Neutral Citation Number: [2020] EWHC 1731 (Ch)

INGENIOUS LITIGATION

Claim Nos: HC-2015-002715, HC-2015-004581
HC-2017-000490, BL-2018-000279
BL-2018-001466, BL-2018-002554
BL-2019-001140

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

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 2 July 2020

Before :

MR JUSTICE NUGEE

- -

Between :

MR NIGEL ROWE & Others	**Claimants**
- and -	
INGENIOUS MEDIA HOLDINGS PLC & Others	**Defendants**

Claim Nos: HC-2015-004561, HC-2016-001674
HC-2017-001049, BL-2018-000507

And Between :

MR ANTHONY BARNESS & Others	**Claimants**
- and -	
INGENIOUS MEDIA LTD & Others	**Defendants**

Claim No: FS-2017-000005

And Between :

MR THOMAS AHEARNE & Others	**Claimants**
- and -	
PATRICK ANTHONY McKENNA & Others	**Defendants**

- -

- -

Andrew Hunter QC, **Tom Cleaver**, and **Gayatri Sarathy**
(instructed by **Stewarts Law LLP**) for the **Stewarts Claimants**

Mark Vinall (instructed by **Peters & Peters Solicitors LLP**)
for the **Peters & Peters Claimants**

Tom Mountford (instructed by **Mishcon de Reya LLP**) for the **Mishcon de Reya Claimants**

Simon Birt QC, **Craig Morrison**, **Geoffrey Kuehne** and **Sophie Shaw**
(instructed by **RPC**) for the **Ingenious Defendants**

David Yates QC and **Niamh Cleary** (instructed by **TLT LLP**) for **Coutts & Company**

Ben Quiney QC, **Carlo Taczalski** and **Frederick Simpson**
(instructed by **Kennedys Law LLP**) for **SRLV (a firm)**

Richard Handyside QC, James Duffy and **Nick Daly**
(instructed by **Herbert Smith Freehills LLP**) for **UBS AG**

Simon Pritchard and **Harry Adamson** (instructed by **Eversheds Sutherland (International) LLP**) for **HSBC Private Bank (UK) Ltd**

Hearing dates: 9 and 10 June 2020

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Approved Judgment

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

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10 am on Thursday 2 July 2020

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. On 9 to 11 June 2020 I heard a Case Management Conference (**"CMC 3"**) in these actions. I was able to give oral rulings on most of the issues that were raised, but there was one aspect argued on Days 1 and 2 on which I reserved judgment. This is my judgment on that point.

2. It is not necessary to give an account of the background. The parties themselves are very familiar with it, and if anyone else is interested they can find a sufficient account in two reserved judgments I have given: *Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch) and *Rowe v Ingenious Media Holdings plc* [2020] EWHC 235 (Ch).

3. CMC3 was largely devoted to disclosure issues. The parties were able to agree very many items, but there were three linked issues on the agenda which were argued together. They concern the question whether and to what extent the claimants should give disclosure as to their other investments. Putting it very broadly, there were two issues to which such disclosure was said to go: first, the financial sophistication of each claimant and their appetite for investing in more or less risky investments (**"the sophistication point"**), and second, a question as to the causation of loss (**"the loss point"**). Mr Richard Handyside QC, for UBS, took the lead on the sophistication point for the defendants, and Mr Simon Birt QC, for the Ingenious Defendants, on the loss point; Mr Andrew Hunter QC led for the claimants on both issues; and in each case they were supported and supplemented by counsel for the other parties. I am very grateful for the efficient and effective way in which all concerned made their submissions and conducted the hearing, which was, as is currently standard practice, held as a remote hearing.

The issues

4. The relevant issues are issues 8, 13 and 29 on the Disclosure Agenda.

5. Issue 8, as summarised on the Agenda, is as follows:

> "Should the Pleading Claimants give disclosure in relation to other investments they made and/or investment advice they sought or received in relation to potential investments?
>
> If so, what is the appropriate formulation for such disclosure and what are the appropriate limits?
>
> The formulations proposed by the Pleading Defendants are:
>
> Issue 1: *"What investments did [Pleading Claimant] make between [date] and [date] (other than (i) investments made in the course of his employment, (ii) purchases of residential property in which he or his family resided, (iii) contributions to personal pensions or ISAs)?"*
>
> Issue 2: *"What advice did [Pleading Claimant] seek or receive between [date] and [date] in relation to potential investments (other than (i) investments made in the course of his employment, (ii) purchases of residential property in which he or his*

family resided or (iii) contributions to personal pensions or ISAs)?"

If these issues are included as Issues for Disclosure, should Model C or Model D apply?"

This issue arises as between all the parties.

6. Issue 13:

"Should the SRLV Pleading Claimants give disclosure in relation to the following issue:

"Between [date] and [date]:

(i) What was [Pleading Claimant's] investor profile including his appetite for risk and tax-efficient schemes?

(ii) What was [Pleading Claimant's] level of sophistication as an investor/ability to understand investments such as the Ingenious Partnerships?"

If so, should this be on the basis of the Model C requests suggested by SRLV? [viz:]

"Documents such as emails, letters, meeting notes, prospectuses of other investments which [Pleading Claimant] considered during the period 2001-2008. Documents (such as emails, letters, CVs, business plans and job applications) evidencing [Pleading Claimant]'s professional experience within the entertainment industry, and as a solicitor."

