Neutral Citation: [2023] UKFTT 719 (TC)

Case Number: TC 08909

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard at Taylor House, London

Appeal reference: TC/2021/02845

INCOME TAX – Appellant entered into scheme devised by Montpelier – penalty under TMA s 95 for acting fraudulently or negligently – whether fraudulent – no – recklessness not pleaded – whether negligent – yes – penalty reduced and appeal allowed in part

Heard on 10-13 July 2023
Judgment date: 15 August 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MR JOHN AGBOOLA

Between

KENAN ALTUNIS

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ximena Montes Manzano and Siobhan Duncan, both of Counsel, instructed by Crowe UK LLP

For the Respondents: Ms Sadiya Choudhury of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. In March 2008, Mr Altunis entered into a tax scheme called "Alphabeta" ("the scheme" or "the Alphabeta scheme") designed and marketed by the Montpelier group of companies[1].

2. On 2 June 2008, Mr Altunis filed his 2007-08 self-assessment ("SA") tax return. This included a claim for scheme-generated losses of £5,344,836.23 from a trade in derivatives conducted between 3 and 17 March 2008. The trading was allegedly carried out via an agent, Alphabeta Trading Limited ("ABT"), based in Bermuda.

3. HMRC opened an enquiry into Mr Altunis's return; this was closed on 30 July 2019 removing the claimed losses. The closure notice was not appealed. On 27 September 2019, HMRC issued Mr Altunis with a penalty under Taxes Management Act 1970 ("TMA") s 95, on the basis that he had acted "fraudulently or negligently". The penalty was for £1,657,268, but HMRC asked the Tribunal to reduce it to £1,139, 371 to allow a higher level of mitigation.

4. As the closure notice had not been appealed, our starting point was that the losses were not allowable. The issue we had to decide was whether Mr Altunis had acted "fraudulently or negligently", and if so, whether the penalty was appropriate.

5. On behalf of HMRC, Ms Choudhury submitted that Mr Altunis had acted fraudulently by "knowingly" making a false representation in his 2007-08 SA return, because he knew he was not trading in derivatives on a commercial basis with a view to profit.

6. We agreed that Mr Altunis knew he was not carrying out such a trade. However, we also agreed with Ms Montes Manzano, appearing with Ms Siobhan Duncan for Mr Altunis, that he had understood that this was not necessary, because he was deemed to be trading as a result of the agency agreement with ABT. We found he had not acted fraudulently.

7. HMRC placed a lot of weight on a "side letter" issued to Mr Altunis by Montpelier. This said that if the scheme did not work, Montpelier would refund his costs of entering the scheme and would write off a related loan. We found that the side letter did not prove Mr Altunis had "knowingly" made a false representation. Instead, it showed he was unsure whether the scheme worked, but participated after receiving the side letter, which had protected his downside risk. However, HMRC had not pleaded that, as the result of the side letter, Mr Altunis completed his SA return recklessly, "not caring whether it be true or false". We made no finding on whether Mr Altunis was reckless.

8. However, we agreed with HMRC that Mr Altunis had been negligent. The reasonable person in Mr Altunis's position would have taken independent professional advice on this highly aggressive loss-creation scheme. Mr Altunis instead relied only on Montpelier and extracts from a Counsel's Opinion, despite having doubts as to whether the scheme worked.

9. The penalties were charged under TMA s 95, which does not distinguish between fraud and negligence. Instead, it sets penalties for both at a maximum of 100% of the tax which would have been paid had the return been completed correctly ("the tax difference"). In Mr Altunis's case, the tax difference was £2,071,585. The issued penalty was 80% of that amount, on the basis that Mr Altunis had acted fraudulently. We decided that, as Mr Altunis had not been fraudulent, it was appropriate to begin from a lower starting point, and we allowed a further reduction for co-operation. The resulting penalty is £652,549, being 31.5% of the tax difference resulting from his inaccurate loss claim.

[1] Unless necessary to do so, in this decision we have not distinguished between the various Montpelier group companies, but referred to them simply as "Montpelier".

THE EVIDENCE

10. The Tribunal was provided with a Bundle of documents running to 1,547 pages. This included:

(1) correspondence and notes of meetings between the parties, and correspondence between the parties and the Tribunal;

(2) emails, documents and faxes between Mr Altunis and various Montpelier employees;

(3) the scheme documents;

(4) emails between various Montpelier employees and other scheme participants;

(5) extracts from a Counsel's Opinion provided by Mr Argles of 15, Old Square Chambers;

(6) various internet pages obtained via the "Wayback" machine;

(7) correspondence between Mr Altunis and his insurer and between him and the Royal Bank of Scotland ("RBS");

(8) various pages from Mr Altunis's bank accounts, and his SA tax returns for 2006-07 and 2007-08; and

(9) correspondence between Mr Altunis and his accountants, Coppergate International LLP ("Coppergate"), and between Montpelier and Coppergate.

11. The Tribunal also had sight of the original documentation Mr Altunis had faxed to Montpelier when he entered the scheme, in addition to the copy which was in the bundle.

Mr Altunis's evidence

12. Mr Altunis provided a witness statement running to 199 paragraphs; he gave evidence-in-chief led by Ms Montes Manzano; was cross-examined by Ms Choudhury; answered questions from the Tribunal and was re-examined by Ms Montes Manzano. We found parts of his evidence to lack credibility, including in particular the following:

(1) Ms Choudhury asked Mr Altunis four times whether the side letter was a guarantee that if the scheme did not work, he would get his money back. In responding Mr Altunis was evasive, giving lengthy discursive replies, but did not answer the question.

(2) Mr Altunis denied knowing that Alphabeta was a loss generating scheme and said he instead thought it was a genuine trading opportunity with the possibility of making profits. We found that evidence to be inconsistent with other key facts and not credible.

(3) He was reluctant to give a straight answer when asked whether the payment due to Montpelier of £656,250 was the fee for entering the scheme calculated as a percentage of the maximum losses he could utilise in the current and three preceding years, despite the payment being exactly 12.5% of those maximum losses.

(4) As part of the scheme Mr Altunis had signed a loan agreement for £5,250,000 with a Montpelier company called Bayridge Investments LLC ("Bayridge"). Mr Altunis said that "at no point in time did I think the loan was not real". We found that evidence to be unreliable and did not accept it.

Mr Wharrie's evidence

13. Mr Michael Wharrie is an HMRC Officer working within HMRC's Fraud Investigation Service. He took responsibility for Mr Altunis's case in July 2018, and issued the penalty which is under appeal. He provided a witness statement, gave oral evidence-in-chief led by

Ms Choudhury and was cross-examined by Ms Montes Manzano. We found him to be a straightforward and credible witness.

Mr Dupont

14. The Bundle also included notes of a meeting between HMRC and Mr John Dupont, the Sales and Marketing Director of Montpelier Tax Consultants (London) Ltd. Mr Dupont subsequently agreed in writing that the notes were "a fair reflection" of what had been said, with the exception of one point. Mr Wharrie, whom we have found to be a credible witness, was at the same meeting. We have therefore accepted these notes as an accurate record, with the exception of the point corrected by Mr Dupont.

FINDINGS OF FACT

15. On the basis of the evidence summarised above, we make the findings of fact in this part of our judgment. We make further findings later in our decision, see in particular §180 to §195.

Mr Altunis

16. At the time he entered the scheme, Mr Altunis was the Managing Director and Global Head of FX Sales of UniCredit, part of Bayerische Hypo-und Vereinsbank AG. He denied he had any expertise in stock market trading, saying that "comparing my expertise to that of a trader is akin to comparing a car salesman to the production engineers".

17. We accept that Mr Altunis's role was to "intermediate between the bank's traders and the client's traders", and not to carry out stock market trades for the bank. Nevertheless, we agree with Ms Choudhury that he had a good working understanding of what is meant by stock market trading in general, because he otherwise could not have liaised successfully between sophisticated traders in the FX markets on a daily basis, or persuaded clients to enter into FX trading transactions. To use his own analogy, a successful car salesman has a good understanding of the vehicles he is selling, even though he is not an engineer. However, it was not in dispute that Mr Altunis had very little experience of actually buying and selling shares, and no experience at all of trading in derivatives such as contracts for differences ("CFDs") or dividend strips.

The Alphabeta scheme

18. The Montpelier group of companies was headquartered in the Isle of Man and chaired by Mr Watkin Gittins. One of its subsidiaries was Montpelier Tax Planning (Isle of Man) Ltd ("MTP"), previously known as MTM (Tax Consultants) Ltd; another was Montpelier Tax Consultants (London) Ltd.

19. Montpelier designed the Alphabeta scheme, which was made up of two main elements. One was a dividend strip scheme, and the second a variant of another Montpelier scheme, called Pendulum.

The dividend strip scheme

20. The dividend strip scheme involved the purchase of dividend rights from Montpelier associated companies. Scheme users claimed a trading loss in respect of the cost of purchasing dividend rights, but in reliance on a perceived loophole within Income and Corporation Taxes Act 1988 ("ICTA"), s 730(1) they excluded dividends received from the computation of trade profits.

21. The scheme was essentially the same as that considered by the FTT (Judge Walters and Mrs Bridge) in *Clavis Liberty Fund 1 LP v HMRC* [2016] UKFTT 0253 (TC); their decision that the scheme did not work was upheld by Mann J in the Upper Tribunal under reference [2017] UKUT 418 ("*Clavis*"). There was no onward appeal.

The original Pendulum scheme

22. The original Pendulum scheme was considered in two FTT decisions: *Thomson and others v HMRC* [2018] UKFTT 396 ("*Thomson*"), a decision of Judge Richards (as he then was) sitting with Mrs Bridge, and *Sherrington and others v HMRC* [2020] UKFTT 128 ("*Sherrington*"), a decision of Judge Sinfield and Mrs Bridge.

23. Under that original version of the Pendulum scheme:

(1) taxpayers were required to commence buying and selling CFDs so as to demonstrate that they were carrying on a trade; they subsequently entered the Pendulum scheme, which generated CFD losses;

(2) those losses were said to be trading losses which could be set against other taxable income.

24. A key element of the Pendulum scheme was a loan agreement between the individuals and Bayridge Investments LLC ("Bayridge") a Montpelier group company registered in Delaware. In *Thomson* at [65(5)] the FTT explained:

> "…the Bayridge Loan…meant that the appellants were not themselves funding the entire Designated Issue Value of the Pendulum CFDs out of their own resources. Under the Bayridge Loan, Bayridge funded 95% of the Issue Value of the Pendulum CFD on highly advantageous terms. The Bayridge Loan therefore operated to 'ramp up' the amount that the appellants could claim they invested in the Pendulum CFD even though they had not in any economically real sense invested the full Designated Issue Value."

25. In both *Thomson* and *Sherrington* the FTT found that none of the appellants were carrying on a trade, and that even if they were trading, the trades were not carried on with a view of profit. Neither decision was appealed to the UT.

The Alphabeta version of the Pendulum scheme

26. The Alphabeta version was essentially identical to the original Pendulum scheme, but instead of participants being required to show they had a prior trade of dealing in CFDs by carrying out a number of transactions before entering the scheme, they instead appointed ABT to trade as their agent. ABT was a Barbadian company incorporated on 5 November 2007.

27. In other respects the Alphabeta scheme incorporated the same arrangements as Pendulum including the use of a loan agreement with Bayridge ("the Loan Agreement"). We have not thought it necessary to explain the detail of the underlying transactions carried out by ABT; both parties accepted that the machinery in question had been correctly described in *Thomson* and *Sherrington.*

No allowable expenses or losses

28. By the time of Mr Altunis's hearing, HMRC had therefore succeeded in *Clavis, Thomson* and *Sherrington.* As the losses claimed by Mr Altunis and other participants in the Alphabeta scheme arose from essentially the same elements as had been considered in those earlier cases, and as Mr Altunis had not appealed his closure notice, we proceeded on the basis that the scheme did not work.

