UT Neutral citation number: **[2024] UKUT 00203 (TCC)**

UT (Tax & Chancery) Case Number: UT/2023/000096

Upper Tribunal
(Tax and Chancery Chamber)

INCOME TAX – discovery assessments – Appellants had claimed losses on tax returns in relation to transactions which had been marketed as tax avoidance – agreed scheme did not achieve intended tax benefits – FTT held inaccuracies in tax returns were deliberate – Appellants appealed – held – no procedural error in review of decision by FTT, and FTT was entitled to make the amendments made to the decision – whilst FTT had purported to apply the correct subjective test when assessing whether conduct was deliberate, reasoning included an objective approach – appeal allowed and remitted to FTT

Hearing venue: The Rolls Building
London
EC4A 1NL

Heard on: 1 and 2 May 2024
Further written submissions: 3, 10 and 13 May 2024
Judgment date: 12 July 2024

Before

JUDGE JEANETTE ZAMAN
JUDGE ASHLEY GREENBANK

Between

ANTHONY OUTRAM
ROSS OUTRAM

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

<u>Representation</u>:

For the Appellants: Jeremy Woolf, Counsel, instructed by Barnes Roffe LLP

For the Respondents: Sadiya Choudhury KC, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The Appellants, Anthony Outram ("AO") and Ross Outram ("RO"), appealed to the Upper Tribunal against the decision of the First-tier Tribunal (the "FTT") that there was a deliberate inaccuracy in their self-assessment returns for 2005/06 in which they had claimed losses as self-employed options traders. The Appellants had claimed to set those losses against other income in that year with the remainder being carried back to set off against income in preceding years.

2. By the time of the hearing before the FTT in these appeals, it was accepted by the Appellants that the Appellants were not entitled to the claimed losses. The issues between the parties narrowed further during the course of the FTT hearing, the result of which was that the only issue to be decided by the FTT was whether the extended time limit applied for HMRC to issue discovery assessments, which required HMRC to establish that the loss of tax or excessive relief was brought about deliberately.

3. The FTT's decision was released on 27 April 2021 and is reported at [2021] UKFTT 126 (TC) (the "Original Decision"). The FTT dismissed the Appellants' appeals. That decision was subsequently amended by the FTT and the amended decision was released on 25 September 2023 (the "Revised Decision"). One issue in the appeal before us was as to the basis on which those amendments were made, and that is addressed further below as part of the discussion of Ground 2. The Revised Decision was not published. We have attached the Revised Decision as the Appendix hereto. References to numbers in square brackets are to paragraphs of the Revised Decision unless the context indicates otherwise.

4. The Appellants had applied for permission to appeal against the Original Decision. The FTT granted permission to appeal on 25 September 2023.

THE SCHEME

5. The FTT recorded at [9] that the mechanics of the contractual arrangements and much of the documentation were very similar to that which had been the subject of appeals to different compositions of the FTT in *Thomson v HMRC* [2018] UKFTT 396 (TC) ("*Thomson*") and *Sherrington v HMRC* [2020] UKFTT 128 (TC) ("*Sherrington*"), and we refer to these arrangements as the "Montpelier Arrangements".

6. The Montpelier Arrangements as entered into by the Appellants are described by the FTT in the Revised Decision. However, the concession by the Appellants meant that, in contrast to *Thomson* and *Sherrington*, the effectiveness of those arrangements was not part of the appeal. We set out below the description by the FTT in *Thomson* of the intended operation of the Montpelier Arrangements (footnotes excluded):

> "65. We have drawn the following conclusions… :
>
> (1) Montpelier presented the Pendulum CFD and surrounding arrangements to its customers as a tax avoidance scheme that, provided it went into Phase Two, would deliver trading losses. Montpelier told users of the scheme that they would first need to "establish a financial trade" before they purchased the Pendulum CFD which was the instrument by which the tax loss would be delivered.
>
> (2) The tax avoidance result could be achieved only if a Pendulum CFD entered Phase Two (or subsequent Phases). In that case, it was important that a user of the tax avoidance arrangements should appear to pay a high Designated Issue Value for rights under the Pendulum CFD but that, shortly after entering Phase Two, a Pendulum CFD could be said to have a low value

for accounting purposes. So, for example, in Mr Worsfold's case, the Designated Issue Value of the Pendulum CFD was £300,000 but just 5 or 6 days after it moved into Phase Two, the Pendulum CFD was said to have a value of just £4,653 for accounting purposes. The difference between the high Designated Issue Value and the low accounting value would be the tax loss that would be generated. That was the "GAAP anomaly" to which Mr Gittins referred in his evidence… Indeed it is precisely the basis on which all appellants are claiming the loss that is in dispute.

(3) To achieve the result set out at [(2)], the Index Target Levels applicable to Phases Two to Five (and the lengths of Phases Two to Five) in the Pendulum CFD needed to be set at values that meant that, when Pendulum came to make its repurchase offer described at [44] above, it could justifiably offer a low price. Pendulum was not purporting to "value" the Pendulum CFD. However, it was hoped that a low repurchase value offered by a counterparty who was, at least ostensibly, transacting at arm's length, would justify a low value for accounting purposes. Without such pricing of the Pendulum CFD, the "GAAP anomaly" that Mr Gittins identified could not be achieved, and the desired tax loss could not be generated.

(4) If the appellants had had to pay the full Designated Issue Value of the Pendulum CFDs out of their own pockets the steps set out above would have achieved little. For example, Mr Worsfold would have paid £300,000 for a CFD that, a few days later, was, at least according to Pendulum, worth only £4,653. He would have made an economic loss of £295,347 and even if he obtained a tax loss as a result, that would only compensate him for part of his economic loss.

(5) For the arrangements to function as a tax avoidance scheme, the arrangements had to produce a tax loss without an economic loss. That was achieved by the Bayridge Loan which meant that the appellants were not themselves funding the entire Designated Issue Value of the Pendulum CFDs out of their own resources. Under the Bayridge Loan, Bayridge funded 95% of the Issue Value of the Pendulum CFD on highly advantageous terms. The Bayridge Loan therefore operated to "ramp up" the amount that the appellants could claim they invested in the Pendulum CFD even though they had not in any economically real sense invested the full Designated Issue Value.

