**Neutral Citation Number: [2025] EWHC 2399 (Comm)**

**Claim No: CC-2021-MAN-000040**

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS IN MANCHESTER**

**CIRCUIT COMMERCIAL COURT (KBD)**

**BETWEEN:**

**(1) – (176) OMAIR AHMED & OTHERS IDENTIFIED IN THE SCHEDULE TO THE BRIEF DETAILS OF CLAIM**

**Claimants**

**-and-**

**(1) WHITE & COMPANY (UK) LIMITED**

**(2) ALLIANZ GLOBAL CORPORATE & SPECIALITY SE**

**Defendants**

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**Mr RICHARD CHAPMAN KC** instructed by **OZON SOLICITORS LIMITED** for the **Claimants**

**Ms CLARE DIXON KC and Ms HANNAH DALY** instructed by **CLYDE & CO LLP** for the **Defendants**

Hearing dates: 11, 12, 13, 14, 18, 19, 20, 26, 27 November 2024

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**JUDGMENT**

This judgment was handed down at 3pm on 22 September 2025 by circulation by email to the parties' represntatives and by release to the National Archive.

**HIS HONOUR JUDGE PEARCE**

## INTRODUCTION

1. When King James II first saw Wren's magnificent new construction of St Paul's Cathedral, he is said to have described it as "*amusing, awful and artificial*[1]." Whether certain tax mitigation investment schemes are awful or amusing is not relevant to this case; whether they are artificial is one of the central issues.

2. The Claimants[2] each claim damages for losses alleged to arise from advice given by the First Defendant ("**White & Co**") which was negligent and/or in breach of the fiduciary duties owed to the Claimants. The Second Defendant ("**Allianz**") was the First Defendant's professional indemnity insurer for the period 26 November 2016 to 27 December 2017 ("**the Allianz Policy Period"**).

## THE STRUCTURE OF THE JUDGMENT

3. The judgment is structured as follows:



[1] In modern parlance one might say "amazing, awe-inspiring and artistic," rather than the rather less positive connotation that these words have in current usage.

[2] I shall refer to the Claimants collectively by this title save where necessary to distinguish between them. In contrast, the words "claimants" (uncapitalised) is used to mean people who have a claim in general, rather than being specific to this case. Other terms of art that are used in the judgment will be defined in brackets and in bold when they are first introduced and are summarised in Appendix 2.

[3] "SOI" is a reference to the Statement of Issues prepared by the parties for the purpose of their closing submissions as considered below as refined at [108] below.

| MAIN HEADING | SUB HEADING | Para Ref | Page Ref | SOI Ref |
|---|---|---|---|---|
| NOTIFICATION – THE FACTS | Background | 61 | 30 | |
| | The Akbar Letters | 63 | 31 | |
| | The Block Notifications | 73 | 34 | |
| | The Kennedys Documents | 81 | 39 | |
| AGGREGATION - THE LAW | | 91 | 44 | |
| THE LITIGATION | The Course of the Litigation | 93 | 45 | |
| | The Issues | 102 | 47 | |
| | The Expert Evidence | 110 | 59 | |
| THE SCOPE OF THE CLAIMS | Whether the claims as pleaded include Seed EIS investments | 120 | 71 | SOI[1] |
| | Whether the claims as pleaded include investments in Ober | 131 | 74 | SOI[2] |
| THE AKBAR LETTERS | What were the facts of which White & Co was aware by virtue of the Akbar Letters | 136 | 75 | SOI[3] |
| | Were those facts such as to lead a reasonable person in the position of White & Co to consider that a claim might be made by claimants who were not listed in the Akbar Letters in relation to certain categories of investment? | 147 | 78 | SOI[4] |
| | On a true construction of the Akbar Letters, were these a notification of circumstances which might give rise to a claim? | 161 | 82 | SOI[5] |
| | If so, what was the scope of the matters notified to Allianz? | 173 | 83 | SOI[6] |
| | Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz? | 173 | 83 | SOI[7] |

| MAIN HEADING | SUB HEADING | Para Ref | Page Ref | SOI Ref |
|---|---|---|---|---|
| THE BLOCK NOTIFICATION | As a consequence of the Block Notification was White & Co aware that advice it had provided clients in respect of certain investments was or might have been negligent, and if so what was the nature of that advice? | 174 | 86 | SOI[8] |
| | Were the matters set out in the Block Notification such as to lead a reasonable person in White & Co's position to consider that a claim might be made by certain person in respect of certain investments? | 187 | 89 | SOI[9] |
| | On a true construction were the documents comprising the Block Notification a notification of circumstances which might give rise to a claim against White & Co? | 193 | 91 | SOI[10] |
| | What was the scope of any matters thereby notified to Allianz? | 203 | 94 | SOI[11] |
| | Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz? | 209 | 95 | SOI[12] |
| THE KENNEDYS DOCUMENTS | Was White & Co aware of the 19 October Letter and/or the 22 October Letter during the Allianz Policy Period? | 210 | 95 | SOI[13] |
| | In what capacity did Kennedys receive the 19 October Letter and the 22 October Letter and is White & Co to be taken as having been aware of them by virtue of Kennedys having received them? | 224 | 98 | SOI[14] |
| | In what capacity did Kennedys send the First November Emails to Allianz and is White & Co to be taken as having been aware of their contents? | 229 | 99 | SOI[15] |

| MAIN HEADING | SUB HEADING | Para Ref | Page Ref | SOI Ref |
|---|---|---|---|---|
| | Were the contents of the 19 October Letter and/or the 22 October Letter and/or the First November Emails such as to lead a reasonable person to consider that a claim might be made by certain people in respect of certain investments? | 243 | 102 | SOI[16] |
| | Was Kennedys sending the 19 October Letter to Allianz capable of comprising a notification of circumstances within the meaning of the Allianz Policy? | 252 | 105 | SOI[17A] |
| | Was Kennedys' receipt of the 22 October Letter together with its enclosure capable of comprising a notification of circumstances within the meaning of the Allianz Policy? | 263 | 108 | SOI[17B] |
| | On a true construction of the Kennedys Documents, did they comprise a notification of circumstances which might give rise to a claim against White & Co? | 270 | 110 | SOI[18] |
| | Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz? | 280 | 113 | SOI[19] |
| THE OBER EXCLUSION | What is the proper construction of the Ober Exclusion? | 286 | 115 | SOI[20] |
| | Is the Ober Exclusion contrary to the Minimum Approved Wording in the Allianz Policy? | 286 | 115 | SOI[21] |
| THE TAX MITIGATION ENDORSEMENT | What is the proper construction of the Tax Mitigation Endorsement? | 287 | 116 | SOI[22] |
| | Does the Tax Mitigation Endorsement apply to all or some of the claims the subject of these proceedings? | 310 | 123 | SOI[23] |

4. As regards the form of this judgment:

   (1) I identify documents within the trial bundles as Bundle Number/Tab Number/Page Number, following the pagination at the bottom right of the trial bundle.

   (2) I have as far as possible adopted the terms defined in the parties' respective written submissions to identify particular documents, people and concepts.

   (3) Paragraph numbers, both within this judgment and in other documents, are in the style [XYZ]. The context will indicate which document is being referred to.

   (4) From an early stage in this judgment, I refer to the evidence of the experts instructed by the parties, that is, for the Claimants, Mr Matthew Wentworth-May, and for Allianz, Mr David Francis.

**THE PARTIES AND OTHER RELEVANT PLAYERS**

5. The First Appendix to this judgment sets out a list of the major players in this part of the litigation. I am grateful to the parties' lawyers for preparing this document, which is annexed almost verbatim.

6. The Claimants are individuals all of whom availed themselves of the services of White & Co in respect of accountancy, investment and/or tax matters. Each is alleged to have relied on advice given either by White & Co itself or through another practice of Chartered Accountants,

McKenzie Knight & Partners, in making investments. It is the Claimants' case that these investments have all substantially failed. They contend that the advice was negligent and/or that secret commissions were paid.

7. White & Co was a practice of Chartered Accountants owned by Mr Benjamin White ("**Mr White"**) and Ms Emma Abbott (otherwise, Ms Emma Abbott-Rattray) (**"Ms Abbott"**). It went into administration on 27 March 2019 and into liquidation on 17 February 2020.

8. On 4 June 2017, Mr White and Ms Abbott acquired the business and practice of McKenzie Knight & Partners ("**MKP**").

9. Allianz was White & Co's professional indemnity insurer for the Allianz Policy Period pursuant to a policy of insurance ("**the Allianz Policy**"). Allianz was also MKP's professional indemnity insurer for the same period.

10. The original Defendants [3] to [69] ("**the ARP Defendants"**) were the insurers for White & Co in the period following the Allianz Policy Period. The claim against them has been compromised.

**THE INVESTMENTS**

11. There is reference within this litigation to investments in:

    (1) Enterprise Investment Schemes ("**EIS**");

    (2) Seed Enterprise Investment Schemes ("**Seed EIS**[4]");

    (3) Super Enterprise Investment Schemes ("**Super EIS**");

    (4) Films Rights Business ("**FRB**");

    (5) A company called DJI Holdings plc ("**DJI**");

    (6) A company called Ober Private Clients Ltd ("**Ober**"); and

    (7) Corporate bonds ("**Bonds**").

12. The EIS Investments involved the purchase of shares in new and/or small companies which were intended to qualify as eligible shares for the purposes of Section 150A and/or Section 150C of the Taxation of Chargeable Gains Act 1992 ("**the 1992 Act**").

13. The qualifying company for this eligibility must meet a series of requirements, including currently:

    (1) A gross assets requirement that it has no more than £15 million in gross assets immediately before the relevant shares are issued;

[4] In advance of and during the trial, these schemes were sometimes called "SEIS." However that term is also used at times for Super EIS Investments and to avoid confusion I have distinguished the two by using the term "Seed" or "Super" as appropriate. Where the text uses "SEIS," that is as a direct quote from the original.

(2) That it has fewer than 250 employees immediately before the relevant shares are issued.

14. The investor needs to comply with a series of requirements including:

(1) Not having a connection with the issuing company;

(2) Not having received any linked loans;

(3) Meeting the tax avoidance requirement.

15. Such investments needed to comply with various conditions of the Income Tax Act 2007 ("**the 2007 Act**"), including:

(1) That no linked loan would be made by any person at any time in the relevant period, whether to the investor or an associate of the investor - section 164(1) of the 2007 Act;

(2) The subscription for shares was for genuine commercial reasons and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax - section 165 of the 2007 Act;

(3) The shares offered for subscription were being issued for genuine commercial reasons, and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax - section 178 of the 2007 Act;

(4) The issuing company met and would continue to meet the "trading requirement" as defined throughout the relevant period beginning with the issue of shares and ending three years later pursuant to section 181 of the 2007 Act;

(5) The issuing company met the control and independence requirements of section 185 of the 2007 Act;

(6) A compliance certificate, known as an EIS3, was issued for the company under section 204 of the 2007 Act;

(7) The money raised by the issue was used wholly for the purpose of the qualifying business activity for which it was raised pursuant to section 175 of the 2007 Act.

16. A risk to capital condition was introduced by the Finance Act 2018, which amended the 2007 Act to include a new Section 157A;

> "*(1) The risk-to-capital condition is met if, having regard to all the circumstances existing at the time of the issue of the shares, it would be reasonable to conclude that—*
>
> *(a) the issuing company has objectives to grow and develop its trade in the long-term, and*

*(b) there is a significant risk that there will be a loss of capital of an amount greater than the net investment return."*

17. When Parliament introduced the risk to capital condition, the Explanatory Notes to the Bill which introduced it emphasised the purpose of the legislation in the following terms:

> "*The government intends the venture capital schemes (the EIS, SEIS and VCTs) to be focused on support for companies with high growth potential. The risk to capital condition is a principled approach to reduce opportunities to use the schemes for tax motivated investment. It will enable the government to avoid excluding further specific types of activity, which would risk excluding genuine entrepreneurial businesses.*"

18. The tax consequence of investment in a vehicle that qualifies under the EIS scheme is conveniently explained by Mr Francis in his first report at [5.17]:

> "*The benefit for the investor is multifaceted because not only do they obtain investments in trading companies which are intended to increase in value (given the company must use the funds for the betterment of its trade). There are also a number of tax reliefs available under the EIS regime, which are often quoted in prospectuses and can be summarised as follows:*
>
> *(a) Income tax relief - provided a qualifying EIS investment is held for three years from the date of issue or three years from commencement of trade if later, an individual with no more than 30% interest in the company can reduce their income tax liability by an amount equal to 30% of the amount invested up to an investment limit of £1,000,000 (i.e. up to £300,000 income tax relief). In practice, a £100 investment would afford the investor the ability to claim EIS income tax relief of £30.*
>
> *(b) Capital gains tax exemption - provided that EIS relief is granted and not withdrawn by HMRC on qualifying shares, if the shares are disposed of after three years from the date of issue or three years from commencement of trade if later, then no capital gains tax is payable on the disposal of those qualifying shares.*
>
> *(c) Loss Relief – if EIS shares are disposed of at any time at a loss (after taking into account income tax relief) such loss can be offset, in the year of disposal or previous year, against the investor's capital gains. or income, affording loss relief against income tax or capital gains tax.*
>
> *(d) Capital gains deferral relief - tax on capital gains realised on a different asset can be deferred, where disposal of that asset was less than 36 months before the EIS investment or less than twelve months after it.*

*(e) Inheritance tax - EIS Investments are generally exempt from inheritance tax after two years of holding such investment.*"

19. The practical advantage of such an investment from the point of view of many investors (including all of the Sample Claimants) was the entitlement to income tax relief at the time of investment, as a result of which a qualifying investment could give investors an immediate reduction (or often extinction) of an anticipated income tax liability and on some occasions a refund of tax already paid. In consequence, investments were typically calculated by reference to a tax liability.

20. Seed EIS Investments are a variant on EIS introduced by the Finance Act 2012 and intended to encourage investment in risker companies. For Seed EIS relief to be available, the risk-to-capital condition must be met, namely that, having regard to all the circumstances existing at the time of the issue of the shares, it would be reasonable to conclude that the issuing company has objectives to grow and develop its trade in the long-term, and there is a significant risk that there will be a loss of capital of an amount greater than the net investment return.

21. For an issuing company to be a qualifying company in relation to the relevant shares for the Seed EIS scheme, it must meet the requirements that are broadly in line with the EIS legislation[5]. In addition:

    (1) The gross assets requirement is that the company must have less than £350,000 in gross assets immediately before the relevant shares are issued;

    (2) The company must have fewer than 25 employees immediately before the relevant shares are issued;

    (3) The company cannot have previously received any EIS or Venture Capital Trust investments; and

    (4) The company cannot have previously raised over £250,000 through Seed EIS.

    The similarities between EIS and Seed EIS schemes are dealt with further in [120] below, in particular in the passage quoted from Mr Francis' report.

22. Like EIS investments, investments in Seed EIS vehicles had a variety of tax benefits of a similar nature for those of EIS investments, though, in the case of income tax relief, the benefit is even more generous in that it involves the potential to reduce income tax liability "*by an amount equal to 50% of the amount invested up to an investment limit of £100,000 per annum per company and a total of (currently) £200,000 per investor per annum across their investments in S[eed] EIS companies (i.e. £100,000 income tax relief). In practice, a £100 investment would afford the investor the ability to claim SEIS income tax relief of £50*.[6]" The practical advantage was thus

[5] In respect of Seed EIS scheme, the compliance certificate that must be issued is known as a SEIS3.

[6] Mr Francis' first report at [5.31]

even more favourable than investment in an EIS, albeit that the price is the risker nature of investments that might qualify under the Seed EIS scheme.

23. Super EIS Investments are a product that was described to one Claimant (Dr Sulaiman) in an email from Mr Cowman, the Managing Director of MKP of 16 March 2015[7] (**"the Sulaiman Email**") as follows:

> "*The Super EIS is unlike a standard EIS in that there is loan facility provided by a specialist bank, which allows you to claim relief on a gross investment that is approximately five times your net cash outlay; this effectively super-charges your tax relief. One of the reasons why the ultimate investment return from a Super EIS is unlikely to be particularly high is because the profits on the transaction are used to repay the loan (together with the majority of the interest and charges) before any surplus can be distributed to you, the investor.*
>
> *The loan will be repaid from the proceeds of the sale of the Super EIS Company's underlying assets/rights. If for any reason these do not yield sufficient proceeds the guarantor will cover the repayment (in other words, you could not be called upon by the bank to pay them any additional funds).*"

24. Mr Wentworth-May explains this scheme at [16] of his report of 9 August 2024[8] as follows:

> "*16.1 each Claimant would use their own personal funds to make an EIS Investment in an Investee Company, with the same terms as described above in relation to "standalone" EIS Investments;*
>
> *16.2 in addition to investing their own personal funds, each Claimant would enter into an agreement (the "Loan Agreement") with a third party bank (the "Amorone Bank")…*
>
> *16.3 the Claimant would draw down additional funds under the Loan Agreement (the "SEIS Loan"). The Claimant would use the proceeds of the SEIS Loan to make a further EIS Investment (the "Loan EIS Investment") in the Investee Company (the amount of this investment would be four to five times the amount of the EIS Investment to be made from the Claimant's own personal funds). My understanding is that it was intended that the Claimants would direct the Amorone Bank to pay the proceeds of the SEIS Loan directly to the relevant Investee Company in satisfaction of the Claimant's agreement with the Investee Company make the Loan EIS Investment (by way of a subscription for ordinary shares in the Investee Company);*

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[7] At F4/241/1.

[8] At C/1/9.

*16.4 I understand from the Sulaiman Email that repayment of the SEIS Loan was to be guaranteed (the "Loan Guarantee"), however I have not seen a copy of this Loan Guarantee; and*

*16.5 The Loan EIS Investment would have the effect of "super-charging" the tax relief for investors, and would allow them to claim tax relief that could potentially exceed the amount of their EIS Investment."*

Hence it can be seen that the Super EIS investments use the structure of EIS investments but involve a greater level of tax relief at no additional outlay to the investor.

25. In respect of Films Rights Business investments, Mr Wentworth-May explains that the investors received an information brochure about the films in which investments might be made, the potential returns and tax benefits and the "soft" benefits of investing in the film industry. He goes on:

"21.2 *Each relevant Claimant who was making a FRB Investment would agree to enter into an Assignment of Film Rights Deed ("Film Rights Assignment") with Film Rights Exchange Limited ("FRE"), a limited company incorporated in Guernsey for the assignment of certain film rights ("Film Rights") to the Claimant;*

*21.3 The consideration payable for the assignment of the Film Rights would be funded from two sources (a) personal funds to be provided by the Claimant (the "Personal FRB Investment"); and (b) funds provided pursuant to the Claimant pursuant to a loan to be provided to the Claimant with the Amorone Bank (the "Loan FRB Investment"). From the information brochure, it appears that the intention was that a quarter of the funds for the acquisition of the Film Rights were to be provided from personal funds available to the Claimant, with three quarters of the funds to be provided from the proceeds of the FRB Loan...*

*21.4 Each Claimant would then acquire the relevant Film Rights. The intention was that each Claimant would, in relation to the acquired Film Rights, carry on a trade of producing and distributing the relevant film as a sole trader ("Film Rights Trade"). The example calculations set out in the information brochure in relation to the FRB Business suggest that the Claimant would, in the accounts of their Film Rights Trade, immediately claim an 85% write-down in the value of the Film Rights. The calculation suggests that the amount of this write-down would be available as a deduction in calculating the profits of the Film Rights Trade for income tax purposes."*

26. Pausing at this point in the examination of the investments, it will be seen that all four types of investment considered so far, EIS, Seed EIS, Super EIS and FRB, involve the investor obtaining tax relief at the outset of their investment. It is apparent from the witnesses who gave evidence in the Coverage Trial that the tax planning implications of these investments was a prominent issue in how they were marketed and indeed played a central role in the decision of individual investors as to whether or not to invest. This evidence is summarised by Allianz in the first Schedule to its closing submissions.

27. If the Claimants are correct in their assertion that White & Co gave inadequate advice in respect of such tax matters, the effect on the individual investor would depend on exactly how they had invested, but in each case the inadequacy of that advice would be the potential cause of loss to the investor. Thus, there is a degree of similarity between all four of these investments in so far as their attractiveness depends on the examination of the tax implications for the investor.

28. DJI Investments involve individual investors subscribing for ordinary shares in BNN Technologies PLC, a limited company marked as being listed on NASDAQ[9], which carried out a gambling business.

29. Investments in Ober are described in the expert evidence as being of two types:

    (1) An opportunity to loan a sum to Ober for a short period, after which the loan would be repaid with interest.

    (2) An investment in shares in Ober for £100,000 in exchange for a 1% shareholding, which constituted a pure investment.

30. Bond Investments involved investors lending money to fund businesses, the loan carrying simple interest.

31. The Claimants say that, apart from the similarity of the first four categories of investment referred to above at [11], all seven categories of investment share the feature that they were high risk investments in which the investors were inadequately warned of the risks.

**THE POLICY**

32. The Allianz Policy included the following relevant clauses:

    (1) Under the heading "Circumstances," the Policy provides:

> "*The Policyholder shall as soon as reasonably practicable during the Policy Period notify the Insurer at the address listed in the Claims Notifications clause below of any circumstance of which any Insured becomes aware*

[9] Mr Wentworth-May says that it was not in fact so listed.

*during the Policy Period which is reasonably expected to give rise to a Claim. The notice must include at least the following:*

*(i)* *a statement that it is intended to serve as a notice of a circumstance of which an Insured has become aware which is reasonably expected to give rise to a Claim;*

*(ii)* *the reasons for anticipating that Claim (including full particulars as to the nature and date(s) of the potential Wrongful Act(s));*

*(iii)* *the identity of any potential claimant(s);*

*(iv)* *the identity of any Insured involved in such circumstance; and*

*(v)* *the date on and manner in which an Insured first became aware of such circumstance.*

*Provided that notice has been given in accordance with the requirements of this clause, any later Claim arising out of such notified circumstance (and any Related Claims) shall be deemed to be made at the date when the circumstance was first notified to the Insurer.*[10]*"*

(2) By the Schedule to the Policy, liability for *"any one claim"* is limited to £2,000,000. Defence costs are payable in addition.

(3) The Policy contains a clause aggregating and limiting liability in respect of tax mitigation schemes ("**the Tax Mitigation Endorsement**") in the following terms:

"***Aggregate/Costs in Addition Endorsement in Respect of Tax Mitigation Schemes***

*In respect of all Claims relating to Tax Mitigation Schemes, the following Limit of Liability shall apply:*

*1.* *Item 3 of the Schedule is deleted from the policy and replaced with the following:*

*Limit of Liability (all Claims in the aggregate, Defence Costs in addition).*

*2.* *The Limit of Liability (Limit and Retention) provision is deleted from the policy and replaced with the following:*

***Limit of Liability***

*(i)* *The total amount payable by the Insurer under this policy for all Claims in the aggregate during the Policy Period shall not exceed the Limit of Liability.*

[10] See D/1/10.

*(ii) Sub-limits of liability and Extensions are part of that amount and are not payable in addition to the Limit of Liability.*

*(iii) Each sub-limit of liability set forth in the policy is the most the Insurer will pay in the aggregate under this policy as Loss in respect of any insurance cover or extension to which it applies.*

*(iv) Defence Costs are payable in addition to the Limit of Liability. In the event that this policy's Limit of Liability is insufficient to cover the amount paid by or on behalf of any Insured to dispose of a Claim (exclusive of Defence Costs), then this policy shall only cover the same proportion of Defence Costs as this policy's Limit of Liability bears to the total amount paid to dispose of the Claim (exclusive of Defence Costs).*

*(v) The inclusion of more than one Insured under this policy does not operate to increase the total amount payable by the Insurer under this policy.*

*(vi) The Limit of Liability is the total sum payable by the Insurer. Any sum paid by the Insurer under this policy shall erode the Limit of Liability. In no circumstances shall the liability of the Insurer exceed the Limit of Liability.*

*The following Definition is added to this policy:*

*Tax Mitigation Schemes means loans, investments or trusts which are pre-planned artificial transactions designed to achieve a specific tax outcome including tax loss, tax allowances or tax exemptions. Those schemes may include but are not limited to*

*- offshore trusts*
*- film/finance /film production partnership schemes*
*- stamp duty land tax (SDLT)*
*- employee benefit trusts (EBTs)*
*- VAT artificial leasing*
*- finance retired benefit schemes (FURBS).*
*- employer finance retired benefit schemes (EFRBS).*
*- enterprise management incentives (EMI)*
*- enterprise investment schemes (EIS)*
*- pension liberation schemes*

*All other terms conditions and exclusions remain unchanged.*[11]*"*

(4) The "*limit of liability"* in the schedule to the policy is £2 million and the general provision in the policy is that "*the total amount payable by the insurer under this policy (excluding Defence Costs) for any one Claim during the Policy Period shall not exceed the limit of Liability."* It is agreed that the effect of the Tax Mitigation Endorsement is to disapply the limit of liability clause in so far as it applies to individual claims, replacing it with a provision where all claims that fall within the Tax Mitigation Endorsement are and made subject to a single limit of liability of £2 million.

(5) Under the heading "*Related Claims,"* the policy contains a provision limiting liability for related claims ("**the Related Claims provision**"):

> "*If during the Policy Period a Claim is made or a circumstance is notified in accordance with the requirements of this policy any Related Claim made after expiry of the Policy Period will be accepted by the Insurer as having been:*
>
> *(i) made at the same time as the notified Claim was made or the relevant circumstance was notified, and*
>
> *(ii) notified at the same time as the notified Claim or circumstance.*
>
> *All Related Claims shall be deemed to be one single Claim and deemed to be made at the date of the first Claim of the series or at the first circumstance notified, whichever is first*.[12]"

(6) "*Related Claims*" are defined as meaning "*any Claims alleging, arising out of, based upon or attributable to the same facts or alleged facts, or circumstances or the same Wrongful Act, or a continuous repeated or related Wrongful Act."*[13] The terms referred to in the Related Claims definition are (so far as is relevant):

(1) "*Claim means any: (i) written or oral demand for compensation in respect of a Wrongful Act of an Insured….*[14]" and

(2) "*Wrongful Act means any actual or alleged act, error or omission committed solely in the performance of or failure to perform Professional Services*[15]*."*

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11 See D/1/17.
12 See D/1/12.
13 At D/1/7.
14 At D/1/5
15 At D/1/8.

33. It is agreed that the minimum policy wording of the Institute of Chartered Accountants in England and Wales dated 12 August 2016 was in force throughout the period of the Allianz Policy and that, in consequence, White & Co (and standing in the shoes of the insured under the Third Party Rights against Insurers Act 2010[16], the Claimants) are entitled to rely on the 2016 Minimum Terms if those terms are more favourable to the insured than the Allianz Policy. Condition 2.2 of the 2016 Minimum Terms ("**the Minimum Term**") provides:

> "*If during the Period of Insurance the Insured becomes aware of any circumstance which may give rise to a Claim, the Insured shall give notice in writing of such circumstance to Insurers as soon as reasonably practicable and in any event not later than the last day of the Period of Insurance. Any Claim arising from such circumstance shall be deemed to have been first made in the Period of Insurance*."

**THE CLAIMANTS' CLAIMS IN SUMMARY**

34. The claim was issued on 25 May 2021, naming White & Co, Allianz and the ARP Defendants as Defendants to the claim. The Schedule to the Claim Form identified 176 Claimants, all of whom were said to have made investments in reliance on advice from White & Co. The claim was put in the Brief Details of Claim at [6] as one for "*damages and/or equitable compensation for breach of contract and/or breach of duty or negligence and/or breach of fiduciary duty and/or misrepresentation and/or negligent misstatement arising out of work carried out or advice or services tendered or representations made by* [White & Co] *as accountants and professional advisors in connection with investment and tax affairs."*

35. The claim against Allianz and the ARP Defendants was brought under the Third Party under the 2010 Act, pursuant to which a person with a claim against an insured person may stand in place of the insured for a corresponding claim against the insurer for indemnity under the insurance policy. The claim did not proceed against White & Co because of its insolvency but progressed against Allianz and the ARP Defendants until the claim against the latter was settled.

36. The parties' Statements of Case have been amended at various points in the proceedings. By the time of trial, the relevant documents were:

    (1) The Re-Amended Particulars of Claim ("**RAPOC**") (marked copy at A/10/1ff and clean copy at A/10.1/1ff). RAPOC includes reference to a Schedule containing the information required by my order of 7 October 2022 referred at [9.1] of RAPOC. The schedule is an Excel document accessible by external link at A/12.

    (2) The Re-Re-Amended Defence ("**RRAD**") (marked copy at A/13/1ff and clean copy at A/13/1/1ff);

[16] "**The 2010 Act**" hereafter.

(3) The Re-Re-Re-Re-Amended Reply (marked copy at A/14/1ff and clean copy at A/14/1/1ff).

37. It was common ground at trial that the Claimants need to amend the Particulars of Claim yet further adequately to deal with what are called below the November emails and to tidy up certain matters that are no longer in issue. A proposed Re-Re-Amended Particulars of Claim has been filed by the Claimants and Allianz agrees to the amendment. It appears in the bundle at A/10.2/1ff. As I indicated during closing submissions, I will grant permission to amend in this form with permission to file a further amended Defence and further amended Reply if so advised.

38. The parties had also served Part 18 Requests and responses to the Second Defendant's requests of the Claimants dated 25 March 2022 and 24 July 2023 were before the court.

39. The Claimants' case, by way of overview, is put thus in paragraph 3 of their closing submissions:

> *"(1) The claims as pleaded include Seed EIS Investments and investments in Ober Private Clients Limited.*
>
> *(2) [White & Co] was aware that it had advised its clients in respect of each the Investments and that there may be claims by any such client. Crucially, allegations had already been made as to alleged negligent tax and investment advice, which [White & Co] would know could have been similarly applicable to any other client receiving similar advice.*
>
> *(3) A reasonable person, with all the background knowledge which would reasonably have been available to Allianz, would have understood the notifications to be notifications of circumstances to the effect that there may be claims by any of* [White & Co's] *clients on a similar basis to the allegations that had already been made as to alleged negligent tax and investment advice. By way of example, the First November 2017 Email notes that Mr Levy, "is also still actively seeking to recruit further potential Claimants, though no further individuals have been named specifically at this stage." It is submitted that the Claimants in due course became those further potential Claimants. Indeed, the potential breadth of such claims was also referred to in the First November 2018 Emails as it is noted that Mr Levy, "has apparently looked into c.90 EIS companies with which the Insured are supposedly involved. His position is that c. £97,000,000 of investments has been procured, but only 3 of the companies show any profit." ("the Investment Companies").*
>
> *(4) There is a causal connection between the notified circumstances and each of the Claimants' claims as they were* [White & Co's] *clients with similar allegations to those which had already been made as to alleged negligent tax and investment advice.*

*(5) If the Ober Exclusion is only relied upon by Allianz to reiterate the insuring clause in the policy, then it adds nothing and does not need to be construed any further.*

*(6) The Allocation Provision is inconsistent with the 2016 Minimum Terms as the Allocation Provision would not allow for full recovery where the same loss is concurrently caused by both covered and uncovered matters. However, the Claimants agree that this is academic in circumstances in which no claim is made against an uninsured entity.*

*(7) The Tax Mitigation Endorsement is of no effect in respect of regular EIS Investments regular Seed EIS Investments and the shares of the Super EIS Investments paid for with the Claimants' capital rather than by way of a loan.*

*(8) The Related Claims Provision does not operate to aggregate claims which are themselves notified circumstances. In the alternative, the Claimants' claims are not Related Claims as they are not the same Claims (as distinct from being similar Claims). In the further alternative, if the Related Claims Provision does apply, then it operates to provide a £2,000,000 limit in respect of each of the Investment Companies*."

40. The Claimants consider the issue of awareness in three categories:

(1) "**Advice Awareness**" – awareness of the advice that White & Co had given;

(2) *"***Loss Awareness**" - awareness that clients may have suffered loss from investments made on White & Co's advice, whether through HMRC denying tax relief or the poor performance of companies in which investments had been made; and

(3) *"***Risk of Claim Awareness***"* - awareness that a claim might be brought against White & Co in respect of losses allegedly suffered as a result of investments made on its advice.

41. The Claimants contend in their written closing submissions at [23.1] that White & Co were, in general terms, aware of the following:

(1) That they had advised a range of clients, including the Claimants, as to EIS Investments, Super EIS Investment and FRB Investments;

(2) That various clients had suffered or might suffer loss from such investment as a result of HMRC denying tax relief and/or the poor performance of the individual investments;

(3) That it was being alleged by Claimants for whom Mr Levy was acting that White & Co's advice as to investment in various companies, either identified by specific name ("**the Named Companies**") or generically, was negligent.

42. More specifically in RAPOC at [35.1.3] it is said of the Akbar Letters that they gave rise to relevant awareness within the meaning of the 2016 Minimum Terms, namely:

> "*that it may be claimed by individuals or entities advised by* [White & Co] *in respect of investments relating to EIS Investments and/or SEIS Investments and/or FRB Investments and/or Bond Investments and/or DJI Investments and/or similar investments that the advice was negligent. The said circumstances related to:*
>
> *(1) Investments in the companies listed in the Akbar Letters;*
>
> *(2) Investments in EIS Investments and/or SEIS Investments and/or FRB Investments being the types of investments expressly mentioned*
>
> *(3) (By virtue of* [White & Co's] *advice in respect of the companies referred to in the Akbar Letters being typical of* [White & Co's] *advice in respect of other companies) the said circumstances also related to any similar investments in which* [White & Co] *gave similar advice; and.*
>
> *(4) Any Bond Investments and/or DJI Investments which had been the subject of similar advice (including similar representations as to Mr White's expertise and track record).*"

43. As to the alleged Block Notification by the 1 June Letter, the 6 June Email and the 29 June Email, the Claimants' case is pleaded thus in RAPOC at [35.3]:

> "*By virtue of the Block Notification,* [White & Co] *was aware of circumstances that may give rise to a "Claim" within the meaning of the 2016 Minimum Terms; namely that the First Defendant had advised clients in respect of enterprise investment schemes (being the EIS Investments and the SEIS Investments) and/or FRB Investments and/or Bond Investments and/or DJI Investments and that such advice may have been negligent. The said circumstances relate to:*
>
> *(1) The EIS Investments and SEIS Investments which were identified in the Block Notification;*
>
> *(2) Any similar EIS Investments and SEIS Investments being the types of investments expressly mentioned and/or which had been the subject of similar advice.*
>
> *(3) Any Bond Investments and/or DJI Investments which had been the subject of similar advice (including similar representations as to Mr White's expertise and track record)."*

44. Of the Kennedys Documents, it is asserted in RAPOC at [35.6.4] that these made White & Co aware of:

"*circumstances that may give rise to a claim; namely, that it may be claimed by clients or former clients that its advice in respect of investments relating to EIS Investments and/or SEIS Investments and/or Bond Investments and/or FRB Investments and/or Bond Investments and/or DJI Investments and/or similar investments was negligent. Although the First Defendant was not itself a party to the correspondence constituting the Kennedys Documents, it is to be inferred that the First Defendant received copies of the same by virtue of Kennedys acting as the First Defendant's solicitor. For the avoidance of doubt, the said circumstances related to:*

*(1) Investments in the companies listed in the Kennedys Documents;*

*(2) Investments in EIS Investments and/or SEIS Investments and/or FRB Investments and/or Bond Investments, being the types of investments expressly mentioned;*

*(3) (By virtue of the First Defendant's advice in respect of the companies referred to in the Kennedys Documents being typical of the First Defendant's advice in respect of other companies) any similar investments in which the First Defendant gave similar advice;*

*(4) Advice in respect of Investments given by the First Defendant to the individuals or entities listed on the Spreadsheet under the sheet titled "Shareholders;" and*

*(5) Any Bond Investments and/or DJI Investments which had been the subject of similar advice (including similar representations as to Mr White's expertise and track record*)."

45. However, whilst awareness of the matters referred to at [40] above is a necessary pre-cursor to valid notification (because one cannot notify that of which one is not aware) it will ultimately only be those matters that are in fact notified that will be relevant to whether a claim has been notified. In oral submissions, Mr Chapman KC, having dealt the awareness of White & Co, accepted that *"if that awareness doesn't make its way into the notification then the scope of the notification is probably going to be determinative of where it goes from there…If the awareness that gives rise to the notification and is shown on the notification is itself enough to show that it may give rise to a claim by its very nature … then any wider awareness … falls away into the ether.*[17]*"*

46. The Claimants assert in their closing submissions at [23.2] that the Akbar Letters, the Block Notification and the Kennedys Documents (individually and in combination in the sense that previous notifications are part of the factual matrix for later notifications) are to be construed as notifying Allianz of the following circumstances:

[17] Ms Dixon KC agreed with this point in her oral closing submissions when she said that awareness was necessary but not sufficient for notification for Allianz's obligation to indemnify to arise.

(1) White & Co's advice to its clients (whether named in the notification or not) to invest in the companies named in the documents may give rise to negligence claims in respect of tax advice and/or investment advice.

(2) Further or alternatively, White & Co's advice to its clients (whether named in the notification or not) to invest in the companies identified in the First November 2017 Emails[18] (which included the named companies) may give rise to claims in respect of tax advice and/or investment advice.

(3) Further or alternatively, the circumstances were Hornet's Nest Notification and so did not require specificity as to the quantum or character of the potential claims'.

47. The Claimants deny that the claims brought in this case fall within the Tax Mitigation Endorsement or that the Related Claims provision applies to some or all of the claims.

**THE DEFENCE IN SUMMARY**

48. In brief, Allianz contends that:

(1) Whilst the Akbar Letters amounted to notification of a claim, that is to say the claim of the initial Akbar Claimants, that notification did not extend to claims made by other investors or in respect of other investments;

(2) Further, neither the Block Notification nor the Kennedys Documents amounted to notification of circumstances or claims within the meaning of the Policy;

(3) The entirety of the claims brought within this case fall within the Tax Mitigation Endorsement; and

(4) The entirety of the claims brought within this case (alternatively specific classes of claims brought) fall to be aggregated under the Related Claims Provision.

49. Allianz also raises anterior questions about the scope of the pleaded case, in particular as to whether the Claimants' pleaded case is capable of including within it claims relating to Seed EIS Investments and claims relating to Ober Private Clients Ltd.

**NOTIFICATION – THE LAW**

50. The parties set out in their written closing submissions[19] the relevant law to be applied to a notification provision such as that with which we are concerned in this case (whether pursuant to the clause of the policy cited at [32(1)] above or pursuant to the Minimum Term cited at [33]).

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[18] The Claimants' written Closing Submissions at [3(3)] identify "*the Investment Companies*" as the "*c. 90 EIS companies"* referred to in the "*First November 2018* (sic – this should read 2017) *Emails*".

[19] The Claimants at [17]; Allianz at [17]ff.

51. There is no dispute as to the fundamental principles which, so far as is applicable here, can be drawn from the judgment of Gloster LJ in *Euro Pools plc (in Administration) v Royal & Sun Alliance Insurance plc* [2019] EWCA Civ 808 and the cases she refers to therein. These can be summarised as follows:

    (1) A deeming provision relating to notification is to be construed and applied with a view to its commercial purpose, namely "*to provide an extension of cover for all claims in the future which flow from the notified circumstance*" – see *Euro Pools at* [39(i)] and the explanation of the need for such a provision given by Gloster LJ in *HLB Kidsons (A Firm) v Lloyds Underwriters* [2007] EWHC 1951 (Comm) ("*Kidsons*").