Mr Altunis considers the Alphabeta scheme

29. In 2007 and 2008 those tribunal hearings were far in the future. At that time, Mr Altunis was aware from colleagues, and from independent financial advisers ("IFAs") who often visited the bank where he worked, that there were a number of "offerings" in the marketplace involving tax planning, including gilt strip and film schemes. He participated in a film partnership in 2006-07, with the related costs being included in his SA return by an

accountancy firm called Coppergate International ("Coppergate"), which had prepared Mr Altunis's tax returns for a number of years. Mr Altunis's particular contacts at that firm were Mr Des Martin ("Mr Martin") and Mr Neill Virtue.

30. In late 2007 or early 2008 Mr Altunis was introduced by a work colleague to an IFA called Liam Martin[2] from the PK Group. He introduced Mr Altunis to "various tax planning products", including the Alphabeta scheme, and also introduced him to Mr Dupont of Montpelier.

Preliminary discussions

31. Mr Liam Martin and Mr Dupont explained to Mr Altunis that the Alphabeta scheme involved trading in CFDs; that this was carried out by ABT acting as an agent, and that ABT was a subsidiary of Montpelier. Mr Altunis also had discussions with Mr Gittins about the scheme.

32. It was provisionally agreed that Mr Altunis would participate in the Alphabeta scheme on the basis of a £5.25m loan from Bayridge and a payment by him of £656,250. Mr Altunis said he would require financing, and Mr Gittins told him Montpelier had an arrangement with RBS for participants to borrow the money they needed to make their payments; he offered to provide bridging finance while that loan was organised.

33. We make further findings later in our judgment about whether the £656,250 was a fee for entering the scheme; whether Mr Altunis knew it was a loss scheme and whether he thought the loan was repayable, see §§105; 116 and 125.

The documents sent to Mr Altunis

34. On 28 February 2008, Montpelier emailed Mr Altunis the following documents:

(1) a "sophisticated investor" form;

(2) the extract from Mr Argyles' Counsel's Opinion;

(3) the "new client" letter, sometimes subsequently referred to as the "advice letter";

(4) the "information memorandum in relation to Alphabeta trading financial products as agent" ("the Information Memorandum");

(5) the agency agreement with ABT; and

(6) the Loan Agreement with Bayridge, with the figures of £5.25m and £656,250 inserted in the relevant places.

35. So far as relevant to our decision, we consider those documents in the next following paragraphs.

The sophisticated investor form

36. Mr Altunis signed the sophisticated investor form on the day of receipt: this was a necessary preliminary to entering the scheme. Mr Altunis met one of the conditions for that self-certification, because he had invested in two unlisted companies in the previous two years.

The extract from Counsel's Opinion

37. On 13 December 2018, Mr Argles of Counsel provided Montpelier with an document running to 12 numbered paragraphs, headed "Extract from Counsel's Opinion in the matter of Alphabeta Trading Limited". This included the following passages (where "A" is ABT):

[2] We have used "Mr Martin" to refer to Mr Altunis's accountant at Coppergate, and "Mr Liam Martin" to refer to his IFA.

> " A is considering embarking on a new venture which is to undertake a trade or business as agent for a third party individuals ('traders') who are resident in the United Kingdom and who wish to engage in trading activities of the kind already undertaken by A in its own right…
>
> I confirm first that the trader will be regarded as a sole trader for the purposes of United Kingdom taxation and that A will be regarded as trading as the agent for the United Kingdom trader (and not as a partner of the trader). I confirm also that the fact that the trader trades through A as his or her agent will have no detrimental effect on the trader's tax position.
>
> The arrangements here are in every sense commercial arrangements. If the trader make a profit through his dealing he will pay United Kingdom income tax on that profit. If he has the misfortune to make a loss that loss may be used to relieve his liability to income tax…"

38. Mr Argles ended by opining that the Alphabeta arrangements fell outside the Disclosure of Tax Avoidance Scheme ("DoTAS") rules, and so did not have to be disclosed by participants.

The new client letter

39. Mr Altunis denied having received a copy of the new client letter, on the basis that he could not find a copy in his papers and did not remember having seen it before. We reject that evidence because:

(1) Mr Altunis told HMRC in 29 January 2013 that he had not seen or received the extract from the Counsel's opinion, but later said it had been "pivotal" to his decision to enter the scheme;

(2) It was part of his case that his memory had faded and that various documents had been "lost or destroyed";

(3) the new client letter is listed as an attachment to the email from Montpelier to Mr Altunis dated 28 February 2008, and it was common ground that he had received that email;

(4) MTP's engagement letter and invoice were appended to the new client letter, and Mr Altunis signed the engagement letter and paid the invoice;

(5) the new client letter is referred to in the side letter, see §54; and

(6) Mr Altunis was aware of a particular technical point which was identified only in that letter, as we explain at §69-§70.

40. The Bundle contained a copy of the new client letter sent to another client. Its opening paragraph first draws attention to the fact that MTP was associated with both ABT and Bayridge, and then says "therefore you may wish to seek other independent advice instead of, or to confirm" the advice set out by MTP in the letter. It continues:

(1) it is a "more than reasonable assumption" that ABT will be trading on behalf of participants in the scheme, and doing so with a view to profit;

(2) MTP's "unqualified view" is that "based on the proposed method of Alphabeta trading, you will be regarded by HMRC as carrying on the business of a sole trader in derivatives with a view to profit";

(3) MTP agree with the summary of tax law set out in the Information Memorandum (see further below);

(4) in MTP's opinion, the Alphabeta scheme does not meet any of the hallmarks so as to require disclosure under DoTAS; and

(5) section 95 of the Income Tax Act 2008 ("ITA") does not apply (see further §69).

The Information Memorandum

41. The Information Memorandum included the following information:

(1) ABT was incorporated in Barbados on 5 November 2007.

(2) It has an issued share capital of US$10m and is a wholly owned subsidiary of Montpelier Holdings Ltd.

(3) Montpelier Holdings Ltd is an Isle of Man holding company of a diversified financial services group responsible for the management and control of client funds in excess of £1.5 billion which has been in business since 1992.

(4) ABT's proposed auditors are Ernst & Young, and one of its two directors is Mr Gittins, a fellow of the Institute of Chartered Accountants in England and Wales and the chairman of the Montpelier group; Mr Gittins has over 30 years experience in financial services.

(5) A description of certain trading techniques used by ABT, including the Elliott Wave Principle and "Technical Analysis". Appendix II to the Information Memorandum contains further details of the methodology.

(6) The company will also trade as agent; any such arrangements are to be formalised via the standard agency agreement attached to the Information Memorandum. If trading as agent, ABT will use the same techniques "on an absolutely discretionary basis" unless notified of any limitations by the other party to the agency agreement and then only if those limitations "can reasonably be implemented into the company's trading strategy". That other party is defined as "the trader".

(7) ABT is entitled to 2.5% of capital advanced by the trader as an initial fee, and the same percentage on an annual basis.

(8) The trader will be sent a detailed statement of trades at the end of each calendar quarter and at the end of each trading year.

(9) Clause 14.6 said that ABT "broadly disclaims liability for any loss, liability, costs or expense in relation to the agreement including in respect of its trading on a trader's behalf". Traders "must accept all of the risks" inherent in ABT's trading activities.

(10) Clause 17 reads:

> "Although the company will at all times be trading with a view to profit, there can be no guarantee that any such profit will be made or that a loss will be avoided. Significant losses may result in a trader's entire capital being eliminated. If there are any doubts in relation to agency trading as discussed in this Information Memorandum, professional advice should be sought."

(11) Under the heading of "UK taxation", Clause 20 reads:

> "The trading of financial instruments of the sort traded by the company should constitute a trade for UK tax purposes, and therefore an individual trader should be regarded as in effect a sole trader and assessed on the profits and losses of his trading in the normal way."

(12) Under the same heading, the Information Memorandum sets out detailed information as to how and when an individual can claim a loss for tax purposes. This

part ends by noting that "…a loss relief claim may have consequences for inter alia pension contributions. Trader's [sic] should therefore seek appropriate UK tax advice".

(13) Clause 30 repeats this in broader terms, saying (text as original):

> "the above is the company's summary of UK tax legislation insofar as concerns an individual trader carrying on a derivative or similar trade but is no substitute for taxation advice pertaining to the affairs of an individual. The company recommends that any prospective trader seeks taxation advice specific to his or her circumstances."

The agency agreement

42. The agency agreement was stated to be between ABT and "the trader". The "trader" was defined as a third party who enters the agency arrangement and who places "at least £100,000 with ABT for trading purposes". There was no requirement that the funds be provided from the trader's personal resources: as is clear from the Loan Agreement, the funds could be borrowed.

43. Clause 12 said:

> "A trader who enters into an agency agreement will be responsible in his or her own right for the income and expenditure of the trading as all transactions entered into by the company as agent will be deemed under law to be that of the trader as principal"

44. The financial products which ABT was authorised to trade on the trader's behalf included "all types of financial derivatives, financial contracts and deposits, whether traded on an exchange or otherwise, including without limitation, options, futures, warrants and contracts for difference". ABT was not required to give the trader prior notice or approval before making any trade, and had the power to delegate the trading to "brokers or agents"; those brokers or agents were themselves entitled to "sub-delegate any such authorities or powers".

45. Although, as stated in the Information Memorandum, ABT was required to comply with any limitations notified to it by the trader, the agreement provides that ABT was nevertheless not required to comply with any such notified limitations "with which it is not reasonably practicable to comply or which interfere with ABT's trading strategy".

46. By Clause 4, ABT was obliged to "keep complete and accurate records of all trades made on the trader's behalf" and to send the trader "a detailed written report" within 60 days of each calendar quarter and at the end of each trading year, and annual accounts within 60 days of the end of each tax year.

47. Clause 5 provided that ABT would charge an initial fee of 2.5% of all funds advanced to ABT by the trader, plus a "performance fee equal to 10% of any profit made by ABT on the Appellant's funds. There was provision for a further 2.5% for later years.

48. Attached to the agreement was a declaration, which the trader was required to sign. It includes an acknowledgement that ABT had recommended that the trader take appropriate professional and legal advice prior to entering into the agreement, and a statement that the trader holds ABT "free and harmless of all consequences" to the trader following the entering into of the agreement.

The Loan Agreement

49. The recitals to the Loan Agreement state that Mr Altunis had entered into an agreement with ABT to trade in various derivative products as agent, and that Bayridge has agreed to advance funds to the borrower for that purpose.

50. The main body of the Loan Agreement specified the amount of the loan as being £5.25m; this was conditional on Mr Altunis at the same time advancing £656,250 of his own capital to ABT "in cash and free of any charges or encumbrances".

51. The loan did not bear interest, but 20% of any profit would be charged as a fee. The loan was to be repaid on the 50th anniversary of the date of the Loan Agreement, if not repaid previously.

The side letter

52. Mr Altunis read the Information Memorandum and became concerned by use of the word "should" in the passage from Clause 20 set out above, namely that the arrangements "should" constitute a trade for UK tax purposes, and an individual "should be regarded as in effect a sole trader".

53. Although on holiday with his family in Tenerife, on 3 March 2008 Mr Altunis called Mr Dupont to discuss his concerns. Mr Dupont sent the following email to Mr Altunis the same day, copying Mr Liam Martin:

> "Dear Kenan
>
> Following our discussions today I wish to confirm the following:
>
> 1. Amy will email you our engagement letter, which states that in return for your fee of £1,000 + VAT, Montpelier will deal with any enquiries and fight the revenue up to and including the high court at its sole cost on your behalf. You will need to sign two copies and return these to me, along with a cheque payable to Montpelier tax planning (IOM) Limited for £1,175.
> 2. In addition to this, I will arrange for a letter from the Chairman, Watkin Gittins which will state that in the event that HMRC do not treat you as a 'sole trader' for tax purposes, the initial margin of 12.5% will be refunded in full to you and any loan will be taken back with no outstanding liability to you. I[n] addition, the letter will state that the loan from Bayridge can also be assigned to anything or anyone of your choice.
>
> The letter will accompany the signed engagement letter…"

54. Mr Gittins subsequently sent Mr Altunis the side letter, which read:

> "…in the event that HMRC does not accept that in entering into the Alphabeta arrangement you are a self employed trader trading on a commercial basis with a view to profit as per our letter of advice so as to avail of loss relief, we will procure that your initial margin paid to Alphabeta is repaid in full and that any loans from an associated company of Alphabeta will be taken over at no loss to you, or you may freely assign such loan to whoever you wish."

