Neutral Citation: [2024] UKFTT 00618 (TC)

Case Number: TC09239

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Taylor House

Appeal reference: TC/2022/12353

*CAPITAL GAINS TAX – Section 103KA of the Taxation of Chargeable Gains Act 1992 - whether the Appellant performed investment management services directly or indirectly in respect of an investment scheme under arrangements involving at least one partnership and carried interest arose to the Appellant under the arrangements – held that the arrangements were such that the Appellant did perform investment management services, the arrangements involved at least one partnership and carried interest arose to the Appellant – however, the investment management services were performed by the Appellant in respect of the joint venture in which the entity of which the Appellant was a member was invested and it was common ground that that joint venture was not an investment scheme – the investment management services were not performed by the Appellant, either directly or indirectly, in respect of the other investors in the joint venture and therefore, even if any of those other investors was an investment scheme, the requirement that the investment management services be performed in respect of an investment scheme was not satisfied – appeal upheld*

**Heard on:** 10, 11, 12 and 13 June 2024
**Judgment date:** 5 July 2024

**Before**

**TRIBUNAL JUDGE TONY BEARE**
**MR JULIAN SIMS**

**Between**

**NICHOLAS MILLICAN**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr John Gardiner KC and Ms Sarah Black, of counsel, instructed by McCarthy Denning

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| For the Respondents: | Mr Akash Nawbatt KC, Mr Bayo Randle and Ms Aparajita Arya, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs |

## DECISION

### INTRODUCTION

1. This decision relates to an assessment to capital gains tax in respect of a disposal which was made by the Appellant in the tax year ending 5 April 2017. The Appellant takes the view that that disposal did not fall within the special regime in the Taxation of Chargeable Gains Act 1992 (the "TCGA") which applies to "carried interests" and the Respondents disagree.

2. In order to put this dispute in context, we think that it would be helpful to explain what the term "carried interest" has historically meant in the financial services context and to describe the background to the introduction in 2015 of the specific carried interest provisions in the TCGA with which are now concerned.

3. As a general matter, the term "carried interest" has historically been used to describe the return which is made by a person who participates in the management of an investment partnership and which is calculated by reference to the underlying performance of that partnership.

4. Prior to 2015, the capital gains tax treatment of such returns was governed by the legislation generally applicable to partnerships in what is now Section 59 of the TCGA, a statement of practice (D12) expanding on the application of that legislation, a 1987 statement from the British Venture Capital Association (the "BVCA") approved by the Inland Revenue and a 2003 memorandum of understanding between the BVCA and the Inland Revenue.

5. The cumulative impact of all of those was that an individual participating in the management of an investment partnership (a "manager") who received carried interest obtained two distinct tax benefits.

6. The first was that, although the carried interest was, in economic terms, a reward to the manager for the investment management services which he or she had performed, the form in which that reward was being provided – which is to say, by the manager's holding an interest in the investment partnership and thus receiving a portion of the partnership's chargeable gains – meant that it was subject to capital gains tax and not income tax. Historically, capital gains tax has usually been charged at a lower rate than income tax and, currently, that remains the case.

7. However, there was another related, and even more significant, tax benefit which arose to a manager under the relevant rules and that was a function of the way in which the capital gains tax legislation applies to partnerships in general. Under Section 59 of the TCGA, any partnership dealings are treated as dealings by the partners and, under statement of practice D12, each partner is treated is treated as holding a proportion of the partnership's assets which corresponds to his or her share in the asset surpluses of the partnership from time to time. This means that, on a disposal by the partnership of one of its assets, each partner is allocated a share of the aggregate disposal proceeds which accords with his or her share in the asset surpluses of the partnership at the relevant time. More significantly in the present context, each partner is treated as having a share in the aggregate base cost of the relevant asset which accords with his or her share in the asset surpluses of the partnership at the relevant time.

8. The significance of the latter point in the context of an investment partnership was profound because of the basis on which the members of the partnership invested capital in the partnership. Typically, the amount of capital invested by a manager was very much lower than the manager's share in the asset surpluses of the partnership, reflecting the fact that the manager was providing his or her services to the partnership in lieu of capital.

9. To explain this by way of example - which we hasten to add has no necessary correlation to the terms of any real investment partnership – the manager might put 1 of capital into the partnership whilst the investors put 99 of capital into the partnership but the terms of the partnership agreement might be that the managers would be entitled to 20% of partnership profits whilst the investors would be entitled to the remaining 80% of partnership profits. Assuming that the aggregate capital invested were to be used to acquire an asset for 100 and that asset were to be sold for 500 in due course, the manager's entitlement would be to 100 of the proceeds (20% of 500). However, the manager's base cost in respect of the disposal would be 20 (20% of 100) and not the 1 which the manager had actually put into the partnership.

10. Effectively in that example, the manager would have obtained the benefit of 19 of additional base cost and so his or her gain for capital gains tax purposes would be 80 (100 – 20) and not his real economic gain of 99 (100 – 1). This process, which arose by virtue of the application of the rules generally applicable to partnerships in the context of investment partnerships was known colloquially as "base cost shift". Of course, the additional base cost obtained by the manager in the above example would have been lost by the investors but they would generally have been outside the scope of UK tax in some way, whether by being non-UK resident or by being tax exempt for UK tax purposes.

11. The legislation introduced in 2015 by way of Section 43 of the Finance (No 2) Act 2015 was designed to prevent a person deriving carried interest from benefiting from the base cost shift in respect of his or her carried interest. The legislation in question applied with effect from 8 July 2015 and is contained in Chapter 5 of Part III of the TCGA. Where it applies, a taxpayer affected by it cannot benefit from the base cost shift in calculating his or her chargeable gains in respect of partnership assets.

12. The matter at issue in this case is simply whether the Appellant falls within the ambit of the new legislation in respect of the disposal mentioned in paragraph 1 above. The subject matter of the appeal is therefore quite limited in scope. The parties have asked us to determine as a matter of principle whether or not that is the case and without regard to matters of quantum. They have said that, if we determine the question of principle in favour of the Respondents, then there is no dispute as to quantum.

**THE BACKGROUND**

13. We start our recitation of the facts in the case by setting out the background to the disposal in question. These are as follows:

(1) the Appellant was a member of Greycoat EPIC Capital LLP ("GEC LLP"), a limited liability partnership incorporated in England under the Limited Liability Partnership Act 2000 (the "LLPA 2000") on 19 August 2014;

(2) another member of GEC LLP was Greycoat Real Estate LLP ("GRE LLP"), a limited liability partnership incorporated in England under the LLPA 2000 on 29 October 2008;

(3) the Appellant was also the chief executive officer of, and a member of, GRE LLP;

(4) GEC LLP was a member of EPIC Investor LLP ("EPIC LLP") a limited liability partnership incorporated in England under the LLPA 2000 on 19 August 2014;

(5) the other members of EPIC LLP were Cheyne Real Estate Credit Holding Fund, L.P., Cheyne Real Estate Credit Holding Fund II, L.P., Cheyne Real Estate Credit Holding Fund III, L.P. (together, the "Cheyne Funds" and, each, a "Cheyne Fund"). The Cheyne Funds were at arm's length to the Appellant, GEC LLP and GRE LLP;

(6) EPIC LLP was governed by a deed dated 18 September 2014 (the "Initial Deed") (as amended by two deeds of variation, one dated 30 January 2015 and the other dated 1 October 2015) (as so finally amended, the "Deed");

(7) GRE LLP was a party to the Initial Deed when the Initial Deed was first executed and prior to its amendment but, by virtue of clause 3.1 of the Initial Deed, GRE LLP retired from, and ceased to be a member of, EPIC LLP simultaneously with the Cheyne Funds' admission as members;

(8) EPIC LLP's principal activity was to acquire, own, hold, manage, operate, finance, refinance, sell and otherwise deal and dispose of shares and other securities and investments in the Equity Partners Infrastructure Company No. 1 Limited (the "Company"), an exempted company incorporated and registered in Bermuda on 3 September 2014 with limited liability, and the Company's subsidiaries;

(9) EPIC LLP initially acquired 50% of the shares in the Company but this increased to 85% of the shares in the Company by January 2015;

(10) the Company owned 100% of a company called EPIC (Bermuda) Holdings Limited ("EBH") and that company in turn held, indirectly, a 17.49 % investment in the MOTO group of companies (the "MOTO group");

(11) each of GEC LLP, GRE LLP and EPIC LLP was a limited partnership incorporated under the LLPA 2000 and carried on a trade, profession or business with a view to profit. It is common ground that, pursuant to Section 59A of the TCGA, each of them therefore fell to be treated for capital gains tax purposes in the same way as a partnership, which is to say that, subject to the potential application of the carried interest legislation which is the subject of this appeal, the treatment described in paragraphs 2 to 10 above applied and members of the relevant entity were to be treated for capital gains tax purposes as holding a proportion of the entity's assets which accorded with his or her share in the asset surpluses of the entity;

(12) clause 7 of the Deed was divided into two parts – the first contained provisions in relation to the management of EPIC LLP and the second contained provisions requiring GEC LLP to provide certain services, which were described as "advisory services", to the Cheyne Funds "and, where relevant, to [EPIC LLP]", in return for a fee which was payable by the Cheyne Funds. When the Initial Deed was executed, the clause required GEC LLP to provide those services to EPIC LLP itself but, by virtue of the amendments made to the Initial Deed described in paragraph 13(6) above, the identity of the recipient of the services was changed so that it read as set out above. We will have more to say about the precise terms of this clause in due course;

(13) GEC LLP in turn contracted with GRE LLP to perform GEC LLP's obligations under clause 7.5 of the Deed on GEC LLP's behalf. We have not been provided with a copy of this contract or with any meaningful information as regards its terms;

(14) on 26 October 2015, the Company disposed of its interest in the MOTO group for approximately £140,000,000;

(15) after the disposal, EPIC LLP revalued its assets in its financial statements to £117,184,478 pursuant to clause 8.3 of the Deed;

(16) pursuant to Section 104 of the Bermuda Companies Act 1981, the Company and EBH amalgamated, with the Company as the surviving entity;

(17) the Company then repurchased nearly all of the shares in the Company held by the shareholders in the Company other than EPIC LLP;

(18) on 30 October 2015, the Company made an unsecured loan to EPIC LLP (the "EPIC Loan") in the amount of £115,886,090;

(19) on 13 January 2016, by a resolution passed by EPIC LLP as (by now) the holder of 98.4% of the shares in the Company, the Company was put into a members' voluntary liquidation. At that point, the assets of the Company were:

(a) the EPIC Loan;

(b) cash of £2,590,000; and

(c) shares in a company called Arqiva Broadcast Holdings ("Arqiva") valued at £1,046,819;

(20) in the course of its liquidation, the Company distributed to EPIC LLP:

(a) £2,590,000 in cash; and

(b) £116,932,909 in specie by assigning to EPIC LLP the shares in Arqiva and setting off EPIC LLP's right to liquidation proceeds against the Company's rights under the EPIC Loan;

(21) on 6 October 2016, the liquidation of the Company concluded and the Company was dissolved;

(22) after deducting certain costs, EPIC LLP distributed £115,555,664 to its members, of which £17,869,831.81 was distributed to GEC LLP and the rest went to the Cheyne Funds. Those shares were calculated in accordance with the "profit waterfall" set out in clause 6 of the Deed;

(23) of the sums distributed to GEC PLC, £6,345,727.26 was distributed to the Appellant by virtue of his membership interest in GEC LLP (and conceivably, although this wasn't clarified at the hearing and is ultimately of no relevance to this decision, by virtue of his membership interest in GRE LLP and GRE LLP's membership interest in GEC LLP); and

(24) the chargeable gain which is the subject of this appeal arises in respect of the Appellant's share of the liquidation proceeds of the Company, derived by way of the route described in paragraph 13(23) above.

