Neutral Citation Number: [2023] EWHC 386 (Ch)

Case No: BL-2021-000898

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

Royal Courts of Justice
7 Rolls Buildings, Fetter Ln,
London EC4A 1NL

Date: 23 February 2023

Before :
MS CLARE AMBROSE SITTING AS A DEPUTY HIGH COURT JUDGE

- -
Between :

(1) STEPHANE ETROY
(2) RBC TRUST COMPANY (JERSEY) LIMITED — **Claimant**

- and –

SPEECHLY BIRCHAM LLP — **Defendant**

- -
- -

Richard Wilson KC and Jamie Randall (instructed by Withers LLP) for the **Claimants**
Michael Pooles KC (instructed by RPC LLP) for the **Defendant**

Hearing dates: 3, 6, 7 February 2023

Judgment supplied to the parties in draft on 13 February 2023

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Approved Judgment

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

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MS CLARE AMBROSE SITTING AS A DEPUTY HIGH COURT JUDGE

Ms Clare Ambrose

Introduction

1. This is the trial of a preliminary issue as to whether the Claimants' claims for negligent tax advice are time-barred.

2. The claims are made by Mr Stephane Etroy (an individual resident in London) and the Second Claimant (a professional provider of trusts services based in Jersey) for damages for negligent tax advice given by the Defendant, Speechly Bircham LLP to Mr Etroy in 2009. Pursuant to that advice the Second Claimant ("RBC") established a trust and was appointed as the professional trustee. They allege that they have incurred tax liabilities of over £1 million as a result of that advice.

3. The Defendant was a solicitors' firm that held itself out as a specialist in private client matters including inheritance tax. It subsequently merged to become Charles Russell Speechlys LLP.

4. The Claimants issued a claim form on 26 May 2021. The Defendant maintained that the claims were statute-barred because the alleged tort arose more than 6 years earlier. The Claimants maintain that the action is not time-barred because, pursuant to section 14A of the Limitation Act 1980, the earliest date on which they acquired the knowledge required for bringing their action was on 28 September 2018, less than 3 years prior to issuing their claim form. On 22 February 2022 Deputy Master Nurse ordered that there should be a trial of the time-bar issue, namely as to whether the claims were brought within the time permitted by section 14A of the Limitation Act.

<u>The Defendant's advice, its breach of duty and the alleged damages</u>

5. There was common ground as to the advice provided by the Defendant and also as to its breach of a duty of care owed to Mr Etroy. In particular, in September 2009, Mr Etroy instructed the Defendant to advise him and the scope of work included advising on the creation of a new discretionary trust.

6. At a meeting on 22 September 2009 Mr Charles Gothard of the Defendant and Mr Etroy discussed an existing trust, named the Helios April Trust ("HAT") that had been set up in 2002 in Jersey, and under which Mr Etroy held an interest in possession. Detailed written advice was not given but a note of the advice was made. In summary, Mr Gothard advised Mr Etroy that:

    a) As Mr Etroy was not domiciled or deemed domiciled in the UK when he established the Helios April Trust in 2002, as it then stood the trust held excluded property for inheritance tax ("IHT") purposes.
    b) However, if the second to die of the Mr Etroy and his wife were deemed to be domiciled in the UK at the time of his or her death and had a life interest in the Helios April Trust, section 80 of the Inheritance Tax Act 1984 (IHTA 1984) would apply. The status of the Helios April Trust would be reassessed and it would not be treated for IHT purposes as an excluded property settlement pursuant to section 48 of the IHTA 1984.
    c) In order to deal with this difficulty, the assets of the Helios April Trust should be transferred to a new discretionary settlement, to which section 80 of the IHTA 1984 would not apply (by virtue of Mr Etroy not having any interest in possession under it) and of which RBC would be the trustee.

7. Mr Etroy followed this advice and the assets held within the HAT were transferred to a

new discretionary trust governed by the law of the Cayman Islands. The new trust was named the Helios May Trust ("HMT").

8. The Defendant accepts that it was in breach of its duty to Mr Etroy in failing to appreciate that there were UK situs assets held by the Helios April Trust, and in failing to mitigate IHT charges. There is an issue as to whether the Defendant owes a duty of care to RBC but for the preliminary issue it is assumed that there was an actionable breach.

9. The crux of the Claimants' complaint against the Defendant is that because of its negligent failure to appreciate that the trust assets in question were UK assets (or to give advice to mitigate the tax consequences), the creation of the Helios May Trust caused the following significant tax charges and costs, for which they seek compensation:

    a) A charge under section 1 of the IHTA 1984 occasioned by the transfer of assets from the Helios April Trust to the Helios May Trust of £1,057,069.82 (this is an entry charge) plus interest and penalties;

    b) A charge under section 64 of the IHTA 1984 that arose on 31 July 2012 of £66,460.09 (this is a principal charge in respect of additions to the Helios May Trust made prior to 22 March 2006) plus interest and penalties;

    c) Legal costs paid to the Defendant for its advice (£19,000) plus costs incurred in implementing the advice;

    d) Costs (of approximately £480,000) including costs incurred by the Claimants' accountants PwC (at around £102,000), legal costs and RBC's costs.

10. In the Claimants' skeleton argument and opening their counsel took considerable time to explain the inheritance tax background against which the preliminary issue was to be decided. This explanation was presented in as summary and simple terms as possible, but it was lengthy and complex. It was significant that the Defendant took no issue with the content or relevance of this explanation (or the fact that it presented something of a simplification).

11. This explanation of the statutory background was necessary to make proper sense of the claims made, the correspondence that was relied on by both sides, the nature and significance of the new trust that Mr Etroy was advised to create and also his original trust and five separate trusts ("the Five Trusts") set up by his former colleagues which were being considered in much of the correspondence relied on. The explanation was also necessary to understand the significance of the Defendant's acts and omissions which are alleged (and admitted in relation to Mr Etroy) to constitute negligence, the damage in respect of which damages are claimed, and the Claimants' case as to why that damage is attributable to the Defendant.

12. I rely on the Claimants' explanation of the tax background and some of the terminology adopted, including the term principal charge and entry charge, which has been simplified for convenience. Given that there was no issue as to the background law and its application I do not set it out. I flag up particular features of the tax background and its significance for the issues to be decided. In the interests of brevity in dealing with a complex area, these features are presented in simplistic terms without attempting to provide full accuracy, including as to the legal or technical terms or details.

    a) The IHTA 1984 has rules as to what property counts within an individual's estate for IHT purposes. Where property on trust is held under what is called the "relevant property" regime it will be treated as outside the beneficiary's estate.

However, it is subject to a principal charge on the trust's 10 year anniversary, sometimes also described as a 10 year charge.

b) The location of an asset is relevant for tax purposes and covered in the UK rules. The word "situs" reflects the place of an asset for tax purposes and is commonly used in that context.

c) Prior to 22 March 2006 there was a very significant difference in the tax treatment of a discretionary trust (where the trustees have discretion over the interests) and a trust in which interests in possession subsist (i.e. where the beneficiary has more immediate rights to the income), of which a common form is a life interest trust. One difference was that interests in possession were not treated as relevant property and were not subject to the 10 year principal charge. Consequently, where a person transferred property into a trust in which interests in possession subsisted, there was no chargeable event (i.e. a tax liability did not arise), but tax was charged when the interest terminated (whilst the charge arises on the trust in which the interest in possession subsisted, where it arises on a transfer to a relevant property trust, it is often referred to as an entry charge). By contrast in a discretionary trust there was a principal charge on the trust's 10 year anniversary, but the death of the beneficiary would not be a chargeable event.

d) The Finance Act 2006 significantly changed the tax regime for trusts. For UK situs assets settled after 22 March 2006 it removed some of the differences between discretionary trusts and life interest trusts. One change was that assets added to trusts in which there were interests in possession arising after 22 March 2006 were treated as relevant property.

e) This meant that post 22 March 2006 additions of UK situs assets to trusts were treated as relevant property falling within the UK inheritance tax regime (and subject to a 10 year charge) even if the assets were held in a life interest trust. These additions would attract an entry charge and a 10 year principal charge.

f) Therefore UK situs assets added after 22 March 2006 to the HAT, and later to the HMT, would attract a principal charge. This charge would apply whether the assets had been kept in the HAT or transferred to the HMT. The Claimants have not claimed damages in relation to this charge because it would have been incurred regardless of the Defendant's advice.

g) However, UK situs assets that had been settled in a life interest trust before 22 March 2006 remained outside the relevant property regime.