55. Although that letter is dated 29 February 2008, that predates the earlier email from Mr Dupont promising that Mr Gittins would write to him with these undertakings. It is also clear from an email chain that the side letter was signed by Mr Gittins on 5 March 2008 and sent to Mr Altunis on 18 March 2008. We thus find that the side letter should have been dated 5 March 2008, and it was received on 18 March 2008.

56. As noted at §12(1), Ms Choudhury asked Mr Altunis four times whether the side letter was a guarantee that if the scheme did not work, Mr Altunis would get his money back. Mr Altunis gave lengthy responses, but did not answer the question.

57. Based on the plain meaning of both the side letter and the email from Mr Dupont, we agree with Ms Choudhury that:

(1) Mr Altunis received a commitment from Montpelier before entering into the scheme that he would be given a guarantee that if HMRC did not accept he was carrying out a trade so as to allow him to claim loss relief, he would be repaid the costs of entering the scheme and the loan would be written off; he would thus be liable only to pay the £1,175 for MTP's services (as to which, see further §64).

(2) Mr Gittins subsequently gave him that guarantee in the form of the side letter.

58. Since the side letter was a response to Mr Altunis's concerns, and since it gives undertakings about both the "initial margin" and the loan, we further find that Mr Altunis had raised concerns not only about providing the "initial margin" but also about the loan.

59. In his witness statement, Mr Altunis denied he had relied on the side letter as an indemnity, saying:

(1) he would not have made subsequent payments to Montpelier had this been the position; and

(2) the side letter was never mentioned in his later correspondence with Mr Gittins about those payments.

60. However, the side letter said Mr Altunis would receive a *refund*, so plainly required Mr Altunis to pay Montpelier. The fact that Mr Altunis made later payments to Mr Gittins does not undermine our findings about the meaning of the side letter.

The email from Mr Altunis

61. The Bundle also contained an email between Mr Altunis and Mr Dupont, which reads:

> "As per our telephone conversation of just now, I can confirm my participation in the sole trader proposition of Alphabeta. I would like to participate to the tune of 5.25mn and will put in 12.5% equating to GBP 656,250.00 and borrow the balance through Bayridge.
>
> I would like bridge financing for the GPB 656,250 and will guarantee this in the worst case scenario, to come from a payment of EUR 1.25mn from my employer due September 2008. In the meantime, I will seek out other sources of financing in order to repay the bridge over the coming four to eight weeks.
>
> I appreciate your flexibility with this matter, and look forward to your confirmation of this agreement."

62. The email was uplifted by HMRC when Montpelier was raided (see further §93), so we find as a fact that it had been received by them. It is undated, but we find that it must have been sent before Mr Altunis signed the engagement letter, committing to the scheme.

Mr Altunis signs the documentation

63. Having received the promise of the guarantee, Mr Altunis arranged for the hotel where he was staying to print off a copy of the ABT agency agreement, the Loan Agreement and the extracts from Counsel's Opinion, all of which had previously been emailed to him by Montpelier; he then signed all relevant parts of the agency agreement and the Loan Agreement. Those documents were faxed back to Montpelier on the same day along with a copy of Mr Altunis's SA return for 2005-06, including all attachments and calculations.

Professional services agreement

64. On 10 March 2008, Mr Altunis signed the professional services agreement with MTP**.** Under that agreement and in return for a fee of £1,175 including VAT, MTP agreed to provide taxation advice to Mr Altunis in connection with "UK tax implications and consequences of the client commencing the trade of purchase and sale of derivative contracts", including

assistance with the preparation of accounts and with tax returns and any negotiations with the Inland Revenue. However, the letter also stated that Mr Altunis "or his qualified adviser in his home jurisdiction" was responsible for "the making of and for the accuracy of all required returns to the tax authorities in his home jurisdiction".

65. By signing the agreement, Mr Altunis also confirmed he understood that:

> "where a structure is based upon Counsel's Opinion, this Opinion has not been obtained specifically for the client, but that the Opinion is considered applicable to the situation facing the Client, If the Client expressly requests that Counsel's Opinion be obtained for him, Montpelier will arrange this at cost to the Client."

The transactions undertaken

66. Meanwhile, ABT had begun to record transactions said to be on behalf of Mr Altunis; these were as follows:

(1) Between 5 and 19 March 2008, five CFD transactions in line with the Pendulum model which were said to have generated losses of £2.4m.

(2) Between 7 and 11 March 2008, eight dividend strip transactions which were said to have generated allowable expenses of £6,478,325 and non-taxable income of £6.5m.

(3) Between 5 and 13 March 2008, several put and call transactions with WH Ireland Stockbrokers which generated much smaller sums.

67. In addition, on 14 March 2008 Mr Altunis received an email from Mr Beaumont of Montpelier relating to a transaction which he was invited to carry out himself, but with payment being taken from the Bayridge loan. The transaction was shown in Montpelier's records as resulting in a credit of £10,446.

68. Under cross-examination, Mr Altunis said he "wouldn't have had the expertise" to carry out that transaction and he knew nothing about the companies in question, but had been "instructed to do it" because "it was a tax-related thing that I needed to do a trade", which had been explained "in the documentation somewhere" and "did not come as a surprise" to him.

69. The new client letter from Mr Gittins about the Alphabeta scheme, referred to at §39, includes this passage**:**

> "You must be aware of section 95 of the Income Tax Act 2007, which states that if a trade is conducted 'wholly' abroad, loss relief is restricted generally to overseas income. To avoid this…we recommend that you carry out personally at least one derivative trade per month, By this action it cannot be said that the trade is carried on 'wholly' outside the UK and there should be no restriction on any loss claim you may make."

70. There is no other document in the Bundle which explains why this trading transaction was carried out, and we find that Mr Altunis's understanding of its purpose, which was not a surprise to him, came from this letter.

71. Montpelier later produced a Client Account summary for Mr Altunis, which showed him as having a total negative balance of £2,521,616, all of which was "drawn down" from the Bayridge loan. The £656,250 Mr Altunis had been required to provide was not shown in his client account.

The scheme comes to an end

72. On 17 March 2008, the law changed: FA 2008, Sch 21 inserted ss 74A to 74D into ITA 2007. Section 74A capped losses made after 12 March 2008 at £25,000 if claimed by non-

active traders, and s 74C defined a "non-active" trader as one who spent less than 10 hours a week on average "personally engaged in activities of the trade".

73. Mr Dupont emailed Mr Gittins the same day, saying:

> "…Kenan is the guy going for £5.25m. He is MD of Global trading at UniCredit. He has not done any other trading in his own name this year but has asked if he can demonstrate 10 hrs/week of market research etc (which is what he does anyway) can he not continue with Alphabeta and go for the whole losses rather than close his account today and get apportionment."

74. Mr Altunis confirmed under cross-examination that Mr Dupont had called him and he had discussed whether he could satisfy the new ten hour rule. He also accepted that at this point he knew he had made losses, but said he did not know how much they were. Although he denied "going for £5.25m" he agreed he knew that £5.25m was "the maximum loss I could take advantage of if a loss materialised". We return to the issue of Mr Altunis's intentions later in our judgment.

75. On 26 March 2008 Mr Altunis emailed Montpelier asking that they "cease all trading on [his] Alphabeta account with immediate effect". However, Mr Altunis's tax return (see below) states that his trade ceased on 17 March, and Montpelier subsequently told Coppergate they had apportioned losses which had arisen between 5 and 17 March. We infer from this that Montpelier suspended Mr Altunis's account from the date the change in the law was announced, even though they only received notification from Mr Altunis a week later.

The SA return

76. On 27 March 2008, Mr Altunis emailed Mr Martin and Mr Virtue, his accountants at Coppergate. The email is headed "2007-08" and includes information about interest charges on a bridging loan for a film partnership. It then says:

> "I will be claiming sideways loss relief on £5,250,000 for the current plus 3 previous years as a sole trader. Below are the total taxable incomes that I paid tax on for this plus the last 3 years."

77. In the same email, after setting out his taxable income for each of those years, and the tax payable, Mr Altunis said:

> "Please let me know what other information you require, if any, and please let me know when you expect the first draft to be prepared, as I would like to submit the first draft as close to midnight on 06 April as possible."

78. Despite that instruction, there was a delay. On 13 May 2008, Mr Martin emailed Mr Altunis with "a few questions on the 2007/08 tax return" relating to his "sole trade"; these included its business name and address; the description of the trade and the date of its commencement and cessation. Mr Martin then said "if this is a David Hayman scheme, perhaps there is some more paperwork that goes with it". Mr Hayman was an IFA who had introduced Mr Altunis to a "Disney-backed film scheme" in a previous year, but he was not involved in the Alphabeta scheme.

79. Mr Altunis answered the specific questions and also said:

> "I have clarified with John Dupont of Montpelier that the accounts will not be ready for another week or so. He said we do not need to wait to submit the return, as we will only need to provide documentation if there is an enquiry."

80. On 2 June 2008, Coppergate submitted Mr Altunis's SA return online. It included his employment income of just over £3m, and losses as a derivative trader between 3 March 2008 and 17 March 2008 of £5,344,836.23. That figure equalled the total of Mr Altunis's taxable

profits for 2007-08 and the three previous years. Mr Altunis therefore claimed a repayment of tax of £2,038,057.93, being £1,241,154.17 for 2007/08 and £796,903.76 relating to the carry backs. The white space of the SA return did not explain how these losses had arisen, and the box which asks whether the return contains an estimate had not been ticked. Mr Martin sent Mr Altunis a copy of his SA return with a letter saying that according to his calculations, Mr Altunis was due a refund of £2,038,057.93.

81. On 29 July 2008, Mr Quinn of Montpelier emailed Mr Martin saying that he had received a trading account from ABT showing that Mr Altunis's losses were £5,250,858 and noting that a higher amount had been claimed on his SA return On 30 July 2008, Mr Martin replied, saying that:

> "When preparing Kenan's tax return we did not have the trading statement on Alpha Beta but initial estimated losses were detailed as £5,250,000. Kenan understood his losses would be significantly in excess of the amount detailed above when the accounts were produced so we made the losses equal to the maximum carryback he needed to maximise his tax refunds."

82. Mr Quinn replied the same day, saying that Mr Altunis's total losses were in excess of £5,250,858, but were restricted to that figure by the changes introduced by FA 2008, in other words, Mr Altunis's "trade" had commenced on 5 March 2008 and ended on 17 March 2008, but under FA 2008, only the period up 12 March could be claimed. Montpelier later told HMRC that the original figure of £5,344,836.23 had been caused by the number of days in the apportionment having been wrongly calculated.

83. On the basis of the correspondence and Mr Altunis's own evidence, we find that:

(1) in March 2008, he calculated that the loss figure needed in order to eliminate his taxable profits was £2.5m;

(2) when Coppergate prepared his return, they established that the loss required was slightly higher, at £5,344,836.23;

(3) Mr Altunis understood that his losses from the Alphabeta scheme were at least equal to that figure, so the SA return was submitted on that basis; but

(4) when Montpelier calculated Mr Altunis's available loss using the correct apportionment figure, the available loss was slightly less, at £5,250,858.

84. On 18 September 2008, Mr Gittins wrote to Mr Virtue of Coppergate, attaching details of Mr Altunis's trading. On 21 April 2009, Mr Altunis's SA return was amended to include the lower loss figure.

