of the Contract was £200,000 and that it would essentially consist of a number of "Future Trading Target Levels" identified by Pendulum in relation to the FTSE. The terms and conditions of the Pendulum Contract were said to be set out in the Master Agreement.

73. We use the word purportedly deliberately, since, as can be seen from paragraph 85 below the loan agreement was witnessed by Peter Crawford from Montpelier. Both appellants have confirmed that there had only been one meeting with Montpelier. Anthony Outram confirmed that all documents had been signed at that meeting. We find that every document, and not many have been produced in a signed form, was signed on 3 March 2006 notwithstanding the date, if any on the document.

74. Neither appellant could recall if they had signed blank documents. They did not deny that possibility when that was put to them.

75. According to the pre-printed dates on his Offer to Trade, the first phase in Anthony Outram's Pendulum Contract lasted for seven days between 15 March 2005 and 21 March 2005. Of course that should have read 2006 as the handwritten documentation further up the page indicated. He states that he did not notice and he could not be sure whether the handwriting was his, albeit the signature was his. The designated swing movement was both up and down 140 points of the closing day of the FTSE on the previous day.

76. Ross Outram's Offer to Trade was dated the same day but had the correct dates. Neither appellant could be sure that the handwriting on the documents was their own other than the signatures.

77. Neither appellant can recall who fixed the designated swing movement but both appellants thought that it might have been suggested by Montpelier.

78. Both appellants agreed to pay an Initial Margin on the Pendulum Contract being 7% of the issue value within five business days of the start date. The Pendulum Contract was accepted by Pendulum on the same date as is recorded in the Acceptance Confirmation Note (the "ACN") and the Initial Margins were paid on 16 March 2006. Anthony Outram paid £14,000 and Ross Outram paid £35,000.

79. We observe that the ACN carried a warning that it was not approved by an authorised person[10], that Pendulum was not regulated by the Seychelles Securities Authority and that its paid up capital and reserves amounted to €2,000[11]. The ACN is version 10 as is the version of the Master Agreement but the latter states that Pendulum was not regulated by the Seychelles Securities Authority and that its paid up capital and reserves amounted to €1,000. The Master Agreement also carries other warnings including one to the effect that Pendulum is not authorised or regulated in the UK.[12]

[10] Page 4 of the ACN
[11] Page 5 of the ACN
[12] Paragraphs 4.1and 4.5 page 9 of 39

80. As the FTSE had failed to exceed the designated swing movement at the end of Phase One in the Pendulum Contracts, both entered Phase Two. Under the terms of the Master Agreement the appellants were required to pay the balance of the Designated Issue Value (ie the Margin Call Balance (the "MCB")) under the Pendulum Contracts on being served with a Notice of Obligation to pay the MCB from Pendulum.

81. Pendulum served Notices of Obligation on the appellants on 27 March 2006. In Anthony Outram's case that was in the sum of £186,000 and in Ross Outram's case that was in the sum of £465,000.

82. We observe that the footnote on the first page of the Notice of Obligation highlights, by underlining the words "Not regulated", the fact that Pendulum is not regulated in either the Seychelles or the UK. It also draws attention, again by underlining, to the attached "Warnings" which are stated to form part of the document.

83. The appellants both stated that they signed loan agreements with Mandaconsult AG. Anthony Outram says that he did so when he signed the Offer to Trade and Ross Outram alleges that he signed it when he responded to Pendulum's email of 6 February 2006. The copies produced to HMRC are undated and signed only by the appellants. Clause 2 reads:

> "2. Amount of Loan and Draw Down
>
> The amount of loan is £186,000 [£465,000 for Ross Outram] which must be drawn down within six weeks of the date of this agreement failing which this agreement shall terminate."

84. The loan was not interest bearing but the lender was entitled to a fee as specified in Appendix II, the payment was to be made to a nominated account (and there was none specified), repayment was due on the 50th anniversary of the agreement but was also due in the event of specified defaults such as being of unsound mind or bankruptcy but not in the event of death. The borrower is free to assign the CFD without consent. Appendix II specifies that fees equal to varying levels of profit (30%, 50% or 70% dependent on timing) will be payable in the event that profits were made. If fees were paid the loan was repayable. Profit is not defined anywhere.

85. Both were witnessed by Peter Crawford, one of the Montpelier employees with whom the appellants had met on 3 March 2006. Both were undated. In the case of Ross Outram, although he is named as a party to the agreement on the first page, the name opposite his signature is that of someone completely different. We find that they were both signed on 3 March 2006.

86. HMRC having instigated an enquiry, on 20 June 2014, BR wrote to Mandaconsult AG seeking information and documents relating to that loan.

87. On 23 June 2014, Mandaconsult AG replied stating:

> "Mandaconsult AG never signed any Loan Agreements and never made any payments to Ross Peter Outram or Anthony Patrick Outram and has therefore no debts owed by either of the above named individuals.
>
> We further confirm that Mandaconsult AG had no contact with either Montpelier Tax Consultants or Pendulum Investment Corporation".

88. The appellants in *Thomson* and two of the appellants in *Sherrington* had entered into loan agreements with another Montpelier company[13], Bayridge Investments LLC ("Bayridge") for payment of the MCB under their CFD contracts. The FTT in both *Thomson* and *Sherrington*

[13] Sherrington at paragraph 54

found the terms of the Bayridge loans to be wholly uncommercial and that they were intended to enable the appellants to "ramp up" their claims for tax relief.[14] The terms of the unsigned Mandaconsult AG loan agreement are identical to those of the Bayridge loans. We agree that the terms of the proposed loan were wholly uncommercial but, of course, in the event there were no loans.