    (2) Consistently with that purpose, a provision which refers to circumstances that "may" give rise to claims sets a deliberately undemanding test – see *Euro Pools* at [39(ii)]. As Rix J (as he then was) put it in *J Rothschild Assurance Plc v Collyear* [1999] 1 Lloyds Rep IR 6 ("J Rothschild"), "*I do not think ... that there is any justification for demanding too much of the test that the notified circumstance "may" give rise to a claim. There need only be a possibility of claims in future*."

    (3) A notification need not be limited to particular events. It may extend to something as general as a regulatory warning about a class of business or a concern about work done by a former employee or prior entity. The insured may give what has been called a "can of worms" or "hornet's nest" notification ("**Hornet's Nest Notification**"), that is to say the "*notification of a problem, the exact scale and consequences of which are not known*" - see Euro Pools at [39(iii)].

    (4) A requirement of the notification of circumstances of which the insured is or becomes aware "*does not predicate that the insured needs to know or appreciate the cause, or all the causes, of the problems which have arisen, or the consequences, or the details of the consequences, which may flow from them*" - see *Euro Pools* at [39(iv)], citing Ms Viven Rose QC (as she then was) in *McManus v European Risk Insurance Co* [2013] Lloyd's Rep IR 533 at [43], who, having considered the decisions in *J Rothschild* and *Kidsons,* stated:

        "*In my judgment, the key point arising from these authorities is that in both cases the notifications were held to be valid in relation to later claims that arose from the circumstances notified, even though the notification had not even referred to the transaction from which the later claim arose, let alone identified a defect in relation to the handling of that particular client as likely to give rise to a claim by that client. In Rothschilds the Court clearly*

*rejected the view expressed by the underwriter's initial response to JRA that the notification was premature and that JRA must instead notify only once it had identified a possible defect in a specific case. On the contrary, the Court, having found that there was a sufficient factual basis to amount to a 'circumstance', held that the notification covered not only transfers out of pensions but also opt out advice, despite the fact that JRA had not even been able to list the clients to whom opt out advice had been given. Similarly in Kidsons there was no suggestion either in the judgment of Gloster J or in the judgment of the Court of Appeal that the notification was ineffective because it failed to identify particular clients to whom the tax avoidance products had been sold or to examine whether that particular client might have a claim. The assumption was that provided circumstances exist which may give rise to a claim, and provided those circumstances are notified, then any future claim arising out of those circumstances must be paid out by the insurer at risk at the time of notification whether or not the particular transaction or possible claimant has been identified at the time of notification*."

(5) Where proper notification of circumstances is given, any claim arising out of the notified circumstances will be considered to have been made within the requisite period of insurance but there must be a causal (rather than coincidental) link between the notified circumstances and the later claim – see *Euro Pools* at [39(v)]. This can include new damage flowing from the notified circumstances even if after the policy period providing it arises from the notified circumstances. In *Kajima UK Engineering Ltd v The Underwriter Insurance Company Ltd* [2008] EWHC 83 (TCC), ("*Kajima"*), Akenhead J put it thus at [99(i) & (j)]:

"(*i) The claim which is later pursued must arise not only from the notified circumstances but also only from the circumstances of which the Insured was aware. It can not arise from any other circumstances which may have happened or been discovered either after the notification or in any event after the expiry of the insurance cover. Put another way, a subsequent claim which relates to matters of which the Insured was not aware at the time of the notification would not and could not arise from the notified circumstances and, to that extent, would not be covered by the policy.*

*(j) The claim subsequently brought can relate to new damage flowing from or consequences of the properly notified circumstances which had not occurred*

> *by the time of the expiry of the insurance cover because the claim would arise from the notified circumstances*."

(6) Conventional principles of interpretation are to be applied when construing a communication to determining whether it is a notification and, if so, its scope – see *Euro Pools* at [39(vi)]. As Akenhead J put it in *Kajima* at [99]:

> "*(g) One must construe any notification objectively but one is entitled to review subjectively what the Insured was aware of with regard to the notified circumstances. It matters not in this case because the Insured did notify expressly in words the circumstances of which it was aware*.
>
> *(h) I do not consider it helpful to talk in terms of a narrow or broad interpretation of the notification. It will be interpreted objectively on the basis of the words used, having regard to the factual context in which it was served. The factual context is important, not only as a matter of interpretation of the notification but also, because it is only matters of which the insured is aware that can form the basis of a valid notification."*

52. The Claimants contend in their written submissions that other matters should be borne in mind:

(1) A notification of circumstances clause will often have the following elements: awareness, notification, and causation. In *Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm) ("*Cultural Foundation*"), Andrew Henshaw QC (as he then was, sitting as a Judge of the High Court) stated at [153]:

> "*In the present case no claim was received during either policy period, within clauses 1.1. and 3.2(a), so any cover arises by virtue of the clause 3.2(b) extension of cover to Circumstances (as defined) notified during the policy period and thereafter giving rise to a claim. The key questions are therefore as at the time of Notifications 923 and 953:*
>
> *(i) what information or circumstances was RMJM aware of that suggested that a claim was likely to be made against it which it may become legally liable to pay?*
> *(ii) did RMJM notify that information or those circumstances to insurers as soon as practicable?*
> *(iii) did that information or those circumstances subsequently give rise to a claim against RMJM, and if so what claim?*"

(2) Awareness by an insured is a matter of fact. In *Kajima,* Akenhead J stated at [99(d)]:

> *"The insured must be aware of the circumstances which it is notifying to the Underwriters. It would not be enough to say: 'I think it is possible that there may be some unknown and unidentified design deficiencies in a particular building.' That would not be a good notification because the insured would not be aware of the circumstances; the insured would simply be guessing that there might be circumstances. That is not good enough. It is only circumstances of which the Insured is actually aware which can be the subject matter of a notification.* "

(3) Whether a circumstance meets the required test of materiality is an objective one. In *Cultural Foundation*, Andrew Henshaw QC at [161] cited *Kidsons, Kajima* and *Mannai Investment v Eagle Star* [1997] AC 749 as authority for the proposition that

> "*…exactly what has been notified is a question of the objective construction of the insured's notice against the factual context in which it is served.*"

(4) The threshold for notification is relatively low where one is only concerned with whether a circumstance "may" or "might" give rise to a claim – see Cooke J in *Ocean Finance & Mortgages Ltd v Oval Insurance Broking Ltd* [2016] EWHC 160 (Comm) at [126] (though it might be argued that the "*reasonably expected to give rise to a claim*" threshold here is somewhat higher).

53. Allianz applies the same principles to summarise the relevant questions that the court needs to ask about any particular alleged notification as follows:

(1) Is there a "*circumstance of which any Insured becomes aware … which is reasonably expected to give rise to a Claim"?*

(2) Has notification been made in the manner required by the Policy?

(3) What is the scope of that notification?

(4) Do the claims arise from the circumstance notified?

54. On the facts of this case, these questions give rise to consideration of the following matters:

(1) Can the awareness be that of an agent of the insured? Bowstead & Reynolds on Agency puts it as follows at Article 95(1), "*a principal is generally imputed with knowledge relating to the subject matter of the agency which an agent acquired while acting for the principal."* This is qualified in the text by the statement*, "it is always necessary to consider the context of the particular legal issue to which imputation of knowledge might be pertinent. There is no overarching principle that a principal is deemed to know at all times and for all purposes that which an agent knows."* Lord

Neuberger in *Naylor v J L Builders & Son* [2009] EWCA Civ 1621 at [16] said, "*the contractual functions of an agent are not to be extended beyond what he or she is expressly told to do or understood he or she should do, or what is reasonably incidental thereto."* As Ms Dixon KC put it in oral closing submissions, simply because someone is somebody's agent for one purpose does not mean that they are an agent for all purposes.

(2) What actual knowledge does the insured have? The issue it to be judged objectively. As Akenhead J put it in *Kajima,* op. cit*.,* at [99(d)]:

> "*The insured must be aware of the circumstances which it is notifying to the Underwriters. It would not be enough to say, "I think it is possible that there may be some unknown and unidentified design deficiencies in a particular building." That would not be a good notification because the insured would not be aware of the circumstances; the insured would simply be guessing that there might be circumstances. That is not good enough. It is only circumstances of which the insured is actually aware which can be the subject matter of the notification*."[20]

In similar vein, Rix LJ in *Kidsons* spoke at [75] of the need to identify a "*substratum of underlying external fact"* which might stand as the relevant knowledge to give rise to a circumstance that could be notified.

(3) Would the relevant knowledge be such as to give rise to a reasonable expectation of a claim? This was considered by Toulson LJ in *Kidsons*, op. cit*:*

> *"138. At one end of the spectrum, there may be cases in which an insured seeks to notify a circumstance which is too vague or remote to be reasonably capable of being regarded in itself as a matter which might give rise to a claim. This is not as unlikely as it might sound, because an insured at the end of a policy period may have an incentive to give a notification in the widest possible terms for which there may be no real justification. The Insurer would be entitled to refuse to accept such a purported notification.*
>
> *139. In the middle of the spectrum, there may not uncommonly be cases in which different people, possessed of the same knowledge, might reasonably form different views about whether a claim was a real possibility as distinct from a remote risk. In such cases an insurer could not reject a notification of*

[20] As the written closing submissions of Allianz note, the judgment of Males LJ in *Euro Pools* at [95] is to like effect.

> *the circumstance, but nor could an insured complain if the insured did not give such a notification.*
>
> *140. At the other end of the spectrum are cases in which any reasonable person in the insured's position would recognise a real risk of a claim. If so, the insured would be duty-bound to give notice of it to a prospective insurer. He would also in my view be bound to give notice of it to the current insurer if the terms of the policy required him to give notice of any circumstance of which he became aware and which might give rise to a claim."*

55. In oral submissions, Ms Dixon KC for Allianz expanded on her argument in closing written submissions by contending that the court should be astute not to import awareness by the insured of facts that might be relevant to notification into the scope of the notification itself. A hypothetical personal injury barrister who habitually advised that adult claimants with capacity had 4 years in which to bring a personal injury claim would not, by notifying their insurer of a particular threatened claim for damages for losses caused by such negligent advice have at the same time notified their insurer of other claims where they had given the same advice merely by their own knowledge that they had given similar advice on other occasions. To put the point another way, subjective awareness of circumstances by the insured will not fall within the scope of notification unless there is objective notification of the relevant circumstances to the insurer.

56. Notification in strict accordance with its terms may be a precondition to liability under the Policy or under the Minimum Term, following [114] in the judgment of Rix LJ in the Court of Appeal in *Kidsons,* because:

    (1) The extension of cover given by a clause such as the "circumstances" clause of this policy (or the corresponding Minimum Term) is by way of it deeming a claim not in fact made within in a particular period to have been made in that period.

    (2) The price of this extension of cover is compliance with the terms of the condition as to proper notification – one cannot have the benefit of the extension of cover without paying the price of giving proper notice.

57. In essence, Allianz's manner of putting the relevant questions for the court to decide follows the same structure of "awareness, notification and causation" to which Henshaw J referred in *Cultural Foundation*, merely subdividing the "notification" issue so as to consider the manner and the scope of notification as separate issues. Since the question of notification will always at least in principle include consideration both of its manner and of its scope, I see no material difference between the approach adopted by the Claimants and that adopted by the Defendant. In this case, the scope of the alleged notification is in particular in issue. Indeed, as Mr Chapman KC identified in closing submissions, the "related claims" issue in the Schedule of Issues referred to

below at SOI[24] raises a particular question about the scope of notification that was given - even if it was given in the appropriate manner, did it cover the "*Related Claims*"? Thus I see benefit in adopting Allianz's approach of subdividing the issue, even if there is no ultimate difference on the two approaches since both would involve asking the same questions.

58. As to whether notification can be given by someone other than the policyholder, my attention is drawn to a passage from Colinvaux's Law of Insurance, 13th Edition at [10-020] dealing with the somewhat controversial judgment of the Court of Appeal in what is there called *Lickiss v Milestone Motor Policies at Lloyd's*[21] [1966] 1 WLR 1344:

> "*By whom must notice be given*? *Most notification of loss clauses specify that notice must be given by the assured. It is nevertheless arguable that such wording is adopted simply because the assured will normally be the appropriate person to give notice, and that the insurers' intention is not to impose a personal obligation on the assured. It was thus held in Lickiss v Milestone Motor Policies at Lloyd's that the assured's obligation under a motor policy to notify the insurer of any accident and of any notice of intended prosecution served on him by the police, had been satisfied where the relevant information had been provided to the insurer by the victim's insurers and the police. In the view of Lord Denning, "law never compels a person to do that which is useless and unnecessary." Salmon LJ, dissenting on this point, preferred the construction that the obligation to notify was personal to the assured. If the majority view in Lickiss is good law, it is certainly to be confined to the situation in which the reliability of the notification is beyond doubt. It may also be that if the insurers themselves have actual knowledge of the loss then notification to them is not required (Abel v Potts (1800) 3 Esp 242*[22]*). It may be noted that Lickiss was distinguished in AXA Insurance UK Plc v Thermonex Ltd*[23] *where notification was not given by the assured but rather by a third party claimant against the assured after the assured had become insolvent. The court's view was that the clause by its terms ("you") required notification by the assured personally. The comments were obiter, as the requirement for immediate notification had plainly not been complied with, but it does throw some doubt onto the principle in Lickiss. To the contrary, it has been suggested in Australia that if insurers have received reliable information of a potential claim against the assured—e.g. from solicitors appointed by the insurers to defend any proceedings—*

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[21] This case should actually be called as *Barrett Bros (Taxis) v Davies* and that name is used hereafter. Lickiss & Milestone Motor Polices at Lloyd's was in fact the name of Third Parties.

[22] Reference is also made in the footnote to the text of this paragraph in Colinvaux to the case of *Alexander Forbes Europe Ltd v SBJ Ltd* [2003] Lloyd's Rep.

[23] The reference for this case is [2012] EWHC B10 (Mercantile).

*they would be acting in breach of the duty of utmost good faith in relying upon a failure by the assured to notify*."

59. It will be noted that this passage expressed doubt about the ambit of the ratio in *Barrett Bros (Taxis) v Davies*. This doubt is reflected in several places:

    (1) As I noted in *Makin v Protec & QBE* [2025] EWHC 895 at [54], it is arguable that if *Barrett Brothers v Davies* is said to be authority for the proposition that the failure of the insured to give notification in breach of a condition precedent can be cured by the insurer learning of the relevant matters from another source, it is inconsistent with the decision of Bingham J as he then was in *Pioneer Concrete v National Employers Mutual General Insurance* [1985] 2 All ER 395 at p. 403i, as approved by Potter LJ in his judgment in *Pilkington v CGU Insurance* [2005] 1 All ER (Comm) 283 at [58] (albeit obiter), and the Privy Council in their advice in *Motor and General Insurance Co v Pavy* [1994] 1 WLR 462 at p.469E-F.

    (2) The Court of Appeal in *Astor Management AG v Atalaya Mining Plc* [2018] EWCA Civ 2407 at [34] that there is "*no principle of law or even interpretive presumption which enables a contractual precondition to the accrual of a right or obligation to be disapplied just because complying with it is considered by the court to serve no useful purpose*." Indeed, as I considered with Ms Dixon KC during closing submissions, it is arguable that the decision in *Astor Management* is in fact inconsistent with that in *Barrett Bros*.

    (3) At [28-041], the authors of MacGillivray on Insurance Law state, "*Where it is a condition precedent that insurers are to be provided with information within a reasonable time, there is no governing principle that the condition is only breached if insurers can show prejudice resulting from delay*."

60. Allianz also draws my attention to *Axa Insurance v Thermonex* (cited in the passage from Colinvaux above) where HHJ Simon Brown QC, considering an issue of non- or late notification and citing *Kidsons,* commented, "*The recent trend of authorities suggest that the formal requirements of notification are fairly undemanding but that where they do impose specific requirements they have to be met."*

**NOTIFICATION - THE FACTS**

**Background**

61. The Claimants' case on notification turns on a series of communications on their behalf defined as:

    (1) The Akbar Letters;

    (2) The Block Notification;

    (3) The Kennedys Documents.

62. It is apparent from the review of the law above that the parties need to address not only what was communicated to Allianz as insurer but the awareness of White & Co as the insured. The Claimants contend that this involves looking at the various documents that are said to amount to notification in context, including considering documents sent later in time than the notification documents themselves. For this reason, this section of the judgment identifies and considers each of the documents that is said to amount to notification in the wider context to which the Claimants point.

**The Akbar Letters**

63. For a considerable period of this case, the Claimants instructed Mr Michael Levy, a barrister with appropriate authorisation to conduct litigation. Mr Levy was also instructed on behalf of a separate group of investors who alleged breach of duty on the part of White & Co and/or Mr White and issued a claim. The lead named claimant was a Mr Akbar and this claim has been called "**the Akbar Claim"** within this litigation.

64. On 27 March 2017, Mr Levy sent a letter ("**the March Letter**"[24]) to White & Co on behalf of 8 named people (who formed some of the claimants in the Akbar Claim and who have consequently been called "the **Initial Akbar Claimants**"). The letter said that White & Co had advised these people regarding investments into 14 named companies between 2012 and 2014. It alleged that the advice given by White & Co was "*inaccurate and/or deceitful, and/or negligent, and/or in breach of professional duty, and/or in breach of fiduciary duty*." The letter requested a full account of the investments made in the named companies "*as well as details of all transactions carried out by the companies in which they have invested including full access to all company records and accounts*." The letter threatened that, if adequate information was not provided, proceedings would be commenced for "*pre-action discovery as well as action for negligence, breach of contract, breach of fiduciary duty and deceit*" in which the Initial Akbar Claimants would be "*seeking damages and/or restitution and or other relief."* A list of investments made by the Initial Akbar Claimants was provided.

65. By email dated 5 April 2017, McParland Finn Ltd ("**MFL**"), White & Co's insurance brokers, sent a copy of the March Letter to Allianz. The email subject heading is "Re: White & Company Ltd – Akbar et al (New Notification)." Its text states,

> "*In view of the circumstances, it would appear that the appropriate course of action would be to note this matter against the current policy and instruct Panel Solicitors to assist the Insured in responding to the Barrister.*"

66. Allianz responded to MFL by email on 10 April 2017, stating:

[24] At D/4/1.

> "*Thank you for your email of 5 April 2017 with details of this new notification. I have noted this against the Insured's 2016/2017 policy but will need further information in order to confirm formal acceptance….*
>
> *I note that the Insured acted for the 8 individuals noted in [the March Letter]. I understand each of them wishes to bring a claim. Until we know more details about the claims I am unable to confirm how many claims (as defined by the policy) are being made.*
>
> *The letter received from Elite is vague and makes a range of allegations without providing any substantive evidence for such claims*."

Allianz went on to propose that White & Co should respond to Mr Levy stating that the allegations were vague and unparticularised and that, if the Initial Akbar Claimants wanted to take matters further, they should provide a Letter of Claim that complied with the Professional Negligence Pre-Action Protocol.

67. In the meantime, on 9 April 2017, Mr Levy, on behalf of the Akbar Claimants, wrote again to White & Co ("**the 9 April Letter**"[25]) including an unsigned witness statement from Mr Levy ("**the Levy Witness Statement**"[26]). The letter was headed "*Claim against White and Co for negligent accounting advice*" and identified the client as "*Mr Javed Akbar and others*." It would appear that White & Co had not in fact acted on the suggestion from Allianz to respond to the March Letter by this time because the 9 April Letter begins with the statement that a reply had not been received to the March Letter. It goes on to state that Mr Levy had been instructed "*to commence proceedings for pre-action disclosure*," in support of which prospective application, he attached a witness statement and draft Particulars of Claim. The Levy Witness Statement identified the prospective claimants as the Initial Akbar Claimants and the prospective defendants as Mr White and White & Co. It annexed draft Particulars of Claim. It contained a list of companies, including 9 of the 14 identified in the 27 March Letter, in which companies it was said that White & Co had advised the Initial Akbar Claimants to invest. The Levy Witness Statement went on to set out certain facts about the 9 companies. It asserted that none of the Initial Akbar Claimants had been able to obtain any tax benefit from the investments, but had instead faced fines from HMRC and paid out for separate accountancy advice. The statement ended with a request for information from White & Co, including "*the nature and value of each investment recommended by the defendants*" and "*all correspondence between the claimants and defendants*." It exhibited in total 36 documents.

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[25] At D/10/1

[26] At D/8/1

68. The parties have together called the March Letter and/or 9 April Letter, (together with the Levy Witness Statement included with the latter) "**the Akbar Letters**".

69. It is apparent that White & Co contacted MFL about the 9 April Letter and, by email on 10 April 2017, MFL wrote to Allianz about it. The email set out some text from the letter and attached the Levy Witness Statement. MFL ended by saying: "*While it would appear that the appropriate course of action would be to reply along the lines set out in the recent email, I would be grateful for any comments you may have in this instance*."

70. On 13 April 2017, Allianz sent an email to Mills and Reeve LLP ("**Mills & Reeve**") a firm of solicitors[27], in these terms:

> "*Insured: White & Company*
>
> *Claimants: [the Initial Akbar Claimants]*
>
> *Policy Period: 2016/2017*
>
> *Our reference: GBFF01790317*
>
> *This matter has been notified against the Insured's 2016/2017 policy…As you will see from the emails attached, we have not formed a view on the number of claims which have been made… The Insured (an accountant) has received a number of letters from Elite Chambers acting for all of the Claimants. The claims made are un-particularised but pre-action disclosure application (and issue of proceedings) have been threatened. I would be grateful if you could investigate this with the Insured in the usual way and respond to Elite Chambers.* **"**

71. On 24 April 2017, Mr Levy, again on behalf of the Akbar Claimants, wrote to Mills & Reeve ("**the 24 April Letter**"[28]). In that letter, Mr Levy stated, amongst other things:

> "*You have received full information to notify your client that something is seriously amiss.*
>
> - *Your client through Mr White advised my clients that the investments that he advised would allow them to obtain tax benefits.*
> - *He has stated that the tax benefit would be immediate.*
> - *The tax benefits did not materialise.*
> - *My clients have been subject to great expense in resolving their tax issues. Your client is fully aware of this.*

---

[27] Mills & Reeve were instructed under a joint retainer by Allianz and White & Co. Kennedys Law LLP ("**Kennedys**") later acted for White & Co in respect of the Akbar claim.

[28] At D/12/1.

- *Your client through Mr White has stated that the investments that he recommended would be sound and good investments*.

…

"*The practice of your client bears all the hallmarks of an attempt to gain tax benefits* for *the investors and the companies in which they invest, but in a manner which is not legally possible for the investors*."

Mr Levy also indicated a complaint would be made to the Institute of Chartered Accountants in England and Wales and repeated a request for "*full disclosure of your client's involvement in each of the companies in which my clients have invested*."

72. On 28 December 2017, the Akbar Claim was issued. The named claimants were the Initial Akbar Claimants together with three additional claimants who had not previously been referred to. The brief details of claim stated:

> "*The Claimants claim damages and losses resulting from and ancillary to making various investments under various "schemes" pursuant to the Defendants' misrepresentations, negligent mis-statement and/or culpably bad advice, being advice given by the Defendant in breach of their common law, contractual and/or fiduciary duties and/or professional duties*."

**The Block Notification**

73. In 2017, it would appear that White & Co and/or MKP received an enquiry from HMRC relating to claims for EIS relief that had been made before schemes had been formally authorised by HMRC as qualifying for relief. On 1 June 2017, JMW solicitors, acting according to the face of the letter for both White & Co and MKP, wrote to MFL, their clients' insurance brokers ("**the 1 June Letter**"[29]). That letter stated, amongst other things:

> "*We have been instructed by the above named to advise in relation to an HMRC enquiry. Please accept this letter as notification of potential claims in compliance with the terms of the policies. The following information is supplied to address the requirements at page 10 and the heading "Circumstances" in the policy document.*
>
> *(i) The client companies advise and assist their own clients in the submission of applications to HMRC for tax relief under the government's Enterprise Investment Scheme. Once a particular application is authorised, tax relief may be claimed for the relevant period. HMRC question whether our client was correct when advising that relief may be claimed before formal authorisation is given. It is said that even though the applications were likely to be granted, the applicants obtained tax relief from an earlier*

[29] At D/29/1.

*point, thereby committing an offence attracting a penalty. Our clients do not accept HMRC's interpretation of accepted practice and procedure on this point and seek advice on how they might defend or mitigate against the HMRC penalties now applied to a number of applicants. The cases under investigation are those where McKenzie Knight and Partners Ltd advised. Cases involving advice provided by White and Company (UK) Ltd may be investigated in due course.*

*(ii) Our clients have received correspondence from applicants who are now obliged to pay HMRC penalties, including interest, even though they may ultimately be entitled to the tax relief. The applicants ask our clients to indemnify them in respect of the penalties, interest and potential related loss. Further investigation will be required to identify the full scope of the claims.*

*(iii) The number of potential claims by complainant applicants is under consideration, but the sums involved may exceed the stated excess in each policy. The identity of each claimant can be provided in the course of determining quantum.*

*(iv) The identity of any insured for the purposes of the claims will be – McKenzie Knight and Partners Ltd, White and Company (UK) Ltd, Ben White and Emma Abbott*."

74. By email of the same day (1 June 2017), MFL requested further information. On 6 June 2017, JMW replied by email to MFL ("**the 6 June Email**"[30]), stating:

"*We met with the directors on 2nd June to discuss developments, Ben White in particular has been liaising with investors and is now confident that those who originally notified their intention to claim compensation from White and Co/McKenzie Knight are happy for our clients to speak with HMRC on their behalf to find a solution. Our clients say that there has been no dishonesty on their part. They acted in good faith when advising investors that they could claim tax relief before receiving formal authority from HMRC, who take issue with the timing of the claims, not the eligibility for tax relief itself. Consequently, our clients wish to speak with HMRC to determine whether it was reasonable for them to impose financial penalties on investors in respect of claims where the investor obtained tax relief earlier than they were entitled to obtain it. Our clients say that whilst some inspectors were content to postpone enforcement action pending receipt of the EIS3 (the formal authority), other inspectors proceeded to impose penalties. Our clients are in the process of arranging a meeting with the inspector conducting the investigation and it is proposed that we attend the meeting to advise on how enforcement might be avoided or limited. This will have an impact on how we answer the questions in your email 1st June. I stress that no admissions will be made during that meeting. We*

[30] At D/28/1.

*regard it as a meeting at which we may clarify HMRC's position and advise on the level of risk faced by our clients and the insurer*."

75. On the same day (6 June 2017), MFL emailed Allianz twice [31]. The email subject was: "*Re: White & Company Ltd – EIS Investments (New Notification).*" MFL attached a copy of the 1 June 2017 Letter and the subsequent exchange of emails between JMW and MFL. The email stated that further information had been requested from White & Co and/or JMW "*in order to support the notification*" and requested that Allianz "*note this matter against the current policy and let me have your comments in due course*." The second email was identical save that the email was headed "*Re: McKenzie Knight & Partners Ltd – EIS Investments (New Notification).*"

76. On 13 June 2017, by emails timed 08:40[32] and 08:42[33], Allianz responded to each of MFL's emails in identical terms, stating: "*the queries raised in your email dated 01 June 2017 are helpful and I await sight of the documents requested before considering policy response*."

77. On 29 June 2017, JMW further emailed MFL ("**the 29 June Email**"[34]). That email attached an email from Ms Abbott[35] which included a spreadsheet, headed "*MKP Summary for insurers*"[36] which comprised a summary of MKP's clients who were currently being investigated by HMRC in relation to their claims for EIS relief having been made prior to the relevant EIS3 Certificates being issued. In the email, Ms Abbott email stated amongst other things:

> "*At the current date the clients affected solely relate to [MKP] clients, accordingly no details have been provided for White & Company as we consider no notification is required*."

78. Later on 29 June 2017, MFL emailed Allianz[37], stating

> "*I write with reference to the previous correspondence in connection with both Insured noted above[38] and the 'Blanket Notifications'.*
>
> *In response to the request for further information regarding these matters, I have now received the attached copy correspondence from JMW Solicitors LLP."*

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31 At D/26/1 and D/30/1.

32 At D/31/1.

33 At D/32/1.

34 At D/34/1 (wrongly referenced in the Claimants' written closing submissions as D/33/1).

35 At D/34/2.

36 At D/35/1 as a hyperlink in native format.

37 At D/33/1.

38 The subject of the email is stated to be White & Co and MKP, and this is clearly a reference to those companies since no other entity is named.

The parties have referred to the 1 June Letter, the 6 June Email and the 29 June Email together as "**the Block Notification.**" The Claimants contend that those documents were annexed to the email of 29 June 2017.

79. I note in passing that, by the time of the receipt of these communications, White & Co had also received n email from Dr Dipankar Bose, a Claimant in the instant case, which was dated 25 May 2017[39]. I set this out in full since it is the most full and contemporary account of a complaint from a Claimant in this action to which my attention has been drawn and it is of relevance to some of the conclusions below.

> "*I just wanted to inform you that I have paid the HMRC the total tax demanded and the penalty too. My big anxiety is the other EIS schemes I have subscribed to in year 2016-17 tax year and certainly I have not received EIS-3 certificates for all of them yet. I am worried that I might not have funds to pay back the tax return and subsequent penalty for those investments too.*
>
> *I have taken advice and I am very clear that there is still a possibility of getting the tax relief if you all can persuade the HMRC to issue you the EIS-3, 1 have also been told in no unclear terms that as the rules have been broken regarding the claiming back of the tax return before the EIS-3 certificate was issued, in no circumstances would the penalty be refunded or reduced. Even if I get my refund on the tax return, I could still be asked to pay the interest.*
>
> *I am one of your customers and have been given professional advice by your company to make these investments. Your company has charged me handsomely for the advice in getting and setting up the investment, accountant fees and have also staked claim on my future earnings. I was informed that I can lose my entire invested sum as a result of these EIS schemes and I had agreed to take that risk. I have also been told that these investments were approved for EIS and qualified for the tax exemptions. You being a professional accountant took that responsibility of applying for the tax rebates as per the law of the land. At no point, I repeat; AT NO POINT, was I ever told that there was still a risk that these might not qualify for EIS rebates and risk being penalised for claiming tax returns early. I had absolutely no doubt about the advice you gave me and the claims made to me about the benefits of these schemes. At no time I thought that I would be penalised by HMRC for the professional advice and the tax returned by the HMRC based on the returns filed by your company. The one and only one risk I took was failure of the investment and in that case I still had a reduced liability as a result of the rebate from the HMRC.*

[39] At F/11/440/1.

*I am a hard working doctor and every penny I have saved is as a result of the hard work I have done. The money I have invested is not by playing the market or by running profit making businesses. I am also near the end of my professional career and do not have much opportunities to carry on earning for many years. I certainly feel very much let down by your company and the advice given. I have no doubts that you, Christine and Charlotte are working very hard to make amends and get back the tax return and I thank you for that effort.*

*The bottom line is, although I had to pay the tax which i thought I had saved and I am able to at this stage accept that. Certainly I do not feel that I should be penalised for the actions of your company in putting me in this situation. You could have easily asked us to make the investment on the principles that the tax can only be claimed back after the EIS-3 has been received and the risks of not being issued with one. I could have then analysed the risks and decided if they are worth taking or not. I can clearly see that the risks were taken by your company without any information to me as a customer, on whose behalf you have made the tax refund claims. I was never made aware of these facts that it was not permissible according to the rules of HMRC. I can see that you have changed your procedures this year and made us all aware of it now. So clearly I cannot be held responsible for breaking the law, hence the penalty.*

*I would urge you as a responsible person to help me out in these times of need and own up to the responsibility of paying the penalty. We can deal with the effect of the tax return at a later date.*

*As it is possible that you or your company do not have adequate funds to cover the losses of all your clients, I shall be grateful if you let me know the name of your insurer who indemnity your practice with your policy details, as I do not wish to be left with no ends to latch on to if you decide to down the shutter one day. I would also like to be educated by you as to how should I put in a complaint or other legal course or arbitration if I do not agree with your decisions on the long run. I sincerely hope that we would not have the need for any of these agencies.*

*I do wish to tell you that I have been with McKenzie Knight and Partners since 1996 and have received a fantastic service by them and do wish you to carry on handling my tax matters. I am probably one of your longest loyal client. I want you to know that I still have faith in you and I know that you are doing your best to get the most favorable outcome from this all*."

80. Mr White responded by email of 31 May 2017[40], stating amongst other things:

[40] At F11/441

- "*We followed HMRC guidance in relation to making provisional claims when preparing your tax return. I do not agree that we have misinterpreted the law.*"
- "*We are confident that EIS3 certificates will be issued in the near future and the tax relief accepted.*"
- "*We will do everything we can to have the penalties cancelled.*"

**The Kennedys Documents**

81. As noted above, Kennedys took over conduct of the Akbar Claim on behalf of White & Co in June 2017. Ms Bushen of Kennedys gives evidence in her witness statement at [4] – [5] that Kennedys was instructed in relation to the Initial Akbar Claimants' claim (only) on around 7 June 2017, after which Kennedys sent a client care letter to White & Co in respect of that claim[41]. The letter identifies that "*Kennedys has been appointed by White & Company's professional indemnity insurers, Allianz ("Insurers") to act on behalf of White & Compony in relation to the claim pursued by Mr Akbar and others. The purpose of this letter is to explain the basis upon which Kennedys will act… Kennedys has been retained to investigate and defend this claim and to report to Insurers on liability and strategy…Kennedys is instructed subject to the terms and conditions of the Policy, which governs the relations between White & Company and your Insurers. These terms and condition, so far as relevant, are incorporated into Kennedys' contract with White & Company…"*

82. Mr Levy wrote to Kennedys on 10 July 2017 ("**the July Letter**"[42]). That letter sought information as to the film rights acquired by a list of named people. It is headed

> **"***My Client: White and Co. Clients*
> *Litigation: Claim against White and Co for negligent accounting advice*
> *Your client: White and Co*."

It goes on:

> "*I have not heard from you since our conversation of 12 June.*
> *I am continuing to gather information concerning the investment made by my clients.*
> *In the interim, please provide full details regarding the film rights acquired by my clients on the following dates*."
> [Information as to the clients, amount invested and dates is then given]
>
> "*At this stage, please provide details of the film and the relevant territory in each case*."

[41] At D/18/1.
[42] At D/19/1.

83. Mr Levy wrote to Kennedys on 19 October 2017 ("**the 19 October Letter**"[43]). In the letter, Mr Levy sought further disclosure and alleged that White & Co had been negligent in giving advice in relation to investments in EIS and FRB schemes. He stated, amongst other things:

> "*ALLEGATIONS*
>
> *For the purposes of a letter before claim, my clients normally*[44] *make the following allegations.*
>
> *…*
>
> *BREACHES OF DUTY*
>
> *19. Your client has acted in conflict of interest in that it has offered services an agent of my clients in assessing investment opportunities whilst your client has stood to benefit from the investment.*
>
> > *a. Your client has failed to disclose all benefits that your client has had from each investment. Nonetheless, a reasonable assessment of the overall conduct of your client's business activities leads a reasonable minded third-party to the inevitable conclusion that your client has not acted in good faith and has concealed benefits that it has received as a result of each investment.*
>
> *20. Your client has repeatedly misrepresented that investments presented by your client will be likely to provide profit and benefits to my clients when objectively this was not the case as demonstrated by the uniform failure of investments to provide benefits to investors.*
>
> *…*
>
> *26. Your client has represented by way of publicity material that it has a history of success in advising in EIS investments when the majority of the investments advised if not all make losses for the investor.*
>
> *…*
>
> *EIS Investments*
>
> *47. My clients have made various investments in EIS schemes. In no cases have my clients received a dividend, and in all cases my clients have been unable to recover this investment.*
>
> *48. It is clear from taking a broad view of all the schemes into which your client has advised investment, that the pattern is of unrelieved failure and is so consistent as to demonstrate utter disregard for the financial welfare of my clients or, indeed, of any other clients.*

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[43] At D/20/1. This is sometimes called "*the October Letter*" but I have named it thus to distinguish it from the 22 October letter referred to below.

[44] This is probably intended to say *"Formally*," as transcribed in the RAPOC at [35.6.2].

*49. My clients have investigated the following companies by way of reference to their submitted accounts and returns on Companies House*[45].

...

*50. Of all of them, only three make a profit at all, and that is only a paper profit. In each of the three companies, the debtors who owe money to the company form the entirety of the positive assets. It seems likely based on the form of the other companies that these debtors will turn into bad debts in time resulting in a 100% record of loss throughout all companies in which your client has advised investment in the time period at which we are looking.*

*51. This contrasts with the presentations made by your client directly or through its sister company, OBER, or through other publicity material such as a report by Hardman & Co, which is freely available on the Internet and represents that there is an almost uniform record of success with only three failures out of the past 70.*

*...*"

84. Mr Levy further wrote to Kennedys by letter dated 22 October 2017[46] ("**the 22 October Letter**") enclosing a copy of a letter dated 11 August 2017[47] ("**the Freeman Fisher Letter**") from Mr Levy to Freeman Fisher (solicitors acting for White & Co in respect of an allegation that Mr Levy had defamed White & Co in a letter dated 4 August 2017). The Freeman Fisher Letter includes the following passage:

"*Please find below my response to the allegation of defamation…*

*Please note that all statements made by me to which you refer have come either from my discussions with clients in the course of privileged professional dealings, witnesses who have been identified as a result of investigation and who have chosen to contact me in response to letters written to them, and as a result of examination of documents in the public domain.*

*I have sought comments from other investors. I have had several who have shared the same experiences of loss. I have had none that have disagreed…*

*The analysis of the records on Companies House produces the following summary of companies that we have identified have been the subject of recommendations by White & Co as sound investments.*

*Number of Companies 77*

*Companies showing a profit 3*

*Companies showing a loss 43*

---

[45] There follows a list of companies with company number.

[46] At D/21/1.

[47] At D/22/1.

*Of those companies showing a profit, number where debtors are greater than profits.*

*3*

*No Accounts Yet 31*

*Total lost £36,708,804.00*

*Debtors £26,245,157.00*

*This contrasts markedly with supposedly independent reports that would seem to indicate that White & Co has a track record of advising on sound investments.*

*Having looked into the directors of those companies, those who figure most prominently have unenviable track records of several directorships of companies that lose money repeatedly*

*…*

*I must conclude that no due diligence was taken whatsoever into the companies or into the history of the directors with disastrous results for my clients and for others*."

85. Mr Levy attended a meeting at Kennedys' offices on 21 November 2017 ("**the November Meeting**") and asserts that during this meeting he provided a spreadsheet ("**the Spreadsheet**"). Whether or not the Spreadsheet was provided by Mr Levy to Kennedys has been the subject of heated dispute and evidence was to be adduced on this issue. In the event, the Claimants conceded that whether the Spreadsheet was handed over to Kennedys is not relevant to the issues in the preliminary trial and therefore it was unnecessary to hear evidence on the issue or to resolve it.

86. On 23 November 2017, Kennedys emailed Allianz twice:

(1) At 15:00, stating,

"*I just wanted to let you have a brief update on the above matter following our meeting with Michael Levy of Elite Chambers this week. The primary purpose of our meeting with Mr Levy was to allow him to present his Clients' case as it stands to us, as he has yet to put forward any formal allegations against the Insured. At the meeting, Mr Levy presented us with a copy of a Letter of Claim, which he said was sent a couple of weeks ago, but which we have not received. A copy is attached for your reference*."

