Neutral Citation Number: [2019] EWHC 1505 (Ch)

Case No: HC-2016-003579

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 June 2019

Before :

JUDGE ELIZABETH COOKE
sitting as a Deputy High Court Judge

- -

Between :

(1) Sir Christopher Evans	**Claimants**
(2) Lady Anne Evans	
- and -	
PricewaterhouseCoopers LLP	**Defendant**

- -
- -

Nigel Jones QC, Laurence Page (instructed by CGS Legal) for the Claimants
Graham Chapman QC, Pippa Manby (instructed by Herbert Smith Freehills LLP) for the Defendant
Hearing dates: 26, 27, 28 March 2019

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JUDGMENT

Judge Elizabeth Cooke:

1. The Claimants seek damages in negligence and breach of statutory duty arising from tax advice given by the Defendant as their accountant. The Defendant says that both causes of action are barred by limitation and has applied to strike out the action on that basis, or alternatively for summary judgment. This is my decision on that application and, because that application is refused, on further applications to re-amend the Defence and the Particulars of Claim by the Defendant and the Claimants.

2. I heard the applications in the Rolls Building on 25 to 27 March 2019. The Claimants were represented by Nigel Jones QC and Laurence Page of counsel,

and the Defendant by Graham Chapman QC and Pippa Manby, and I am grateful to them all for their assistance.

The factual background

3. The following facts are not in dispute save where indicated. I have been assisted by the agreed chronology that the parties have provided.

4. The First Claimant is the settlor of the Solidum Trust ("the Trust"), which was established in 1992; the two Claimants are both trustees and beneficiaries of the Trust. The Defendant has been the accountant and tax adviser to the Claimants.

5. The Defendant was incorporated on 9 December 2002. Before that date the Claimants were advised by PricewaterhouseCoopers United Kingdom, a traditional partnership to which I refer, later in this decision, as "the Partnership". For the moment, however, I ignore the fact that the Defendant itself cannot be liable for anything done before its incorporation; I address that difficulty later when I come to the parties' applications to re-amend their pleadings. Until then I refer to "the Defendant" without distinguishing between the Partnership and the LLP incorporated towards the end of 2002.

6. In 2000 the trustees of the Trust were resident in the Isle of Man. The trustees wanted to sell the Trust's shareholding in Abbotsford Ltd, in order to release cash for the First Claimant, but the shares had increased in value considerably since their purchase. Capital Gains Tax was going to be payable by the First Claimant as settlor of the Trust pursuant to section 77 of the Taxation of Chargeable Gains Act 1992. The Defendant advised the adoption of a "Round

the World" scheme. The essence of such a scheme was that the trust would become resident for part of the tax year in a jurisdiction that did not tax capital gains; later in the year it would move back to the UK, and the effect of the provisions of the relevant double taxation treaty would be that no, or very little, tax would be payable on the capital gain.

7. The Defendants' plan in 2000 was for the Trust to use Mauritius as the overseas jurisdiction, and took leading counsel's advice about that. In July 2000 Kevin Prosser QC gave advice to the Defendant on the telephone, and again in conference in December 2000. He advised that the Inland Revenue (as it then was) was likely to look very closely at such a scheme, but took the view that it should work provided that the shares were sold for cash. The Defendant relayed that advice to the trustees and to the Claimants, but suggested Canada rather than Mauritius on the basis that there might be small amount of tax payable on the gain (for the period between the trust's move to Canada and the disposal) but that this was worth it for the sake of reducing the "smell factor" in the transaction (I quote from a letter from Mr Brian Dunk, then an employee of the Defendant, to the trustees on 21 March 2001).

8. That switch from Canada to Mauritius is what the Claimants say the Defendant got wrong. The reason for that is as follows. A "Round the World" scheme was intended to ensure that the capital gain was not taxable in the UK by making use of the provisions of the relevant double taxation treaty. The treaty with Mauritius ensured success of the scheme, according to the Claimants, because it provided that in a case where the Trust had been resident during a tax year both in the UK and in Mauritius, the capital gain would be

taxable in the “place of effective management” of the trust. This is known as a “tie-breaker” provision. Provided that the trustees made sure that that place was Mauritius, the capital gain would be liable to tax in Mauritius, which meant that no tax would be chargeable. However, the tie-breaker provision in the UK/Canada double taxation treaty was different. Article 13(6) of the Double Taxation Relief (Taxes on Income) (Canada) (Order) 1985 (SI No. 1996) provided that in these circumstances the competent authorities (the Inland Revenue, now HMRC, and the Canada Revenue Agency) should endeavour to determine by mutual agreement where the Trust was resident and which authority should tax the gain. Such an agreement could be challenged only on public law grounds.