89. At no time has either appellant contacted Pendulum to check if the MCB had been paid and if so by whom.

90. Neither appellant could say whether or not they had accepted Pendulum's offer to buy back the contract.

91. Neither appellant had contacted Pendulum at the end of the subsequent phases to ascertain whether or not they had made a profit or if there was a different valuation for the contract. Although to be fair, Ross Outram did say that he knew he had not made a profit.

The Discovery Assessments

92. The relevant provisions are to be found in sections 29 and 36 TMA and the versions in force in 2014/15 read as follows:

The Taxes Management Act 1970

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) ….

The officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
…

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his

[14] Thomson at paragraphs 42 to 43 and Sherrington at paragraphs 103-105

behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) Ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) Informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) It is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) …"

36 Loss of tax brought about carelessly or deliberately etc

…

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax-

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7, […]

(c) attributable to arrangements in respect tof which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), [or]

[

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,

] may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

….

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made [in a case] mentioned in subsection (1) [or (1A)] above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

…

118 …

(7) In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person."

93. As we indicate at paragraph 2 above, Mr Woolf conceded, after hearing Officer Reilly's evidence that the discovery assessment had been validly made. The only question for the Tribunal was therefore whether the appellants' behaviour had been deliberate or not.

94. We found that Officer Reilly's evidence was clear, succinct and wholly credible.

95. On 23 April 2013, he was allocated three cases as part of a project into taxpayers who had purchased CFDs from Pendulum. HMRC's belief at that time was that taxpayers who purchased CFDs from Pendulum were users of a mass marketed undisclosed tax avoidance scheme, sold and promoted by Montpelier. Two of the cases were those of these appellants.

96. As we have indicated above, the background is that premises in the Isle of Man and the UK belonging to Montpelier were searched by HMRC on 29 September 2010 as part of an ongoing criminal investigation into both them and their guiding mind, Mr Gittins who, of course, also owned Pendulum. A significant quantity of material was seized and it became apparent that amongst the documents seized were documents relevant to the civil investigations into certain taxpayers and that further investigations would be appropriate. On checking the tax affairs of the appellants it was clear that they had claimed losses in their SATRs for 2005/2006 and lodged with HMRC on 31 January 2007 but with no indication as to the source of the losses.

97. Following the review of the appellants' tax affairs, both the appellants' cases were sent for approval to an authorised officer of HMRC to open a Code of Practice 9 ("COP 9") investigation on the grounds of suspected fraud arising from the submission of an incorrect tax return containing a claim for loss believed to be knowingly incorrect. This was approved on 21 June 2013. On 1 July 2013, HMRC advised the appellants that they were intending to

investigate their affairs under COP 9. On 31 July 2013 the appellants declined HMRC's invitation to enter the Contractual Disclosure facility with a view to securing immunity from prosecution.

98. On 13 November 2013 Officer Reilly and another officer met separately with each appellant and BR. Both HMRC and BR kept extensive notes of those meetings and, amongst other things, the following matters were established namely:-

Anthony Outram

(a) The appellant confirmed that he wished to insist on his claim to loss relief.
(b) He stated that he had commenced the CFD trade in 2005/06 after he ceased employment and that he had become involved in a few trades in futures in the same tax year and stated that he had "just about broken even".
(c) He could not recall how he had become aware of Pendulum but stated that Montpelier had introduced him and his brother to the Scheme.
(d) When asked whether he believed the arrangement with Pendulum to be a tax planning scheme he said that it "was some sort of tax system" but that the scheme was a trade and not tax avoidance. BR also had it noted that it was a "tax system".
(e) He confirmed that he had made no enquiry in relation to either Pendulum or Montpelier to satisfy himself that the arrangements were *bona fide*. He had relied on the fact that Montpelier were FSA registered.
(f) He advised that he had made no provision for repayment of the loan either personally or out of the value of his estate.
(g) BR's notes of the meeting record that:-

> "Reilly asked for a potted history from first meeting Montpelier to the income tax return entries.
>
> Outram replied as follows:-
>
> (a) He met with Montpellier;
> (b) They set up the CFD trading account with one of <u>their</u> companies;
> (c) He traded;
> (d) He made a loss."
>
> In cross-examination Anthony Outram was asked what he meant by the use of the word "their" which we have underlined and he said that he had meant Pendulum because in his words "they had a relationship with them". He argued that Montpelier had effectively acted as a broker.

Ross Outram

(a) The appellant confirmed that he wished to insist on his claim to loss relief.
(b) He could not recall how he had become aware of Pendulum but stated that he had met Montpelier in London and they had introduced him to the Scheme along with his brother.
(c) When asked whether he believed the arrangement with Pendulum to be a tax planning scheme he said that it "was an investment".

(d) He confirmed that he had made no enquiry in relation to either Pendulum or Montpelier to satisfy himself that the arrangements were *bona fide*. He had relied on the fact that Montpelier were FSA registered and he "… had faith in their systems".
(e) He stated that he had entered the arrangements to make a loss. BR recorded that "He expected a loss … You wanted a loss but you could have had a win."
(f) He said that all of the paperwork had been signed in the Montpelier offices.
(g) He maintained that he had dealings in CFDs prior to the Pendulum Contract.
(h) BR's notes of the meeting record that:-

> "Outram commented that it was all a long time ago. However, he suggested that the chronology was something along the following lines:-
>
> a. He went to see Montpellier (sic);
> b. He discussed the scheme and wanted a loss;
> c. He set a date for the trade;
> d. He did the trade;
> e. He waited for completion;
> f. You won or your (sic) lost;
> g. The result went on his income tax return."