(2) At 15:34, including the attachment which had been omitted from the email sent at 15.00, namely the 19 October Letter.

Together these have been called "**the First November Emails**"[48].

[48] At D/25.1/1.

87. On the same day (23 November 2017), Kennedys emailed White & Co at 15.45 ("**the Second November Email**"[49]), stating,

> "*I just wanted to let you have a brief update on the above matter following Ben's call with Claire earlier today.*
>
> *The primary purpose of our meeting with Mr Levy*[50] *was to allow him to present his Clients' case as it stands to us, as he has yet to put forward any formal allegations against White & Co. At the meeting, Mr Levy presented us with a copy of a Letter of Claim, which he said was sent a couple of weeks ago, but which we have not received. A copy is attached for your reference.*
>
> ….
>
> *Mr Levy appreciates that we are currently in the process of trawling through c35,000 emails/documents in order to complete the disclosure exercise, which has been a more extensive task than we had initially expected. However, he is acutely conscious that some of the investments complained of were entered into in early January 2012, so limitation will be due to expire shortly. On that basis, he is currently working on preparing proceedings. However, he has indicated that he would prefer to enter into a standstill agreement (which would stop time running for limitation purpose)s to allow the parties to attempt to narrow the issues. We understand that he is also still actively seeking to recruit further potential Claimants, though no further individuals have been named specifically at this stage…"*

The Second November Email had attached to it a copy of the 19 October Letter.

88. Taken together, the First November Emails and the Second November Email have been termed, "**the November Emails**." It will be noted that the First November Emails are simply two parts of the same communication. The Second November Email is a separate communication relating to the meeting with Mr Levy and, as Allianz point out in submissions, may require separate consideration.

89. The Claimants originally gave the name "**the Kennedys Documents**" to the July Letter, the 19 and 22 October Letters and the Spreadsheet. As noted below, the Claimants at trial did not rely on the July Letter or the Spreadsheet as adding to the argument as to notification. However, the Claimants do rely on the First November emails and the Second November Email as part of the Kennedys Documents, as recorded in the draft Re-Re-Amended Particulars of Claim at [35.6.0][51]. As I deal with below, the parties agreed that the Claimants should have permission to amend in

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[49] At D/70/1.

[50] A reference to the meeting on 21 November 2017.

[51] At A/10.2/19.

the terms of this draft and accordingly I treat the Kennedys Documents as defined by the Claimants to include those emails.

90. Allianz admits in its Re-Re-Amended Defence at [99] that it received the 19 October Letter, though disputes that it was capable of amounting to notification as alleged. It denies receiving the remainder of the Kennedys Documents. The definition of "the Kennedys Documents" at the time that this pleading was filed did not include the First November Emails and the Second November Email, so Allianz's case must be taken to be the positive case that it did not receive the July Letter or the Spreadsheet.

**AGGREGATION – THE LAW**

91. In *AIG Europe Ltd v OC320301 LLP* [2017] 1 WLR 1168 at [14], Lord Toulson said of aggregation clauses:

> "*Aggregation clauses have been a long-standing feature of professional indemnity policies, and there have been many variants. Because such clauses have the capacity in some cases to operate in favour of the insurer (by capping the total sum insured), and in other cases to operate in favour of the insured (by capping the amount deductible per claim), they are not to be approached with a predisposition towards either a broad or a narrow interpretation.*"

92. The Claimants make the following further points:

(1) The language of the unifying factor is of critical importance (see Lord Hoffman in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Company Ltd* [2003] 4 All ER 43 ("*Lloyds TSB*") at [17] and [18]).

(2) Whether matters or transactions are "related" is a fact sensitive issue (per Lord Toulson in *AIG Europe Ltd v OC320301 LLP* at [22]).

(3) Where the test is similarity, the degree of such similarity must be "*a real or substantial degree of similarity as opposed to a fanciful or insubstantial degree of similarity*" (per Teare J in *AIG v Woodman* [2015] EWHC 2398). In *Axis Specialty Europe SE v Discovery Land Co LLC* [2024] EWCA Civ, Andrews LJ said of this test:

> "*[84] Whilst I would agree with Teare J that the degree of similarity must be real or substantial, it does not follow that the issue of similarity must be approached at the highest or most superficial level. Nor do I read his judgment as suggesting that it should. On the contrary, it seems to me that in answering the question whether there is a "real or substantial" similarity between the acts or omissions giving rise to two or more claims, one cannot avoid consideration of the substance of each claim, i.e. what it is alleged that*

*the defendant did or failed to do, when, and in what circumstances, with a view to identifying common or similar features, which is what Teare J did. It does not necessarily follow from the fact that the acts giving rise to the claims are of a similar nature (in this case, theft from a client account) that there is a real or substantial similarity between them. On the other hand, there may be sufficient substantive similarity between the acts or omissions complained of, even if there are distinctions between them on points of finer detail, as there were in the AIG case. It is a fact-sensitive evaluation in each case.*"

(4) Subject to the wording of the unifying factors, acts or events form a related series if they together resulted in each of the claims. Thus the related claims must have been caused by the same series of acts. In *Baines v Dixon Coles & Gill* [2021] EWCA Civ 1211, Nugee LJ, considering Lord Hoffman's judgment in *Lloyds TSB,* stated:

"*[53] It is plain from what he says at [26] that before a series of acts or omissions can be said to be related, one has to find a unifying factor, and that the relevant unifying factor has to be identified, expressly or impliedly, in the wording of the clause. At [27] he identifies, from the language of the clause, the unifying factor as being that the acts or omissions should have resulted in a series of claims, or in other words caused a series of claims. But:*

> *'This obviously does not mean that it is enough that one act should have resulted in one claim and another act in another claim … It can only mean that the acts or events form a related series if they together resulted in each of the claims'.*

*In other words if there is a series of acts A, B and C, it is not enough that act A causes claim A, act B causes claim B and act C causes claim C. What is required is that claim A is caused by the series of acts A, B and C; claim B is also caused by the same series of acts; and claim C too."*

(5) The words "*arising from*" and "*attributable to*" require a direct causal relationship between the claims and the unifying feature, whereas "*in connection with*" is a broader test (see Eder J in *Standard Life Assurance Ltd v Ace European Group* [2012] EWHC 104 (Comm) at [262] and [263].

(6) Whether two or more matters or transactions are related is to be analysed from the perspective of the insured (see Cannon and McGurk at paragraph 10.67, citing *Forney v Dominion Insurance Co Ltd* [1969] 1 WLR 928).

## THE LITIGATION

### The Course of the Litigation

93. From an early stage it was identified that the issues as between the Claimants on the one hand and Allianz and the ARP Defendants on the other fell into two broad areas:

    (1) Whether White & Co was liable to the Claimants ("**the Liability Claim**");

    (2) Whether Allianz and/or the ARP Defendants were liability to indemnify any claim that might be established against the First Defendant ("**the Coverage Claim**").

94. By order of 20 January 2022, the Court gave directions with a view to trying the Coverage Claim first. A set of 15 sample Claimants was identified and the trial of the Coverage Claim was listed in November 2024. Prior to that trial, the claim against the ARP Defendants was compromised, leaving only Allianz continuing to defend the claim.

95. At trial, oral evidence was given by the Sample Claimants[52], namely Dr Dasappaaiah Ganesh Rao[53], Mr Howard Atkins[54], Mr Anthony Burn[55], Dr Stuart Hood[56], Dr Naveen Vasireddy[57], Dr Jonathan Shanks[58], Dr Syed Ayaz Lufti Sulaiman[59], Dr Anthony Coyne[60], Mr Roger Stephenson[61], Mr Matt Ravenscroft[62], Mr John Dickinson[63], Dr Daniel Glass[64], Professor John Skinner[65], Mr Yega Kalairajah[66] and Professor Anoop Chauhan[67].

96. Allianz relied on the written statements of Ms Claire Bushen, Mr Niall Innes and Ms Arran Roberts. The contents of those statements were not challenged and the authors did not give oral evidence**.**

97. Both experts, Mr Matthew Wentworth-May[68] for the Claimants and Mr David Francis[69] for Allianz were called to give oral evidence and were subject to cross examination. Both experts dealt with

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52 For each witness, I have given the reference for where their evidence starts in the transcript.
53 Day 1/31
54 Day 1/122
55 Day 1/154
56 Day 2/60
57 Day 2/102
58 Day 2/116
59 Day 3/1
60 Day 3/42
61 Day 3/100
62 Day 3/121
63 Day 4/2
64 Day 4/67
65 Day 4/99
66 Day 4/152
67 Day 5/1
68 Day 6/8
69 Day 6/127

issues of tax law within their reports. It was agreed by the parties that, although issues of law are of course a matter for the Judge not the experts, such evidence was liable to be of assistance in so far as it dealt with the use of certain words in the tax context, with particular relevance to how that use might apply in light of the way that the various investment schemes operated. Neither party therefore took issue with the experts expressing opinion that in part might be considered to be matters of law and equally I did not interrupt to prevent this though I am acutely aware that on all matters of law, I am the judge applying the usual rules of legal interpretation rather than favouring the evidence of one expert or the other.

98. In so far as the lay witness evidence is concerned, it is not necessary to deal with it in similar detail at this stage. The evidence of the Sample Claimants, in so far as relevant to issues relating to the effect of the Tax Mitigation Endorsement and the Related Claims Provisions is dealt with in the later sections of this judgment dealing with those issues. The evidence of Allianz's lay witnesses (which was not the subject of dispute) is referred to as appropriate when dealing with notification issues.

99. As for the expert evidence, I deal with that in some greater detail below, summarising the opinions of each of the experts before returning to deal with the implication of that evidence in respect of the relevant issues set out below.

100. Subsequent to the examination of witnesses, the parties filed the Statement of Issues referred to above as well as detailed written closing submissions. They each made oral submissions.

101. The structure of this judgment is to follow the order and numbering of issues identified in the Statement of Issues. In large part, the issues turn on the true interpretation of the statements of case and the documents that are relied on in respect of notification. The evidence of individual witnesses is of relevance only to part of the case, the application of the t Tax Mitigation Endorsement, albeit this is clearly a matter of importance both to the Sample Claimants and to the case more generally. I deal with that evidence when dealing with the effect of the Tax Mitigation Endorsement.

**The Issues**

102. In the original List of Issues prepared by the parties at **A/1/11f**, the parties identified the following issues for the trial of the Coverage Claim[70].

[70] In the quoted text in this paragraph and the next paragraph, I have changed WCUL to "White & Co" for consistency with usage in the judgment more generally.

"***CLAIM AGAINST ALLIANZ***

***Entity Indemnified***

*Issue 1. Do the Liability Claims or any of them arise from professional services provided by an entity other than White & Co and consequently fall outside the scope of the Allianz Policy?*

***The Akbar Letters***

***Awareness***

*Issue 2. What were the facts of which White & Co was aware by virtue of the March Letter and/or the 9 April Letter and Witness Statement?*

*Issue 3. Were those matters such as to lead a reasonable person in White & Co's position to consider that a claim might be made by claimants who were not listed in the Akbar Letters in relation to:*

*(1) Investments in the companies listed in the Akbar Letters;*

*(2) EIS, SEIS and/or FRB Investments not listed in the Akbar Letters by reason of those investments being:*

*(a) The types of investment expressly mentioned in the Akbar Letters, or*

*(b) As the Claimants must prove, "similar investments" to the investments listed in the Akbar Letters;*

*(3) Bond and/or DJI Investments by reason of:*

*(a) Advice alleged in the Akbar Letters;*

*(b) Being 'similar advice', as the Claimants must prove, to advice given in relation to these types of investment.*

*Issue 4. As to the 24 April Letter:*

*(1) In what capacity did Mills & Reeve receive the 24 April Letter;*

*(2) Is White & Co to be taken as having been aware of its contents by virtue of Mills & Reeve having received it.*

***Notification***

*Issue 5. On a true construction of (a) the 5 April 2017 Email (sent by MFL to Allianz) and its attachments and (b) the MFL 10 April 2017 Email and its attachments, were these emails a notification of circumstances which might give rise to a claim?*

*Issue 6. If so, what was the scope of the matters notified to Allianz?*

*Issue 7. Did receipt by Mills & Reeve of the 24 April Letter comprise a notification to Allianz of matters contained in the 24 April Letter?*

***Block Notification***

***Alleged awareness***

*Issue 8. As a consequence of the Block Notification was White & Co aware that advice it had provided clients in respect of EIS and/or SEIS and/or FRB Investments and/or Bond Investments and/or DJI Investments might have been negligent?*

*Issue 9. If so, what was the nature of the advice of which White & Co was aware?*

*Issue 10. Were the matters set out in the Block Notification such as to lead a reasonable person in White & Co's position to consider that a claim might be made by:*

*(1) Persons listed in the Block Notification in relation to:*

*(a) Investments identified in the Block Notification,*

*(b) Investments not identified in the Block Notification by reason of, as the Claimants must prove, those investments being:*

*(i) Similar to the investments identified in the Block Notification, or*

*(ii) The subject of similar advice to the investments identified in the Block Notification?*

*(2) Persons not listed in the Block Notification on the same bases as set out in (1) above?*

*Issue 11. If so, what was the nature of the advice of which a reasonable person in White & Co's position would have been aware as a consequence of the Block Notification?*

***Notification***

*Issue 12. On a true construction were (a) MFL's email to Allianz on 6 June 2017 at 9:56 and the attachments to that email and (b) MFL's email to Allianz of 29 June 2017 together with its attachments (i.e., the 29 June Email and the 23 June 2017 Email) a notification of circumstances which might give rise to a claim against White & Co?*

*Issue 13. What was the scope of any matters thereby notified to Allianz?*

***Kennedys Documents***

*Issue 14. Was the Spreadsheet provided and/or shown to Kennedys on 21 November 2017?*

*Issue 15. Was White & Co aware of the July Letter, the 19 October Letter and the Spreadsheet during the Allianz Policy Period?*

*Issue 16. In what capacity did Kennedys receive the July Letter, the 19 October Letter and (if it was provided) the Spreadsheet and is White & Co to be taken as having been aware of them by virtue of Kennedys having received them?*

*Issue 17. Were the contents of the July Letter and/or the 19 October Letter and/or the Spreadsheet such as to lead a reasonable person to consider that a claim might be made:*

*(1) By individuals listed in the Kennedys Documents;*

*(2) By individuals not listed in the Kennedys Documents;*

*(3) In relation to investments listed in the Kennedys Documents;*

*(4) In relation to Investments not listed in the Kennedys Documents by reason of, as the Claimants must prove, those investments being:*

*(a) Similar to investments identified in the Kennedys Documents, or*

*(b) The subject of similar advice to the investments identified in the Kennedys Documents?*

***Alleged notification***

*Issue 18. Other than the October Letter (which Allianz admits it received from Kennedys), were the Kennedys Documents sent to Allianz?*

*Issue 19. In what capacity did Kennedys receive the July Letter and (if it was provided) the Spreadsheet and is Allianz to be taken as having received those document by virtue of Kennedys' receipt of them (if established)?*

*Issue 20. Did Kennedys sending the 19 October Letter to Allianz comprise a notification of circumstances within the meaning of the Allianz Policy?*

*Issue 21. On a true construction of the Kennedys Documents, did they comprise a notification of circumstances which might give rise to a claim against White & Co?*

***Alleged cumulative awareness and notification***

*Issue 22. Can a valid notification be given as a consequence of and/or by inference from a collection of communications even if the communications taken individually would not themselves comprise a notification?*

*Issue 23. If so, then taking the Akbar Letters, the Block Notification and the Kennedys Documents together:*

*(1) What awareness did White & Co have as a consequence of those communications: alternatively, what awareness would a reasonable person in White & Co's position have as a consequence of those communications?*

*(2) Did those communications comprise a notification of circumstances which might give rise to a claim against White & Co?*

*(3) If so, what was the scope of the matters notified to Allianz?*

*(4) Do the claims in this action arise out of that notification?*

***Causal connection***

*Issue 24. Which, if any, of the claims made by the Claimants in these proceedings arise from matters notified to Allianz (a) by virtue of the 5 April 2017 Email and the MFL 10 April 2017 Emails; (b) by the Block Notification; (c) by the provision of the Kennedys Documents to Kennedys and/or Allianz (if established); or (d) by virtue of (a) to (c) collectively?*

***Ober***

*Issue 25. What is the proper construction of the Ober Exclusion?*

*Issue 26. Can the Ober Exclusion take effect in circumstances where it is not included in the 2016 Minimum Terms?*

*Issue 27. Where a Claimant received advice and/or information from both White & Co and Ober or alternatively, advice or information from Ober which communicated advice or information from White & Co, or advice from MKP, do claims arising from the said advice fall within the scope of the Ober Exclusion?*

***Allocation***

*Issue 28. Can the Allocation clause take effect in circumstances where it is not included in the 2016 Minimum Terms?*

*Issue 29. Where a Claimant received advice and/or information from both White & Co and another entity what allocation should be made between Allianz and that other entity?*

***Tax Endorsement***

*Issue 30. What is the proper construction of the Tax Mitigation Endorsement?*

*Issue 31. Does the Tax Mitigation Endorsement apply to all or some of the claims the subject of these proceedings?*

***Related Claims***

*Issue 32. Does the Related Claims provision operate:*

` *(a) to aggregate all the claims the subject of these proceedings into a single limit of indemnity; or*

*(b) if it is held that there is more than one Related Claim, to subject each Related Claim to a single limit of indemnity; or*

*(c) at all?*

***Retention***

*Issue 33. Can Allianz rely on the Retention provision in the Allianz Policy or is it inconsistent with paragraph C13 of the 2016 Minimum Terms?*

*34. How should the Retention be applied given the Court's findings in relation to Related Claims and/or the Tax Mitigation Endorsement."*

Given the compromise of the Claimants' claims against the ARP Defendants, issues 34 to 43 in the list of issues did not arise for determination.

103. By the time of closing submissions at trial, several issues had either fallen away or were contended to be better dealt with in the Liability Trial (an argument with which I agreed). The position on these issues is summarised in the Schedule of Issues dated 19 November 2024 at **A/1.1/1**:

"*Issue 1: Do the Liability Claims or any of them arise from professional services provided by an entity other than White & Co and consequently fall outside the scope of the Allianz Policy?*

*It is agreed that this Issue falls for determination as part of the Liability Trial.*

*Issue 3(3), 8: Bond/DJI Investments*

*It was conceded by the Claimants that claims relating to these types of investments do not arise from notified circumstances and so no longer form any part of the claims.*

*Issues 4 and 7: 24 April Letter*

*It was conceded by the Claimants that they no longer rely on the 24 April Letter on the basis that it does not add materially to the Akbar Letters. However, the Claimants continue to rely on it as a document said to contribute to White & Co's awareness.*

*Issues 15, 16, 19: July Letter*

*So far as these issues refer to the July Letter, the Claimants conceded that it does not materially add to awareness or notification and no determinations are sought in respect of it.*

*Issues 14, 15, 16, 17, 19: the Spreadsheet*

*So far as these issues refer to the Spreadsheet, the Claimants have accepted that the Spreadsheet which Mr Levy says was referred to at his meeting with Kennedys on 21*

*November 2017 is not capable of being a notification to Allianz. It therefore falls away as a point for determination on these issues, and Issues 14, 15 and 19 fall away entirely.*

*Issues 22 and 23: Cumulative awareness and notification*

*The Claimants conceded that the cumulative awareness set out at paragraphs 35.7.0 to 35.7.2 of the Re-Amended Particulars of Claim do not constitute a separate notification of circumstances in their own right. Accordingly Issues 22 and 23 fall away. However, the Claimants' case is that the factual matrix for the proper construction of each notification ought to include the contents of any previous notifications.*

*Issue 27: Where a Claimant received advice and/or information from both White & Co and Ober or alternatively, advice or information from Ober which communicated advice or information from White & Co, or advice from MKP, do claims arising from the said advice fall within the scope of the Ober Exclusion?*

*The parties agree that Issue 27, like Issue 1, is better determined as part of the Liability Trial.*

*Issue 28: Is the Allocation Clause contrary to the Minimum Approved Wording in the Allianz Policy?*

*The parties agree that, if Issue 28 arises, it is better determined as part of the Liability Trial.*

*Issue 29: Where a Claimant received advice and/or information from both White & Co and another entity what allocation should be made between Allianz and that other entity?*

*The parties agree that Issue 29, like Issues 1 and 27, is better determined as part of the Liability Trial.*

*What constitutes a Claim?*

*The parties agree that this issue (insofar as it arises) is better determined as part of the Liability Trial.*

*Issues 33 and 34: Can Allianz rely on the Retention provision in the Allianz Policy or is it inconsistent with paragraph C13 of the 2016 Minimum Terms? How should the Retention be applied given the Court's findings in relation to Related Claims and/or the Tax Mitigation Endorsement?*

*The parties agree that Allianz can in principle rely on the Retention clause in the Allianz Policy, and that a retention of £10,000 per Claim (as defined) is applicable, up to a maximum of £60,000*."

104. The remaining issues for determination were identified by the parties in the Schedule of Issues[71] dated 19 November 2024 and the core of each party's case was conveniently summarised. I adopt this list of issues in my judgment below to determine the outstanding issues in the Coverage Claim. It is doubtless the case that the list is the product of negotiation between the parties and some degree of compromise but overall it encompasses all of the issues that need to be determined save for two difficulties about the drafting of SOI[17] that I deal with below.

105. I should note however the discussion that took place at the beginning of closing submissions where the parties considered issues which are closely related to the issues that have been defined for the Coverage Trial but which it was agreed should not be dealt with at this stage. These include:

(1) The so-called allocation issue – how does the Policy treat a claim that includes both matters or persons that are covered by the policy and matters or person that are not? It is agreed that this issue is for the moment academic (it is not in fact obvious that there are any such cases) and if relevant at all could not be resolved independently of the Liability Trial.

(2) Are the claims of individual Claimants to be aggregated as one (or potentially more than one) claim? Again this issue is potentially academic (very few Claimants have claims that could exceed the aggregate limit of £2 million) and is best considered at the same time as determination of the actual liability of White & Co (if any) at the Liability Trial.

106. In terms of SOI[17], there is an apparent inconsistency between how this is drafted and how it is dealt with by the Claimants. The drafted language is "*Did Kennedys sending the October Letter to Allianz comprise a notification of circumstances within the meaning of the Allianz Policy?"* This may be in fact be intended to be a reference to the "October Letters" that is to say both the 19 October and the 22 October letters or simply to the 19 October Letter. When dealing with this issue in written closing submission, the Claimants refer to whether sending the 19 October Letter amounted to notification but also whether receipt of the 22 October Letter by Kennedys was good

[71] The document appears at A/1.1/4. Given the complexities of the case it is unsurprising that the formulation of issues has been revised during the litigation. This has meant that the final Schedule of Issues contains matters that were not in the original List of Issues but combines some that were. In an attempt to maintain clarity, I have retained the paragraph numbering used in the Schedule of Issues even though it differs from numbering of the List of Issues. I refer to paragraph numbering in the Schedule of Issues as "SOI[para number]" and the numbering of issues as "Issue Number."

notification. These two issues are rather different in nature and the obvious way to distinguish between them is to subdivide SOI[17] between the two letters.

107. A further issue arises as to SOI[17]. As I see it, the distinction between SOI[17] and SOI[18] (apart from the fact that the former deals only with the October Letters and the latter deals with all of the Kennedys Documents) is the question as to whether, having regard to the role of Kennedys, receipt or sending documents by it is capable of amounting to notification, whereas the issue in SOI[18] is whether some or all of the Kennedys Documents in fact amounted to notification. To reflect this difference I have slightly reworded the two parts of SOI[17] as follows:

(1) SOI[17A] Issue 20 - Was Kennedys sending the 19 October Letter to Allianz capable of comprising a notification of circumstances within the meaning of the Allianz Policy?

(2) SOI[17A] Issue 20 – Was Kennedys' receipt of the 22 October Letter and its enclosure capable of comprising a notification of circumstances within the meaning of the Allianz Policy**?**

108. With this slight redrafting and minor changes for clarity and accuracy, the Schedule of Issues of 19 November 2024 and the summary of each party's case is thus:

| | **Claimants' Case** | **Allianz's Case** |
|---|---|---|
| **(A)** | **The Scope of the Claims** | |
| ***SOI[1] Whether the Claims as pleaded include Seed Enterprise Investment Scheme investments.*** | | |
| | Yes. The investments are pleaded in the Claimants' Schedule **{A/12}** albeit incorrectly referred to as EIS Investments. | No. The RAPOC defines "SEIS" as "Super Enterprise Investment Schemes" (para.17) **{A/10.1/6}** and makes no reference to Seed EISs. |
| ***SOI[2] Whether the Claims as pleaded include investments in Ober Private Clients Ltd.*** | | |
| | Yes. The investments are pleaded in the Claimants' Schedule **{A/12}** albeit incorrectly referred to as EIS Investments. | No. The RAPOC makes no reference to investments in Ober. |
| **(B)** | **Alleged notification pursuant to the Akbar Letters** | |
| ***SOI[3] (Issue 2) What were the facts of which White & Co was aware by virtue of the March Letter and/or the 9 April Letter and Witness Statement ("the Akbar Letters")?*** | | |
| | "Advice Awareness," "Loss Awareness," and "Risk of Claim Awareness" as defined in paragraph 23.1 of the Claimants' written closing submissions. | Limited to awareness of the Initial Akbar Claimants' intention to make a claim against White & Co in respect of negligent advice in relation to investments in specific companies: Allianz Closing ¶68-70. |
| ***SOI[4] (Issue 3) Were those facts such as to lead a reasonable person in the position of White &*** | | |

| Claimants' Case | Allianz's Case |
|---|---|
| ***Co to consider that a claim might be made by claimants who were not listed in the Akbar Letters in relation to:***<br>***(1) Investments in the companies listed in the Akbar Letters;***<br>***(2) EIS, SEIS and/or FRB Investments not listed in the Akbar Letters by reason of those investments being:***<br>***(a) The types of investment expressly mentioned in the Akbar Letters, or***<br>***(b) As the Claimants must prove, "similar investments" to the investments listed in the Akbar Letters?*** | |
| Yes, in all respects. | No, in all respects. |
| ***SOI[5] (Issue 5) On a true construction of (a) the 5 April 2017 Email (sent by MFL to Allianz) and its attachments and (b) the MFL 10 April 2017 Email and its attachments, were these emails a notification of circumstances which might give rise to a claim?*** | |
| Yes, in respect of both. | No. The 5 April 2017 Email was notification of a Claim (not circumstances; the Claim being that of the Initial Akbar Claimants, the subject of separate proceedings), and the 10 April 2017 Email provided further particulars in relation to that Claim. |
| ***SOI[6] (Issue 6) If so, what was the scope of the matters notified to Allianz?*** | |
| "Named Companies Notification," "Investment Companies Notification" and "Hornet's Nest Notification" as defined in paragraph 23.2 of the Claimants' written closing submissions. | Since the only notification was of the Claim of the Initial Akbar Claimants, the notification was limited to that Claim. |
| ***SOI[7] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?*** | |
| Yes, all claims in respect of EIS/Seed EIS Investments, Super EIS Investments, FRB Investments, and investments in Ober. | No, for the reasons above. However, if contrary to Allianz's case, there was a notification of circumstances, they do not relate to any wider set of investments other than those of the Initial Akbar Claimants: the alleged similarities are too vague. |
| **(C) Alleged notification pursuant to the Block Notification** | |
| ***SOI[8] (Issues 8 and 9) As a consequence of the Block Notification was White & Co aware that advice it had provided clients in respect of EIS and/or SEIS Investments and/or FRB Investments was or might have been negligent, and if so what was the nature of that advice?*** | |
| Yes, in respect of EIS/Seed EIS Investments and Super EIS Investments. The advice was tax advice and investment advice. FRB Investments are not pursued as part of the Block Notification. | No. The negligent advice which Claimants allege as part of their claims have nothing to do with the Block Notification, which was about premature claims for EIS relief, and which concerned MKP, not White & Co. |

| Claimants' Case | Allianz's Case |
|---|---|
| ***SOI[9] (Issue 10) Were the matters set out in the Block Notification such as to lead a reasonable person in White & Co's position to consider that a claim might be made by:***<br>***(1) Persons listed in the Block Notification in relation to:***<br>***(a) Investments identified in the Block Notification,***<br>***(b) Investments not identified in the Block Notification by reason of, as the Claimants must prove, those investments being:***<br>***(i) Similar to the investments identified in the Block Notification, or***<br>***(ii) The subject of similar advice to the investments identified in the Block Notification?***<br>***(2) Persons not listed in the Block Notification on the same bases as set out in (1) above?*** | |
| Yes, in all respects. | No, in all respects. |
| ***SOI[10] (Issue 12) On a true construction were (a) MFL's email to Allianz on 6 June 2017 at 9:56 and the attachments to that email and (b) MFL's email to Allianz of 29 June 2017 together with its attachments (i.e., the 29 June Email and the 23 June 2017 Email) a notification of circumstances which might give rise to a claim against White & Co?*** | |
| Yes, in respect of both. | No, whether taken separately or together. |
| ***SOI[11] (Issue 13) What was the scope of any matters thereby notified to Allianz?*** | |
| "Named Companies Notification," "Investment Companies Notification" and "Hornet's Nest Notification" as defined in paragraph 23.2 of the Claimants' written closing submissions. | Limited to claims<br>(i) against MKP (not White & Co),<br>(ii) arising out of premature claims for EIS relief (not negligent advice to enter into investments),<br>(iii) in respect of the specific people and their investments named. Alternatively, if the Court finds there is a circumstance which gives rise to a claim, the scope is limited to (iii). |
| ***SOI[12] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?*** | |
| Yes, all claims in respect of EIS/Seed EIS Investments and Super EIS Investments. | No: no causal connection. |
| **(D) Alleged notification pursuant to the Kennedys Documents** | |
| ***SOI[13] (Issue 15) Was White & Co aware of the 19 October[72] Letter and/or the 22 October Letter during the Allianz Policy Period?*** | |
| White & Co is to be treated as aware of these letters by virtue of Kennedys' agency. | White & Co 's awareness "*during the Allianz policy period"* is irrelevant. White & Co must have knowledge for the purpose of (and therefore prior to) the notification. White & Co received |

[72] For the sake of clarity, I repeat the point made above that this document is called "the October Letter" in the List of Issues as filed but I have given it its date within this document to distinguish it from other October letters.

| Claimants' Case | Allianz's Case |
| --- | --- |
| | the October Letter (19 October 2017 Letter) in the Second November Email (sent on 23.11.17 at 15:45). White & Co did not receive the 22 October 2017 Letter. The scope of Kennedys' retainer and its agency were limited and did not extend to receiving information relevant to notification on behalf of White & Co. |
| ***SOI[14] (Issue 16) In what capacity did Kennedys receive the 19 October Letter and the 22 October Letter and is White & Co to be taken as having been aware of them by virtue of Kennedys having received them?*** | |
| Kennedys received the said letters as agent for White & Co (notwithstanding any other agency relationship). White & Co is therefore to be taken as having been aware of them. | Kennedys were appointed to defend the claim of the Initial Akbar Claimants. Their agency was limited by reference to the retainer and did not extend to receiving information on behalf of White & Co. |
| ***SOI[15] In what capacity did Kennedys send the First November Emails to Allianz and is White & Co to be taken as having been aware of their contents?*** | |
| Kennedys is to be treated as sending the First November Emails and their attachment (being the 19 October Letter) as agent for White & Co (notwithstanding any other agency relationship). White & Co is therefore to be taken as having been aware of their contents. | As above, Kennedys' agency was limited and did not extend to sending or receiving information relevant to notification on behalf of White & Co. Further, since the First November Emails were sent before the Second November Email, White & Co could not have had knowledge of the 19 October 2017 Email when the First November Email was sent. |
| ***SOI[16] (Issue 17) Were the contents of the 19 October Letter and/or the 22 October Letter and/or the First November Emails such as to lead a reasonable person to consider that a claim might be made:***<br>***(1) By individuals listed in the Kennedys Documents;***<br>***(2) By individuals not listed in the Kennedys Documents;***<br>***(3) In relation to Investments listed in the Kennedys Documents;***<br>***(4) In relation to Investments not listed in the Kennedys Documents by reason of, as the Claimants must prove, those Investments being:***<br>***(a) Similar to Investments identified in the Kennedys Documents, or***<br>***(b) The subject of similar advice to the Investments identified in the Kennedys Documents?*** | |
| Yes, in all respects. | No, in all respects. |
| ***SOI[17A] (Issue 20) Was Kennedys sending the 19 October Letter to Allianz capable of comprising a notification of circumstances within the meaning of the Allianz Policy?*** | |
| *Yes.* | No. |

| Claimants' Case | Allianz's Case |
|---|---|
| ***SOI[17B] (Issue 20) Was Kennedys receipt of the 22 October Letter capable of comprising a notification of circumstances within the meaning of the Allianz Policy?*** | |
| *Yes.* | No. |
| ***SOI[18] (Issue 21) On a true construction of the Kennedys Documents, did they comprise a notification of circumstances which might give rise to a claim against White & Co?*** | |
| *Yes.* | No. |
| ***SOI[19] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?*** | |
| Yes, all claims in respect of EIS/Seed EIS Investments, Super EIS Investments and FRB Investments. | No. |
| **(E) The Ober Exclusion** | |
| ***SOI[20] (Issue 25) What is the proper construction of the Ober Exclusion?*** | |
| It appears that Allianz no longer rely upon the Ober Exclusion. | Allianz no longer relies upon the Ober Exclusion. |
| ***SOI[21] (Issue 26) Is the Ober Exclusion contrary to the Minimum Approved Wording in the Allianz Policy?*** | |
| Yes (although this is not relevant if Allianz no longer relies upon the Ober Exclusion). | As above. |
| **(F) The Tax Mitigation endorsement** | |
| ***SOI[22] (Issue 30) What is the proper construction of the Tax Mitigation Endorsement?*** | |
| The focus is upon artificiality. This is to be assessed on an investment by investment basis rather than by the combination of investments. The subjective intention of the investor only gives rise to artificiality if the *only* purpose of a transaction is that of tax avoidance. | The key dispute is about the meaning and application of the term "artificial." It can apply to investments, investment companies, and combinations of investments. It should be applied in the relevant context, which includes consideration of the relevant legislative conditions. Those conditions include s.165 ITA 2007, which requires (i) a genuine commercial reason for an investment and (ii) that it must not be the main or one of the main purposes to avoid tax. An investment can be artificial in a number of ways including if the investor's intentions show that s.165 has not been met. |
| ***SOI[23] (Issue 31) Does the Tax Mitigation Endorsement apply to all or some of the claims the subject of these proceedings?*** | |
| The Tax Mitigation Endorsement only applies to FRB Investments and the enhanced element of the Super EIS Investments. | It is common ground that the Tax Mitigation Endorsement applies to FRB Investments and the enhanced elements of the Super EIS investments. It also applies to all other EIS, including the non-enhanced elements of Super EISs, and (insofar as |

| Claimants' Case | Allianz's Case |
|---|---|
| | relevant) Seed EIS investments. |

**(G) The Related Claims Provisions**

***SOI[24[ (Issue 32) Does the Related Claims provision operate: (a) to aggregate all the claims the subject of these proceedings into a single limit of indemnity; or (b) to aggregate any of the claims the subject of these proceedings as more than one Related Claim (and if so how many and on what basis); or (c) at all?***

| | |
|---|---|
| The Claimants' primary position is that the Related Claims Provision does not operate in respect of any of the claims. The Claimants' secondary position is that there is aggregation is on an investment by investments basis with the effect that there is a £2,000,000 limit for claims for each investment company. | Assuming notification, then all the claims in these proceedings constitute a single Related Claim. |

109. It will be noted that, in light of Allianz's position on the Ober Exclusion, Issues 25 and 26 do not fall for determination.

**The Expert Evidence**

110. The experts both have impressive experience in dealing with issues of tax law, with particular reference to issues relevant to this case.

(1) Mr Matthew Wentworth-May, instructed by the Claimants, is a qualified barrister who completed pupillage in specialist tax chambers in 2014 and who has worked with tax firms advising amongst other things on EIS tax relief.

(2) Mr David Francis, instructed by Allianz, has worked as an Inspector of Taxes with HMRC as well as being a partner and head of the tax dispute resolution team in a large firm dealing with issues such as the kind of tax mitigation/avoidance schemes that are in issue in this case.

111. As is noted below, the experts agreed that the key issue is whether transactions are artificial and that this may be judged by applying the summary of the law given by Lord Walker at [22] in the judgment of the Privy Council in *Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica* [2012] 1 WLR 1794:

> "*…in this context a transaction is "artificial" if it has, as compared with normal transactions of an ostensibly similar type, features that are abnormal and appear to be part of a plan. They are the sort of features of which a well-informed bystander might say, "This simply would not happen in the real world." Recognising a transaction as artificial in this sense is an evaluative exercise calling for legal experience and judgment. It is certainly not an ordinary question of primary fact…*"

112. Mr Wentworth-May's approach in his first report was to consider where, as a matter of general tax law, any particular investment could be treated as a Tax Avoidance Investment, defined in his report as "*loans, investments or trusts which were pre-planned artificial transactions designed to achieve a specific tax outcome including tax loss, tax allowances or tax exemption*." His focus was on the investment itself not the investment vehicle.

113. Mr Francis looked at the individual investment vehicles and asked a series of questions to consider whether the investment vehicles were artificial:

(a) Did the investment vehicle produce a tax result which did not reflect the economic reality of the investment vehicle's transactions (e.g. a tax loss where no financial loss was suffered)?

(b) Did the investment vehicle achieve, by design or not, a result that was not intended by Parliament?

(c) Was the investment vehicle designed to exploit shortcomings in legislation?

(d) Did the investment vehicle knowingly or deliberately claim tax relief in circumstances where the investor/user did not qualify for the aforementioned tax relief?

(e) Was the only purpose of the investment vehicle to produce a tax advantage?

(f) Did the investment vehicle have a commercial purpose?

(g) Did the investment vehicle users have knowledge and regard of the workings of the investment vehicle and the intended outcome?

(h) Did the investment vehicle users have an appetite or history in participating in other artificial investment vehicles?

(i) Did the investment vehicle contain steps only implemented to take advantage of tax relief which the investor/user would not ordinarily qualify for were it not for the investment vehicle?

(j) Did the investment vehicle contain a legitimate or commercial transaction which was only entered into as a condition of a larger pre-ordained arrangement?

(k) Did the investment vehicle arrangements align with commercial or economic norms?

(l) Was participating in the investment vehicle a reasonable and genuine course of action?

114. Applying those principles, Mr Francis considered the EIS investments that are in play in this case and drew together his conclusions in a table. His conclusions in that table were revised in the light of certain additional information that became known after his main report was prepared, as considered in his addendum report of 15 November 2024.

115. Mr Wentworth-May then commented on Mr Francis' assessment of many (though not all[73]) of the individual investment vehicles within his supplemental report. In doing so, he raised various points of disagreement with Mr Francis as to the criteria set out in the preceding paragraph.

(a) *Did the investment vehicle produce a tax result which did not reflect the economic reality of the investment vehicle's transactions (e.g. a tax loss where no financial loss was suffered)?*

This is a key indicator of artificiality, although the focus is on whether the investment, rather than the investment vehicle produces a tax result for the investor that does not reflect economic reality.