9. Accordingly, according to the Claimants, had the Trust moved to Mauritius it would have been possible to ensure the “right” answer for the Trust by fulfilling an objective criterion, namely making sure the place of effective management was Mauritius. But the jurisdiction chosen was Canada, where there was no such objective criterion and the two taxation authorities were able to – as Mr Jones QC put it – chat among themselves, and with very little scope for the Trust to challenge the agreement they reached.

10. The Defendant disagrees. It says that the advice given was correct but that the scheme was doomed, not because of anything in the double taxation treaty but because of the effect of the Court of Appeal’s decision in *Revenue & Customs Commissioners v Smallwood* [2010] EWCA Civ 778. Which of the parties is right about that will be the central question at trial and is not relevant to the application before me.

11. Reverting to the facts, in accordance with the Defendant's advice on 5 April 2001 the trustees resigned; the Royal Trust Corporation of Canada ("RTCC") was appointed in their place (so as to have the Trust resident in just two jurisdictions during the tax year). Then on 9 August 2001 the shares in Abbotsford Ltd were sold, at an arm's length price of £5,480,719, to the Ectoplasm Trust, of which the Claimants were beneficiaries but neither was a settlor. The third step in the scheme was taken on 18 December 2001 when RTCC resigned and the Claimants, who are resident in the UK, were appointed trustees.

12. The Defendant prepared the First Claimant's self-assessment tax return for the tax year 2001/2, setting out the details of the disposal of the shares and claiming relief from capital gains tax on the basis of the UK/Canada double taxation treaty. On 5 April 2005 HMRC opened an enquiry into the tax return.

13. On 17 December 2013 the Canada Revenue Agency wrote to HMRC to the effect that (i) the Trust was not resident in Canada for tax purposes from 6 April to 18 December 2001 and (ii) that in any event the UK could tax the gain realised by the Trust on the sale of Abbotsford. The Claimants say that they did not see this letter until 2015.

14. On 25 March 2014 HMRC issued a closure notice to the First Claimant directing an amendment to his 2001/2 tax return to show (i) a capital gain of £4,932,647 and (ii) a tax liability of £1,996,058.50. The First Claimant appealed, and in June 2014 the tax liability was confirmed; an HMRC departmental review upheld that confirmation in September 2014.

15. The First Claimant appealed HMRC's review decision to the First-tier Tribunal (Tax Chamber). On 29 November 2016 the First Claimant entered into a settlement to pay HMRC £3,331,364, being the tax liability together with statutory interest.

16. The Claimants say that the Defendant advised them to enter into a scheme that did not work. They say that the Defendant was negligent, and in breach of its duty under the Financial Services and Markets Act 2000. Initially they also claimed for breach of contract, but that claim is not pursued. They claim the sum agreed on 29 November 2016, any further interest incurred as a result of later payment, professional fees, interest on borrowings to meet the tax liability, and so on; alternatively, if it is found that no effective scheme could have been entered into in 2001 to prevent the tax liability, they claim all their losses apart from the charge to tax itself.

The law

17. CPR Rule 3.4(2)(a) and (b) provides:

> "The Court may strike out a statement of case if it appears to the court -
>
> > (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
> >
> > (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

18. CPR Rule 24.2 provides:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or a particular issue if –

> (a It considers that (i) that Claimant has no real prospect of succeeding on the claim or issue; …
>
> (b) There is no other compelling reason why the case or issue should be disposed of at trial."

19. The Defendant has applied under both rules on the basis, and only on the basis, that the claim is barred by limitation and therefore cannot succeed. There is no suggestion of an abuse of process in any other sense.

20. It is uncontroversial that a statement of case may be struck out if it is bound to fail or where the pleaded claim is not valid as a matter of law. Summary judgment is appropriate where the Claimant has no real prospect of success (*Three Rivers DC v The Governor & Company of the Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1, Lord Hope at paragraphs 94 – 95), for example where even if the Claimant were to prove all the facts he or she sets out to prove, he or she will not be entitled to the remedy sought. In this case the Defendant says that the claim is so obviously statute-barred that there are no reasonable grounds for bringing it and it stands no realistic prospect of success.

21. In substance, in this case, the test for the two alternative applications is the same, and in what follows, for brevity, I refer to them together as "the strike-out application". In determining that application I have to decide whether the Claimants have a realistic prospect of resisting the limitation defence.

22. Section 2 of the Limitation Act 1980 provides:

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

23. Section 9 imposes the same limitation period for the recovery of sums due under statute. It is uncontroversial that a cause of action in negligence and a cause of action for breach of statutory duty both accrue only when there is both a breach of duty and actionable damage.

24. Section 14A of the Limitation Act 1980 is relevant only to the cause of action in negligence:

> "(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2) Section 2 of this Act shall not apply to an action to which this section applies.
>
> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4) That period is either—
>
> (a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

25. Accordingly, if the cause of action in negligence accrued more than six years before the commencement of proceedings on 14 December 2016, the action is nevertheless brought in time if the Claimants did not have the knowledge

required for bringing an action, as described in section 14A, before 14 December 2013.