In cross-examination when referred to this paragraph he said that he had "worded himself poorly". He had been aware that he could make a loss and he could use that loss but he had wanted a profit.

99. BR recorded that both appellants had stated that they thought that the chances of winning were about 50:50 and that a long time had elapsed between the first contact with Montpelier and the deal. Ross Outram said it was a few months and Anthony Outram said it was about six to eight weeks. Of course, in fact, it was much less than a month.

99. Correspondence ensued and Officer Reilly requested that further documents and information be provided by 17 January 2014. There was no response.

100. On 28 January 2014 the officer received extensive further documentation which was specific to the appellants from the materials seized in the raid on Montpelier. That included a number of the documents to which we have referred above but, he regarded as key amongst the documents, the undated loan agreements between Mandaconsult AG and the appellants for loans specifically to pay any MCB due to Pendulum.

101. On 12 February 2014, BR stated that they would be responding to Officer Reilly's request dated 3 December 2013. Further documents and information were provided on 21 and 25 February 2014. The key point is that the appellants did not hold, and seemed never to have held, signed copies of most of the primary documentation and produced, for example an undated blank application for a CFD trading passport from Pendulum and an undated blank Master Agreement for a CFD from Pendulum.

102. Having reviewed not only the further seized information and the documentation provided by BR, on 4 April 2014, Officer Reilly issued an Information Notice under Schedule 36 seeking further documents and information.

103. On 2 May 2014, Officer Reilly received 23 further pieces of documentation for Ross Outram including the Statements of Income and Expenditure to which we have referred above,

the BR Client Tax Return checklist (which asked no questions about CFDs but which, when completed, held no information about such trades) and a copy of the undated loan agreements.

104. He received 19 further pieces of documentation for Anthony Outram which were similar to those for Ross Outram.

105. On 30 May 2014, Officer Reilly wrote to the appellants with a view of the matter letter in relation to the Schedule 36 Notices and BR responded on 27 June 2014 and accepted the offer of a review.

106. In that letter, BR raised a number of issues including:-

(a) An admission that the appellants had suffered no economic loss beyond the initial margin payment since there appeared to be no loan.
(b) A claim that there may have been a false presentation by Montpelier and that BR considered that the appellants may have been victims of fraud.
(c) Copy correspondence including the letter from Mandaconsult AG dated 23 June 2014.
(d) In respect of Ross Outram they produced an undated summary of his CFD trades (see paragraph 32 above).

107. On 6 August 2014, Officer Reilly wrote to BR acknowledging that the appellants had suffered no economic loss and asked whether a complaint of fraud had been made to the police or the Serious Fraud Office. He set out in considerable detail his view of the matter. Amongst the many points that he made, he pointed out that:

(a) The appellants had entered into the Pendulum Contracts and those were a highly leveraged product with longer term options and success/fail criteria over one week and two, seven, 15 and 25 years which purported to be financed by a non-existent interest free loan with a duration of 50 years.

(b) The appellants had not personally paid the claimed additional loss and had not entered into a contractual obligation to borrow the money from anyone else.

(c) The appellants had undertaken no due diligence checks and sought no independent professional advice.

(d) Although the appellants had entered Phase Two they had never checked whether they had made a profit or loss. They had never made checks about subsequent years.

(e) The appellants had knowingly submitted the SATRs claiming the losses knowing that they had not paid the MCB nor had they entered into any alternative arrangements for payment. Therefore they could not have had an honest belief that their SATRs were accurate.

108. The next communication received from BR was on 18 September 2014 and it included a number of claims, namely:

(a) They had received a communication from Mr Gittins confirming that Mandaconsult AG were not the lender but that an entity called Bayridge[15] would have been the lender and that that was being investigated.
(b) It may have been too early to concede that there was no economic loss.

[15] Paragraph 100 of Sherrington – "Bayridge … is owned and controlled by Mr Gittins".

(c) The appellants may have spoken to Bayridge at the meeting with Montpelier as they understood Bayridge operated from the same premises.
(d) It was posited that it was possible that another loan existed and that it was possible that the appellants had had contact with a lender or someone purporting to be a lender at the meeting with Montpelier.

109. Nothing further having been received, on 18 December 2014, Officer Reilly issued his discovery decisions to the appellants with copies to BR. The letters summarised the reasons for his decisions outlining the lack of genuine trading or intention to make a profit. In those decisions he denied the appellants £200,000 and £500,000 respectively of the losses claimed for 2005/06 on the basis that:

(a) The loss was predicated on a claim to have entered into a loan agreement to fund that loss together with the Initial Margin payment.

(b) In response to the Schedule 36 Notice BR had provided as evidence of the payment, the undated but witnessed loan agreements. These had been relied upon by the appellants to establish an economic loss in relation to trading on the basis that the loan covered the contractual obligation.

(c) Subsequently evidence was provided to show that Mandaconsult AG had never entered into loan agreements and nor had they heard of Montpelier or Pendulum.

(d) BR's letter of 18 September 2014 speculated that there might have been some other lender but nothing had been produced to evidence that.