This only arises between SRLV and the SRLV Pleading Claimants (who are all Stewarts Claimants).

7. Issue 29 is an ancillary issue dealing with custodians and the like.

The Pleading Claimants

8. There are 28 Pleading Claimants (although it is anticipated that for practical purposes, including disclosure, there will only be 27 active Pleading Claimants as one of them, Mr Hughes-Morgan, will not participate due to ill-health). Various distinctions were drawn between them during the course of the argument. They are represented by three different firms of solicitors, each with its own counsel team, and although they have made a great deal of common cause each naturally has its own points to make. They do not all sue the same defendants: some of them sue advisers (of whom SRLV, UBS and Coutts are Pleading Defendants) for negligent advice; some only sue the Ingenious Defendants, primarily, but not exclusively, for deceit (and conspiracy to deceive); some sue HSBC, primarily for conspiracy to deceive.

9. In the main actions (those against the Ingenious Defendants and the advisers), there are, as well as generic Re-Re-Amended Particulars of Claim, individual pleadings for each Pleading Claimant. (This exercise has not been repeated with the claims against HSBC which have been brought in separate proceedings.) I was taken to selected highlights of these, usually to illustrate some point that counsel wished to make, from which it is apparent that the claimants vary widely in background and experience.

10. I have not found it easy to keep all these variables and permutations in mind when listening to the argument, or reading the transcripts, and it is difficult to have an overview of the proceedings as a whole when focusing on the detail of one particular claimant. I have therefore prepared a schedule which seeks to collate the relevant information in a simple form, which I have appended to this judgment (**"the Schedule"**). The aim is primarily to act as an aide-memoire for myself which can be referred to not only for the present purposes but for other purposes going forward, and to enable me to have a simplified overview of the various claims and who is suing whom. It is not intended to be definitive, and I have probably made some errors in compiling it; if there are any errors of significance they can no doubt be corrected. I will refer to the individual Pleading Claimants by the numbers they bear on the Schedule, which correspond to the numbers of the individual pleadings in the Re-Re-Amended Particulars of Claim (eg **"C1"** for Mr Rushton-Turner).

General principles

11. There was no extended debate before me as to the principles applicable to disclosure under the Disclosure Pilot (PD 51U). I have however re-read the guidance given by Vos C in *McParland and Partners Ltd v Whitehead* [2020] EWHC 298 (Ch), which includes the following:

    (1) The *"watchword"* is contained in PD 51U para 6.4, namely that an order for extended disclosure must be reasonable and proportionate having regard to the overriding objective including certain specific factors [3]. The Disclosure Pilot is intended to apply across a wide range of cases stretching from the highest value business cases to the lowest value ones, and from the most complex, lengthy and document intensive to the least complex cases with few relevant documents; it is critical, however, that in every case, the type of extended disclosure is fair, proportionate and reasonable [4].

    (2) The identification of issues for disclosure is a quite different exercise from the creation of a list of issues for determination at trial [56]. It should not be a mechanical exercise of going through the pleadings, but should be driven by the relevance of the documentation likely to be in a party's possession to the contested issues [44].

    (3) There is no presumption that a party is entitled to extended disclosure and in particular to Model D or Model E (see PD 51U para 8.2) [9]. The approach to choosing between different disclosure models is illustrated at [50ff]. In particular on one issue in that case, Model C was appropriate because the underlying transaction no doubt generated a large amount of documentation most of which would have no relevance to the dispute.

12. In the present case I was reminded that the claims overall are very substantial, thought to be over £200m. Not only that but, as the Schedule illustrates, some of the individual claims in themselves run into several million pounds. It is true that even in the most high-value case disclosure must be *"fair, proportionate and reasonable"*, but self-evidently a disclosure exercise is less likely to be regarded as disproportionate in a very high-value case than in a low-value one.

13. Moreover, I was told that the burden of the disclosure that has already been agreed

between the parties will fall much more heavily on the defendants than on the claimants. This is not surprising: the Ingenious Defendants will between them have to give extensive disclosure as to the intended and actual operation of the Ingenious schemes, whereas the claimants are individuals and in the nature of things are bound to have far less relevant documentation. Mr Hunter made the point that the claimants' three firms of solicitors will between them have to marshal 27 individuals, all with different depositories of documents, and have already agreed to give disclosure on 309 issues; he also pointed out that unlike the Ingenious Defendants they had not already been through a similar exercise at the FTT. I accept that any such exercise will involve some work and a real cost. But Mr Birt told me that, to take the Stewarts figures, they were currently anticipating considering 50,000 documents for disclosure and their anticipated costs were some £200,000 whereas the Ingenious Defendants had about 750,000 electronic documents and another 100,000 in hard copy, and their anticipated costs were close to £4m. That does not of course obviate the need for the Court to consider whether any particular issue requires extended disclosure, which, as explained above, is a question in every case whether it is fair, proportionate and reasonable, and the mere fact that the overall burden is heavier on the defendants cannot determine that, but I agree with Mr Birt that it does form part of the relevant context.

Adviser claims

14. I propose to consider first the question of disclosure in relation to those Pleading Claimants who bring claims against intermediaries or advisers. As shown by the Schedule, these are all Stewarts Claimants; the claims (against UBS, SRLV and Coutts) are in negligence for breach of a duty of care in giving advice.