h) By 2009 it was anticipated that non-domiciled UK residents would be brought further within the UK tax regime. The purpose of the Defendant's advice concerning the HAT was to bring Mr Etroy's interests in the HAT into a discretionary trust while he was still non-domiciled. This would avoid his interests in possession under the HAT terminating after he became deemed UK domiciled and being subject to inheritance tax at 40% on his or his wife's death. However, following the Finance Act 2006 that would only work for excluded property, namely non-UK situs assets.

i) The transfer of UK situs assets from a life interest trust into a discretionary trust (as advised by the Defendant) gave rise to an immediate entry charge. In addition the assets settled before 22 March 2006 then became subject to a 10 year charge when they would otherwise have been outside that regime. The consequences of transferring UK situs assets could have been mitigated by the assets being held by an off-shore company. The assets would then have been shares in a Jersey company

and therefore non-UK situs assets treated as "excluded property" outside the relevant property regime.

j) The Claimants have claimed for damages in relation to a principal charge incurred in respect of pre-22 March 2006 additions of UK situs assets (the claim is for £66,460.09). They say that this tax (and also the entry charge of £1,057,069.82 and costs claimed) would have been avoided if the Defendant had appreciated that the assets within the HAT were UK situs assets and advised him how to mitigate such tax effectively.

k) Interest is payable on late payment of tax, and penalties are payable where there is fault in failing to pay tax.

l) Percentage rates are set for the assessment of an entry charge (20% in life and 40% on death) and a principal charge (up to 6%). The assessment is generally much more complex and involves a valuation of the underlying assets on relevant dates, and will be subject to exemptions, allowances and thresholds including a nil rate band.

The factual background

Introduction

13. The main facts relating to the original trust, the Defendant's advice and the setting up of the new trust are set out above. The issues to be decided related to events between 2017 and 2019 leading to Mr Etroy instructing solicitors to advise him on whether to issue a claim in negligence. The factual issue to be decided was the date when the Claimants first had the knowledge required to bring their action in negligence. The Claimants said it was 28 September 2018 and the Defendant put it at 2 May 2017.

14. In summary, Mr Etroy had set up a trust in 2002 to hold interests from his work. Following advice from the Defendant in 2009 he transferred assets in that trust (HAT) to the new trust (HMT) in 2010. In 2017 he sought tax advice from PwC in relation to the trust, and PwC raised inheritance tax issues, in particular, a potential entry charge and principal charge and the potential need to rectify this with HMRC. PwC continued investigations and advised him to register a disclosure covering such liabilities to HMRC on 28 September 2018.

Mr Etroy's assets

15. Mr Etroy is a French national (he also has Swiss nationality and more latterly UK nationality). He has been resident in the UK since 1998 and worked as a partner in a private equity investment firm in London, Charterhouse Capital Partners LLP ("Charterhouse") for some years until around 2015. During that time he earned carried interest and co-investment interests in various funds. In particular, he was the owner of interests in four limited partnerships which related to two funds. Two of these partnerships were Scottish and the other two were English. It is common ground that the management of these interests was UK based and the situs of these interests for the purpose of inheritance tax was the UK.

Engagement of PwC by Charterhouse partners

16. In January and February 2017, PwC had been engaged by around five partners in Charterhouse ("the Charterhouse partners") who had each, like Mr Etroy, established a trust to hold their co-investment and carried interest partnership interests, which were held as interests in possession. RBC was also the professional trustee for these trusts, i.e. the Five Trusts. Like Mr Etroy they were also non-domiciled in the UK and they were seeking advice in respect of changes to the tax rules for non-domicile residents expected to come into effect as from 5 April 2017. The carried interest reflected the partners' share of the profits. PwC were advising on whether the carried interest could be purchased by the Charterhouse partners in order to crystallise capital gains tax prior to the changes to the tax rules.

17. In the course of providing advice to the Charterhouse partners, PwC noticed that there were UK situs assets held in the Five Trusts and that additions had been made after 22 March 2006. On 24 February 2017 Ms Christine Cairns of PwC gave RBC an update on the position regarding these Five Trusts. She noted that the Five Trusts held interests in possession and flagged up that post 22 March 2006 additions could be subject to an entry charge and also a 10 year charge, stating:

> *"<u>Post-22 March 2006 relevant property</u>*
> *We understand that in the case of at least one of the trusts {the [redacted] Trust), UK situs assets were added post 22 March 2006 - namely the English and Scottish LPs that hold carry and co-investment for the various CCP Funds. The additions list that you sent to us did not specify when the partnership interests were added. While we acknowledge that the trusts are pre-22 March 2006 qualifying IIPs, any additions post 22 March 2006 of UK situs assets would be treated as relevant property and therefore taxable on entry as well as subject to the 10 year charge (as the trust would now be "mixed"). (As the Settlor of each trust was a non-domiciled and non-deemed domiciled individual for IHT at the time, transfers of non-UK assets would be excluded property so outside the scope of chargeable transfer rules.)"*
> *Given that the CCP Fund interests would be treated as UK situs for IHT purposes, I'm keen to understand whether the advice you received from RBC Regent Tax Consultants Limited covered this point, and whether they were aware that UK situs assets had been added post 22 March 2006. Would you please be able to confirm please as we have not seen the original advice? This is important because a) we need to ascertain whether there was potentially an entry charge, as well as b) whether there were 10 year charges due which have not been paid. The email you previously sent us appeared to indicate that no 10 year charge was due because the trust was a qualifying IIP, but I'm not sure whether they were aware that UK situs assets were settled post 22 March 2006. This also leads us to a related point which is the need to ensure that the post-22 March 2006 relevant property is restructured so as to mitigate any future IHT"*

<u>Mr Etroy's engagement of PwC in February 2017</u>

18. Mr Etroy was introduced to PwC by Charterhouse on around 20 February 2017 because he was non-domiciled at that point and looking for advice in calculating the offshore element of his carried interest. He subsequently sought advice on the same topic as the other Charterhouse partners in respect of purchasing carried interest prior to the expected changes to tax rules.

19. PwC provided an explanation of the proposed purchase on 8 March 2017. Mr Etroy responded with queries on purchasing the carried interest. He also asked a question as to what disadvantages there would be in winding up the trust of carried interest, and also what advantages were left for him in holding assets in an offshore trust following April 2017. It was common ground that his queries were in relation to ongoing IHT protection rather than past liabilities.

20. Ms Cairns of PwC responded to this question as follows on 9 March 2017

"Where carry is concerned, generally the main benefit in continuing with a trust structure is the IHT protection. Whether you currently have IHT protection depends on the type of trust you have, when the trust was established, whether the assets were added after March 2006, and whether the assets are treated as non-UK situs for IHT. CCP interests, for example are UK situs assets and so depending on the circumstances, may even not be protected from IHT if held directly by the trustees. You would need to balance any IHT protection against your requirement to withdraw funds from the trust, particularly where you have been taxed on the carry. For co-investment there is still a clear benefit as gains can roll up tax free, and you have IHT protection (subject to my previous comments). The analysis on income treatment from April 2017 will depend on your trust structure (e.g. if you have an interest in possession, you will be taxable on all income). Happy to look at this aspect for you."

21. Mr Etroy formally engaged PwC on 13 March 2017.

<u>Further communications in March 2017</u>

22. On 15 March 2017 Ms Cairns contacted RBC about the Five Trusts stating:

"<u>Trust IHT protection</u>
There are a number of points to consider in relation to the fact that the trust holds post 22 March 2006 relevant property as follows:
- *If relevant property was held at the trusts' 10 year anniversaries, which we believe was the case, then there is likely to be an outstanding 10 year charge to deal with for all trusts.*
- *We will need to confirm whether or not an IHT charge arose on the settlors when they settled the relevant property after 22 March 2006.*

We have not seen the detailed advice that the trustees received from Regent Tax Consultants Limited in respect of the 10 year charges, but it would be worth the trustees reviewing this to confirm whether the advice took into account the fact that relevant property was added to the trusts post 22 March 2006. We are very happy to assist the trustees on this review, as well as the preparation of any 10 year charges and in dealing w1th HMRC to rectify the position, if required. We will wait to hear from you as to how you would like to proceed on this point."

23. RBC responded stating that no account had been taken of the fact that relevant property had been added post 22 March 2006 and no action had been taken in respect of the 10 year anniversaries and they asked for PwC's assistance for the purpose of rectification.