(b) *Did the investment vehicle achieve, by design or not, a result that was not intended by Parliament?*

Again, this is a key indicator of artificiality, although the focus is on whether the investment, rather than the investment vehicle produces a tax result for the investor that does not reflect economic reality. However, Mr Wentworth-May would add that "*where an investor and the controlling mind of the investment vehicle enter into arrangements to ensure that the investment vehicle was established in a way that allowed the investment to obtain a tax result contrary to the intention of Parliament, then those arrangements are likely to be artificial.*"

(c) *Was the investment vehicle designed to exploit shortcomings in legislation?*

Again this is a key indicator of artificiality, though can be seen as an aspect of (b).

(d) *Did the investment vehicle knowingly or deliberately claim tax relief in circumstances where the investor/user did not qualify for the aforementioned tax relief?*

This is a feature of tax evasion not of artificiality. As Mr Wentworth-May puts it, "*where the individual (or individuals) responsible for establishing and operating an investment vehicle (likely to be, but not necessarily, the directors of that vehicle) sets up an investment vehicle in a way that they know didn't qualify for EIS relief (or where they were disinterested whether it qualified for such relief), but they still*

[73] Mr Wentworth-May makes the point that where he agrees with Mr Francis' reasons and conclusions that investment vehicles are not artificial, he has not commented in his report; hence where Mr Francis considers the investment vehicle not to be artificial, Mr Wentworth-May can be taken to agree with him.

*induce investments into that vehicle on the basis that they qualify for EIS relief, then that is not evidence that the investment itself was artificial from a tax perspective, because that investment could never qualify for EIS relief, and so such an investment cannot have had any abnormal features which are intended to achieve a tax result that is contrary to the intentions of Parliament*."

(e) *Was the only purpose of the investment vehicle to produce a tax advantage?*

This may be a feature of artificiality. But, "*where the main purpose of an investor is to make a commercial investment, then the different purpose of the investment vehicle cannot mean that the investment itself is designed to achieve a specific tax outcome, in the sense of having the obtaining of such a tax outcome as its main purpose*."

(f) *Did the investment vehicle have a commercial purpose?*

This is a "red flag" which would suggest that an investment could be artificial, and would justify further investigation by the relevant HMRC inspector, but does not by itself make an investment artificial in nature.

(g) *Did the investment vehicle users have knowledge and regard of the workings of the investment vehicle and the intended outcome?*

This is a "red flag" which would suggest that an investment could be artificial, and would justify further investigation by the relevant HMRC inspector, but does not by itself make an investment artificial in nature.

(h) *Did the investment vehicle users have an appetite or history in participating in other artificial investment vehicles?*

This is a "red flag" which would suggest that an investment could be artificial, and would justify further investigation by the relevant HMRC inspector, but does not by itself make an investment artificial in nature.

(i) *Did the investment vehicle contain steps only implemented to take advantage of tax relief which the investor/user would not ordinarily qualify for were it not for the investment vehicle?*

This is likely to be an indicator of artificiality.

(j) *Did the investment vehicle contain a legitimate or commercial transaction which was only entered into as a condition of a larger pre-ordained arrangement?*

This is likely to be an indicator of artificiality.

(k) *Did the investment vehicle arrangements align with commercial or economic norms?*

This is a "red flag" which would suggest that an investment could be artificial, and would justify further investigation by the relevant HMRC inspector, but does not by itself make an investment artificial in nature.

(l) *Was participating in the investment vehicle a reasonable and genuine course of action?*

This is a "red flag" which would suggest that an investment could be artificial, and would justify further investigation by the relevant HMRC inspector, but does not by itself make an investment artificial in nature.

116. Drawing together the opinions of the two experts on the individual investment vehicles,

| Investment Number | Investment Name | Type | Mr Francis considers to be within his definition of artificial | Mr Wentworth-May considers to be within his definition of artificial |
|---|---|---|---|---|
| 1 | 10 Things Films Ltd | EIS | No, principles not engaged. | |
| 2 | Absolutely Anything Plc | EIS | No, principles not engaged. – see addendum report. | |
| 3 | Active in Style Ltd | EIS | Yes, principles (d), (e), (h), (i), (k) and (l) | No |
| 4 | Addington Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f) (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 5 | AKL Research and Development Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 6 | Anonymous Endeavour Ltd | SEIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | |
| 7 | AX Capital Ventures Ltd | SEIS and EIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | |
| 8 | Base Entertainment (UK) Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 9 | Bette Davis is Alive and Well and Living in Liverpool the Movie Ltd | SEIS | No, principles not engaged. | No |

| Investment Number | Investment Name | Type | Mr Francis considers to be within his definition of artificial | Mr Wentworth-May considers to be within his definition of artificial |
|---|---|---|---|---|
| 10 | Blazing Productions Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 11 | Blonde to Black Pictures Two Ltd | SEIS and EIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | No |
| 12 | BNN Technology Plc | Share investment | No, principles not engaged. | No |
| 13 | Broadlane Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 14 | Capsicum Grand Prix Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 15 | Car Seller International Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 16 | Cardioprecision Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 17 | Carpalla Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 18 | Crown Talent and Media Group Ltd | EIS | Yes, principles (d), (e), (f) (g), (k) and (l) engaged. | No |
| 19 | Cuchifritos Restaurant Ltd | SEIS | Yes, principles (e), (f) and (h) engaged. | No |
| 20 | Dimson Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 21 | Ellenglaze Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f) (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 22 | Encore Theatre Productions Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 23 | Evolution Digital Films Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 24 | Fairytale Films Ltd | SEIS and EIS | Yes, principles (d), (e) and (h) engaged. | No |
| 25 | Falling Snow Ltd | EIS | No, principles not engaged. – see addendum report. | No |
| 26 | Film Rights Exchange Ltd | Film Rights Business | Yes, principles (b), (c), (d), (f), (g), (k) and (l) engaged. | Yes, in so far as funded by loans |

| Investment Number | Investment Name | Type | Mr Francis considers to be within his definition of artificial | Mr Wentworth-May considers to be within his definition of artificial |
|---|---|---|---|---|
| 27 | Five Foot 2 Blonde Ltd | EIS | No, principles not engaged. – see addendum report. | No |
| 28 | Fivelane Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 29 | Fusion Festivals and Events Ltd | Corporate Bond & EIS | Corporate Bond -no. principles not engaged. EIS investments pre-15 March 2018 — no, principles not engaged.<br>EIS investments post 15 March 2018 — yes, principles (b) and (d) engaged. | No |
| 30 | Garras Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 31 | Global Brands Licensing PLC | Share Gifting | Yes, principles (a), (b), (c), (e), (f), (i) and (k) engaged. | Potentially yes |
| 32 | Go Big Ltd | Seed EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 33 | Green Waste Group Ltd | Seed EIS and EIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | No |
| 34 | GweedyMe Limited | EIS | No, principles not engaged. | No |
| 35 | Hallworthy Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 36 | Hekamiah Holdings Ltd | EIS | Yes, principles (d), (e), (g), (h), (k) and (l) engaged. | No |
| 37 | Idless Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 38 | Intensifi London Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 39 | Kerris Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 40 | Lawyer Services Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 41 | Livewire Events Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |

| Investment Number | Investment Name | Type | Mr Francis considers to be within his definition of artificial | Mr Wentworth-May considers to be within his definition of artificial |
|---|---|---|---|---|
| 42 | Longships Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 43 | Luxure Media Group Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 44 | Marlwood PLC | Share Gifting | Yes, principles (a), (b), (c), (e), (f), (i), (k) and (l) engaged. | Potentially yes |
| 45 | Merrymeet Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f) (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 46 | Myxa Ltd | EIS | No, principles not engaged. – see addendum report. | No |
| 47 | Nelson's Kids Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 48 | New Talent Films (No 1) Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 49 | Northcott Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 50 | NowPresent Ltd | SEIS and EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 51 | Ober Private Clients Ltd | Ober | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 52 | One Giant Gig for Mankind Ltd | EIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | No |
| 53 | Osea Events Media and Management Ltd | EIS | Yes, principles (e), (f), (g), (h), (j), (k) and (l) engaged. | No |
| 54 | Osea Island Events Media & Management Ltd | EIS | Yes, principles (e), (f), (g), (h), (j), (k) and (l) engaged. | No |
| 55 | Panic House Films Ltd | SEIS and EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 56 | PlusMe Ltd | SEIS and EIS | No, principles not engaged | No comment (but can be taken to agree with Mr Francis) |

| Investment Number | Investment Name | Type | Mr Francis considers to be within his definition of artificial | Mr Wentworth-May considers to be within his definition of artificial |
|---|---|---|---|---|
| 57 | Prizefighter Film Ltd | SEIS and EIS | No, principles not engaged | No comment (but can be taken to agree with Mr Francis) |
| 58 | Quoit Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 59 | Red Union Film Three Ltd | SEIS and EIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | No |
| 60 | RFS Entertainment Ltd | Corporate Bond & EIS | Corporate Bond principles - not engaged.<br>EIS - yes, principles (d), (e) and (h) engaged | No |
| 61 | Rosevine Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 62 | Shooting For Socrates The Film Ltd | SEIS and EIS | Yes, principles (d), (e), (g), (f), (g), (h), (k) and (l) engaged. | No |
| 63 | Steffi Productions Ltd | SEIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 64 | Stratton Film Productions Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 65 | Summercourt Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 66 | Switch Generation Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 67 | GweedyMe Ltd/T.B. Seen Ltd | EIS | No, principles not engaged. | No |
| 68 | Talland Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |
| 69 | The Documentary Company Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 70 | Trillionaire Ltd | EIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | No |
| 71 | Uprising Features Ltd | SEIS | Yes, principles (d), (e), (f) (g), (h), (k) and (l) engaged. | No |
| 72 | Veryan Films Ltd | Super EIS | Yes, principles (a), (d), (e), (f), (g), (k) and (l) engaged. | Yes, to the extent that investments of loans were made. |

| Investment Number | Investment Name | Type | Mr Francis considers to be within his definition of artificial | Mr Wentworth-May considers to be within his definition of artificial |
|---|---|---|---|---|
| 73 | Vincent Asian Kitchen Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 74 | Vintage Seekers Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 75 | Vumanity Content Ltd | EIS | No, principles not engaged. | No comment (but can be taken to agree with Mr Francis) |
| 76 | West Park Productions Ltd | EIS | Yes, principles (d), (e), (f), (g), (h), (k) and (l) engaged. | No |
| 77 | WRT Limited/Vicinity Group Ltd | EIS | Yes, principles (d), (e) and (h) engaged. | No |

117. The experts agreed in their joint meeting that there was a scale of artificiality which was a starting point for considering the circumstances of individual investments or investment vehicles. It was common ground that Super EIS and FRB investments were artificial, at least in so far as the relevant loan to achieve the Super EIS scheme or (where relevant) FRB investment was made. If the loan was not made and/or the investment was funded from the individual investor's own personal funds, Mr Wentworth-May considered that the investment would not be said to be necessarily artificial.

118. On the scale of artificiality,

(1) Mr Wentworth-May ranked the investments as follows:

| Rank | Description of investment vehicle | Conclusion on artificiality |
|---|---|---|
| 1= | Regular investments such as investments in companies such as BNN Technology Plc. | Not artificial |
| 1= | Corporate Bonds | Not artificial |
| 1= | EIS and Seed EIS investments with EIS3 or SEIS3 received and no indicators of artificiality | Not artificial |
| 1= | EIS and Seed EIS investments with the purpose of saving tax | If an investor is making an EIS or SEIS investment with the purpose of saving tax, that by itself does not make the investment "artificial." There is a clear distinction between an investment being "artificial" (which is an objective test in relation to the nature of the investment itself) and whether an investment is "designed to achieve a specific tax outcome" (which is a subjective test, and |

| | | |
|---|---|---|
| | | requires consideration of a particular investor's purpose in entering into the investment). If an investor's main purpose of entering into an investment was to achieve a tax saving, then the investment would be "designed to achieve a specific tax outcome," but this does not mean that the investment would be artificial. |
| 1= | EIS and Seed EIS investments which do not meet the criteria (for example not trading). | An EIS or SEIS investment which fails to meet the relevant criteria for relief is not, as a consequence, an "artificial" investment (or more likely to be treated as an artificial investment). In particular, not meeting the statutory criteria for tax relief is not an "abnormal" feature of the investment, and is also not evidence of a specific plan to obtain income tax relief. |
| 2 | EIS and Seed EIS investments specifically designed to obtain relief not entitled to. | If an investor structured their investment to include an abnormal feature, without which income tax relief could not have been available, then such an investment would be artificial. From his review of the available documentation, none of the EIS investments include such a feature. |
| 3 | Super EIS | Where Super EIS investments were in fact funded by loans (with those loans being guaranteed) then, on the information available as to how such loans were intended to be structured, such investments are artificial. |
| 4= | Share Gifting Arrangements | Where investments were made by an investor, and as part of that investment there were arrangements to artificially inflate the value of the shares (in order to increase tax relief on a gift of those shares to charity), then such arrangements are artificial. |
| 4= | Film Rights Business | Where an individual's Film Rights Business was in fact funded by loans (with those loans being guaranteed) then, on the information available as to how such loans were intended to be structured, such investments are artificial. |

(2) Mr Francis ranked the various investment as follows:

| Rank | Description of investment vehicle | Conclusion on artificiality |
|---|---|---|
| 1 | Regular investments such as investments in companies such as | Not artificial |

| | | |
|---|---|---|
| | BNN Technology Plc. | |
| 2 | Corporate Bonds | Not artificial |
| 3 | EIS and Seed EIS investments with EIS3 or SEIS3 received and no indicators of artificiality | Not artificial |
| 4 | EIS and Seed EIS investments with the purpose of saving tax | Where EIS and Seed EIS arrangements were entered into solely for the purposes of making a tax saving, giving no consideration to the commerciality of the investment, these are likely to be artificial given the pure intention of the investor is to save tax which is likely in contravention of the EIS and Seed EIS legislation and the 'no tax avoidance requirement'. |
| 5 | EIS and Seed EIS investments which do not meet the criteria (for example not trading). | Where investments in EIS and Seed EIS companies were made where the investment vehicle was not going to qualify for EIS or Seed EIS relief, because the investment vehicle clearly did not meet the required criteria to afford relief, but the purpose of the investment remained obtaining relief, the investment would be considered artificial. |
| 6 | EIS and SEIS investments specifically designed to obtain relief not entitled to. | Where investments in EIS and SEIS companies were made in a contrived manner, where relief was sought in circumstances where additional steps are required to justify the claims for relief, these would be considered artificial investments. For example, investors seeking EIS relief in a company trading in the hotel business, which is an excluded trade never eligible for EIS relief, through investing in a related 'events' business which affords shares in the Hotel business and claiming EIS relief, would be considered an artificial investment because steps have been taken to obtain EIS relief where those involved know it would not have been available. |
| 7= | Super EIS | Where Super EIS investments were made with the intention of claiming EIS relief on the full investment amount (including the loan amount), such investments are artificial. |
| 7= | Share Gifting Arrangements | Where investments were made by an investor, and as part of that investment there were arrangements to artificially inflate the value of the shares (in order to increase tax relief on a gift of those shares to charity), then such arrangements are artificial. |
| 7= | Film Rights Business | Where an individual's Film Rights Business was funded by loans affording a larger loss than the economic reality, such investments are artificial. |

119. In the joint statement, the experts considered the so-called Ramsay principle[74] to the effect that proper approach to the taxation of a transaction involving "*pre-ordained artificial steps which served no commercial purpose other than to avoid tax, the proper approach was to tax the effect of the transactions as a whole, such that the artificially created capital losses should be disregarded*."

[74] A reference to the decision of the House of Lords in *W T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300– see the joint statement at [C.4.2].

**THE SCOPE OF THE CLAIMS**

**SOI[1] Whether the Claims as pleaded include Seed Enterprise Investment Scheme investments**

**The Claimants' Case**

120. The Claimants' claim is that the investments in respect of which it brings an action or set out in the schedule to the RAPOC. They are defined in paragraph 4 of that document. There is no specific reference to Seed EIS investments, but several of the investments are in fact of that category and the court should focus on the actual nature of the investment, not its label. In particular:

(1) The Block Notification names several of the Seed EIS investments including Finkios Ltd, PerfectSkin the Movie Ltd and Backroads Production Ltd. Therefore, insofar as notification is concerned, the Claimants have notified the scheme, albeit that the investments may have been mis-labelled.

(2) The similarity of Seed EIS investments to EIS investments was acknowledged by Mr Francis, the expert for the Defendant, both in cross-examination and in his report. Whilst it is accepted that the legislative route to qualifying for the tax relief differs, Mr Francis notes a series of similarities in his report:

> "*5.25 For an investor to be a qualifying investor in relation to the relevant shares, they must meet the requirements of Chapter 2, Part 5a, ITA 2007. Many of the requirements relating to the SEIS*[75] *shares are in line with the EIS legislation but the substantive difference is that the investor must not be an employee of the issuing company and not have a substantial interest in the issuing company.*
>
> *5.26 As with EIS, the SEIS legislation specifically prevents an investor qualifying for relief if they received a loan which would not have been made or would not have been made on the same terms, unless the relevant shares were subscribed for by the investor for genuine commercial reasons, and not as part of a scheme or arrangement where the main purpose, or one of the main purposes, is the avoidance of tax.*
>
> *5.27 For shares to be relevant shares, they must meet the requirements of Chapter 3, Part 5, ITA 2007. Many of these criteria are similar to the EIS legislation, with the substantive difference that the money raised must be employed within a longer time period (usually three years) and that the shares must also have been issued within ten years of the relevant first commercial sale, or if the issuing company so*

[75] In this quotation from Mr Francis' report, "SEIS" means Seed EIS.

*elects, the date by reference to which that company is treated as reaching an annual turnover of £200,000.*

*5.28 As with EIS, there is also a no tax avoidance requirement stipulating that the shares must be issued for genuine commercial reasons, and not as part of a scheme or arrangement where the main purpose, or one of the main purposes, is the avoidance of tax.*

*5.29 The advance assurance and procedural processes are very similar to the EIS schemes, with SEIS1, SEIS2 and SEIS3 forms mirroring EIS1, EIS2 and EIS3 forms respectively…"*

(3) Several of the investments, including AX Capital Ventures Ltd, Hekamiah Holdings Ltd and NowPresent Ltd, were said to qualify at different times both as EIS and as Seed EIS schemes.

(4) The Defendants do not consistently distinguish between the EIS and the Seed EIS Investments – see for example Ms Abbott's email of 23 June 2017 at D/34/2.

121. As Mr Chapman KC pointed out in oral closing submissions, there is no necessary inconsistency between a particular investment scheme qualifying as Seed EIS at one stage and an EIS later on given that two have differing but overlapping criteria. The claim is about the investments that are named within the Statements of Case – whether they are correctly identified as Seed EIS or EIS is merely a labelling issue.

122. In these circumstances, the failure specifically to plead the correct nature of the particular investment is of no import. So long as the actual investment as to which the allegations relate is identified, its actual labelling as EIS or Seed EIS is a not a material issue that should prevent the investment being considered as part of the claim.

**Allianz's Case**

123. Allianz draws attention to the failure to plead any reference to Seed EIS Investments within the RAPOC itself and only ambiguous reference ("SEIS") within the Schedule. It rejects the suggestion that, if the Claimants could prove notification of a particular category of investment, the relevant investment falls within the ambit of the claim. As Ms Dixon KC put it in closing submissions, "*Something does not become part of the underlying claims because it is part of the case on notification… it is very important to keep those two things separate…"*

124. Of the various Seed EIS investments referred to in the Schedule at A/12 in the bundle, Allianz contends that some were wrongly labelled as EIS schemes where they were in fact Seed EIS schemes - those are Anonymous Endeavour, Cuchifritos, Go Bog, Steffi Productions and Uprising Features. But there are others where the labelling is wrong not because the scheme is inaccurately

named but because it is not sufficiently labelled because these are schemes that at one stage were subject to the Seed EIS regime and a later stage were subject to the EIS regime. These are AC Capital, Blonde to Black, Fairytale Films, Hekamiah Holdings, Nowpresent, Panic House Films and PlusMe[76].

125. As Ms Dixon KC put it "*My point is the investment companies are named, they are not incorrectly labelled, they are wrongly labelled…You cannot just cut and paste EIS out and put SEIS*[77]*in because for some of them they also have share elements or they have bond elements, film right elements or they are both seed and EIS. It's not just mislabelling."* As she pointed out in oral submissions the Claimants had indicated that they were not proposing to seek permission to amend in this respect and accordingly they had to live with their pleaded case which simply did not refer to Seed EIS Investments.

126. In respect both of this and the second issue, whether Ober Investments are included in the pleaded case, Allianz accepts that it cannot say that it has suffered any prejudice through the failure to plead the claims properly, since the error had come to light before the trial and it has been possible to conduct the case on the basis that the Seed EIS Investments and the Ober Investments may be included within its ambit without this changing the arguments that need to be developed.

**Discussion**

127. I have sympathy with Allianz for the failure to plead the Seed EIS Investments accurately. The fact that this is not a description of some investments but goes further to amount to a failure accurately to particularise the case by distinguishing between investments that were at times subject to the Seed EIS regime and at other time the EIS regime is potentially confusing. But the failure of the Defendant to show any actual prejudice on this issue causes me to hesitate before ruling that it is not open to the Claimants to advance the entirety of their case because of what ultimately is a simple pleading failure.

128. The point can be put another way: would there be any difference to how the case has developed and been presented, had the Claimants pleaded the case as Allianz say they were obliged to? The answer is no, save possibly as to the incurring of avoidable costs that flow from the issue not being adequately or accurately particularised. The parties know where they stand. Admittedly the failure to plead the case accurately may have caused some confusion on route to fully understanding the claim and if, ultimately and but for the ruling on this issue and Issue 2, the Claimants recover costs in circumstances where either the costs that they recover or the

[76] It will be noted that this list includes the schemes noted by Mr Chapman KC to fall within both the Seed EIS scheme and the EIS scheme at different times, albeit that the list of such investment/companies is rather longer.

[77] The transcript says "SEIS," probably correctly - Ms Dixon KC was clearly referring to Seed EIS at this point.

irrecoverable costs of Allianz are shown to be greater than they would have been but for the failure to plead the investments accurately, Allianz would have a powerful argument that the costs order should be adjusted to reflect the incurring of avoidable costs. The calculation of those costs may not be entirely straightforward, but in principle a rough and ready approach should be capable of being adopted to avoid any costs prejudice to Allianz.

129. I do not consider that this principle is to be applied differently where the error arises not through simply mislabelling something but through a failure to recognise the different scheme to which an investment is subject at different times such that the label given to an investment may be wrong at one point in time but correct later on. Such a mistake may be more likely to be the source of confusion than a mislabelling that has remained consistently wrong but where, as here, it cannot sensibly be said that any prejudice is caused by this category of mistake, the same principle of allowing a party to have the entirety of its case decided so long as this can be achieved fairly has equal force. This is consistent with the overriding objective in so far as it involves the court seeking to do justice between the parties whilst being aware of the potential consequences of procedural failings.

130. For these reasons, I accept that, so long as investments are pleaded within the Schedule to the RAPOC then, even if pleaded inaccurately as to type, they are within the ambit of the claim, regardless of whether the misdescription is one that has been consistently made in respect of the investment or is one that is correct at some points but wrong at others. Accordingly, I answer Issue 1 in the affirmative.

**SOI[2] Whether the Claims as pleaded include investments in Ober Private Clients Ltd**

**The Claimants' Case**

131. As regards Ober Private Clients Ltd, this was a company that was expressly mentioned in the March Letter[78], one of the documents that comprises the Akbar Letters. Mr Chapman KC acknowledged in closing submissions that the reference was to "Ober" not to "Ober Private Clients Ltd" but he contends that there is no other company to which this could be a reference.

132. Again, the Claimants accept that Ober is not expressly mentioned in the RAPOC but in so far as any investment in fact falls within that category and the investment itself is listed, the Claimants say that the court should find that there is adequate notification.

**Allianz's Case**

133. Again Allianz points to the absence of any reference to Ober Investments in the RAPOC. In this case however the difference between Ober investments and other investments is of a different nature than that which is considered in the EIS/Seed EIS case. The latter involves investments

[78] See D/4/2.

subject to a specific tax regime. On the other hand, Ober investments are defined by reference to the company in which the investment is made.

134. These investments are listed in the Schedule to RAPOC but are not referred to in the RAPOC itself. The notification of these claims is again said to come in the March letter, albeit that, as Ms Dixon KC noted in closing submissions, the so-called investments listed in that letter is something of a catch-all, since it includes for example Amarone, a company that was lending money to investors, but which has not itself been the subject of investment.

**Discussion**

135. As with Seed EIS Investments, the failure within the body of RAPOC to plead to a case based on this kind of investment could well have led to a confusing picture. In the event, it has not done so. For the same reasons, I conclude that the failure properly to particularise the claim in this regard should not be a bar to the Claimants including such investments within the scope of this claim. The same caution as to any potential costs consequences applies.

**ALLEGED NOTIFICATION PURSUANT TO THE AKBAR LETTERS**

**SOI[3] (Issue 2) - What were the facts of which White & Co was aware by virtue of the March Letter and/or the 9 April Letter and Witness Statement ("the Akbar Letters")?**

**The Claimants' Case**

136. I have noted above that the Akbar letters comprise the March Letter and 9 April Letter, together with the Levy Witness Statement that was included with the latter. The Claimants contend that the Akbar Letters made White & Co aware of matters in respect of all three of the categories of awareness noted at [40] above, namely Advice Awareness, Loss Notification and Risk of Claim Notification.

137. Advice Notification was:

(1) That clients expected to make significant returns on their investments;

(2) Mr Levy's clients were complaining of inappropriate advice involving investments in Film Rights Exchange Limited, Vintage Seekers Limited, Crown Talent & Media Group Limited, WRT Limited/Vicinity Group Limited, Luxure Limited, 10 Things Limited, Luxure Media Group Limited, Osea Island Resort Limited, Falling Snow Limited, New Talent Films Limited, Amorone Investments (Guernsey) Limited, Vicinity Group Ltd and Ober Private Clients Ltd (together "**the Akbar Letters Companies**");

(3) White & Co had given advice to the Akbar Claimants including as to the tax effect of the Akbar Claimants' investments;

(4) White & Co had advised the Akbar Claimants as to the level of risk involved in the investments, albeit that White & Co had stated that this was not investment advice.

138. Loss Notification was to the effect that:

(1) The potential claims related to allegations that White & Co had:

(i) advised as to the qualification of the investments for tax relief; and

(ii) advised that the investments were likely to produce a profitable return in the long-term;

(2) The Akbar Claimants did not in fact qualify for tax reliefs and exemptions;

(3) The Akbar Claimants were unable to recover their investments, had incurred costs in resolving their tax positions and/or had paid penalties to HMRC.

139. Risk of Claim Notification was as follows:

(1) The Akbar Claimants were intimating claims against White & Co in negligence and in breach of duty in respect of its advice concerning investment and in its tax advice;

(2) The potential claims went beyond merely the Akbar Claimants;

(3) The potential claims intimated against White & Co in respect of EIS Investments were the same or similar claims or causes of action pursued by Mr and Mrs Baxter against White & Co from 2014 under claim number B40MA145 ("**the Baxter Claim")** which White & Co had settled in 2017, a claim relating to an investment in Crown Talent & Media Group Ltd (one of the Akbar Letters Companies)[79].

**Allianz's Case**

140. Broadly speaking, Allianz accepts much of the Claimants' stated case on the contents of the Akbar letters and their meaning. In its written submissions, it accepts that the communications would create awareness that the Initial Akbar Claimants were claiming that White & Co had given them negligent advice in respect of their investments in named company and that as a result they would be making claims of damages against White & Co. Allianz's issue is with the suggestion that "*the potential claims went beyond merely the Akbar Claimants."* The documents do not refer to any investors other than the Akbar Claimants nor do they refer to any other investment vehicles than the named companies, all of which were companies into which the Akbar Claimants were said to have invested.

[79] The Baxter Claim is pleaded at paragraph 35.7.2 of the RAPOC as a claim for "*breach of professional liability on the part of [White & Co] and misrepresentation or misstatement by Mr White in respect of investment advice involving inter alia EIS investment concerning Crown Talent & Media Group Ltd and Falling Snow Ltd*." This is admitted as an accurate description of the allegations made in the Baxter Claim – see RRAD104. There is no evidence as to the detail of the misrepresentations or misstatements that were alleged in the claim.

141. The Akbar Letters are careful to identify the investors and companies to which they relate and do not suggest that others, on whose behalf claims might be made, had lost out as well or that other investment vehicles were being contemplated as the basis of claims. Both the March Letter and the Levy Witness Statement set out a table of specific investments made by each of the Initial Akbar Claimants into the named companies. White & Co could have done no more than guessed whether it was being suggested that other investors and/or other vehicles might have been the subject of the same or similar allegations.

**Discussion**

142. The matters of which White & Co can be said to be aware as a result of the Akbar letters is largely apparent from the face of those letters, which is to say that the named (but no other) investors might bring claims in respect of the stated investments (but no others). The letters do not make the reader aware of facts beyond that which is stated in them. It is possible that such facts might be implicit, but there is nothing internal in the wording of the letter that would make the reader consider that other claims might arise. To the contrary, the understandable detail into which the letter goes implies that these are the only potential claims known about to the author of the letter and therefore the only claims that the author is raising with White & Co.

143. I accept that any reader of the letter who knew that White & Co had advised these and other clients in respect of other investments might suspect that, if these were good claims, there would potentially other good claims to be made. That suspicion would arise from awareness of facts outside of the contents of the letter (specifically the details of the practice of White & Co).

144. It is necessary to bear in mind that notification clauses of the kind with which we are dealing here act potentially to the benefit of the insured (and therefore potentially to the third party who has a claim under the 2010 Act), since it enables the insured to obtain indemnity in respect of potential claims where otherwise it might have to declare the existence of such claims and risk insurance cover being declined or only offered on special terms before the claim itself has been notified. But if, as Allianz contends, the price of such extended cover is the obligation to notify potential claims at the "awareness" stage, an overly broad interpretation of awareness may cause irremediable prejudice to the insured.

145. It follows that the contents of the letter should not be interpreted broadly, drawing in facts which the informed reader might know from other sources. Rather, it should be looked at on the face of the words used. Those words simply make White & Co aware that the Initial Akbar Claimants intend to make a claim against White & Co in respect of negligent advice in relation to investments in specific named companies.

146. Looked at in terms of the Claimants' breakdown of the issues here, I accept that the Akbar Letters gave the advice notification and loss notification of which the Claimants speak. However, it only

gave the first element of the risk of claims notification, that is to say that "*The Akbar Claimants were intimating claims against White & Co in negligence and in breach of duty in respect of its advice concerning investment and in its tax advice.*" It did not make White & Co aware of the potential claims of others, nor did it make White & Co aware that "*The potential claims intimated against White & Co in respect of EIS Investments were the same or similar claims or causes of action pursued by Mr and Mrs Baxter against White & Co from 2014 under claim number B40MA145 which White & Co had settled in 2017, which related to an investment in Crown Talent & Media Group Limited, itself one of the Akbar Letters Companies*." For the sake of completeness, I should say that this does not mean that White & Co may not have been aware of these latter two matters on or after reading the Akbar Letters; simply that it was not the Akbar letters that made them aware of this.

**SOI[4] (Issue 3) - Were those facts such as to lead a reasonable person in the position of White & Co to consider that a claim might be made by claimants who were not listed in the Akbar Letters in relation to:**

**(1) Investments in the companies listed in the Akbar Letters;**
**(2) EIS, SEIS and/or FRB Investments not listed in the Akbar Letters by reason of those investments being:**
**(a) The types of investment expressly mentioned in the Akbar Letters, or**
**(b) As the Claimants must prove, "similar investments" to the investments listed in the Akbar Letters?**

**The Claimants' Case**

147. The Claimants contend that a reasonable person in the position of White & Co would know the nature of its practice, including that it had advised other investors and that the advice covered other companies than those named. On receipt of the Akbar Letters, the reasonable person would consider that any client who invested in the companies named in the Akbar Letters might make the same allegations as the Akbar Claimants because any client investing in the same company or companies might face the same challenge from HMRC and suffer the same investment outcome.

148. It is reasonable to infer that White & Co knew (and that the reasonable person in White & Co's position would have known) that White & Co's approach to the tax treatment and presentation of EIS Investments, Super EIS Investments and FRB Investments was substantially similar. Therefore a reasonable person would consider that any client who invested in EIS Investments, Super EIS Investments or FRB Investments may make the same allegations as the Akbar Claimants.

**Allianz's Case**

149. Allianz contends that a reasonable recipient of the Akbar Letters in White & Co's position would not have formed the view that, just because the Initial Akbar Claimants were making claims

against White & Co, there was a risk of claims being made by (i) other investors, or (ii) in respect of other investments. That is because the allegations were all referable to advice given by White & Co to the Initial Akbar Claimants, But no other investors were named and no other investment companies were identified. There was quite simply no "*substratum of underlying external fact"* which might give rise to the circumstances that might be notified.

150. Ms Dixon KC cautioned that there was a particular danger of seeking to interpret documents as giving notification to an insurer where the insurer could not reasonably have anticipated or understood that to be the purpose of the documents. She gave as an example of this the 9 April letter annexing a witness statement that exhibited Particulars of Claim and other documents and said, "*I have some horror about what that*[80]*would mean if insurers had to scrutinise exbibits to documents that they were provided with to see if there were any possibility that they contained a scintilla of something beyond* [what] *they had been told was the notification."*

**Discussion**

151. I have indicated in respect of SOI[3] that the facts communicated by the Akbar letters are to be judged from their internal contents, not by looking at the wider picture. But if "awareness", in the sense of being furnished with information which the insured reasonably thinks might give rise to a claim, is a factual matter to be judged on the basis of their state of mind, I see no reason why such awareness might arise not only from facts communicated to the insured but also from the insured's own knowledge of relevant matters. I referred above to the hypothetical personal injury barrister who habitually misadvises on the applicable limitation period. Assuming that the barrister knows that they have given this advice on many occasions, once they are made aware that the advice is or may be wrong, they equally become aware that other claims might flow from the advice. Without a detailed audit, the barrister might not know how many claims, nor may they be able to remember the particular litigants whom they have advised. But I do not see they would lack the necessary awareness of the potential of a claim.

152. One can test this issue by looking at whether this hypothetical barrister, who at the expiry of one professional indemnity insurance policy is seeking a replacement policy. Would they be under an obligation to declare the fact that it had come to their attention that they had been habitually misadvising clients because they had misunderstood or misapplied the relevant limitation period? Insofar as their awareness was concerned, it is at least arguable that they are aware of the potential for a claim and, dependent upon the particular questions raised of them, may have to declare those matters. The corollary is that a condition of a policy or a minimum term, such as that with which the court is dealing, is liable to be interpreted in a manner generous to the barrister who might

[80] That is to say, a definition of notification that included such a communication.

otherwise find themselves uninsured and uninsurable in respect of a potential professional liability.

153. Consideration of the state of mind of White & Co therefore involves consideration of their practices, including what advice they had given and to whom. It is the Claimants' case that they advised many other investors in respect of many other investments and this advice was similarly flawed, to the extent that the Claimants have felt able to seek to amend their claim to plead fraud. For the moment, there is no evidence from which the court could reach such a conclusion even if the pleading had been admitted (which it as not), but there is evidence to support the contention that there are many other investors who have been advised by White & Co and whose affairs have been investigated by HMRC, often leading to an unsatisfactory conclusion for the investor because of the failure of the investments to achieve the tax benefits that had been anticipated. There is further evidence that the investments themselves were not making good returns for the investors.

154. Looked at through the lens of Toulson LJ in *Kidsons* at [139] – [141], cited above, this is at least a case where there could well be a finding of the real possibility, if not the real risk of a claim. The reference by Rix LJ to a "*substratum of underlying external fact"* (my emphasis) might be thought to require the circumstances to lie outside of matters known to the insured but not to others, for example the knowledge of one's own deficient practice. But I see nothing in the authorities to support the proposition that the knowledge that is relevant to the risk of a claim must arise independently of the state of mind of the insured itself. Such a requirement would be difficult to adjudicate on, since it might well require the court to examine whether factors that were undoubtedly known to the insured were sufficiently known by others to make them "external" in this sense.

155. It might be said that, if the insured's own knowledge of circumstances is sufficient to give rise to the existence of matters that could be subject to notification, this condemns the court to having to examine the internal thinking of the insured in a way that will create uncertainty about whether the obligation to notify has arisen. Undoubtedly it would be undesirable to encourage ambiguity in what amount to relevant circumstances for notification purposes, though the existence of such uncertainty is already inherent in the spectrum of cases contemplated by Toulson LJ in *Kidsons.*

156. In reality though the uncertainty in permitting (or indeed requiring) the knowledge or belief of the insured themselves to form part of relevant circumstances in terms of their awareness is likely to be unproblematic:

(1) In so far as the insured wishes to rely on that knowledge to declare a relevant circumstance, it is clear that it would have to make the relevant matter known to the

insurer (see SOI[6] below for a discussion of this with regard to the facts of the instant case).

(2) In so far as the insurer sought to argue that the knowledge obliged the insured to declare the circumstances in order to establish the right to indemnity, the insured would need to identify objectively verifiable material from which the court could conclude that the insurer had that knowledge. The mere assertion of knowledge or suspicion of facts would not suffice without some outward clothing that could allow the court to make the relevant finding.

157. It follows that the fact that relevant facts or suspicion lie within the mind of the insured is no bar to a finding that the insured had sufficient awareness that a claim might be made to trigger the right and/or obligation to declare that circumstance to the insurer.

158. On receipt of the Akbar Letters, White & Co must have been aware of the pattern of advice that they had given, and must have realised that that which was being alleged might apply to many other investors and many other companies. Put simply, these letters would have been liable to cause consternation in the mind of anyone who knew the scope of the work that White & Co had been undertaking. (One might similarly suspect that the hypothetical personal injury barrister, who is suddenly told that the limitation advice given routinely over several years is in fact wrong, would feel horrified on realising how many clients may have been misadvised.)

159. Whether on the facts of this case it can be said that the Akbar letters made White & Co aware of matters that might be relevant to potential claims either on behalf of other clients or in respect of other investments is a fact sensitive issue. The Claimants' case is that White & Co were well aware that that they were habitually misadvising clients. Indeed, at its (unpleaded) highest, the Claimants contend that this was a fraud on clients. But whether in fact receipt of the Akbar Letters can be said to have made White & Co aware of specific facts beyond those which are stated in the letters will depend upon a consideration of the practice of White & Co in terms of advising on investments and the possibility that the contents of those letters. It might have been the case that, even on receiving the Akbar Letters, White & Co considered that no claims could properly be bought either by the Initial Akbar Claimants or indeed by anybody else whom they had advised in similar terms. Whether that is in fact a tenable argument is one that may fall to be determined during the Liability Trial. Certainly, on the evidence before me, a reasonable person receiving the kind of notification set out in the Akbar Letters would probably have concluded that similar considerations might apply to investors such as the Sample Claimants and, having heard from the Sample Claimants, there is good prima facie evidence that they and other investors in a similar position would be liable to contemplate litigation against White & Co.

160. It follows that, given the relevant background knowledge of the advice that White & Co had given, a reasonable person in the position of White & Co would have concluded that claims might be made by persons other than those listed in the Akbar Letters in respect both of the investments referred to in those documents and to other similar investments, such as EIS, Seed EIS and FRB schemes.