26. Section 14B of the Limitation Act 1980 makes a further provision in relation to claims in negligence:

> "(1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—
>
> > (a) which is alleged to constitute negligence; and
> >
> > (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).
>
> (2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that—
>
> > (a) the cause of action has not yet accrued; or
> >
> > (b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;
>
> before the end of the period of limitation prescribed by this section."

27. Section 14B imposes a long-stop. The Claimants cannot bring an action in respect of a breach of duty more than 15 years old at the date proceedings

were issued, even if at that date no damage had arisen from that breach of duty.

Do the Claimants have a realistic prospect of resisting the limitation defence?

28. Proceedings were issued on 14 December 2016.

29. There are several possible dates upon which time might begin to run against the Claimants, and there is more than one way in which they might resist the limitation defence. It is convenient to look at section 14B, then at section 2 and finally at section 14A of the Limitation Act 1980 in order to capture all the possibilities.

Section 14B of the Limitation Act 1980

30. Mr Jones QC for the Claimants accepted that any breach of duty occurring before 14 December 2001 (15 years before proceedings were issued) is no longer actionable in negligence. He acknowledges that it is not possible therefore to sue in respect of advice given before that date. At the hearing he produced draft Re-Amended Particulars of Claim, to which I refer as "the coloured draft" (I have to revert to it later in connection with Claimants' application to re-amend). In the coloured draft paragraphs 48.2, 48.11 and 48.12 are deleted in acknowledgment of the effect of section 14B, and accordingly there is nothing else I have to decide in respect of section 14B.

Section 2 of the Limitation Act 1980

31. For the Defendant it is said that nothing survives section 14B because any cause of action in negligence and breach of statutory duty had accrued before

14 December 2001. Mr Chapman QC argues that the cause of action accrued at the latest on 9 August 2001 when the shares were sold. From that point on the die was cast, the scheme had been adopted, the position of the trust and the Claimants had been changed in reliance upon the Defendant's advice, and damage had therefore been suffered (even if it was at this stage hard to quantify). If that is right, the causes of action in both negligence and breach of statutory duty cannot succeed. If that argument fails then, according to Mr Chapman QC, in any event the damage accrued at the latest when the Claimants became trustees on 18 December. The action for breach of statutory duty must therefore fail, and the action in negligence too unless it can be saved by section 14A (and the Defendant says that it cannot).

32. Mr Jones QC for the Claimants makes a number of points in response.

33. First, he points out that the advice that led to the sale in August 2001 is not the last breach of duty alleged by the Claimants. He points to the allegation of continuing failure, until the Defendant ceased to act for the Claimants in 2011, to advise the Claimants that the scheme they had adopted was not as reliable as would have been the Mauritius scheme, and to the failure to advise them to pay the tax rather than incur further interest and penalties. He points to the Claim Form, which alleges breaches of duty from 1999 to 2015 and failure to advise the Claimants after the events of 2001, and to the Particulars of Claim where the allegations, in paragraph 48, of failure to warn the Claimants of the risk of a charge to tax are not limited in time.

34. That continuing series of breaches – if proved – clearly extends into the six years prior to the commencement of proceedings, because the retainer

continued beyond 14 December 2010. I take the view that if the Claimants are able to show, at trial, that the Defendant's advice to enter into the Canada scheme was negligent, then it is clearly arguable by the Claimants that there were continuing breaches of duty on the part of the Defendant after 14 December 2010, in view of the continuing retainer, and that those breaches caused damage. That argument may not succeed, but it is not fanciful.

35. On that basis alone the action cannot be struck out. But if that was the Claimants' only arguable win on limitation, the action that survived would be a shadow of its former self, being a claim for just part of the statutory interest payable and perhaps also professional fees. To get to the heart of the issue on limitation I have to engage with the Claimants' two further arguments: first, that one or more breaches of duty by the Defendant on or after 14 December 2001 caused the tax liability and, second, that the Claimants suffered no damage as a result of that breach until HMRC issued its closure notice on 25 March 2014 (or at the earliest when the Canada Revenue Agency wrote to HMRC on 17 December 2013). If those two arguments have a realistic chance of success then the actions in negligence and breach of statutory duty cannot be struck out.

36. As to the first point, the Claimants say that the Defendant was in breach of duty in arranging the change of trustees on 18 December 2001, and in completing the First Claimant's self-assessment tax return for that year, and thereby caused the liability to tax to arise.