15. Mr Handyside said that the issue of how financially sophisticated and experienced the UBS Pleading Claimants were had been expressly put in issue on the pleadings, as follows:

    (1) In UBS's Defence, the duty of care was admitted but said to be informed by, among other things, the financial experience and sophistication of the UBS Pleading Claimants (para 48.1, 48.2).

    (2) There was a general plea that the UBS Claimants were sophisticated investors with substantial financial experience, including (in many cases) experience working in the financial services sector as professional bankers and/or investment managers (para 23).

    (3) That was supplemented by the defences to the individual schedules where a similar plea was in each case made, with specific reference to the individual's background. Thus for example in relation to Mr Coates (C6) it was pleaded that he had worked as a professional banker for many years and was a Managing Director and Head of High Yield at the Royal Bank of Scotland. In reply it was pleaded that his professional experience related to high-yield bonds, a specialist market with no overlap with tax-efficient investments, an area of which he had no experience.

16. Mr Handyside said that the financial experience of the claimants was relevant not only to the scope of the duty of care, but also to causation; a claimant's investment

history would shed light on his real appetite for risk. The kinds of documents that UBS was seeking under Issue 8 were routinely ordered in negligence claims against financial advisers.

17. Mr Hunter, while maintaining a degree of scepticism as to how useful such an exercise would turn out to be, accepted that the sophistication point could not, in the case of advisers, be dismissed as plainly irrelevant and could be seen to have a degree of validity. In an attempt to shorten matters, he volunteered at the outset of the argument on Day 1 the provision of some proportionate information in relation to each Pleading Claimant, perhaps in the form of a schedule, setting out what investments (over an appropriate value threshold) each made in a period – he suggested 2 years – prior to their first Ingenious investment. By the time he came to make his substantive submissions on Day 2, he had refined the offer as follows:

    (1) In relation to those Pleading Claimants suing advisers there would be a 2-stage process.

    (2) As a first stage the relevant claimants would provide a schedule showing for each claimant the investments that he had made in the 2 year period prior to the date of advice.

    (3) That would be subject to the following limitations:

        (i) it would not include investments falling within the three carve-outs specified in the wording of Issue 8 (investments in the course of employment, residences, and personal pensions/ISAs);

        (ii) there would be a value threshold which would have to differ for different individuals;

        (iii) it would be limited to investments made otherwise than through the relevant intermediary;

        (iv) it would be limited to actual investments made and not extend to potential investments on which advice was given but which were not made;

        (v) the disclosure exercise (see below) would be limited to a search of documents in the claimants' possession.

        Mr Hunter said that he understood Mr Handyside to have proposed the last three limitations.

    (4) The second stage would be limited disclosure. It would be disclosure of documents *"sufficient to show"* the nature of the investments and the degree of risk associated with them.

    (5) Mr Hunter accepted that it would always be open to the defendants to request further disclosure in relation to a particular investment and the claimants would consider any properly explained request.

18. That proposal was ultimately welcomed in reply by Mr Handyside and Mr Quiney,

subject to some points on the suggested limitations. It does seem to me a useful starting point. It is not really disputed that the sophistication point is at least potentially relevant to the adviser claims, but it is very doubtful to what extent it will be of any value in resolving it in any particular case to have anything more detailed than an understanding of what sort of investments a particular claimant had previously invested in. There is a difference between a claimant who has previously only invested in very vanilla investments with no element of tax planning – in which case it might be thought that there was nothing to be gained by extensive disclosure of the details – and a claimant who had previously invested in complex tax schemes of a more or less speculative nature. It might be much more likely that the defendants could make out a case for further disclosure in relation to the latter.

19. As appears from the Schedule the Pleading Claimants would appear to vary quite considerably in their financial experience and sophistication and a schedule of the kind helpfully volunteered by Mr Hunter seems likely to me to be a useful tool. As well as any further disclosure requests it might also help to inform the selection of Pleading Claimants whose cases should actually be tried out, with a view to ensuring that those selected include some with different levels of sophistication and experience.

20. As to the details of the proposal, there were a number of points that were argued. The first was when the date range should start. Mr Hunter's proposal was for investments made in the 2 years prior to advice; Mr Handyside proposed that the date range should start 3 years prior to each investment or top-up investment made. As to this (i) there is no particular logic to either 2 years or 3 years, but I prefer 3 years as it will give a fuller picture without being significantly more onerous; (ii) I think it should be 3 years before the *making of the investment* rather than 3 years before the *giving of advice*, as the former is more likely to be an easily identifiable date (as well as being when the claimant acted on the advice, assuming he did); and (iii) I agree with Mr Handyside that it should include 3 years before each fresh investment (including top-up).

21. The next question was whether the date range should stop at the date of advice. Mr Hunter said it should, on the basis that the issue was the risk appetite or characteristics of the claimant at the date of advice, and that there was no logic to extending it later. I agree that the issue is the sophistication of each claimant at the relevant date (although as already indicated I think the relevant date is better taken not as the date when advice was given but when it was acted upon, ie the date of investment) and that a change in the claimant's understanding after that date cannot logically be relevant; but for most people their degree of financial sophistication does not change rapidly, and investments made after the relevant date are likely to be capable of shedding light on the claimant's sophistication at the relevant date. Mr Hunter accepted the logic of this when I suggested it to him but said it should be limited to investments *"roughly contemporaneous"*; I think Mr Handyside's proposal of 1 year after the date of each investment is a reasonable and proportionate one.