24. On 17 March 2017 Ms Cairns contacted Mr Etroy flagging up the possibility of the need to rectify an IHT problem on a 10 year charge on additions post 22 March 2006, referring to her email of 9 March set out above and continuing:

"I'm assuming that you have decided to continue with the trust after April 2017. You will recall that in a previous email I raised some points around IHT and income protection (paragraph copied and pasted below). Would you like us to look at this further? In connection with this, if Charterhouse partnership interests were added post 22 March 2006, which we suspect may be the case, there is a possibility that your trustees have missed a ten year anniversary charge, so there may be a past problem which requires rectifying. We're happy to engage with the trustees to review the position."

25. Mr Etroy immediately responded asking Ms Cairns to look at the IHT point further.

26. Ms Cairns also reverted to RBC on 17 March 2017 stating that PwC was advising Mr Etroy and discussing the possibility of him purchasing his carried interest, and also the same IHT issues as the other trusts relating to the 10 year charge, and she asked for confirmation of tax advice received for his trust in relation to potential ten year anniversary charges (and whether it took into account any additions of assets after 22 March 2006). Later that day she also told RBC that:

   "*We will need to review the IHT impact of the original settlement in 2010 (namely, was there an entry charge on settlement) and obtain the values of the assets to ascertain what tax may be due".*

27. On 21 March 2017 Ms Cairns of PwC sent RBC a long fee proposal under the subject "*Disclosure to HMRC in respect of 10 year charges – scope of work and fee quotation."* The PwC proposal covered the Five Trusts and also listed the Helios May Trust stating "(*if relevant – we should discuss").* PwC proposed that RBC make a voluntary disclosure directly to HMRC. The global fee estimate was £30,000 to £35,000. She noted that "*in order for us to assess the penalty position more clearly, please could you provide copies of any advice the trustees has* [sic] *obtained in relation to these trusts, as well as the information provided in order to obtain that advice".*

28. On 21 March 2017 RBC provided PwC with a schedule of the initial and additional settled funds for the Helios May Trust. Ms Cairns of PwC responded thanking RBC and asked a number of questions regarding that trust:

   "Are you able to provide us with some background in relation to:
   a. The circumstances around the settlement of the Helios May trust
   b. When the Helios April Trust was settled (and whether it still exists)
   c. Was tax advice sought on assignment of the Charterhouse LPs to the Helios May Trust (and if so may we see it?)
   d. Was the asset situs/UK IHT considered when the Charterhouse LPs were assigned?
   e. Was tax advice sought in relation to the ten year anniversary charge as a result of the assignment of assets from the Helios April Trust to the Helios May Trust.
   We just want to be certain that we don't have the same 10 year charge issue for this trust (and you will note that I included the Helios Trust in the fee quote for the Disclosure just in case)."

29. Samantha Gay of RBC informed PwC on 22 March 2017 that, although she was not involved at the time, she could see that *"the client approached Speechly Bircham and received advice to set up a new trust which was fully discretionary".*

<u>Internal communications within RBC in February/ March 2017</u>

30. In February and March 2017 RBC internally considered the position of the Helios May Trust and also the Five Trusts. On 27 February 2017 RBC had internally raised Ms Cairns' email of 24 February 2017 relating to the Five Trusts and the potential for a 10 year charge with its own in-house tax advisers ("Regent"). On 28 February 2017 Regent had responded:

    "Our only involvement with this trust has solely been with the ten year charge checklist, which states that no UK situs assets were held. We were not asked to provide UK tax advice in relation to the additions made back in March 2006, and therefore we would be unaware of this IHT issue. However, we do agree that if UK situs assets were added post March 22, 2006, these assets would be relevant property and subject to the discretionary IHT regime."

31. Further internal correspondence followed PwC's request (dated 21 March 2017) for tax advice on the transfer of Charterhouse LPs to the Helios May Trust and also information as to whether the asset situs/UK IHT was considered at the time. Having looked at the file the internal response from Ms Gay recorded on 22 March 2017 was that the reasons surrounding the set-up of a new trust were to do with tax, primarily, making the trust fully discretionary to prevent a "domicile retest" on the death of the second to die of Mr Etroy and his wife if they were deemed domiciled. She also recorded that the Defendant was heavily involved in the process for setting up the trust and provided advice at the time but it did not appear to be in formal written form so it was difficult to ascertain whether the ten year charge was considered at the time. Later that day Ms Gay requested RBC's archived files asking to look for the tax advice from the Defendant in relation to the set-up of Helios May Trust and transfer of assets from Helios April Trust.

32. On 22 March 2017 RBC recorded internally the need for asset details for all six of the trusts in question, noting that PwC was said to require the information as soon possible. It acknowledged that collating the accounts would involve "*a lot of work*", and asked that the time be marked as *"NO CHARGE collating information for PwC re 10 year charges"*.

33. On 24 March 2017 Ms Samantha Gay of RBC sent an internal "handover/update" message responding to some queries from Mr Higgins at RBC. She noted:

    "PwC have emailed regarding the rectification of the 10 year charge position - we are in the process of pulling all info together (reporting and core team) and will need to gain approval to log as loss event. PwC are engaged by Stephane Etroy personally and will be engaged by the trustees (when we receive engagement letter). They have asked for information regarding Helios which core team are looking at to do with the set up in 2010 and whether tax advice was sought in relation to the transfer of assets from Helios April Trust to Helios May."

34. At that stage the internal correspondence at RBC showed that 10 year charge checklists (referred to by Regent on 28 February 2017) had been completed by Ms Gay of RBC on around the 10 year anniversary of the Five Trusts. A 10 year checklist had not been completed for the Helios May Trust since it had not yet reached such an anniversary. These checklists had been inaccurately completed for four of the Five Trusts since the checklists had stated that no UK situs assets were held. It was acknowledged that this was an error which was reported to the RBC Risk Management Department. It was agreed that the matter would be logged as "*a loss event*" and there would be a meeting to discuss "*an issue in relation to the IHT 10 year charge"* for the Five Trusts. One

director's response to this internal email was "*Oh B*ll*cks…*".

35. An internal meeting took place on 28 March 2017 in order to discuss pre-5 April tax planning in relation to the Helios May Trust relating to purchase of the carried interests, and also the previously raised "*loss event with regard to undisclosed 10 year IHT charges*" in relation to the Five Trusts. The meeting notes referred back to PwC's advice of and stated that:

"*<u>Undisclosed IHT 10 year charges</u>*
An issue has come to light in relation to undisclosed IHT 10 year charges for the following trusts connected to the Charterhouse group:
[REDACTED]
As part of RBC policy, IHT 10 year charge checklists were completed and reviewed by Regent Tax 6 months prior to the respective 10 year anniversary dates. The advice received from Regent Tax stated that, on the basis that the trusts were life interest trusts created pre 22 March 2006, these will be considered 'qualifying life interests' for IHT purposes and therefore will not be subject to either IHT exit or 10 year charges. The checklists for 4 of the trusts incorrectly stated that no UK situs assets were held within the trust. However, it was noted that the checklist for one of the trusts (X Life Interest Settlement) <u>did</u> state that UK situs assets were held and Regent Tax concluded that no action was required.

PwC have advised that, as UK situs assets were added post 22 March 2006, these assets would be relevant property and subject to the discretionary IHT regime. As such, PwC have offered their services to rectify this issue on behalf of the trustees and have estimated their costs in doing this to be between £30-35,000. PwC are confident that the penalties for omission could be reduced to nil as the trustees' actions were not deliberate nor purposely trying to circumvent HMRC rules. Pending further investigation, there may be a cost implication to the remedial work that will be required."
…

RHH queried if external advice was sought when the UK situs assets were added to the trusts. It was agreed that the files would be reviewed to ascertain if this was the case before RBC can commit to covering the costs involved to rectify the position."

36. Later on 28 March 2017 Rupert Hague Holmes (RHH) of RBC internally reported as follows giving "*A heads up on a new related tax loss which was flagged in a HRBC this morning which was convened to look at some pre 5/4 planning*". He explained:

"UK situs assets were then introduced between 2006 to date which has meant there is an IHT entry charge and 19 year anniversary charge due both on the value of the UK situs assets introduced. This wasn't picked up on the IHT checklists supplied to Regent Tax since the checklist was completed incorrectly by a (junior) member of the client handling team. I have asked the client handling team involved (Sarajane Kempster) to look back to see if external tax advice was taken when the UK situs assets were settled into the trust – if it was, then in my view we should argue that none of the cost involved for resolving the issue is for RBC's account. I have made the point that we (RBC) do not necessarily write a cheque every time a problem arises.
Sarajane's view is that the IHT would be payable by the Trust in any event but RBC needs to pay the costs of PWC for sorting out the problem (essentially making a disclosure to HMRC) this cost is in the region of £30-35k pus VAT. PWC, who are

advising the settlor, say there is unlikely to be any late payment penalties, although there may be interest. The Tax Group are not so sanguine".