(e) Neither appellant had provided any purported lender with any financial information to secure the loan. No genuine lender advancing funds on a commercial basis would be prepared to enter into an agreement on the basis of such minimal evidence.

(f) Neither appellant had ever met with any lender or seen any signed loan agreement so at the time that the SATRs were submitted the appellants must have known that the loan did not exist.

(g) The appellants cannot have relied on the possibilities of payment by some unknown party to claim losses on the SATR.

(h) At no point had either appellant sought clarification on the level of their indebtedness or indeed notified other creditors of the substantial debt.

(i) The purported loan facility was offered on wholly uncommercial terms, bearing no interest, requiring no security and only repayable after 50 years.

(j) In the case of Ross Outram the loan agreement bears the name of an unknown third party.

(k) In the case of Ross Outram his stated intention was to make a loss.

(l) No evidence had been provided that the MCB was paid either by the appellants or by any other lender.

(m) In the case of Anthony Outram he had stated that the scheme was an investment and an opportunity to make money.

(n) HMRC have information that suggests that the appellants entered into the arrangements with Montpelier solely for tax planning and not for the purposes of genuine commercial trading with a view to making a profit.

110. He said that the assessments would follow.

111. On 9 January 2015, BR appealed both decisions.

112. On 15 January 2015, yet more documentation from the material seized from the raid was furnished to Officer Reilly. Included in that was an email chain that was internal to Montpelier dated 12 January 2005 where Mr Gittins responded to the Sales and Marketing Director who said

> "I am getting a few questions around the loan after 50 years. I know that in reality it won't be called. However, it is difficult for the client to believe that, as there is nothing to say that in any paperwork…"

with the statement that

> "It is crucial to the deal that they are seen to pay the full price for the cfd. (sic) the net present value of a 50 year loan is under 40% so immaterial when you think a 40% tax credit/rebate is due.".

113. We note, and agree with Judge Sinfield in *Sherrington* at paragraph 174 when he says in regard to that that:

> "…it seems to us that it is good evidence of what those clients were told and, therefore, the basis on which they entered into the arrangements with Pendulum and Bayridge. That is especially true in this case, given the Appellants' lack of due diligence and reliance on what they were told by their respective advisers…. We consider that the true meaning of Mr Gittins' words is the more natural reading, namely that the clients would never actually pay the full price of entering into the Pendulum Contracts but would only be seen to do so."

114. It also included a PowerPoint presentation by Andrew Simpson of Finance, and who had attended the meeting with the appellants on 3 March 2006, albeit it is dated 10 May 2006. The accompanying speaking notes set out the details of the Scheme. Officer Reilly was particularly interested in the notes for slide 8 which reads:-

> "There are two main components to this opportunity.
> The basis for this tax planning is that you will create a trading loss. There you must have a trade. As I would imagine the majority of you are employed, you will have to establish yourselves as a self-employed trader.
>
> Once you have set up this self-employed trade and you have been trading on the markets we will enable you to create a trading loss and this loss will be used to gain a rebate on taxes paid."

115. The notes for slide 16 resolved the issue of repayment of the loan by stating that the loan was repayable "However it is uncertain what will happen to …the company in the future. There is a very". We agree with Judge Sinfield at paragraph 175 of *Sherrington* where he stated:

> "The note ends abruptly on the word 'very'. In our view, it is likely that the missing words, if they were ever written down, or words supplied by the speaker would, given the reference to the uncertain future of Pendulum and Mandaconsult (later replaced by Bayridge), state something like 'There is a very [good chance that neither would be around in 50 years to enforce the payment of amounts under the contracts]'".

116. In our view, neither appellant would have had any reason to believe that even if there had been a loan that it would be repayable.

117. Officer Reilly also noted that the notes and slides had the same Phases and Index Target Levels as those in the appellants' documentation.

118. On 17 February 2015, Officer Reilly responded to the appeals by BR with a detailed explanation of his decision. At the heart of that he argued that neither appellant had been trading, or trading commercially as the characteristics of trading were missing. In particular, he pointed to the following issues:-

(a) The appellants had not acted as other traders in the business of futures. They were not turning over large volumes that deal in margin, hedging against market movements to keep exposure limited or generally trading in more complex ways than simply entering into a contract and waiting for the price to move.

(b) There is a substantial, if not overwhelming, element of chance in what they were doing.

(c) They were not exercising specific acumen, experience or research in the business in which they alleged that they were trading.

(d) The holding is extremely long term and they were at the mercy of the market with no customers. The only market place for sale was realistically only to Pendulum. There were no hedge or stop loss provisions in place.

(e) The financing of the Pendulum Contract through loans with Mandaconsult AG was untrue and in any event the draft loan agreement had no commercial characteristics.

119. In support of that Officer Reilly cited, not comprehensively, the following:-

(a) They should have known that Pendulum was an unregulated offshore company with capital of only €1000 and yet they did no due diligence.

(b) There was no evidence that either MCB had been paid in that there was no receipt from Pendulum, no acknowledgement from the lender and no account statement.

(c) The draft loan agreements were not evidence of loans and in the absence of any further evidence there were no loans.

(d) The CFDs were not actually CFDs as defined in the Financial Services & Markets Act 2000 but rather a "Binary Contract". Furthermore there was a spurious accuracy to some of the figures used since no one could predict the FTSE level to the nearest 1000 points 25 years in the future as was the case for Phase Five. The reality was that the appellants' position was based on a generalised view that the stock market would rise over time.