22. The next question is as to value thresholds. No-one asked me to fix value thresholds at this stage and I do not have the material to do it anyway. But in principle I agree with Mr Hunter that it must make sense for there to be *some* threshold, although I suspect he is right that it will be different for different claimants. For some, £50,000 will no doubt have been a significant amount of money; for others it is likely to have been relatively unimportant. I propose at this stage to say nothing about it. I assume, as Mr Hunter suggested, that the parties will have sensible discussions about it; if they

cannot agree, Mr Hunter's schedule will indicate what cut-off has been adopted for each claimant, and if the defendants wish to challenge that as unreasonably high they will be able to ask for a ruling on the point.

23. The next point is whether it should be limited to investments made otherwise than through the adviser who is being sued. I did not understand the Defendants to raise a specific objection to this, but for my part I think it would nevertheless be helpful for the *schedule* to show all investments in the relevant period, whether made through the relevant adviser or not. In that way it will be able to act as a better snapshot of each claimant's personal investment history which should be useful not just for disclosure but for wider purposes. On the other hand, there should normally be no need for any *disclosure* in relation to investments made through the adviser as one would expect the adviser to have sufficient documentation themselves to indicate what investments were made and their risk profile. It is only if in a particular case the adviser's records are missing that it might become necessary to have further disclosure from the claimant.

24. The next point is whether the schedule should be limited to actual investments made or extend to potential investments. Mr Handyside was himself willing to confine it to actual investments, but Mr Quiney, for SRLV, argued for it to include potential investments, as set out in his Issue 13. He referred me by way of example to the specific pleading in relation to Mr Blair (C14), a solicitor who from 1995 to 2001 was employed by Warner Brothers as a lawyer specialising in film production, including sale and leaseback partnerships. SRLV's Defence, as well as making this point, refers to advice that Mr Blair received about another tax-planning scheme called Pantheon, supposedly described as *"aggressive"*, about which Mr Blair is said to have received advice from another firm of accountants.

25. Mr Quiney's submission in these circumstances is that when understanding someone's risk appetite, and indeed understanding of risks, it is as important to know what they have rejected as much as what they have accepted, what was not done as much as what was done: see, by way of analogy, *Castle Water Ltd v Thames Water Utilities Ltd* [2020] EWHC 1374 (TCC) at [35] per Stuart-Smith J .

26. There is some force in Mr Quiney's point, but I agree with Mr Hunter that the proposed formulation in Issue 13 is a very wide one and likely to be difficult to operate. It would on the face of it include virtually anything that a claimant had thought about doing with his money. Moreover the real question it seems to me is a claimant's understanding of, and appetite for, the risks involved in tax planning schemes. I do not see that a claimant's understanding of the rather different risks involved in, say, the property market, is likely to be of much if any relevance to the scope of the duty of care, or a claimant's understanding of advice, in relation to the Ingenious schemes. No doubt all investment, even putting money on deposit, involves some risk, but in relation to schemes which depend for their success on the ability to take advantage of some provision in taxing statutes, there is the very particular risk that HMRC might not accept that the scheme works as intended.

27. What I propose to do in the circumstances is to require the inclusion in Mr Hunter's schedule, as well as actual investments made, of a list of specific potential investments on which a claimant took or received professional advice in the relevant period, but limited to potential investments involving tax planning schemes.

Mr Handyside said that limiting it in that way would be likely to pose practical problems for reviewers. I accept that there may be grey areas and it may involve some degree of judgement as to whether a particular potential investment can be said to involve a tax planning scheme, but in general I do not think it should be difficult to identify the sort of investments concerned; in any event the schedule is bound to be drawn up under the supervision of the claimants' legal team and if they are left in doubt they should err on the side of caution.

28. The next question is whether the claimants should only have to search their own documents or should also ask for documents from their advisers. Mr Handyside disputed that he had ever intended to suggest the latter was unnecessary. I do not see that this needs resolving at this stage. Mr Hunter is not proposing to do more than give disclosure sufficient to show the nature and risk of the investments concerned. If that can be done from a claimant's own documents, that will be enough. If not, he will have to ask for the relevant documents from his advisers. It is a future question whether further disclosure will be required once this has been provided.

29. As to the searches and inquiries that the claimants will have to make before drawing up the schedule, I do not propose to say anything. It is for the claimants and their legal team to satisfy themselves that the list of investments (and specific potential tax-planning schemes on which advice was taken or received) is accurate and complete. If the claimants are able to do the exercise satisfactorily from their own records, that is enough. If not, they will no doubt have to ask their then advisers if they have records. One would not have expected this to be a difficult task, as all that is needed is to identify the investments and sufficient documents to show the nature of them; it is not a comprehensive trawl.

30. Finally on this part of the case Mr Quiney suggested that the schedule should be supported by a sworn statement of truth. I do not propose to require this. I am not going to stop to consider whether I would have power to require it – the schedule is being proffered voluntarily and I propose to leave it up to the claimants and their lawyers to decide what form it should take.