37. At around this stage RBC decided that it would seek advice from PwC as trustee of the HMT although the engagement was not confirmed until after July 2017.
38. On 30 March 2017 RBC also internally reported an operational risk event report notifying of a loss in relation to the Five Trusts estimated at about £35,000 in total reflecting PwC's fees for rectifying any issue arising out of the 10 year checklists being incorrectly completed.

Communications in April-June 2017

39. The end of year tax planning that had prompted PwC's instructions earlier in the year had included the proposed purchase of carried interests in the Helios May Trusts. However, this fell through and led to some frustration on Mr Etroy's part. On 12 April 2017 he approached PwC indicating that he wanted to change trustees.
40. PwC responded to Mr Etroy on 25 April 2017 that:

"we are currently working with RBC to resolve an IHT question (namely whether there is a potential 10 yearly charge that was due for the Helios Trust) so we suggest that we ascertain if there are any issues that require rectification before you consider a change of trustees."

41. On the same day Mr Etroy responded asking Christine Cairns of PwC:

"*Could you please tell me more about this 10 year charge issue…?"*

42. On 2 May 2017 Ms Cairns responded to Mr Etroy as follows:

"There are potentially two issues arising from the fact that the CCP interests held on your trust are considered to be UK situs ("relevant property") for UK inheritance tax purposes because the carry/coinvest partnerships are Scottish limited partnerships.

1. Potential 10 year trust anniversary charge on the value of "relevant property" added to the trust after 22 March 2006 (at roughly at 6% on the value of the relevant property) - any relevant charge would have become due on the trust's first 10 year anniversary.

2. Potential inheritance tax charge on the value of any UK situs assets settled before 22 March 2006 and subsequently moved from the Helios April Trust to the Helios May Trust (at roughly 20% on value of UK assets above nil rate band at the time)

Our first step is to establish all of the relevant facts to ascertain whether either of the above apply. The trustees are assisting us with this.

If either of the above charges apply and there is outstanding IHT, then we are recommending that the trustees rectify the position by making a disclosure to HMRC (possibly as a joint declaration with the other Charterhouse trusts to which this issue also applies). All fees as well as any interest and penalties arising on the outstanding tax should be borne by RBC as responsibility for reporting trust IHT charges lies with the trustees – and it may be easier for you to reclaim these fees if you are still with RBC. The trustees are aware that there is a potential issue here and have already

sought a fee quote from us for rectifying the position. We will get to the bottom of the facts ASAP and advise you accordingly."

43. In this message Ms Cairns also gave notice that she would be going on maternity leave from mid-July 2017 and Peter Rivers of PwC would be taking over.

44. On 23 May 2017 Mr Etroy contacted Mr Rivers and asked for a call to discuss the *"10 year charge in relation to the Trust"*. Mr Rivers told Mr Etroy that it would be best to wait until they had all the relevant information and could provide full advice. Mr Etroy accordingly emailed on 26 May 2017 saying, *"Let me know when you have news on the RBC/10 year charge situation"*.

45. On 30 May 2017, PwC requested further information from RBC in respect of HMT.

"Further to our ongoing correspondence in relation to a potential UK tax issue to consider in respect of the Helios May Trust's 10 year charge. We also need to consider the position in respect of the Helios April Trust. That is, the UK tax position of the April Trust and the UK tax impact of transferring the assets from the April to the May Trust in 2010. We should therefore be grateful if you would provide us with the information requested below.

1. *Can you please confirm if any UK IHT has been paid on any transfers into the Helios April or May Trusts since they have been settled. This also includes the transfer between the Helios April Trust to the Helios May Trust in 2010. If so, please provide us with copies of any UK IHT tax filings and any supporting calculations.*
2. *In order to determine if there are any UK IHT issues, would you please be able to supply us with the following:*
   - *The trust deed and any supplementary deeds for the Helios April Trust;*
   - *A schedule of the dates of when assets were settled into the Helios April Trust, including a description of the asset and the value;*
   - *A schedule of the assets transferred from the April Trust to the May Trust in 2010.*
   - *A copy of any UK tax advice obtained by the trustees prior to the transfer of assets from the Helios April Trust to the Helios May Trust or any other UK tax advice received by the trustees prior to any assets being settled into the Trust's."*

46. On 31 May 2017 Martin Higgins of RBC responded, confirming that no IHT had been paid on the Helios Trust "*much like the other trusts in the group"*. He quoted the summary contemporaneous note of advice given by the Defendant in September 2009. This advice was essentially what is set out above (as pleaded) and contained no reference to potential entry or principal charges.

47. On 7 June 2017, Mr Etroy followed up with PwC asking for a call on the *"10 year potential charge issue (that I am not sure I fully understand)"* and was told that PwC was waiting for information from RBC.

<u>July 2017-March 2018</u>

48. On 11 July 2017 RBC told Mr Etroy that it was looking to engage PwC to undertake rectification work in relation to the 10 year charge position for the HMT and that it would finalise the engagement in due course.

49. On 19 July 2017 Ms Cairns sent Mr Etroy an update before going on maternity leave.

She noted that PwC's fee proposal was still with the trustees for consideration and said:

"*as soon as we have their agreement, we can begin the work of ascertaining whether or not any tax became due on your trust's first 10 year anniversary, as well as on the transfer of assets from the Helios April to Helios May Trust. I have recommended that the trustees discuss with you who will bear the fees to cover this work (as well as any interest/ penalties if tax is due)*".

50. Mr Etroy responded indicating that the 10 year charge work should be paid for by the trustees but commenting that RBC had not yet formally raised the question. Ms Cairns responded stating:

"With regards the 10 year charge and the liability of any tax charge….you might argue that the trustees did not obtain the correct advice that would have alerted you to the impending charge, and possible mitigation of such a charge."

51. Some additional documents were provided by RBC to PwC in mid-August and RBC reported to Mr Etroy that it had provided PwC with all information in respect of the 10 year charge/IHT issue.

52. In December 2017 and February and March 2018 PwC provided updates and apologies but were also seeking further information as to the valuation of Mr Etroy's trust for 10 year purposes.

<u>April- August 2018</u>

53. On 12 April 2018 PwC provided draft calculations for the Five Trusts and HMT. It calculated the principal charge for the post-2006 additions to HMT as £200,000 in a "worst case scenario". PwC did not calculate an entry charge. It commented as follows:

"You will see that the outcome is rather unexpected given the high valuation of trust assets……It is our guess that the settlors will not be expecting charges of this magnitude and we have suggested that we should consider alternative filing positions which may reduce or even eliminate 10 year charges."

A draft letter was provided for informing the Charterhouse partners and Mr Etroy but RBC asked PwC not to notify the settlors at this stage.

54. On 24 July 2018, PwC told RBC they did not have final tax liabilities but the updated calculations indicated liabilities around the £20k mark per trust.

<u>September 2018</u>

55. On 10 September PwC provided figures for the 10 year post-2006 principal charge for HMT as £28,000 which was similar to the sums for the Five Trusts. They also reported:

"However what is causing complexities in respect of this Trust is the transfer that took place between the Helios April to Helios May trust in 2010. It appears this transfer may generate a substantial liability (c£800k) from our reading of what happened at the time. However we wanted to check with you if the Trustees or Stephane Etroy received any UK advice at the time in respect of this transfer. If so can you please forward us copies of this tax advice as this may help us."

56. On 18 September 2018 PwC referred to the extract of the note of the Defendant's advice provided by Mr Higgins on 31 May 2017 and told RBC that "*Our concern is that there*

may be a chargeable lifetime transfer in respect of UK situs assets as a result of Stephane ceasing to have a life interest in the assets". PwC queried whether more detailed advice would have been obtained and whether the Defendant *"may have an alternative analysis"*. RBC again contacted the Defendant regarding what advice had been given.

57. Both PwC and RBC were aware that 30 September 2018 presented a deadline for registering a disclosure since new penalty rules would then apply. On around 26 September 2018 PWC contacted Mr Etroy for an urgent call and asked him whether he had received formal written advice from the Defendant when he set up the HMT. Mr Etroy was immediately concerned that it was bad news because PwC did not usually communicate by phone. This was also the first time he had been asked about the Defendant's advice.