(6) Phase One of the Pendulum CFD had two functions. Its first was to act as a smokescreen by enabling the appellants to argue that the Pendulum CFD was not inevitably going to produce a loss. That is why the presentation … speaks in slightly apologetic terms about the possibility that there might be a profit at Phase One. It also explains why Mr Gittins attached significance … to the effect that the Pendulum CFD might not produce a tax loss. Since counterparties had to fund the Initial Margin at Phase One out of their own resources, the second function of Phase One was to ensure that Pendulum would receive the Initial Margin from counterparties which was in the nature of a "fee" payable to Pendulum for the tax avoidance scheme that was offered."

7. The claims to loss relief were based on s380 and s381 Income and Corporation Taxes Act 1988:

(1) Claims to set-off their losses against current year income were made under s380 (the conditions for which are set out in s384). The combined effect of these provisions is that where a taxpayer incurs a loss in a trade in a particular year, that loss can be set off against other taxable income arising in the same year, or the immediately preceding year, but only where the requirements of s384 are met. Those requirements are that the

trade was being carried on a commercial basis and with a view to the realisation of profits (which is deemed to be the case if the trade is carried on so as to afford a reasonable expectation of profit).

(2) Claims for loss relief in earlier years were made under s381, which provides that relief is available for losses incurred in the first four tax years of a trade which, if the loss exceeds the income of that year, is applied to the preceding three years starting with the earliest. The loss relief under s381 is only available if the trade was carried on throughout the relevant year on a commercial basis and in such a way that profits could reasonably be expected to be realised in the period in which the loss occurred or shortly thereafter.

8. As set out in further detail below, the FTT found in the present appeals that there were no loans to the Appellants (at [88]). Mr Woolf and Ms Choudhury addressed the relevance of this in their submissions before us, but we nevertheless consider that the above summary is helpful in explaining how the Montpelier Arrangements were intended to operate.

RELEVANT LEGISLATION

9. Section 29 Taxes Management Act 1970 ("TMA 1970") sets out the basis on which HMRC may make a discovery assessment.

10. Section 29(1) provides that if an officer of the Board discovers that any income which ought to have been assessed to income tax has not been assessed, that an assessment to tax is or has become insufficient or that any relief which has been given is or has become excessive, the officer may make an assessment. Section 29(3) provides that if an officer makes a discovery and the taxpayer has made and delivered a return for that year of assessment, one of two conditions must be satisfied for HMRC to make a discovery assessment for that year. These alternative conditions are set out in s29(4) and 29(5).

11. The ordinary time limit for the issue of a discovery assessment is four years after the end of the tax year to which the assessment relates (s34 TMA 1970). In a case where the relevant loss of tax has been brought about deliberately by the taxpayer, that time limit is extended to 20 years. The extended time limit is set out in s36(1A) TMA 1970:

> "An assessment on a person in a case involving a loss of income tax or capital gains tax -
>
> (a) brought about deliberately by the person,
>
> …
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

12. Section 118(7) TMA 1970 provides:

> "In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person."

DECISION OF THE FTT

13. We have summarised below the findings and reasoning of the FTT in the Revised Decision.

14. The Appellants claimed losses in their tax returns for 2005/06, which had been prepared and submitted by Barnes Roffe LLP ("BR"):

(1) AO claimed losses of £216,273. His tax return showed previous employment with Refco Overseas Limited ("Refco"), and AO confirmed he had traded in oil futures as an employee and then on his own account. He declared sales of contracts for differences ("CFDs") of £87,850 and purchases of £283,944, of which £200,000 related to a contract between AO and Pendulum Investment Corporation ("Pendulum"). The margin on the other sales, was £3,906. At most, his only transactions in CFDs took place in the space of less than four months but in all probability in the space of less than one month.

(2) RO claimed losses of £506,370. His tax return also showed previous employment with Refco, and he confirmed he had worked in oil futures. He declared CFD sales of £327,653 and purchases of £817,865, of which £500,000 related to a contract between RO and Pendulum. There was a discrepancy in the evidence related to these purchases and sales, but in oral evidence RO conceded that the small number of other sales had produced a loss of £155. His only transactions in CFDs took place in the space of less than one month.

15. The mechanics of the arrangements and much of the documentation were very similar to those in *Thomson* and *Sherrington*.

16. The contract between each Appellant and Pendulum is a "Pendulum Contract". Describing the Montpelier Arrangements and the Pendulum Contract, the FTT's findings included:

(1) The arrangements constituted a marketed tax avoidance scheme ([40]).

(2) That scheme sought to create an artificial trading loss for tax purposes which the scheme users would be able to set against their general income ([41]).

(3) The Pendulum Contract was a simple bet that the FTSE would have moved up or down from its level at the date of the contract by a specified range of points at specified dates in the future ([43]).

(4) The Pendulum Contract was documented by a Master Agreement, an Offer to Trade and an Acceptance Confirmation Note (although the Appellants were not able to produce a signed copy of the version of the Master Agreement which governed their Pendulum Contracts) ([44] and [46]).

(5) The Pendulum Contract provided for a maximum of five Phases. The counterparty would pay the Initial Margin to Pendulum. If the Designated Index moved (up or down) by an amount greater than the designated swing movement over Phase One, Pendulum would be obliged to pay the "Trade Profit" to the counterparty. If the Pendulum Contract did not terminate, it would move into Phase Two, and Pendulum would serve a Notice of Obligation on the counterparty requiring the counterparty to pay the Margin Call Balance. Phase Two was to last for two years. The Pendulum Contract provided for further Phases ([47]).

17. The Appellants' contacts with Montpelier and Pendulum were described as follows:

(1) RO was looking for tax planning advice from Montpelier ([53]). In his witness statement AO stated his brother had introduced him to Montpelier, but in the hearing he said that Matthew Woolf and his brother had told him about Montpelier ([57]).

(2) Montpelier Financial Services Limited ("Finance") wrote to both Appellants on 28 February 2006 and each Appellant was told "You should consult your accountant or a tax specialist" as Finance were not giving advice on the tax treatment of CFDs. On 1 March 2006 the Appellants signed and returned a letter in which they each confirmed

they understood that Finance was not advising them as to tax and that they must seek the advice of an accountant or tax specialist ([59 and 60]).

(3) On 3 March 2006 both Appellants attended a meeting with Peter Crawford from Finance and Andrew Simpson from Montpelier Tax Consultants (City) Limited ("City") ([62]).