37. The Claimants have not explained how the completion of the tax return was negligent, and it is not mentioned in the Particulars of Claim. I regard the

allegations about the tax return as speculative and without substance. Leaving that aside, the crucial point here is whether the last relevant breach of duty took place when the shares were sold in August 2001, or whether the Claimants have a realistic chance of showing that the Defendant was in breach of duty right up to and including the date on which the Claimants were appointed trustees (as is said in the Particulars of Claim at paragraph 48.12). I take the view that that is clearly arguable. The sale of the shares was a central ingredient in the scheme but it was not the final ingredient. What the Claimants are saying is that having given bad advice throughout the year, between 14 and 18 December 2001 the Defendant was under a duty to say "Stop. Do not complete the scheme we advised. It will not work and we advise you to do something different". Mr Jones QC pointed out that there is no evidence that the appointment of the Claimants as trustees on 18 December 2001 was inevitable or unavoidable, and that no UK tax was payable absent that appointment.

38. So I accept that first point. The scheme was not finished in August, the circle had to be completed by the return of the trust to the UK, and if the Defendant had been negligent in setting up the scheme it was arguably in breach of duty in allowing the Claimants to complete a faulty scheme and failing to advise the Claimants of what it had done wrong.

39. The difficult point is the second one. If the Defendant was negligent and in breach of duty on 18 December 2001, was the damage caused there and then, or not until 2013 or 2014?

40. The Claimants' argument on this point focuses on the decision of the House of Lords in *Law Society v Sephton & Co (a firm)* [2006] 2 AC. The Defendant in that case had prepared and certified a solicitor's accounts over a period of several years and had failed to report that the solicitor was misappropriating clients' money. Eventually some of those clients made a claim on the Solicitors Compensation Fund, and the Law Society then sued the Defendant in negligence. The House of Lords had to decide whether the action was statute-barred, which depended upon whether damage was caused each time the solicitor misappropriated money, or only later when each claim was made.

41. It was held that the damage was caused, and the cause of action accrued, each time a claim was made. Before that point there was a purely contingent liability. Any particular client might in the end not have lost money (because the solicitor was moving money around office and client accounts), or might not have made a claim. Only when a claim was made was there a loss; up until then there was only a risk. The Law Society could not have sued before then, even on the basis that it was likely that there would be a claim (Lord Hoffmann at paragraph 9). Lord Walker at paragraph 43 spoke of the need for the claimant to be "financially worse off". The decision establishes that a pure contingency does not amount to damage so as to make a cause of action accrue.

42. However, their Lordships also emphasised that where a claimant has acquired or taken on a "package of rights" less valuable than he or she was entitled to expect, or where an asset has diminished in value, or the claimant's legal position has been changed, then damage has accrued even if it cannot be

precisely quantified (Lord Walker at paragraphs 45 and 48, Lord Mance at paragraph 76).

43. Mr Jones QC argues that the Claimants suffered no damage until a decision was taken to charge the tax. Until then, the Claimants were at risk, as was the Law Society in *Sephton*. But that risk might never have become a reality. The decision whether the UK would charge tax was a matter for the UK and Canada revenue authorities to agree, and their agreement could be challenged only on public law grounds so that they had (within reason) a free choice. So far as the Claimants were concerned there was simply a risk of the two authorities deciding that the UK could tax the gain (as indeed they did).

44. Mr Chapman QC argues that the Claimants have pleaded expressly that damage was suffered before December 2001, by referring to the "implications" (point (4) of the Claim Form) of what was done earlier in the year, and to the adoption of the Canada scheme as problematic (paragraph 48 of the Particulars of Claim, paragraphs 13 and 18 of the Reply). He also seizes on the words of paragraph 27 of the Particulars of Claim where it is said that the claim for double taxation relief "had no real prospect of success if challenged by HMRC". I am unimpressed with those points, which seem to me to take words out of context and to be a mischaracterisation of what the Claimants say. But his substantive argument is that this is not a case of purely contingent loss. He agrees that a pure contingency without more is not normally actionable damage, but points out that a contingency together with some other change in position or in legal rights will constitute actionable damage. In a number of cases *Sephton* has been distinguished on that basis.

45. A useful distinction found in those decisions is between the "no transaction cases" (where the Claimant would not have entered into a transaction at all but for the advice), the "wrong transaction" cases (self-explanatory), and the "other" cases which did not involve advice leading to a transaction, of which *Sephton* itself is an obvious example. In the "wrong transaction" cases – like this one – the courts tend to find immediate damage on entry into the transaction, because the claimant has the wrong package. An asset is bought that does not match what was wanted, or the claimant has lost commercial flexibility or changed their legal position.

46. *Pegasus Management Holdings SCA v Ernst & Young* [2010] EWCA Civ 181 was a "wrong transaction" case. An individual, B, and a company sued a firm of accountants for negligent tax advice. A cause of action arose once B had taken advice designed to mitigate a capital gains tax liability by making use of roll-over relief and had, as advised, incorporated the company in order to have the company reinvest the capital gain in healthcare businesses, which were "qualifying investments" under section 164A of the Taxation of Chargeable Gains Act 1992. But because B arranged for the company to buy shares in the healthcare businesses, rather than to acquire the assets of those businesses, the company would be exposed to a large capital gains tax liability when it disposed of those shares. The problem could have been avoided if the Defendant had advised B to ensure that the company incorporated and funded subsidiaries to acquire the healthcare businesses.