**SOI[5] (Issue 5) - On a true construction of (a) the 5 April 2017 Email (sent by MFL to Allianz) and its attachments and (b) the MFL 10 April 2017 Email and its attachments, were these emails a notification of circumstances which might give rise to a claim?**

**The Claimants' Case**

161. The Claimants contend that the emails of 5 April 2017 and 10 April 2017 from MFL to Allianz amounted to the notification of circumstances which might give rise to a claim since:

(1) The subject heading of the 5 April 2017 Email states that it is a notification.

(2) The text of the 5 April 2017 Email suggests that the contents be noted against the policy and panel solicitors be instructed.

(3) The 10 April 2017 Email, even putting aside the Levy Witness Statement, made clear that litigation was in contemplation and that therefore the insurers might be called upon to respond under the policy.

162. Within their written submissions on SOI[6], the Claimants deal with the question of whether the Akbar Letters amount to Hornet's Nest Notification. In my judgment, this issue needs to be considered as part of SOI[5], since it involves consideration in the first place of whether the communications amounted to the notification of circumstances rather than what was being notified, albeit that if the court accepts that it does amount to the notification of circumstances, this raises a further question of what the scope of that notification was, to which Hornet's Nest Notification may also be relevant.

163. The Claimants make the following points as to Hornet's Nest Notification:

(1) Although the 5 April 2017 Email and the 10 April 2017 Email did not themselves refer to potential claimants other than the Akbar Claimants, they did not expressly say they were restricted to the Akbar Claimants.

(2) The March letter and the Levy Witness Statement contained observations of general application suggesting a systemic failure by White & Co in its duty to clients, which objectively would have been understood by the reader as going beyond the Abkar Claimants. A good example of this is the reference to the investment companies with the following comment:

> "*It does not appear that any of the companies mentioned above have ever traded. It would appear from the records that most if not all of my clients' investments have not been recorded on the company documents.*
>
> *It would appear* that *the companies have been formed purely for the purpose of receiving investment money with no intention of trading. In several of the instances money has been solicited from my clients immediately before application for the winding up of the company or the conclusion of any activity whatsoever of the company when it was not possible that the officers of the company including Mr White had any belief that the company was viable or likely to trade*."

(3) The exhibits to the Levy Witness Statement are said to reveal that White & Co was advising other investors, not just the Akbar Claimants. This can be seen for example in the list of shareholders of Vintage Seeker Ltd, a company referred to in the March Letter, at D/9/10 which contains the names of people whose contact details are shown as "C/o White & Co" but who are not amongst the Initial Akbar Claimants.

(4) The notifications were not restricted to the Akbar Claimants and so could relate to any client investing in the same type of investments as the Akbar Letters Companies who received similar advice.

(5) Allianz comments in the email of 10 April 2017 that, "*Until we know more details about the claims I am unable to confirm how many Claims (as defined by the Policy) are being made*."

(6) As Mr Chapman KC said in oral closing submissions, the Akbar Letters show that "*there is a serious problem with the structure of these investments.*" However the scale of that problem is unknown.

164. On the other hand, the Claimants deny that these were notification of claims under the policy.

(1) The Akbar Letters were not referred to as Claims within the emails;

(2) The Akbar Letters were not in fact claims since they sought pre-action disclosure; they cannot be treated as a "*written or oral demand for compensation in respect of a Wrongful Act of an Insured"* (the definition of a claim in the Allianz Policy wording at D/1/5).

**Allianz's Case**

165. Allianz contends that the 5 April 2017 email from MFL to it, including the March Letter from Mr Levy on behalf of the Initial Akbar Claimants, was notification of a Claim (not a circumstance), namely the demand by the Initial Akbar Claimants in respect of advice they had received by

White & Co in relation to the specified investments. The further email from MFL on 10 April 2017 sought to bring the Levy Witness Statement and further information from White & Co in relation to that Claim to the attention of Allianz. It was not, on Allianz's case, the notification of either a Claim or a circumstance.

**Discussion**

166. I consider first the 5 April 2017 Email. That included the March Letter from Mr Levy that stated amongst other things that:

(1) Mr Levy acted on behalf of the Initial Akbar Claimants;

(2) White & Co had advised those Claimants in respect of various investments;

(3) The advice given by White & Co was "*inaccurate and/or deceitful and/or negligent and/or in breach of professional duty and/or in breach of fiduciary duty*";

(4) The Claimants would be seeking damages and/or restitution and/or other relief.

167. Contrary to the position taken by the Claimants, this was the clearest notification of a claim, in the sense of a written demand for compensation in respect of wrongful acts of White and Co. It is indeed correct that the allegations are not referred to as "Claims" and that Mr Levy sought the disclosure of documentation. But the absence of that documentation did not prevent him asserting what is obviously a "claim" both within the meaning of that phrase in the Allianz policy wording and indeed within the ordinary meaning of that word (which is similar to the Allianz wording).

168. There is nothing in principle to prevent the same communication being both notification of one or more claims and a notification of circumstances. But, as I have identified above, the language of the letter does not imply that there were other claims to be brought, whether by other claimants or in respect of other investments.

169. If the communication with Allianz had been accompanied by assertions (from White & Co or someone else with the relevant knowledge) to the effect that there would or might be other claimants and/or other investments in the same circumstances as those named within the March Letter, it may be that the email could have been interpreted as the notification of broader circumstances but the material before the court simply does not support that conclusion. Without the knowledge of other potential cases, I do not see that this communication to Allianz could be interpreted as anything other than it appears on its face, namely a notification of specific claims.

170. As to the email of 10 April 2017, the enclosures from Mr Levy (the draft statement and his letter of 9 April 2017) provide further material in support of the allegations contained in the March Letter. In particular, details of the various investment companies. That information might have caused White & Co some concern about other investors with the same companies, but there is

nothing in the communication with Allianz that would be liable to cause it to think that other claims were in contemplation.

171. In so far as it is suggested that the Hornet's Nest Notification principle applies to either or both of these notifications, the difficulty for the Claimants lies in showing that any circumstances have been notified that might be said to be the "*notification of a problem, the exact scale and consequences of which are not known*" as referred to in *Euro Pools* at [39(iii)]. The very fact that the document refers to specific incidents without suggesting a wider problem tends against this conclusion. In respect of the particular points advanced by the Claimants:

(1) Whilst it is correct that Mr Levy's letter does suggest a systemic problem with the various investment companies, it fails to disclose either that other companies are similarly problematic as investment vehicles or that other investors have any complaints about the named vehicles.

(2) The references in the exhibits to the Levy Witness Statement certainly name other people who may have some connection with White & Co but do not show that others were advised by White & Co or that they have any complaint about such advice.

(3) The notified claimants and companies were not stated to be the full extent of the problem known to the author but equally there is no suggestion that there are or even may be greater problems than those identified.

(4) Allianz comments in the email of 10 April 2017 suggest uncertainty about how many claims will be brought. But the context of this is that the material in the March Letter and the Levy Witness Statement indicates that there are a number of investors/clients complaining about a number of investments, many of them having made multiple investments through the same company (see the table at D/8/3). It is not apparent whether these claims are all discrete or form part of the same claim, or whether they may be subject to aggregation. Certainly, the true reading of the Allianz email could in theory be that there are, in the mind of the author, other potential claims. But there is nothing in the material to make this the more probable explanation. On the contrary, the material otherwise does not imply that there are further claimants or companies beyond those named, as noted above.

172. It follows that I agree with Allianz that the 5 April 2017 Email was notification of a Claim (that of the Initial Akbar Claimants) not the circumstances of a claim or claims, and the 10 April 2017 Email provided further particulars in relation to the Claim of the Initial Akbar Claimants. It did not amount to the notification of circumstances that might give rise to a claim and is not capable of being relied on by the Claimants in this case.

**SOI[6] (Issue 6) - If so, what was the scope of the matters notified to Allianz?**

**SOI[7] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?**

173. It follows from my finding on SOI[5] that SOI[6] and [7] do not fall for determination since I do not consider that the Akbar Letters communicated anything other than the claims of the Initial Akbar Claimants, these being claims that form no part of the litigation before me. In particular it is neither necessary nor possible to analyse the scope of Hornet's Nest Notification in circumstances where the Akbar Letters do not amount to a relevant notification at all.

**ALLEGED NOTIFICATION PURSUANT TO THE BLOCK NOTIFICATION**

**SOI[8] (Issues 8 and 9) - As a consequence of the Block Notification was White & Co aware that advice it had provided clients in respect of EIS and/or SEIS Investments and/or FRB Investments was or might have been negligent, and if so what was the nature of that advice?**

**The Claimants' Case**

174. The Claimants start by noting that White & Co was already aware of the matters set out at in [137] to [139] above (relating to Advice Awareness, Loss Awareness and Risk of Claim Awareness) as a result of the Akbar Letters. The Claimants contend that further awareness in each category arose as a result of the Block Notification.

175. Advice Awareness:

(1) That White & Co had given advice to their own clients as to tax relief under the EIS, Seed EIS and FRB tax schemes;

(2) That White & Co had sought advice from JMW "*on how to mitigate or defend claims by clients*" in respect of allegations that advice provided by them was alleged to be "*wrong*;"

(3) That White & Co was aware on 25 May 2017 that Dr Dipankar Bose (a Claimant in these proceedings) advanced a complaint by his email timed 14:13 addressed to Mr White asserting that he had made investments based on advice given by White & Co.

176. Loss Awareness:

(1) That clients were obliged to pay penalties and interest and "potential related loss" in respect of EIS Investments and the "quantum" would need to be assessed "in due course" once the "identity of each claimant" is identified. The Claimants contend that it would be a reasonable inference from the material in White & Co's possession that Dr Bose was only one of many other clients that White & Co advised to make EIS Investments.

177. Risk of Claim Awareness:

(1) That White & Co was actively considering "*the number of potential claims by complainant applicants*" and such was the magnitude of the potential loss that the "*sums involved may exceed the stated excess in each policy."*

(2) That Dr Bose expected White & Co to indemnify him for his losses, asking them to provide insurance details lest they "*do not have adequate funds to cover the losses of all your clients*."

(3) That HMRC was challenging the timing of claims for tax relief and was considering imposing penalties and interest.

(4) That clients entering into EIS Investments (referred to in the email as "EIS clients") may claim compensation.

178. The Claimants argue that the nature of the advice was:

(1) That the EIS and/or Seed EIS Investments and Super EIS Investments were approved for the Enterprise Investment Scheme and qualified for tax relief;

(2) That tax relief could be claimed on the EIS, Seed EIS and Super EIS Investments;

(3) That the claims to tax relief would be valid at the time that they were made.

**Allianz's Case**

179. Allianz assert that there are several problems with the Claimants' case:

(1) The Block Notification arose because HMRC were investigating cases where investors who had been advised by White & Co had obtained EIS relief prior to the time when they were entitled to it. In contrast, these proceedings are concerned with the allegation that the investors were not entitled to EIS relief at all. Thus the awareness that arose was not of matters relevant to the claim before the court.

(2) The potential claims that were contemplated related not to White & Co but to MKP. In spite of some early ambiguity in the communications, this was made clear by Ms Abbott's email of 23 June 2017, where she states: "*At the current date the clients affected solely relate to [MKP] clients, accordingly no details have been provided for White & Co as we consider no notification is required*."

(3) Ms Abbott provided considerable detail of the clients, their investments and the state of the HMRC investigations in support of a notification on behalf of MKP.

180. Allianz therefore denies the contention that this material amounted to the provision of any notification beyond that for claims that might be made against MKP.

181. In respect of the ambit of that notification, Allianz says that it was limited to claims or potential claims against MKP (not White & Co) arising out of premature claims for EIS relief (rather than negligent advice as to entering into such investments) limited to the people and their specific investments named. During closing submissions, Ms Dixon KC drew my attention to the contents for example of the email from Dr Bose at D/36/1. This makes clear reference to the concern that a premature claim for EIS relief had been made but was not more generally a complaint about the advice to enter into the investment. There is nothing in these communications to cause the recipient to think that a claim along the lines of that now being made was envisaged. Indeed, that is how Mr White interpreted the communication as is apparent from his response at D/37. The mere fact that clients were complaining about delay in getting certificates was not some form of complaint about advice to enter into the transaction at all.

**Discussion**

182. This issue is of course concerned with the state of mind of White & Co. By the time of the Block Notification, that firm was aware of several key matters:

(1) It knew that it was being alleged that it had given advice in respect of EIS schemes.

(2) It knew that that HMRC was challenging the timing of claims for tax relief in respect of investors in such schemes and was considering imposing penalties and interest.

(3) It knew that the Initial Akbar Claimants were accusing it of having given negligent advice in respect of named investment companies and were alleging that they had suffered loss for which White & Co was liable.

(4) It knew that Dr Bose alleged that it (not MKP) had given negligent advice in respect of certain investments and that he had suffered loss in respect of which White & Co was liable.

183. Further White & Co of necessity knew the nature of what it had said to clients and therefore it knew whether advice had in fact been given, and, to the extent that it had, the nature of that advice, the range of investors that it had advised and the spread of investments in which it had given advice. The evidence of the Sample Claimants as to the reasons for their investments and in particular the significance of the tax advantages of the EIS schemes was very much in line with that asserted by Dr Bose in his letter. I have no hesitation in concluding from the totality of the evidence that White & Co was aware that, if the tax benefits from entering into EIS schemes were less favourable than it had advised, investors might complain that they had suffered losses as a result of entering into such schemes, just as Dr Bose was doing.

184. It is of course clear that Ms Abbott was asserting that the only potential liability was that of MKP. That was a statement that appears to have been made on behalf of both MKP and White & Co and

I do not accept that it can be disregarded simply because it speaks of the position of the former – the very point being made is that the claims related to MKP, not White & Co, which is as much (if not more) a statement relevant to White & Co's position vis-a-vis the insurer as it is in respect of MKP's position.

185. However, the assertion that the claims only relate to a potential liability of MKP is inconsistent with several features of the evidence:

(1) That JMW identified White & Co as one of the relevant insured parties in the Block Notification;

(2) That Dr Bose's complaint was addressed to White & Co, not MKP; and

(3) That previously the Initial Akbar Claimants had identified White & Co as the body that had advised it.

186. Taking the contents of the Block Notification with the background knowledge about other associated companies about Advice alleged to have been given by White & Co, I am satisfied that a reasonable person in the position of White & Co would have considered on receipt of the Block Notification that any of the clients whom it had advised about entering into EIS, Seed EIS and/or FRB schemes might complain that they were not obtaining the tax benefits that they had been advised that they could expect to receive.

**SOI[9] (Issue 10) - Were the matters set out in the Block Notification such as to lead a reasonable person in White & Co's position to consider that a claim might be made by:**

**(1) Persons listed in the Block Notification in relation to:**
**(a) Investments identified in the Block Notification,**
**(b) Investments not identified in the Block Notification by reason of, as the Claimants must prove, those investments being:**
**(i) Similar to the investments identified in the Block Notification, or**
**(ii) The subject of similar advice to the investments identified in the Block Notification?**
**(2) Persons not listed in the Block Notification on the same bases as set out in (1) above?**

**The Claimants' Case**

187. The Claimants contend that it is self evident from the matters referred to in respect of SOI[8] that the people named in the Block Notification might bring claims against White & Co, that being the very purpose that the Block Notification was made. As to others:

(1) White & Co knew the detail of the advice that it had given to others;

(2) They knew that named people (the Baxters and Dr Bose) had already complained about the advice they had received and knew what the contents of the advice was;

(3) They knew that they had given similar advice to other people;

(4) They knew that HMRC was raising issues in respect of various EIS schemes;

(5) They knew that number of claimants involved was "*under consideration*" by them and the full extent of potential claims relating to such advice had clearly not finally determined.

188. These features were reflected in the fact that the MFL email of 29 June, which refers to the notification as "Blanket Notifications."

**Allianz's Case**

189. Allianz repeats the point that the evidence from Ms Abbott's email indicates a belief on the part of White & Co that potential claims that were contemplated related not to White & Co but to MKP. In response to the Claimants' argument that the email was written by Ms Abbott on behalf of MKP, not on behalf of White & Co and therefore cannot be treated as evidence of White & Co's state of knowledge, Allianz argues that this is an artificial distinction. Ms Abbott was clearly speaking in the correspondence in her role as director and shareholder of both companies. Further, Allianz lays emphasis on the fact that the Block Notification communications related to the timing of EIS relief, not to whether it was available at all.

**Discussion**

190. I have found that the Akbar Letters amounted to notification of a claim, that is to say the claim of the Initial Akbar Claimants. However, that notification did not extend to claims made by other investors or in respect of other investments referred to above.

191. In looking at White & Co's awareness following the Block Notification, it is again appropriate to bear in mind the range of information that it had now received, as summarised in respect of SOI[8] at [175] to [175] above**.** White & Co knew that others were complaining about the advice that they had received in respect of the tax implications of the EIS and similar schemes. The Baxters had brought a claim (that had settled) and Dr Bose had intimated a claim for losses suffered due to the failure of HMRC to recognise purported EIS investments. The queries that HMRC were now receiving in respect of the people named in the Block Notification were, in the first place, about the timing of claims for EIS relief. However, from Dr Bose's communication, it is quite clear that he is complaining not just about the timing of EIS relief but rather whether it is available at all and that, in this respect, he has been told that *"the rules have been broken*."

192. It important not to judge White & Co's state of awareness with the benefit of hindsight. Knowing what has been pleaded and said in court during the hearing of this case, anyone might be forgiven for thinking that the adequacy of White & Co's advice as to the operation of EIS schemes, in particular the expression of unjustified optimism that such schemes would be approved by HMRC, is the unifying feature of the allegations that are made against them. But applying the test

of "reasonable foresight" as to what White & Co can properly be said to have been aware of when the Block Notification was made, the combination of their knowledge of the advice that they had given and the range of investors whom they had advised, together with the queries that HMRC were raising and the concerns expressed by Dr Bose about whether at least some of the schemes proposed by White & Co properly qualified for EIS, I am satisfied that White & Co were aware that claims might be made by:

(1) Persons listed in the Block Notification in relation to:

(a) Investments identified in the Block Notification; and

(b) Investments not identified in the Block Notification by reason of those investments being:

(i) Similar to the investments identified in the Block Notification, or

(ii) The subject of similar advice to the investments identified in the Block Notification

(2) Persons not listed in the Block Notification on the same bases as set out in the previous sub paragraph.

**SOI[10] (Issue 12) - On a true construction were (a) MFL's email to Allianz on 6 June 2017 at 9:56 and the attachments to that email and (b) MFL's email to Allianz of 29 June 2017 together with its attachments (i.e., the 29 June Email and the 23 June 2017 Email) a notification of circumstances which might give rise to a claim against White & Co?**

**The Claimants' Case**

193. The Claimants repeat their contentions in respect of SOI[8] and SOI[9], laying emphasis on the range of potential claims and the description of the communication as "Blanket Notifications." In so far as it is suggested that Ms Abbot's email of 23 June 2017 might appear to limit the notification to claims against MKP rather than White & Co, the Claimants contend that this email was forwarded as part of a notification which related both to White & Co and MKP, as is apparent for example in the subject line of the email from MFL to Allianz of 29 June 2017.

**Allianz's Case**

194. Allianz again repeats its position in respect of SOI[8] and SOI[9]. The notification that was being given related to a different issue (the timing of EIS relief) and was specified to relate to MKP, not White & Co.

**Discussion**

195. In the first place, consideration is required as to whether the Block Notification was a notification of claim or of circumstances. Giving my finding at [173] above as to the ambit of the

notifications, this was plainly a notification of more than individual claims, but rather circumstances that might give rise to claims.

196. I turn to whether these circumstances might give rise to a claim against White & Co. In considering the previous issue, the awareness or state of mind of a reasonable person in the position of White & Co at the time that the Block Notification was made, I have laid particular emphasis on matters known to White & Co that were not apparent from the fact of the documents that were communicated to Allianz. As I have identified, consideration of White & Co's state of mind necessarily involves consideration of matters known to it that were not necessarily known or apparent to others.

197. But when attention turns to how a reasonable insurer in the position of Allianz would interpret the notification that it received, such material must be approached with care. There are many things known to an insured that are never shared with the insurer yet may be relevant to potential claims.

198. The two emails from MFL to Allianz dated 6 June 2017[81] were expressly stated to be on behalf of White & Co and MKP respectively and, taken alone, might be thought to amount to a notification on behalf of both of those two insured entities. However, the actual text of the emails makes clear that the question of what is being notified requires further consideration not least in light of the 6 June Email from JMW which shows ongoing investigation and which does not distinguish between the position of White & Co and MKP. The further communications sent by MFL to Allianz on 29 June 2017 then expressly limit the notification to MKP.

199. Allianz was not privy to any of the other material referred to above as supporting the fact that White & Co's state of mind was to the effect that claims might be brought against it relating to advice in EIS or similar schemes. Specifically:

(1) For reasons identified above in respect of SOI[5], the Akbar Letters did not amount to notification of anything other than the identified claims and cannot be taken to give notice of problems more generally.

(2) The communications with Dr Bose were not shared with Allianz therefore did not provide the basis for a suspicion of wider problems that might lead to a finding of Hornet's Nest Notification.

(3) It is not pleaded, nor is there any evidence, that Allianz had knowledge of the Baxter Claim which might indicate that White & Co had been in the habit of giving advice of the kind alleged in that case more generally.

[81] Of course, only that stated to be sent in respect of White & Co is suggested to be notification of claims against that firm, hence SOI[10] refers only to a single email of that date, this being the email to which reference is made.

(4) Equally, it is not pleaded, and there is no evidence, that Allianz knew that White & Co were, in general terms, in the habit of giving advice to clients of the kind that now was the subject matter of potential claims against MKP.

200. It would not be right to treat the initial ambiguity about which of MKP and White & Co were said to be the subject of potential claims as providing notice to Allianz of potential claims against White & Co (rather than MKP). The process identified above was one of clarification of what notification was being supplied to the insurer. If an insured is not able to provide such clarification, it risks the adverse consequence for it that an insurer treats it as having notified circumstances (or a claim, as the case may be) that adversely affects the insured's claims history without it ever having intended to make such notification. If an insurer is not able to rely on such clarification, it risks a finding that it has received notification of claims or circumstances which it has been implicitly told (in the information being by way of clarification) that it does not need to treat as such.

201. It follows that I do not find the Block Notification to be valid notification to Allianz of circumstances which might give rise to claims against White & Co.

202. For the sake of completeness, I accept that the Block Notification gave rise to the notification of circumstances which might give rise to claims against MKP, not merely identified claims. I say this because:

(1) MKP is expressly named in the notification.

(2) It is plain from the Block Notification that the full extent of the potential claims is as yet unclear because although the pool of potential investors who might be affected by the claim was set out in the spreadsheet at D/35. Ms Abbott had not however identified precisely which of the members of that subset might be relevant claimants.

**SOI[11] (Issue 13) - What was the scope of any matters thereby notified to Allianz?**

**The Claimants' Case**

203. The Claimants contend that the Block Notification gave notice of potential claims relating to tax advice and investment advice in respect of the companies named in the various documents in respect of EIS Investments, Seed EIS Investments and Super EIS investments and of similar investors and similar investment companies through Hornet's Nest Notification of circumstances that might give rise to such claims.

204. The Claimants contend that Seed EIS and Super EIS Investments are "similar" to EIS Investments, which are the express subject matter of the notification.

205. As regards other investors and other investment companies, the Claimants' written closing submissions adopt the argument as to the nature of such notification which is argued in relation to SOI[6] relating to the Akbar Letters above. In light of my findings on SOI[5], it was neither necessary nor appropriate to consider that issue as part of SOI[6], since I did not accept that notification of circumstances had taken place at all through the Akbar Letters. The situation on this issue differs from that in respect of the Akbar Letters because here I do accept that the notification is not simply of claims but is of circumstances, in that the named people are a set who are potentially claimants but it cannot yet be ascertained which of them are.

206. The Claimants therefore advance their case that there was here notification not only of the specific circumstances of the potential claimants and investments listed in the spreadsheet at D/35. They contend that, whilst the notification specifically identifies EIS Investments[82], the tax similarities between EIS schemes, Super EIS schemes and Seed EIS schemes identified above are sufficiently close to mean that anyone aware of the possibility of claims relating to the first would realise that any advice that was relevant to that investment would be liable to have been informed by similar if not the same thinking as investment in respect of the other two schemes.

**Allianz's Case**

207. Allianz does not dispute that the Block Notification was of circumstances not merely claims, but contends that those circumstances were limited to the pool of named investors and the named companies. There was no wider notification than that and no question of Hornet's Nest Notification arises**.**

**Discussion**

208. In light of my findings on SOI[10], it is unnecessary to consider in any detail the scope of matters notified to Allianz by the Block Notification in respect of White & Co – there were none.

**SOI[12] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?**

**Discussion**

209. In light of my findings on SOI[10] and SOI[11], the answer to his question is self evident. The answer is "no." As with SOI[7], it will not assist to analyse the parties' arguments further on the assumption that the appeal court takes a different view of these issues, since those arguments would need to be reconsidered in the light of the nature of the notification that it was found had been given in the relevant communications, a fact-specific exercise which cannot be conducted in the abstract and without positive findings on SOI[10] and SOI[11].

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[82] See the subject heading to the emails of 6 June 2017, which refers to EIS Investments but not the other two categories.

**ALLEGED NOTIFICATION PURSUANT TO THE KENNEDYS DOCUMENTS**

**SOI[13] Issue 15 - Was White & Co aware of the 19 October Letter and/or the 22 October Letter during the Allianz Policy Period?**

**The Claimants' Case**

210. As I have noted above, Kennedys started to act for White & Co in respect of the Akbar Claim in June 2017. The 19 October and 22 October Letters were sent well after then.

211. The 19 October Letter is of note because, although it relates to the Akbar Claim, it makes assertions that are said to be of broader relevance to other potential claims. It is common ground that Kennedys sent the 19 October Letter to White & Co by the Second November Email (during the Allianz Policy Period) and to that extent its awareness of the contents of the letter during the policy period is not in issue. However I commented at [107] above that the issue in respect of the 19 October Letter is not strictly speaking one of awareness but rather one of whether its receipt by Kennedys was capable of amounting to notification.

212. The potential significance of the 22 October Letter is that it annexes the Freeman Fisher Letter, containing a variety of allegations that Mr Levy is making that are said to be relevant to notification issues. Allianz has made no admission that it was actually sent to or seen by White & Co.

213. But the Claimants draw attention to the evidence that Mills and Reeve, who acted for White & Co earlier in 2017, had been asked to communicate with them rather than with White & Co directly[83]. It is a reasonable inference that Kennedys were instructed on the same terms. Further, the Second November Email shows that Kennedys were keeping White & Co updated on the progress of dealings with Mr Levy. It is therefore a reasonable inference that the contents of the 22 October Letter were shared with White & Co.

**Allianz's Case**

214. As I have noted, Allianz admits that Kennedys sent the 19 October Letter to White & Co[84]. As for the 22 October Letter, Allianz contends that there is no evidence that the letter itself was sent by Kennedys to White & Co, nor that White & Co had received a copy of the Freeman Fisher letter which was enclosed with the 22 October Letter from any other source.

215. Allianz notes the nature of Kennedys' retainer, a joint retainer for both White and Co and Allianz and relating to the claim being pursued by "*Mr Akbar and others*[85]." The retainer involved the investigation and defence of "*this claim"* and reporting to Allianz on *"liability and strategy."*

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[83] See letter of 4 May 2017 at H/4/513.

[84] See RRAD at [98(a)].

[85] See the witness statement of Ms Bushen and the letter of retainer at D/18/1 cited above.

Both Ms Bushen and Mr Roberts say within their statements that the retainer was limited to the Akbar claim.

216. Further, the joint instruction of Kennedys by Allianz and White & Co as co-principals militates strongly against them being treated as the agent of one for the purpose of notification to the other, since this would risk giving rise to a conflict of interest.

**Discussion**

217. As I have indicated, it is accepted that White and Co were aware of the 19 October Letter in November 2017 (that is to say during the Allianz Policy Period). As for the 22 October Letter, it enclosed the Freeman Fisher Letter relating to the issue of defamation. The defamation was alleged by Freeman Fisher in a letter of 4 August 2017, which makes clear that the allegation is one made against Mr Levy personally and /or Elite Chambers Ltd, the business from which he practices.

218. The response to that in the Freeman Fisher Letter, is significant in several respects:

(1) On its face, it purports to respond to allegations against Mr Levy and/or Elite Chambers Ltd, but it repeatedly refers to "*my clients*" as though it is sent on behalf of others, presumably some people who have or may have complaints in respect of services received from White & Co, although they are not named.

(2) It requests material that appears to be at least as relevant to the underling claims of Mr Levy's clients as it does to defending the allegations of defamation, albeit that, since the allegations of defamation arose from statements made whilst representing those clients, the documents might in part have assisted Mr Levy to defend the allegations against him, as well as to advance his clients' cases.

(3) It makes reference to a small number of investment companies (Crown Talent, Vintage Seekers and Summercourt) but would appear to be referring to many other investments that are not identified.

(4) It makes allegations that go considerably beyond what was alleged by the Akbar Claimants in their Re-Amended Particulars of Claim. Most obviously the Freeman Fisher Letter alleges "*fraudulent behaviour*" and "*deception*" (without expressly stating to whom the allegations relate, but clearly in context being a reference to White & Co generally and/or Mr White in particular) whereas the Re-Amended Particulars of Claim is carefully drafted to avoid making such allegations.

219. It is not entirely clear why Mr Levy sent the Freeman Fisher Letter to Kennedys under cover of the 22 October Letter. The text of that letter suggests that it was sent partly for information

purposes ("*you will note that I asked several questions"*) and partly to seek further information ("*please consider responses to the questions that have been posed"*).

220. There is no evidence before the court that Kennedys were instructed by Allianz to act in respect of claims brought by Mr Levy other than under the joint retainer relating to the Akbar Claimants. A general understanding of what was being alleged was likely to be of assistance both to White & Co and to Allianz in dealing with the Akbar Claim further.

221. In the absence of direct evidence that White & Co were shown these Emails and the Freeman Fisher letter, I consider whether I can draw the inference that they were shown to White & Co. As with the October documents, there is no reason to think that Kennedys were not diligent in their discharge of duties. The contents of the Freeman Fisher Letter attached to the 22 October Letter were, as I have noted, of potential relevant to the defence of the Akbar Claim and therefore may have been of interest to White & Co. The proper discharge of Kennedys' duties relating to the Akbar Claim would have included taking instructions from White & Co on any matters that might be relevant to the defence of that claim. In order to know whether White & Co were able to give any instructions relevant to the Akbar Claim in respect of matters that Mr Levy was raising in the letter, it would obviously have been necessary for it to be shown the 22 October Letter and its enclosure, the Freeman Fisher Letter.

222. Further, given that Kennedys are not parties to this action and White & Co had not engaged prior to its liquidation, the failure of any party to produce evidence of such communications is not wholly surprising. Whilst Allianz's disclosure obligations pursuant to the extended disclosure order included the search of documents provided by Kennedys (see in particular the extended disclosure certificate at E/21/3) and I have no doubt that Kennedys will have sought to identify and provide relevant documents, there is no presumption that they have in fact done so and it is perfectly possible that a communication through this route was missed.

223. Taking these points together it is more likely than not that the letter of 22 October 2017 and its enclosure, the Freeman Fisher Letter, were sent to White & Co and that this happened during the Allianz Policy Period[86].

**SOI[14] Issue 16 - In what capacity did Kennedys receive the 19 October Letter and the 22 October Letter and is White & Co to be taken as having been aware of them by virtue of Kennedys having received them?**

**The Claimants' Case**

[86] For the avoidance of doubt, this conclusion (on the balance of probabilities) is unaffected by the correction of the factual error in the draft judgment as to whether the Freeman Fisher letter was sent to Allianz.

224. The Claimants contend that Kennedys received communications from Mr Levy, including the 19 October 2017 letter and the 22 October 2017 Letter and its enclosure, as solicitors acting for Allianz and White & Co under the joint retainer referred to above, and therefore as agent for both.

**Allianz's Case**

225. Allianz equally accept that the letters were received by Kennedys pursuant to the joint retainer, but emphasise that the retainer related to the defence and investigation of the Akbar Claim, not agency for the purpose of receiving notification of claims.

**Discussion**

226. This issue is very closely connected to SOI[13] and my answer to that issue renders this issue academic. Indeed, in closing submissions, the Claimants contend that it is not that necessary to answer this question. For my part, it seems that the issues are better dealt with as part of SOI[16] and SOI[17], but for the sake of completeness I deal with that which the parties invite me to resolve in the List of Issues since the resolution of the issue may be relevant to SOI[16] and SOI[17] in due course.

227. It is common ground that the receipt of the letters was as a result of Kennedys acting under the joint retainer. I accept Allianz's argument that the capacity in which Kennedys received the letters is to be judged by the retainer and that the retainer related specifically to the investigation and defence of the Akbar Claim.

228. The additional question posed in SOI[14], whether White & Co is "*to be taken as having been aware of them by virtue of Kennedys having received them"* is counterfactual and of no relevance to the outcome in light of my finding of fact that White & Co actually received both letters. In so far as SOI[14] raises a point of law, it is academic on my finding of fact. I consider the point in slightly further length in respect of SOI[15]. However in considering that issue, unlike SOI[14], the role in which Kennedys were acting when they sent the First November Emails to Allianz is arguably relevant to the issue of notification. On the other hand, the role in which Kennedys received the October Letters is irrelevant if in fact White & Co had knowledge of the documents in any event, as I find to be the case.

**SOI[15] In what capacity did Kennedys send the First November Emails to Allianz and is White & Co to be taken as having been aware of their contents?**

**The Claimants' Case**

229. The Claimants do not contend that I should make a finding that the First November Emails were seen by White & Co at the time. As the Claimants note, Allianz initially claimed privilege in respect of the First November Emails. That would be consistent with Allianz believing that the content did not relate to the joint retainer, since if they did it is difficult to see how privilege could

attach. Yet there would be no point in claiming privilege if in fact the document had already been shown to White & Co. Hence, the claim of privilege supports the conclusion that the First November Emails were not in fact sent to White & Co. In any event, Kennedys shared the 19 October Letter and the contents of the First November Emails (though not those emails themselves) with White & Co by virtue of the Second November Email. There would be no obvious point in Kennedys separately having emailed White & Co sharing with them the fact that they had emailed Allianz to like effect as they were emailing White & Co. Hence it is understandable that the Claimants do not seek a finding that the First November emails were sent to or seen by White & Co.

230. But the Claimants again contend that these documents were sent to Allianz pursuant to Kennedys' joint retainer with Allianz and White & Co. Since Kennedys was writing to Allianz as agent for both parties, its knowledge and (in this case) its actions are to be imputed to White & Co as a co-principal. As the closing written submissions put it at [56] in respect of the 19 October 2017 Letter, Kennedys sent the letter "*as both* [White & Co]*'s agent and Allianz's agent and so at least in part on behalf of* [White & Co] *(fulfilling the requirement in the 2016 Minimum Terms to be provided by the insured).*" As Mr Chapman KC said in closing submissions, had Kennedys simply been advising Allianz on the risk of further claims against White & Co this agency would not arise. However, because the communication was sent specifically out of the instruction of Kennedys to act on behalf of White & Co, Kennedys should be treated as writing it on behalf of White & Co. That argument would appear to apply with equal force to the First November Emails.

231. The Claimants note also that the contents of the First November Emails related to the events at the meeting on 21 November 2017 at which Kennedys received information from Mr Levy at least in part in discharge of its duties as White & Co's agent so that, again, its knowledge is to be imputed to its principal.

232. In support of this proposition, the Claimants rely on Bowstead & Reynolds on Agency at Article 95(1) to the effect that "*A principal is generally imputed with knowledge relating to the subject matter of the agency which an agent acquired while acting for the principal.*" (It is fair to say however that the text thereafter and the authorities referred to show this this principle is in fact qualified in several respects.)

233. The Claimants draw from this principle the argument that, if the First November Emails were sent to Allianz by Kennedys in their role as agent for White & Co and, if White & Co are to be taken to have knowledge of the contents of their communications, that the emails were sent by

Kennedys as agent for White & Co such that this may[87] constitute notification under the terms of the Policy or the Minimum Term.

**Allianz's Case**

234. Allianz respond to this argument in like manner to its response on SOI[14], namely that, in so far as the emails were sent to Allianz pursuant to the joint retainer, that retainer related to the defence and investigation of the Akbar Claim. Thus, anything that bears on arguments as to whether sending the documents amounted to an act on behalf of the principal or whether the knowledge of the contents of the documents should be imputed to the principal involves an examination of:

(1) Whether the documents were sent pursuant to the retainer; and

(2) If they were sent pursuant to the retainer, they were sent in the context of White & Co either having relevant knowledge or such knowledge being imputed to it under the terms of the retainer because of the knowledge that Kennedys.

235. As to the contention that White & Co is "*to be taken as having been aware*" of the contents, Allianz contend that the nature of any knowledge that White & Co may have either actually had or may be imputed to them is to be examined critically in dealing with SOI[16] and SOI[17].

236. However Allianz rejects the suggestion that in some way Kennedys may have become the exclusive agent of White & Co for the purpose of notifying claims under the Allianz Policy. Several points are relied on:

(1) The retainer letters do not support this interpretation of the retainer;

(2) The evidence of Ms Bushen and Ms Roberts is inconsistent with such a wide retainer having been entered into or having arisen subsequently;

(3) The existence of joint retainer is inconsistent with Kennedys being treated as White & Co's agent for the purposes of receiving information relevant to notification because that would, or risked, placing Kennedys in a position of conflict, for example if the adequacy of notification was in issue.

**Discussion**

237. The First November Emails enclosed the 19 October 2017 Letter, which on the Claimants' case involves notification of circumstances and is relevant to the coverage issue. There is no evidence before the court that Kennedys were instructed by Allianz to act in respect of claims brought by Mr Levy other than under the joint retainer with the Akbar Claimants. However, a general understanding of what was being alleged was likely to be of assistance both to White & Co and to

[87] The Claimants are not at this point dealing with the question of whether this did amount to notification – that is dealt with in SOI[16], SOI[17] and SOI[18]. At this stage, the only issue is whether this is capable of amounting to notification on the basis that it is to be treated as material provided on behalf of White & Co.

Allianz in dealing with the Akbar Claim further. This points to the conclusion that, whether or not the 19 October Letter sent under cover of the First November Emails to Allianz is capable of amounting to relevant notification, in forwarding it to Allianz under cover of the emails, Kennedys were at least in part discharging their duties relating to the joint retainer.

238. I turn to consider whether White & Co is to be taken as being aware of the contents of the First November Emails. Given that the 19 October 2017 Letter and the content of the meeting with Mr Levy were shared with White & Co by the Second November Email, the significance of this issue is narrow in that:

(1) It must have been self evident to White & Co that Kennedys would send a copy of the 19 October 2017 Letter to Allianz. The very fact of sending a copy to one joint principal would make one think that it had been sent to the other. Kennedys appear to have been diligent in their discharge of their duties, most obviously in this respect sharing the 19 October 2017 Letter with White & Co. It is far more likely that they equally shared it with Allianz than that they did not do so. So it is unnecessary to rely on the imputed knowledge of a principal to demonstrate that White & Co probably knew that the 19 October Letter was sent to Allianz.