14. The description above is a little complicated because we wish to record the main transactions which occurred in the course of the arrangements. However, for the purposes of this appeal, it suffices to note simply that:

(1) EPIC LLP was a joint venture between GEC LLP and the Cheyne Funds and the members shared in the profits of EPIC LLP in accordance with their respective profit shares as set out in the Deed;

(2) EPIC LLP owned a significant stake in the Company. It initially owned 50% of the shares in the Company but this increased to 85% of the shares in the Company by January 2015;

(3) the Company held indirectly a 17.49% stake in the MOTO group;

(4) when the MOTO group was sold, the Company's share in the disposal proceeds, along with other assets, were received by EPIC LLP as a result of the Company's liquidation and then distributed by EPIC LLP to its members; and

(5) the Appellant received his share of the liquidation proceeds as a result of his membership interest in GEC LLP (and conceivably by virtue of his membership interest in GRE LLP and GRE LLP's membership interest in GEC LLP).

**THE DISPUTE**

15. In submitting his self-assessment tax return for the tax year ending 5 April 2017, the Appellant took the view that the carried interest legislation did not apply to the disposal of his interest in the Company as described above. Accordingly, in preparing that return, he applied the usual capital gains tax rules described in paragraphs 2 to 10 above, which included the base cost shift.

16. The relevant steps in the dispute to date are as follows:

(1) on 23 January 2018, the Appellant submitted his tax return;

(2) on 18 January 2019, the Respondents opened an enquiry into the return under Section 9A of the Taxes Management Act 1970 (the "TMA") focusing on whether or not the carried interest legislation applied;

(3) on 29 March 2022, the Respondents concluded the enquiry by issuing a closure notice under Sections 28A(1B) and 28(2) of the TMA, assessing the Appellant to an additional £1,399,130.48 of additional capital gains tax;

(4) on 13 April 2022, the Appellant's representative, McCarthy Denning ("MD"), on the Appellant's behalf, appealed against the closure notice and requested postponement of the tax due under the closure notice;

(5) on 21 April 2022, the Respondents acknowledged the Appellant's appeal and agreed to postpone the tax;

(6) on or around 7 June 2022, the Respondents issued their view of the matter letter and offered the Appellant an independent review;

(7) on 8 June 2022, MD, on the Appellant's behalf, accepted the offer of the review;

(8) on 21 July 2022, the Respondents issued their review conclusion letter confirming the closure notice; and

(9) on 17 August 2022, the Appellant gave notice of his appeal against the closure notice, as confirmed by the review conclusion letter, to the First-tier Tribunal (the "FTT").

**THE LEGISLATION**

17. The provisions which are at the centre of this appeal are largely to be found in the TCGA.

18. The starting point is Section 103KA of the TCGA, which defines the scope of the legislation, and the consequences of its application, as follows:

"(1) This section applies where—

(a) an individual ("A") performs investment management services directly or indirectly in respect of an investment scheme under arrangements involving at least one partnership, and

(b) carried interest arises to A under the arrangements."

19. From this, it can be seen that the legislation will have been in point in relation to the disposal in this case if the arrangements in the course of which the disposal occurred satisfied each of the following conditions:

(1) the Appellant performed "investment management services" under the arrangements;

(2) those investment management services were "performed directly or indirectly in respect of an investment scheme";

(3) the arrangements "[involved] at least one partnership"; and

(4) carried interest "arose" to the Appellant under the arrangements.

20. A number of the terms used in the legislation set out above are subject to a legislative gloss. Before going on to elaborate on those provisions, we should make the following introductory observations:

(1) first, the gateway to the legislation is the arrangements. The "investment management services" must be performed under the arrangements, the carried interest must "arise" under the arrangements and the arrangements must "involve at least one partnership";

(2) secondly, it is not necessary for the "investment management services" which are performed under the arrangements to be performed directly. They can also be performed indirectly; and

(3) thirdly, however, the "investment management services" which are performed directly or indirectly under the arrangements need to be "in respect of an investment scheme".

21. We will go on to explore each of the above points further in this decision although it is worth saying at the outset that it is common ground in these proceedings that:

(1) the arrangements in this case involved at least one partnership given that each of the Cheyne Funds was a limited partnership under Cayman Islands law and that each of GEC LLP and EPIC LLP, as a limited liability partnership under English law, was deemed to be a partnership as a matter of the UK chargeable gains legislation by virtue of Section 59A of the TCGA; and

(2) the return derived by the Appellant from the disposal of the shares in the Company was a profit-related return and was therefore "carried interest".

22. We will now set out the provisions in the legislation which contain the meanings of some of the crucial terms described above.

23. Section 103KG defines the meaning of the word "arise" in Chapter 5 of Part III of the TCGA as follows:

"For the purposes of this Chapter, carried interest "arises" to an individual ("A") if, and only if, it arises to him or her for the purposes of Chapter 5E of Part 13 of ITA 2007."

24. Section 103KH of the TCGA is headed "Interpretation of Chapter 5" and contains the following:

"(1) In this Chapter –

"arrangements" has the same meaning as in Chapter 5E of Part 13 of ITA 2007 (see section 809EZE of that Act);

"carried interest", in relation to arrangements referred to in section 103KA(1)(a), has the same meaning as in section 809EZB of ITA 2007 (see sections 809EZC and 809EZD of that Act);

"investment scheme", "investment management services" … have the same meanings as in Chapter 5E of Part 13 ITA 2007 (see sections 809EZA(6) and 809EZE of that Act)."

25. It can be seen that each of the definitions set out in paragraphs 23 and 24 above refers to definitions contained in Chapter 5E of Part 13 to the Income Tax Act 2007 (the "ITA").

26. The following provisions in Chapter 5E of Part 13 to the ITA are relevant to this appeal:

(1) Section 809EZA of the ITA defines "investment scheme" as follows:

"(6) In this Chapter "investment scheme" means – ...

(a) a collective investment scheme, or

(b) an investment trust…."

(2) Section 809EZC of the ITA defines "carried interest" as "a sum which arises to the individual under the arrangements by way of profit-related return." The section then goes on to define "profit-related return" and both to limit and to extend the above definition in certain specified circumstances but, since it is common ground that the return derived by the Appellant in this case fell within the definition of "carried interest" (see paragraph 21(2) above), we will not set out those provisions in this decision. For the same reason, we will not set out Section 809EZD of the ITA, which extends the meaning of "carried interest" in certain specified circumstances or Sections 809EZDA and 809EZDB, which describe circumstances in which a sum arising to a person other than the individual in question will fall to be treated as arising to the individual; and

(3) finally, Section 809EZE of the ITA contains the following relevant provisions:

"In this Chapter –

"arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);

"collective investment scheme" has the meaning given by section 235 of FISMA 2000;

…

"investment management services", in relation to an investment scheme, includes –

(a) seeking funds for the purposes of the scheme from participants or potential participants,

(b) researching potential investments to be made for the purposes of the scheme,

(c) acquiring, managing, disposing of property, for the purposes of the scheme, and

(d) acting for the purposes of the scheme with a view to assisting a body in which the scheme has made an investment to raise funds; …"

27. It can be seen from the above provisions that, in defining a "collective investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA, Section 809EZE of the ITA incorporates the definition set out in Section 235 of the Financial Services and Markets Act 2000 (the "FISMA 2000"). That section provides as follows:

"(1) In this Part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purposes or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income"

(2) The arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.

(3) The arrangements must also have either or both of the following characteristics –

(a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;

(b) the property is managed as a whole by or on behalf of the operator of the scheme.

(4) If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.

(5) The Treasury may by order provide that arrangements do not amount to a collective investment scheme –

(a) in specified circumstances; or

(b) if the arrangements fall within a specified category of arrangement."

28. The order to which reference is made in Section 235(5) of the FISMA is The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (the "CIS Order"). The CIS Order was enacted in order to ensure that certain specified arrangements which are described in the Schedule to the CIS Order do not amount to a collective investment scheme for the purposes of the FISMA. Two of the arrangements described in the Schedule to the CIS Order are of some relevance to this decision, namely:

(1) "arrangements entered into for commercial purposes wholly or mainly related to existing business" in paragraph 9 of the Schedule to the CIS Order; and

(2) "bodies corporate etc." in paragraph 21 of the Schedule to the CIS Order.

29. As the potential application of either or both of those two exclusions was a matter of some debate in the proceedings, we will set them out in full in the paragraphs which follow.

30. At the time when the arrangements which are the subject of this decision were in place, the relevant parts of paragraph 9 of the Schedule to the CIS Order provided as follows:

"Schemes entered into for commercial purposes wholly or mainly related to existing business

9.— (1) …

(2) Arrangements first entered into on or after 15th July 2008 do not amount to a collective investment scheme if all participants are permitted participants.

(3) The exclusion in sub-paragraph (2) shall not apply to arrangements falling within that sub-paragraph if each person which is at that time a permitted participant at any time irrevocably agrees in writing that that the arrangements do not amount to a collective investment scheme.

(4) If at any time a person which is not a permitted participant participates in arrangements then for as long as that person is a participant but not a permitted participant the exclusion in …sub-paragraph (2) shall not apply to the arrangements.

(5) For the purposes of this paragraph—

"permitted participant" means a participant which—

(a) at the time of entering into the arrangements carries on a business which is not a specified business (the "first business") but which may be in addition to any specified business carried on by that participant at that time and—

(i) does not carry on that first business solely by virtue of being—

(a) a participant in the arrangements; or

(b) a member, partner or trust beneficiary of a body corporate, unincorporated association, partnership or trust which is itself a participant in the arrangements; and

(ii) enters into the arrangements for commercial purposes wholly or mainly related to the first business; or

(b) is a body corporate, unincorporated association partnership, or trustee of a trust (unless that trustee is an individual) which—

(i) does not carry on a specified business; and

(ii) only has as its members, partners or trust beneficiaries persons which themselves qualify, or would qualify if they participated in the arrangements, as participants of the kind mentioned in paragraph (a) of this paragraph; and

"specified business" means the business of engaging in any regulated activity of the kind specified by any of articles 14, 21, 25, 25D, 37, 40, 45, 51 to 53 or, so far as relevant to any of those articles, article 64 of the Regulated Activities Order.

(6) For the purposes of this paragraph, neither the entry into arrangements by any person as a further participant nor the exit from arrangements by any participant shall in itself constitute the creation of new arrangements.

(7) An agreement made in accordance with the provisions of …sub-paragraph (3) is not affected by the entry into arrangements by any person as a further participant nor the exit from arrangements by any participant."

31. At the time when the arrangements which are the subject of this decision were in place, paragraph 21 of the Schedule to the CIS Order provided as follows:

"Bodies corporate etc.

21.—(1) Subject to sub-paragraph (2), no body incorporated under the law of, or any part of, the United Kingdom relating to building societies or industrial and provident societies or registered under any such law relating to friendly societies, and no other body corporate other than an open-ended investment company, amounts to a collective investment scheme.

(2) Sub-paragraph (1) does not apply to any body incorporated as a limited liability partnership."

**THE ISSUES**

32. Now that we have set out the relevant provisions in the legislation, we will summarise the matters which are in issue between the parties. In essence, the dispute between the parties turns on a short point of statutory construction.