58. On 28 September 2018 a conference call was held between Mr Etroy, PwC and RBC. PwC told Mr Etroy that he was looking at a potential tax liability of around £1 million. Later that day Mr Rivers sent a note summarising the main issue discussed during the call, namely to register a disclosure to HMRC of the potential tax liability. He explained that there was a risk that inheritance tax was due when his interests in the HAT were terminated and transferred to the HMT, plus a 10 year charge may be due on the assets in HMT. Mr Rivers explained that the assets in the HAT *"should have been treated as being held on an excluded property trust*". Mr Etroy "*queried why nobody had pointed out this potential liability to him"* and said he would *"be seeking legal advice on this matter so he understands his options"* and *"he feels it is clear he was badly advised at the time and the result is not his fault"*.

59. In December 2018, the issue was still being investigated and the finalised figure had not yet been determined but Mr Etroy instructed the solicitors now acting in this matter.

The Defendant's case

60. The Defendant argued that the threshold for investigation under s14A is a low one. The damage must be more than trivial but the test is whether to issue proceedings on the basis that the defendant does not contest liability and has assets.

61. It argued that the Claimants' complaint here was a very simple one that could have been shortly answered at the outset of the communications with PwC in 2017, namely the Defendant's failure to appreciate the situs of the assets when they advised on inheritance tax.

62. Mr Etroy was sophisticated in financial matters and the Second Claimant was a specialist Channel Islands professional trustee. They were both aware from an early stage in 2017 (2 May 2017 at the latest) of the significance of the situs of the trust assets and the fact that the HAT and HMT contained UK situs assets. They were also aware from that stage of their potential exposure to both an entry charge and a 10-year charge. This exposure had been emphasised several times (as seen in PwC's letter of 24 February 2017 to RBC and the exchanges that took place in March and May 2017, and PwC's emails to Mr Etroy in March 2017 and on 2 May 2017). The Claimants also both knew that the Defendant had been involved in setting up the HMT, and that no advice had been given as to this exposure to immediate or deferred IHT charges. Indeed, RBC had gone back to the advice and knew it made no mention of such charges.

63. PwC's email to Mr Etroy on 2 May 2017 was relied on in alleging that the Claimants had, from that date, the actual or constructive knowledge required to start time for s14A. That email gave Mr Etroy sufficient knowledge even though the true scale of the potential exposure had yet to be bottomed out. Although this email was only addressed to Mr Etroy, it contained nothing that RBC was not already aware of from the earlier

communications. Both Claimants had understood these communications and knew the situs of the assets and its significance, and that there had been no advice on these charges. The simple point was that if UK assets were placed in a trust after 22 March 2006 they would attract an entry charge. The simplistic nature of the complaint meant that the case was distinguishable from *Barker v Baxendale-Walker* [2016] EWHC 664 (Ch) and the Claimants would have been aware of it without needing specialist knowledge or further advice.

64. The Defendant also argued that Mr Etroy's evidence was that he had left RBC to deal with the matter and this meant that he was content that RBC's knowledge was to be treated as his knowledge. RBC's knowledge was to be imputed to Mr Etroy.

65. RBC understood very well that there was an issue on the 10 year principal charge and also on the entry charge. Indeed, Mr Higgins had accepted that he knew there was an issue on both these matters in March 2017. This was relevant to the Helios May Trust and the court should reject Mr Higgins's attempt to suggest that this discussion only related to the Five Trusts.

66. The Defendant said it was inexplicable as to why the consequences of the situs of the trust assets took so long to resolve, and how it took 18 months for PwC to give answers. RBC knew they were exposed to the tax in question and the only explanation given by Mr Higgins for not telling Mr Etroy earlier was that RBC (and PwC) were waiting to see what the final answer was.

67. The relevant damage suffered had two main parts, first the IHT charge by way of a debt to HMRC that was avoidable and secondly the investigation costs incurred (the primary cost being accountants' fees). It was clear from the outset of PwC's involvement from March 2017 (and indeed from communications between PwC and RBC in February 2017) that by reason of the UK situs of the assets, the Helios May Trust (and RBC as its trustees) were exposed to considerable expense by way of the investigation costs (including accountants' fees spent on making a corrective statement to HMRC).

68. Upon receiving the advice from PwC about the IHT charges and the need for investigations in May 2017 (as also reflected in the communications to RBC in March 2017) any reasonable person in the Claimants' position would have asked why these investigations were required and why they had not been advised of these charges when advised to set up the trust. By that stage they would have known that "something had happened" that they did not expect. However, it was not relevant whether the Claimants knew that the Defendant should have advised on these IHT charges since that would be negligence within s14A(9).

69. Further, there was no doubt as to the Claimants' exposure to investigation costs from 2 May 2017. Indeed Mr Higgins had conceded that the fees estimated in the region of £5,000 for the HMT were a significant sum. The fact that this element of the damage emerged more clearly than the IHT charges did not stop time running. The Defendant relied on *Clinton Eagle v Redlime Ltd* [2011] EWHC 838 QB in arguing that the fact that a claimant does not know the full scale or extent of damage or the underlying details, does not prevent time running if it has knowledge of some of the damage.

THE LAW – SECTION 14A

70. There was much common ground on the law. The ordinary limitation period is 6 years but s14A of the Limitation Act sets a later starting date for a three year limitation period in circumstances where the claimant lacks the knowledge required for bringing an action

in negligence. The issue in dispute was as to when the Claimants first had the knowledge required for the purpose of section 14A, which provides as follows:

(1) This section applies to any action for damages for negligence other than one to which section 11 of this Act applies

…

(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) 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 by him with the help of appropriate expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

71. While both sides asked me to consider the justice of their case, they acknowledged that the preliminary issue required an application of the statutory provisions.

Burden of proof

72. There was common ground that the burden of proof lay initially on the Claimants although if the Defendant wished to rely on an earlier date of knowledge (whether actual

or constructive) the onus would lie on it to prove that. The position under section 14A is the same as that under section 11 of the Limitation Act 1980, and the position was helpfully explained by Purchas LJ in *Nash v Eli Lilly* [1993] 1 WLR 786 [6]:

"Finally it is important to remember where the onus of proof lies. If the writ is not issued within three years of the date when the cause of action arose (section 11(4)(a)), the onus is on the plaintiff to plead and prove a date within the three years preceding the date of the issue of the writ (section 11(4)(b)). If the defendant wishes to rely on a date prior to the three year period immediately preceding the issue of the writ, the onus is on the defendant to prove that the plaintiff had or ought to have had knowledge by that date."

Knowledge

73. There was no issue in this case as to the identity of the Defendant and both parties acknowledged that there were two elements of knowledge to be assessed for determining when time begins to run, namely knowledge:
    a) "of the material facts about the damage in respect of which damages are claimed" (addressed in s14A(6)(a) and (7))
    b) "that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence" (addressed in s14A(8)(a)).

74. Lord Nicholls in *Haward v Fawcetts* [2006] UKHL 9 [8-10] explained the degree of knowledge required for both elements as follows:

"9. *Thus, as to the degree of certainty required, Lord Donaldson of Lymington MR gave valuable guidance in Halford v Brookes [1991] 1 WLR 428 , 443. He noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice*[1] *and collecting evidence "Suspicion, particularly if it is vague and unsupported will indeed not be enough but reasonable belief will normally suffice." In other words, the claimant must know enough for it to be reasonable to begin to investigate further*

10. Consistently with the underlying statutory purpose, Slade LJ observed in Wilkinson v Ancliff (BLT) Ltd [1986] 1 WLR 1352 , 1365, that it is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim. Where the complaint is that an employee was exposed to dangerous working conditions and his employer failed to take reasonable and proper steps to protect him it may well be sufficient to set time running if the claimant has "broad knowledge" of these matters. In the clinical negligence case of Hendy v Milton Keynes Health Authority [1992] 3 Med LR 114 , 117–118, Blofeld J said a plaintiff may have sufficient knowledge if she appreciates "in general terms" that are problems capable of being attributed to the operation, even where particular facts of what specifically went wrong or how or where precise error was made is not known to her. In proceedings arising out of the manufacture and sale of the drug Opren Purchas LJ said that what was required was knowledge of the "essence" of the act or omission to which the injury was attributable: Nash v Eli Lilly & Co [1993] 1 WLR 782 , 799. In Spargo v North Essex District Health Authority [1997] PIQR P235 , P242, Brooke LJ referred to "a broad knowledge of the essence" of the relevant acts or omissions. To the same effect, Hoffmann LJ said section 14(1)(b) requires that "one should look at the way the plaintiff puts

[1] Lord Donaldson refers here to legal advice

his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which the complaint is based": Broadley v Guy Clapham & Co [1994] 4 All ER 439 , 448."