The HMRC enquiry begins

85. Meanwhile, on 19 June 2008, HMRC called Mr Virtue and told him they would be opening an enquiry under TMA s 9A into the loss claim made in Mr Altunis's return. Mr Altunis met with Mr Dupont and sent an email to him, to Mr Quinn of Montpelier and to Mr Martin of Coppergate authorising them to "establish a link such that we can handle my 2007/08 claim in as efficient a way as possible".

86. The email also said that when the opening letter was received "we can have a quick conference call between the four of us on this email and decide what to give them". HMRC later relied on that sentence as evidence that Mr Altunis was giving instructions to restrict the information provided to HMRC in relation to the enquiry. We however agree with Mr Altunis that, read in context, the sentence simply sets out a practical approach to dealing with the enquiry.

87. HMRC subsequently issued the opening letter on 16 July 2008, attaching a list of questions. On 18 September 2008, Montpelier provided a draft response, and on 24 September Mr Martin used the same information in a letter to HMRC.

88. HMRC continued to correspond with Coppergate; the responses to those letters were drafted by Montpelier but sent to HMRC by Mr Virtue or Mr Martin. Mr Altunis was always aware of HMRC's deadlines, and he regularly chased Montpelier via Coppergate when each time limit was approaching. Much later, on 17 March 2016, Mr Martin told HMRC that Coppergate was not able to respond to questions about the scheme, but was wholly reliant on Montpelier.

89. Having considered HMRC's enquiry correspondence, we agree that many of the questions in HMRC's letters could only realistically have been answered by Montpelier, not by Mr Altunis or by Coppergate. However, some questions concerned points on which Mr Altunis did have information, such as the fee payable, the loan arrangements and why he decided to participate in the scheme.

90. On 22 April 2009, HMRC told Mr Altunis that the enquiry had been moved to their specialist investigations section, and would proceed under Code of Practice 8 ("COP 8"). Mr Altunis passed this information on to Montpelier, which responded by applying to the Tribunal for the enquiry to be closed. On 20 July 2009, HMRC issued an Information Notice under FA 2008, Sch 36, and on 19 October 2009 followed this with a £300 penalty for failure to comply.

What Mr Altunis paid

91. As noted at §32 above, Mr Altunis knew before he entered the scheme that he was required to make a payment of £656,250 to Montpelier from his own resources, but he had also been told that Montpelier had arranged a facility with RBS relating to providing funding to participants, and had been offered and accepted a bridging loan from Mr Gittins until the RBS funding materialised.

92. However, by the time the law changed on 17 March 2008, Mr Altunis had not paid any part of the £656,250. Instead, payments were made as follows:

(1) On 3 April 2008, RBS wrote to Mr Altunis, referring to previous discussions, and agreeing in principle to a loan of £600,000 for 18 months. No such loan was in fact made because of the financial crash.

(2) On 9 April 2008, Mr Altunis wrote to Mr Dupont reiterating that he had accepted Mr Gittins's offer of a £656,250 bridging loan, which he would repay by September 2008.

(3) On 26 August 2008, an internal Montpelier email records that "as yet we have not received any of the initial payment due" from Mr Altunis, but that it had now been agreed that he would pay £100k by the end of August 2008; £450k by the end of September 2008, and the balance by February 2009 at the latest.

(4) Around the same time, Mr Altunis agreed a fixed term loan with RBS: the documentation describes it as a "cash loan of £100,000 for tax investment". That sum was paid into his bank account on 2 September 2008, and soon afterwards transferred to Montpelier.

(5) On 19 October 2009, after HMRC had issued the £300 penalty for refusing to respond to the Sch 36 Information Notice, Mr Altunis thought Montpelier was deliberately dragging its heels in dealing with HMRC's questions because he had not yet paid most of the £656,250 required under the scheme.

(6) As a result of that concern, on 5 November 2009 Mr Altunis wrote to Mr Gittins, suggesting that he pay a further £100k immediately and another £150k in February "with the balance to be paid upon success". Mr Gittins suggested to Mr Altunis they compromise with another £150k payable "now", £150k by the end of March 2010 and £250k "contingent on success", and Mr Altunis agreed**.**

(7) On 27 November 2009 he paid £100k and on 19 February 2010 he paid £180k; Mr Altunis could not find any evidence that the balance of £20k had been paid, but as he was not chased for it, assumed it had been.

From 2010 to 2020

93. In September 2010, HMRC raided Montpelier's offices in London and in the Isle of Man**.** Mr Gittins was arrested on 29 September and was subsequently prosecuted in relation to a charity tax scheme. On 8 December 2010, HMRC wrote to Mr Altunis informing him of the criminal investigation into the Montpelier companies, and inviting him to withdraw his loss claim. Mr Altunis contacted Mr Gittins, who told him it was an HMRC "ruse" to intimidate Montpelier and its clients; Mr Altunis believed Mr Gittins.

94. On 23 November 2012, HMRC informed Mr Altunis that HMRC were extending their criminal investigation to encompass his loss claim. On 29 January 2013, he was interviewed under caution ("the IUC") for "offences of a criminal nature" relating to the Alphabeta loss claims**.**

95. When he attended the IUC, Mr Altunis was accompanied by his solicitor, who advised him to say "no comment" to "anything that touches on the technicalities of the structure". At the end of the IUC, HMRC's investigators showed Mr Altunis a copy of the side letter, which had been uplifted during the raid on Montpelier's offices, but which Mr Altunis had not previously provided to HMRC or to Coppergate. Mr Altunis confirmed in the IUC that he remembered receiving the side letter.

96. In June 2014, Bayridge was struck off the Delaware company register and so ceased to exist. In the same month, Mr Altunis instructed Crowe UK LLP ("Crowe"). The hearing of Mr Gittins's criminal charge commenced three months later, but the prosecution withdrew their case during the hearing, and Mr Gittins was acquitted on 17 September 2014.

97. Meanwhile, other cases were making their way through the courts and tribunals.

(1) In 18 April 2016, the FTT decided *Clavis* in favour of HMRC, finding that the "transactions concerned were not trading transactions at all", and that ICTA s 730 did not have the effect relied on by the participants in that dividend strip scheme.

(2) HMRC also prosecuted Mr Rowan Carstairs, a participant in the Pendulum scheme, on the basis that he had committed fraud by providing a false representation when his advisers had written a letter to HMRC in 2009. It was accepted by HMRC in those proceedings that the Pendulum arrangements themselves were not "a dishonest sham"; they instead submitted that dishonesty only arose when the later letters were sent. On 8 June 2017, Tomlinson J handed down his judgment, published under reference T2016/0493 (*"Carstairs*"). He dismissed the indictment, saying:

> "…a properly directed jury would struggle with the idea that a defendant who made a tax return and was not acting dishonestly at the time he made it nonetheless became dishonest when he later sought to justify it and further argue it."

(3) On 19 October 2017, the UT refused the appellants' appeal in *Clavis*, agreeing with the FTT that those who had participated in the dividend strip scheme were not trading, and concluding that the scheme therefore "falls at the first hurdle".

98. On 8 November 2017, HMRC raided Coppergate; the warrant related to documents and correspondence concerning Mr Altunis. On 15 March 2018, HMRC informed Mr Altunis that no charges were to be brought against him following Tomlinson J's dismissal of the *Carstairs* case.

99. On 16 July 2018, the FTT issued their decision in *Thomson,* agreeing with HMRC that the appellants were not trading; upholding the 42% penalty on Mr Thomson for negligently submitting his SA returns, and reducing to 40% the penalty charged to the other two participants.

100. On 18 July 2018, Mr Wharrie wrote to Mr Altunis inviting him to "make a disclosure and offer a settlement proposal". On 7 October 2018, Mr Cassidy of Crowe replied, saying Mr Altunis had suffered significant stress as the result of the long-running enquiry, and that now the criminal case against him had been dropped, he was prepared to settle on the basis that, in accordance with *Cotter v HMRC* [2013] UKSC 69, the losses carried back to the earlier years were allowable.

101. On 26 November 2018 Mr Cassidy and Mr Wharrie held a meeting. Mr Wharrie said *Cotter* did not apply, as in that case the loss claim had been made outside the SA return, whereas all Mr Altunis's losses were within his 2007-08 return. The meeting ended with the parties saying they "would have to agree to disagree".

102. There was no settlement, and on 30 July 2019, HMRC closed the enquiry, disallowing all the claimed losses. Mr Cassidy responded to the closure notice on 31 July 2019, saying:

> "For the record, we do not accept your view of the matter or agree with the long narrative you have given for reaching that view. That said, as Mr Altunis has been put through the mill by HMRC for nearly a decade, highlighted by a criminal investigation started four+ years after making the claim which continued for more than five years before being dropped by HMRC, he has decided that he no longer wishes to continue. The closure notice will therefore not be appealed."

103. On 27 September 2019, Mr Wharrie issued Mr Altunis with a penalty under TMA s 95 of £1,657,268. This was 55% of the £2,071,585 understatement of tax on his SA return. Having considered representations from Mr Cassidy, Mr Wharrie wrote to Mr Altunis on 17 November 2020 saying he was reducing the penalty to £1,139,371. After a statutory review which upheld Mr Wharrie's conclusions, Mr Altunis notified his appeal to the Tribunal on 6 August 2021.

Further findings of fact

104. We end this part of our decision by making findings of fact on three issues which were significantly disputed, namely:

(1) whether the £656,250 was a fee for entering the scheme;

(2) whether Mr Altunis knew Alphabeta was a loss scheme; and

(3) whether Mr Altunis thought the Bayridge loan was repayable.

Whether the £656,250 was a fee for entering the scheme

105. HMRC's case was that participants in the scheme paid a fee to Montpelier which was equal to a percentage of the losses they were seeking. Ms Choudhury emphasised that in Mr Altunis's case, the £656,250 payable was exactly 12.5% of the £5.25m of losses he understood

he required to offset his income for the current and previous three years. However, Mr Altunis denied that there was a link between those "maximum losses" and the payment due to Montpelier.

106. In making our findings of fact on this issue, we considered what Montpelier had said about the payments, the scheme documentation and Mr Altunis's evidence.

What Montpelier said

107. On 29 August 2007, Mr Morgan, MTM's Sales and Marketing director in London, emailed another Montpelier employee, copying Mr Dupont, saying:

> "We do have a new income scheme coming out in September. Looking at 12% as a fee. It is based on our current trading scheme which is still going strong. However, you do not need to be a trader to get the loss and it will go back three years."

108. On 8 October 2007, Mr Dupont emailed a different client, first explaining the Pendulum scheme, and then saying that Montpelier were:

> "bringing out a new arrangement which will be costed at 12% of your gross loss required. This will not require you…to do any trading in your own name…both of these ideas will enable you to carry back losses against this tax year and up to the last 3 tax years."

109. On 29 November 2007, Mr Dupont emailed other Montpelier employees, saying:

> "We are now ready to move forward on the new Alphabeta investment opportunity (NEW INCOME TAX PLAN)
>
> The first stage of the process is for clients to return appropriate sophisticated investor forms to us…
>
> Once received, the client will be sent the information memorandum. This will be followed by the loan agreement and the agency agreement which will need to be completed and returned with their 13% contribution.
>
> Any questions, please contact myself or Ryan. Good hunting!!"

110. We find that Montpelier always intended to charge clients a fee which was directly proportionate to the losses to be generated, and that the fee was to be between 12% and 13%.

Montpelier documentation

111. We next considered what the scheme documentation said about the payment.

(1) The Loan Agreement said Mr Altunis was required to provide £656,250 of his own capital to ABT "in cash and free of any charges or encumbrances"; the agreement did not specify that the sum was to be used in the trading carried out by ABT.

(2) The £656,250 was also not included in Mr Altunis's trading client account: the only sum shown as being traded by ABT on behalf of Mr Altunis was the Bayridge loan amount, see §71.