(4) The Appellants signed various documents at that meeting, including a Professional Services Agreement with Montpelier Tax Planning (Isle of Man) Limited ("MTP") in which services provided by MTP were taxation advice in respect of the UK tax implications and consequences of the client commencing the trade of purchase and sale of derivative contracts ([65]).

18. The FTT recorded the evidence given by the Appellants about tax advice:

> "63. The appellants' recollection was that they were told that the scheme had been backed by Counsel and that it was legitimate. Anthony Outram said that no detail was given about that Opinion. In cross-examination he conceded that he was aware that Montpelier marketed tax planning and what he called "investments". Neither could remember much else that they had been told although Ross Outram conceded that he had been aware that Montpelier marketed tax planning and that they were tax advisers. He said in cross-examination that Montpelier had marketed both tax planning and "trade" at the meeting. He said that it was "very possible" that tax advice had been given at the meeting. He said that he had been told that the fees were built into the cost of the CFD and that a loan was available to fund the Margin Call Balance ("MCB") if it became payable. In his witness statement Anthony Outram said that he recollected that "…the fees were wrapped-up in the price paid for the CFD contract." In cross-examination he could not remember if it was included in the initial Margin."

19. The FTT found that neither Appellant could, or should, have been in doubt that they were dealing with an offshore tax planning company that was not FSA registered. Since neither Appellant sought tax advice from BR, "we can only assume that the only tax advice, if any, that [the Appellants] received" was from Montpelier in the shape of MTP ([66]).

20. The FTT found that neither Appellant was able to produce "anything remotely like a complete set of signed documents" ([49]).

21. The FTT's findings on the transactions as entered into by the Appellants included:

(1) The Appellants received an Offer to Trade from Pendulum ([72] to [77]), and the first phase in the Pendulum Contract was for seven days, with a designated swing movement of up and down 140 points of the close of FTSE trading on the previous day.

(2) The Appellants paid the Initial Margin of 7% of the issue value on 16 March 2006; AO paid £14,000 and RO paid £35,000 ([78]).

(3) The FTSE did not exceed the designated swing movement at the end of Phase One, so both entered Phase Two. Under the terms of the Master Agreement the Appellants were required to pay the balance of the Designated Issue Value (ie the Margin Call Balance) under the Pendulum Contracts on being served with a Notice of Obligation to pay the Margin Call Balance from Pendulum. Service of those Notices should have triggered a draw-down of the loans ([80]).

(4) Pendulum served Notices of Obligation on the Appellants on 27 March 2006; £186,000 for AO and £465,000 for RO ([81]).

(5) The Appellants both stated that they signed loan agreements with Mandaconsult AG ("Mandaconsult"). The copies produced to HMRC were undated and signed only by the Appellants ([83]). The loan was not interest bearing but the lender was entitled to a fee (specified as equal to varying levels of profit, payable in the event that profits were made), repayment was due on the 50th anniversary of the agreement or earlier upon specified defaults such as being of unsound mind or bankruptcy but not in the event of death ([84]). In a letter dated 23 June 2014, Mandaconsult informed BR that it had never signed any loan agreements with AO or RO and had never made any payments to AO or RO ([87]).

(6) The terms of the proposed loans were wholly uncommercial but, of course, in the event there were no loans ([88]).

(7) At no time has either Appellant contacted Pendulum to check if the Margin Call Balance had been paid and if so by whom ([89]).

(8) Neither Appellant had contacted Pendulum at the end of the subsequent phases to ascertain whether or not they had made a profit or if there was a different valuation for the contract. Although to be fair, Ross Outram did say that he knew he had not made a profit ([91]).

22. The FTT set out the relevant legislation, recorded the concession by Mr Woolf that the discovery assessments had been validly made and identified that the only question for the FTT was whether or not the Appellants' behaviour had been deliberate.

23. Having considered some of the documentation from the material seized from an HMRC raid on the offices of Montpelier (including emails and a PowerPoint presentation and accompanying speaking notes dated 10 May 2006), and referred to the decision of the FTT in *Sherrington*, the FTT concluded that it is unlikely that either Appellant would have had any reason to believe that even if there had been a loan that it would be repayable ([112] to [116]).

24. In the Discussion, the FTT described both Appellants as "less than compelling witnesses", acknowledging that the events were 16 years ago but both had access to the bundle and "seemed unaware of numerous pertinent matters" ([126]). The FTT's reasoning then included:

(1) The true objective of the Appellants in entering into the Pendulum Contracts was not to make a profit at the end of any Phase but to lose at the end of Phase One so as to create a loss in respect of which they did not bear the full economic cost but which reduced their liability to tax ([137]).

(2) The PowerPoint presentation and speaking notes (which we refer to as the "Montpelier Materials"), whilst dated two months after the date of the Appellants' Pendulum Contracts, accurately represent how Montpelier marketed the arrangements ([138]). The Pendulum Contracts were marketed to the Appellants as a tax avoidance scheme, and the Appellants knew that ([140]).

(3) Montpelier's marketing focused on a two-stage process, establishing a trade and then incurring losses. That part of the message does not appear to have been acted upon by the Appellants. The Appellants did not commence any trade before entering into the Pendulum Contract ([142] to [143]). Both Appellants only entered a very small number of other CFD contracts; and these were after the date of the Pendulum Contracts ([144] and [145]). The CFD contracts other than the Pendulum Contracts were mere window dressing to give the impression of trading ([147]).

(4) The FTT did not accept that either Appellant was trading in CFDs and even if they were wrong they were not doing so on a commercial basis with a view to profit. Very few, if any, of the badges of trade are present. If you do not have a trade, as Montpelier made very clear, you cannot relieve any losses ([148] and [149]).

(5) There was no loan constituted in any way. The Appellants suffered no economic loss ([157]).

25. The FTT then identified at [158] that the issue is whether the Appellants' behaviour in submitting tax returns containing the losses was deliberate. We address the FTT's reasoning thereafter in the context of Ground 3.

PROCEDURAL HISTORY

26. The Original Decision was issued to the parties on 27 April 2021. On 7 June 2021, BR submitted the Appellants' applications for permission to appeal (dated 28 May 2021 for AO and 27 May 2021 for RO) (the "PTA Application"), submitting that the FTT erred in law on three grounds, which broadly correspond to what we have described as Grounds 1, 3 and 4.