75. In order to assess knowledge under s14A it is helpful to identify the nature of "the damage" suffered and also the "essence" of what the Claimants are complaining about. Lord Scott helpfully drilled down to identify the relevant "damage" complained of in *Haward v Fawcetts* where it was the claimant entering into a bad investment [46]. In this case the relevant damage was the Claimants creating a trust that gave rise to an immediate entry charge, liability for a 10 year principal charge on assets added prior to 22 March 2006 and also costs, all of which were avoidable. As regards the essence of the act or omission complained of, here it was common ground that the heart of the Claimants' complaint was the Defendant's failure to appreciate the existence of UK situs assets and to advise that creating a new trust would give rise to an immediate entry charge of 20%.

76. I do not accept the Claimants' argument (which was not pressed very firmly) that a higher degree of knowledge is required as to whether sufficiently serious damage has been suffered under s14A(6)(a) as opposed to knowledge of attributability of the damage under s14A(8)(a)). In *Haward v Fawcetts* Lord Mance acknowledges that the statute addresses the two elements of knowledge differently and there is an interplay between them but suggests there is not a separate higher test of knowledge based on s14A(7). Indeed he suggests that the question under s14A(7) as to whether damage is sufficiently serious goes to matters of quantum, commenting as follows.

106. Under section 14A the onus is on a claimant to plead and prove that he first had the knowledge required for bringing his action within a period of three years prior to its bringing. Subsection (6) of section 14A distinguishes two aspects of the knowledge required. The first aspect relates to the seriousness of the damage, the second to "the other facts relevant to the current action" including in particular that such damage was attributable in whole or part to the act or omission alleged to constitute negligence and the identity of the defendant. The seriousness of the damage is relevant because there may be cases where, although it is known that loss has been suffered due to the negligence of another person, the loss may appear for a time so minor that no one would contemplate instituting proceedings. That is I think more likely in the area of personal injuries and fatal accidents, covered by section 14 on which section 14A(7)-(10) were modelled, than in the area covered by section 14A itself. In both areas, the statutory language assumes that it is known that there has been some injury (under section 14) or damage (under section 14A). But this too can give rise to difficulty. If a doctor advises that it is necessary to operate, or to remove a breast, in order to remove a malignant tumour, one would not usually speak of the patient sustaining an injury until one knew that the diagnosis was misconceived and there was no such tumour. Similarly, if a financial adviser advises in favour of an investment, one would not describe the making of the investment itself as "damage" until one discovered that it had been a bad or unsound investment from the outset.

107. In such cases, there is an interplay between knowledge of what would ordinarily be regarded as injury or damage and knowledge regarding the factual circumstances in which the operation or investment occurred. Yet, the first aspect of the knowledge required relates to damage of sufficient seriousness "to justify [the claimant] instituting proceedings" (section 14A (7)), whereas the knowledge required regarding the attributability of such damage to some act or omission of the defendants is, as will appear, not necessarily such knowledge as to justify proceedings. To maintain a coherent scheme, the better view

therefore appears to be to treat the first aspect of knowledge as relating solely to matters of quantum and all questions regarding the evaluation or classification of damage as such as falling within the second aspect of the knowledge required. This is also the view taken in authority: see Dobbie v Medway Health Authority [1994] 1 WLR 1234, 1241-1242, per Sir Thomas Bingham MR."

77. Lord Bingham in *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, 1241-1242 stated:

> "*The requirement that the injury of which a plaintiff has knowledge should be "significant" is in my view directed solely to the quantum of the injury and not to the plaintiff's evaluation of its cause, nature or usualness. Time does not run against a plaintiff, even if he is aware of the injury, if he would reasonably have considered it insufficiently serious to justify proceedings against an acquiescent and credit-worthy defendant, if (in other words) he would reasonably have accepted it as a fact of life or not worth bothering about. It is otherwise if the injury is reasonably to be considered as sufficiently serious within the statutory definition: time then runs (subject to the requirement of attributability) even if the plaintiff believes the injury to be normal or properly caused*."

78. These comments suggest that the first aspect of knowledge, going to whether the damage is sufficiently serious, mainly relates to matters of quantum rather than the existence of damage. The degree of knowledge required for the evaluation and classification of damage (which would include whether relevant damage has arisen) will, to maintain a coherent scheme, generally be assessed in the same way as knowledge going to the attribution of the damage.

79. In some cases it will be possible to approach the two elements of knowledge under s14A in stages, most typically where the damage complained of is apparent (for example *Clinton Eagle v Redline* [2011] EWHC 838 (QB) where subsidence was apparent and knowledge of damage was dealt with separately from knowledge of attributability). However, in cases of financial advice the ascertainment of any loss can cause more difficulty as Lord Mance commented in *Haward v Fawcetts* [106 set out above], and relevant damage may not be identifiable until it is apparent that the professional intervention was unsound from the outset.

80. The Claimants are claiming a pure economic loss and Lord Walker in *Haward v Fawcetts* [64] pointed out that such cases typically call for specialised technical expertise, where it is most likely that a claimant may know a basic fact but not know what, to an expert, they add up to. This is such a case.

81. The Claimant drew helpful comparison with the decision of Roth J in *Barker v Baxendale-Walker* [2016] EWHC 664 (Ch) [184] which related to the application of s14A to negligent tax advice. There the damage was also identified as entering into a transaction that gave rise to tax liabilities. Roth J concluded that in these circumstances the two elements of knowledge, namely knowledge of the relevant damage and knowledge that this was attributable to the defendant's act or omission, "effectively go together" and that knowledge of the relevant damage would not arise until the claimant had received specialist advice.

82. *Haward v Fawcetts* acknowledged that the two elements may be dealt with together where appropriate. It was a case about applying s14A(8)(a) (i.e. the attributability of damage) and it makes clear that what the claimant must know to set time running is the

essence of the act or omission to which his damage is attributable [90]. Until the claimant is aware of the damage it is unlikely that it will have knowledge of attributability. This approach is also supported by the House of Lords' broader comments on the tension between s14A(8)(a) and (9) and the fact that knowledge is assessed with hindsight as to what is ultimately complained of. It will commonly be necessary for the claimant to know that something has gone wrong, even if knowledge of negligence as a matter of law is irrelevant [12, 58, 59, 114 and 115].

Knowledge of investigation costs

83. There was an issue as to whether knowledge of investigation costs would trigger a starting date under section 14A. In principle, costs of investigating a loss suffered may be relevant damage for the purpose of section 14A, especially if assessing the extent of known damage. However the starting date under s14A involves identifying the date when the claimant has knowledge of the essence of what is later complained of. The Claimant must have enough information to embark on the preliminaries to commencing proceedings. Costs incurred for the purpose of deciding whether any damage has been suffered are unlikely to meet these tests since the investigation is premised on there not yet being sufficient information to justify proceedings, and the costs are typically preliminary or ancillary to the essence of the claimant's complaint.

84. A further reason why knowledge of the cost of investigations to ascertain whether damage has been suffered would be unlikely to start time is that s14A(10) expressly states that a claimant may use an expert in order to ascertain the relevant facts. It would be inconsistent with that wording (and involve an element of bootstraps) to find that the mere fact of using an expert to ascertain the relevant facts, in itself constituted knowledge of the relevant facts. As the Claimants commented, this would punish a claimant that had done what was permitted under s14A(10).

85. Investigation costs may also not trigger a starting date under s14A if they do not meet the test as to whether damage is sufficiently serious under s14A(7). As Lord Bingham MR explained above in *Dobbie*, this is intended to prevent time running where a person may be aware of damage but *"he would reasonably have considered it insufficiently serious to justify proceedings against an acquiescent and credit-worthy defendant, if (in other words) he would reasonably have accepted it as a fact of life or not worth bothering about."*

86. The Defendant argued for a different approach and suggested that s14(A)(7) incorporates a *de minimis* test, and also that it is to be applied by reference to a hypothetical reasonable person regardless of their actual circumstances (for example as to their wealth or the relative significance of the issue at stake) whereas s14A(10) is to be applied by reference to the characteristics of a person in the position of the claimant.