120. He went on to explain that the materials from those seized in the raid on Montpelier supported the view that there were concerted arrangements and that that affected the question as to whether or not the appellants were trading or whether the arrangements were purely put in place to obtain tax relief.

121. Officer Reilly described the PowerPoint presentation and the speaking notes and he offered a sight of that presentation and the emails internal to Montpelier to both the appellants and BR. That offer was not taken up.

122. He offered a review of the decision.

123. On 11 March 2015, BR appealed on behalf of the appellants. The argument was that the appellants had acted in accordance with the advice of Montpelier, the appellants had acted in good faith and the time limit in terms of Section 36(1) TMA had expired.

124. On 30 April 2015, Officer Boyle having reviewed the decision, not only upheld the decision and assessments but did so on the basis that "HMRC formed the opinion that you were not carrying on a trade and therefore, had not incurred an allowable loss relating to that aspect. Consequently, HMRC disallowed those losses and raised the adjustments and assessments to collect the additional tax due …".

Summary of the appellants' arguments

125. The appellants continue to insist that:

(a) They did engage in a genuine trade.

(b) They thought, and think that they owed £186,000 and £465,000 respectively for loans to "someone".

(c) Therefore the losses are genuine.

(d) They went into the Pendulum Contracts knowing that they would be able to relieve losses if necessary but they had always intended to make a profit. Although both had told Officer Reilly at the meeting on 13 November 2013 that they had thought that there was a 50:50 chance of a profit in Phase One, Anthony Outram conceded that that diminished sharply thereafter to a minimal possibility by 25 years. In the case of Ross Outram he departed from the 50:50 argument and argued that he thought that there was a good chance of getting into Phase Two (ie making a loss in Phase One) which was good because he believed that there was a significant chance of a profit in Phase Two and it was a good investment. Phase Two was his primary focus as it was the "main driver".

(e) Both appellants claimed that they were not "a man for detail", they knew little about tax and they had relied on Montpelier at all times. They had assumed that as Montpelier were FSA registered they would have "protected" them and done all necessary diligence. They had thought that everything was *bona fide* or legitimate and would have expected that if that had not been the case then BR would have warned them. They knew the "gist" of the deal.

(f) They had assumed that Montpelier would have drawn down the loan. In the absence of any demand for payment, and given the terms of the letter of 10 May 2014 sent by Pendulum with the offer to repurchase the Pendulum Contract that payment under the terms of the Loan Agreement had certainly been made.

(g) Both relied on the fact that Mr Matthew Woolf had made a profit and had recommended Montpelier to them.

(h) Both said that they "tried" the CFD product to see if it "suited" them and decided that it did not.

(i) Neither could remember the detail due to the elapse of time.

Discussion

126. Both appellants were less than compelling witnesses. Whilst we appreciate that these matters occurred 16 years ago, both have had access to the Bundle (although there had to be a recess for the Bundle to be provided to them) for some time yet seemed unaware of numerous pertinent matters. Both repeatedly said that they could not remember what had happened.

127. We start with Mr Matthew Woolf whom they said had recommended Montpelier to them. The introduction to Montpelier was certainly in late February 2006. Neither was able to say why Mr Woolf would have recommended Montpelier (and the Pendulum Contract to them) given that Mr Woolf's unchallenged first witness statement, dated 16 November 2016, stated that at the end of 2005 things started to go wrong and he had become disillusioned with Pendulum. The second witness statement dated 23 May 2017 confirmed the disillusionment stating that problems had started in late October 2005 and they had been slow in paying him his profit.

128. The third witness statement dated 29 October 2020 is very brief. He points out that his memory is sketchy and says that "…having had an opportunity to consider the circumstances under which I introduced Ross Outram to…" the Pendulum CFD arrangement he thought that it might have been in late 2005 as "..he felt that it was perfectly possible to make gains…and thought the arrangements were attractive for that reason, in addition to the possibility of tax losses and soft finance if…not successful".

129. In fact Ross Outram said in evidence that he thought that that discussion happened in early 2006 albeit he could not remember the detail. It seems very unlikely that it was in 2005.

130. Furthermore, as Ms Choudhury pointed out, both appellants' argument that Mr Woolf made profits is not accurate. He did initially, but at best he ultimately recovered only his initial investment being the Initial Margin.

131. In summary, both appellants say that they heard about Montpelier from him but neither can remember when. On the balance of probability, we find that his earlier witness statements which are broadly consistent the one with the other and speak of disillusionment, months before Ross Outram approached Montpelier and met with them, are accurate. We find that Mr Woolf's evidence was adduced purely in an attempt to give rise to an inference that there was always an intention to make a profit because they said that he had done so. His evidence does not assist in any material way.