33. The Respondents allege that:

(1) the arrangements in this case "involved at least one partnership";

(2) the Appellant performed "investment management services" under the arrangements;

(3) those investment management services were performed directly or indirectly "in respect of" each of the Cheyne Funds;

(4) the Appellant has not discharged the burden of proving that none of the Cheyne Funds was an "investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA, which is to say that the Appellant has not discharged the burden of proving that none of the Cheyne Funds was a "collective investment scheme";

(5) the chargeable gain derived by the Appellant in this case was "carried interest"; and

(6) that carried interest "arose" under the arrangements.

34. Crucially in this regard, the Respondents accept that EPIC LLP was not an "investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA because it was not a "collective investment scheme" for the purposes of that chapter. For that reason, the allegation mentioned in paragraph 33(3) above is expressed by reference to one or more of the Cheyne Funds and not EPIC LLP.

35. For his part, the Appellant accepts that the arrangements in this case did "involve at least one partnership" and that the return which he derived from EPIC LLP through GEC LLP and GRE LLP fell within the definition of "carried interest". However, he says that:

(1) he did not perform "investment management services" under the arrangements;

(2) even if he did perform investment management services under the arrangements, he did not perform those services directly or indirectly "in respect of" any of the Cheyne Funds;

(3) even if he did perform investment management services under the arrangements directly or indirectly in respect of any of the Cheyne Funds, the onus is on the Respondents to establish that the relevant Cheyne Fund was an "investment scheme"

for the purposes of Chapter 5E of Part 13 to the ITA and the Respondents have failed to discharge that burden; and

(4) moreover, even if:

(a) he did perform investment management services under the arrangements directly or indirectly in respect of any of the Cheyne Funds;

(b) the onus is on him to establish that the relevant Cheyne Fund was not an "investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA; and

(c) he has failed to discharge that burden,

the carried interest which he derived under the arrangements did not "arise" under the arrangements because it was not the result of the provision of investment management services. Instead, it resulted from the disposal of his interest in the underlying assets of EPIC LLP and "arose" from that.

36. As regards the point made in paragraph 35(1) above, the Appellant accepts that he was responsible for most of the day-to-day management of EPIC LLP but says that this did not entail the performance by him of investment management services because:

(1) those management tasks were performed in his capacity as the representative of GEC LLP, a member of EPIC LLP. A member of a limited liability partnership who acts for the limited liability partnership in that capacity cannot be said to be performing "services" for the limited liability partnership; and

(2) insofar as he provided any services to the Cheyne Funds under clause 7.5 of the Deed, those services were investment advisory services and not investment management services.

37. We will elaborate on each party's submissions in the paragraphs below but, for present purposes, it suffices to note that, based on the summary of each party's position set out in paragraphs 33 to 36 above, there are five issues between the parties, namely:

(1) did the Appellant perform "investment management services" under the arrangements ("Issue One")?

(2) if so, were those investment management services performed directly or indirectly "in respect of" any of the Cheyne Funds ("Issue Two")?

(3) if so, does the Appellant need to prove that the relevant Cheyne Fund was not an "investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA in order to avoid falling within the ambit of the legislation or do the Respondents need to prove that the relevant Cheyne Fund was an "investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA in order to establish that the Appellant fell within the ambit of the legislation? In other words, which of the parties has the burden of proof in relation to the question of whether or not the relevant Cheyne Fund was an "investment scheme" ("Issue Three")?

(4) has the party who has the burden of proof as determined at Issue Three discharged that burden ("Issue Four")? and

(5) if the Respondents succeed in establishing that:

(a) the Appellant performed "investment management services" under the arrangements;

(b) those investment management services were performed directly or indirectly "in respect of" any of the Cheyne Funds;

(c) either:

(i) the Appellant needs to prove that the relevant Cheyne Fund was not an "investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA in order to avoid falling within the ambit of the legislation and has failed to discharge that burden; or

(ii) the Respondents need to prove that the relevant Cheyne Fund was an "investment scheme" for the purposes of Chapter 5E of Part 13 to the ITA in order to establish that the Appellant fell within the ambit of the legislation and has discharged that burden,

then did the carried interest which the Appellant derived "arise" under the arrangements ("Issue Five")?

38. We will consider each of the above issues in turn in the section of this decision headed "DISCUSSION" below but we should note at this stage that, in order to succeed in his appeal, the Appellant need only succeed in relation to any one of Issue One, Issue Two or Issue Five or, as regards Issue Three and Issue Four, demonstrate either that the Respondents have the burden of proof and have failed to discharge it or that he has the burden of proof and has discharged it.

## THE EVIDENCE

### Introduction

39. The evidence in the proceedings took the form of:

(1) a bundle, which contained the Deed, along with a number of emails, presentations and other documents pertaining to the arrangements; and

(2) the testimony of the Appellant.

### The documentary evidence

40. As regards the bundle, the document which we considered to be of paramount importance was the Deed. This was helpfully provided in a form which showed the changes which had been made to the Initial Deed when that document was amended.

41. The part of the Deed which was of primary interest to us for the purposes of reaching our decision was clause 7. As we have already trailed in paragraph 13(12) above, this was divided into two parts. The first part – clauses 7.1 to 7.4 – began with a clause headed "Management" and the second part – clauses 7.5 to 7.7 – began with a clause headed "Greycoat Advisory Services".

42. For present purposes, we would note only that:

(1) the clauses in the first part provided, inter alia, that:

(a) EPIC LLP would be managed and administered at all times so as to ensure that the members together had day-to-day control over the management of its property for the purposes of Section 235(2) of the FISMA (other than at a time when it could appropriately be authorised by the Financial Conduct Authority to operate itself as a collective investment scheme for the purposes of FISMA and elected to do so);

(b) the members could delegate their powers, authorities, duties and responsibilities to any member or committee or retain third parties to act as brokers etc. in connection with EPIC LLP's business; and

(c) no member could bind EPIC LLP except as provided in the Deed and, specifically, without the approval of members by way of ordinary resolution and subject to other protections for each member that one would expect to see in a joint venture – for example, a provision stipulating that GEC LLP could not execute any document that was not expressly contemplated by the budget or operating plan without the approval of members by way of ordinary resolution;

(2) the clauses in the second part provided, inter alia, that:

(a) the Cheyne Funds appointed GEC LLP to provide various services to the Cheyne Funds and, where relevant to EPIC LLP and that those services included:

(i) the preparation of the budget and operating plan and an investment and divestment policy;

(ii) recommendations in relation to the subscription, purchase or other acquisition of shares or other securities in the Company and/or members of the MOTO group;

(iii) advice and consultation with the Cheyne Funds in relation to the management of EPIC LLP's business;

(iv) if requested, the recommendation of one or more executives of GEC LLP or one of its affiliates to act as a director of the Company and/or members of the MOTO group and, if so appointed, attendance at board meetings of the relevant company; and

(v) "to do such other things and provide such other services as may be agreed between the [Cheyne Funds] and [GEC LLP]"; and

(b) in consideration for the services described above, GEC LLP would be entitled to be paid by each Cheyne Fund an advisory fee equal to 0.5% of that Cheyne Fund's equity and loan capital contribution to EPIC LLP; and

(3) clause 7.8, which was the final paragraph in clause 7, provided that GEC LLP would ensure that the Appellant would devote such of his working time as might be necessary to ensure satisfactory performance by GEC LLP of its obligations and duties under the Deed and that, should that not be the case without good cause, then the Cheyne Funds would no longer be required to pay the fee referred to in paragraph 42(2)(b) above and GEC LLP's share in the profits of EPIC LLP would abate so as to be limited to reflecting its own equity and loan capital contribution to EPIC LLP.

43. The bundle also contained a substantial number of contemporaneous documents, some of which we were shown in the course of a lengthy cross-examination of the Appellant. The common feature of the relevant documents is that they revealed the extent to which the Appellant was involved in the day-to-day management of EPIC LLP. However, as the Appellant had conceded at the outset of the proceedings that this was the case, and it is not a matter which is in dispute, we do not propose to summarise the contents of those documents in any detail. We would say only that they included documents revealing that:

(1) the Appellant had prepared a business plan in relation to EPIC LLP and, in the transaction economics section of the business plan, the 0.5% fee to be derived by the Greycoat group from the arrangements was described as a "running management fee";

(2) the Appellant was responsible for producing and updating the budget and operating plan for EPIC LLP;

(3) one of the Appellant's fellow-directors in the Company, Mr Mick Carolan, had described the Appellant in an email to a potential seller of further shares in the MOTO group as "the Managing Principal of [EPIC LLP]"; and

(4) the Appellant had informed Ms Yasmin Jiang of the Cheyne Capital group in an email in September 2015 that EPIC LLP had largely driven the agenda for the refinancing of the MOTO group.

**The witness evidence**

44. Turning then to the witness evidence, we regret to say that we did not form a favourable impression of the Appellant. We found him to be evasive and argumentative in giving his evidence and, on occasion, reluctant to confront reality. We were also unimpressed by the exchange of emails in the bundle which revealed that it was his idea to amend the drafting in clause 7 of the Initial Deed so as to describe the services in clause 7.5 as being provided not to EPIC LLP (as originally drafted) but instead to the Cheyne Funds "and, where relevant, to [EPIC LLP]" in order to escape a VAT charge on the relevant services. We do not comment on the efficacy of that change in achieving its objective as that is a question which falls outside the scope of this decision. However, we do think that it revealed an aspect of the Appellant's character which inevitably coloured the weight which we were prepared to accord to his evidence.

45. One consequence of this was our response to the Appellant's testimony to the effect that the carried interest which GEC LLP obtained by virtue of the arrangements was entirely attributable to the fact that GEC LLP had brought the deal to the Cheyne Funds and provided the Cheyne Funds with a business plan and transaction structure and in no way referable to the extensive role which was played by GEC LLP (and the Appellant specifically) in the day-to- day management of EPIC LLP and the management of the Company. In that regard, the Appellant accepted that the Greycoat group's standard transaction structure was for a Greycoat entity to provide management services to the transaction vehicle in return for a carried interest but said that this arrangement was different because it did not involve a property development but instead involved a minority shareholding in another group of companies.

46. We accept that the nature of the investment in the present case was different from the nature of the investments made in the Greycoat group's standard transactions. However, we consider the assertion that the carried interest in this case was entirely attributable to the fact that GEC LLP brought the deal to the Cheyne Funds and provided the Cheyne Funds with a business plan and transaction structure and had nothing to do with the ongoing management of the deal by the Greycoat group to be utterly implausible given the extensive role which was played by GEC LLP (and the Appellant specifically) in the day-to-day management of EPIC LLP and the management of the Company.

47. Any residual doubt on the subject was resolved in our eyes by the terms of clause 7.8 of the Deed, which provided that the failure by the Appellant, without good cause, to devote such of his working time to GEC LLP as was necessary to enable GEC LLP to perform its obligations and duties under the Deed would both relieve the Cheyne Funds from their obligations to pay the fee under clause 7.6 of the Deed and result in the loss of the carried interest for GEC LLP and a reversion to profit-sharing in proportion to each member's percentage interests in EPIC LLP. Clauses 6.2(b) and 13 of the Deed made similar provision for GEC LLP's carried interest to be lost during any period when GEC LLP was in material violation of the terms of the Deed, committed an event of default or acted in a manner which was grossly negligent or fraudulent. Mr Gardiner, who was acting for the Appellant, tried manfully to explain these provisions as no more than penalties designed to ensure compliance

by GEC LLP with its obligations under the Deed. However, we do not agree. In our view, the relevant provisions support the conclusion that we have reached that the carried interest which was enjoyed by GEC LLP was attributable significantly to the management of EPIC LLP by the Greycoat group and, specifically, the Appellant.