47. In *Pegasus*, therefore, the Claimant adopted the wrong scheme. Rimer LJ, with whom Sir John Chadwick and Potter P agreed, explained that B was left,

as a result of the advice, in a materially worse commercial position than he would otherwise have been. There would have been other ways to avoid the tax, until the end of the relevant tax year, but B's options were restricted and the other methods might have proved impracticable. What he bought was worth what he paid, but he got the wrong package; he did not acquire a company with characteristics that would have prevented the tax charge from arising (paragraph 81). The damage was the Defendant's failure to achieve for the Claimant what he was entitled to expect (paragraph 84). Damage was suffered even though precise quantification was not initially possible (paragraph 85).

48. Other cases employ a similar analysis. In *Foster v Outred* [1982] 1 WLR 86 the claimant suffered damage when she executed a mortgage (pursuant to negligent advice) rather than when the demand for repayment was made. In *Baker v Ollard & Bentley* (1982) 126 SJ 593 CA the Claimant purchased property on a basis that did not give her the security she wanted, as a result of negligence advice about the tenure to be taken. Damage was suffered on acquisition, and not later when she was unable to resist a sale of the property. In *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863 the Claimant was given incorrect advice about a pension; damage was suffered when he acquired the wrong pension plan rather than later when it proved incapable of meeting his expectations. *Halsall v Champion Consulting* Ltd [2017] EWHC 1079 (QB) was another case where the wrong tax avoidance scheme was adopted, and damage occurred when the scheme was adopted and a company acquired rather than later when tax was charged.

49. I have to decide whether the Claimants have an arguable case that this was a potential loss, a pure risk, and analogous with *Sephton*, rather than a case where they entered the wrong transaction, got the wrong deal, changed their position and suffered an immediate loss even though the full extent of that loss was not clear until later.

50. Certainly the comparison with *Pegasus* is enticing. *Pegasus* was a case, like this one, where the wrong tax advice was given and the Claimant got the wrong package. And in general in the "wrong transaction" cases damage is suffered when the transaction is entered into.

51. However, I am not convinced that this case is on all fours with those "wrong transaction" cases. In all those cases there was a measurable loss, even if the full extent of the loss was not clear. A pension scheme was not going to deliver what was wanted. A mortgage was unsecured. A company, or an interest in land, was acquired in a form that could not deliver the benefits sought. These are actual losses and are to some extent measurable. There need not be finally quantifiable damages, but there must be actual damage. By contrast, in the present case nothing was acquired; it has not been shown that what happened in 2001 restricted commercial options for the future (although it may be that after full argument at trial it can be shown that that was the case). Shares were sold, cash was released, and all that the Claimants took on was a risk. Tax might or might not be charged, depending upon the agreement of the two revenue authorities. Arguably that is a pure contingency. No suggestion has been made as to how the situation in which the Claimants were

placed after December 2001 could be valued. A risk can be valued, but a risk by itself is not damage.

52. It is said that the uncertainty as to the tax charge in *Pegasus* did not matter, and that the damage had accrued because commercial flexibility had been lost. But the uncertainty in *Pegasus* was of a different order from that seen in this case; in *Pegasus* it was certain, because of the corporate structure adopted, that there would be a tax charge if the shares in the healthcare businesses were sold unless different measures were taken before the end of the tax year; and the resulting loss of commercial flexibility is obvious. But in the present case it could not have been known until 2013, or perhaps 2014, that tax would be charged. Until then the outcome was unknown because it depended upon the unpredictable outcome of a future conversation between the CRA and HMRC.

53. In the present case there was no difficulty of quantification once the tax liability became a reality; at that point tax was payable at a known rate on a known gain. But nothing was payable until the CRA and HMRC reached their agreement in 2013, and (on the Claimants' case) they might have made a different agreement. Once they reached it, then indeed the tax was inevitable, and so I am unimpressed by the technical point, stressed by Mr Jones QC, that nothing was payable until the closure notice itself was issued. Once the CRA sent its letter in 2013 then tax was going to be payable; that was a reality not a risk.

54. Another way of looking at this is to ask if an action could have been brought before 2013. In *Pegasus* the Claimants could have sued once the acquisition of the healthcare businesses was complete; what they had was not simply a

situation, but a package of assets with known characteristics. In the present case it is not at all clear that the Claimants could have brought an action before 2013. True, in 2005 HMRC had opened an enquiry, as the Claimants had been told to expect, but there was no sign of any liability to tax. Up until the CRA's letter of 17 December 2013 the point could have gone either way and the scheme might have worked.

55. Accordingly I take the view that the Claimants have an arguable case that the causes of action in negligence and in breach of statutory duty did not accrue until 17 December 2013.