132. By contrast we had the unchallenged evidence of Mr Bradley and Ms Choudhury very appropriately relied on the findings of the FTT in *Sherrington* at paragraphs 171 and 172. We add a small part of the explanation at paragraph 170. The relevant excerpts read:

> "170. Mr Bradley produced a schedule analysing all the Pendulum Contracts known to HMRC. HMRC had identified 253 contracts which were the same or similar to those entered into by the Appellants…. We accept that Mr Bradley's schedule is broadly correct and shows that only 11.5% of Pendulum Contracts achieved success at Phase One. For the successful 29 contracts, the total Trade Profit was £434,500, leaving Pendulum with £2.62m in net Initial Margin receipts. In relation to the Pendulum Contracts that were not successful at Phase One, Pendulum was owed a total of £36,017,867 in Margin Call Balances. Pendulum's offers to re-purchase the Appellants' Pendulum Contracts show that Pendulum assessed the chances of those contracts achieving the relevant Index Target Level as negligible.
>
> 171. Mr Bradley explained why a person might prefer to lose at the end of Phase One and continue into Phase Two and subsequent Phases rather than win. The different economic benefits that flowed from success and failure at Phase One of a Pendulum Contract can be seen by examining the figures from Mr Sherrington's three contracts (which all had an Issue Value of £300,000). In each case, Mr Sherrington paid a 5% Initial Margin of £15,000. Mr Sherrington was unsuccessful at Phase One in all three contracts but had he won at Phase One, he would have received twice the Initial Margin, ie £30,000, as Trade Profit. Mr Sherrington would thus have made a profit of £15,000 on which, as a higher rate taxpayer, he would have paid tax at 40% leaving a net gain of

£9,000 on each contract that was successful at Phase One. In fact, Mr Sherrington always lost at Phase One and was left with three contracts, each with an Issue Value of £300,000, which were valued by Pendulum at £3,501, £4,000 and £4,199 respectively. That gave Mr Sherrington a total loss of £888,300 which he used to claim relief from tax in the current and previous years giving him a right to a repayment of £355,320. As he had paid three Initial Margins amounting to £45,000, Mr Sherrington's net position, having lost at Phase One, was a gain of £310,320. Against that, Mr Sherrington had a liability to repay Bayridge the three loans of £285,000, ie £855,000 in total, after 50 years which we consider below.

172. Mr Bradley's evidence was that all the people who made a 'Trade Profit' at Phase One went on to re-invest their proceeds into further contracts, which then went on to lose at Phase One. *Mr Bradley explained that, in reality, the individuals had far more to gain from losing at Phase One than from winning because of the economics of the Pendulum Contract. Mr Bradley's view was that, given the benefits of losing, no one would have wanted to win at Phase One which is why, if they did, the participants in the Pendulum Contracts, including the Appellants, went on to enter into new contracts and lose at Phase One of those contracts. Mr Bradley's view was that the participants entered into the Pendulum Contracts solely in order to generate a loss. We accept Mr Bradley's analysis and conclusions.* We find that the true objective of the Appellants in entering into the Pendulum contracts was not to make a profit at the end of any Phase but to lose at the end of Phase One so as to create a loss in respect of which they did not bear the full economic cost but which reduced their liability to tax.

133. We particularly agree with the analysis which we have highlighted in italics.

134. It is clear from the evidence that both appellants were seeking a method of minimising their taxes. They did not go to a trading platform which would have been the logical thing to have done if their motive had been to make a profit. That is supported by the fact that both appellants went to Montpelier and signed a contract for tax planning services[16] with an offshore company that most certainly was not FSA approved. Ross Outram's need for his P60's for the three preceding years makes it explicit that he thought that it was all about tax losses. Clearly, in advance of the meeting he wanted to quantify the extent of the losses that might potentially be utilisable.

135. Although in the hearing Ross Outram argued that his use of words had been poor, as both BR and HMRC record, he had freely admitted at the meeting with HMRC on 13 November 2013 that his intention had been to achieve losses. BR had recorded him as saying "You want a loss but you could have had a win." HMRC recorded that: "RO confirmed that it was his intent to make a loss and that it seemed a very logical thing to do". Clearly, on the balance of probability, that was his motivation at the time.

136. Mr Bradley's evidence is clear that even if one made a profit, as Mr Woolf did briefly, by entering a new contract there would be access to losses once the loan was made.

137. We too find that the true objective of the appellants in entering into the Pendulum Contracts was not to make a profit at the end of any Phase but to lose at the end of Phase One so as to create a loss in respect of which they did not bear the full economic cost but which reduced their liability to tax.

138. Like the FTT in both *Sherrington* and *Thomson* we had the PowerPoint presentation and speaking notes and whilst we accept that they are dated approximately two months after the

[16] We only had a signed Professional Services Agreement for Anthony Outram but Ross Outram conceded in cross examination that he would have signed one too.

date of the appellants' Pendulum Contracts, we conclude that they accurately represent how Montpelier marketed the arrangements. In this case, however, the position is even more clear cut. The author was Andrew Simpson from City and it was he who sent the email indicating that he needed details to enable him to pre-populate the documents, he who attended the meeting on 3 March 2006 and he who wrote the email that afternoon which makes it explicit that the documents that purported to be dated after that date had already been signed (see paragraphs 61-62 and 68 above). It is inherently incredible that he would have departed from the sales pitch that had been used the previous year for the appellants in *Sherrington* and *Thomson* and which he formalised a few weeks after his meeting with the appellants.

139. The fact that Anthony Outram's records at MTP are labelled "Income Loss (Derivative Trade)" is also significant as it was Andrew Simpson who had completed the documentation that included that and which he sent to MTP on 8 March 2006.

140. Like the FTT in *Sherrington* and *Thomson* we find that the Pendulum Contracts were marketed to the appellants as a tax avoidance scheme. Further we find that the appellants knew that.

141. However, that is not the end of the matter. Before moving to our other findings, for the avoidance of doubt, BR's concession, on behalf of the appellants, to the effect that the scheme was ineffective (see paragraph 10 above) has carried no weight in our consideration of the other factors.