(3) In some correspondence, such as Mr Martin's email about the side letter of 3 March 2008, and the side letter itself, the 12.5% was described as "initial margin". However, Mr Dupont told HMRC that "Montpelier may have referred to it as the margin to the client but the client knew it was a cost, in reference to the loss, to enter the scheme and was not returnable". Ms Choudhury submitted that it was "highly plausible" that the "initial margin" wording was used in an attempt to avoid triggering the DoTAS notification requirements. Although the relevant legislation was not cited, at the relevant time one of the "hallmarks" was the existence of a "premium fee", and Reg 9(2) of the

Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 defined such a fee as:

> "a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is
>
> (a) to a significant extent attributable to that tax advantage, or
>
> (b) to any extent contingent upon the obtaining of that tax advantage."

112. We find that the absence of the £656,250 from the client account supports the conclusion that it was a fee, and not an "initial margin" to be used by ABT as part of its trading capital. We agree with Ms Choudhury that, on the balance of probabilities, Montpelier described it as an "initial margin" in an attempt to avoid the DoTAS regulations.

Mr Altunis's evidence

113. Mr Altunis's evidence on this point was as follows:

(1) When taken in cross-examination to the Montpelier emails about how the scheme was to be marketed, Mr Altunis said "perhaps through the channel I went through, which is my IFA, they sold it to me differently".

(2) In his witness statement, he said that the £656,250 "was never described to me as being <u>entirely</u> a fee" (his emphasis).

(3) When Ms Choudhury pointed out to Mr Altunis that the £656,250 was exactly 12.5% of the losses he expected to have available, and then asked "that is the amount which you are asked to pay in order to have access to the arrangements, do you agree with that", Mr Altunis replied "yes". Ms Choudhury continued: "what this leads us to is that the fee which you are required to pay to enter into the arrangement is determined by the amount of loss you would be able to realise. Do you agree with that?" Mr Altunis initially said the £656,250 was all "equity" which would be traded by ABT, but after Ms Choudhury twice repeated her question, he finally said "I looked at the scheme and said 'I have only got protection in the event of loss for this much' so I participated for that much".

114. Although this evidence was inconsistent and Mr Altunis was at times evasive, he did accept that he knew the £656,250 was proportionate to the maximum losses he understood he could utilise.

Conclusion

115. Taking into account all of the above, including Mr Altunis's responses under cross-examination, we find as a fact that he knew his contribution of £656,250 was calculated as 12.5% of what he understood to be the maximum loss could use to reduce his tax liability. We also find that he knew that this sum was not (or not all) used by ABT as working capital for the arrangements but that at least some of it was retained by Montpelier as a fee.

Whether Mr Altunis knew Alphabeta was a loss scheme

116. Mr Altunis said in his witness statement "I was advised that if I made a profit, great, if not the losses would result in a tax rebate" and that "while the potential for a loss was obvious, there was no guarantee given to me that there would be a loss, ever".

117. However, we find as a fact that Mr Altunis knew that Alphabeta was a scheme to generate tax losses. We come to that finding because of how it was marketed, and for the further reasons set out below.

How the scheme was marketed

118. The consistent evidence from Montpelier was that Alphabeta was marketed as a loss scheme: in the email cited at §108 above, Mr Dupont said on 29 November 2007 that it would enable users "to carry back losses against this tax year and up to the last 3 tax years", and he later described it as Montpelier's "new income tax plan". He told HMRC that clients provided him with details of the income they wished to shelter; that he passed that information on to other Montpelier colleagues, and that:

> "…clients came to Montpelier for a creative product, there was a loss they could use, and our conversations were around the losses with the majority of people interested in the tax consequences rather than entering an investment scheme with the potential for profits."

119. Although Mr Dupont also said he "would never say explicitly that there was a guaranteed loss", when he was provided with a copy of the email at §108 which described the scheme as "a new arrangement which will be costed at 12% of your gross loss required", he agreed he marketed the product in that way. It is therefore clear from the Montpelier material, and confirmed by Mr Dupont, that the scheme was marketed as a loss scheme. Moreover, Mr Dupont could not recall taking any different approach when he explained Alphabeta to Mr Altunis, albeit that the requisite percentage was 12.5%, midway between the 12% and 13% in the internal emails considered above.

120. In addition, when Mr Altunis was asked in the IUC "how did Liam Martin present Alphabeta to you" he initially replied "as a tax product". When pressed to explain what he understood by that term, he backtracked, first saying it wasn't so described, and then refusing to respond when asked if he had discussed with Montpelier how he could avoid tax on his employment income.

Other facts

121. We also rely on the following facts relating to Mr Altunis's participation in the scheme:

(1) The amount Mr Altunis agreed to pay Montpelier was £656,250, exactly 12.5% of the maximum tax loss he understood to be necessary to offset all his taxable income for the current and three previous tax years.

(2) Mr Altunis sent Montpelier a copy of his previous year's SA return when he signed up to the scheme. This was not one of the documents on Montpelier's required list. Mr Altunis said from the witness box that he had "no idea" why he had sent Montpelier a copy of that return. Sending Montpelier historic SA data is consistent with providing information relating to a carry back loss claim.

(3) The side letter was a guarantee which would take effect "in the event that HMRC does not accept that in entering into the Alphabeta arrangement you are a self employed trader trading on a commercial basis with a view to profit as per our letter of advice <u>so as to avail of loss relief</u>" (our emphasis).

(4) On 17 March 2008, Mr Dupont referred to Mr Altunis in an internal email as "the guy going for £5.25m". Mr Altunis accepted he had spoken to Mr Dupont that day, and he also accepted that he knew that £5.25m was "the maximum loss I could take advantage of if a loss materialised". We find that Mr Dupont knew Mr Altunis was "going for" a loss of £5.2m, and that amount had been predetermined based on his current and previous tax liabilities.

(5) The legislation introduced on 17 March 2008 was relevant only to losses, not to profits. The suspension of Mr Altunis's account on the date of that change is consistent with Alphabeta being a loss scheme which had been blocked by the new legislation.

(6) On 27 March 2008, before Mr Altunis had received any trading information from Montpelier, he emailed Coppergate to say "I will be claiming sideways loss relief on £5,250,000 for the current plus 3 previous years as a sole trader", and providing details of the previous three years' taxable income. The figure of £5.25m he provided to Coppergate was exactly the same as (a) that used to calculate the £656,250 and (b) the figure Mr Dupont had said he was "going for". That email is only consistent with Mr Altunis knowing that the scheme's purpose was to create losses of that predetermined value.

(7) Mr Altunis's RBS loan was described as being for "tax investment"; that description can only have come from Mr Altunis as the borrower, not from RBS as the lender. Similarly, in correspondence about his insurance (see further §127) Mr Altunis described Alphabeta as "a sole trader tax scheme".

(8) During the IUC Mr Altunis was asked whether his intention was to make a profit. He declined to answer, saying that the question "pertained to the technicalities of the structure" and he had been advised by his lawyer not to answer such questions. However, as the investigating officer said at the time, the question was not about technicalities, but "a simple question" about his intention.

Lack of credibility

122. We find that it is not credible that an intelligent person such as Mr Altunis, who held a senior role in a major city bank, would have entered into an agency arrangement with an unknown company based offshore to trade in complex financial products on an "absolute discretionary basis" including unlimited rights to delegate the trading to others, when:

(1) that company had only been established a few months earlier with a total issued share capital of only US$10m, so had no track record and insignificant reserves;

(2) the company disclaimed liability for "loss, liability, costs or expense in relation to the agreement including in respect of its trading" on behalf of Mr Altunis who was required to hold ABT "free and harmless of all consequences" to him following the entering into of the agency agreement; and

(3) Mr Altunis did not give ABT any instructions or set any limitations on what it could do as his agent, and neither did he think it unacceptable that ABT was not required to comply with any such notified limitations if they were "not reasonably practicable" or if they interfered with "its trading strategy".

123. Finally, Mr Altunis showed no interest in the transactions carried out by ABT as his agent, and filed his SA return without having received any trading information. That is not the behaviour of a person who expected the trading to be profitable, but entirely consistent with an understanding that the scheme was designed to create losses.

Conclusion

124. Based on all the above, we find that (a) the scheme was marketed to Mr Altunis as a loss scheme, and (b) he understood that to be its purpose and he participated on that basis.

Whether Mr Altunis thought the Bayridge loan was repayable

125. The terms of the Bayridge loan stated it was interest free and repayable at the end of fifty years, see §51. Mr Altunis's evidence was that his "understanding all along…was that the loan was real and enforceable". Ms Choudhury robustly challenged Mr Altunis on this point in cross-examination.

126. We find as facts that the loan was not repayable, and that Mr Altunis knew this to be the position from inception. We come to those findings having considered the points set out below.

The insurance policy

127. On 1 June 2011, Mr Altunis took out a thirty year term life insurance policy for £25m. He provided three emails:

(1) One dated 3 May 2011 headed "first draft" in which he told someone called David Schiller that he was providing "the first cut" and setting out a list of assets and liabilities. One of these was a £6m loan from ABT "related to a sole trader".

(2) Another dated 19 May 2011 to Mr Peter Gordon-Smith at Montpelier, which reads:

> "I was wondering if you can help with the following. I am in the process of increasing my life insurance, and in order to do so, I need to prove all of my liabilities. As there is a loan embedded in the alpha beta structure, I will include this as a potential liability. Can you please confirm what the maximum potential liability would be? I have the following, which appears to say it is about £2.5m, but am not sure if it is complete, or accurate to begin with. Thanks for your help."

(3) A third dated 26 May 2011, also to David Schiller, saying "please see attached Bayridge loan which is for a sole trader tax scheme amounting to £2.5mn. There is a further £3mn to this one but I can't find the doc right now".

128. Mr Altunis said he would not have included the Bayridge loan in the insurance cover had he known it was not repayable.

129. There are, however, several difficulties with his evidence:

(1) In the first email he says the loan was for £6m, and in the second, that it was for "about £2.5m" and in the third, that it was for £5m. If Mr Altunis genuinely thought the loan was repayable, it is not credible that he didn't know how much he owed.

(2) The loan was for £5.25m, so all the above amounts were wrong.

(3) Mr Altunis also describes the loan as "a potential liability" not as a "liability". Since the Loan Agreement said the loan was to be repayable after 50 years if not previously repaid, it was never a "potential liability": it was either genuine and enforceable or it was not.

130. In addition, although Mr Altunis supplied the first page of his insurance policy dated 1 June 2011, he did not provide any other pages; neither did he provide any communication with the insurer or even with Mr Schiller to show what liabilities had in fact been included when calculating the total sum insured. Instead, he only supplied these preliminary emails.

131. Taking all the above factors into account, we find that his communications about the insurance policy does not constitute reliable evidence that he genuinely believed he owed Bayridge £5.25m.

The Montpelier emails

132. The Bundle included an email dated 12 January 2005 from Mr Morgan to Mr Gittins about the original Pendulum scheme, saying:

> "I am getting a few questions about 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 paper work."

133. Mr Gittins replied the same day, saying "it is crucial to the deal that they are seen to pay the full price for the CFD". The same email was considered in *Sherrington* at [174], where the FTT noted that Mr Gittins had not said "it is crucial…that <u>they pay</u> the full price", but rather "that <u>they are seen to pay</u>". The FTT went on to find 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."

134. We agree with that finding. It is supported by another email dated 29 January 2008 from Mr Dupont to another Montpelier client (text as in original):

> "This is a comment from Watkin [Gittins] re the Alphabeta loan;
>
> re the loans the likelihood is that they wont be there at 5th April but the loss will be created by virtue of gapp. the loans are the mechanism to get the loss. although you cant guarantee this you can tell them that this is the likely outcome ie no debt at 5 April. remember that the loan is only a facility. pl advise all accordingly."

135. From the above emails we find that Montpelier knew that the Bayridge loan was "a mechanism to get the loss" and that there was no intention that the loan would be repaid by the participants.