56. Mr Chapman QC was anxious that I should make a final decision on when the causes of action accrued, rather than simply deciding the strike-out application by saying whether or not the Claimants have an arguable case. I take the view that I cannot properly do so without having heard full argument about the advice given by the Defendant and about the cause or causes of the failure of the scheme, assuming for the purposes of this application that negligent advice was given. It may be that a Canada scheme was bound to fail. It may be that there were ways in which it could have been made to succeed. Evidence and disclosure is not yet complete, and it is important that I should not pre-empt what happens at trial. So I say only that it is realistic for the Claimants to argue that damage was suffered, and the cause of action accrued, in 2013.

57. On that basis the strike-out application fails.

Section 14A of the Limitation Act 1980

58. In case I am wrong about that, I turn to section 14A of the Limitation Act 1980. If the cause of action in negligence accrued prior to 14 December 2010 (as it will if the Claimants fail at trial to show that damage was not suffered until 2013, save in respect of any continuing breaches of duty in the period from then until the end of the Defendant's retainer in 2011), then section 14A may save the negligence action if the Claimants can show that they did not have "the knowledge required for bringing an action in damages" before 14 December 2013, being three years before the claim was issued.

59. For the Claimants it is said that they had no idea that there was going to be any capital gains tax liability on the sale of the Abbotsford shares until the closure notice on 25 March 2014, and no reason to investigate the Defendant's advice until the letter from the CRA was disclosed to them on 6 February 2015. This is set out in the Reply to the Defence at paragraph 3.8.

60. For the Defendant it is argued that the Claimants must have been aware of the problem long before. To begin with there was the HMRC investigation, which began in April 2005. However, the Claimants had been advised by leading counsel that HMRC would look very closely at the disposal of the shares and I take the view that the enquiry, even if the Claimants were told of it, would not have indicated to them that there was a problem with the advice given to them.

61. Next, it is said that the Claimants must have been aware of the *Smallwood* decision. The Claimants' Reply to the Defence says at paragraph 3.8.2 that they were not, and the witness statement of their solicitor, Mr Sanger, dated 29 May 2018 reiterates that. But in any event, the strike-out application has to be

addressed by taking the Claimants' case at its highest, and their case is that *Smallwood* made no difference to their liability and was not a cause of it. Mr Chapman QC conceded at the hearing that knowledge of *Smallwood* is irrelevant to the section 14A point.

62. Finally it is said that the evidence put forward for the Claimants in support of their argument on section 14A is nowhere near adequate to demonstrate at trial that they did not have the requisite knowledge until March 2014. There is a witness statement from their solicitor but not from either of the Claimants themselves (although the hearing bundle includes a witness statement made by the First Claimant in support of his appeal to the First-tier Tribunal in response to the tax charge).

63. For the purposes of this application I have to take the Claimants' case at its highest and must take the evidence submitted for the Claimants to be true. I must, for the purpose of this application, accept the truth of their solicitors' statement that the Claimants did not know about any possible Capital Gains Tax liability until March 2014. I do not accept that the absence of a witness statement from the Claimants themselves at this stage casts any doubt upon what is said on their behalf or by their solicitor.

64. On that basis the strike-out application in respect of the negligence action must fail because the Claimants have a realistic chance of resisting the limitation defence on the basis of section 14A. What will emerge at the trial, after further witness evidence has been exchanged and after cross-examination, is not known, but for now the evidence given for the Claimants is that they had no idea of any problem until March 2014. There might well be argument as to

whether they knew enough to bring an action in 2014, or not until 2015, but that does not matter for the purposes of this application.

65. On that basis as well, therefore, the strike-out application fails.

The Defendant's application to re-amend its defence

66. I explained at paragraph 5 that I was going to ignore, for the purposes of the strike-out application, the fact that the Defendant was not incorporated until 9 December 2002 and therefore did not exist at the time of the earliest breaches of duty alleged. I now have to turn to that problem, and for the purposes of the rest of this decision my references to "the Defendant" are to PricewaterhouseCoopers LLP. Occasionally I refer to it as "the LLP" where the context requires it.

67. Proceedings were issued on 14 December 2016 and served on the Defendant, right up against the deadline, on 13 April 2017. In its Defence, served in August 2017, the Defendant made no mention of the date of its incorporation and admitted that it had been the entity that gave the advice from 2000 onwards. The Particulars of Claim and Defence were amended by agreement later in 2017. On 17 May 2018 the Defendant's solicitors wrote to the Claimants', to say that it had come to their attention that the LLP was incorporated on or around 9 December 2002 and to ask what they proposed to do about that. There is no evidence that the delay in bringing this point to the Claimants' attention was deliberate. The Claimants' solicitors replied that any re-amendments necessary could be addressed following the outcome of the Defendant's strike-out application (which was then due to be heard by Master Price).