27. On 25 September 2023 the FTT issued its decision on the PTA Application (the "PTA Decision"). Permission was granted, but the PTA Decision also set out the procedural history and explained and apologised for the delays:

> "2. On 23 August 2021, at my behest, the Tribunal wrote to the parties intimating that I had considered the Applications for Permission to Appeal. I had not had an opportunity to speak to Mr Bell but it was my intention to review the Decisions in terms of Rule 41 the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules").
>
> …
>
> 5. I considered in accordance with Rule 40 of the Rules whether to review the Decision and decided that if there was a perceived lack of clarity, which would be an error of law, then I should undertake a review.
>
> 6. That being the case, in terms of Rule 41(3) of the Rules, I was required to give the parties the opportunity to make representations in relation to the proposed action.
>
> 7. I did so and the draft suggested changes were issued on 2 May 2023.
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> 8. On 25 May 2023, as directed, both parties lodged with each other their submissions on the proposed revisions.
>
> …
>
> 11. I had said in the decision on the application for leave to appeal that I had had in mind the parameters for review set out in paragraph 45(8) in *Vital Nut Co. Limited v HMRC* [2017] UKUT 192 (TCC). Barnes Roffe argue that the proposed changes appear to do more than clarify the original reasoning.
>
> 12. Their submissions on the proposed revisions were detailed and I have carefully considered them. I had intended to address those but on reflection, I believe that there is a bigger problem.
>
> 13. One of the issues that Barnes Roffe raise, fairly, is that the delay in drafting the proposed revisions is a factor because the Tribunal's memory would inevitably be dimmed by the passage of time.
>
> 14. Barnes Roffe suggest that the changes are not made and the original application for leave to appeal be granted unless the Tribunal was minded to allow the appeals in light of the arguments advanced in relation to the

> proposed revisions or if the Tribunal accepts that there are flaws in the original reasoning that are adverse to the appellants, that should be highlighted.
>
> 15. I do not accept that the appeals are to be allowed. Mr Bell and I decided that the appeals were dismissed and we stand by the Decision.
>
> 16. As I indicated in the review decision, when I considered in accordance with Rule 40 of the Rules whether to review the Decision I decided that if there was a perceived lack of clarity, which would be an error of law, then I should undertake a review. The review was not undertaken because I (or Mr Bell) accepted that the Decision was flawed and unreasonable as averred by the appellants.
>
> 17. Since I did find that there was a possible error in law in that there was a perceived lack of clarity, then the appellant's original application for leave to appeal should be granted. Accordingly the proposed revisions will not be made."

28. Whilst the PTA Decision refers to a draft amended decision of 2 May 2023 (the "May 2023 Draft") and the representations made thereon, the parties did not provide those documents to us (with Ms Choudhury's explanation being that this was on the basis that the draft was not a decision that was the subject-matter of the appeal). We accept that this was an appropriate approach.

29. The FTT also sent a separate letter to the parties on 25 September 2023 attaching the Revised Decision. That letter read as follows:

> "Please find enclosed decision notice which has been amended under Rule 37 (clerical errors and accidental slips or omissions)
>
> Please note that the release date of the decision to you remains 21 July 2021 and the time limit in which you may exercise your right of appeal is unchanged."

30. Notwithstanding the terms of that letter, the Revised Decision enclosed by the FTT had a "Release date" at the end of the decision of 25 September 2023 and a note that it was "Amended pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) on 21 September 2023."

GROUNDS OF APPEAL AND RESPONDENTS' NOTICE

31. In their Notice of Appeal from the FTT, the Appellants identified four grounds of appeal:

(1) Ground 1 – The Revised Decision is inadequately reasoned, failing to provide a clear explanation for why the FTT rejected the arguments that the Appellants had a bona fide belief that they were entitled to make the claims for loss relief because they were told the arrangements were backed by counsel and also because it was never suggested by Montpelier or BR that the making of the claims was inappropriate.

(2) Ground 2 – The changes that were made to the Original Decision in the Revised Decision are too extensive and significant to be justified under the slip rule in Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FTT Rules") and are of a nature that should not be made under the review power in Rule 41 of the FTT Rules.

(3) Ground 3 – The FTT used flawed objective reasoning when deciding that the conduct of the Appellants was deliberate.

(4) Ground 4 – The basis on which the FTT found that the Appellants were guilty of deliberate conduct discloses an error of law and aspects of the reasoning appear

unreasonable and suggest that there has been a failure to pay proper regard to material considerations.

32. The Appellants submitted that for the reasons relied upon in their grounds, the decision of the FTT should be quashed and remitted to a new Tribunal for redetermination.

33. In their Respondents' Notice, HMRC submitted that the Revised Decision is properly reasoned, and should not be quashed.

34. HMRC also submitted that Ground 2 appeared to be a new ground of appeal, acknowledging that this ground could not have been included in the PTA Application but stating that the Appellants should apply for permission to amend their grounds of appeal. The Appellants made such an application on 5 December 2023. All parties made written submissions on that application in their written submissions ahead of the substantive hearing before us. We did not request further oral submissions at the hearing and informed the parties that we gave permission for the Appellants to rely on Ground 2.

35. We received detailed written submissions from counsel for all parties. We received further written submissions after the hearing. We are grateful to counsel for their helpful submissions, both in writing and orally, although we have not found it necessary to refer to each point that they raised.

36. We address Ground 2 first (as the Appellants submit that the changes to which they refer should not be taken into account when deciding whether to allow the appeal). We then address Ground 3 as that concerns the application of the test of whether the loss of tax arose as a result of a deliberate inaccuracy in the Appellants' tax returns and logically should be considered before considering submissions as to the adequacy of reasons given for that decision.

GROUND 2 – CHANGES MADE BY THE FTT TO ITS DECISION SHOULD NOT HAVE BEEN MADE

37. The Appellants submitted that the FTT erred in law as the changes that were made in the Revised Decision are too extensive and significant to be justified under the slip rule in Rule 37 and are of a nature that should not be made under the review power in Rule 41, the consequence of which is that we should treat the relevant changes as not having been made when deciding whether to allow the appeal.

38. We set out first the relevant legislation and rules before summarising the parties' submissions and reaching our conclusions.

39. Section 9(1) Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") provides that the FTT may review a decision made by it on a matter in a case. Section 9(2) provides that this power is exercisable of its own initiative or on an application by a person who has a right of appeal in respect of the decision. By s9(3), Tribunal Procedure Rules (which include for this purpose the FTT Rules) may provide that the FTT may not review certain decisions, may provide that review is exercisable only of the FTT's own initiative, that an application may be made only on specified grounds or that the power to review of its own initiative is exercisable only on specified grounds.