Mr Dupont

136. It follows from our findings above that Mr Dupont, who was Mr Altunis's particular contact at Montpelier, knew the loan would never be repaid. He told HMRC that (as instructed by Mr Gittins in the email above) he "would tell clients they needed to take the loan seriously and set up a sinking fund", but would also say "who knows if Bayridge will exist later down the line", and he could not recall having marketed the scheme any differently to Mr Altunis. We find on the balance of probabilities that Mr Dupont told Mr Altunis that the loan was not recoverable.

The side letter

137. We have already found as a fact (see §58) that before participating in the scheme, Mr Altunis raised concerns not only about providing Montpelier with the £656,250, but also about the loan.

138. Mr Dupont's email of 3 March 2008 promised that Mr Gittins would confirm in writing that if the scheme did not work "any loan will be taken back with no outstanding lability to you", and the side letter similarly said "any loans from an associated company of Alphabeta will be taken over at no loss to you".

139. The side letter did not state that the loan was irrecoverable, but instead that "any loans" would not be repayable if the scheme failed. However, on the basis of the internal Montpelier emails, we find that this was because Mr Gittins did not want to say in writing that the loan was not recoverable, because it was "crucial" that participants were "seen to pay the full price".

Mr Altunis's evidence about the loan

140. Mr Altunis said in his witness statement that although the Bayridge loan "optically looked very large", he had calculated that its net present value was only about £325,000, on the assumption that interest rates would be 6% throughout that 50 year period, and that looking ahead he would have expected to be able to repay that sum in 2058.

141. This evidence was challenged by Ms Choudhury and we agree it is not reliable. There is no contemporaneous evidence that Mr Altunis carried out a time value of money calculation before he entered the scheme, and given our findings about how it was marketed to him, such a calculation would have been entirely unnecessary.

Bayridge's position

142. Mr Altunis has not had any contact or communication from Bayridge since he signed the Loan Agreement in March 2008. As noted earlier in this decision, Bayridge went into

liquidation on 1 June 2014, after its assets had been transferred to Bayridge (Isle of Man) Ltd, a company owned by Mr Gittins and his wife.

143. Mr Altunis nevertheless gave evidence at the hearing that now, over fifteen years later, he still believed he had the liability and that the liquidation made no difference because the loan could be sold to a third party which could enforce it.

144. We do not accept this evidence. In addition to our findings about what Mr Altunis was told when he entered the scheme, he also has a side letter from Mr Gittins, the owner of both Bayridge and Bayridge (Isle of Man) Ltd, which promises that if the scheme failed, the loan would not be enforced. The scheme has failed, and it follows that the loan cannot be enforced.

Overall credibility

145. Mr Altunis is a rational, intelligent person with knowledge of the financial markets generally, but with no experience of trading CFDs or dividend strips. In March 2008 he was so short of available funds that he had to borrow the scheme participation fee from Mr Gittins. It is simply not credible that he would have decided to borrow £5.25m from Bayridge in order to invest in a highly speculative derivative trading enterprise operated by a new offshore company with no trading history, unless he had understood it to be part of a loss creation scheme, in which the loan was not repayable.

THE LEGISLATION

146. TMA s 95 is headed "Incorrect return or accounts for income tax or capital gains tax", and so far as relevant reads:

> "(1) Where a person fraudulently or negligently—
>
> (a) delivers any incorrect return of a kind mentioned in section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act), or
>
> (b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or
>
> (c) submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,
>
> he shall be liable to a penalty not exceeding the amount of the difference specified in subsection (2) below.
>
> (2) The difference is that between—
>
> (a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and
>
> (b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct."

147. TMA s 100 provides that an officer of the Board "may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate".

148. TMA s 100B(1) provides a right to appeal such a penalty determination, and s 100B(2)(b) provides that the Tribunal has the following powers:

> "(i) if it appears to them that no penalty has been incurred, set the determination aside,

> (ii) if the amount determined appears to them to be appropriate, confirm the determination,
>
> (iii) if the amount determined appears to them to be excessive, reduce it to such other amount (including nil) as they consider appropriate, or
>
> (iv) if the amount determined appears to them to be insufficient, increase it to such amount not exceeding the permitted maximum as they consider appropriate."

149. Although Mr Wharrie wrote to Mr Altunis on 17 November 2020 saying he was reducing the penalty to £1,139,371, it was common ground that HMRC did not have the power under the TMA to reduce a penalty once issued, and that any reduction would be a matter for the Tribunal under s 100(2)(b)(iii).

WHETHER MR ALTUNIS ACTED FRAUDULENTLY

150. We first consider what is meant by "fraud", followed by HMRC's case and that of Mr Altunis, together with our own view.

The definition of fraud

151. The classic description of fraud is that given by Lord Herschell in *Derry v Peek* (1889) LR 14 App Cas 37 at 374:

> "Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth."

152. Our reading of this passage is that a person is fraudulent when he makes a false representation (a) knowingly or (b) recklessly, but the two are not identical. As Ms Montes Manzano pointed out, the Supreme Court in *Tooth v HMRC* [2021] UKSC 17 also indicated that there was a difference: Lord Briggs and Lord Sales, giving the only judgment, said at [47] that a "deliberate" inaccuracy required "an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement", and that "recklessness" as to the truth of a statement "perhaps" constituted a deliberate inaccuracy, although it was not necessary to decide that matter in Mr Tooth's appeal.

153. Fraud must be properly particularised and pleaded, see Lord Millett's judgment in *Three Rivers District Council v Bank of England* [2001] UKHL 16 where he said at [185]:

> "It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal…"

HMRC's case

154. HMRC had the burden of showing that Mr Altunis acted fraudulently, and we therefore asked Ms Choudhury whether they were submitting that Mr Altunis had acted fraudulently because:

(1) he had "knowingly" made a false representation in his 2007-08 SA return; and/or

(2) he had completed the return recklessly, not caring whether it be true or false.

155. Ms Choudhury said that HMRC's case on fraud "rests on" the former, and they had "pinned [their] colours to a much higher mast…and have gone for the higher level of knowing". HMRC's Statement of Case and Ms Choudhury's skeleton argument similarly said:

> "HMRC's case is that the Appellant's sole purpose in entering into the purported trade which was to be carried out on his behalf by Alphabeta was to generate a loss. Accordingly, in claiming the loss in his return on the basis that he was trading on a commercial basis with a view to profit the Appellant acted fraudulently within the terms of section 95(1) TMA 1970. In particular, he knowingly and falsely asserted that he was trading on a commercial basis and with a view to profit when he submitted his return to HMRC. He made the return on that basis despite having entered into a loss-making arrangement with Montpelier in which the fees due to Montpelier were calculated by reference to the loss he wished to make."

156. As recklessness has not been pleaded, it follows that we are unable to make a finding as to whether Mr Altunis acted recklessly. Our position is similar to that of the UT in *CPR Commercials v HMRC* [2022] UKUT 00061. The FTT had decided that CPR had acted deliberately because it had been "at least reckless". CPR appealed on the basis that recklessness had not been pleaded by HMRC, and the UT allowed the appeal, saying at [39]:

> "Although the concepts of blind-eye knowledge and recklessness as to the truth or falsity of a statement may intersect, they are clearly not identical. As we have already stated, HMRC did not ask us to consider whether an inaccuracy is deliberate where a taxpayer is reckless as to whether the document contains any errors. In the absence of any argument on the point from HMRC, and because it is not necessary for the purposes of this decision, we do not consider whether recklessness is a sufficient basis for determining that an inaccuracy is deliberate further in this decision, and make no comment either way."

HMRC's submissions

157. Ms Choudhury submitted that Mr Altunis had knowingly made a false representation in his SA return, because he had instructed Coppergate to include a claim for trading losses on the basis that he had been in business as a derivatives trader between 3 and 17 March 2008. She relied on the following:

(1) Mr Altunis knew from the documentation and advice provided to him by Montpelier that in order to make a loss claim, a person had to be "trading on a commercial basis with a view to profit".

(2) He knew he was not "trading on a commercial basis with a view to profit" because he had entered into a loss-making scheme, the fee for which was directly related to the losses he wanted to generate

(3) He obtained the side letter, which indemnified him against a finding that he was not trading with a view to profit, and he withheld that letter from HMRC and from Coppergate, so it only came to light when Montpelier was raided.

(4) The Bayridge loan was not a genuine liability, because it was understood by both parties that it would not be called on. The Loan Agreement was thus a document "executed to give the appearance of creating particular legal rights and obligations in circumstances where there was a common intention that those rights and obligations should not actually be created". It was therefore a sham, as defined in *Snook v West Riding Investments Ltd* [1967] 2 QB 786 ("*Snook*") and *Hitch v Stone* [2001] STC 214.

158. We have considered the first three of the above points together, and then the sham point, and in so doing have also taken into account Ms Montes Manzano's submissions.

Trading with a view of profit and on commercial basis

159. It was not in dispute that Mr Altunis knew that a person had to be trading on a commercial basis with a view to profit in order to have a "trade" for tax purposes. We have also found as a fact that he entered into the Alphabeta scheme in order to generate losses.

160. However, it is important to establish exactly what Mr Altunis believed. We first set out his own words, and then some extracts from the documents; all emphases are ours.

161. He said in his witness statement:

> "My understanding at the time was that I could be deemed a sole trader as this was a simple, straightforward HMRC designation. At the time, one could be a sole trader without committing to anything it seemed. This was confirmed to me by the various IFAs, and eventually by Montpelier."

162. He added that his contacts at Montpelier "assured" him he "would be deemed to be trading in such a way", and also said:

> "My understanding was that, by contracting an agent to conduct all the trading activity on my behalf without the need for me to personally place trades, the motives of the agent would pass through to me. In other words, if the agent was trading on a commercial basis with a view to a profit that I would be deemed to be trading on a commercial basis with a view to a profit. This made sense as the trades they were conducting, as agent, were ultimately my trades."

163. The same wording can be seen in the scheme documentation and the side letter:

(1) The agency agreement stated that "all transactions entered into by the company as agent will be deemed under law to be that of the trader as principal".

(2) The Information Memorandum said that "an individual trader should be regarded as in effect a sole trader".

(3) In the Counsel's Opinion, Mr Argles said "I confirm first that the trader will be regarded as a sole trader for the purposes of United Kingdom taxation and that [ABT] will be regarded as trading as the agent for the United Kingdom trader".

(4) The new client letter said that MTP's "unqualified view" was that "based on the proposed method of Alphabeta trading, you will be regarded by HMRC as carrying on the business of a sole trader in derivatives with a view to profit".

(5) The email from Mr Dupont of 3 March 2008 said "I will arrange for a letter from the Chairman, Watkin Gittins which will state in the event that HMRC do not treat you as a 'sole trader' for tax purposes".

164. This key point was encapsulated in the following dialogue between Ms Choudhury and Mr Altunis during cross-examination:

> "Ms C: Just to be clear what your understanding was, so do you accept that it was essential for you to have a motive of trading with a view to profit?
>
> Mr A: That was not my interpretation.
>
> Ms C: Was your interpretation that it was essential for your agent to have a motive of trading with a view to profit?
>
> Mr A: Primarily, yes. If my agent had a view to – I can't remember the exact language – commercial basis with a view to a profit, that I

> would be deemed to have his same motive. That's what the documentation for Alphabeta said; that's what the extract from Counsel's Opinion said; that's what I went by."

165. In summary, Mr Altunis's evidence was that he understood he was deemed to be a trader because ABT was trading on his behalf. Although we have found much of Mr Altunis's evidence to lack credibility, we accept his evidence on this issue, because it is consistent with the contemporaneous documentation provided.

166. We thus find that Mr Altunis did not submit his SA return "knowing" he was not entitled to losses. Instead, he completed it on the basis that under the scheme he was deemed to be a trader because Alphabeta was trading on his behalf.