68. After that hearing there was some inconclusive correspondence about the possibility of agreeing re-amendments, and on 13 June 2018 the Defendant applied to amend its Defence, if and only if the strike-out application failed. Its amendments are set out in a draft and consist of new paragraphs 3.1A, 4.1A and amendments to paragraph 6 stating that the Defendant was incorporated on 9 December 2002 and started providing professional services to clients on 1 January 2003.

69. The Claimants resist that application; they have applied for judgment to be entered on the Defendant's admissions, but abandoned that at the hearing. The Defendant cannot amend the defence without permission (CPR rule 17.1 (2)). Considerable time was spent in argument as to whether the amendment that the Defendant wants to make should be considered as an ordinary amendment under CPR rule 17 or as the withdrawal of admissions under CPR rule 14, on the basis that this would affect the basis on which permission might be granted. However, the Defendant accepts that, as the White Book states at 17.3.5:

> "In considering whether to permit amendments withdrawing an admission previously made in a statement of case [which here includes a defence] the court must have regard to rule 14.1 and the practice under that rule."

70. The effect of that is that I must take into consideration the prejudice, if any, caused to the Claimants if the Defence is re-amended; that prejudice is the only basis on which the Claimants seek to resist the application whether under CPR Rule 14 or Rule 17.

71. In order to assess whether the re-amendment will cause prejudice I have to return to the issue of limitation. It is well-established that if one defendant is

substituted for another, proceedings are to be regarded as having been issued against the substitute defendant on the date when they were issued against the original defendant (White Book 2018, 19.5.1). That is not the case if a new defendant is added alongside the existing one.

72. Accordingly if the Defendant is allowed to say that it did not exist before 9 December 2002 and did nothing before 1 January 2003, and so withdraw its various admissions as to having been the Claimants' adviser before then, the Claimants can choose to apply for permission either to add the Partnership as a second defendant or to substitute the Partnership for the Defendant. The Claimants applied on 11 July 2018 to add the Partnership as a second defendant if the Defendant's application to re-amend the Defence succeeds. The way that that application has been argued has been confused and confusing. Mr Sanger's witness statement says that but for the mistake, both the Partnership and the Defendant would have been sued from the outset, which appears to suggest that the Partnership was to be added as a further defendant. However, a "mistake" is relevant only to substitution.

73. On more than one occasion on the first day of the hearing Mr Jones QC confirmed that the Claimants sought to add the Partnership, because it did not wish to lose the LLP. On the morning of the second day Mr Page confirmed the same to Miss Manby by email. Only when Mr Jones QC got to his feet part way through the afternoon of the second day, and after Mr Chapman QC had made his application for permission to re-amend, did he say that there had been a change of mind and that substitution was sought. The plan now was to

substitute the Partnership in this action, and then to bring a fresh action against the LLP and consolidate the two.

74. Permission to substitute is only sought if the Defendant's application to re-amend is successful, and that application is challenged on the basis of prejudice to the Claimants. What will that prejudice be?

75. A number of different presentations of that prejudice were put forward, which was perhaps inevitable because the parties were dealing with a number of different possible limitation periods. The Claimants have not helped themselves either by failing to follow the pre-action protocol before issuing proceedings (which as the Defendant says might have brought this problem to light) or in issuing so long after the events complained of. I can summarise the arguments about prejudice as follows.

76. Mr Jones QC focused on the effect of section 14B of the Limitation Act 1980. Substitution places the Partnership in the LLP's shoes so that anything that was in time in the action brought against the LLP will be in time as against the Partnership. But a new action brought now (in the spring of 2019) against the LLP will be able to allege breaches of duty only from the corresponding date in 2004, and there will therefore be a hiatus from 1 January 2003 until that date. Mr Jones QC points out that that hiatus would have caused no difficulty if the Defendant had spoken up when it served its defence in August 2017, because at that point the 15 year window went back to 2002, before the LLP's incorporation.

77. Mr Chapman QC puts it differently. He focuses on the effect of section 14A (because it is the Defendant's case that the causes of action accrued before 14

December 2010, on the basis that the *Sephton* argument fails). In that event the cause of action in negligence only can be saved by section 14A of the Limitation Act 1980, and if the Claimants' knowledge is dated at 25 March 2014 then a new action against the LLP would have been out of time even if it had been commenced in August 2017. On that basis the amendment can cause no prejudice to the Claimants.

78. I have found that the Claimants have a realistic chance of succeeding on the *Sephton* point. But so has the Defendant. If at trial on further analysis the analogy with *Sephton* fails, then only the cause of action in negligence can be salvaged, and only through section 14A. In that event there is no prejudice to the Claimants in allowing the Defendant to re-amend its Defence. If the Claimants do succeed on the *Sephton* point, the prejudice to them is minimal. The only problem that might arise from the hiatus identified above is that it is likely to cover the period when the tax return was prepared but, as I have said, the Claimants are unable to say what was wrong with the preparation of the tax return and there appears to be no substance in any allegation about the tax return.