31. Those were I think all the points that were argued on Mr Hunter's proposal. Strictly speaking where I have decided points against him – for example that the date range should start 3 years before the investment rather than 2 years before the date of advice – I do not think I am ordering him to provide a schedule in this form, as it is being put forward voluntarily. But it is being put forward as an alternative to extended disclosure on the issue. So when I say that I require the schedule to be in a certain form, what I mean is that unless put forward in that form, I do not think it will suffice to avoid the need for extended disclosure.

Claims against Ingenious Defendants and HSBC

32. Mr Hunter says these raise very different issues. He is willing to extend his schedule to claimants who do not have adviser claims, but says there is no need for the second stage in their case and no disclosure should be given at all. Mr Mountford and Mr Vinall confirmed that their position was the same.

33. Mr Birt put forward a number of arguments as to why there should be disclosure from all the Pleading Claimants, but concentrated his argument particularly on the loss

point.

34. This requires looking in detail at the state of the pleadings, which are as follows:

(1) In the generic part of the Re-Re-Amended Particulars of Claim it was pleaded that the facts as to loss and damage were set out in each Pleading Claimant's particular schedule, but that in general loss and damage consisted of various heads (para 114). This included the fact that the claimants had made capital contributions to the LLPs which they had lost (para 114.1); and that if they had not invested in the LLPs, they would either (a) not have incurred interest and fees borrowing the amount of their contributions; or (b) invested their contributions in a different way which would have generated returns (para 114.5).

(2) The individual schedules vary in what they pleaded. Some of the claimants borrowed the capital that they contributed to the LLPs; this was the case with those Peters & Peters Claimants who borrowed from Coutts and NatWest and whose claims I considered in *Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch), namely Messrs Murphy, Teale, Barness and Campbell (C19, C20, C22 and C23). As Mr Vinall pointed out, they advance no case as to what else they would have done with their contributions if they had not invested in the Ingenious schemes; they say they simply would not have borrowed the money from the banks in the first place. Consistently with this, Mr Murphy's individual schedule, for example, pleads the loss of his contributions (para 80.1), and the interest and fees he has paid to Coutts (para 80.4). (For the sake of completeness Mr Murphy also claims other heads of loss (interest paid to HMRC, and interest on sums paid to HMRC in discharge of PPNs) but they do not affect the present question.) The position with Messrs Teale, Barness and Campbell is the same, as indeed it is with the other Peters & Peters Claimants (Messrs Mayes and Johnston, C18 and C21), who borrowed their contributions from S G Hambros and Coutts respectively.

(3) Others pleaded that they would have done something else with the money if they had not invested in Ingenious. Four of the five Mishcon de Reya Claimants did this: for example, Mr Rubinstein (C24) pleaded that if he had not invested in the Ingenious schemes he *"would have invested his money elsewhere"*, and specifically that at the time he was investing in hedge funds, including Brevan Howard and Lansdowne Partners' funds, and in capital protected notes issued by Credit Suisse, and would have invested his money in those or similar investments (para 31). Corresponding pleas are found in the schedules for Messrs Hajialexandrou, Prout and Rungasamy (C26, C27 and C28), although not for Mr Ratzer (C25).

(4) So far as the Stewarts Claimants are concerned, the pleading varied. Some, namely Messrs Strafford-Taylor, Blair and Wilson, (C12, C14 and C16) specifically claimed the cost of borrowing. Mr Rushton-Turner (C1), by contrast, claimed damages for *"the loss of opportunity to utilise his available tax capacity in an alternative tax efficient investment that was available at that relevant time"* (para 15.4): similar claims were made by Messrs Guest, White, Thorpe and MacKenzie (C3, C11, C13 and C17). The remainder of the Stewarts Claimants, however, simply claimed damages for the loss of capital.

(5) The Ingenious Defendants' Defence responded to the generic plea in para 114.5(b) that the claimants would have invested their contributions in a different way. It said that the premise of the allegation that the claimants had lost their capital contributions was that they would otherwise have retained them (para 419.1) and continued (para 419.2):

> "That premise is inconsistent with the allegation at paragraph 114.5(b) that the Claimants would have invested the capital contributions in a different way had they not made an investment in the relevant Partnerships, and it is in any event to be inferred that the Claimants would have made investments of the same or similar amounts in other partnerships, investment vehicles or schemes seeking to provide similar benefits, including benefits relating to sideways loss relief. Each Claimant will be required to prove (a) that such investments would have put them in a better position than the investments made in the Partnerships, or (b) to prove that they would not have made any such investments and that, as a result, they would have retained these sums. Insofar as the Claimants would have made alternative investments sustaining equal or greater losses than alleged to have been suffered by reason of their investment in the Partnerships, then it will be denied that such Claimants' investments in the Partnerships were causative of any loss."

That plea, as can be seen, suggested that it was for each claimant to prove what they would have done with the money if they had not invested in the Ingenious partnerships, a point which I will return to.

(6) The Ingenious Defendants also pleaded to the individual schedules. Where it had not been suggested that the claimant would have invested in any particular alternative investment, it nevertheless pleaded an inference that the claimant would have invested in another tax scheme. An example is Mrs Horner (C2) where the plea was as follows (para 14.2):

> "If Mrs Horner had not made an investment in ITP, it is to be inferred that she would have made investments of the same or a similar amount in other partnerships, investment vehicles or schemes seeking to provide similar benefits, including benefits relating to sideways loss relief. It is incumbent upon Mrs Horner to prove that such investments would have put her in a better position than the investment she made in ITP. If Mrs Horner would have made alternative investments sustaining equal or greater losses than she alleges she suffered through her investment in ITP, then the investment in ITP would not be causative of any loss."