142. Montpelier's marketing focussed on a two stage process, establishing a trade and then incurring losses.

143. Unfortunately for the appellants that part of the message does not appear to have been understood by them. As Judge Richards makes very clear (in relation to an email but the same point is made in the Montpelier slides and speaking notes) at paragraph 51 of *Thomson*:

> "This email indicates that Montpelier intended the Pendulum arrangements to function as a device to deliver a trading loss to a user of the scheme but that, before such a loss could be delivered, the user first needed to commence a trade of dealing in derivatives."

The appellants did not commence any trade first.

144. Both Pendulum Contracts were dated 15 March 2006, albeit effectively put in place on 3 March 2014. Ross Outram's first other CFD trade was on 17 March 2006 and the last on 3 April 2006. Self-evidently, he only commenced trading after the Pendulum Contract.

145. The position in regard to Anthony Outram is less clear since he has no recollection as to when he did any trades and there is no evidence. However, he conceded in cross-examination, that the trades were probably after the Pendulum Contract. On the balance of probability that seems very likely since both appellants seemed to have acted in concert. Both only entered a very small number of other CFD contracts.

146. We note that both state that CFD contracts did not "suit" them. We find that what did suit them was the losses created by the loans in the Pendulum Contracts. Both agreed that they would not have entered the Pendulum Contracts if the loans, on such very advantageous terms, had not been available.

147. We find that the CFD contracts other than the Pendulum Contracts were mere window dressing to give the impression of trading.

148. For all of the reasons advanced by Officer Reilly (see paragraphs 109 and 118-121 above), which we do not intend to rehearse again here, but with which we agree and adopt, we do not accept that either appellant was trading in CFDs and even if we are wrong, they were

certainly not doing so on a commercial basis with a view to a profit. Very few, if any, of the badges of trade are present.

149. If you do not have a trade, as Montpelier made very clear, you cannot relieve any losses. In any event, the losses could only be created if there was a loan.

150. In the words of Judge Richards in *Thomson* at paragraph 65(5)

> "For the arrangements to function as a tax avoidance scheme, the arrangements had to produce a tax loss without an economic loss. That was achieved by the … Loan … The Loan … operated to 'ramp up' the amount that the appellants would claim they invested in the Pendulum CFD even though they had not in any economically real sense invested the full Designated Issue Value."

151. We are wholly unpersuaded by BR's suggestions, that are unsupported by any evidence whatsoever, that it was possible that another loan existed and that the appellants might have had contact with such a lender during the meeting with Montpelier (see paragraph 108 above). Quite apart from anything else, neither appellant supported that assertion.

152. Mr Woolf relied on paragraphs 13 and 14 of Mr Gittins' witness statement which read as follows:

> "13. It was the policy of Bayridge to advise Montpelier staff discussing Pendulum CFD's to offer the Bayridge loan for the reason stated above. At the beginning of the Pendulum trading a company called Mandaconsult AG was intended to offer the loans instead of Bayridge but it never did. This led in some cases to traders executing agreements with Mandaconsult AG which were later replaced by Bayridge. At all material times however irrespective of the identity of the lender verbal assurances were given to all potential traders that any margin call under a CFD would be met on the terms advised. This was the clear understanding of each trader.
>
> 14. In the case of most traders I can locate executed loan agreements with traders but for reasons unknown I cannot locate agreements signed by the Appellants. Consequently both Bayridge and I presume the Appellants rely on the verbal agreements when they traded with Pendulum."

153. His argument was that that could be relied upon to evidence the fact that there must have been some sort of verbal loan. There is absolutely no evidence to that effect.

154. The fact that in the many years that have passed since the Pendulum Contracts, the appellants have done absolutely nothing to establish the extent of their indebtedness beyond the enquiries triggered by HMRC which points to an understanding that the loans were unlikely to be repayable.

155. We are dealing here with deliberate behaviour as opposed to the much higher standard of alleged fraudulent or negligent behaviour but we agree with Judge Falk (and Mr Bell) in *Bayliss v HMRC*[17] at paragraph 52 where it states: "Subsequent conduct is relevant only insofar as it provides evidence of whether that earlier conduct was indeed fraudulent or negligent."

156. We are not looking at conduct *per se* but it is very clear that, although not in the documentation, it was made explicit to those who invested in a Pendulum Contract that the

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loan would never be repayable (see paragraphs 112 above). That presumably accounts for the fact that the appellants were unconcerned about the loans. In reality the loans too were mere window dressing although, of course, for these appellants since there are no loans that really does not matter. However, the point is that, on the balance of probability we accept that the appellants would have had reasons to believe that they had suffered no economic loss.

157. We do not accept that there was any loan constituted in any way. The appellants suffered no economic loss.

158. The remaining issue, therefore, is whether or not the appellants' behaviour in submitting their tax returns containing the losses was deliberate. There is no doubt that it did give rise to tax losses.

159. What we have here is what is agreed to be a validly issued discovery assessment under Section 29(4) TMA and HMRC are arguing that it is subject to the extended time limit in Section 36(1A) TMA because the appellants' behaviour was deliberate.

160. Although there is extensive case law on what amounts to deliberate behaviour in the context of penalties, there is very little in the context of discovery assessments.