The side letter

167. We considered whether the side letter changed the position. As set out earlier in this judgment:

(1) Despite having been told that the trading requirement would be satisfied by ABT, and that he would be deemed to be a trader because ABT was his agent, Mr Altunis was concerned by use of the word "should" in the Information Memorandum, namely that the arrangements "should" constitute a trade for UK tax purposes, and an individual "should" be regarded as in effect a sole trader.

(2) In his witness statement, Mr Altunis said "Montpelier assured me that I would be deemed to be trading in such a way…but I still had issues with the word 'should'."

(3) As a result of those concerns, he was offered and subsequently obtained the side letter. This gave him a guarantee that if HMRC did not accept that he was carrying out a trade so as to allow him to claim loss relief, Montpelier would repay his costs of entering the scheme, and the loan would be written off.

168. In summary Mr Altunis was worried that the scheme might not work, but the side letter did not give him any information to demonstrate that his worries were unfounded. Instead, it limited his personal downside risk, and he went on to file his SA return.

169. We find as a fact that once Mr Altunis had the side letter, he thought that if his concerns about the scheme were justified and it failed, his only cost would have been the £1,175 payable to MTP under the professional services agreement.

170. However, HMRC did not submit that, as a result, Mr Altunis acted recklessly, not caring whether the loss claims in his return were true or false. Instead, they based their case on the submission that he "knowingly" made a false representation. For the reasons set out above, that was not the position.

Sham

171. Ms Choudhury's submissions on this issue were brief; she said they were being made because HMRC understood from *Bayliss v HMRC* [2016] UKFTT 500 (TC) ("*Bayliss*") that HMRC needed to establish sham in order to prove their case on fraud or negligence.

172. We agree with Ms Montes Manzano that this is a misreading of *Bayliss.* As this Tribunal said in the hearing, "sham is an element of some frauds but it has to be possible to have a fraud that does not include a sham". Nevertheless, as HMRC pleaded sham, we have considered whether it is present in this case.

173. In *Snook,* Lord Diplock said:

> "I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them

> to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities…that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

174. Ms Choudhury said that:

(1) the parties to the Loan Agreement were Mr Altunis and Bayridge, a subsidiary of Montpelier;

(2) the Loan Agreement refers to the £656,250 payable by Mr Altunis as the "initial margin", whereas both parties knew it was the fee payable for entering the scheme;

(3) the Loan Agreement also says that the loan was repayable after 50 years, when both parties knew this was not the position; and

(4) the Loan Agreement and the explanation of the "initial margin" were provided by Coppergate to HMRC during the enquiry with the intention that HMRC should rely upon them as an accurate reflection of the position.

175. There are a number of difficulties with those submissions:

(1) There is a difference between a loan which the parties agree would not be collected and a sham loan agreement which did not "create the legal rights and obligations which [it gave] the appearance of creating".

(2) HMRC did not put to Mr Altunis that the Loan Agreement was a sham, but only that he did not have to repay the loan created by that agreement.

(3) The Loan Agreement does not use the term "initial margin" but instead stated that Mr Altunis had to provide £656,250 of his "own capital" to ABT "in cash and free of any charges or encumbrances".

(4) HMRC did not identify to the Tribunal any notes or correspondence between Coppergate and HMRC in which the former had put forward the Loan Agreement together with an incorrect explanation of the "initial margin", and no such notes or correspondence were put to Mr Altunis in cross-examination.

176. We thus find that the "sham" ground fails. In coming to that conclusion, we have not relied on *Carstairs*, although as Ms Montes Manzano pointed out, HMRC had conceded during those proceedings that the Pendulum arrangements entered into by Mr Carstairs were not "a dishonest sham".

Conclusion on fraud

177. HMRC failed to meet their burden of showing that Mr Altunis acted fraudulently and we decide this issue in Mr Altunis's favour.

WHETHER MR ALTUNIS WAS NEGLIGENT

178. Both parties agreed that the relevant test for negligence was that in *Anderson v HMRC* [2009] UKFTT 258 at [22], where Judge Berner said it was necessary to "consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done". That formulation was cited with approval by the UT in *Colin Moore v HMRC* [2011] UKUT 239 (TCC), and also followed in *Thomson.*

179. HMRC made a number of submissions, one of which was that a reasonable taxpayer in Mr Altunis's position would have taken independent professional advice. Ms Montes Manzano submitted that it was reasonable for Mr Altunis to rely on Montpelier.

Further findings of fact

180. In considering those submissions, we first make a number of further findings of fact, and then consider whether, in the light of those facts, Mr Altunis acted reasonably. Our findings are under the following headings:

(1) Mr Altunis's knowledge of Montpelier.

(2) The Counsel's Opinion.

(3) What Montpelier said about taking advice.

(4) The role of Coppergate.

(5) Other advice.

Mr Altunis's knowledge of Montpelier

181. Before entering into the Alphabeta scheme, Mr Altunis looked Montpelier up on Google and found the group's webpage, which said it was "a leading international provider of financial advice, wealth management advice and tax planning solutions to private and corporate clients".

182. Mr Altunis's evidence was that he understood from this that Montpelier was experienced in financial trading, and this gave him confidence that it knew about buying and selling derivatives, including CFDs. Ms Choudhury challenged that evidence, pointing out that there is no reference to financial trading on the webpage, and that there is a significant difference between wealth management services and financial trading. We agree with Ms Choudhury. Mr Altunis worked in a large bank, acting as its key link with stock market traders. We do not find it credible that he thought providing "wealth management advice" was the same as trading in the stock market, or that the webpage provided him with comfort that Montpelier was experienced in the highly specialist area of dealing in derivatives.

183. A separate webpage stated that Montpelier Europe was regulated in Belgium by the Belgian "Commission de Bancaire, Financier et des Assurances". Mr Altunis's evidence was that he understood from this that Montpelier was "regulated by a European financial markets' regulator". However he accepted under cross-examination that he had no dealings with Montpelier Europe; he knew that Montpelier was headquartered in the Isle of Man. We do not find it credible that a webpage which explicitly related to Montpelier Europe led him to conclude that the entire Montpelier operation was regulated by the Belgian regulator.

184. Mr Altunis knew from Montpelier's stationery that one of its directors was a barrister, and others were chartered accountants and chartered tax advisers. He also relied on the following material in the Information Memorandum:

(1) ABT was owned by Montpelier Holdings Ltd, the "holding company of a diversified financial services group which is responsible for the management and control of client funds in excess of £1.5 billion and has been in business since 1992";

(2) ABT's proposed auditors were Ernst & Young; and

(3) Mr Gittins was "a chartered accountant with over 30 years' experience in financial service and a director of dozens of companies".

185. Mr Altunis was introduced to Montpelier by Mr Liam Martin, an IFA regulated by the Financial Service Authority ("the FSA") who worked for the PK Group. Mr Altunis researched

that company on the internet, and established that it had expertise in financial and tax planning and wealth management.

186. We thus find that Mr Altunis's knowledge of Montpelier was based on its own web pages, on the qualifications of some of those working for the organisation, from the scheme documents, and from the fact that his IFA, who was himself regulated by the FSA and worked for a reputable firm, had recommended them.

The Counsel's Opinion

187. Mr Altunis relied on Mr Argyles' Opinion, describing it as "pivotal" to his analysis before he entered the scheme, and he understood it to have "endorsed the structure".

188. However, the document made available to Mr Altunis was headed "Extracts from Counsel's Opinion in the matter of ABT Ltd". It is plainly not the whole of the Opinion. Mr Altunis was aware of this, because he referred in his witness statement to "its brevity versus what I would have expected a full Counsel's opinion to be on such a structure". Despite that realisation, he did not ask to see the full Opinion.

189. Moreover, when he signed the professional services agreement with MTP, Mr Altunis expressly acknowledged that (a) the Counsel's Opinion with which had been provided had not been obtained for him, and (b) he knew Montpelier would arrange for him to be provided with his own Opinion at his cost. However, he issued no instructions for such an Opinion to be obtained.

What Montpelier said

190. Montpelier made a number of statements about taking advice, including the following:.

(1) The opening paragraph of the new client letter drew attention to the fact that MTP was associated with both ABT and Bayridge, and continued "therefore you may wish to seek other independent advice instead of, or to confirm" the advice set out by MTP in that letter.

(2) Clause 17 of the Information Memorandum said "if there are any doubts in relation to agency trading as discussed in this Information Memorandum, professional advice should be sought". Clause 25 stated that "a loss relief claim may have consequences for inter alia pension contributions. Trader's [sic] should therefore seek appropriate UK tax advice". After setting out various tax points, Clause 30 says:

> "the above is the company's summary of UK tax legislation insofar as concerns an individual trader carrying on a derivative or similar trade but is no substitute for taxation advice pertaining to the affairs of an individual. The company recommends that any prospective trader seeks taxation advice specific to his or her circumstances."

(3) Attached to the agency agreement was a declaration which Mr Altunis was required to sign; this included an acknowledgement that ABT had recommended the trader take appropriate professional and legal advice prior to entering into the agreement.

(4) The MTP professional services agreement stated that Mr Altunis "or his qualified adviser in his home jurisdiction" was responsible for "the making of and for the accuracy of all required returns to the tax authorities in his home jurisdiction".

191. Montpelier therefore repeatedly and clearly advised Mr Altunis to obtain independent professional advice before entering the scheme.

The role of Coppergate

192. Mr Altunis said in his witness statement that he did not "ask Coppergate to review the Montpelier scheme *in detail*" (our emphasis). We find that he did not ask Coppergate to review the scheme *at all.* We come to that finding because:

(1) Mr Altunis contacted Coppergate on 27 March 2008 to tell them he would "be claiming sideways loss relief on £5,250,000 for the current plus 3 previous years as a sole trader", and instructed them to prepare his SA return on that basis so it could be submitted "as close to midnight on 06 April as possible". He did not request any advice.

(2) Before Coppergate finalised that return, Mr Martin asked if there was "some more paperwork to go with it" but Mr Altunis did not provide Coppergate with the documents in his possession, which included the Information Memorandum; the Counsel's Opinion; the agency agreement and the side letter. Instead he responded by passing on the message from Montpelier that the return could be submitted to HMRC without waiting for the accounts.

193. Ms Montes Manzano submitted that Mr Altunis was reassured by "Coppergate's apparent failure to make enquiries and/or raise any potential concerns" before the return was filed. However, Mr Altunis did not give evidence to that effect and we reject the submission.

Other advice

194. Mr Altunis said in his witness statement that he had not asked another firm or specialist for an opinion because it could have cost "a significant amount of money" and so reduced "the risk/reward ratio of the transaction to a point where it no longer made sense". When asked by Ms Choudhury whether he had taken advice as Montpelier had suggested, he said:

> "They recommended it. No, I didn't do it. You have to understand, with lots of these contracts they will put clauses in there to protect themselves, you know, and I can have countless sets of advisers and lawyers review every single document that I am, you know [pause] One could argue I have five sets of accountants submitting my returns and going over all of this stuff, but where do you draw the line?"

195. We find that Mr Altunis did not take advice from any person other than Montpelier, because it would have been expensive.

Whether Mr Altunis acted reasonably

196. In our judgment, the reasonable person in Mr Altunis's position would have taken independent advice on the scheme from a suitably qualified tax specialist. We come to that conclusion because:

(1) He was told that the Alphabeta scheme would eliminate his entire taxable income for the current year and the three previous years by generating losses of £2.5m in no more than a month (he entered the scheme on 3 March 2008 and the tax year ended on 5 April 2008). He knew the fee was directly proportional to the losses he wished to generate. It was clear from all those elements that Alphabeta was an extremely aggressive scheme and we find as a fact that Mr Altunis realised this was the case.

(2) Montpelier, the scheme provider, repeatedly advised that he obtain independent professional advice, but Mr Altunis did not do so.