40. Section 9(4) provides:

> "Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following –
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside."

41. Section 9(5) provides that where the FTT sets a decision aside, the FTT must either (a) re-decide the matter concerned, or (b) refer that matter to the Upper Tribunal.

42. Paragraph 15(1) of Schedule 5 TCEA 2007 provides that rules may make provision for the correction of accidental errors in a decision or record of a decision. Paragraph 15(3) provides that paragraph 15(1) is without prejudice to any power to correct errors or set aside decisions that is exercisable apart from rules made by virtue of this sub-paragraph.

43. The FTT Rules then set out the procedural rules and requirements applicable to the FTT (Tax Chamber).

44. Rule 37 provides:

> "37. Clerical mistakes and accidental slips or omissions
>
> The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by -
>
> (a) sending notification of the amended decision or direction, or a copy of the amended document, to all parties; and
>
> (b) making any necessary amendment to any information published in relation to the decision, direction or document."

45. Rule 40 (Tribunal's consideration of application for permission to appeal) provides at Rule 40(1) that on receiving an application for permission to appeal the FTT must first consider, taking into account the overriding objective in Rule 2, whether to review the decision in accordance with Rule 41. Rule 41 provides:

> "41. Review of a decision
>
> (1) The Tribunal may only undertake a review of a decision –
>
> (a) pursuant to rule 40(1) (review on an application for permission to appeal); and
>
> (b) if it is satisfied that there was an error of law in the decision.
>
> (2) The Tribunal must notify the parties in writing of the outcome of any review, unless the Tribunal decides to take no action following the review.
>
> (3) The Tribunal may not take any action in relation to a decision following a review without first giving every party an opportunity to make representations in relation to the proposed action."

46. Rule 36 (Interpretation) provides that "review" means the review of a decision by the FTT under s9.

Appellants' submissions

47. Mr Woolf submitted that it was unclear whether the FTT had purported to amend the Original Decision under Rule 37 or Rule 41, or even if they had intended the changes to be made at all, drawing attention to:

(1) the letter of 25 September 2023 enclosing the Revised Decision referred to it as having been amended under Rule 37;

(2) the PTA Decision of the same date says at [17] "the proposed revisions will not be made", whereas many were, submitting that the inclusion of the changes may itself have been an accidental slip by the FTT; and

(3) the end of the Revised Decision refers to Rule 41, and the release date of the Revised Decision had been updated.

48. The Appellants' submissions related to three of the changes which had been made by the Revised Decision (and Mr Woolf confirmed that these were the only changes which were relied upon as errors of law). Mr Woolf confirmed that all three of these changes had been included in the May 2023 Draft which had been sent to the parties, and the Appellants had made representations on them. Those changes were (with additions being underlined and deletions in square brackets):

(1) [116] – The FTT had described parts of the Montpelier Materials, the need for a trade and that a loan is advanced:

> "116. In our view, on the balance of probability, given that evidence and Judge Sinfield's analysis, it is unlikely that either [neither] appellant would have had any reason to believe that even if there had been a loan that it would be repayable."

(2) [143] – At [142] the FTT had set out that the Montpelier Materials focused on a two-stage process, establishing a trade and then incurring losses:

> "143. Unfortunately for the appellants that part of the message does not appear to have been acted upon [understood] by them. As Judge Richards makes very clear (in relation to an email but the same point is made in the Montpelier slides and speaking notes) at paragraph 51 of *Thomson*:
>
> "This email indicates that Montpelier intended the Pendulum arrangements to function as a device to deliver a trading loss to a user of the scheme but that, before such a loss could be delivered, the user first needed to commence a trade of dealing in derivatives."
>
> The appellants did not commence any trade first."

(3) [149] – The FTT had referred to the timing of entry into the Pendulum Contracts, made findings as to whether the Appellants had entered into other transactions, and concluded at [148] that they did not accept that either Appellant was trading in CFDs. This was then followed by:

> "149. If you do not have a trade, as Montpelier made very clear, you cannot relieve any losses. [In any event, the losses could only be created if there was a loan.]"

49. Mr Woolf submitted that the changes which had been made to these three paragraphs were not corrections capable of falling within Rule 37. He did accept in his oral submissions that the changes to [116] were capable of being made under Rule 41 if we were to conclude that there had been such a review. However, Mr Woolf submitted that the changes which had been made to [143] and [149] were not appropriate even following a review under Rule 41.

50. Mr Woolf relied on the decision of the Upper Tribunal (Administrative Appeals Chamber) in *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC) ("*JS*") (with paragraphs of that decision being referred to as *JS*[x], and a similar approach being adopted for the reference to paragraphs of other decisions to which we subsequently refer). Mr Woolf relied on the Upper Tribunal's statements that "the power of review must not be used in a way that subverts the appeal process and bypasses the proper function of the Upper Tribunal" (at *JS*[28]) and that it must not be used "to correct defective reasoning or to provide commentary on the grounds of appeal" (at *JS*[36]). The Upper Tribunal in *JS* decided that the safeguards within the power to review a decision were both procedural and substantive, stating at *JS*[45] that the substantive safeguard is "to interpret 'amend'" in a way that minimises the risk and apparent dangers inherent in the process and to confine it to cases that properly fulfil the purposes of the provision. So it is limited to cases in which it would be proper to amend

the reasons rather than set aside the decision… It covers cases where there is some objective guarantee that the reason have not drifted into justification."

51. Mr Woolf also relied on *Vital Nut Co. Ltd v HMRC* [2017] UKUT 192 (TCC) ("*Vital Nut*") where the Upper Tribunal adopted the review of relevant authorities in *JS* and said at *Vital Nut*[45(9)] that "whilst it is perfectly permissible for the FTT to use the review process to clarify what has already been decided, the FTT should refrain from seeking to justify its decision on other, even better, grounds or from seeking to defend its decision in advance from an attack that is anticipated in an appeal".

52. Mr Woolf submitted that the changes which had been made by the FTT to [143] and [149] were not appropriate on a review of a decision, emphasising in particular:

(1) the change in [143] is not appropriate to be made two years after a hearing, and was made in consequence of contentions in the PTA Application that the FTT was using objective reasoning; and

(2) the change in [149] was trying to change the FTT's reasoning retrospectively, seeking to defeat a challenge based on an error of law.