A similar plea is found in each schedule (including for those claimants who borrowed their capital contributions), but where the Defendants could plead more specifically they did. An example is Mr Rushton-Turner (C1), where the plea took this form (para 16.4):

> "As contemplated at paragraph 15.4, if Mr Rushton-Turner had not made an investment in ITP, it is to be inferred that he would have made investments of the same or a similar amount in other partnerships, investment vehicles or schemes seeking to provide similar benefits, including benefits relating to sideways loss relief. It is incumbent upon Mr Rushton-Turner to prove that such investments would have put him in a better position than the

investment he made in ITP. In this regard, it is averred that Mr Rushton-Turner subsequently invested in an Eclipse Film Partners partnership materially similar to Eclipse Film Partners 35 LLP, which was the subject of successful challenge by HMRC. If Mr Rushton-Turner would have made alternative investments sustaining equal or greater losses than he alleges he suffered through his investment in ITP, then the investment in ITP would not be causative of any loss."

In addition there was a further plea as follows (para 16.6):

"Further, Mr Rushton-Turner is put to strict proof in relation to his claim at paragraph 15.4 for the loss of opportunity to *"utilise his available tax capacity"* (by which it is not clear what is meant) in an *"alternative tax efficient investment that was available at the relevant time."* In particular, he is put to proof as to (a) what *"alternative tax efficient investment that was available at the relevant time"* he would have invested in; and (b) what the outcome of any such other investment would have been, including that it would have put him in a better position than the investment he made in ITP and the extent of any benefit he alleges he would have obtained from participation in such an investment."

(7) In the case of the Mishcon de Reya Claimants who had pleaded that they would have made alternative investments, they were again put to proof, as for example in the case of Mr Rubinstein (C24) where the pleas were as follows:

"20.4.1. The allegation that Mr Rubinstein would have invested *"elsewhere"* in *"hedge funds, including Brevan Howard and Landsdowne Partners' funds, and in capital protected notes issued by Credit Suisse…or similar investments"* is an entirely inadequate plea, is embarrassing for want of particular[it]y, and the Ingenious Defendants' position is reserved pending the provision of proper particulars and/or adequate disclosure. No admissions are made and Mr Rubinstein is put to strict proof of his allegations.

20.4.2. In any event, if Mr Rubinstein had not made an investment in IT1, IT2, IFP or IFP2, it is to be inferred that he would have made investments of the same or similar amounts in other partnerships, investment vehicles or schemes seeking to provide similar benefits, including benefits relating to sideways loss relief. It is incumbent upon Mr Rubinstein to prove that such investments would have put him in a better position than the investments he made in IT1, IT2, IFP and IFP2.

20.4.3. In any event or in the alternative, Mr Rubinstein is put to strict proof as to whether (if he had not made an investment in IT1, IT2, IFP or IFP2) he would have made any other investments (whether similar or not) and what the outcome of any such other investment would have been. If Mr Rubinstein would have made alternative investments sustaining equal or greater losses than he alleges he suffered through his investment in IT1, IT2, IFP and IFP2, then the investment in the Partnerships would not be causative of any loss."

(8) Finally, the Claimants gave some Further Information in response to a request from the Ingenious Defendants. I can take that given by Mr Rushton-Turner (C1) as an example. This pleads as follows:

> "14.1 Mr Rushton-Turner cannot now say with certainty what he would have done with the capital if he had not invested it in ITP. In the absence of any reason to conclude that he would have deployed it in any particular manner, the most appropriate measure of his loss in respect of that capital contribution is the amount of the contribution together with interest. Accordingly, that is his primary case.
>
> 14.2 Mr Rushton-Turner does not rely upon any particular alternative investment.
>
> …
>
> 14.4 Mr Rushton-Turner's investment in ITP, which resulted from the acts and omissions pleaded in Schedule 1, resulted in him making a claim for sideways loss relief against his income. If he had not done so, it would have been open to him to make other tax-efficient investments giving rise to relief capable of being claimed successfully against that income. However, his primary case is as set out in subparagraph 1."

Similar answers were given by all the Pleading Claimants (save for the Peters & Peters Claimants such as Mr Murphy who borrowed to invest and simply replied that if they had not invested in the Ingenious partnerships they would not have borrowed that money, for investment purposes or at all).

35. As to the Further Information Mr Birt aptly commented that although Mr Rushton-Turner says what his primary case is, he nowhere abandons his alternative or fallback case. In answer however Mr Hunter accepted that this was not what was meant, and that *"primary case"* was an unfortunate use of language; what was meant was that was not his only head of loss, but in relation to loss of the use of his investment capital, that was his case, and he confirmed that the same was true for all the Stewarts Pleading Claimants, both in relation to the claim against the Ingenious Defendants, and also in relation to the claim against HSBC (where the pleadings are not in quite the same form); Mr Mountford and Mr Vinall accepted that it was also true for their Pleading Claimants as well. All of that appears unequivocally on the transcript. I will proceed on the basis therefore that no Pleading Claimant now seeks to rely on any alternative investment, or on any fallback case; each simply claims the capital invested in Ingenious which has been lost, together with either interest or (in the case of those who borrowed) the cost of borrowing.