(3) Mr Altunis read the documentation and noted that it did not guarantee he would be entitled to claim the losses, but instead that HMRC "should" accept his claim. Even then he did not obtain independent professional advice, but instead entered the scheme having been assured that his fee would be refunded and the loan written off were the scheme not

to succeed. The side letter could not have removed his doubts about whether the scheme itself worked and we find that it did not do so. That is because the side letter did not seek to correct the use of the word "should" in the documentation, or provide any reassurances about whether the scheme would succeed. Instead, it addressed his personal financial risk.

(4) Mr Altunis had been provided with an extract from a Counsel's Opinion, but not the whole document. He knew that it was not a full Opinion, and commented on its brevity; he also knew it had been provided via Montpelier, the scheme provider. It was therefore not reasonable for him to rely on the Opinion, or treat it as "pivotal". Moreover, Mr Altunis was explicitly offered the opportunity to obtain a complete Opinion, but did not take up that opportunity. This was not because he was convinced the scheme would succeed, but because of the financial outlay involved.

(5) Mr Altunis had no previous experience of Montpelier, although he checked its website and took into account the professional qualifications of senior staff and of his IFA. That falls far short of the actions of a reasonable person, given all the factors set out above.

197. We therefore find that Mr Altunis was negligent because, despite the aggressive nature of the scheme and his own doubts about whether it would succeed, he failed to take independent professional advice.

Causation

198. In *Bella Figura Ltd v HMRC* [2020] UKUT 0120 (TCC)) ("*BFL*"), the UT considered the issue of causation in the context of TMA s 36. That section allows HMRC a longer time limit to issue assessments where "a loss of income tax or capital gains tax [has been] brought about carelessly". The UT in *BFL* held that the section "is concerned with the question of whether a failure to take reasonable care causes a loss of tax".

199. The wording of TMA s 95 is different from s 36 and does not use the words "brought about". Nevertheless, the FTT held in *Bayliss* at [52] that when considering whether a penalty was due under TMA s 95:

> "…an element of causation is required. The error in the return must be attributable to the fraud or negligence of the appellant. This follows straightforwardly from the wording of s 95(1) and is supported both by the obvious policy objective and by the method of calculating the penalty under s 95(2), by reference to the additional tax payable if the return had been correct."

200. In *BFL* the UT allowed BFL's appeal, holding that the FTT should have asked itself whether that company would have taken the same course of action had it taken professional advice.

201. Ms Choudhury submitted that HMRC's burden of proof cannot extend to requiring the production of witnesses to give evidence as to the advice they would have given in 2008 if, hypothetically, they had been asked. We agree. We note that in *BFL* the UT took into account only the advice which would have been given at the relevant time by the specific firm with which the company was already working.

202. Nevertheless, we accept that HMRC must show that the negligence caused the loss of tax. We therefore considered whether, had Mr Altunis taken independent professional advice, that advice would have endorsed the scheme. We have no hesitation in finding that no independent professional would have advised him to participate, because that person would have identified the following points:

(1) ABT was working as agent for principals whose only purpose was to obtain losses. The transactions ABT undertook were designed to create those losses, and no independent professional in possession of all the facts would have found that ABT was trading on a commercial basis with a view to profit. Instead, it was carrying out transactions with a view to creating losses. As a result, Mr Altunis could not be deemed to carrying out a trade for tax purposes via his agent, and the views expressed by Montpelier and in the Counsel's Opinion to the contrary were plainly wrong.

(2) The fact that the fee was calculated in advance in proportion to the losses required by the participants would have confirmed that this was an entirely artificial loss creation scheme.

(3) There were also other red flags: the scheme relied on an opaque and complex structure, operated offshore by a company with no trading record, where all participating companies were part of the same group and the losses were generated by means of a loan which Mr Altunis knew he would not have to repay.

(4) Case law of the highest authority, in particular the House of Lords judgment in *FA and AB Limited v Lupton* [1972] AC 634, confirms that courts and tribunals would take the same view. Applying the wording of that judgment to the facts of the Alphabeta scheme, it was "predominantly an artificial structure, remote from trading and fashioned so as to secure a tax advantage" where "the greater part of the transaction is explicable only on fiscal grounds", and was "in reality merely a device to secure a fiscal advantage" and its "paramount object" was to create losses for the scheme participants.

203. Consistently with the conclusion to which we have come, the FTT in *Thomson, Sherrington* and *Clavis* also found that participants in the Pendulum and dividend strip schemes were not trading, and the UT upheld the FTT's judgment in *Clavis.* Mr Martin similarly told HMRC that Coppergate would not have recommended the scheme, and Mr Cassidy said the same.

Conclusion on negligence

204. We find that Mr Altunis was negligent and that the negligence caused the loss of tax.

THE PENALTY

205. TMA s 95 provides that a penalty for "fraudulently or negligently" delivering an incorrect return cannot exceed the difference between the tax properly due, and the amount shown on the return. The current penalty provisions in FA 2007, Sch 24 use the term "potential lost revenue" or "PLR" to describe essentially the same concept.

206. Sch 24 provides for different maximum penalties for carelessness, deliberate behaviour, and for behaviour which is both deliberate and concealed. The maximum penalties for carelessness are significantly less than those for deliberate behaviour, and also depend on whether the inaccuracy "involves an offshore matter", and if so, how the relevant territory is categorised.

207. Unlike Sch 24, TMA s 95 does not set any behaviour-related parameters. HMRC's position in previous TMA s 95 penalty cases has been that the starting point is the same for both negligence and fraud, namely 100% of the PLR, albeit that negligence justifies higher abatement for "seriousness": see for example *Thomson* at [230], where the FTT accepted HMRC's methodology.

208. However, in *Bayliss,* where Judge Falk (as she then was) was sitting with Mr Bell, the FTT said at [71] that this approach was "highly questionable" as "fraud is in a quite different category to negligence", and they continued:

> "We would fully expect the percentage to vary depending on whether fraud or negligence is established, reflecting the degree of culpability, and if the appellant had been found to be negligent for s 95 purposes we would have been inclined to reduce the penalty on that basis"

209. Although those comments were *obiter,* because the FTT decided Mr Bayliss was not negligent, we respectfully agree.

210. Section 95 requires us to set the penalty at an amount which we "consider appropriate", subject only to the maximum of 100%. We are not bound by HMRC's guidance or by the fact that other tribunals have accepted that approach. We instead consider the behaviour-based approach in Sch 24 to be an appropriate guide, reflecting as it does different levels of culpability. Ms Choudhury very fairly accepted that, were we to decide that Mr Altunis had been negligent rather than fraudulent, that "would have an impact on quantum".

211. If Mr Altunis's penalty had been charged under Sch 24, the maximum would have been 45%, because all trading had been carried out in Bermuda, a Category 2 territory. We find this percentage to be an appropriate starting point for our calculation of Mr Altunis's penalty, and it is from that point that we consider whether to abate the penalty.

212. The PLR in Mr Altunis's case was £2,071,585, and 45% of that figure is £932,213.

Abatement

213. In abating the penalty, Mr Wharrie relied on Chapter 6000 of the Enquiry Manual ("EM"). We noted that this Chapter is headed "contract settlement" and relates to tax rather than penalties, but other FTT decisions show that HMRC apply an identical mitigation structure in penalty cases, so we have accepted the EM as fairly representing HMRC's established practice.

214. HMRC guidance is that abatement depends on three factors: disclosure (maximum 20%); co-operation (maximum 40%) and seriousness (again maximum 40%). We agree that these are appropriate factors, albeit that in considering "seriousness" we have considered that factor only in the context of negligence.

Disclosure

215. EM6070 states that "disclosure" means "a disclosure of irregularities, or an admission that the returns or accounts have been wrong", and "implies positive, voluntary and useful contributions to [the officer's] knowledge of the irregularities". A disclosure at a late stage may be "no more than confirmation of what [the officer has] irrefutably established".

216. Mr Wharrie originally considered no abatement was due under this heading, because Mr Altunis did not agree with HMRC's conclusions set out in the closure notice, and had only decided not to appeal because he no longer wished to continue the dispute (see §102). Mr Wharrie also noted that Mr Altunis had taken this position despite the FTT ruling in *Thomson,* released over a year earlier.

217. When Mr Wharrie reconsidered the penalty in November 2020, he allowed a 5% abatement on the basis that in October 2018 Mr Altunis had shown a willingness to settle, albeit on the technically inaccurate basis that *Cotter* applied.

218. We agree with Mr Wharrie's original view. There was no relevant disclosure, and no acceptance by Mr Altunis that the losses were not allowable. Although HMRC invited full disclosure in their letter of 18 July 2018, the offer to settle made in the following October was based on a misunderstanding of the case law; when this was pointed out by Mr Wharrie in November, Mr Altunis did not concede the position; it was instead HMRC who brought the case to an end by issuing the closure notice some eight months later. This remained the position

at the hearing: Ms Montes Manzano's skeleton argument refers to Mr Wharrie "purportedly establishing a tax difference of £2,038,057". We give no abatement for disclosure.

Co-operation

219. HMRC's guidance at EM605 includes the following passages:

> "The abatement you give should reflect the extent to which the taxpayer has been prepared to co-operate throughout the enquiry, and thus help bring it to a speedy and accurate conclusion.
>
> The time taken to reach a settlement, in so far as it has been influenced by the actions of the taxpayer or his agent, will therefore be the starting point for your consideration of abatement.
>
> It should be recognised that
>
> - it will inevitably take longer to settle a taxpayer's affairs where they are more than ordinarily complicated, and
> - the length of the enquiry period is often influenced as much by the enquiry officer as by the taxpayer."

220. Mr Wharrie originally mitigated the penalty by 10% for co-operation, on the basis that:

(1) responses to HMRC's questions were incomplete, regularly delayed and required HMRC to issue a Sch 36 Notice; and

(2) Mr Altunis had not supplied key information to HMRC, and in particular had not provided the side letter or information about the calculation of the payments made to Montpelier, and this obstructed the timely resolution of the enquiry.

221. When Mr Wharrie reassessed the position on 17 November 2020, he increased the mitigation to 30% because Montpelier and Coppergate had conducted the earlier correspondence "without Mr Altunis' direct involvement or [his] approval of the responses": Mr Wharrie said this changed his "initial assessment of one of direct obstruction to one of indirect omission by Mr Altunis".

222. We have already found that (a) many of HMRC's questions related to the mechanism of the scheme, so that Mr Altunis was wholly reliant on Montpelier to provide the answers to those questions, and (b) Mr Altunis regularly chased Montpelier via Coppergate when deadlines were approaching. The significant delays during the later period of the enquiry were the result of the criminal investigation and not caused by any failure to co-operate. However, Mr Altunis did not inform either Coppergate or HMRC about the mechanism for calculating the fee payable to Montpelier, and this was highly relevant to the trading question. Taking into account all those factors, we decided Mr Wharrie's revised figure was correct and have allowed 30% for co-operation.

Seriousness

223. HMRC's guidance at EM6080 states that the relative and absolute size of the error are relevant factors, as is "the degree of culpability ranging from a minor degree of negligence to a case of serious fraud". By setting a start point of 45%, we have already taken into account that HMRC have not proved fraud; we have thus considered only the seriousness of Mr Altunis's negligence.

224. Mr Wharrie allowed mitigation of 10% under this heading; he said this was because the size of the inaccuracy was large in both relative and absolute terms. However, we were unable to understand why *any* abatement had been given under this heading. The losses claimed of

£5,250,858 were sufficient to eliminate Mr Altunis' entire 2007-08 income of £3,221,554 with over £2m of losses carried back.

225. We find that the inaccuracy was very serious, both because it was designed to wipe out all Mr Altunis's taxable income for both the current year and the three prior years, and also because of the absolute size of the losses claimed. We give no reduction under this heading.

Overall conclusion on the penalty

226. From our starting point of £932,213 we have allowed a reduction of 30% for co-operation, and we find the resulting penalty of £652,549 to be appropriate. This compares with an original penalty of £1,657,268 and Mr Wharrie's reduced figure of £1,139,371.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

227. 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 REDSTON
TRIBUNAL JUDGE

Release Date: 15 August 2023