48. As we have already noted, Mr Millican accepted that he had been extensively involved in the management of the Company in his capacity as representative of GEC LLP. In particular, he accepted that:

(1) his attendance at board meetings of the Company as EPIC LLP's nominee on the board of the Company was pursuant to GEC LLP's obligations in clause 7.5 of the Deed and taken in the course of managing EPIC LLP's investment in the Company;

(2) the other directorial services which he performed outside board meetings for the Company were carried out pursuant to GEC LLP's obligation in clause 7.5 of the Deed "to do such other things and provide such other services as may be agreed between the [Cheyne Funds] and [GEC LLP]" and those activities were also taken in the course of managing EPIC LLP's investment in the Company; and

(3) he had played an active role in the day-to-day management of EPIC LLP's investment in the Company and that role had included:

(a) playing a leading part in the initial acquisition of shares in the Company and then the increase in EPIC LLP's percentage stake in the Company following the initial acquisition;

(b) taking the lead in discussions with First New Zealand in relation to that process;

(c) being primarily responsible for instructing EPIC LLP's lawyers, Appleby and Reed Smith, when those firms were acting as advisers to EPIC LLP; and

(d) taking the lead on behalf of EPIC LLP in relation to the refinancing of the MOTO group although he pointed out that the refinancing had largely been run at group level through the group's investment adviser, Deutsche Bank.

49. However, Mr Millican made it clear that:

(1) his sole purpose in performing his management activities under the arrangements were to increase the profitability of EPIC LLP; and

(2) neither he nor any Greycoat group entity had the purpose of enhancing the profitability of the Cheyne Funds, as such. Any such enhancement would simply have been a consequence of the enhanced profitability of EPIC LLP and not a purpose in and of itself.

We accept that evidence. We can see no reason why the Appellant, or, for that matter any Greycoat group entity, would have had any interest in enhancing the profitability of the Cheyne Funds, as such.

**OUR FINDINGS OF FACT**

50. In the light of the evidence described above, we make the following findings of fact for the purposes of this decision:

(1) the Appellant played a major role in the management of EPIC LLP. He had control over the day-to-day management of EPIC LLP and, by virtue of his appointment as EPIC LLP's nominee on the board of the Company, he played a major role in the management of the Company, which was EPIC LLP's most significant asset;

(2) the management carried out by the Appellant was in some respects simply a function of GEC LLP's position as a member of EPIC LLP. In other words, the Appellant's activities reflected the fact that the entity which he was representing, GEC LLP, was a member of EPIC LLP;

(3) however, certain of the management functions in relation to EPIC LLP which were performed by the Appellant – notably, attending board meetings of the Company as EPIC LLP's representative and otherwise acting as a director of the Company - were provided by way of the performance of services to the Cheyne Funds pursuant to clause 7.5 of the Deed;

(4) the carried interest which GEC LLP derived from its participation in EPIC LLP was attributable in large measure to the management functions on the part of the Appellant described in paragraphs 50(1) to 50(3) above. For the reasons given in paragraphs 45 to 47 above, we reject the proposition that the carried interest was simply a reward for putting the deal together and bringing it to the Cheyne Funds; and

(5) in addition to the services described in paragraph 50(3) above, some of the services which were provided by the Appellant to the Cheyne Funds pursuant to clause 7.5 of the Deed were advisory in nature and did not pertain to the management of the investments of EPIC LLP;

51. There are two points which we should make in relation to our findings of fact in paragraphs 50(3) and 50(5) above.

52. The first is that we need to make it clear that, in reaching that finding, we have taken into account the fact that the preamble to clause 7.5(a), following its amendment to include references to the Cheyne Funds, stated that the services enumerated in that clause were to be provided to the Cheyne Funds "and, where relevant, to [EPIC LLP]", thereby raising the possibility that, in providing the services enumerated in that clause, the Appellant was providing its services to EPIC LLP and not to the Cheyne Funds. However, we do not think that this is a correct interpretation of the relevant drafting. In particular, we note that that preamble began by saying that the appointment of GEC LLP to perform the relevant services was an appointment made by the Cheyne Funds and not an appointment made by the Cheyne Funds and/or EPIC LLP. More importantly, under clause 7.6 of the Deed, the entire consideration for the relevant services was required to be paid by the Cheyne Funds. EPIC LLP was not required to pay for any of the services. Finally, we would observe that the amendment which was made to the drafting in clause 7 in order to avoid a VAT charge on the relevant services – see paragraph 44 above – could have achieved that objective only if the relevant services were actually supplied to the Cheyne Funds and not to EPIC LLP.

53. We have therefore concluded - and the findings of fact in the relevant paragraphs reflect - that all of those services were being provided by the Appellant to the Cheyne Funds and not to EPIC LLP.

54. However, we need to make it clear (because it is of some moment to Issue Two) that that is not to say that the relevant services in any way pertained to the businesses or investments of any of the Cheyne Funds. Each of the services pertained very clearly solely to the business and investments of EPIC LLP. That limitation was explicit in each of the paragraphs in clause 7.5(a) of the Deed other than paragraph (vii). However, it is plain from the context and from the evidence that paragraph (vii) was not envisaging some, as yet unknown, service for the Cheyne Funds in relation to their own businesses and investments which bore no relation to the business and investments of EPIC LLP. Instead, it is implicit in that paragraph that it pertained to other services which might be performed for the Cheyne Funds in the future in relation to EPIC LLP and the business and investments of EPIC LLP.

We therefore find as a fact that all of the services which GEC LLP was required to perform pursuant to clause 7.5 of the Deed pertained to EPIC LLP and that none of those services pertained to any of the Cheyne Funds. As a related matter, we also find as a fact that enhancing the profitability of the Cheyne Funds, as such, was not any part of the purpose of GEC LLP or the Appellant in providing those services. Instead, the sole purpose of GEC LLP and the Appellant in providing those services was to increase the profitability of EPIC LLP. The relevant service was performed solely for the purpose of EPIC LLP and not for the purpose of any Cheyne Fund.

55. The second point which we should make in relation to paragraphs 50(3) and 50(5) above is that it is a little unclear from the evidence with which we have been provided whether, in providing the services to the Cheyne Funds described in those paragraphs, the Appellant was acting as the representative of GEC LLP (which was the stated obligor under clause 7.5) or, as a result of the subcontracting arrangements, as the representative of GRE LLP. The Appellant was a member of both limited partnerships and this meant that, when he was performing the relevant services for the Cheyne Funds, he could have been acting for either of them.

56. However, nothing turns on the answer to that question in the context of this decision because, so far as it pertains to the services which were provided by the Appellant to the Cheyne Funds, it is merely necessary to determine the nature of those services. The entity which the Appellant was representing in providing the relevant services is not relevant. We therefore choose not to address it. The critical fact is that the Appellant, an individual, provided services to the Cheyne Funds pursuant to clause 7.5 of the Deed and that at least some of those services related to the management of EPIC LLP's investment in the Company.

57. Finally, as we have already mentioned in paragraph 13(5) above, it was common ground that the Appellant was at all times at arm's length with the Cheyne Funds. However, in addition, we were provided with a letter signed by the Chief Financial Officer of Cheyne Capital Management (UK) LLP confirming that neither the Appellant nor GEC LLP had ever been appointed as an investment manager or investment adviser for any of the Cheyne Funds and we make a finding of fact to that effect.

**DISCUSSION**

## Introduction

58. We now address the issues set out in paragraph 37 above in the light of our findings of fact in paragraphs 50 to 57 above.

## Issue One - did the Appellant perform "investment management services" under the arrangements?

### *The submissions*

59. Mr Gardiner explained that:

(1) the term "investment management services", when used in Section 103KA of the TCGA, was defined, by virtue of Section 103KH of the TCGA, by Section 809EZE of the ITA; and

(2) the Appellant had not at any point in the course of the arrangements performed "investment management services" as so defined.

60. His starting point was that, although the definition of "investment management services" was stated to be inclusive, it should be construed purposively and in context as being exhaustive. In support of this proposition, he relied on the judgment of the Privy

Council in the case of *Dilworth and others v The Commissioner of Stamps; Dilworth and others v The Commissioner for Land and Income Tax* [1899] A.C 99 ("*Dilworth*"). The litigation in *Dilworth* had related to the construction of the term "charitable bequest" in a New Zealand statute. The phrase in question was said to "include" one of a number of different things which were there enumerated and Lord Watson, giving the decision of the Court, had noted as follows:

"The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that. they shall include. But the word " include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions" (see *Dilworth* at 105).

61. Mr Gardiner said that the definition of "investment management services in this case was an example of the latter category. This was because the definition was aimed at a number of different things, each of which could amount on its own to an investment management service, and this meant that, although the draftsman intended the definition to be exhaustive, he or she could not use the word "means" because of the difficulty in finding the right conjunction to use immediately before the final paragraph in the definition. If the word "and" had been used along with "means", then it might have been suggested that, in order to fall within the term "investment management services", all four of the stated activities set out in the paragraphs needed to be present. In contrast, if the word "or" had been used along with "means", then it might have been suggested that the stated activities set out in the paragraphs were alternatives. It was for that reason that the draftsman had used the word "includes" in an exhaustive sense.

62. Mr Gardiner went on to say that, if that was correct, then the only services which could constitute "investment management services" for the purposes of the legislation were those set out in the four paragraphs of the definition and nothing which the Appellant had done in the course of the arrangements fell within any of the paragraphs in question.

63. He added that, even if he was wrong on that point of interpretation and that services falling outside the four paragraphs could constitute "investment management services" for the purposes of the legislation, then it was still necessary to take account of the fact that the phrase "investment management services" included the word "investment". That word had to be given a meaning. A service that did not amount to investment management but was instead merely investment advice did not fall within the phrase.

64. The activities of the Appellant in the course of the arrangements did not amount to investment management services even on that wider interpretation of the definition.

65. This was because it was apparent from the way in which clause 7 of the Deed was laid out that the parties wished to make a clear distinction between the management of EPIC LLP - which was the subject of clauses 7.1 to 7.4 of the Deed - and advice rendered in connection with the affairs of EPIC LLP - which was the subject of clauses 7.5 to 7.7 of the Deed.

66. He accepted that the Appellant had been extensively involved in the day-to-day management of EPIC LLP in accordance with clauses 7.1 to 7.4 of the Deed. However, that management had been carried out because he was representing GEC LLP as a member of EPIC LLP and GEC LLP was acting in its capacity as a member in carrying out that management. Nothing done by GEC LLP in that capacity involved the provision of a service

because the activities of a partner in the course of running its own partnership business did not amount to a service either to the partnership or, for that matter, to any of the other members of the partnership. It followed that the Appellant was not providing "investment management services" in managing EPIC LLP pursuant to those clauses of the Deed.

67. As for any services that had been provided by the Appellant to the Cheyne Funds pursuant to clause 7.5 of the Deed, those services were demonstrably advisory in nature and did not amount to services of investment management.