(2) White & Co, having been sent a copy of the 19 October 2017 Letter in the Second November Email, knew of its contents and were as able as Kennedys or indeed Allianz to judge its purpose, so it is unnecessary for the Claimants to rely on imputed knowledge to establish their own knowledge of its contents.

239. But what the Claimants seek to draw from the imputed knowledge on the part of White & Co is that the First November Emails were sent by Kennedys to Allianz as agent for White & Co. Although the Claimants rely on the passage from Bowstead & Reynolds cited above in support of this contention, in fact the principle set out there is not concerned with the role in which an agent is acting, but rather the knowledge that is to be imputed to the principal. The mere fact that the principal knows of the existence and contents of a document that is sent by an agent to another person does not prove that it was sent for some purpose which lies outside of the bounds of the agency.

240. No authority has been cited for the proposition that an agent engaged under a joint retainer is, as a matter of law, the agent for each of the individual principals in dealing with the other. Indeed, this would be contrary to Article 12 of Bowstead & Reynolds, which states that "*Where two or more persons give authority to an agent to do the same thing, it is presumed that the authority is to act for their joint account only, unless a contrary intention appears from the nature of the terms of the authority, or from the circumstances of the particular case*." There is no evidence here of a

contrary intention nor are any circumstances identified that mean that a different rule should apply in the particular case.

241. The implication of the Claimants' argument as to agency is that the joint retainer of Kennedys was in fact such that Kennedys, who are identified as the agent of White & Co and Allianz jointly for the purpose of investigating and defending the Akbar Claim, became the agent of White & Co exclusively for the purpose of giving notification of other claims to Allianz. I can see nothing in the law of agency that would support a finding that such a change of status could arise, in the absence of evidence that the parities agreed to this and I see no evidence here that any of the relevant players, White & Co, Allianz or Kennedys, agreed to that change of status. Further, it is easy to see that this change of status would potentially put Kennedys in a position of conflict. In particular the very circumstances that arise here might involve enquiries as to whether Kennedys were acting under the joint retainer or under the exclusive agency with White & Co relating to notification of claims. Kennedys would have to be able to demonstrate which agency they were acting under, which might make them in effect the judge of whether they owed duties to the parties jointly in respect of the notification or to White & Co only. A working example of this problem can be seen in the analysis under SOI[17B] below.

242. For these reasons I reject the argument that Kennedys sent the First November Emails as the agent of White & Co. Rather, I find that those emails were sent pursuant to Kennedys' duties under the joint retainer to report to its principals on matters relevant to the investigation and defence of the Akbar Claim.

**SOI[16] Issue 17 - Were the contents of the 19 October Letter and/or the 22 October Letter and/or the First November Emails such as to lead a reasonable person to consider that a claim might be made:**

**(1) By individuals listed in the Kennedys Documents;**
**(2) By individuals not listed in the Kennedys Documents;**
**(3) In relation to Investments listed in the Kennedys Documents;**
**(4) In relation to Investments not listed in the Kennedys Documents by reason of, as the Claimants must prove, those Investments being:**
**(a) Similar to Investments identified in the Kennedys Documents, or**
**(b) The subject of similar advice to the Investments identified in the Kennedys Documents?**

**The Claimants' Case**

243. The Claimants argue that a reasonable person would consider that these documents taken separately or together would lead to the conclusion that:

(1) Claims might be made by persons identified in the Kennedys Documents who had invested in companies named in those documents;

(2) Claims might be made by persons not identified in the Kennedys Documents who had invested in the companies named in those documents;

(3) Claims might be made by any person, whether or not identified in Kennedys Documents, who had invested in investment companies similar to those named in those documents, that is to say EIS, Super EIS and FRB companies.

244. The Claimants argue that this is for the following reasons:

(1) They rely on the issues identified in respect of the Akbar Letters at SOI[3], SOI[4] and SOI[5] above.

(2) The breaches of duty referred to in the 19 October 2017 Letter relate to each investment company referred to in the letter. A reasonable person would consider that it was possible that they would equally be applicable to other clients of Mr Levy and of others[88] with investments in the same companies.

(3) Similarly, a reasonable person would treat the allegations as potentially applicable to other investments of the same type as those mentioned (namely, EIS Investments, Super EIS Investments and Film Rights), given Mr Levy's broad assertion at [48] in the 19 October Letter that "*It is clear from taking a broad view of all the schemes into which your client has advised investment, that the pattern is of unrelieved failure and is so consistent as to demonstrate utter disregard for the financial welfare of my clients or, indeed, of any other clients."*

(4) Mr Levy's assertions in the Freeman Fisher Letter, that being the document annexed to the First 22 October 2017 letter, are written in broad terms that are not necessarily restricted to his own clients.

245. The November 2017 Emails included the following note of what Mr Levy had to say in the November Meeting, in particular his assertion that, of around 90 EIS Companies with which White & Co was involved, "*c.£97,000,000 of investment has been procured, but only 3 of the companies show any profit. He has a particularly low opinion of Ben White and seemed to think that all of the EIS schemes are some sort of scam that has been concocted to defraud investors...He is also still actively seeking to recruit further potential Claimants, though no further individuals have been named specifically at this stage*."

**Allianz's Case**

246. Allianz begins it submission on this issue by contending that the 22 October Letter (including the Freeman Fisher Letter) and the First November Emails were not in fact sent to White & Co. For

[88] Note the reference at [48] to "*disregard for the financial welfare of my clients or, indeed, of any other clients*."

reasons identified under SOI[13] I have found that the 22 October Letter was in in fact sent to White & Co. As I have noted in respect of SOI[15], White & Co probably did not see the First 2017 November Email but were of course aware of its contents and probably did believe that this information was sent to Allianz.

247. In so far as the Freeman Fisher Letter was dealing with potential claims, this was in the context of a claim for defamation and did not suggest that other claims might be brought. More generally there is nothing in these communications that would lead the reasonable reader to think that that they were referring to matters that might give rise to a claim. Allianz cites the passage of Toulson LJ in *Kidsons* at [139] to the effect that what is being referred to are matters which are "*too vague or remote to be reasonably capable of being regarded in* [themselves] *as* [matters] *which might give rise to a claim*."

**Discussion**

248. The reasonable reader of the Kennedys documents would realise that Mr Levy was already acting for people with potential claims against White and Co. That person would then have acquainted themselves with the Akbar Claim and would have been aware of the allegations being made. They would then realise that the additional information being referred to by Mr Levy involved assertions that White and Co were involved in whole-scale misadvising of their clients as to investment in schemes such as those referred to in the Akbar Claim as well as those expressly mentioned in the Kennedys documents.

249. This is, in my judgment, the description of a problem, "*the exact scale and consequences of which are not known*" in the words of Gloster LJ see *Euro Pools* at [39(iii)], but which effects both named people and others, and named investment companies and other similar companies. Whilst the allegations lack specificity, they cannot be said to be too vague to be matters which "*might give rise to a claim."* Rather, the communications give every impression that the broader range of issues referred to may well give rise to claims, albeit that the details of those claims cannot be given.

250. I therefore accept that

(a) the 19 October 2017 Letter, which White & Co saw as a result of the Second November email;

(b) the 22 October 2017 Letter (including the Freeman Fisher Letter), which White & Co saw; and

(c) the First November Emails, of which White & Co knew the contents,

together set out matters which may give rise to a claim:

(1) by people advised by White & Co, whether or not listed in those documents;

(2) in respect of the investments in the companies listed in those documents or in similar investments.

251. However, it goes too far to include within that category (i.e. matters which might give rise to a claim) other investments which were "*The subject of similar advice to the Investments identified in the Kennedys Documents*." There is nothing in the material to suggest that White & Co was advising on schemes other than those identified as being similar to EIS Investments (which I have identified as including Seed EIS and Super EIS investments) and FRB or giving "*similar advice"* in respect of an such investments. The use of the word "*similar"* here is vague since it is not at all obvious what the similarity would need to be and I see no basis for interpreting these communications as relating to some other unascertained schemes of investment in respect of which White & Co gave advice, even if there are any (as to which I am not clear).

**SOI[17A] Issue 20 - Was Kennedys sending the 19 October Letter to Allianz capable of comprising a notification of circumstances within the meaning of the Allianz Policy?**

**The Claimants' Case**

252. I have noted in respect of SOI[15] above the Claimant's argument at [56] in its written closing submissions in respect of the 19 October 2017 letter, that Kennedys sent the letter "*as both* [White & Co's] *agent and Allianz's agent and so at least in part on behalf of* [White & Co]*."* The submission goes on that "*The 19 October 2017 Letter is to be seen in the context of the factual background of the Akbar Letters and the Block Notification. Against such a background, a reasonable person would treat Kennedys' provision to Allianz of the 19 October 2017 Letter as a further notification in its own right or alternatively further circumstances to be added to the previous notifications."*

253. If the 19 October Letter was not sent by Kennedys as agent of White & Co, the Claimants acknowledge that a difficulty arises as to whether this can be seen as valid notification, regardless of whether one is concerned with notification under the terms of the Policy or under the Minimum Term. The policy requires notification to be by "the Policyholder." The Minimum Term requires notification by "the Insured." Unless the agency argument is successful, this notification cannot be said to have been given by White & Co.

254. However, the Claimants emphasise the authorities that support the contention that notification does not have to be given by the insured so long as it is effectively drawn to the attention of the insured (see the passage at [10-020] in Colinvaux, cited above). It is not in dispute that Allianz knew the contents to the 19 October 2017 Letter for the simple reason that it was sent to them.

The court should treat it as notification of circumstances within the meaning of the policy and/or the Minimum Terms.

**Allianz's Case**

255. Allianz deny that it is correct to characterise Kennedys role in sending the email as White & Co's agent for the reasons advanced in respect of SOI[15].

256. In so far as it might be argued that actual receipt of the letter by Allianz avoids the need for the Claimants to prove notification by the route specified in the contract and/or the Minimum Terms, Allianz contend that this is inconsistent with the nature of such a term as a condition precedent.

257. The contractual terms and the Minimum Term are unequivocal in requiring notification by the insured/policyholder. This is a condition precedent to Allianz's liability, following the reasoning of the judgment of Rix LJ in *Kidsons* at [114] because

(1) Condition 2.2 of the 2016 Minimum Terms (which, Allianz accepts is to be applied since if the policy conditions are less favourable to the Claimants, the Minimum Terms apply) provides an extension of cover under the policy by deeming the giving of notice of a circumstance which may gave rise to a claim under the policy to have equivalent effect to the giving of such notice during the period of insurance.

(2) The extension of cover is conditional upon such notice being given.

(3) Conversely, the fulfilment of the requirement to give notice is the very thing which permits the extension of cover to be made.

(4) The obligations of the insured to give notice in writing to the insurer is the conditions precedent to the extension of cover.

**Discussion**

258. I repeat the analysis above in respect of SOI[15]. This applies with equal force to the argument that the 19 October Letter was sent as agent of White & Co as it does to whether the First November Emails were sent in that capacity. I thus conclude that the 19 October 2017 Letter and enclosure were not sent by Kennedys to Allianz as agent of White & Co. It follows that the purported notification was not given by the insured/policyholder.

259. As to the alternative argument that compliance with the condition that notice be by the insured/policyholder was not a condition precedent of Allianz's liability, the position in this case is very similar to that of the insurer in *Kidsons.* The terms of both the Policy and the Minimum Term make clear that they deal with a deeming provision and I find no rational basis to distinguish the reasoning here from that of Rix LJ in *Kidsons.* Accordingly I am satisfied that compliance with these terms are conditions precedent to the liability of Allianz.

260. As to the argument that compliance with a condition precedent as to notification is not necessary where the insured has notice of the claim from some other source, I do not accept that this proposition can hold good on the facts of this case. The passage from Colinvaux's Law of Insurance, 13th Edition at [10-020] cited above shows that in some circumstances, notification from some other source may suffice. But I do not accept that departure from the usual rule that notification must be in accordance with the terms of the contract, is justified here:

(1) Unlike in either *Abel v Potts* or *Barrett Bros v Davies*, both of which are cited as exceptions to the general rule, the court here is dealing not with the notification of one claim but with notification of circumstances of many potential claims. The receipt of information from third parties in those cases could only realistically have been for purposes relating to a claim under the policy relating to the identified loss. In this case, the very purpose of the notification may be in issue – was it intended to be as the prelude to White & Co seeking indemnity under the policy, was it intended to inform the insurer of matters that might be relevant to dealing with the Akbar Claim that had already been notified to them or was it intended for other purposes? The insurer has no way of knowing this and correspondingly this cannot be said to be a case where requiring compliance with the terms of the notification requirement has no purpose.

(2) I have noted the caution that has been expressed about the decision in *Barrett Bros (Taxis) v Davies*. If is said to be authority for the proposition that the failure of the insured to give notification in breach of a condition precedent can be cured by the insurer learning of the relevant matters from another source, it is inconsistent with the decision of Bingham J in *Pioneer Concrete v National Employers Mutual General Insurance*, as approved by Potter LJ in his judgment in *Pilkington v CGU Insurance* and the opinion of Privy Council in *Motor and General Insurance Co v Pavy*. I have noted above that it was distinguished in *Axa v Thermonex.*

261. In so far as the ratio of *Barrett Bros v Davies* can clearly be identified, it is of course binding on this court. But given the doubt that has been expressed about the correctness of the decision from several sources, it is in my judgment best confined in its application to the particular facts, namely the notification of an identified loss by an authoritative source. It has no application here where the alleged notification is of the circumstances of many potential claims from a source (the lawyer acting for potential claimants) who inevitably is acting on the instruction of his client, rather than as an independent public body with no interest in the outcome of the insurance claim (as was the position of the police in *Barrett Bros v Davies*).

262. It follows that the Claimants cannot rely on the 19 October Letter as notification of circumstances for the purpose of compliance either with the Allianz Policy or the Minimum Term.

**SOI[17B] Issue 20 - Was Kennedys' receipt of the 22 October Letter together with its enclosure capable of comprising a notification of circumstances within the meaning of the Allianz Policy?**

**The Claimants' Case**

263. The Claimants argue that by sending the 22 October Letter to Kennedys, Mr Levy was notifying circumstances in accordance with the Allianz Policy and/or the Minimum Terms by the following chain of reasoning:

(1) Kennedys acted under a joint retainer to act in the common interests of White & Co and Allianz.

(2) Kennedys' retainer letter of 15 June 2017 included as follows:

> "*Kennedys is instructed subject to the terms and conditions of the Policy, which governs the relationship between White & Company and your insurers. These terms and conditions, so far as relevant, are incorporated into Kennedys' contract with White & Company. You should therefore read the Policy carefully.*
>
> *You should be aware that Insurers will be given full access to all information which comes into Kennedys' possession relating to this matter, including all documents or copies thereof arising from or in connection with the underlying facts. Insurers may be given copies of correspondence between Kennedys and others, and opinions or advice from Counsel, as well as notes of conversations and meetings or conferences with you and/or Counsel. Insurers may elect to attend any conference or meeting on or in connection with this matter. If you have any concerns or do not agree to the terms of Kennedys' retainer (including the disclosure of information to Insurers) then you must inform me as a matter of urgency*."

(3) Mr Levy sent the 22 October Letter to Kennedys in their capacity as White & Co's solicitors, since the heading refers to "*Your client: White & Co*."

(4) The contents of the 22 October Letter (and in particular the Freemen Fisher Letter which was enclosed), whilst on their face relating to allegations of defamation, in fact contained information relevant to the allegations that Mr Levy was making against White & Co.

(5) Thus, whilst the documents were received by Kennedys as White & Co's agent, they then immediately became available to Allianz under the provision giving Allianz access to information provided to Kennedys pursuant to its retainer with White & Co,

whereupon Kennedys held the letters as agents for both White & Co and Allianz under the joint retainer.

(6) Once Allianz is to be treated as holding the 22 October Letter and its enclosure as agent for Allianz, the latter is treated as having knowledge of the contents, which is capable of amounting to notification of the circumstances set out in the documents.

**Allianz's Case**

264. Allianz reject the Claimant's analysis for two reasons:

(1) The scope of Kennedys' retainer did not extend beyond acting for Allianz and White & Co in the defence of the claims by the Initial Akbar Claimants. It did not extend to receiving notifications on Allianz's behalf.

(2) If the Claimants' interpretation is correct, it puts Kennedys, on receipt of the 22 October 2017 Letter, as both being fixed with White & Co's knowledge for the purpose of awareness; but also making a notification by White & Co to Allianz. This places Kennedys in the obvious situation of potential conflict because whether White & Co wished to make a notification of circumstances and whether Allianz wished to receive it might involve Kennedys having to reconcile conflicting positions of its co-principals.

**Discussion**

265. I have dealt with my analysis of the nature of Kennedys' agency in respect of SOI[15] above. I identified that the instant issue is one where the potential conflicts that the Claimants' analysis of Kennedys' role involve are very clear.

266. In my judgment, Allianz's points on this issue are well made. Kennedys' express retainer related to the investigation and defence of the Akbar Claim. It is neither necessary nor desirable to construe that agency in a broader fashion. Its role in receiving documents and sending them to its co-principals is easily explained by its performance of its role pursuant to the joint retainer and does not require the court to adopt what would be the much more difficult interpretation of it acting as White & Co's agent for the purpose of receipt of a document, as White & Co's agent for the purpose of conveying the contents of that document to Allianz and simultaneously as Allianz's agent for the purpose of the receipt of knowledge of the contents of the communication.

267. If the Claimants' analysis is accepted, Kennedys was simultaneously acting as the agent of the insured/policyholder for the purpose of receiving notice from a client and giving notice to its insurer and the agent of the insurer for the purpose of receiving notice. This would not be a relationship of co-principals but rather two separate agency relationships.

268. As I noted in respect of SOI[15], such a relationship could be created by the express agreement of the parties (though doubtless they would have been astute to the potential for conflicts of interest to arise) but that did not happen here. To imply such roles with their associated obligations creates a position in which a conflict of interest may arise without any evidence that any of the players have agreed to that situation.

269. The agency that arises in this case is a creature of the contractual terms that the parties have expressly or impliedly agreed, to be judged in accordance with the usual rules of contractual interpretation and the implication of terms. There is nothing in the circumstances of this case that would mean that the relationship contended for by the Claimants should be implied as a matter of law nor that, on the facts, such a relationship should be implied. It follows that the answer to SOI[17B] is "no".

**SOI[18] Issue 21 - On a true construction of the Kennedys Documents, did they comprise a notification of circumstances which might give rise to a claim against White & Co?**

**The Claimants' Case**

270. The Claimants rely on notification from the following of the Kennedys Documents:

(1) The 19 October 2017 Letter, attached to the First November Emails, which makes allegations of negligence and breach of duty in respect of tax advice and investment advice in respect of named Companies and makes allegations of negligent tax and investment advice in respect of EIS and similar schemes.

(2) The Freeman Fisher Letter enclosed with the 22 October 2017 Letter which makes broad allegations against White & Co.

271. These communications amounted to notification of specific claims as variously set out, but also Hornet's Nest Notification relating to White & Co's practice generally such that any reasonable reader would conclude that any person who had invested in EIS or similar schemes following advice from White & Co may have a claim against that firm.

**Allianz's Case**

272. Allianz's assertions in respect of the contents of the documents have been set out above. It is unnecessary to repeat them because I have already made findings about the meaning of the documents.

273. Putting aside those arguments Allianz does not dispute that these documents might cause one to believe that others had suffered loss through investing on the advice of White & Co in EIS and similar schemes. But it contends that these communications are not "notification" within the meaning of the Allianz Policy or the Minimum Term at all. It argues that an initial notification

cannot be widened by the discovery of later problems unless those later problems are themselves the subject of valid notification (see Akenhead J in *Kajima*). It is of course possible for an insured to give Hornet's Nest Notification, where the circumstances notified did not identify specific incidents, transactions or acts/omissions of the insured. But Hornet' Nest Notification had not been given here prior to receipt of the Kennedys' documents and, on an objective reading, the Kennedys' Documents did not purport to notify circumstances of claims.

274. In particular, of the documents relied on:

(1) The 19 October 2017 Letter, forwarded by the First November Emails, sought to advance the Akbar Claim;

(2) The 22 October 2017 Letter and the enclosed Freeman Fisher Letter simply revealed that White & Co had made allegations of defamation against Mr Levy and that Mr Levy denied those allegations.

It is not necessary or desirable to read either of them, either individually or collectively with other documents, as amounting to the notification of the circumstances of claims to which the policy might respond.

275. In any event, the Kennedys Documents do not amount to a notification of a problem "*in general terms"* such as to be capable of amounting to Hornet's Nest Notification of the type referred to by Gloster LJ in *Euro Pools* at [39(iv)].

**Discussion**

276. I have already held in respect of SOI[17A] and SOI[17B] that the relevant elements of the Kennedys Documents were not communicated to the insurer in circumstances that are capable of amounting to notification either under the terms of the Allianz Policy or in accordance with the Minimum Term.

277. If I were wrong about this, it would be necessary to consider whether in fact the contents of the documents amounted to notification. The summary of the law in *Euro Pools* show that the courts take a relatively expansive view of what amounts to notification. If, as I have found to be the case, the contents of the October Letters would lead a reasonable person to the conclusion that claims might be made by people who had been advised by White & Co, whether or not listed in those documents and in respect of the investments in the companies listed in those documents or in similar investments, the fact that this information was shared with Allianz would be good Hornets' Nest Notification so long as White & Co had the requisite knowledge of the matters referred to in the documents. Given my findings that White & Co saw the relevant communications during the Allianz Policy Period, I would have found this to be good notification.

278. The alleged notification in the Kennedys Documents is clearly not limited to specific investments, specific companies or specific investors. Applying the concept of "*a problem, the exact scale and consequences of which are not known*"[89], the contents of the Kennedys Documents, if capable of amounting to notification at all include reference to a variety of circumstances in which investors, having been advised by White & Co, had invested in companies that had failed where, on the Claimants' case, the failure of the company was predictable or had invested in schemes that provided up front tax benefits which in fact were liable to challenge by HMRC. This is a clear example of the notification of problems (inappropriate tax advice and inappropriate investment advice) where the exact scale and consequences of the problem are unknown. I do not consider that the fact that the actual nature of the tax problem may differ slightly between EIS, Seed EIS, Super EIS and FRB investments prevents the communications from amounting to Hornet's Nest Notification of claims in any category of investment.

279. Accordingly, if the Kennedys documents had been capable of amounting to notification, I would have found that in fact they did notify circumstances which might give rise to a claim against White & Co in so far as they related to claims by people who had been advised by White & Co, whether or not listed in October Letters and in respect of the investments in the companies listed in those documents or in similar investments, namely other EIS, Seed EIS and/or Super EIS investments.

**SOI[19] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?**

**The Claimants' Case**

280. The Claimants argue that all of the claims before the court fall within the ambit of Hornet's Nest Notification. White & Co's alleged negligence was in respect both of tax and investment issues. The Claimants all allege that they have suffered loss by way of loss of tax relief, the imposition of penalties and/or interest by HMRC and/or the loss of all or part of their investments. The Kennedys Documents relate to all of these issues:

(1) The 19 October Letter identified a series of companies in which people advised by White & Co had invested and in respect of which losses had been suffered. In so far as a client of White & Co had invested in a company that was named within the communications, the nature of Hornet' Nest Notification would bring within its ambit any investment in the same company, regardless of whether the client was named or identified.

(2) The Freeman Fisher Letter identified a pattern of investments advised by White & Co in companies that had subsequently failed and/or had never been viable. In so far as a

[89] *Euro Pools* at [39(iii)].

client of White & Co had invested in such a company, regardless of whether either the client or the company was named or identified, the Kennedys Documents amounted to Hornet's Nest Notification of circumstances of such claims in respect of any company where it was alleged that White & Co had advised investment but the company had failed.

(3) The 19 October 2017 Letter identified losses allegedly suffered as the result of investment in EIS schemes where appropriate qualification for EIS relief was not in fact established. In so far as a client of White & Co had invested in a similar scheme to those identified (whether EIS, Seed EIS or Super EIS) again the Kennedys Documents amounted to Hornet's Nest Notification of circumstances of potential claims arising from such investments, regardless of whether either the particular client or the particular investment company was named or identified in the documents.

(4) The 19 October Letter identified losses suffered as a result of people investing in FRB investments, even though they would not be accepted by HMRC to be genuinely involved in film trading or film production. Yet again, in as far as a Claimant had invested in an FRB investment, whether or not the client or the FRB Company was named or identified, the Hornet's Nest Notification that arose from the communications would amount to the notification of circumstances.

**Allianz's Case**

281. Allianz again contends that the failure of the notification to identify the general nature of the problem that is being notified means that it is not possible to show the relevant causal nexus between what is said to be the subject of notification and the particular claims brought by the Claimants in this action.

**Discussion**

282. I have already held in respect of SOI[18] that, if I am wrong about the role played by Kennedys in respect of the October Letters, these would amount to the notification of circumstances which might give rise to a claim within the ambit of Hornet's Nest Notification. The notification is broad in nature, as I have noted above. It covers both the assertion that White & Co had been advising clients to invest in companies that have failed (and indeed in many cases which were never intended to succeed) and that the tax advice that was given was not likely to withstand challenge by HMRC.

283. By way of example, in the letter of 19 October 2017, Mr Levy alleges

(1) In respect of Roccia, an FRB:

"*30*

*a. …the scheme presented by your client was presented to people who were not film traders or produces in any form that would be identified as such by HMRC.*

*b. …The scheme that was proposed by your client was set up to look to the investor as though he was likely to make a profit, although, in reality your client was fully aware and intended that the investor would not profit from the investment in film rights themselves but only from the tax relief that might have been obtained."*

(2) Of EIS investments

"*53. My clients allege that in each case:*

*a. No due diligence has been carried out by your client, or in the alternative,*

*b. Your client was fully aware that the investment recommended was likely to fail;*

*c. You client failed to carry out any assessment of the attitude to risk of my clients, in the alternative,*

*d. Your client was reckless as to the attitude to risk my clients,*

*e. Your client was materially involved itself in preparation of documents designed to encourage my clients to invest in the various EIS investments knowing that the conduct of the company and the conduct of the directors previously were such as almost to guarantee the failure by an investor to realise profit on his investment….*

*56. In several of the companies in which clients have invested, there is no evidence of trading or of ever having used the funds that were invested. In terms of EIS regulations, this would violate the principle that invested sums have to be used within two years of investment, or the company will lose it's EIS status retroactively and any money previously claimed against the Inland Revenue and allowed for tax relief would be forfeited and must be return to the Inland Revenue.*

*57…*

*c. my clients reserve the right to claim further for losses that may be incurred by investigation by the Inland Revenue into tax relief that has been claimed for investment in companies that may transpire to lose their EIS status retroactively.*

284. I have set out at [84] above a passage from the Freeman Fisher Letter dealing with the allegation that companies in which White & Co advised investment had poor track records of success.

285. Taking the Kennedys Documents together, they provide Hornet's Nest Notification of circumstances sufficient to comply with the notification obligation in respect of any circumstances which are akin to that being notified, namely:

(1) A claim against White & Co for negligence or breach of statutory duty arising from investment by a client of White & Co in a company that was named within the Kennedys Documents, regardless of whether the client was named or identified;

(2) A claim against White & Co for negligence or breach of statutory duty arising from investment by a client of White & Co in a company, regardless of whether either the client or the company was named or identified, in the Kennedys Documents;

(3) A claim against White & Co for negligence or breach of statutory duty arising from investment by a client of White & Co in a company where EIS related tax benefits were not in fact established, whether the client had invested in an identified EIS scheme or any similar scheme to those identified (whether EIS, Seed EIS or Super EIS), regardless of whether either the particular client or the particular investment company was named or identified in the documents;

(4) A claim against White & Co for negligence or breach of statutory duty arising from investment by a client of White & Co in an FRB investment, even though they would not be accepted by HMRC to be genuinely involved in film trading or film production regardless of whether the client or the FRB Company was named or identified.

**THE OBER EXCLUSION**

**SOI[20] (Issue 25) What is the proper construction of the Ober Exclusion?**

**SOI[21] (Issue 26) Is the Ober Exclusion contrary to the Minimum Approved Wording in the Allianz Policy?**

286. These no longer require determination in light of the concession of Allianz referred to above.

**THE TAX MITIGATION ENDORSEMENT**

**SOI[22] Issue 30 - What is the proper construction of the Tax Mitigation Endorsement?**

**The Claimants' Case**

287. The Claimants contend that the definition of "Tax Mitigation Scheme" within the Tax Mitigation Endorsement is determined by the policy itself, not by any other source and applies only to transactions which meet all of the requirements of the definitions, namely that they are:

(1) loans, investments or trusts; which are

(2) pre-planned; are

(3) artificial transactions; and are

(4) designed to achieve a specific tax outcome including tax loss, tax allowances or tax exemptions.

288. Accordingly the court must focus on the particular transaction in issue, determining whether it achieves a particular tax outcome on purpose and whether it is "*artificial*." As to the last of these, the experts (and the parties) agree that the meaning of the word in this context is best summarised in the judgment of the Privy Council in *Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica* [2012] 1 WLR 1794. The Board was concerned with whether a transaction fell within Section 16 of the relevant Jamaican legislation, the Income Tax Act 1954, which makes special provision in relation to artificial or fictitious transactions direction at the reduction of tax liability. I am reminded of [22] of the judgment, referred to above.

289. The experts also considered the line between tax avoidance on the one hand and legitimate tax mitigation on the other. They considered the judgment of Lord Nolan in *IRC v Willoughby* [1997] 1 WLR 1071 at 1079, where he accepted the argument of leading counsel for the Crown as to the meaning of "*tax avoidance*" for the purpose of section 741 of the Income and Corporation Taxes Act 1988 as then in force:

> "*The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation on the other hand is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subject motive of avoiding tax."*

290. On the issue of what amounts to a taxpayer's "*purpose*," the Claimants note the judgment of Falk LJ in *Blackrock HoldCo LLC v HMRC* [2024] EWCA Civ 330 where, in dealing with the question of the "*unallowable purpose*" test in sections 441 and 442 of the Corporation Tax Act 2009, she said:

> "*[124] … For present purposes "object" can also be regarded as synonymous with purpose. So far as relevant to this case, and gathering the points together, I would summarise the key points as follows:*
>
> *a) Save in "obvious" cases, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor.*
>
> *b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.*
>
> *c) Subjective intentions are not limited to conscious motives.*

*d) Further, motives are not necessarily the same as objects or purposes.*

*e) 'Some' results or consequences are 'so inevitably and inextricably involved' in an activity that, unless they are merely incidental, they must be a purpose for it.*

*f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker.*"

291. The Claimants draw attention to several points of Mr Francis' evidence where he agreed with the following propositions put to him by Mr Chapman KC:

(1) That an artificial transaction could be an example of tax avoidance;

(2) That tax avoidance and artificiality are two different concepts that are not always to be found together;

(3) That tax avoidance can be distinguished from tax mitigation;

(4) That an intention to obtain a tax outcome does not itself constitute tax avoidance[90], though it may be an indicator of it;

(5) That the failure to meet the requirements for a particular tax outcome does not of itself mean that the transaction constitutes tax avoidance.

292. The Claimants lay emphasis on the Ramsay principle arguing that there would only be artificiality where there is no commercial purpose and so instead the sole purpose is that of tax avoidance. They do not accept that a "main purpose" test should be applied where the question in issue under the Tax Mitigation Endorsement is "artificiality" and not main purpose and where the enabling legislation refers to a purpose of "the avoidance of tax," the very issue that the Ramsay principle deals with.

293. From this material, the Claimants draw the following conclusions about the construction of the phrase "*artificial transactions*" in the Tax Mitigation Endorsement:

(1) "*If a transaction is not tax avoidance, then it is difficult to see that it can be an artificial transaction (unless, for example, the anti-avoidance legislation allows for it by, for example, comparing outcomes irrespective of the economic reality of the transactions).*"

(2) "*The term 'artificial transactions' is not to be construed as including transactions which are genuinely entered into but where there is an intention to obtain a tax outcome*."

[90] The Claimants cite Arden LJ to similar effect in *Astall v HMRC* [2010] STC 137 at [41]: *"…the mere fact that the parties intended to obtain a tax advantage was not in itself enough to make a statutory relief inapplicable."*

(3) *"'Artificial transactions' can be construed as including transactions where the only purpose is to obtain a tax outcome if that is the basis for there being no economic reality to a transaction."*

(4) *"The term 'artificial transactions' is not to be construed as meaning a failure to obtain the tax treatment sought. The failure to obtain the tax treatment is, it is submitted, irrelevant to the proper construction of the Tax Mitigation Endorsement. Where the failure to obtain the tax treatment is because of artificiality, the significance to the Tax Mitigation Endorsement is the artificiality itself, not the failure to obtain the tax treatment."*

**Allianz's Case**

294. Like the Claimants, Allianz focuses on the four features of Tax Mitigation Schemes as defined in the Policy and identifies the concept of "*artificiality"* as the most disputed part of the definition. However, it also makes the following points:

(1) The reference to "*transactions"* as "*loans, investments or trusts"* in each case in the plural, means that the Tax Mitigation Scheme could apply to a single investment or loan[91], more than one investment or loan or a combination of one or more investments and one or more loans;

(2) The Claimants contend that the phrase "*designed to achieve a specific tax outcome*" is to be determined by looking at the subjective intention of the individual investor, whereas Allianz contends that it is capable of being judged by looking at the design of investors, the investment vehicle itself, the proposer of the investor or indeed anyone else.

(3) The concept of "*tax outcome*" would cover any reduction in tax or liability to tax, and is not for example limited to that which would amount to tax avoidance applying the Ramsay principle.

(4) It suffices that the transaction(s) in question were designed to achieve a tax outcome – it does not need to be shown that the tax outcome was in fact achieved.

295. As to the term "*artificial,*" Allianz draws attention to the following:

(1) The relevant Oxford English Dictionary definition of "*artificial*" is "*not existing naturally; contrived or false*." It is apparent from this definition that something which is "*artificial*" generally resembles something which exists naturally; it is contrived because it looks like something else.

[91] The reference to trusts has no application on the facts of the instant case.

(2) There is no statutory definition of artificiality or tax avoidance in English and Welsh tax legislation:

(3) The following sources provide assistance:

(a) HMRC produces guidance entitled "*Introduction to tax avoidance*." The version in the trial bundle postdates the Investments. The original version, published on 6 September 2016 was in place for some (but not all) of the investments. Under the heading "*What tax avoidance is*," it is said: "*Tax avoidance involves bending the rules of the tax system to try to gain a tax advantage that Parliament never intended… It often involves contrived, artificial transactions that serve little or no purpose other than to produce this advantage. It involves operating within the letter, but not the spirit, of the law*."

(b) In Scotland, there is a general anti-avoidance rule (as opposed to an anti-abuse rule) which "*has effect for the purpose of counteracting tax advantages arising from tax avoidance arrangements that are artificial*" [92], that tax avoidance arrangements are ones where "*having regard to all the circumstances, it would be reasonable to conclude that obtaining a tax advantage is the main purpose, or one of the main purposes, of the arrangement*" [93] and that one ground on which a scheme may be artificial is if "*the arrangement lacks economic or commercial substance.*"[94]

(c) In Wales, there is also a general anti-avoidance rule in Part 3A of the Tax Collection and Management (Wales) Act 2016. This seeks to counteract tax advantages from artificial tax avoidance arrangements and, at section 81C, sets out the factors to be taken into account when determining whether a tax avoidance arrangement is artificial including whether there was "*any genuine economic or commercial substance to the arrangement (other than the obtaining of a tax advantage).*"

(4) The Privy Council in *Seramco Ltd v Income Tax Commissioner* [1977] AC 287 (on appeal from the Court of Appeal of Jamaica) considered the meaning of "artificial" in Section 10(1) of the Income Tax Law 1954. At p298A of the judgment of the Board, Lord Diplock stated:

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[92] Section 62 of the Revenue Scotland & Tax Powers Act 2014 ("the 2014 Scotland Act")

[93] Section 63 of the 2014 Scotland Act

[94] Section 64(1) of the 2014 Scotland Act. This is followed by a list of indicative factors including "*whether the arrangement is carried out by a person in a manner which would not normally be employed in reasonable business conduct*" and "*whether the arrangement results in a tax advantage that is not reflected in the business risks undertaken by the taxpayer.*"

> "*'Artificial' is an adjective which is in general use in the English language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used… their Lordships reject the trustees' first contention that …[it] is, a mere synonym for "fictitious"… "Artificial" as descriptive of a transaction is, in their Lordships' view a word of wider import. Where in a provision of a statute an ordinary English word is used, it is neither necessary nor wise for a court of construction to attempt to lay down in substitution for it, some paraphrase which would be of general application to all cases arising under the provision to be construed. Judicial exegesis should be confined to what is necessary for the decision of the particular case. Their Lordships will accordingly limit themselves to an examination of the shares agreement and the circumstances in which it was made and carried out, in order to see whether that particular transaction is properly described as 'artificial' within the ordinary meaning of that word*."

(5) Lord Walker's judgment in *Cigarette Company of Jamaica* cited at [111] above provides what the experts agree to be an effective summary of what it is to be artificial.

**Discussion**

296. Whilst there are slight differences of emphasis in the submissions of the parties on the meaning of the Tax Mitigation Endorsement, in large part their differences arise not in the context of its true construction but rather its application to the investments and loans that are in issue in this case. This issue is encompassed in SOT[23] below and does not fall for determination at this stage.

297. In so far as issues of construction arise, I summarise my conclusions as follows, setting out my reasons, in so far as I have preferred the submissions of one party to that of the other(s).

298. First, the Tax Mitigation Endorsement is capable of applying to an individual loan or investment but also to combinations of more than one loan, more than one investment and/or one or more loans combined with one or more investments. Taken together, those investments and/or loans are *"pre-planned artificial transactions designed to achieve a specific tax outcome*." The definition could have been that "*A Tax Mitigation Scheme*" means "*a loan, investment or trust*" of the identified kind. Instead, the use of the plural throughout is a clear indication that the relevant scheme need not simply comprise one investment or one loan.

299. Second, in the context of the present case (and probably the vast majority of alleged Tax Mitigation Schemes), the description "*pre-planned*" adds nothing to the other words in the definition, since a scheme, to be artificial will inevitably have been planned in advance – indeed all of the schemes with which the claim is concerned were so planned. This is common ground.

300. Third, whether a scheme is artificial is an evaluative judgment. This is common ground.

301. Fourth, this evaluative judgment is to be reached by comparing the scheme in question with "*a normal transaction of an ostensibly similar type"* and asking whether the scheme has features that "*are abnormal and appear to be part of a plan."* This emphasis on the comparison of the scheme in question with the "*normal*" transaction is consistent both with the dictionary and usual meanings of the word "*artificial*" and with the judgment of Lord Walker in *Cigarette Company of Jamaica* cited above. Accordingly the court will need to consider whether in fact the particular investment complied or at least was intended to comply with the statutory provision applicable to the particular type of investment.

302. Fifth, in determining whether a scheme has abnormal features, the court will be assisted by looking at the various sources that seek to distinguish between legitimate tax mitigation on the one hand and tax avoidance on the other, since artificiality will inevitably involve an element of tax avoidance, even if the mere fact that a scheme achieves tax avoidance does not necessarily mean that it is artificial. This is common ground.

303. Sixth, the mere fact that a particular scheme achieves a benefit for the investor in terms of reduction of their tax liability does not without more render the scheme artificial. This is common ground and is consistent with the concept that a tax benefit may be integral to the policy reasons why particular investments are encouraged. ISAs are one example that were given during trial. Premium Bonds might be another.