53. Mr Woolf's submission was that these two changes should not have been made and that when reaching our decision on the Appellants' other grounds of appeal, we should reach that decision by reference to the Revised Decision without these two changes having been made.

HMRC's submissions

54. Ms Choudhury submitted that all of the changes were capable of being made by the FTT under Rule 37 as being in the nature of accidental slips or omissions or clerical mistakes, drawing attention to:

(1) [116] – similar reasoning was already present in [156];

(2) [143] – this cannot be regarded as anything more than a correction. There was evidence of the Appellants' actions (or lack of action) in relation to establishing a trade before entering into the Pendulum Contract as noted in [143], and expanded on by reference to each Appellant in [144] and [145]. There was no direct evidence of their knowledge of the requirement to establish a trade given their inability to recall what, if any, advice was given to them by Montpelier; and

(3) [149] – the FTT may have considered that the inclusion of the final sentence was confusing as it would require further explanation and therefore decided simply to omit it. The omission falls far short of an attempt to go beyond clarification. Moreover, a similar statement can still be found in the Revised Decision at [171].

55. HMRC acknowledged that it was not entirely free from doubt that the Original Decision was revised under Rule 37, referring to the facts that at the end of the Revised Decision it is said to have been amended under Rule 41 and the release date has been changed to 25 September 2023.

56. In the alternative, Ms Choudhury submitted that the changes were amendments the FTT was entitled to make following a review under Rule 41 and are in accordance with the guidance given in *JS* and *Vital Nut* as being clarificatory in nature regarding what had already been decided.

Discussion and conclusions

57. We have set out above the powers of the FTT under Rule 37 and Rule 41 of the FTT Rules. The powers of the FTT under these rules are different procedurally and substantively:

(1) There is no restriction on when the FTT can exercise the power under Rule 37. The FTT can amend a decision under Rule 37 of its own initiative or following application or notice by the parties. Rule 37 is not limited to cases where there has been an application for permission to appeal and the FTT is satisfied that the decision contains an error of law. There is no procedural requirement as to giving notice to the parties before making any changes. The restriction on the FTT's power to amend a decision under Rule 37 is one of substance – the power is to "correct any clerical mistake or other accidental slip or omission".

(2) A review under Rule 41 may only be undertaken following an application for permission to appeal and if the FTT is satisfied that there was an error of law in the decision. Where the FTT undertakes a review of a decision, it may not take any action in relation to that decision without first giving every party an opportunity to make representations in relation to the proposed action. Where Rule 41 applies, the FTT has broad powers as set out in s9(4) TCEA 2007.

58. Here, following initial consideration of the PTA Application, the FTT informed the parties that it would be reviewing the Original Decision. The changes which were proposed to be made (which included those subsequently made to [116], [143] and [149] as well as others) were sent to the parties on 2 May 2023 and the parties provided representations thereon. The Revised Decision was subsequently released. The issues which have arisen are:

(1) whether the Revised Decision was the result of a review of the Original Decision under Rule 41 or correction of accidental slips under Rule 37; and

(2) whether the changes made were ones that the FTT was entitled to make under the relevant process.

59. At the hearing, the panel raised with the parties whether there was a further issue, namely that some of the changes which had been made in the Revised Decision had not been provided to the parties in draft in advance of the Revised Decision being released. Ms Choudhury and Mr Woolf both confirmed that the Revised Decision did include some such changes, and Ms Choudhury provided us with a list of those changes at the beginning of the second day of the hearing.

60. There were 17 changes which had been made by the Revised Decision which had not been proposed in the May 2023 Draft and on which the parties had not therefore been given the opportunity to make representations (the "17 changes"). The vast majority of the 17 changes were, on any view, corrections – correcting a typo in a date, adding punctuation, changing singular to plural. One of the 17 changes was, however, arguably more than a correction. In the Revised Decision, [153] reads as follows:

> "His argument was that that could be relied upon to evidence the fact that there must have been some sort of verbal loan. There is absolutely no evidence to that effect. <u>As can be seen from paragraphs 83 to 87 above, both appellants signed loan agreements copies of which were produced to HMRC but it was only when HMRC instigated enquiries in 2014 that it transpired that Mandaconsult AG had never signed the agreements. The witness statements of both appellants refer to the loans and both said that they assumed that Mandaconsult AG had executed the loan agreements. There is absolutely no reference to any verbal loan; indeed both state that they proceeded on the basis that the loan agreements were key to the arrangements and existed. In oral evidence Anthony Outram said that he would not have entered into the Pendulum Contract without the loan and Ross Outram said that it was the existence of the loan that made it attractive and the existence of the loan was the "deciding factor"</u>."

61. The underlined text above shows the changes which had been made to the Original Decision (by way of addition). Most of this had been proposed in the May 2023 Draft. However, the closing phrase "the existence of the loan was the "deciding factor"" had not been included in the May 2023 Draft.

62. Mr Woolf and Ms Choudhury both confirmed at the hearing that their position was that the 17 changes (including the change to [153]) were the correction of clerical mistakes or accidental slips or omissions which the FTT had power to make under Rule 37.

63. Having considered the PTA Decision, the FTT's letter of 25 September 2023 and the Revised Decision, we have concluded that the Original Decision was reviewed by the FTT under Rule 41 and not Rule 37. We recognise that the FTT's communications with the parties created unfortunate and unnecessary confusion on this point:

(1) the contents of the letter of 25 September 2023 are inexplicable, including the reference not only to Rule 37 but to the release date of the decision remaining as 21 July 2021 – the Original Decision was released on 27 April 2021, and the release date of the Revised Decision, which was attached to the letter, had been changed on the final page to 25 September 2023; and

(2) the PTA Decision, having recounted the background and in particular the submissions received from BR on behalf of the Appellants, stated at [17] thereof that the Appellants' original application for leave to appeal should be granted and ended with "Accordingly the proposed revisions will not be made." Yet the version of the Revised Decision which was released to the parties did include some, but not all, of the revisions which had been proposed in the May 2023 Draft.