87. I did not accept this distinction (although it did not make a difference on the facts of this case) because the wording does not support a significantly different test as between s14A(7) and (10). The wording is slightly different but section 14A(7) incorporates an objective test by reference to a reasonable person that has suffered the same damage as the claimant. This can only properly be applied against the other external surrounding circumstances of the claimant, including the significance of the matter to a reasonable person in their position (see *Gravgaard v Aldridge Brownlee* [2004] EWCA Civ 1529 [20]).

88. The bar may not be very high in establishing that damage is sufficiently serious to justify instituting proceedings (see *Cole v Sion* [2020] EWHC 1022 (Ch) [16[4]). However,

section 14A(7) does not merely introduce a *de minimis* rule such that knowledge of any non-trivial loss would be sufficient to start time. A *de minimus* rule would not need express wording and would not reflect the wording chosen. The correct approach is that of Lord Bingham MR in *Dobbie*, namely that the test of "sufficiently serious" is a broad one that allows the court to consider whether time runs if a person initially (and reasonably) decides that the damage did not justify proceedings, including on grounds that the damage was a fact of life or not worth bothering about.

Gravgaard v Aldridge Brownlee [2004] EWCA Civ 1529

89. The Defendant submitted that the court should find assistance from the Court of Appeal's decision in the comparable case of *Gravgaard* . There the court found that the claimant's belief in a claim against a third party bank (which was ultimately ill-founded) meant she should reasonably have sought legal advice so as to trigger constructive knowledge. Similarly, according to the Defendant, the Claimants knew that they were exposed to tax charges and would have to spend thousands of pounds to put in a corrective statement to HMRC in relation to the post-22 March 2006 additions, and this gave rise to both actual and constructive knowledge.

90. *Gravgaard* is a case about constructive knowledge. It is distinguishable since the claimant in that case was acutely aware at an early stage that something had gone very wrong in that she was exposed to the bank taking an interest in her house, and that exposure was intimately bound up with the transaction that gave rise to the disputed claim against her solicitor. While she had wrongly attributed the exposure to the bank, she was aware of the damage and should reasonably have sought legal advice at that stage. By contrast, in this case (for the reasons set out below), the Claimants had not known that something had gone wrong that required legal advice until September 2018. The issues raised in 2017 on a potential 10 year principal charge for post-22 March 2006 additions were not intimately or necessarily connected with the Defendant's advice since they would have arisen anyway (and related to all six trusts). Further, as soon as the issue arose the Claimants had reasonably sought tax advice to ascertain potential charges.

DISCUSSION

91. There was a great deal of correspondence (including notes of meetings) in evidence. Both sides focused on these communications and they were well recorded. This was the best evidence of what the parties knew or should reasonably have known at the time, but I also took account of their evidence as to what they knew and understood.

92. Mr Etroy was an impressive witness. He was questioned at length on somewhat complex correspondence between PwC and RBC that he had not been party to, and that related to other people's matters. However, he attempted to assist the court as far as possible, giving straightforward and helpful answers.

93. Mr Higgins' evidence was less impressive because he was somewhat defensive. While he could have been more open he gave fair and honest answers reflecting his role and that of his colleagues at RBC. They were not tax advisors. Given that PwC had been appointed to provide specific tax advice RBC would have been led by its advice rather than taking the initiative in identifying tax issues or drawing inferences between the files. Mr Higgins had fairly maintained that discussion relating to the Five Trusts was treated as applying to those trusts rather than being applied to HMT.

94. There was no evidential or legal basis for the Defendant's suggestion that RBC's knowledge was to be imputed to Mr Etroy. RBC had a clearly defined role as professional trustee. It was not appointed as Mr Etroy's agent or with comparable

authority. Mr Etroy had not said that he expected RBC to deal with matters and make decisions on his behalf. Instead, his expectation was (unsurprisingly) that RBC would deal with the matter in their appointed role as trustee.

95. A significant feature of much of the correspondence relied upon by the Defendant was that it related to advice provided by PwC to RBC in relation to the Five Trusts set up by the other Charterhouse partners (this included PwC's emails of 24 February 2017 and 15 March 2017). It was not related to the HMT or sent to Mr Etroy. This could not give rise to relevant knowledge on the part of Mr Etroy.

96. RBC's internal correspondence in March 2017, upon which the Defendant placed significant emphasis, was focused on the implications of RBC's inaccurate completion of 10 year charge checklists on the Five Trusts in around 2012 which could mean that 10 year charges were being declared late (giving rise to interest and possibly penalties that were avoidable). The email sent by Rupert Hague Holmes of RBC on 28 March 2017 related to the Five Trusts.

97. Advice and discussion on the Five Trusts would not have put RBC on notice of relevant damage, namely exposure to tax liabilities by reason of the Defendant's tax advice. The Five Trusts shared some common features with the HMT, namely that they had been set up by partners of Charterhouse to hold interests earned from their work at Charterhouse, and RBC was the professional trustee. PwC was being involved in advising on these trusts because the partners in question were, like Mr Etroy, regarded as non-domiciled in the UK and they wanted advice in advance of potential changes to their tax status in April 2017. However, there were important differences because Mr Etroy no longer worked for Charterhouse and was instructing PwC individually, and his interests had been transferred into a discretionary trust whereas the Five Trusts had all remained interest in possession trusts.

98. RBC was asked to find previous external tax advice, and PwC pressed them on this. This did not show that RBC had knowledge of a real possibility that something had gone wrong in that tax advice. RBC (and PwC) were trying to find out what had happened so that PwC could advise. RBC also wanted to take an informed view on its own responsibility and take the appropriate next steps. There was no suggestion that PwC were looking to see whether responsibility for the liability itself lay with former advisors. Indeed, they explained that they needed the advice to consider the penalty position.

99. The content of the correspondence relied upon by the Defendant was focused on whether there was a 10 year principal charge on assets added to these trusts after 22 March 2006. This was the focus whether the correspondence was about the Five Trusts, or HMT or the six trusts being dealt with together. It was common ground that the incidence of this charge was not attributable to advice given by the Defendant. It was an issue that arose regardless of the Defendant's advice and was not intimately connected to it. While any such charge needed to be identified and potential interest and penalties resolved, this discussion would not have put the claimants on notice that something had happened that would justify taking legal advice or issuing proceedings.

100. Further, there was nothing in the correspondence to show knowledge on the Claimants' part of exposure to a liability to a principal charge on pre-2006 additions. Accordingly there was no basis for suggesting actual or constructive knowledge of that element of the damage suffered. It is notable that PwC did not identify this charge as a possibility until around 2 years after the correspondence in 2017.

101. Potential entry charges were identified in some of the communications (including the emails of 24 February, 15 & 17 March and 2 May 2017) but for similar reasons as apply to the discussion of a potential principal charge this did not give the Claimants knowledge that such liabilities would not only be incurred but were capable of being attributed to the Defendant's acts or omissions.

a) The focus of the advice was on a potential principal charge on post 22 March 2006 additions having been incurred on all the trusts' 10 year anniversary (see above).
b) Any entry charge payable by the Five Trusts would also not be attributable to advice from the Defendant. Such an entry charge was not, on the evidence before me, something that should have been avoided. Accordingly, the fact that entry charges were being mentioned did not put the Claimants on notice that the Defendant's advice could be the source of the problem.
c) The advice of 2 May 2017 (consistently with the earlier communications from PwC) emphasised that PwC had not yet identified any liability for an entry charge and it needed to gather more facts. The advice was tentative as to whether principal or entry charges would arise, not merely as to the extent of such charges. PwC's advice was firm as to there being an issue requiring investigation but tentative as to the likely outcome of the investigations. It did not convey a real possibility that there would be an entry or principal charge or that such charges were capable of being attributed to the Defendant's advice.
d) There was obvious justification for PwC being tentative as to whether any charges had been incurred or as to their attribution.
   i) The trusts in question contained funds (rather than simply cash and shares) so valuation was complex and required cooperation from Charterhouse. While PwC gave a "worst case scenario" figure for the post-2006 principal charge for HMT being £200,000 in April 2018 after having done substantial investigations, the actual charge was around £28,000. On 2 May 2017 PwC did not have the numbers it needed to give an estimate.
   ii) Liability for a principal charge did not necessarily lead to an outstanding entry charge since the charges would depend on allowances and thresholds. It appeared that no entry charges were incurred for the Five Trusts even though there was potential liability.
   iii) PwC made clear that it had not got to the bottom of the issues. Even in September 2018 it was asking whether an alternative analysis was available. The Defendant now accepts its advice was negligent and the parties' knowledge is being assessed with the benefit of hindsight, PwC did not have the benefit of advising against that certainty.