36. There was some argument about the onus of proof. I would have thought, even without authority, that a claimant who shows that he has been induced to pay out a capital sum as a result of a deceit (or other legal wrong) by a defendant and has not received it back, is *prima facie* entitled to recover that sum as damages, together with interest (either simple interest under s. 35A of the Senior Courts Act 1981 or interest as damages under the principle of *Sempra Metals Ltd v IRC* [2007] UKHL 34) on the simple basis that that is what he has lost. There is no onus on him to prove what else he would have done with the money, with the result that if no other evidence is called on the point, he will succeed; if the defendant wants to say that he would have lost the money anyway, it is for the defendant to plead and prove that. Mr Hunter referred me to a passage in the decision of Males J in *Equitas Ltd v Walsham Bros & Co Ltd* [2013] EWHC 3264 (Comm) at [123(ii), (iv)]; I do not need to set it out, but it would appear to suggest that he took the same view as I have expressed.

37. Mr Birt accepted that that might be the usual position and might end up being the position at trial, and indeed ultimately I think accepted that if the claimants showed a *prima facie* case of loss, they would succeed unless somebody showed something else. I do not propose on this application to decide anything finally, and everything will remain open to argument at trial, but as matters stand I think Mr Hunter is right on what he needs to prove, and I am at the moment wholly unpersuaded that the parts of the Ingenious Defendants' pleading that seek to put the claimants to proof as to what they would have otherwise have done with the money, or how any alternative investment might have performed (such as para 419.2 of the generic pleading or the second sentence of para 14.2 of the pleading in relation to Mrs Horner) go anywhere, as the view I currently take is that there is no onus on the claimants to prove any of that.

38. Mr Birt however said that they had not only put the claimants to proof, but had positively pleaded (see for example the first sentence of para 14.2 of the pleading in relation to Mrs Horner) that it was to be inferred that the claimants would have sought to invest in other schemes providing similar benefits including sideways loss relief. That he said was sufficient to make it an issue on which disclosure should be given.

39. That seems more promising; it must in principle be open to the defendants to show, if they can, that if a claimant had not invested in the Ingenious partnerships they would, on the balance of probabilities, have invested in some other scheme which would also have failed. I have considerable doubts whether the defendants will be able to make out that case, certainly in respect of all the claimants and quite probably in respect of any of them, but I do not think I should shut them out from seeking to do so at this stage. In principle therefore I accept that the defendants are entitled to know if there is any material suggesting that a claimant would have invested in another such scheme. That is likely in practice to consist of a claimant's track record in putting money into tax planning schemes, or at the very least taking, or receiving, advice on them.

40. Mr Hunter has already volunteered to extend his schedule to claimants who do not bring adviser claims. That will show their track record of actual investments. I think it should, as with the adviser claimants, also include specific potential investments in tax planning schemes on which a claimant took, or received, professional advice in the relevant period. That will enable the defendants to have an overview of the position with each claimant.

41. That leaves the question whether the second stage, disclosure of *"sufficient to show"* documents, should also be extended to these claimants. Mr Hunter resisted this on the basis that it was nothing more than a fishing expedition, but I think Mr Birt is right that if he is going to ask the Court to infer that a claimant would have invested in another tax scheme with equally disastrous results, he should be given the information in the claimants' possession to enable him to do that. Disclosure of *"sufficient to show"* documents does not seem to me to be unduly onerous, and I think the second stage should also be extended to the claimants who are not suing advisers.

42. But I would confine the second stage in their case to tax planning schemes (actual or potential). That seems to me the only material which is realistically capable of supporting the plea, for example, that:

> "If Mrs Horner had not made an investment in ITP, it is to be inferred that she would have made investments of the same or a similar amount in other partnerships, investment vehicles or schemes **seeking to provide similar benefits, including benefits relating to sideways loss relief**."

(emphasis added). The case sought to be made is that a claimant had such an appetite for tax planning that if they had not invested in the Ingenious partnerships they would have invested in something else similar, and would have lost money on that as well. I can see that a claimant's track record in investing in tax planning schemes might be of assistance on that issue, as might a specific alternative tax scheme on which a claimant received advice. But I do not see that disclosure of the details of other (non-tax planning) investments is likely to be of any assistance at all on that question.

43. I have not overlooked the fact that Mr Birt said that as well as the loss point, he could rely on the sophistication point, and sought to align himself with Mr Handyside. But it seems to me that the nature of the case he is facing is a rather different one from that brought against the advisers. The central question in relation to the adviser claims is whether the Ingenious schemes were suitable for the claimants, and one can see how their general financial sophistication and appetite for risk could be relevant to that. The central claim that Mr Birt is facing however is that his clients misrepresented the Ingenious schemes. Whether that is put on the basis of deceit, or negligent misrepresentation, or under the Misrepresentation Act, or as a claim for rescission, it is far less apparent how a claimant's appetite for risk or experience with other investments can affect the question whether misrepresentations were made and relied on. Mr Birt gave as an example the case of a claimant experienced in investing in tax schemes who might therefore appreciate that HMRC did not clear schemes in advance; there might be some force in that, but as can be seen that is all tied up with a claimant's experience of tax schemes. I am not persuaded that a case has been made for disclosure to the Ingenious Defendants of details of a claimant's other investments.