161. HMRC rely on Floyd LJ in *Tooth v HMRC*[18] in the Court of Appeal where Floyd LJ gave the following analysis:

> "86. The deliberateness requirements of section 29(4) and 36(1A) (a) require HMRC to prove that the taxpayer intended to bring about a particular fiscal result. In the case of section 29(4) it is an intention to bring about a situation in which an assessment to tax is insufficient, and in the case of section 36(1A) (a) it is an intention to bring about a loss of tax. I agree with HMRC's contention, however, that section 118(7) is a deeming provision which means that HMRC can establish the relevant intention by showing that there was a deliberate inaccuracy in a document given to HMRC by or on behalf of the taxpayer, and that the loss of tax followed "as a result of" the deliberate inaccuracy. That is no more than what the language of the statute conveys. It follows that the enquiry about the taxpayer's intention stops once it is established there is a deliberate inaccuracy in a document. Thereafter one enquires into whether the loss of tax or other situation occurred as a result of the inaccuracy. That is simply a question of factual causation.
>
> 89. The triggers for the 20 year time limit identified in section 36(1A)(a) to (d) also do not include a consistent requirement of blameworthy conduct by the taxpayer. Sub-paragraph (b) includes a failure by a person who is chargeable to income tax for any year of assessment and who has not delivered a return of his profits, gains or income for that year to give notice that he is so chargeable. The failure is not required to be negligent or deliberate. Such a failure could occur, for example, as a result of incorrect advice.
>
> 90. In the light of these considerations, I do not regard it as surprising that, as a result of the expanded meaning given to the sub-sections by section 118(7), conduct which is overall not blameworthy is brought within the definition.
>
> …
>
> 94. I approach this second sub-issue on the assumption (contrary to my conclusion on the first sub-issue) that there is an inaccuracy in the document. If there is no inaccuracy then there is no deliberate inaccuracy either. If there is an inaccuracy, however, that must be because it is incorrect to construe the tax return as a whole, and correct to focus on the individual inaccuracy on the partnership pages of the return. The incorrect insertion of

[18] 2019 EWCA Civ 826

the employment losses in the boxes reserved for partnership losses was, viewed in this way, a deliberate …".

162. Mr Woolf agrees the relevance of *Tooth,* relying on it to demonstrate that it must be established that the appellants knew that there was an inaccuracy in the SATRs and the test as to whether or not the behaviour was deliberate is linked to knowledge.

163. Although it deals with different statutory provisions we agree with the Tribunal in *Auxilium Project Management v HMRC*[19] where Judge Greenbank (and Mr Bell) said at paragraph 63:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

164. We have already established that we find that:-

(a) The appellants had knowingly taken part in a tax avoidance scheme;

(b) They knew that that scheme involved the need to have a trade and thereafter create losses, whereas the reality was that there was no trade;

(c) They knew that the losses would be created by a purported loan on uncommercial terms and that that loan would not be repayable on the elapse of 50 years;

(d) They knew that their other CFD contracts were not even modest but were in fact minimal in size and occurred within a very short period and after the meeting on 3 March 2014;

(e) The only information given to BR was the extent of the alleged trade;

(f) They did not seek tax advice from BR at any stage in relation to the Pendulum Contract.

165. Therefore we find that each of the appellants knew at the time of filing their respective SATRs that they were not carrying on a trade which entitled them to make a claim for loss relief.

166. We were wholly unconvinced by the appellants' argument that they were entitled to rely on Montpelier for everything and that they needed to check almost nothing because Montpelier was FSA registered and had a Counsel's Opinion which they had not seen. Had they asked to see it, as they were entitled to do, as Judge Richards says at paragraph 48 of *Thomson* (which is quoted with approval by Judge Sinfield at para 56 of *Sherrington*) that Opinion made it clear that Counsel was not endorsing the scheme. We have underlined the key words.

> "He also sought tax advice from UK tax counsel, Mr Shipwright, on the tax consequences for investors. Mr Shipwright's advice included an analysis of the general law, and HMRC practice on what amounted to the carrying on of a trade on a commercial basis with a view to profit. However, that analysis was generic: Mr Shipwright was not purporting to advise as to whether any particular taxpayer met this requirement and he noted that the question was ultimately a question of fact that depended on what a taxpayer actually did."

[19] 2016 UKFTT 249 (TC)

167. As can be seen their primary dealings were in fact with Andrew Simpson of City and their Professional Services Agreements were with MTP, neither of which were FSA registered. The documentation made it abundantly clear that there was no FSA protection and nor was there protection in the Seychelles. They had both requested a sophisticated investors certificate, which was provided by Montpelier and which took them out of FSA protection.

168. Their glib assertions that they were not men with an eye for detail and that they had therefore not read the documents in detail, do not assist them. By any standard, purported indebtedness of £185,000 and £465,000 is not insignificant for individuals of relatively limited means.

169. The fact that neither of them knew whether they had accepted Pendulum's offer to re-purchase the CFDs and their failure to check what had happened in subsequent years, points to a disregard of anything other than the losses which they had set out to achieve.

170. This is a self-assessment system. The taxpayer is ultimately responsible for submitting an accurate SATR.

171. This was not a question of the appellants turning a blind eye. They did not ask questions or read documents because they knew precisely what they were doing. They were trying to create a significant loss and thereafter make substantial claims for repayment of tax. Crucially the appellants do not and never did have any liability to repay a purported loan. Therefore they did not incur expenditure and they incurred no losses that were capable of being relieved. Furthermore they had not been carrying on a trade on a commercial basis with a view to making a profit.

172. In submitting their SATRs we find that they acted deliberately with a view to claiming non-existent losses. Their intention was to mislead HMRC and obtain repayments of tax.

173. For all these reasons the appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 27 APRIL 2021