102. The identification of the tax liabilities raised by PwC in 2017 and what had given rise to them was a complex matter. This was apparent from the investigations and it was unrealistic for the Defendant to suggest that the matters complained of were simplistic. Neither Mr Etroy nor RBC had specialist knowledge on UK inheritance tax and would not reasonably have been expected to analyse the various factors differently or to have gone behind PwC's advice so as to draw separate conclusions or work out that something had gone wrong in that the transaction was in itself unsound. Taxes are not only complex and frequently changeable, but also a fact of life even where professional advice is taken (the situation was very different to the disastrous investments or operations or subsidence that were discussed in *Haward v Fawcetts* and *Clinton Eagle*). The mere fact that Mr Etroy had taken advice in 2009 would not have alerted him or RBC to this being the source of the problem.

103. The Claimants had asked PwC for specialist tax advice and done all that was necessary for PwC to answer the tax issues that arose. There was no basis for suggesting that the Claimants should have taken different advice or at an earlier stage.

RBC would have had some understanding of the meaning of a principal charge, and the impact of the Finance Act 2006, in particular regarding UK situs assets. However, it would not have sufficient awareness (whether actual or constructive) to conclude that the liabilities being discussed were attributable to the Defendant's advice. It would have been premature for the Claimants to have taken legal advice in March or May 2017 (again *Graavgard* was distinguishable).

104. PwC's focus was on whether there had been a failure to disclose a potential 10 year principal charge and entry charge (with the risk of interest, penalties and a disclosure to HMRC), not on whether such charges should never have arisen. Similarly, the further focus in RBC's internal discussion was on whether there had been a failure on its part to identify a principal charge in around 2012 when completing the 10 year checklists for the Five Trusts. These matters were not inextricably linked to the acts and omissions later complained of which went to whether the initial advice regarding the setting up of the HMT was unsound.

105. The Defendant placed emphasis on the fact that the Claimants had known from the outset of the investigations that the trusts had UK situs assets and that they had not been advised by the Defendant about potential liabilities for an entry or principal charge as a result of a transfer of UK situs assets. It emphasised that Mr Higgins had retrieved the record of the Defendant's advice on the creation of the trust. However, this presumed that Mr Etroy (or RBC) would have known that something was missing from the Defendant's advice or that PwC's advice alerted them to this. This was incorrect (as explained above) and unfairly assumed that the Claimants had a sophisticated understanding of the rules and would have realised that something unexpected had happened. This was not realistic, particularly where PwC had taken over 18 months to come to a conclusion on the tax charges and suggest that the status of the assets should have been appreciated on creating the HMT.

106. The high point of the Defendant's case was PwC's email to Mr Etroy on 2 May 2017 (and the same information already provided to RBC, mainly in March 2017). This email put Mr Etroy on notice of two issues, first a potential 10 year charge at roughly 6% on property added to the trust (whether the HMT or MAT) after 22 March 2006, and secondly a potential entry charge for inheritance tax on UK assets settled before 22 March 2006 and moved into the HMT (at roughly 20%). He was told that PwC still needed to establish relevant facts to ascertain whether either of these charges would apply, and if there were any charges then it would be necessary to rectify the position by making a disclosure to HMRC. PwC made clear that they needed to get to the bottom of the facts and would then advise accordingly.

107. The Defendant emphasised that RBC was undertaking very considerable investigations at PwC's request. In addition, PwC had firmly indicated that an investigation was required and would entail considerable work in identifying outstanding tax and preparing a disclosure to HMRC.

108. By May 2017 both RBC and Mr Etroy knew that it was necessary for PwC to carry out the proposed investigation into undisclosed 10 year IHT charges. RBC also knew it would have to carry out its own work. However, this was not sufficient to start time running under s14A, taken on its own or with other factors.

a) PwC's fees were being incurred expressly "*with regards to the undisclosed 10 year IHT charges"*. The purpose of these investigations (and those of RBC) was principally to see if there were 10 year principal charges for post-22 March 2006 additions (see above). This work was not attributable to the Defendant's advice and not intimately linked to it (see above).

b) Entry charges were also covered within the investigations but for the same reasons that the issue of entry charges did not give the Claimants relevant knowledge (see above), the existence of investigations would not have done so.

c) If wrong on this, the investigation costs were incurred for the purpose of the Claimants obtaining help to ascertain whether there was any damage, not merely to ascertain the extent of the damage. They would not amount to relevant damage for the purpose of 14A.

d) Further, the investigation fees at stake on 2 May 2017 were around £5,000 for HMT (and it was not said that RBC's internal costs would have made a difference although I take them into account). While this is a significant sum it was not sufficiently serious for a reasonable person who had suffered such damage to consider that it would, in itself, justify commencing proceedings. The investigations were largely attributable to matters unrelated to the Defendant's advice. Even to complete the preliminaries to issuing proceedings would have merited expensive specialist lawyers (as Mr Etroy fairly commented). Any reasonable person would have approached the matter in a business like way and would not have bothered litigating over the costs in question. Knowledge of these costs would not have justified taking steps to commence proceedings.

109. Taking the information available to the Claimants and their circumstances as a whole, their knowledge of exposure to IHT charges and investigation costs by 2 May 2017 fell far short of what would have justified them taking legal advice and embarking on the preliminaries to making a claim, including sending a letter before action. Specialist tax advisors were advising that they did not know if the trust would be subject to an outstanding liability for the charges in question, and they needed to investigate the facts. There was nothing in the email of 2 May 2017 (or the information provided to RBC) to suggest that something had gone wrong with the Defendant's advice so as to cause such tax liability.

110. Communications between 2 May 2017 and 28 September 2018 date did not give the Claimants more relevant knowledge (whether actual or constructive). The passage of time and exchanges of updates and chasers did not materially inform the Claimants. PwC made further enquiries and took almost 18 months to come to a conclusion on whether an entry charge was payable on post-2006 Additions. The Defendant could fairly comment that the work took longer than might be expected. However, it was also clear that calculations were taking some time and the Defendant was unable to show that Mr Etroy or RBC were responsible for any material delays.

111. It was telling that as soon as PwC gave a firm indication on 28 September 2018 that charges had been incurred and the status of the assets should have been appreciated when advice was given in 2009 Mr Etroy knew something had gone wrong and that he had been poorly advised. He sought legal advice within a couple of months and sent a letter before action in February 2019. PwC's telephone conference with Mr Etroy on 28 September 2018 first gave Mr Etroy actual knowledge that liability for the entry charge was a real possibility whereas previously PwC had been tentative and maintaining that further information was required.

112. RBC would have first known that it had suffered damage that was attributable to the Defendant's advice at the same time. While it had notice earlier in September 2018 of the sums in question and that a chargeable lifetime transfer took place on creating the new discretionary trust, PwC did not spell out its advice until the telephone conference on 28 September 2018. It was at this stage that a firm link between the entry charge and the Defendant's advice on the transfer of assets was drawn. RBC would not have had the expertise to have drawn these inferences at any earlier stage from the basic facts.

CONCLUSIONS

113. On 2 May 2017 Mr Etroy did not have knowledge, for the purpose of section 14A of the Limitation Act, of the damage in respect of which damages are claimed, or knowledge that it was attributable to the acts or omissions which are now alleged to constitute negligence.

114. Mr Etroy first had such knowledge on 28 September 2018 since this was the first time that PWC firmly indicated that there was likely to be a significant entry charge that was attributable to the Defendant's advice.

115. On 10 September 2018 RBC were notified of PwC's concern that the transfer advised by the Defendant had generated a very substantial entry charge. However, PwC called a telephone conference for 28 September 2018 to spell out its conclusions and this was the first stage when RBC had the required knowledge for the purpose of s14A, namely sufficient knowledge to justify embarking on the preliminaries to issuing proceedings.

116. As explained above the Claimants had obtained expert tax advice at an early stage to ascertain the trust's tax liabilities. The Defendant's case on actual and constructive knowledge was closely linked. Based on the findings above the Claimants could not reasonably have been expected to have acquired the knowledge required for bringing an action for damages in respect of the damage alleged prior to 28 September 2018.

117. For reasons set out above, the Claimants' claims have been commenced within the time permitted by s14A and are not time-barred.