***Conclusion***

68. In considering this issue, we would start by saying that we do not agree with Mr Gardiner that the definition of "investment management services" in Section 809EZE of the ITA is to be construed as being exhaustive. We say that because:

(1) it is plain from the dicta in *Dilworth* that the more general approach to a definition containing the word "including" is to treat it as being inclusive and that it should be treated as being exhaustive only in the unusual circumstance where the context of the legislation in question suggests that the word is "not merely employed for the purpose of adding to the natural significance of the words or expressions defined";

(2) in this case, the context of the legislation points very firmly in favour of the general approach;

(3) first, the definition in this case appears in the context of anti-avoidance legislation and that suggests that a wide definition was more likely to have been intended by Parliament;

(4) secondly, there are other definitions in the same section which use the word "mean", such as the definitions of "external investor" and "profits". That suggests that the draftsman was fully aware of the difference between an inclusive definition and an exhaustive one and deliberately chose the former in this case;

(5) thirdly, there is another definition in the same section, the definition of "arrangements", which uses the word "includes" in a sense which is clearly meant to be inclusive and not exhaustive. That again suggests that the draftsman was fully aware of the difference between an inclusive definition and an exhaustive one and deliberately chose the former in this case;

(6) fourthly, we have noted that there are many activities other than the ones enumerated in the four paragraphs of the definition that would naturally fall within the meaning of the phrase "investment management services" and we can see no reason why the draftsman would have wished to exclude such other activities from the defined term in the present case;

(7) fifthly, and conversely, we have noted that the four activities which are set out in the definition include certain activities which would not naturally fall to be regarded as investment management and that suggests that, by the list, the draftsman was intending to expand the meaning of the terms "investment management services"; and

(8) finally, we do not see any force in the submission set out in paragraph 61 above. If the draftsman was faced with the conundrum mentioned in that paragraph, he or she could easily have used the word "mean" and deployed the words "and/or" immediately prior to the fourth paragraph of the definition.

69. For the above reasons, we have concluded that the definition of "investment management services" in Section 809EZE of the ITA is to be construed as being inclusive such that an activity which would naturally fall to be regarded as an investment management

service falls within the scope of the definition even if it does not fall within any of the four paragraphs in the definition. However, we do agree with Mr Gardiner that, in order to fall within the definition by virtue of the general words, as opposed to one of the specific paragraphs, an activity needs to involve investment management as opposed to investment advice. The word "management" has been used deliberately and effect must be given to it.

70. We now turn to the application of the definition of "investment management services", as so construed, to the facts in this case.

71. In our view, despite the manner in which clause 7 of the Deed was laid out, at least one of the services which GEC LLP was obliged by clause 7.5 of the Deed to perform for the Cheyne Funds (and which was performed by the Appellant either on GEC LLP's behalf or, through the subcontracting arrangements, on GRE LLP's behalf) was that of acting as EPIC LLP's nominee on the board of the Company. That was an investment management service within the general meaning of the term because it pertained to the management of EPIC LLP's most significant asset, its investment in the Company. It was not an investment advisory service notwithstanding the heading to the relevant clause in the Deed.

72. For completeness, we would add that there was arguably another service which GEC LLP was required to perform for the Cheyne Funds pursuant to clause 7.5 of the Deed (and which was performed by the Appellant either on GEC LLP's behalf or, through the subcontracting arrangements, on GRE LLP's behalf) that could be said to amount to an "investment management service" falling within one of the paragraphs that extended the meaning of the defined term. That service was the making of recommendations to the Cheyne Funds and EPIC LLP in relation to the subscription, purchase and/or other acquisition by EPIC LLP of shares or other securities in the Company in clause 7.5(a)(iii) of the Deed. We say arguably because one of the activities which is expressly described in the definition of "investment management services" is "researching potential investments to be made for the purposes of the scheme" and it seems to us that, although making recommendations (as required by the relevant clause in the Deed) was not "research" as such, it is quite hard to see how such recommendations could have been made without conducting prior research.

73. Be that as it may, this is not a point which was raised by the Respondents at the hearing and we do not rely on it in reaching our conclusion in relation to this issue. That conclusion is that, for the reason given in paragraphs 68 to 71 above, the arrangements in this case involved the performance of "investment management services" by the Appellant for the purposes of the legislation.

74. That conclusion means that it is, strictly speaking, unnecessary for us to address the quite separate, and potentially difficult, question of whether, assuming that GEC LLP had not agreed to provide any services to the Cheyne Funds pursuant to clause 7.5 of the Deed and had instead simply managed EPIC LLP as a member of EPIC LLP, the acts of the Appellant on GEC LLP's behalf in that regard might still have been seen as the provision of "investment management services" for the purposes of this legislation. However, we will do so because the question is one which could well be of general relevance in this context.

75. There are a number of points which we would make in relation to that question, as follows:

(1) our starting point is to consider whether, as a matter of construing the relevant language in isolation – which is to say, without taking into account any specific legislative context in which the language in question appears - a partnership or limited liability partnership can be said to be receiving an investment management service from a member of the partnership or limited liability partnership when that member manages

the investments of the partnership or limited liability partnership in his or her capacity as a member;

(2) in that regard, we think that, so far as concerns a partnership which lacks legal personality, it must be right to say that the partnership is not receiving investment management services from the member in those circumstances. This is because the partnership is simply a contractual relationship between members and carries on its business in common through its members. Although it is not uncommon for a partnership that lacks legal personality to enter into transactions with one of its members, such as a borrowing or a lease, management of the partnership business is different from that. It is the very act of carrying on the business of the partnership in common which means that there is a partnership in the first place. As such, as a general proposition, and ignoring context, we would say that the management by a member of a partnership's business where the partnership lacks legal personality would not involve the provision of investment management services;

(3) the analysis is different in the case of a partnership or limited liability partnership which is a body corporate as a matter of general law and therefore has legal personality. That is because, in that case, the body corporate carries on its business in its own right and any investment management conducted by an individual member of the body corporate therefore necessarily involves the provision of a service by that member to the partnership or limited liability partnership in question in the same way that the management of a company's investments by a member of the company involves the provision of a service by the member to the company;

(4) however, the above is simply our view of how the language in question should be interpreted in general terms and ignoring the context of the specific legislation in which it appears. It is clear from the authorities that the language in a statute should never be construed in isolation. In each case, it is necessary to construe the provisions of a statute purposively before determining whether or not those provisions apply to the facts in a particular case, viewed realistically. As such, the conclusions set out above need to be tempered in each case by a consideration how they might be affected by the specific legislative context in which the relevant phrase appears. For instance, in the context of a provision in the tax legislation, the analysis set out in paragraphs 75(2) and 75(3) above might well be affected by the application of Sections 59 and 59A of the TCGA or Part 9 of the Income Tax (Trading and Other Income) Act 2005 (the "ITTOIA"). Those make provision in different ways for partnerships and limited liability partnerships to be effectively transparent for tax purposes. Depending on the precise legislative context in which the phrase is being considered, it is perfectly possible that that deeming could affect the answer to the question of whether or not a member managing the business of a partnership or limited liability partnership should be regarded as thereby providing an investment management service to the entity of which he or she is a member;

(5) this leads naturally to our considering whether, in the specific context of the legislation in Chapter 5 of Part III of the TCGA, the reference to the performance of investment management services by an individual should be construed as including the management of a limited liability partnership by one of its members;

(6) in so doing, we start by noting that the typical arrangement at which this legislation is aimed involves the creation of a collective investment scheme to which investment management services are provided by an investment management entity and the participation of individuals who work for the investment management entity as

members of the collective investment scheme. In that context, it is easy to see how the legislation was intended to apply. The investment management services are provided by an entity which is not itself a member of the collective investment scheme and therefore the question which we are here addressing does not arise;

(7) however, instead of adopting the conventional structure described in paragraph 75(6) above, it would be perfectly possible to arrange matters so that the investment management entity does not enter into any kind of investment management services contract with the collective investment scheme as such but instead becomes a member of the collective investment scheme and manages the investments of the collective scheme in its capacity as a member. In that instance, it might then seek to rely on the fact that the collective investment scheme does not have legal personality and/or is transparent for tax purposes to show that its management of the collective investment scheme in its capacity as a member does not involve the performance of any investment management services for the purposes of this legislation;

(8) it seems unlikely to us that, in enacting the legislation, Parliament would have intended that to be the appropriate outcome. We are aware that Section 103KD of the TCGA makes provision for ignoring arrangements which have a tax avoidance main purpose in applying the legislation but we would find it surprising if Parliament would have intended that, in circumstances such as those described in paragraph 75(7) above, the Respondents would have to rely on that anti-avoidance provision in order to bring the arrangements within the ambit of the legislation. The purpose of the legislation is clearly that it should apply to arrangements in the course of which an individual carries out investment management activities and receives carried interest;

(9) it is with the above points in mind that we now turn to the language used in the definition of "investment management services" in Section 809EZE of the ITA. In doing so, a striking point is that none of the four paragraphs which are contained in that definition makes any reference whatsoever to the provision of services, as such. Instead, each of the paragraphs is focused on particular identified activities and not on whether or not those activities are being performed by way of the provision of services. It therefore seems to us that, applying a purposive approach to construing the definition, a member of a limited liability partnership who performs any one or more of those specified activities for the limited liability partnership must be performing "investment management services" for the purposes of Chapter 5 of Part III of the TCGA, regardless of the fact that the limited liability partnership is transparent for tax purposes;

(10) it is less clear that an investment management activity performed by a member of a limited liability partnership for the limited liability partnership which does not fall within one of the four paragraphs in the definition should be interpreted in the same way. That is because, in such a case, the question is whether the activity in question falls within the general phrase "investment management services" and it might be said that it is implicit in the language of the defined term itself that the relevant investment management activity needs to be carried out by way of the provision of a service in order to fall within the definition. However, although the position is more finely-balanced as a result, we think that, again adopting a purposive approach to construing the legislation, the same consequences should ensue as in the case of activities falling within one of the four paragraphs;

(11) it follows from the above that, in our view, a member of a limited liability partnership who manages the investments of the limited liability partnership can properly be said to be thereby performing "investment management services" for the

purposes of Chapter 5 of Part III of the TCGA, notwithstanding the tax transparency of the limited liability partnership, and that that is particularly the case where that management involves the performance of one or more of the activities specified in the four paragraphs of the definition of "investment management services" in Section 809EZE of the ITA; and

(12) the above means that, in the present case, even if the Deed had made no mention of the provision of management services to the Cheyne Funds, the Appellant would still have fallen to be treated as performing investment management services in managing EPIC LLP even though, in so doing, he was acting as the representative of GEC LLP as a member. This was both under the general meaning of the term "investment management services" and because one of the management activities in which the Appellant was involved was the refinancing of the MOTO group, which falls within the fourth paragraph of the definition of "investment management services".

76. For the reasons set out above, we have concluded that the arrangements in this case did involve the performance by the Appellant of "investment management services" and therefore we determine Issue One in the Respondents' favour.

**Issue Two - were the investment management services performed directly or indirectly "in respect of" any of the Cheyne Funds?**

***Introduction***

77. Before starting our discussion in relation to Issue Two, we would observe that, on the basis of:

(1) our conclusion in relation to Issue One; and

(2) our finding of fact that the carried interest which was received by the Appellant through his membership of GEC LLP (and possibly GRE LLP) arose as a result of the investment management services which he performed,

if EPIC LLP had been a collective investment scheme, each of the conditions required in order for Chapter 5 of Part III of the TCGA to apply would have been satisfied. That is because, in that case, the arrangements would have involved the performance of investment management services in respect of an investment scheme and carried interest would have arisen under the arrangements.

78. However, it was common ground before us that EPIC LLP was not a collective investment scheme.

79. In that regard, we would say only that, on the basis of the evidence before us, we are not entirely sure that that was the case. We say that because, in order for EPIC LLP to have fallen outside the ambit of Sections 235(1) to 235(4) of the FISMA, each person participating in EPIC LLP must have had day-to-day control over the management of EPIC LLP's property. If one or more of the participants in EPIC LLP did not have day-to-day control over the management of EPIC LLP's property, then the arrangements would have fallen within the relevant provisions. In that regard, it is clear from the terms of Section 235(2) of the FISMA that the right to be consulted and to give directions is different from, and insufficient to amount to, control over day-to-day management.