64. We describe this confusion as unnecessary as the FTT had clearly informed the parties that it was proposing to review the Original Decision and subsequently sent them in draft the changes it proposed to make, and on which they made representations. The process being followed was that in Rule 41. Irrespective of confusion caused by other communications, we answer the question whether the Revised Decision was amended under Rule 37 or Rule 41 by reference to the Revised Decision itself – that document was released to the parties by the FTT and is the decision notice containing the FTT's written findings and reasons for the decision. The Revised Decision states expressly that it was amended pursuant to Rule 41 of the FTT Rules on 21 September 2023, and has an amended release date of 25 September 2023. We are satisfied that the Revised Decision was, as it says, amended following a review under Rule 41.

65. This conclusion does raise a question as to the 17 changes which were made and were not included in the May 2023 Draft. We are satisfied that 16 of these could have been made by the FTT under Rule 37, but no such exercise was undertaken. They could also have been made following a review under Rule 41 (being corrections of accidental errors within s9(4)(a)) but the FTT did not comply with the requirements of Rule 41(3) in respect of such changes. The additional changes to [153] seem to us to amount to more than the correction of accidental errors; it is an additional finding that not only was the loan attractive to RO but also it was the "deciding factor". This change could similarly have been made following a review under Rule 41 (as amending the reasons given for the decision), but the FTT did not comply with the requirements of Rule 41(3). These are procedural errors of law by the FTT in the approach it adopted to the review of its decision. However, we are mindful of the position taken by the parties in respect of these changes and that 16 of the 17 changes could have been made under Rule 37 and that this would not have required the FTT to give the parties the opportunity to make representations in relation to them. We conclude that these procedural errors are not material errors of law.

66. The parties' positions were different in respect of the three changes set out at [48] above. We need to decide whether these were changes which the FTT was entitled to make when exercising its power under s9(4) in accordance with Rule 41.

67. Mr Woolf and Ms Choudhury confirmed that the changes to [116], [143] and [149] were included in the May 2023 Draft. Accordingly, the FTT had complied with the requirements of Rule 41(3), namely that the FTT may not take any action in relation to a decision following a review without first giving every party an opportunity to make representations in relation to the proposed action.

68. Mr Woolf accepted that the FTT had power to make the changes which were made to [116] on a review of its decision under Rule 41 (whereas he had taken the position that the FTT could not make these changes under Rule 37, if we were to conclude that that was the basis relied upon for the changes). We do not consider those changes any further.

69. Mr Woolf's submissions focused on the changes which were made to [143] and [149], which we have set out above. The parties disagreed as to the significance of these changes. Ms Choudhury submitted that these changes could, in any event, have been made under Rule 37 or following a review relying on s9(4)(a). We do not accept that submission. They are both substantive changes to the FTT's reasoning:

(1) The change of language in [143] from the message (from Montpelier) about trading "does not appear to have been understood by them" to "does not appear to have been acted upon by them" is significant. It is part of the FTT's findings as to what the Appellants did or did not do, and is relied upon by the FTT (albeit without express cross-reference) in its reasons for concluding that the conduct was deliberate.

(2) The deletion in [149] of "In any event, the losses could only be created if there was a loan" initially appears very significant, particularly in the light of the Appellants' submissions on Grounds 1 and 4 which included that the FTT's findings in relation to the loans revealed, in the Appellants' submission, that the FTT had failed to understand the arrangements and the basis on which the losses were expected to be claimed. However, we recognise that at [171] of the Revised Decision the FTT states "Crucially the appellants do not and never did have any liability to repay a purported loan. Therefore they did not incur expenditure and they incurred no losses that were capable of being relieved." This makes substantially the same point as that which had been made by the deleted language and we consider that this reduces the significance of the deletion in [149].

70. As the changes to both of these paragraphs do amend the reasoning of the FTT (albeit that we regard the changes to [143] as more significant than the deletion in [149]), we have considered whether there is any restriction as to the type of changes which can be made by the FTT following a review under Rule 41.

71. "Review" is defined by Rule 36 as meaning the review of a decision by the FTT under s9 TCEA 2007, and s9(4) provides that in the light of a review the FTT may (a) correct accidental errors in the decision or in a record of the decision, (b) amend reasons given for the decision, or (c) set the decision aside.

72. At the outset we record that we consider that a straightforward, natural reading of s9(4) and Rule 41 does not, expressly or impliedly, restrict the type of changes that may be made on a review. Rule 41 contains procedural protections, in that the FTT may only review a decision following an application for permission to appeal and if it is satisfied that there was an error of law, and must give the parties the opportunity to make representations in relation to the proposed actions. However, there seems to us to be no restriction set out in these provisions

as to the substance of the changes – not only is there no limiting language in the meaning of "review", but also we consider it counterintuitive that the FTT would be permitted to set aside its decision and re-make it (ie change its mind completely), yet not be permitted to amend its reasons for the decision, not only by explaining further the initial reasoning but also potentially by including additional reasons.

73. We are not persuaded that we are bound by the authorities to reach a different conclusion. We have carefully considered the decision of the Upper Tribunal in *JS*, which was addressing a factual situation in which there had been procedural errors in the appeal process, and the authorities to which it referred, which were addressing the powers of the courts where there is no equivalent to the power to review a decision.

74. In *JS*, a claimant's entitlement to disability living allowance was removed. Her appeal to the FTT was dismissed. That appeal was heard by a fee-paid judge who dismissed the appeal and (following an application) subsequently provided written reasons and then, following an application for permission to appeal, provided additional reasons. The application for permission to appeal was then referred to a salaried district tribunal judge with the amended statement of reasons, who made a decision on that application.

75. The claimant applied for permission to appeal on the ground that the amended reasons were not validly made. The Upper Tribunal identified procedural irregularities:

> (1) The appeal was heard by a single judge whereas the relevant Practice Statement of the Senior President of Tribunals on the Composition of Tribunals provides that a disability living allowance appeal must be decided by a panel consisting of a judge and two members, and one member must be a medical practitioner and the other must have a disability qualification.
>
> (2) The amended reasons were provided by the fee-paid judge who heard the appeal. That Practice Statement provides that the exercise of the power of review under s9 must be carried out by a salaried tribunal judge. The Upper Tribunal considered that amended reasons could not properly be written by a salaried judge who was not a member of the original panel, with the result that power is given to a salaried judge who may not be in a position to implement it. The Upper Tribunal considered that the solution to this is that if the salaried judge considers it may be appropriate to amend the reasons, the proper course is to invite the hearing judge to prepare such reasons as are consistent with the tribunal's reasoning at the time of its decision, and the salaried judge must then decide whether they satisfy the criterion of being amended reasons.
>
> (3) The powers under the rules of procedure must be exercised fairly and justly; this means that they must be exercised transparently. Here, the district tribunal judge did not give the parties an opportunity to make representations – this was said to be inappropriate and unfortunate (at *JS*[9]). The Upper Tribunal did not comment on the hearing judge's failure to provide the parties with the opportunity to comment on the amended reasons.