79. I take the view that it would not be right to refuse the Defendant's application for the sake of a minor potential prejudice to the Claimants. I am aware of the Court of Appeal's decision in *Cluley v RL Dix Heating (A Firm)* [2003] EWCA Civ 1595, where the claimants had sued a sub-contractor rather than the person with whom he had a contract, and the point was raised only when the limitation period had expired against the correct defendant. Permission to amend was refused, because the effect of allowing the defence would have

been to deprive the claimant of any recourse, which is a far greater prejudice than anything possible in this case. I have been assisted by the detailed consideration of the law made by Joanna Smith QC sitting as a Deputy High Court Judge in *Adva Optical Networking Ltd and another v Optron Holdings Ltd and others* [2018] EWHC 852 (TCC); in that case permission to withdraw an admission was refused because there had been considerable and unexplained delay in applying to amend, and the trial date was so near that it would be contrary to the overriding objective to allow the amendment. That is not the case here.

80. Accordingly the Defendant has leave to re-amend its defence.

The Claimants' application to substitute the Partnership

81. The Claimants now seek permission to substitute the Partnership for the LLP as defendant in this action. Permission is required under CPR Rule 19.5 for that substitution, because the Defendant has an arguable case that the limitation period has expired. The relevant parts of the rule are as follows:

> "19.5
> (1) This rule applies to a change of parties after the end of a period of limitation under—
> (a) the Limitation Act 1980;…
>
> (2) The court may add or substitute a party only if—
> (a) the relevant limitation period was current when the proceedings were started; and
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that—
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or

> (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party."

82. I can give permission, therefore, only if the substitution is necessary as set out in rule 19.5(3). Sub-paragraphs (b) and (c) are clearly irrelevant, and the Claimants say that they made a mistake so that substitution should be permitted under Rule 19.5(3)(a).

83. It is well-established that not all mistakes will bring a party within sub-paragraph (3)(a). There has to be a mistake as to nomenclature rather than identity; but that extends to something more than merely getting the name wrong. What matters is that the description should be correct; here the Claimants intended to sue the business entity that gave the tax advice. They are not the first to make this sort of mistake following the conversion of a traditional partnership to an LLP and to have it allowed under rule 19.5; that was what happened in *The Insight Group Ltd v Kingston* Smith [2012] EWHC 3644 (QB) and in *Jenkins v JCP Solicitors Ltd* [2019] EWHC 852 (QB).

84. For the Defendant it is argued that this is not the type of mistake that can be corrected by substitution, but the authorities just cited make it clear that that is not correct. It is also argued that what is wanted by the Claimants is not a true substitution, since their intention is to pursue both the Partnership and the LLP. It is true that the Claimants may choose to commence a new action against the LLP; but they will then be suing these two different entities in respect of the time when each has been in existence. There is no overlap; there can be no breaches of duty in respect of which both are sued, since there is no point at which both were acting as the Claimants' advisers.

85. On that basis it seems to me to be clear that since the Defendant's application to re-amend is permitted, so should be the Claimants' application to substitute the Partnership as defendant.

Further directions

86. The Claimants have also sought permission to re-amend the Particulars of Claim, as marked in green and in blue on the coloured draft.

87. The green amendments were drafted on the basis that the Claimants wanted to add the partnership as an additional defendant, and permission to amend was sought if permission to add was granted. Since the Claimants now have permission to substitute the Partnership and not to add it, their green amendments are for the most part no longer relevant and the Particulars of Claim will have to be the subject of rather drastic surgery instead.

88. The Claimants also sought permission in any event to make the amendments marked in blue on the coloured draft. At the hearing Mr Jones QC mentioned these only briefly to say that they were not needed but were included out of caution. Many of them are relevant only to the LLP and will be redundant when the substitution is made. In any event they appear to me to be drafted in an endeavour to mend what the Defendant says are defects in the pleading, for example to include allegations that the Defendant failed to advise the Claimants to unwind the sale of the shares, or to take up a different tax avoidance scheme (paragraphs 48.8 and 53), which Mr Jones QC said were inherent in the existing version. If they are, then the amendment is not needed; if they are not then there is no reason at this stage to allow the pleadings to be mended or embroidered. It was not clear by the end of the hearing whether the

application for permission to make the blue amendments still stood, but if it did it is refused.

89. At the hearing Mr Jones QC indicated that if permission was given to substitute the Partnership as defendant, the Claimants would nevertheless want to make a decision as to whether to make that substitution once they had considered my decision. In fairness to the Defendant, the Claimants must make that election before any further step is taken in these proceedings. They should then apply, if so advised, for permission to re-amend their pleadings; provision will be needed for the Partnership to respond. A CMC should take place after that. I invite the parties' representatives to agree directions, or at least a timetable for the next steps in this action.