80. It is no doubt with that in mind that clause 7.1 of the Deed – which specified that the members together would have day-to-day control over EPIC LLP's property - was drafted in the way it was. We are not saying that what was said in clause 7.1 was necessarily incorrect. Certainly, in response to a direct question from us on this point at the end of his testimony, the Appellant said that control over the day-to-day management of EPIC LLP's property was

carried out as to two-thirds by the Greycoat group and one-third by the Cheyne Capital group. However, we would say that:

(1) we do not attach significant weight to a self-serving statement contained in the Deed, particularly in light of the changes which were made to clause 7.5 solely in order to obtain a beneficial result for VAT purposes. What matters is what actually occurred and not what the parties said in the Deed as to how what actually occurred was to be construed. One example of where there was clearly a mismatch between the terms of the Deed and what actually occurred was that the Initial Deed was dated 18 September 2014 but the bundle contained minutes of a meeting of EPIC LLP held on 5 September 2014 which was purportedly attended by an individual representing the Cheyne Funds in their capacity as members and at which various significant transaction documents were approved on behalf of EPIC LLP. We are therefore disinclined to attach much credence to the statement in clause 7.1 of the Deed;

(2) the testimony of the Appellant referred to above is similarly not beyond challenge. The Appellant knew what the answer was meant to be and he provided it. The reason why we had asked that question - which was after the cross examination of the Appellant had concluded - was that his evidence prior to that point had strongly suggested that the Greycoat group was solely responsible for the day-to-day management of EPIC LLP's property but that:

(a) it had kept the Cheyne Funds, in the form of Mr Stickney, informed of its activities in that regard at all times; and

(b) no major decisions could be taken in relation to EPIC LLP's property without the consent of the Cheyne Funds.

As we have already intimated, neither keeping the Cheyne Funds informed of the management of EPIC LLP's property nor accepting the directions of the Cheyne Funds in relation to the day-to-day management of EPIC LLP's property was sufficient to confer on the Cheyne Funds themselves control over the day-to-day management of EPIC LLP's property. As such, the fact that the Appellant testified that he kept Mr Stickney informed of his activities in relation to EPIC LLP and was unable to take any significant decision in relation to EPIC LLP without consulting Mr Stickney is not evidence that the Cheyne Funds had control over the day-to-day management of EPIC LLP's property; and

(3) the evidence with which we were provided in the course of the hearing suggested to us quite strongly that day-to-day control over the management of EPIC LLP's property was vested solely in the Greycoat group and that the Cheyne Funds merely had the right to be consulted and to give directions, as described in paragraph 80(2) above.

81. Of course, we accept that, so far as the present proceedings are concerned, the focus as regards the management of EPIC LLP's investments was on the extent, if at all, that the Appellant performed investment management services. As such, it is possible that there might well be a raft of evidence which we were not shown and which would indicate that, while the Appellant was performing his day-to-day investment management activities in the course of the arrangements, Mr Stickney, or one or more other people from the Cheyne Capital group, were doing the same.

82. We also accept that Sections 235(1) to 235(4) of the FISMA alone are not determinative of whether or not arrangements amount to a collective investment scheme. As we will discuss in due course when we address Issue Four, there are various exclusions from

collective investment scheme status for certain specified arrangements even though they satisfy the requirements of those provisions.

83. However, all we can say that is that, on the basis of the evidence with which we have been provided, we are not at all sure that EPIC LLP was not a collective investment scheme and that, if the Respondents had chosen to challenge that conclusion, it is possible that the outcome of this appeal might well have been different.

***The submissions***

84. Having said that, we now turn to the submissions which were made by Mr Nawbatt, on behalf of the Respondents, as to why the investment management services which were performed by the Appellant in this case were performed "in respect of" one or more of the Cheyne Funds.

85. In no particular order, those submissions were that:

(1) first, at least some of the investment management services which were performed by the Appellant were performed under clause 7.5 of the Deed and those services were clearly stated to be provided to the Cheyne Funds. Although the clause referred to the services' being provided to the Cheyne Funds "and, where relevant, to [EPIC LLP]", it was the Cheyne Funds who paid the entire consideration for the services and it was therefore apparent that it was the Cheyne Funds and not EPIC LLP who were the recipient of the services;

(2) secondly, the investment management services which were performed by the Appellant enured for the benefit of the Cheyne Funds through their membership interest in EPIC LLP. Thus, in performing the relevant services, the Appellant intended to benefit, and did benefit, the Cheyne Funds as well as EPIC LLP;

(3) thirdly, the combined effect of Sections 59 and 59A of the TCGA was that EPIC LLP was transparent for UK tax purposes and therefore, in considering whether or not Section 103KA of the TCGA applied, any services which the Appellant performed for EPIC LLP should be seen as being performed for the members of EPIC LLP, which included the Cheyne Funds. Once it was accepted that the Appellant had performed investment management services for EPIC LLP, it must follow from that that the Appellant had performed investment management services for the Cheyne Funds;

(4) even if one were to adopt a more restricted interpretation of the effect of Sections 59 and 59A of the TCGA than the one outlined in paragraph 85(3) above, those sections clearly provided that the assets of a limited liability partnership were to be regarded for the purposes of tax on chargeable gains as being held by the members of the limited liability partnership. It followed that, for the purposes of considering whether or not Section 103KA of the TCGA applied, the assets of EPIC LLP were to be regarded as the assets of each Cheyne Fund and the management of those assets was therefore the management of the assets of each Cheyne Fund;

(5) Section 103KA of the TCGA referred to the performance of investment management services "directly or indirectly". Taking the points made in paragraphs 85(1) to 85(4) above into account, this was an example of an indirect performance of such services; and

(6) if we were to find against the Respondents on this point, that would serve to drive a coach and horses through the legislation and render it largely ineffective because a collective investment scheme such as a Cheyne Fund would be able to create a blocking vehicle through which to make its investments and thereby escape the application of the regime.

***Conclusion***

86. With great respect to Mr Nawbatt, we do not agree with any of the above points.

87. We think that the Respondents' position fails properly to take into account the words "in respect of" which appear in Section 103KA of the TCGA. In this case, there was only one entity "in respect of" which the Appellant performed investment management services and that was EPIC LLP. Those services were not performed "in respect of" any of the Cheyne Funds. Taking each of Mr Nawbatt's points in turn:

(1) as regards Mr Nawbatt's first point, the phrase "in respect of" requires there to be a link between the investment management services which have been performed and the subject of those services, which is to say the person to whom the services relate. The person to whom the services have been provided or who may have paid for the relevant services is neither here nor there. What matters is the person to whom the services relate. This argument on the part of the Respondents equates the person receiving, or paying for, services to the person who is the subject of the services and therefore, in our view, fails adequately to take into account the phrase "in respect of";

(2) a similar point may be made as regards Mr Nawbatt's second point. The mere fact that person A may benefit from a service supplied in respect of person B is, again, neither here nor there. In a group of companies, the ultimate parent company will inevitably benefit from a service which is supplied in respect of one of its subsidiaries but that does not mean that the service has been supplied "in respect of" the parent company (or, for that matter, to the parent company).

There is another point which we should make in this context, stemming as it does from our finding of fact that the purpose of the Appellant in performing the investment management services was solely to enhance the profitability of EPIC LLP and not to enhance the profitability of the Cheyne Funds.

When one looks at the four paragraphs which are contained within the definition of "investment management services" in Section 809EZE of the ITA, it is striking that each of them refers to the relevant activities' being for "the purposes of the scheme". The "scheme" referred to is of course the "investment scheme" "in respect of" which the investment management services in question have been performed. The language used in those four paragraphs therefore serves to reinforce the clear link between the subject of the investment management services – the entity for the purposes of which the investment management services have been performed – and the entity "in respect of" which the investment management services have been performed.

Thus, the purpose of the Appellant in providing the investment management services is another reason why the investment management services in this case are not "in respect of" any Cheyne Fund;

(3) Mr Nawbatt's third point turns on whether the statutory fictions required by the combined effects of Sections 59 and 59A of the TCGA mean that Section 103KA of the TCGA should be applied on the basis that a service which was actually performed "in respect of" a limited liability partnership should be regarded as having been performed "in respect of" the members of that limited liability partnership.

We think that that is not a permissible way to apply Section 103KA of the TCGA, for two reasons.

The first is that, when one looks at Sections 59 and 59A of the TCGA, their effects are:

(a) to treat assets held by a limited liability partnership as being held by the members of the limited liability partnership, for the purposes of tax in respect of chargeable gains;

(b) to treat dealings by the limited liability partnership for those purposes as dealings by its members and not by the limited liability partnership, as such; and

(c) to require tax in respect of chargeable gains accruing to the members of the limited liability partnership on the disposal of any of its assets to be assessed and charged on them separately.

None of those deeming provisions goes as far as suggesting that services performed in respect of a limited liability partnership should be deemed to have been performed in respect of its members.

In this respect, it is worth comparing the relatively limited deeming effects set out above with the deeming language set out in Section 863 of the ITTOIA, which applies in relation to limited liability partnerships for income tax purposes. In that section, one of the deeming provisions states that "anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners". We can see how the process required by that language is slightly closer to the process which Mr Nawbatt was urging us to apply – that of treating a service performed in relation to a limited liability partnership as having been performed in relation to its members. However, even that is not entirely clear and, in any event, that provision applies only for income tax purposes and not chargeable gains purposes. It is therefore inapplicable in construing Section 103KA of the TCGA.

Moreover, even if Sections 59 and 59A of the TCGA had included similar language to that described above in Section 863 of the ITTOIA, there is a second reason why we do not think that the combined effects of those sections would be sufficient to get the Respondents home. This is that the purpose of the provisions is to deem the stated matters to be the case for the purposes of determining the chargeable gains arising to the members of a limited liability partnership in respect of the disposal of the limited liability partnership's assets and the assessment of the members of the limited liability partnership to tax on those chargeable gains. It does not follow that the matters which have been deemed to be the case for those purposes should then be deemed to be the case in applying every other provision in the TCGA as a whole. A deeming provision applies only for the purposes for which it was enacted and its effects do not extend beyond those purposes.

So, in this case, even if Sections 59 and 59A of the TCGA had been expressed in similar terms to Section 863 of the ITTOIA, the deeming effects would not have been read across into Section 103KA of the TCGA such that services which were actually performed in respect of EPIC LLP would fall to be regarded for the purpose of that section as having been performed instead (or additionally) in respect of the members of EPIC LLP. That would be to give the deeming provisions an inappropriately wide effect.

The position in this regard is not dissimilar from:

(i) the one pertaining in *Davies v Hicks* [2005] STC 850, where Park J held that a statutory fiction required for computational purposes – a provision which was intended to identify which shares acquired by a particular taxpayer should be matched with shares sold by the same

taxpayer – could not be deemed to have effects going beyond that and require it to be assumed in applying another statutory provision that the assets held by the taxpayer were not the assets actually held but instead the assets deemed to be held by virtue of the statutory fiction; and

(ii) the one pertaining in *BCM Cayman LP and another v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKUT 198 (TCC), where the Upper Tribunal held that a partner in a partnership that was carrying on a trade could not rely on the tax transparency of the partnership to impart a trading purpose to a borrowing which had been taken out by the partner itself on its own account for investing in the partnership.

In our view, in order for the investment management services in this case to have been performed "in respect of" any of the Cheyne Funds for the purposes of Section 103KA of the TCGA, the services would have needed to relate to the relevant Cheyne Fund itself as opposed to an entity in which the relevant Cheyne Fund invested, even if that entity was transparent for chargeable gains tax purposes. The services which were performed in this case did not relate to any of the Cheyne Funds and that is the end of the matter;

(4) Mr Nawbatt's fourth point raises a slightly different issue from the one discussed in paragraph 87(3) above. It is not based on the proposition that the effect of Sections 59 and 59A of the TCGA is that Section 103KA of the TCGA should be applied on the basis that a service which was actually performed "in respect of" a limited liability partnership should be regarded as having been performed "in respect of" the members of that limited liability partnership. Instead, it is based on the proposition that the effect of the provisions is that Section 103KA of the TCGA should be applied on the basis that the assets of a limited liability partnership should be regarded as being held by the members of that limited liability partnership.