304. Seventh, the reference to a "*tax outcome"* in the Tax Mitigation Endorsement is to a reduction in a person's actual or potential liability to pay tax. This is not disputed by the Claimants and is the obvious meaning of the words.

305. Eighth, in determining whether a scheme is "*designed to achieve a specific tax outcome*" it is appropriate to look at the purpose of the person who devised the scheme, the person who invested in the scheme and any person who proposed the investment or advised on the investor entering into the particular transaction. The actual language of the Tax Mitigation Endorsement appears to identify the relevant design to be that of the loan(s), investment(s) or trust(s). Obviously, none of these has its own mind within which a "design" or "purpose" can be formulated. But the clear emphasis of the phrase "*designed to achieve"* is on the use to which the scheme is put. This suggests looking at the state of mind of the user. However, there is nothing in the language to limit the analysis of who is a "user" to the investor/taxpayer – one might say that a scheme is being used as much by the person who devises it and the person who promotes or advises its use as it is by the person who ultimately benefits from its use.

306. It would be somewhat odd if the test of artificiality turned exclusively on the investor's state of mind, since the same scheme might be used with the same benefit to two different investors, one

of whom had detailed knowledge of tax and investment matters and who understood exactly the manner in which the scheme was being used and another of whom had delegated his financial affairs entirely to others and who had no knowledge of the tax and investment issues involved but simply had asked others to maximise his return on his money. I can see no logic to a construction in which the ignorance or lack of interest of the latter is determinative of whether the description of "artificial" is to be applied to it, nor does the natural meaning of the words point to such a distinction being made. Accordingly, the intention of anyone whose input contributes to an investor making the investment, whether the investor themselves, an adviser or indeed a deviser of the scheme of investment is relevant to determining whether the investment is "*designed to achieve a specific tax outcome.*"

307. In coming to this conclusion, I differ from the opinion of Mr Wentworth-May as to the proper approach to be taken. In my judgment, Mr Wentworth-May's approach to the meaning of "*artificial*" places too much emphasis on the issue of tax avoidance. The wording of the Tax Mitigation Endorsement (through the use of the word "mitigation") is not expressly aimed at that which necessarily amounts to tax avoidance. Where the court is concerned with whether a person is engaging in tax avoidance, the emphasis is understandably on the intention, design or purpose of that person or someone acting on that person's behalf. Here the Tax Mitigation Endorsement is intended to deal with how coverage under the policy applies to advice given by the insured in respect of particular types of scheme. There is no necessary reason for the court to construe the policy as though it is intended to cover only advice in schemes which in fact amount to tax avoidance, rather than those which might, from their inherent nature or their use, be expected to be used in a way not intended by Parliament or which otherwise conform with the description of artificiality given by Lord Walker which it is common ground that the court should accept.

308. Ninth, in determining a person's purpose or design, the Court will be assisted by considering the matters set out at [124] of the judgment of Falk LJ in *Blackrock HoldCo 5 LLC v HMRC.* This is common ground.

309. Tenth, the mere fact that a particular scheme does not achieve the tax outcome that was contemplated is irrelevant to whether the scheme falls within the Tax Mitigation Endorsement since the Endorsement is concerned with purpose not outcome. This is common ground. In my judgment, this is a further example of the eighth point above, which is that the focus in the Tax Mitigation Endorsement is not on whether tax is in fact avoided, but on whether the schemes upon which the insured is advising are being used to reduce tax liability in a manner properly described as artificial.

**SOI[23] Issue 31 - Does the Tax Mitigation Endorsement apply to all or some of the claims the subject of these proceedings?**

**The Claimants' Case**

310. The Claimants accept that FRB Investments fall within the Tax Mitigation Endorsement because of the artificiality of the manner in which the Claimants were advised to act so as to fulfil the requirement of their being traders in the development of films.

311. As for EIS and Seed EIS investments, the court should then consider each investment in turn. The Claimants accept that in each case the investments were pre-planned and were intended to obtain a specific tax outcome (the tax relief that was available for such investments). The court then is only concerned with whether the relevant transaction was artificial.

312. Putting aside for the moment Super EIS Investments, the Sample Claimants all had a commercial intention in entering into the EIS Investments and Seed EIS Investments in that they wanted the possibility of capital gain. The Claimants argue that the central question in making the judgment as to whether the relevant transaction is artificial is to assess whether the transaction reflects the commercial or economic reality

313. The Claimants turn to analyse the alleged artificiality of the various schemes in light first of the expert evidence and then of the evidence of the individual Sample Claimants.

314. In closing submissions, Mr Chapman KC analysed Mr Francis' list of the characteristics of artificiality in the light of his answers in cross examination.

    (a) *Did the investment vehicle produce a tax result which did not reflect the economic reality of the investment vehicle's transactions (e.g. a tax loss where no financial loss was suffered*)? The Claimants accept that this is the essence of the consideration and is the appropriate investigation in assessing artificiality in the context of the Tax Mitigation Endorsement.

    (b) *Did the investment vehicle achieve, by design or not, a result that was not intended by Parliament*? This relates to tax avoidance and says nothing about artificiality.

    (c) *Was the investment vehicle designed to exploit shortcomings in legislation*? This again relates to tax avoidance and says nothing about artificiality.

    (d) *Did the investment vehicle, knowingly or deliberately, claim tax relief in circumstances where the investor/user did not qualify for the aforementioned tax relief*? This is not relevant to the issue of artificiality and is inconsistent with Mr Francis' acceptance that a failure to qualify for an intended tax relief does not itself mean that the transaction is artificial.

(e) *Was the only purpose of the investment vehicle to produce a tax advantage*? This is relevant to the issue of artificiality as it goes to the subjective intention of the investor.

(f) *Did the investment vehicle have a commercial purpose*? This is relevant to the issue of artificiality as it goes to the subjective intention of the investor.

(g) *Did the investment vehicle users have knowledge and regard of the workings of the investment vehicle and the intended outcome?* This is relevant to the issue of artificiality as it goes to the subjective intention of the investor.

(h) *Did the investment vehicle users have an appetite or history in participating in other artificial investment vehicles*? This is relevant to the issue of artificiality as it goes to the subjective intention of the investor.

(i) *Did the investment vehicle contain steps only implemented to take advantage of tax relief which the investor/user would not ordinarily qualify for were it not for the investment vehicle?* This adds nothing to the investigation into whether the investment reflects economic reality.

(j) *Did the investment vehicle contain a legitimate or commercial transaction which was only entered into as a condition of a larger pre-ordained arrangement?* This adds nothing to the investigation into whether the investment reflects economic reality.

(k) *Did the investment vehicle arrangements align with commercial or economic norms?* This adds nothing to the investigation into whether the investment reflects economic reality.

(l) *Was participating in the investment vehicle a reasonable and genuine course of action*? This adds nothing to the investigation into whether the investment reflects economic reality.

315. Applying these arguments to the opinion of Mr Francis as set out in the table at [116] above, the Claimants argue that, save where the evidence supports the conclusion that the companies are in themselves artificial, the proper application of the principles referred to by Mr Francis (as opposed to consideration of the intention of the investors) cannot bring them within the Tax Mitigation Endorsement. As a result, the following companies cannot be seen as inherently artificial: 10 Things Films Ltd, Absolutely Anything plc, AKL Research and Development Ltd, Base Entertainment (UK) Ltd, Bette Davis is Alive and Well and Living in Liverpool The Movie Ltd, Blazing Productions Ltd, Capiscum Grand Prix Ltd, Car Seller International Ltd, Cardioprecision Ltd, Encore Theatre Productions Ltd, Evolution Digital Films Ltd, Falling Snow

Ltd, Five Foot 2 Blonde Ltd, Fusion Festivals and Events Ltd (pre-15 March 2018), Go Big Ltd, GweedyMe Ltd, Intensifi London Ltd, Lawyer Services Ltd, Livewire Events Ltd, Luxure Media Group Ltd, Myxa Ltd, Nelson's Kids Ltd, NowPresent Ltd, Ober Private Clients Ltd (not an EIS), Panic House Films Ltd, PlusMe Ltd, Prizefighter Film Ltd, Steffi Productions Ltd, Stratton Film Productions Ltd, Switch Generation Ltd, TB Seen Ltd, The Documentary Company Ltd, Vincent Asian Kitchen Ltd, Vintage Seekers Ltd, and Vumanity Content Ltd.

316. In respect of other companies where Mr Francis says that artificiality can be established on the evidence before the court, the Claimants argue:

(1) In respect of Active in Style Ltd, the company was said to have been in financial difficulty in breach of the EIS legislative requirements. However, HMRC's internal manual provides that financial difficulty arises where a company is cashflow insolvent, balance sheet insolvent, or (if outside the initial investing period) where more than half of the subscribed share capital has disappeared. There is no evidence to establish any of these for Active in Style Limited.

(2) HMRC investigated Crown Talent & Media Group Ltd in respect of whether it used the funds for qualifying purposes or within time limits. However, the evidence suggests that there was partial compliance between April 2012 and 18 November 2015 and there is no further evidence as to HMRC's investigations or whether the company was genuinely trading. As such, there is nothing to establish that this is an example of artificiality rather than non-compliance with the prescriptive requirements qualification for the EIS legislation.

(3) In the case of Uprising Features Ltd, this was an EIS investment said to have taken place at the same time as the Seed EIS investment. However, in principle, it is possible for there to be a subscription in Seed EIS shares followed by a subscription for EIS shares, providing the EIS subscription is at least one day later (see section 257DK of the Income Tax Act 2007). It is not clear when the Seed EIS shares were issued and so there is insufficient evidence to establish that Uprising Features Ltd was operating in an artificial manner.

(4) As regards Osea Island Events and Management Ltd, HMRC were investigating the use of EIS funds within qualifying companies and the issuing arrangements of the shares. However, there is insufficient information to establish what the outcome of these investigations was and as to whether the company and its structure were artificial.

317. As regards Super EIS investments the Claimants accept that the loan element (and so the shares issued and subscribed for using the loan) is artificial. In the case of each Sample Claimant who

was questioned about the issue, they acknowledge that the loan was made and therefore the argument of Mr Wentworth-May that these investments are not necessarily artificial if the loan was not made falls away. However, the Claimants say that there is no evidence that the companies were themselves artificial. It may well be that the loans to investors were linked loans, which meant the investors could not obtain relief by virtue of section 164 of the 2007 Act, but this is a case of non-compliance with legalisation, not artificiality. The economic reality of the investments in the Super EIS companies is that investors were only investing their capital rather than the uplifted investment attributable to the loans. Therefore, whilst the linked loan was sufficient to deny EIS relief, the investments using the Claimants' own capital were genuine investments in genuine companies and those investments are not artificial within the meaning of the Tax Mitigation Endorsement.

318. The alleged artificiality in respect of the remainder of the investment companies arises from a failure to meet the requirements for tax relief under the EIS legislation or the Seed EIS legislation. The absence of sufficient documentation to establish the reasons for the failure to meet these requirements means that there is insufficient evidence to establish artificiality.

319. In so far as the court is concerned with the effect of a combination of investments (for example an EIS and Super EIS investment), the Claimants contend that the tax treatment of any one EIS Investment does not have a bearing upon the tax treatment of another EIS Investment because the entitlement to relief arises from the issue of the EIS3 certificate, which is considered on an investment by investment basis, as Mr Francis accepted during cross-examination when he agreed that the eligibility of one enterprise investment scheme has no impact upon the eligibility of another investment scheme subject to the caveat as to the wording of any anti-avoidance escape clause.

320. Having considered the arguments as to the inherent artificiality of the schemes, the Claimants' conclusion is that the only schemes which necessarily fall within the Tax Mitigation Endorsement on the grounds of artificiality are those FRB and Super EIS investments that were funded by loans rather than the relevant investors' own assets.

321. The Claimants then turn to consider the intentions of the Sample Claimants. A central issue here is that the Claimants contend that Allianz are wrong to argue that there is artificiality where "*one of the investor's main purposes was the avoidance of tax.*" As Mr Chapman KC puts it in closing submissions, "*on a Ramsay basis there would only be artificiality where there is no commercial purpose and so instead the sole purpose is that of tax avoidance. A "main purpose" test is only appropriate if the "escape clause" (in respect of anti-avoidance legislation) provides for such a test. Here, the test is artificiality and not main purpose*."

322. In terms of the evidence of the Sample Claimants, Mr Chapman KC makes the following points:

(1) They were all honest, credible and seeking to assist the Court in the way in which they gave their evidence.

(2) They entered into the investments in order to make capital gains.

(3) They accepted that they were motivated to make the investments by the tax benefits (and in some cases would not have made the investments without the tax benefits) but this was not their only motivation. A good example of this is Dr Glass who said of entering into EIS investments, "*The main reason I entered into them was because my accountant, who I trusted, suggested this was a reasonable thing to invest in and I would hopefully get a return on the money. Now, if you're asking, would I have made the investment if I didn't have the tax relief, no, I wouldn't, but the reason for investing was to get a return on the investment*[95]." The evidence of Dr Rao[96] is argued to be of like effect.

(4) There was some variation between the Sample Claimants as to the extent to which they carried out their own investigations into the investments, but the general tenor of their evidence was that they were investing based on the advice they had received from White & Co rather than their own investigations of the investment market.

(5) The Sample Claimants understood that White & Co had carried out due diligence investigation into the investments on their behalf in circumstances where: (a) they did not have the necessary skills and knowledge to undertake due diligence themselves; (b) investment due diligence was part of the service that White & Co provided; (c) Mr White was held out as expert in relation to investment due diligence; and (d) the Sample Claimants were charged for the due diligence service.

(6) The Sample Claimants were entitled to rely on White & Co's services. The suggestion that they should have carried out their own investment due diligence in the circumstances is not sensible. In any event, due diligence or the extent to which it had been carried out does not detract from their genuine commercial intention to invest in the hope of obtaining a capital return.

(7) The Sample Claimants who entered into EIS Investments without Super EIS Investments in the same tax year were paying more for their investments than they were obtaining in tax relief – see, for example, Mr Atkins, Mr Burn (in the 2012/13 and 2013/14 tax years), Dr Coyne (in the 2011/12 and 2012/13 tax years), Mr Kalairajah (in the 2012/13, 2013/14, and 2014/15 tax years), Dr Rao (in the 2010/11,

[95] Day 4/97:2

[96] Day 1/72:24

2011/12, and 2012/13 tax years), and Professor Skinner (in the 2010/11 and 2011/12 tax years).

(8) Various of the Sample Claimants who entered into EIS investments with Super EIS investments in the same year said that they were paying broadly the same amount of capital for the investments that they would otherwise have paid in tax - see for example, Dr Glass and Dr Vasireddy.

(9) The Sample Claimants broadly appear to have taken at face value the advice that EIS Investments should be taken together with a Super EIS investment. Even where Sample Claimants appreciated that they would get reduced growth on the Super EIS investments (as it would be used to repay the loan), they still treated the EIS investments as being to provide capital growth.

(10) The evidence of Professor Chauhan was that he claimed relief on his 2015/16 tax return, obtained a refund, used the refund to pay for the investments, and then amended the return. He did this on the advice of his accountants rather than with the intention to deceive HMRC. However, the effect of this advice was that he obtained a refund which he was not entitled to at the time because he had not made the investment, rather than the eventual investments which he did make being artificial.

(11) With the exception of Professor Skinner for the year 2014/15, all of the Sample Claimants invested money prior to the inclusion on the sums on tax returns. Indeed, various Sample Claimants (for example, Dr Glass) said that they were told to delay the submission of their tax returns to allow for the investments to be made first.

323. The Claimants invite me to conclude that all of them intended to obtain capital return from their investments. Whist there was tax advantage this was not the sole purpose and does not give rise to artificiality.

324. Further, the apparent matching of the tax relief and the investment which took place when Super EIS Investments were used does not render the transactions artificial. Crucially, it was only the Super EIS loan which caused these to match. As such, if the Super EIS is removed (as effectively occurred when the tax relief was denied) the capital investment substantially exceeds the relief. In any event, the intention to match the tax relief to the investment does not detract from the fact that the Sample Claimants' intention was also to obtain the benefit of capital growth from the investments.

**Allianz's Case**

325. In order to consider whether a transaction is "*artificial*," it is important to identify what a "*normal transaction*" which is "*of an ostensibly similar type*," would look like and to compare this with

the transaction in question. In this regard, particular attention is required to section 178 of the 2007 Act, namely that the shares offered for subscription in an EIS or Seed EIS scheme must have been subscribed for by the investor for genuine commercial reasons, and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax. It will be noted that this involves consideration of a "main purpose" clause.

326. The experts agree that the purpose of the legislation governing EIS investments was to encourage investors to invest in startup companies. In particular, as Mr Wentworth-May agreed in cross examination, the purpose of the legislation was not to enable investors to reduce or eliminate the income tax they have to pay as demonstrated by the provisions of section 165 of the 2007 Act requiring that shares are subscribed for by the investor "*for genuine commercial reasons and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax."*

327. It follows that a "*normal*" scheme under the EIS and Seed EIS legislation must have a genuine commercial purpose and the avoidance of tax must not be the sole motivation or one of the main purposes of the investment. Equally the scheme would have not to fall foul of the "*excluded activities"* rule in Section 192 of the 2007 Act[97]

328. But, as Allianz notes, commercial benefit and tax avoidance may be seen as two sides of the same coin since any investment which provides tax relief to the investor will have the effect of reducing the financial risk that the investor runs in making the investment. It cannot be the case that compliance with Section 165 is achieved as long as there is some element of commercial advantage to the investor from subscription to the shares, since that advantage might arise solely from the tax relief that the EIS schemes enjoy. Any EIS scheme worth engaging in would have commercial advantage to the investor and the investor obviously would be motivated by this and hence the "tax avoidance" provisions of Section 165 would be meaningless.

329. Compliance with Section 165 must therefore require both that the subscription is for genuine commercial reasons and that it is not "*part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax*." Having regard to this, Allianz argues that a scheme cannot be compliant with Section 165 of the 2007 Act if:

(1) there is no genuine commercial purpose behind an investment;

(2) the sole motivation of an investment is the avoidance of tax; or

(3) one of the main purposes of an investment is the avoidance of tax.

[97] Which contains amongst other things an exclusion at (j) for "operating or managing hotels or comparable establishments or managing property used as an hotel or comparable establishment."

330. This is to be contrasted with other investments. For example, the tax benefits of investing in ISAs are not lost even if the sole purpose of the investment is to avoid paying tax, since there is no statutory provision comparable to Section 165 which defines what is and is not a legitimate purpose for entering into the investment.

331. Allianz contends that whether an EIS investment is artificial is to be considered by taking into account what a compliant EIS investment would look like, including compliance with Section 165. It follows that an EIS investment that purports to comply with the relevant legislation but in fact is not subscribed for by the investor for genuine commercial reasons and/or is part of a scheme or arrangement the main or one of the main purposes of which is the avoidance of tax would not be compliant with Section 165 even though it contrived to be. This would be the clearest example of what is "*artificial*."

332. To this end, Allianz, like the Claimants looks first to the expert evidence and then to the evidence of the individual Sample Claimants, arguing that:

(1) If the experts agree (or the Court finds on the basis of the expert evidence) that an investment is artificial then that is sufficient for the purpose of the Tax Mitigation Endorsement; and

(2) If the experts do not agree and/or the Court does not make a finding on the basis of the expert evidence, the documentary and witness evidence of the Sample Claimants becomes relevant and determinative.

333. In looking at the former issue, Allianz invites me to conclude that an EIS or Seed EIS investment would be non-compliant with the relevant legislation and therefore an investment in it would be artificial if the particular investment failed to comply with relevant legislative scheme. This would be the case where, for example:

(1) EIS3 or SEIS3 certificates were not obtained so as to enable an investor to claim for relief in relation to an investment in the Company:

(2) A company was engaged in "excluded activities," as defined in section 192 of the 2007 Act;

(3) Investments were in a Company which did not comply with the risk to capital condition.

334. Of these cases:

(1) The first is said by footnote 123 to Allianz's skeleton argument to apply to Hekamiah, One Giant Leap, Red Union, (Shooting for Socrates, Trillionaire and West Park Productions, these being the schemes listed in footnote 1 to Mr Wentworth-May's

supplemental report at C/4/10, except for Absolutely Anything, Five Foot Two Blonde and Myxa[98]). In closing submissions, Ms Daly noted that the following companies also fall within this failure to comply with a "hard-edged" condition of an EIS or Seed EIS: Anonymous Endeavour, AX Capital Ventures, Blonde to Black, Crown Talent[99], Cuchifritos, Fairytale Films, Falling Snow, Green Waste and WRT.

(2) The second applies to Osea Events and Osea Island, since they were engaged in "operating or manging hotels," an excluded activity under Section 192 (1)(j) of the 2007 Act.

(3) The third applies to Fusion Festivals and Events, in respect of which an agreement was reached with HMRC following its enquiry into the scheme which treated investments made after 15 March 2018 (when the risk to capital condition was introduced into ITA 2007) as non-compliant. As Ms Daly rightly conceded in closing submissions, Mr Francis' oral evidence was somewhat ambivalent about whether this definitely meant that the investment was artificial.

335. Allianz relies on concessions made by Mr Wentworth-May in cross examination as to matters HMRC would consider as being factors relevant to considering whether the subscription complied with Section 165 of the 2007 Act (and therefore are relevant to artificiality in so far as investment was not made in accordance with the usual conditions for an investment of this kind):

(1) An investor's knowledge about an investment, including:

(a) Whether the investor is bringing their own know-how to the business of the investment Company;

(b) Whether, on the other hand, an investor has undertaken little or no investigation into the Company in which they are investing.

(2) An investors' personal financial circumstances, including:

(a) Their historic appetite for tax-saving measures;

(b) Whether they have previously been involved in setting up structures like LLPs to draw otherwise taxable profits out of limited companies under the pretext of the provision of fictitious 'consultancy fees' so as to reduce the company's liability to corporation tax and place the funds into the hands of the investor;

[98] For the sake of clarity, these are the cases where neither expert has identified any EIS3 or SEIS3 in respect of investment made in the company. There are other examples where some such certificates have been identified even if not for all investments – see the table at [116] above.

[99] It would appear that an EIS3 certificate had been issued on at least one occasions in respect of this company - see C/39/2

(c) Whether they have used a company through which wages are paid to an investor's children who are classed as 'employees' of the company, as a means of transferring money to them from gross rather than net income;

(d) Whether they are investing a high proportion of their income;

(e) Whether they hold themselves out and/or take active steps to present themselves, as a film producer or film trader for the purpose of obtaining tax relief when in fact they are neither of those things.

(3) Evidence that the invested sum is linked to the tax relief, including:

(a) Whether the sum invested is set by reference to the tax liability to be offset;

(b) Whether an investor actively looks for an EIS investment because they are motivated by the fact that a tax liability is going to accrue and wish to avoid paying it.

336. Ms Dixon KC and Ms Daly examined the evidence of witnesses on these issues in Schedule 1 to their closing submissions. It is unnecessary even to summarise that masterly document but suffice it to say that the passages cited therein are contended to provide support for Allianz's submission that witnesses showed time and again that their investment knowledge, personal financial circumstances and attitude to tax relief was exactly that which would alert HMRC having regard to the factors acknowledged by Mr Wentworth-May to be of likely interest to them.

**Discussion**

337. My conclusions as to the proper construction of the Tax Mitigation Endorsement have several implications for the application of the expert evidence to the issue of whether the Tax Mitigation Endorsement applies to all or some of the claims the subject of these proceedings:

(1) As I have indicated, in so far as Mr Wentworth-May's focus is on whether schemes have features of tax avoidance, the bar for artificiality is set at the wrong level - tax avoidance will almost always involve an artificial scheme where there is an intention to mitigate tax but not all artificial schemes to mitigate tax will property be described as tax avoidance. In particular, to the extent that emphasis is placed on the so-called Ramsay principle, I do not consider it a sure guide as to what falls within the endorsement.

(2) Contrary to Mr Francis' opinion that factors such as investors' knowledge, their appetite for investment in other artificial investment vehicles and the actual success or failure of the particular investment vehicle is concerned, these are not sure pointers to the artificiality or otherwise of the particular investment vehicle or scheme. The focus is on the design or purpose in the particular case and whether it can properly be said

to be artificial. Certainly the conduct of the investor generally and the actual failure of a scheme may be an indicator as to how the scheme was designed or what its purpose was in being used in any particular case, but they are not properly to be seen as proxy indicators of whether in fact the scheme is artificial and to that extent I do not accept that they are relevant factors to be taken into account in making the assessment save in so far as they point to some other feature of artificiality.

338. I accept the argument that the question of whether a particular investment is artificial can be looked at either from the point of view of the motivation of those who design, advise on or make the investment or from an examination of the actual characteristics of the particular investment. The actual manner in which an investment performs may be an indicator of how it is intended to operate and may show that the true purpose of the investment is in fact to achieve a particular tax outcome.

339. As I have noted above, I also agree with Ms Daly's point in closing submission that the issue of the purpose, design, motivation or intention of an investment does not have to be looked at from the viewpoint of any particular actor.

340. Of the indicators that Mr Francis refers to, it is agreed that (a), (b), (c), (e), (i) and (j) are indicators of artificiality. In addition, I agree with Mr Francis that (d) and (f) are properly seen as indicators of artificiality.

(1) In respect of (d), if an investment is set up in a way that the person responsible for devising or implementing it knows does not qualify for EIS (or Seed EIS) relief (or where they do not care whether it qualifies), but investments are induced purely to qualify for tax relief, that in my judgment is a clear case of artificiality – it is an attempt to use the EIS or Seed EIS scheme for a purpose outside of that which is permitted by statute and it follows that the scheme is artificial on the test set out above. Given that the test of purpose under Section 165 of the 2007 Act is one which applies as much to those who design or advise on investment schemes as it does to the investors themselves, then the mere fact that an investment could never qualify for the relevant relief is not a bar to a finding that the investment was, in Mr Wentworth-May's words, "*intended to achieve a tax result that is contrary to the intentions of Parliament.*"

(2) In respect of (f), a scheme that has no commercial purpose is by definition one falling outside of the terms of Section 165 of the 2007 Act and is one that is therefore artificial on my finding as to the definition of that word.

341. As to the other factors, (g), (h) and (k) are better seen as red flags that are likely to lead to further enquiry rather than themselves being indicators. Factor (l) is best seen as looked at from the point

of view of the individual investor rather than the investment vehicle and I address this below when considering the motivation of individual Sample Claimants.

342. Accordingly, I consider whether the relevant investment vehicle had the following characteristics:

- (a) Did the investment vehicle produce a tax result which did not reflect the economic reality of the investment vehicle's transactions (e.g. a tax loss where no financial loss was suffered)?
- (b) Did the investment vehicle achieve, by design or not, a result that was not intended by Parliament?
- (c) Was the investment vehicle designed to exploit shortcomings in legislation?
- (d) Did the investment vehicle, knowingly or deliberately, claim tax relief in circumstances where the investor/user did not qualify for the aforementioned tax relief?
- (e) Was the only purpose of the investment vehicle to produce a tax advantage?
- (f) Did the investment vehicle have a commercial purpose?
- (i) Did the investment vehicle contain steps only implemented to take advantage of tax relief which the investor/user would not ordinarily qualify for were it not for the investment vehicle?
- (j) Did the investment vehicle contain a legitimate or commercial transaction which was only entered into as a condition of a larger pre-ordained arrangement?

343. However, judging whether these factors apply in respect of the investment vehicle is in reality an extremely difficult task. In respect of many, if not most, there is material which is capable of supporting the conclusion that there is artificiality in the manner that I have described but it is simply not possible to establish whether the scheme is necessarily artificial. In order to determine for example whether an investment had a commercial purpose, one would need to look in some detail about how the vehicle was set up. I do not consider that Mr Francis' evidence allows me to reach a considered conclusion in respect of any of the vehicles that it was necessarily (or even more likely than not) artificial by application of (a), (b), (c), (e), (f), (i) or (j) above.

344. However, I take a different view in respect of principle (d), at least in so far as no EIS3 or SEIS3 certificate was obtained. If EIS3 and SEIS3 certificates were issued on at least some occasions in respect of a company, this would indicate that it could be shown to comply with the legislative scheme in the case of a particular investor. If such a certificate was never issued, it is overwhelmingly likely that this as because the investment vehicle did not comply with the legislation. Such a scheme would necessarily be artificial. This applies in respect of Hekamiah, One Giant Gig, Red Union, Shooting for Socrates, Trillionaire and West Park, the investments

identified by Allianz in footnote 123 to its closing submissions, together with Anonymous Endeavour, AX Capital Ventures, Blonde to Black, Cuchifritos, Fairytale Films, Falling Snow, Green Waste and WRT, these being the companies (excluding Crown Talent, in respect of which on at least one occasion an EIS3 certificate was issued) referred to in oral closing submission for Allianz.

345. As regards the other individual investments identified by Allianz:

(1) In respect of Osea Island Resort Ltd and Osea Island Events Media & Management Limited, the brochure of the investment opportunity in October 2012 at F2/161 states that Osea Island resort incorporates these two companies and is "*an innovative dual company structure to finance the redevelopment of the first phase of the Osea Island Business Plan"* aimed "*to create a 5 star luxury resort and music, filming & events facility…"* This material strongly supports Allianz's argument that the investment involved the operation or management of hotels, an excluded activity. The use of an EIS scheme for such an investment would therefore be artificial within the meaning of that word in the Tax Mitigation Endorsement and those investments would fall within the endorsement.

(2) In respect of Fusion Festivals and Events, I am not persuaded that the evidence supports the conclusion that investment in this vehicle was necessarily artificial. Whilst the company may have conceded an argument about failure to comply with the risk to capital condition, that concession does not unequivocally point to artificiality since the condition is phrased in terms of whether it is reasonable to reach a certain conclusion rather than whether in fact objectively the company failed to meet some specific requirement. It may be reasonable to reach a particular conclusion because of the quality of evince on the issue, but that does not mean objectively that the scheme does not in fact involve risk to capital of the kind indicated in Section 157A of the 2007 Act. It follows that I am not satisfied that advice on investment in Fusion Festivals and Events necessarily falls within the Tax Mitigation Endorsement (albeit that on the facts of this case, it does so for reasons dealt with below).

346. As noted above, it is common ground that, at least where the relevant underlying transactions are executed, FRB Investments (at least by investors who are not film produces and traders – and it is not contended that any of the Sample Claimants fell within the definition of film producers or traders) and Super EIS Investments fall within the definition of artificiality for the Tax Mitigation Endorsement. This is clearly correct. As the evidence of Mr Burn set out below demonstrates, the FRB scheme is entirely artificial if being used by someone who is not a film producer or trader. Equally, the very description of Super EIS schemes as using loans that are not in fact subject to repayment if the investment vehicle fails, such that tax benefits are maximised to the inclusion of any commercial risk are obvious examples of artificiality in the sense defined.

347. I do not accept the arguments advanced for the Sample Claimants that there may be no artificiality if the particular scheme is not in fact effected. As I have indicated, the emphasis is on the intention or purpose of the scheme, not its actual outcome.

348. Further, in so far as Super EIS schemes are concerned, I do not accept that one can separate out the EIS element of the scheme (funded by the investor) from the "super charged" element of the scheme, funded by the loan. These transactions are closely related, as demonstrated by the fact that the EIS is entered into at the same time as the Super EIS. This is a clear example of an investment which is "*part of a scheme … the main purpose or one of the main purposes of which is the avoidance of tax"* (contrary to section 165 and 178 of the 2007 Act) and therefore fulfils the definition for artificiality.

349. Turning to the Sample Claimants individually, the obvious starting point is to consider their motivation for entering into the various investments. I accept in broad terms the categorisation by Mr Chapman KC of those who gave evidence as honest and straightforward, and that they were motivated to make investments by the desire to achieve capital return as well as by the tax advantages that the various schemes offered.

350. There were points however at which the evidence of witnesses was less straightforward. Mr Burn was asked about [27] and [29] of his witness statement, which is included in part in Schedule 1 to Allianz's closing submissions, though for its full effect a longer quotation is required:

> "*Q: You say at paragraph 27, 'The first investments that we made were in film rights. We were told by Ben White that as long as we involved ourselves in the film business in the way that he recommended, we would be considered film producers by HMRC and entitled to the tax reliefs that he advised.' If we go on then to paragraph 29: 'I was told by BW [Ben White] that by me being a producer and trader, this investment was eligible for tax relief'. If we just pause there, a producer and a trader. My understanding, and let's see if we agree on this, is that a film producer is somebody who oversees film production?*
>
> *A: Correct.*
>
> *Q: Somebody who in pre-production finds material for development, gets the scriptwriter, hires a director; yes?*
>
> *A: Yes.*
>
> *Q. Somebody who at the production stage ensures that the film remains on schedule and on budget?*
>
> *A. Yes.*

*Q. And then after production, deals with sales, marketing, distribution, all of those kind of things; yes?*

*A. Yes.*

*Q. A film trader, I have to say I am not entirely sure what a film trader does. Perhaps you can enlighten me?*

*A. Presumably sells the film, the film rights. But from the definition of HMRC, their definition for the producer was as long as they're involved with the production or the films, 10 hours a week, 360 hours a year, then it counts as being a producer.*

*Q. Mr Burn, we established at the outset that you and your wife were an orthodontist and a dentist respectively yes?*

*A. Yes, that's correct.*

*Q. And that you certainly, I didn't ask about your wife, but you were certainly practising full-time; yes?*

A. *Yes.*

*Q. You weren't actually engaging in film trading or production, were you?*

*A. Well, I mean, at Cannes we met Maggie Monteith, this was the producer of the films. We sat down and talked through the tranche of films that were on offer and that we'd be involved with. They changed over time and you could -- you got information and feedback as to how the films were doing and the scripts. Then, yes, in Toronto, we attended the film festival in Toronto and met representative Maggie Monteith in Toronto.*

*Q. You say at paragraph 29 of your statement: "I was told that by acting as a film producer and undertaking a statutory number of hours per year that this would qualify for tax relief. Ben White gave advice to keep a diary of our film production activities. We did this diligently and attended film festivals in Cannes and Toronto and followed all the advice that Ben White had told us would render us legitimate film producers." So you have just listed off some things that you did. You met Maggie Monteith?*

*A. Yes.*

*Q. You got information and feedback as to how the films were doing, yes, but you couldn't impact how the films were doing, could you.*

*A. Well, I couldn't impact on them, no.*

*Q. You were just having a chat. You were just having a chat so that you could write in your diary that you'd done some work on a film, weren't you?*

*A. I certainly wasn't having an impact on the script or the film.*

*Q. No. You weren't sourcing a scriptwriter?*

*A. No.*

*Q. You weren't looking at the production budget? You didn't have any say over who the director was?*

*A. No.*

*Q. Nobody was asking for your opinion on where this film should be marketed, were they?*

*A. No.*

*Q. No. What you were doing was you were in Cannes and Toronto to give the impression that you were engaging in film production, weren't you, Mr Burn, if we're being honest?*

*A. Also to actually meet Maggie Monteith because he had said that Maggie Monteith was the film production… did she exist –*

*Q. Mr Burn, if I meet Steven Spielberg, I'm not engaged in film production, am I?*

*A. Well, I was meeting Maggie Monteith who was the film producer –*

*Q. If I meet Steven Spielberg and I ask him how his latest film is going and what the budget is, I'm not engaged in film trading and production, am I?*

*A. No, okay.*

*Q. So let's call a spade a spade: you were going there to give the impression of being a producer and trader, but you were not in fact a producer and trader, were you?*

*A. I was not, from the classical sense of producer, no.*"

351. Mr Burn's position on whether he was a film producer, whether in the "*classical sense"* or not was plainly incredible. It did him no credit that he held out with the argument that he had to be so extensively pushed on whether visiting film festivals, meeting producers and the suchlike could truly be said to amount to evidence of such activity. The most generous interpretation – and one that on balance I accept as more likely than not – is that he has so convinced himself of the need to repeat the justification for his entitlement to tax relief under the FRB scheme that he can no longer distinguish what is obviously right and wrong on the issue. But that does not address how he came to accept that such investment on such terms was legitimate in the first place, nor does it give me any confidence in placing reliance on his evidence. Perhaps fortunately him for him, his evidence on other issues was of a piece with other witnesses whose credibility was not similarly damaged and on balance I accept of him, as of other witnesses, that, in so far as they invested in schemes that were not FRB Share-gifting or Super EIS schemes, they did not invest with the

deliberate aim of evading tax that they legitimately knew was in fact payable, but rather that they invested for the dual benefits of potential growth in the investment and tax mitigation.

352. Similarly, it was somewhat concerning in the course of Mr Atkins' evidence that he appeared to retreat from the position that he acknowledged in the two documents referred to in sections 10[100] and 11[101] of the part of Schedule 1 to Allianz's closing submission that relate to him, were prepared outside of the context of his giving evidence to court and were more contemporaneous to the matters which they refer to. In his case, he did not accept during cross examination that tax mitigation considerations played any significant part in his investment decision. Given his contemporary comments in the documents that I have noted and the obvious potential significance of the tax advantages to be enjoyed. I reject his oral evidence and prefer what he had to say in the written documents.

353. With the exception of Mr Atkins (whose evidence on this point I reject), every Sample Claimant accepted that their investment decisions in respect of EIS, Seed EIS and/or Super EIS schemes were influenced by the tax implications of the investment. Some were more cautious than others in accepting this to be the case, perhaps because they realised that their answers might have significant consequences for the Coverage Trial. They also gave slightly different emphasis to the importance of the tax consequences of the investments that they were making.

354. If I had needed to decide whether, in respect of the investment by any Sample Claimant in EIS and/or Seed EIS schemes, the tax outcome of the investment was the sole purpose of the investment, I would have concluded that this was not the case. I accept that in the case of each Sample Claimant, the potential growth on their investment was a relevant factor which made a more than minimal contribution to their decision to invest.

355. Further, if I had needed to decide whether the tax advantages of such investments was the main purpose (to the exclusion of any factor other than as a subsidiary purpose) in making the decision to invest, I would not have been persuaded that this was so in respect of any of the Sample Claimants, given the amounts that were in issue and the potential risk to their capital through investing in this kind of ventures – put simply unless there was at least a prospect of growth in the value of the investment, the Seed EIS and EIS schemes had no more than short term tax advantages at a price that would not have been worth paying.

356. But I am entirely satisfied in respect of each Sample Claimant that the beneficial tax outcomes to be achieved by investing in EIS or Seed EIS Schemes was one of the main purposes of the investment. I say this because:

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[100] A communication with Mr Mark Niven at F20/62/104

[101] A communication with Elite Chambers at F20/62/123

(1) In each case there is a contemporaneous document showing that the favourable tax treatment of such investments, in other words the tax outcome, was one of the factors being considered in the decision to invest;

(2) All Sample Claimants other than Mr Atkins (whose evidence I have rejected in this respect) accepted that the tax factors played a part in their decision to invest;

(3) All Sample Claimants[102] accepted that the amount that was invested was determined (at least in part) by the tax relief that would be obtained through the investment.