44. Mr Pritchard made some short submissions on behalf of HSBC but he largely aligned himself with Mr Birt, and I do not think there is any reason to distinguish between the position of the Ingenious Defendants and HSBC.

Conclusion

45. For the reasons I have given I accept the proposal put forward by Mr Hunter for a two-stage process of (i) providing a schedule of investments for each Pleading Claimant and (ii) thereafter disclosing *"sufficient to show"* documents, but I think the schedule should be expanded in the respects that I have detailed above, and the second stage should also apply to those claimants not suing advisers, subject to being limited in the latter case to investments (actual or potential) in tax schemes.

46. I should make it clear that nothing in this judgment is intended to preclude further disclosure on these matters if appropriate. If having seen the schedule and limited disclosure, a defendant thinks they can justify asking for more documents, they can make specific requests which can be considered by the claimants, or if necessary ruled on by the Court. But it will be much easier to assess both the possible assistance to be gained from further disclosure and what would be involved in providing it once Mr Hunter's two-stage process has been operated.

47. I hope I have adequately addressed the points that counsel wanted answering but if there are any omissions, or obscurities which require clarification, I will give the parties liberty to apply for that, or indeed any other, purpose at or after the handing down of this judgment.

INGENIOUS LITIGATION

Schedule of Pleading Claimants

No	Name	Solicitors	Ingenious	HSBC	Interme-diaries	Schemes								Approx. quantum (cash)	Background	Other tax schemes[1]
						ITP	IT1	IT2	IT3	IFP	IFP2	IFP3	IG			
1	Mr Martin Rushton-Turner	Stewarts	Yes	-	-	x								£475k	Corporate Strategy / Debt Structuring services	EZTs; Amber
2	Mrs Geraldine Horner	"	Yes	-	-	x								£800k	Music artist	
3	Mr Benjamin Guest	"	Yes	Yes	-					x	x			£10.5m	Investment Manager	European
4	Mr Rupert Tyer	"	Yes	Yes	-					x	x			£4m	Investment Manager	Circle; European
5	Mr Simon Howard	"	Yes	Yes	-						x		x	£86k	Recruitment services	
6	Mr Nicholas Coates	"	Yes	Yes	UBS						x			£1.4m	Banker	
7	Mr Nicholas Curtis	"	Yes	Yes	UBS						x			£125k	Investment Manager	
8	Mr Jeremy Herrmann	"	Yes	Yes	UBS						x			£5m	Investment Manager	

9	Mr Jonathan Hughes-Morgan[2]	"	Yes	Yes	UBS						x			£500k	Investment Fund Director	
10	Mr Quentin Marshall	"	Yes	Yes	UBS	x		x			x			£150k	Investment banker (UBS)	
11	Mr Steven White	"	Yes	Yes	UBS						x			£40k	Human resources (UBS)	
12	Mr Ian Strafford-Taylor	"	Yes	Yes	Coutts		x	x		x	x			£2.6m	Accountant / Company Director	
13	Mr David Thorpe	"	Yes	Yes	Coutts					x	x			£362k	IT / private equity	
14	Mr Neil Blair	"	Yes	Yes	SRLV				x	x	x		x	£467k	Solicitor / Literary agent	Phoenix Film Partners
15	Mr Stephen Lewis	"	Yes	Yes	SRLV	x	x	x		x	x		x	£500k	Music publisher	Saturn Film Partners
16	Mr Ian Wilson	"	Yes	Yes	SRLV			x	x	x	x			£675k	Chartered surveyor / Property Manager	
17	Mr Alexander MacKenzie	"	Yes	Yes	(Haibun[3])						x			£333k	Pension Solutions Group Director (Nomura)	
18	Mr David Mayes	Peters & Peters	Yes	-	-	x	x	x			x			£1.65m	Financial trader	

19	Mr Daniel Murphy	"	Yes	-	-					x	x			£936k	Footballer	S & L schemes
20	Mr Gary Teale	"	Yes	-	-					x	x			£165k	Footballer	Corbiere
21	Mr Iain Mac-donald Johnston	"	Yes	-	-		x	x		x				£1m	Investment analyst	
22	Mr Anthony Barness	"	Yes	-	-		x	x		x				£264k	Footballer	Take 5 scheme
23	Mr Kevin Campbell[4]	"	Yes	-	-				x	x				£1m	Footballer	S & L schemes
24	Mr Marc Rubinstein	Mishcon de Reya	Yes	-	-		x	x		x	x			£515k	Financial analyst	
25	Mr James Ratzer	"	Yes	-	-			x		x	x			£580k	Equity research	
26	Mr Michael Hajialexandrou	"	Yes	-	-				x	x	x			£1.65m	Equity trader	
27	Dr James Prout	"	Yes	-	-					x	x			£72k	IT consultant	
28	Mr Coomarassen Jason Rungasamy	"	Yes	-	-					x	x			£95k	Financial adviser	

Notes:
1 Not including pensions, ISAs etc
2 Mr Hughes-Morgan is taking no further active part in the proceedings due to ill-health.
3 Haibun is sued as an adviser but is not a Pleading Defendant
4 Claim vested in and brought by Mr Steven Wiseglass as Trustee in Bankruptcy of Mr Campbell