This proposition has more going for it than the one discussed in paragraph 87(3) above because it does at least rely on the language actually used in the provisions and therefore avoids the first objection to Mr Nawbatt's third point set out in that paragraph.

However, it does not avoid the second objection to that point set out in that paragraph.

It does not follow that, because the assets of a limited liability partnership are deemed to be held by the members of that limited liability partnership for the purposes of determining the chargeable gains arising to those members in respect of the disposal of limited liability partnership's assets and the assessment of the members of the limited liability partnership to tax on those chargeable gains, a provision in the TCGA referring to the performance of investment management services in respect of a collective investment scheme should be applied on the basis that the assets of a limited liability partnership in which the collective investment scheme invested should be regarded as being the assets of the collective investment scheme.

Moreover, even if that were to be a permissible application of the deeming effected by the relevant sections, we do not see how the fact that the investment management services in this case related to assets held by each Cheyne Fund means that those services should be regarded as having been provided "in respect of" the relevant Cheyne Fund. In our view, in order to amount to investment management services "in respect of" the relevant Cheyne Fund, the services would have needed to relate to the relevant Cheyne Fund itself. Investment management services which were performed "in respect of" some of the assets held by the relevant Cheyne Fund through its

investment in a joint venture to which the services in fact related were not investment management services relating to the relevant Cheyne Fund itself and were therefore not performed "in respect of" the relevant Cheyne Fund;

(5) as regards Mr Nawbatt's fifth point, in our view, the phrase "directly or indirectly" in Section 103KA of the TCGA does not advance the Respondents' case. This is because that phrase is qualifying the words "performs investment management services" and not the words "in respect of". The phrase means that the interposition of another entity between the individual who is performing the investment management services and the collective investment scheme in respect of which the individual is performing the investment management services will not enable the individual to escape the clutches of the regime. However, the phrase does not have the effect of deeming an investment management service which has been performed "in respect of" one entity to be treated as having been performed "in respect of" any of that entity's members; and

(6) finally in relation to this issue, we do not understand Mr Nawbatt's submission to the effect that the above conclusion drives a coach and horses through the legislation. The legislation is clearly aimed at the receipt of carried interest from the performance of investment management services "in respect of" a collective investment scheme. The identity of the members of the relevant collective investment scheme and, in particular, whether or not any of them may also be a collective investment scheme is a matter of no moment. If a collective investment scheme participates as a member in an entity which is not itself a collective investment scheme, then the legislation should rightly not apply even if the entity in which the collective investment scheme is participating is wholly-owned by the collective investment scheme. To apply the legislation in any other way would be to pay no regard to the phrase "in respect of" in Section 103KA of the TCGA.

88. It seems to us that, once they accepted that EPIC LLP was not itself a collective investment scheme, the Respondents should have accepted that Chapter 5 of Part III of the TCGA did not apply. Instead, they sought to benefit from the accident that the Cheyne Funds might themselves have been collective investment schemes in order to bring the arrangements in this case within the scope of the legislation. In our view, that was a step which was not justified by the language used in the statute.

89. For the reasons set out above, we have concluded that the performance by the Appellant of "investment management services" under the arrangements with which this appeal is concerned were not performed "in respect of" any of the Cheyne Funds and therefore we determine Issue Two in the Appellant's favour.

90. That conclusion is sufficient to dispose of this appeal in favour of the Appellant. However, because we heard submissions from the parties in relation to the other issues set out in paragraph 37 above, we set out below our conclusions in relation to each of those issues.

**Issue Three - who has the burden of proof in relation to whether or not any of the Cheyne Funds was a collective investment scheme?**

***The submissions***

91. Mr Gardiner submitted that, even if the Respondents were to succeed in establishing that the Appellant did perform investment management services in respect of the Cheyne Funds under the arrangements, that would not be sufficient in and of itself to bring the arrangements within the scope of the legislation. Instead, the application of the legislation would still depend on whether or not the Cheyne Funds were collective investment schemes.

92. This raised the preliminary question of whether, in that event, it would be for the Appellant to establish that the Cheyne Funds were not collective investment schemes or the burden of proving that the Cheyne Funds were collective investment schemes would rest with the Respondents.

93. Mr Gardiner's said that the latter was the case.

94. He accepted that, under Section 50(6) of the TMA, the onus of proof in discharging a tax assessment was generally on the taxpayer. However, he said that this was based on the reality that, in general, it was the taxpayer rather than the Respondents who were apprised of the relevant facts. In a case such as the present, where neither party was apprised of the relevant facts as regards the collective investment scheme status of any Cheyne Fund, it was not up to the Appellant as the taxpayer to have to prove a negative, as he put it. Instead, it was a matter which the Respondents, as the party alleging that the Cheyne Funds were collective investment schemes, would have to prove.

95. In support of this proposition, Mr Gardiner relied on dicta in the Court of Appeal decision in *Kellogg Brown & Root Holdings (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2010] EWCA Civ 118 ("*Kellogg*"). One of the questions at issue in *Kellogg* was whether two apparently-unconnected companies were connected pursuant to Section 286(5)(b) of the TCGA (by virtue of being controlled by the same group of two or more persons) at the time when a loss-making disposal between them had occurred. In the course of addressing that issue, Lord Neuberger MR said as follows at paragraph [47]:

"If HMRC seek to raise the point in relation to two companies which are, and long have been, independent, then it will be very much up to them to prove that s 286(5)(b) is satisfied. The fact that s 50(6) of the Taxes Management Act 1970 places an initial general onus on the taxpayer challenging an assessment does not affect the point that, if HMRC's assessment relies on the fact that two apparently independent companies are 'connected' under the terms of s 286(5)(b), then that would be for HMRC to prove."

96. Mr Gardiner said that, in that passage, Lord Neuberger MR was effectively saying that the terms of Section 50(6) of the TMA did not extend as far as requiring the relevant taxpayer to prove a negative. In a case where the Respondents were asserting that a particular factual situation pertained and the taxpayer was no better-placed than the Respondents to ascertain whether or not that was the case, the onus was on the Respondents to make good their assertion.

***Conclusion***

97. We do not agree with that submission. It seems to us that the burden of discharging a tax assessment is always on the taxpayer - as noted by Mustill LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 and 642 and as stated by the High Court in *Nicholson v Morris* 51 TC 95 at 110 (and approved by Lord Goff in the Court of Appeal in that case at 119) - but that there may be a point where the taxpayer has produced sufficient evidence which, as matters then stand, appears to show that the assessment in question is wrong and that, at that point, the evidential burden passes to the Respondents – see *Wood v Holden* [2006] 1 WLR at paragraph [30].

98. In our view, Lord Neuberger MR in *Kellogg* was doing no more than alluding to the latter principle in the passage set out in paragraph 95 above. He was not saying that the taxpayer could never have the onus of proving a negative. Instead, he was saying no more than that, on the facts of that case, where the companies in question were apparently unconnected and had been so for some time, the taxpayer had established a prima facie case for concluding that that was the case and so had thereby transferred to the Respondents the evidential burden of establishing the connection.

99. For that reason, we have concluded that, in this case, had we resolved Issue Two in the Respondents' favour, it would have been for the Appellant to establish that the Cheyne Funds were not collective investment schemes. We therefore determine Issue Three in the Respondents' favour.

**Issue Four - has the party who has the burden of proof as determined at Issue Three discharged that burden?**

***The submissions***

100. Mr Gardiner said that, even if we did not agree with him in relation to the location of the burden of proof in this case, the facts supported the conclusion that the Appellant had done enough to shift the evidential burden of proof onto the Respondents. In other words, he said that the Appellant had produced sufficient evidence to establish a prima facie case to the effect that the Cheyne Funds were not collective investment schemes and therefore that the evidential burden of showing that they were had passed to the Respondents.

101. In that regard, Mr Gardiner said that:

(1) whether or not arrangements amounted to a collective investment scheme was of great significance from the regulatory perspective. In the UK, there were severe, and sometimes criminal, consequences of, for example, selling interests in unregulated collective investment schemes to non-professional investors. It was for that reason that the authorities in this area had emphasised the need for certainty as to which arrangements fell within the scope of the definition. A cautious approach to the construction of the legislation was appropriate – see Arden LJ in *Financial Services Authority v Fradley* [2006] 2 BCLC 616 at paragraph [32] and Lord Carnwath and Lord Sumption in *FCA v Asset LI Inc and others* [2016] UKSC 17 ("*Asset LI*") at paragraphs [6] and [73] to [102];

(2) the collective investment scheme definition was aimed primarily at unit trust schemes and open-ended investment companies and not at limited partnerships such as the Cheyne Funds;

(3) in order for arrangements to amount to a collective investment scheme, it was not sufficient for the relevant arrangements to involve a pooling of assets in which at least one participant did not have control over the day-to-day management of the property which was held under the arrangements. That was undoubtedly what Sections 235(1) to 235(4) of the FISMA said, but those provisions were subject to Section 235(5) of the FISMA and the provisions of the CIS Order;

(4) the Schedule to the CIS Order described a number of arrangements which were expressly precluded from constituting a collective investment scheme. One of those was arrangements falling within paragraph 9 of the Schedule to the CIS Order – schemes entered into for commercial purposes wholly or mainly related to existing business – and another of them was arrangements falling within paragraph 21 of the Schedule to the CIS Order – bodies corporate etc.;

(5) such evidence as was available to the parties established a prima facie case to the effect that the Cheyne Funds fell within either or both of those paragraphs. On that basis, the Appellant had done enough for the evidential burden of establishing that the Cheyne Funds were collective investment schemes to pass to the Respondents;

(6) paragraph 9 of the Schedule to the CIS Order was aimed at ensuring that arrangements largely comprising professional investors fell outside the scope of the collective investment scheme definition. For that reason, it referred to a concept of "permitted participant", who were basically participants in the arrangements acting in

the course of carrying on a business. In this case, there was ample evidence that the participants in the Cheyne Funds were primarily institutional in nature. For instance:

(a) in his witness statement, the Appellant had said that over 80% of the assets in funds which were managed by the Cheyne Capital group derived from pension funds, insurance companies, sovereign wealth funds, endowments and fund investors and that the remaining assets came from family offices and high-net-worth individuals; and

(b) forms filed with the Securities and Exchange Commission in the US (the "SEC") in relation to two of the Cheyne Funds showed that each of them was precluded from being an investment company for US regulatory purposes because it fell within an exemption in Section 3(c)(7) of the Investment Company Act of 1940 for funds whose securities were owned exclusively by "qualified purchasers". A "qualified purchaser" for that purpose was a professional investor and therefore similar to a "permitted participant" in paragraph 9 of the Schedule to the CIS Order. Although there was no equivalent SEC filing in relation to the third Cheyne Fund, that fund could reasonably be assumed to benefit from the same exemption; and

(7) paragraph 21 of the Schedule to the CIS Order precluded bodies corporate other than open-ended investment companies from being collective investment schemes. In his submission, the Cheyne Funds were bodies corporate because they clearly existed and were not individuals. As such, they had legal personality. Moreover, although the exclusion in paragraph 21 of the Schedule to the CIS Order was stated not to apply to bodies corporate which were incorporated as limited liability partnerships, the Cheyne Funds were limited partnerships and not limited liability partnerships so that that exclusion was not in point.