357. It is common ground that all of the schemes here are of a nature that would fall within the Tax Mitigation Scheme if, but only if, they are "artificial." Having regard to the true construction of the Tax Mitigation Endorsement as set out above, the consideration of whether any or all of the schemes in issue here are artificial is achieved by looking at what a normal scheme would involve. A normal scheme could not be one that was "*part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax*" by virtue of Section 165 of the 2007 Act. On my finding on SOI[25] as set out above, the main purpose of the subscription in the relevant schemes for all investors was the tax advantage to be obtained from the investment by virtue of the associated reduction in tax liability. It might be thought that it follows naturally from this that one of the main purposes of the scheme was the avoidance of tax in the sense of not paying what is otherwise due. But on this issue, the Claimants emphasise the Ramsay principle and the need before one finds "tax avoidance" as a purpose for the court to be satisfied that this is the sole or at least main purpose of the investment. In other words, a scheme that reduces tax liability could not be "tax avoidance" unless that reduction of liability was its sole purpose.

358. I am unpersuaded that this is the correct approach to the task in hand. The express reference to "*one of the main purposes*" in Section 165 of the 2007 Act means that the section would be rendered meaningless if one imposed on the "no tax avoidance requirement" of that section a requirement that the non-payment tax be the sole purpose of the subscription. That would render the meaning of Section 165 to be something along the following lines: "*The relevant shares must be subscribed for by the investor for genuine commercial reasons and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the sole purpose of not paying tax."* The language cannot bear so strange a meaning – if the sole purpose of the scheme or arrangement was to reduce a tax liability such that the scheme could properly be categorised as "tax avoidance" the "main purpose" test would be superfluous because the application of the sole purpose test would inevitably determine the main purpose test. Further, I cannot see how one could ever determine that the main purpose of doing something was the sole purpose of achieving a particular result.

[102] Including Mr Atkins.

359. Having regard to my finding on the true construction of the Tax Mitigation Endorsement, it follows that I am satisfied that all EIS and Seed EIS investments made by the Sample Claimants fall within the ambit of that endorsement, because they are artificial as a result of my finding that one of the main purposes of the investment was to achieve a specific tax outcome (the reduction of tax liability) through the investment, in circumstances where the enabling legislation required that relevant shares must be subscribed for by the investor for genuine commercial reasons, and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax, in the sense of not paying tax that was otherwise due.

360. In summary:

(1) Advice on all of the investments made by the Sample Claimants in EIS, Seed EIS, Super EIS and FRB schemes fell within the Tax Mitigation Endorsement;

(2) Alternatively:

(i) advice on any FRB or Super EIS Investment (including the constituent parts of such an investment) would fall within the Tax Mitigation Endorsement; and further

(ii) advice on any investment in Anonymous Endeavour, AX Capital Ventures, Blonde to Black, Cuchifritos, Fairytale Films, Falling Snow, Green Waste, Hekamiah, One Giant Gig, Osea Island Events Media & Management Limited, Osea Island Resort Ltd, Red Union, Shooting for Socrates, Trillionaire, West Park, and WRT would fall within the Tax Mitigation Endorsement.

**THE RELATED CLAIMS PROVISION**

**SOI[24] Issue 32 - Does the Related Claims provision operate: (a) to aggregate all the claims the subject of these proceedings into a single limit of indemnity; or (b) to aggregate any of the claims the subject of these proceedings as more than one Related Claim (and if so how many and on what basis); or (c) at all?**

**The Claimants' Case**

361. In approaching the issue of aggregation under the "Related Claims" provision, the Claimants draw attention to the need to ensure that insurers are not, through such a clause, aggregating claims in an unjustified fashion.

362. The Claimants argue first that there are three categories of case of the "deeming provision" of notification set out at [32(i)] above.

(1) Those where a claim is made during the relevant period of insurance (category A);

(2) Those where the claim arises from circumstances notified during the period of insurance (category B);

(3) Those where the claim has neither been notified nor arises from circumstances notified during the period of insurance, but is a claim "*alleging, arising out of, based upon or attributable to the same facts or alleged facts, or circumstances or the same Wrongful Act, or a continuous repeated or related Wrongful Act"* (Category C).

363. The Related Claims provision is targeted at claims falling into Category C but, the Claimants argue, does not apply to claims in Category B. As the Claimants' written closing submissions put it, "*Category A and Category B are primary claims for the purpose of the insuring agreement whereas Category C concern secondary liabilities that concern 'the same; facts, circumstances or 'Wrongful Act*'."

364. The Claimants go on to argue that, even if a claim can in principle be both a Related Claim and a notified circumstance, this does not arise in the present case because:

(1) The proper construction of the Related Claim Provision is that the Claims must arise out of, be based upon, or be attributable to the same facts or alleged facts, circumstances or the same Wrongful Act or a continuous repeated or related Wrongful Act.

(2) The word "*same*" in the definition "Related Claim" applies on its natural reading to facts, alleged facts, or circumstances. To construe the phrase otherwise would create an imbalance where only some of the features to be required to be "*the same*," and otherwise no word would define which "*circumstances*" are being referred to.

(3) The provision itself provides for the Wrongful Act to be "t*he same*" for it to apply.

(4) A continuous Wrongful Act envisages the same ongoing act or omission carrying on.

(5) A repeated Wrongful Act also envisages the same Wrongful Act happening again.

(6) A requirement that the facts be the "*same*" is a stricter test than "*similar*" therefore there must be an even closer correlation between claims than in *Axis v Discovery Land* cited at [92(3)] above.

365. The Claimants contend that the claims which are the subject matter of the Sample Claimants' causes of action do not arise out of, are not based upon and are not attributable to the same facts, alleged facts, or circumstances, nor are they attributable to a continuing or repeated single Wrongful Act for the following reasons:

(1) Each of the Claimants received their own advice from White & Co.

(2) (Save for possible exceptions where relevant Claimants were family members) each of the Claimants entered into their own investments which were not linked to or contingent upon the investment of any other investor.

(3) Each of the Claimants suffered their own loss.

(4) The acts or omissions do not "fit together" in that there is no connection or interdependency between the investments by each of the Claimants other than similarity.

(5) It cannot be said that alleged negligence of White & Co in respect of any one Claimant was the cause of its alleged negligence as regards any other Claimant.

(6) Each act of negligence was a separate breach of duty to a separate Claimant.

366. If, contrary to the matters aforesaid, any of the Claimants' claims are to be treated as Related Claims, it is submitted that this is only to the extent of each investment being the same. As such, there would be a £2,000,000 limit for each of the Investment Companies.

**Allianz's Case**

367. Allianz approach the question of the definition of "Related Claims" within the related Claims provision slightly differently. Whilst they accept that the word "*same*" must govern "*circumstances*" as well as "*facts or alleged facts*" in the definition of Related Claims, they contend:

(1) Where, in a solicitors professional indemnity policy, claims aggregate on the basis of the fact that they "*arise from the same act or omissions in a series of related matters or transactions",* the "*same act"* is not a reference to a single act or omission but rather refers to "*two or more acts or omissions which are 'the same', in other words identical*[103]*."*

(2) The same principle applies where the reference is, as here to the same "*facts or alleged facts or circumstances*," such that, as long as the facts or circumstances are identical as between claims, it does not matter that the facts or circumstances occurred on a different occasion – for example if White & Co sent a letter with the same contents to different investors, the fact that the letters themselves were discrete would not prevent the fact or circumstance being "*identical*."

(3) This equally applies to determining what is the same "Wrongful Act."

(4) A Wrongful Act will have been repeated if it is something that has happened before.

(5) It will be related if, as Lord Toulson put it in *AIG v Woodman* [2017] 1 WLR 1168 at [18] (construing an aggregation clause which referred to "*a series of related matters or transactions*"), "*there is a real connection between the transactions in which they occurred rather than merely a similarity in the type of act or omission*." Lord Toulson accepted at [22] of his judgment in that case that the determination of this issue was "an acutely fact sensitive exercise" which involved "an exercise of judgment".

[103] See Canon and McGurk Professional Indemnity Insurance, 11th Edition at [10.64].

(6) An example of a related series of acts or omissions is given by Lord Hobhouse in *Lloyds TSB* at [46] as a document which misrepresented the benefits of a particular pension scheme which was then shown to a number of different investors[104].

(7) To be related, the claims must have arisen from, be based upon or attributable to the alleged unifying factor (the facts(s), alleged fact(s), circumstances(s) or Wrongful Act(s)) for which purpose Allianz notes two cases that are said to provide assistance.

(a) *Caudle v Sharp* [1995] LRLR 433, where Evans LJ at p. 439 said that "*arising out of*" did not require a relationship of proximate cause but implied "*some wider test of causation*"; and

(b) *Various Eateries v Allianz* [2024] EWCA Civ 10 where a business interruption policy provided for aggregation of losses "*that arise from, are attributable to or are in connection with a single occurrence*". The Court of Appeal at [54] approved the finding of Butcher J at first instance that this provision "*require[s] a causal link, but that the inclusion of the words 'in connection with' means that only a weak or loose causal link is required*."

368. Allianz contend that, if, as the Claimants contend, all of the claims were notified by reason of the Akbar Letter and/or the Block Notification and/or the Kennedys Documents, all of the claims must aggregate as a single Related Claim. This is because the same claim cannot be notified twice.

369. Alternatively, Allianz says that the claims all have the same unifying factor for the purpose of the Related Claims provision because:

(1) The alleged Wrongful Act of White & Co and the reliance of the individual Claimants on that act is in each case is the same – see RAPOC at [26] and [29]. This is therefore the same or a repeated or related Wrongful Act.

(2) The alleged Wrongful Act is, in the case of all of the Sample Claimants from whom the court heard evidence, in the pattern of Lord Hobhouse's example in *Lloyds TSB* referred to at [367(6)] above, in that the witnesses all referred to:

(a) Assurances provided orally as to the merits of the investment vehicles by reference to a previous track record of success;

(b) The provision of generic documents setting out the benefits of EIS, Seed EIS and/or Super EIS investments;

[104] Lord Hoffman, in his judgment in the same case, referred to this example and expressed some caution about it, at least where the document was "*very similar*" rather than "i*dentical*." The remainder of the House agreed with the judgments of both of their Lordships.

(c) The provision of documents setting out the specific investment vehicles available at that time which were sometimes accompanied or followed by Information Memoranda on the specific investments; and

(d) Advice given on the precise amount and combination of investments required to offset tax.

**Discussion**

370. I deal first with the question as to whether, because of the deeming provision in terms of notification, the claims that were notified either necessarily were not related claims (on the Claimants' case) or necessarily were related claims (on Allianz's case).

371. I reject the Claimants' division of claims into three categories as set out at [362] above.

(1) I see no justification in the terms of the policy for such a distinction between different categories of claim. There is nothing that prevents a claim, whether actually notified or one that arises from a communication, that falls within the deeming provision of the policy relating to the notification of circumstances from also falling within the category of "Related Claims."

(2) The very definition of "Related Claim" means that it may well cover claims that arise from circumstances that have been notified. Accordingly it is likely that there would be a significant overlap between the Claimants' Category B and Category C claims but for the implications of a condition that a Category B claim could not be a Related Claim under Category C; yet there is nothing in the definition of Related Claims that would justify such a distinction.

(3) Indeed, if the Claimants' contention is correct, it would appear that two claims that are almost identical might be treated differently for the purpose of aggregation under the Related Claims provision dependent upon whether the claims or the circumstances of the claim were notified (Category A and B) where they would not be capable of being aggregated as Related Claims or arose from the same facts as the claims which had been notified (or the circumstances of which had been notified) (Category C) but where the claim or the circumstances had not been notified, where the aggregation provisions would apply.

372. I accept the argument of Allianz that whether notification of the circumstances of a claim has been given is not determinative of whether the claim is or (on the Claimants' claim can be) a Related Claim. The two issues are conceptually discrete.

373. However this analysis also causes me to reject Allianz's argument that, if there was notification of all of the underlying claims by virtue of notification of circumstances within the Akbar Letter and/or the Block Notification and/or the Kennedys Documents, all claims must aggregate as a

single related claim. Whilst it is certainly true that the factors that lead to a finding of notification of circumstances would be likely also to be relevant to consideration of whether the claims aggregated under the Related Claims provision, I can see no necessary correlation between the two.

374. I therefore consider whether on the facts as presented to the court, the claims of the Sample Claimants are to be so aggregated. The use of the word "*same*" in respect of the unifying factor of "*fact(s)"* or "*alleged fact(s)*" and "*circumstance(s)*" is a bar to aggregating where the claims relate to advice given to different investors or relate to advice given to the same investor in different tax years. The evidence of the Sample Claimants demonstrate that, although the advice given by White & Co had many common themes and was very similar in the case of different investors and different tax years for the same investor, it differed in terms of the provision of advice and information that was relevant to the particular investor (including as to their tax circumstances) and the particular investment.

375. The use of the word "*same*" significantly qualifies the Related Claims provision and, in order to be given sensible meaning must be distinguished from a mere similarity of circumstances. The example given by Lord Hobhouse in *Lloyds TSB,* and Lord Hoffman's reasons for expressing caution about it, are telling. Lord Hobhouse supposes an identical document being produced; Lord Hoffman says that it would not suffice that the documents were merely "*very similar."* In my judgment, it cannot be shown here that the advice given to different investors (or to the same investors but in different tax years) was identical (with which I treat "*the same*" to be synonymous") rather than "*very similar*."

376. On the other hand, if one looks at the concept of the "related" Wrongful Act, this is of necessity not concerned with acts that are identical. The court needs to look at whether there is such degree of connection between the alleged unifying factor (in this case the advice given on different occasions to different investors as to how to use EIS and/or Seed EIS and/or Super EIS investments to their financial advantage). The Claimants' approach to this issue is to identify the same criticism of the advice given on different occasions within the RAPOC. The summary of the approach of White & Co to advice given to the Sample Claimants set out at [371(2)] is accurate and a good overview of how White & Co approached the issue of investment in EIS, Seed EIS and Super EIS investments. In particular the advice of White & Co, whether express or implicit, that investment in EIS, Seed EIS and Super EIS investments was compliant with the legislation where, for reasons dealt with in respect of SOI[23] above, I have found that the investments invariably offended Section 165 of the 2007 Act, brings all of the claims within the category of "related" Wrongful Act since the advice was the same in each case even if the context of giving the advice may have varied between investors.

377. It follows that in my judgment the Related Claims Provision acts so as to aggregate all claims based on investment in EIS, Seed EIS and Super EIS investments.

378. I am not however convinced that other categories of claims referred to at [11] above (FRB, DJI, Ober and Bonds) can be said to aggregate on the Related Claims provision. Whist there are undoubtedly similarities in the criticisms made of White & Co's advice, both between the EIS, Seed EIS and Super Eis schemes on the one hand and the other four categories of investment on the other, as well as their being similarities between the four additional categories themselves, whether taken in groups of two, three or four, I do not see that any combination of the additional four categories have sufficient in common to go beyond being called "*very similar"* and therefore falling outside of the ambit of the Related Claims provision.

**CONCLUSION**

379. In summary, my conclusions on the issues that remain for determination in the Coverage Claim are as follows:

**(A) The Scope of the Claims**

***SOI[1] Whether the Claims as pleaded include Seed Enterprise Investment Scheme investments.***

Yes

***SOI[2] Whether the Claims as pleaded include investments in Ober Private Clients Ltd.***

Yes

**(B) Alleged notification pursuant to the Akbar Letters**

***SOI[3] (Issue 2) What were the facts of which White & Co was aware by virtue of the March Letter and/or the 9 April Letter and Witness Statement ("the Akbar Letters")?***

That the Initial Akbar Claimants intend to make a claim against White & Co in respect of negligent advice in relation to investments in specific named companies.

***SOI[4] (Issue 3) Were those facts such as to lead a reasonable person in the position of White & Co to consider that a claim might be made by claimants who were not listed in the Akbar Letters in relation to:***

***(1) Investments in the companies listed in the Akbar Letters;***

***(2) EIS, SEIS and/or FRB Investments not listed in the Akbar Letters by reason of those investments being:***

***(a) The types of investment expressly mentioned in the Akbar Letters, or***

***(b) As the Claimants must prove, "similar investments" to the investments listed in the***

***Akbar Letters?***

Yes

***SOI[5] (Issue 5) On a true construction of (a) the 5 April 2017 Email (sent by MFL to Allianz) and its attachments and (b) the MFL 10 April 2017 Email and its attachments, were these emails a notification of circumstances which might give rise to a claim?***

No

***SOI[6] (Issue 6) If so, what was the scope of the matters notified to Allianz?***

This does not arise

***SOI[7] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?***

No

**(C) Alleged notification pursuant to the Block Notification**

***SOI[8] (Issues 8 and 9) As a consequence of the Block Notification was White & Co aware that advice it had provided clients in respect of EIS and/or SEIS Investments and/or FRB Investments was or might have been negligent, and if so what was the nature of that advice?***

Yes. The advice was that investment in EIS, Seed EIS and Super EIS schemes had tax advantages when in fact those tax advantages might not have been available.

***SOI[9] (Issue 10) Were the matters set out in the Block Notification such as to lead a reasonable person in White & Co's position to consider that a claim might be made by:***

***(1) Persons listed in the Block Notification in relation to:***

***(a) Investments identified in the Block Notification,***

***(b) Investments not identified in the Block Notification by reason of, as the Claimants must prove, those investments being:***

***(i) Similar to the investments identified in the Block Notification, or***

***(ii) The subject of similar advice to the investments identified in the Block Notification?***

***(2) Persons not listed in the Block Notification on the same bases as set out in (1) above?***

Yes, in all respects.

***SOI[10] (Issue 12) On a true construction were (a) MFL's email to Allianz on 6 June 2017 at 9:56 and the attachments to that email and (b) MFL's email to Allianz of 29 June 2017 together with its attachments (i.e., the 29 June Email and the 23 June 2017 Email) a notification of circumstances which might give rise to a claim against White & Co?***

No

***SOI[11] (Issue 13) What was the scope of any matters thereby notified to Allianz?***

Nothing was notified.

***SOI[12] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?***

No

**(D) Alleged notification pursuant to the Kennedys Documents**

***SOI[13] (Issue 15) Was White & Co aware of the 19 October Letter and/or the 22 October Letter during the Allianz Policy Period?***

Yes.

***SOI[14] (Issue 16) In what capacity did Kennedys receive the 19 October Letter and the 22 October Letter and is White & Co to be taken as having been aware of them by virtue of Kennedys having received them?***

(i) Kennedys received the 19 and 22 October Letters pursuant to the joint retainer, acting on behalf of Allianz and White & Co.

(ii) Since White & Co actually received the letters it is academic to consider whether White & Co is to be taken as being aware of them simply because they were in Kennedys' possession and I decline to deal with this issue.

***SOI[15] In what capacity did Kennedys send the First November Emails to Allianz and is White & Co to be taken as having been aware of their contents?***

(i) Kennedys sent the First November Emails pursuant to its duties under the joint retainer.

(ii) White & Co is not to be taken as being aware of their contents as a result of the capacity in which Kennedys sent the documents.

***SOI[16] (Issue 17) Were the contents of the 19 October Letter and/or the 22 October Letter and/or the First November Emails such as to lead a reasonable person to consider that a claim might be made:***

***(1) By individuals listed in the Kennedys Documents;***

***(2) By individuals not listed in the Kennedys Documents;***

***(3) In relation to Investments listed in the Kennedys Documents;***

***(4) In relation to Investments not listed in the Kennedys Documents by reason of, as the Claimants must prove, those Investments being:***

***(a) Similar to Investments identified in the Kennedys Documents, or***

***(b) The subject of similar advice to the Investments identified in the Kennedys Documents?***

The contents of the 19 October Letter and/or the 22 October Letter and/or the First November Emails were such as to lead a reasonable person to think that claims might be

made by people, whether or not listed in those documents, in respect of investments in the companies named in the documents and investments of a similar nature.

***SOI[17A] (Issue 20) Was Kennedys sending the 19 October Letter to Allianz capable of comprising a notification of circumstances within the meaning of the Allianz Policy?***

No

***SOI[17B] (Issue 20) Was Kennedys' receipt of 22 October Letter comprise a notification of circumstances within the meaning of the Allianz Policy?***

No

***SOI[18] (Issue 21) On a true construction of the Kennedys Documents, did they comprise a notification of circumstances which might give rise to a claim against White & Co?***

No; though if the answers to SOI[17A] and SOI[17B] had been "yes", the answer to SOI[18] would also have been "yes."

***SOI[19] Do any of the claims made by the Claimants in these proceedings arise from the matters notified to Allianz?***

No; though if the answers to SOI[17A] and SOI[17B] had been "yes", the answer to SOI[19] would also have been "yes."

**(E) The Ober Exclusion**

***SOI[20] (Issue 25) What is the proper construction of the Ober Exclusion?***

This issue does not require determination in light of Allianz's concession that it does not rely on the Ober Exclusion.

***SOI[21] (Issue 26) Is the Ober Exclusion contrary to the Minimum Approved Wording in the Allianz Policy?***

This issue does not require determination in light of Allianz's concession that it does not rely on the Ober Exclusion.

**(F) The Tax Mitigation endorsement**

***SOI[22] (Issue 30) What is the proper construction of the Tax Mitigation Endorsement?***

The endorsement is to be construed in accordance with [298] to [309] above.

***SOI[23] (Issue 31) Does the Tax Mitigation Endorsement apply to all or some of the claims the subject of these proceedings?***

(1) Advice on all of the investments made by the Sample Claimants in EIS, Seed EIS, Super EIS and FRB schemes fell within the Tax Mitigation Endorsement;

(2) Alternatively:

(a) advice on any FRB or Super EIS Investment (including the constituent parts of such an investment) would fall within the Tax Mitigation Endorsement; and further

(b) advice on any investment in Anonymous Endeavour, AX Capital Ventures, Blonde to Black, Cuchifritos, Fairytale Films, Falling Snow, Green Waste, Hekamiah, One Giant Gig, Red Union, Shooting for Socrates, Trillionaire, West Park, Osea Island Events Media & Management, Osea Island Resort, Red Union, Shooting for Socrates, Trillionaire, West Park and WRT would fall within the Tax Mitigation Endorsement.

## (G) The Related Claims Provisions

***SOI[24] (Issue 32) Does the Related Claims provision operate: (a) to aggregate all the claims the subject of these proceedings into a single limit of indemnity; or (b) to aggregate any of the claims the subject of these proceedings as more than one Related Claim (and if so how many and on what basis); or (c) at all?***

The Related Claims Provision acts so as to aggregate all claims based on investment in EIS, Seed EIS and Super EIS investments into a single limit of indemnity but not otherwise.

380. As I indicated above, I grant permission to the Claimants to re-re-amend the Particulars of Claim in the form that appears in the bundle at A/10.2/1ff, with permission to Allianz to file a Re-Re-Re-Re-Amended Defence limited to responding to the new amendments if so advised and permission to the Claimants to file a Re-Re-Re-Re-Re-Amended Reply responding to any new amendments to the Defence if so advised.

381. Finally I make three unrelated points:

(1) My findings about the artificiality of the investment schemes, which underly my conclusion both on the Tax Mitigation Endorsement and the Related Claims Provision, does not suppose that any particular investor had intended to avoid tax in a manner that the investor realised was contrary to the legislative scheme. The evidence supports the conclusion that investors were offered advice on this issue by White & Co and followed that advice. It may be that, in some cases, the investor realised that the advice was wrong (or at least was told things that would have made the investors query the accuracy of the advice), but that does not lead me to the conclusion that investors generally were seeking to act in disregard of their obligations to pay tax.

(2) I thank the lawyers for their tireless work on this case, before, during and after[105] the trial. It will be obvious that this judgment leans heavily on their preparation both for trial and for closing submissions. I am particularly grateful to counsel for their written and oral submissions which have in all cases been of the highest quality.

[105] The list of suggested corrections was a *tour de force*. All remaining errors, whether through me not having adopted the suggestions or otherwise, are of course my responsibility..

(3) I apologise for the delay in this judgment being handed down. It can only partly be explained by the number of issues and their complexity.

## APPENDIX 1 - PERSONS AND ENTITIES

| ***Name:*** | ***Narrative:*** |
|---|---|
| Abbott, Emma (aka Emma Abbott-Rattray) | White & Co, director and MKP, director |
| Akbar Claimants | Claimants in the Akbar Proceedings[106] |
| Akhtar, Nazmin | MKP, Tax Team |
| Aliem, Annie | White & Co, Junior Investment Administrator |
| Allen, Rob | Ober, Director |
| Allenby, Claudia | White & Co, Assistant PA |
| Allianz Global Corporate & Specialty SE ("Allianz") | Second Defendant |
| Amorone Investments (Guernsey) Ltd ("Amorone") | Lender, registered in Guernsey |
| ARP Defendants | Previous Defendants (Markel Syndicate 3000 and 66 other underwriters of the Assigned Risk Pool of the Institute of Chartered Accountants in England and Wales) |
| Atkins, Howard | Claimant (6) and Sample Claimant (1) |
| Bartlett, Sarah | MKP |
| Baxter Claimants | Mr & Mrs Baxter, Claimants in the Baxter Proceedings |
| Bennett Brooks & Co Ltd ("Bennett Brooks") | Accountants instructed by a number of Claimants after investments made |
| Bibi, Razna | MKP |
| Brookfield, Colin | MKP |
| Brown, Annie | White & Co, Assistant PA |
| Bruce, Yasmin | White & Co, MKP and Prosperity, EIS Operations Manager |

[106] Comprising the "Initial Akbar Claimants" being Jahid Akbar, Amarah Akbar, Javed Akbar, Bhupinder Mehat, Jeffrey Steiner, Arshid Hussain, Pervez Akbar and Saeed Akbar and the "Additional Akbar Claimants" being David Steiner, Marion Steiner and Linens Limited.

| | |
|---|---|
| Burn, Anthony | Claimant (20) and Sample Claimant (2) |
| Burn, Gillian | Claimant (21) and wife of Anthony Burn |
| Bushen, Claire | Solicitor and partner at Kennedys. Witness on behalf of Allianz |
| Chauhan, Anoop | Claimant (28) and Sample Claimant (3) |
| Cowman, Philip | MKP, Managing Director and Claimant (34) |
| Coyne, Anthony | Claimant (35) and Sample Claimant (4) |
| Dardis, Annie | White & Co, Senior PA |
| Davies, Francesca | White & Co, and Ober, Junior Investment Manager |
| Day, Oliver | MKP |
| Dickinson, John | Claimant (42) and Sample Claimant (5) |
| Dobson, Tom | MKP, Semi-Senior Accountant |
| Drzewiecka, Kinga | MKP, Head of Corporate Finance |
| Ewart, Lizz | Ober, Director |
| Francis, David | Partner, Grant Thornton LLP. Expert witness on behalf of Allianz |
| Freeman Fisher | Solicitors previously acting for White & Co, and Ben White in a threatened defamation claim against Michael Levy |
| Glass, Daniel | Claimant (58) and Sample Claimant (6) |
| Greaves, Corin | White & Co, and Prosperity Capital, Investment Administrator |
| Hewitt, Darren | MFL, Manager |
| Holt, Susannah | White & Co, Investment Administrator |
| Hood, Stuart | Claimant (71) and Sample Claimant (7) |
| Hundalani Claimants | Mr & Mrs Hundalani, claimants in the Hundalani Proceedings |
| Innes, Niall | Solicitor and partner at Mills & Reeve. Witness on behalf of Allianz |

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| JMW Solicitors LLP ("JMW") | Solicitors previously acting for White & Co |
| Kalairajah, Yegappan | Claimant (84) and Sample Claimant (8) |
| Kellingray, Wesley | White & Co, Senior Accountant |
| Kennedys Law LLP ("Kennedys") | Solicitors previously acting for White & Co, and Allianz |
| Lakshmanan, Chithra | Wife of Yegappan Kalairajah |
| Lee, Charlotte | MKP and White & Co, Head of Investment |
| Levy, Michael | Barrister at Elite Chambers. Previously acting on behalf of the Claimants and the Akbar Claimants. Current legal representative for Dr Wise and Hundalani Claimants.<br>Witness on behalf of the Claimants |
| Lincoln, Vici | Ober, Personal Assistant |
| Lowe, Katie | White & Co, Investment Administrator |
| Masood, Sehar | MKP, Tax Team |
| Massey, Craig | MKP, Senior Accountant |
| McCarthy, Leah | MKP |
| McGaharan, Louise | White & Co, Manager |
| McKenzie Knight & Partners Ltd ("MKP") | Chartered Accountants, dissolved 02/12/22. |
| McParland Finn Ltd ("MFL") | White & Co and MKP's insurance brokers |
| Measor, Chloe | White & Co, Cert Legal Student |
| Michael, Costas | Allianz, Claims Adjuster |
| Mills & Reeve LLP ("Mills & Reeve") | Solicitors previously acting for White & Co and Allianz |
| Monteith, Margaret | Film Producer and Director, Various Companies |
| Nixon, Marcus | MKP and White & Co, Accounts Assistant |
| Ober Private Clients Ltd ("Ober") | Company which promoted and arranged investments in EIS and corporate bonds. Ceased trading in |

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| | November 2019. Dissolved 01/12/20. |
| Ogley, Charlotte | MKP and Ober, Investment Executive |
| Prosperity Capital Ltd ("Prosperity Capital") | Company involved in financial intermediation |
| Rao, Dasappaaiah Ganesh | Claimant (128), Sample Claimant (9) |
| Ravenscroft, Matthew | Claimant (129), Sample Claimant (10) |
| Roberts, Arran | Partner at Kennedys. Witness on behalf of Allianz |
| Robson, Beverley | MKP, Senior Accountant |
| Ruddleston, Lauren | White & Co, Investment Administrator |
| Sadowska, Dajana | MKP |
| Scott, Charlotte | MKP, Junior Accountant |
| Seaman, Emma | White & Co, Senior Client Executive |
| Shanks, Jonathan | Claimant (145), Sample Claimant (11) |
| Shimwell, Katie | MKP, Accounts Manager |
| Silverfern Investments Ltd ("Silverfern") | Lender, registered in New Zealand |
| Simm, Andrew | White & Co, Senior Manager |
| Skinner, Angela | Wife of John Skinner |
| Skinner, John | Claimant (150), Sample Claimant (12) |
| Stephenson, Roger | Claimant (156), Sample Claimant (13) |
| Sulaiman, Syed Lutfi | Claimant (160), Sample Claimant (14) |
| Sultan, Firdous | MKP, EIS Client Manager |
| Towey, Seana | White & Co, and MKP, Investment Administrator |
| Vasireddy, Naveen | Claimant (170), Sample Claimant (15) |
| Veritas Accountants & Advisory Ltd ("Veritas") | Accountancy practice which acquired the practices of MKP and White & Co, around 28 March 2019 |
| Wallwork, Christine | MKP, White & Co, and Veritas, Tax Manager |

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| Watts, Craig | White & Co, Manager |
| Wentworth-May, Matthew | Barrister. Expert witness on behalf of the Claimants |
| White & Company (UK) Ltd ("White & Co") | First Defendant, Chartered Accountants. In liquidation. |
| White, Benjamin | Director of White & Co, Ober and MKP. Current director of Prosperity Capital. Director of Veritas until March 2019. |
| White, Louise | MKP, Administration Manager |
| Wise, Michael | Claimant in the Wise Proceedings |
| Zaidi, Ibrahim | MKP, Tax Team |

## APPENDIX 2 – ABBREVIATIONS USED IN THE JUDGMENT

| Abbreviations | Definition |
|---|---|
| 1 June Letter | Letter from JMW to MFL dated 1 June 2017 |
| 19 October Letter | Letter from Mr Levy to Kennedys dated 19 October 2017 |
| 1992 Act | Taxation of Chargeable Gains Act 1992 |
| 2007 Act | Income Tax Act 2007 |
| 2010 Act | Third Part (Rights against Insurers) Act 2010 |
| Minimum Term | Clause 2.2 of the minimum policy wording of the Institute of Chartered Accountant in England and Wales dated 12 August 2016 |
| 22 October Letter | Letter from Mr Levy to Kennedys dated 22 October 2017 |
| 24 April Letter | Letter from Mr Levy to Mills & Reeve |
| 29 June Email | Email from JMW to MFL sent on 29 June 2017 |
| 6 June Email | Email from JMW to MFL sent on 6 June 2017 |
| 9 April Letter | Letter from Mr Levy to White & Co dated 9 April 2017 |
| Advice Awareness | Awareness by White & Co of the investment advice that it had given |
| Akbar Claim | Claim for damages for breach of duty brought by Mr Levy on behalf of Mr Akbar and others |
| Akbar Letters | Collectively the March Letter and the 9 April Letter |
| Akbar Letters Companies | The companies mentioned in the Akbar Letters as companies in which clients had made investments |
| Allianz | Allianz Global Corporate & Specialty SE |
| Allianz Policy | White & Co's professional indemnity insurance policy with Allianz for the Allianz Policy Period |
| Allianz Policy Period | The period 28 November 2016 to 27 December 2017 |
| Amorone | Amorone Investments (Guernsey) Limited |
| ARP Defendants | Markel Syndicate 3000 and 66 other underwriters of the Assigned Risk Pool of the Institute of Chartered Accountants in England and Wales who were originally Defendants to this action |
| Baxter Claim | Claim pursued by Mr and Mrs Baxter against White & Co from 2014 under |

| Abbreviations | Definition |
|---|---|
| | claim number B40MA145 |
| Block Notification | Collectively the 1 June Letter, the 6 June Email and the 29 June Email |
| Bonds | Corporate bond |
| Coverage Claim | Whether Allianz and/or the ARP Defendants were liability to indemnify any claim that might be established against the First Defendant, the issues considered in this trial |
| DJI | DJI Holdings plc |
| EIS | Enterprise Investment Schemes |
| First November Emails | Emails from Kennedys to Allianz sent at 15.00 and 15.34 on 23 November 2017 |
| FRB | Films Rights Business |
| Freeman Fisher Letter | Letter from Mr Levy to Freeman Fisher solicitors dated 11 August 2017 responding to an allegation that he had defamed White & Co |
| Hornet's Nest Notification | Notification of circumstances that were a "can of worms" or "hornet's nest" (as referred to in Euro Pools at [39(iii)] and so did not require specificity as the potential claims' quantum or character |
| Initial Akbar Claimants | The Claimants named in the Akbar Claim at the outset, that is |
| JMW | JMW Solicitors LLP |
| July Letter | Letter from Mr Levy to Kennedys dated 10 July 2017 |
| Kennedys | Kennedys Law LLP, Solicitors instructed jointly by Allianz and White & Co to investigate and defend the Akbar Claim |
| Kennedys Documents | Collectively the July Letter, the 19 and 22 October Letters, the Spreadsheet and the November Emails |
| Levy Witness Statement | An unsigned witness statement from Mr Levy sent under cover of the 9 April letter to White & Co |
| Liability Claim | Whether the First Defendant was liable to the Claimants |
| Loss Awareness | Awareness on the part of White & Co that clients may have suffered loss through relying on its investment advice |
| March Letter | Letter from Mr Levy to White & Co dated 27 March 2017 |
| Mills & Reeve | Mills & Reeve LLP, solicitors who acted for White & Co |

| Abbreviations | Definition |
|---|---|
| MFL | McParland Finn Ltd, White & Co's insurance brokers |
| MKP | McKenzie Knight & Partners Ltd |
| Mr White | Benjamin White, co-owner of White & Co and MKP |
| Ms Abbott | Emma Abbott (otherwise Emma Abbott-Rattray) co-owner of White & Co and MKP |
| November Emails | Collectively the First and Second November Emails |
| November Meeting | The meeting between Mr Levy and Kennedys on 21 November 2017 |
| Ober | Ober Private Clients Limited, a company which promoted and arranged investments in EIS and Bonds |
| RAPOC | Re-Amended Particulars of Claim |
| Related Claims provision | The clause in the Policy that deems all related claims to be one single claim |
| Risk of Claim awareness | Awareness on the part of White & Co that clients who may have suffered loss as a result investment advice given by White & Co might bring a claim in respect of such advice. |
| RRAD | Re-Re-Amended Defence |
| Second November Email | Email from Kennedys to White & Co on 23 November 2017 |
| Seed EIS | Seed Enterprise Investment Schemes |
| SOI | The Statement of Issues prepared by the parties for the purpose of their closing submissions |
| Sulaiman Email | An email from Mr Cowman of MKP to Dr Sulaiman, one of the Claimants in this claim, dated 16 March 2015 which explains Super EIS investments |
| Super EIS | Super Enterprise Investment Schemes |
| Tax Mitigation Endorsement | The clause in the Policy aggregating claims for claims arising from transactions designed to achieve a specific tax outcome. |
| White & Co | White & Company (UK) Limited, the First Defendant; a firm of Chartered Accountants. |

**APPENDIX 3 - LIST OF COMPANIES INTO WHICH SAMPLE CLAIMANTS INVESTED AND WHICH ARE AT ISSUE IN THIS ACTION**

| ***Company name*** |
|---|
| 10 Things Films Ltd |
| Absolutely Anything plc |
| Active In Style Ltd |
| Addington Films Ltd |
| AKL Research and Development Ltd |
| Anonymous Endeavour Ltd |
| AX Capital Ventures Ltd |
| Base Entertainment (UK) Ltd |
| Bette Davis is Alive and Well and Living in Liverpool The Movie Ltd |
| Blazing Productions Ltd |
| Broadlane Films Ltd |
| BTOB1 Ltd and Blonde to Black Pictures Two Ltd |
| Capsicum Grand Prix Ltd |
| Car Seller International Ltd |
| Cardioprecision Ltd |
| Carpalla Films Ltd |
| Crown Talent & Media Group Ltd |
| Cuchifritos Restaurant Ltd |
| Dimson Films Ltd |
| Ellenglaze Ltd |
| Encore Theatre Productions Ltd |
| Evolution Digital Films Ltd |
| Fairytale Films Ltd |
| Falling Snow Ltd |
| Film Rights Exchange Ltd |
| Five Foot 2 Blonde Ltd |
| Fivelanes Films Ltd |
| Fusion Festivals & Events Ltd |
| Garras Films Ltd |
| Go Big Ltd |
| Green Waste Group Ltd |
| Hallworthy Films Ltd |

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| Hekamiah Holdings Ltd |
| Idless Films Ltd |
| Intensifi London Ltd |
| Kerris Films Ltd |
| Lawyer Services Ltd / IV League Talent Ltd |
| Livewire Events Limited |
| Longships Films Ltd |
| Luxure Media Group Ltd |
| Merrymeet Films Ltd |
| Myxa Ltd |
| Nelson's Kids Ltd |
| New Talent Films (No 1) Ltd |
| Northcott Films Ltd |
| NowPresent Ltd |
| One Giant Gig for Mankind Ltd |
| Osea Events Media and Management Ltd |
| Osea Island Resort Ltd |
| Panic House Films Ltd |
| PlusMe Ltd |
| Prizefighter Film Ltd |
| Quoit Films Ltd |
| Red Union Films Development A Ltd |
| RFS Entertainment Ltd |
| Rosevine Films Ltd |
| Shooting for Socrates The Film Ltd |
| Steffi Productions Ltd |
| Stratton Film Productions Ltd |
| Summercourt Films Ltd |
| Switch Generation Ltd |
| T.B. Seen Ltd / GweedyMe Ltd |
| Talland Films Ltd |
| The Documentary Company Ltd |
| Trillionaire Ltd |
| Uprising Features Ltd |
| Veryan Films Ltd |
| Vincent Asian Kitchen Ltd |
| Vintage Seekers Ltd |

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|---|
| Vumanity Content Ltd |
| West Park Productions Ltd |
| WRT Ltd / Vicinity Group Ltd |