***Conclusion***

102. Notwithstanding the submissions summarised in paragraph 101 above, we consider that the evidence provided by the Appellant in relation to whether or not the Cheyne Funds amounted to collective investment schemes does not come close to shifting the evidential burden on this question onto the Respondents.

103. In that regard, we would comment as follows:

(1) we do not agree with Mr Gardiner's submission to the effect that the collective investment scheme legislation is aimed primarily at unit trust schemes and open-ended investment companies. It is apparent from both the primary legislation – see Section 235A of the FISMA for example – and the secondary legislation – see paragraph 21(2) of the CIS Order for example – that the legislation is much more wide-ranging than that and that limited partnerships and other contractually-based arrangements are perfectly capable of falling within the legislation;

(2) we also do not follow how the evidence with which we were provided as to why two of the Cheyne Funds were precluded from being investment companies for the purposes of the Investment Company Act of 1940 in the US moves the dial as regards the evidential burden in this case so far as the exclusion in paragraph 9 of the Schedule to the CIS Order is concerned. We say that because:

(a) as a general proposition, the status of arrangements under the laws of jurisdictions other than the UK is not a valuable guide to the status of such arrangements as a matter of English law – see the dicta of Lord Carnwath in *Asset LI* at paragraph [7];

(b) however, insofar as it has any relevance, the fact that the two Cheyne Funds to which the SEC filings related were described in those filings as "pooled investment funds" strongly suggests that each of them met the conditions in Sections 235(1) to 235(4) of the FISMA. It seems highly likely that each Cheyne Fund involved the pooling of assets by each participant in the relevant fund and that some of the participants in the relevant fund did not have control over the day-to-day management of the fund's property;

(c) the exclusion in paragraph 9 of the Schedule to the CIS Order is not as wide-ranging as Mr Gardiner suggested. Even more significantly, it is not targeted at pooled investment vehicles in which the participants are professional or institutional investors. On the contrary, it is directed at a very narrow category of pooled investment vehicle in which all of the participants carry on an unregulated business at the time of investing in the vehicle and are participating in the vehicle for commercial purposes related to that pre-existing unregulated business – see the definition of "permitted participant" in paragraph 9(5).

It applies where, as an adjunct to an existing unregulated business, the person carrying on that business chooses to enter into a pooled investment vehicle with other such persons. That much is clear from the explanatory note to an order which made amendments to the paragraph in order to allow for special purpose joint ventures to be permitted participants.

For example, it might apply where chocolate manufacturers enter into a pooled investment vehicle for making investments in cocoa futures. It is therefore, if anything, directly contrary to an exclusion for pooled investment vehicles in which the participants are professional or institutional investors. Putting the position at its weakest, the evidence to which we were directed by Mr Gardiner as to the nature of the participants in the Cheyne Funds is irrelevant to the conditions for falling within the paragraph;

(d) we would add that, even if that were not the case, all of the participants in the vehicle - and not merely a majority - need to satisfy the definition of "permitted participant" and this is tested on an ongoing basis and not solely at the time when the participant invested in the vehicle. As such, the evidence provided to the effect that a significant majority of the participants were professional or institutional investors is of no moment because it says nothing about the status of those investors who were not professional or institutional in nature. Even if the definitions of "permitted participant" and "qualified purchaser" had been the same, the fact that some of the participants were not professional or institutional investors but were instead family offices and high-net-worth individuals – as the Appellant testified - would be sufficient to prevent the exclusion from applying; and

(e) there is also the fact that the evidence provided by the Appellant as to the nature of the investors in funds managed by the Cheyne Capital group related to funds which were managed by the Cheyne Capital group as a whole. It says nothing about the participants in the Cheyne Funds who were the participants in EPIC LLP specifically;

(3) we also do not see how the submissions made by Mr Gardiner in relation to the application of paragraph 21 of the Schedule to the CIS Order shift the evidential burden onto the Respondents as regards the availability of that exclusion. We were provided with no evidence to the effect that the Cheyne Funds, as limited partnerships under

Cayman Islands law, were bodies corporate. On the contrary, the evidence provided to us suggested that they were not. For example:

(a) in the list of parties to the Deed, each Cheyne Fund was stated to be "acting through its general partner, Cheyne General Partner Inc". The same approach was apparent in the notices provisions in clause 14.3 of the Deed and in the signature blocks at the end of the Deed. If each Cheyne Fund had been a body corporate, as Mr Gardiner submitted, it would have had legal personality in its own right and would have been able to contract in its own name without having its general partner to act for it; and

(b) the Cayman Islands General Registry says the following in relation to partnerships in that jurisdiction:

"Partnerships are registered relations which subsist between persons carrying on business in common with a view to profit. The Cayman Islands partnerships do not have separate legal personality".

If the Appellant wished to establish that the Cheyne Funds were bodies corporate, it would have been a straightforward matter for him to adduce an expert in Cayman Islands partnership law in order to do so. In our view, the fact that he did not was telling.

104. In summary, we consider that the Appellant has not produced any evidence to suggest that there is a prima facie case for concluding that the Cheyne Funds were not collective investment schemes and that the evidential burden of establishing that the Cheyne Funds were collective investment schemes should rest with the Respondents. Had this been a live issue in this appeal, the position would remain that the burden of establishing that the Cheyne Funds were not collective investment schemes would remain with the Appellant and therefore we determine Issue Four in the Respondents' favour.

**Issue Five - did the carried interest which the Appellant derived "arise" under the arrangements?**

***Introduction***

105. We will deal very briefly with Issue Five not only because our views on it are ultimately not determinative of this appeal but also because:

(1) the difference between the parties in relation to how the meaning of "arise" in this context is to be determined appears to us to be more apparent than real; and

(2) based on our finding of fact in paragraph 50(4) above, that difference is, in any event, of no consequence on the facts of this case.

***The submissions***

106. As regards the first of those points, there was a difference between the parties at the hearing as to how the condition to the effect that the carried interest needed to arise under the arrangements was to be interpreted.

107. Mr Nawbatt said that, based on the manner in which Section 103KA of the TCGA was worded, it was unnecessary for there to be any causative link between the carried interest which arose to the Appellant under the arrangements and the investment management services performed by the Appellant under the arrangements. Instead, it was merely necessary for there to be arrangements under which the Appellant performed investment management services in respect of a collective investment scheme and for carried interest to arise to the Appellant under the arrangements.

108. Mr Gardiner disagreed. He said that the word "arise" was defined for the purposes of Chapter 5 of Part III of the TCGA in Section 103KG of the TCGA. The relevant definition specified that carried interest would be treated as arising to an individual for the purposes of that chapter if, and only if, it arose to him or her for the purposes of Chapter 5E of Part 13 of the ITA. Mr Gardiner did not go as far as saying that carried interest could not be regarded as arising under Chapter 5 of Part III of the TCGA unless there were also disguised investment management fees for the purposes of Chapter 5E of Part 13 of the ITA. However, he said that the fact that the two codes were clearly intended to operate in a complementary fashion meant that there had to be a causative link between the performance of the investment management services and the receipt of the carried interest. The carried interest needed to be a form of remuneration for investment management services and not merely something which just happened to arise under the same arrangements as those under which investment management services were performed.

***Conclusion***

109. Whilst we agree with Mr Gardiner that Section 103KG of the TCGA does indeed define the meaning of the word "arises" for the purposes of Chapter 5 of Part III of the TCGA, we do not see how that cross reference in fact creates any requirement under the relevant legislation for a causative link between the receipt of the carried interest and the investment management services in question.

110. We should start by saying that we agree with Mr Gardiner that the mere fact that Section 103KG of the TCGA makes reference to Chapter 5E of Part 13 of the ITA does not mean that carried interest cannot be treated as arising for the purposes of Chapter 5 of Part III of the TCGA unless disguised investment management fees are treated as arising for the purposes of Chapter 5E of Part 13 of the ITA under the same arrangements. That is not what the section says. Instead, it merely says that one needs to look to the provisions of Chapter 5E of Part 13 of the ITA to discover when carried interest "arises" for the purposes of that chapter and then apply the same principles in determining when carried interest "arises" for the purposes of the chargeable gains code.

111. However, the problem with this is that, when one turns to Chapter 5E of Part 13 of the ITA, it is notable that it does not in fact define the meaning of the word "arises" for the purposes of that chapter. Instead, it merely:

> (1) stipulates that a disguised fee arises from an investment scheme when an individual performs investment management services under arrangements, a management fee arises under the arrangements and some or all of the management fee is untaxed (see Section 809EZA (3) of the ITA);
>
> (2) defines a management fee as excluding, inter alia, carried interest other than income-based carried interest (see Section 809EZB of the ITA);
>
> (3) defines carried interest as, broadly speaking, a sum arising to the individual in question under the arrangements by way of profit-related return (see Section 809EZC of the ITA);
>
> (4) identifies specific circumstances in which a sum which arises is to be treated as carried interest for the purposes of Section 809EZB of the ITA (see Section 809EZD of the ITA); and
>
> (5) identifies specific circumstances in which a sum arising to persons other than the individual are to be treated as arising to the individual (see Sections 809EZDA and 809EZDB of the ITA).

112. The word "arises" and cognate expressions of that word are used repeatedly throughout the chapter both in relation to carried interest and other sums without any guidance whatsoever as to what the word means. Moreoever, as we have already mentioned in paragraph 111(1) above, the primary definitional section – the one defining a "disguised fee" - is worded in exactly the same way as is Section 103KA of the TCGA in that it simply requires there to be arrangements under which the individual performs investment management services in respect of an investment scheme and a management fee arises to the individual - see Section 809EZA(3)(a) of the ITA.

113. Mr Gardiner said that the very fact that Chapter 5E of Part 13 of the ITA was concerned with disguised investment management fees was enough to establish a requirement that there be a causative link between the receipt of the carried interest and the investment management services. We disagree. We think that it is apparent from the language used in both codes – Chapter 5E of Part 13 of the ITA and Chapter 5 of Part III of the TCGA – that, in order to fall within the relevant code, there need merely be arrangements under which investment management services are performed by an individual and carried interest arises.

114. It follows from this that, in our view, Mr Nawbatt was correct in saying that there does not need to be a causative link under the arrangements in question between the receipt of the carried interest and the investment management services before the carried interest can be said to "arise" under the arrangements. The definition upon which Mr Gardiner placed reliance at the hearing to establish a causative link does not do so.

115. Having said that, we have already set out our finding of fact to the effect that, on the facts in this case, such causative link did exist. We have rejected the Appellant's claim that the carried interest which he received had nothing whatsoever to do with the investment management services he performed. It therefore follows that, on the facts in this case, even if Mr Gardiner's submissions were to be preferred, this part of the requirements in Section 103KA of the TCGA would be satisfied.

116. For the above reasons, we determine Issue Five in the Respondents' favour.

**CONCLUSION**

117. In summary, in this case, we have concluded that:

(1) the Appellant performed investment management services;

(2) he did so under arrangements involving at least one partnership; and

(3) carried interest arose to the Appellant under the arrangements; but

(4) the investment management services were performed directly in respect of EPIC LLP, which the Respondents have accepted was not an "investment scheme" for the purposes of Chapter 5 of Part III of the TCGA. They were not performed either directly or indirectly in respect of any Cheyne Fund and therefore, even though the Appellant has not satisfied us that the Cheyne Funds were not "investment schemes" for the purposes of Chapter 5 of Part III of the TCGA, not all of the conditions set out in Section 103KA of the TCGA were satisfied.

118. For the reasons set out above, we uphold the Appellant's appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

119. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**TONY BEARE**
**TRIBUNAL JUDGE**

**Release Date: 05th JULY 2024**