76. It was against this background that the Upper Tribunal then considered the purpose of the review power, stating at *JS*[28] that the self-evident purpose is to allow the FTT to avoid the need for an appeal to the Upper Tribunal in the case of clear errors, and that this is to the benefit of the parties and the Upper Tribunal. We agree. The Upper Tribunal then set out at *JS*[29] that there is an issue of balance between inadequate reasons that can appropriately be amended and those for which the only proper course of action is to set aside the decision. In its decision, the Upper Tribunal set out at *JS*[40] that the purpose of amended reasons is the same as the purpose of the original reasons – to show how the tribunal made its decision. They must be the reasons that led the tribunal to decide as it did, not a later attempt to rationalise the

decision, and can only properly be written by the presiding judge or, exceptionally, another member of the panel.

77. The Upper Tribunal drew parallels with some of the authorities addressing the exercise by the courts of their discretionary powers. We consider those in turn:

(1) At *JS*[28] the Upper Tribunal referred to the decision of the Supreme Court in *In the matter of L and B (Children)* [2013] UKSC 8 ("*L and B*") at *L and B*[17] and [19], stating that "the Supreme Court has recently emphasised that the integrity of the appeal process should not be subverted by diverting matters to an alternative process".

In *L and B*, Baroness Hale, in a judgment with which the other members of the court agreed, identified the issue in that case as being whether and in what circumstances a judge who has announced her decision is entitled to change her mind. In an oral judgement on 15 December 2011, the "preliminary outline judgment approved by the court" had concluded that the father was the perpetrator of non-accidental injuries to a child. In a written "perfected judgment" on 15 February 2012 she expanded upon the earlier judgment but reached a different conclusion, stating "I am unable to find to the requisite standard which of the parents it was…It could have been either of them who injured [child] and that is my finding".

Baroness Hale said a judge is entitled to reverse his decision at any time before his order is drawn up and perfected. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. The judge did have power to change her mind, and the question was whether she should have exercised it. Baroness Hale set out at *L and B*[27] that the judge's overriding objective must be to deal with the case justly, and a relevant factor must be whether any party has acted upon the decision to his detriment. Referring to examples of cases where it might be just to revisit, these were said to be only examples, and a carefully considered change of mind can be sufficient; every case is going to depend upon its particular circumstances. The court ordered that the father's appeal be allowed; the welfare hearing should proceed on the basis of the findings in the judgement of 15 February 2012.

However, *L and B* is a case in which there was no separate review process. Baroness Hale expressly allowed for cases where the court (or tribunal) has an express power to vary its order. The review procedure under Rule 41 is a part of such a process, and ordinarily the FTT is not subverting the appeals process by exercising this power (as it is designed to avoid unnecessary appeals). In any event, the FTT has to exercise the power to undertake a review of a decision in the light of the overriding objective and should be mindful of circumstances in which exercise of the power might disrupt the progress of an appeal.

(2) At *JS*[34] the Upper Tribunal stated that the common law or inherent power and the decisions on its exercise form part of the background against which, and by analogy provide guidance on how, s9 TCEA 2007 is to be interpreted and applied. Those decisions "make clear that the power to give additional reasons is only to be exercised exceptionally and with safeguards". They referred to Mummery LJ's speech in *Woodhouse School v Webster* [2009] ICR 818 ("*Woodhouse*") (in particular *Woodhouse*[26] to [28] of that speech).

The Employment Tribunal ("ET") had been divided as to why an employee had resigned. One lay member thought there was no constructive dismissal; the majority took a

different view of the evidence. The Employment Appeal Tribunal ("EAT") made an order that the ET be asked to answer certain questions in relation to its written reasons, and was asked to give its answers by reference to its notes of evidence.

Mummery LJ had emphasised at *Woodhouse*[25] the importance of taking care to observe the limits of the exceptional *Burns*/*Barke* procedure, which is available where the EAT considers that there is possibly an inadequacy in the ET's reasons for its decision. The EAT may, before it finally decides the appeal, refer specific questions to the ET at the preliminary hearing of the appeal, requesting it to clarify or supplement its reasons where no reasons were given or where the reasons were inadequate. He said it is not desirable for the ET to do more than answer the request – it should not, eg, advance arguments in defence of its decision. Mummery LJ's concerns were twofold: the EAT should identify correctly the point on which the ET's reasons may be inadequate; and having been asked questions, the ET chairman went further than the questions required and further than was justified.

We note that in *JS* the Upper Tribunal said at *JS*[35] this reasoning is equally applicable to the review power under s9. However, the reasoning in *Woodhouse* was based on common law principles, whereas the power of review is granted by statute, and is embodied in the relevant Tribunal rules.

(3) At *JS*[36] the Upper Tribunal recorded that one of the limits on the power to supplement reasons is that it must not be used to correct defective reasoning or to provide a commentary on the grounds of appeal, and considered this is equally applicable to the review power. They referred to the decision of the Court of Appeal in *Brewer v Mann* [2012] EWCA Civ 246 ("*Brewer*").

In *Brewer*, the Court of Appeal said at *Brewer*[31] "where a judge has received no request from the parties to reconsider his judgment or add to his reasons, and has not demonstrated the need in conscience to revisit his judgment, but on the contrary has received grounds of appeal and an application for permission to appeal on the basis of the alleged inadequacies of his judgment, then it would be most unwise for him to rewrite his judgment (other than purely editorially) and it would take the most extraordinary reasons, if any, to justify such a course on his part".

This guidance, although expressed as provisional, is given in forceful language. But the point remains that this was given against the background that there was no statutory power to review a decision.

(4) At *JS*[27] and [41] the Upper Tribunal referred to Mummery LJ's speech in *Space Airconditioning plc v Guy* [2012] EWCA Civ 1664. Mummery LJ stated that that the judgment should be an accurate record of the judge's findings and of the reasons for the decision; and before a judge corrected a judgment, the judge should give both sides an opportunity to make submissions on whether there is a valid objection.

The starting-point of Mummery LJ (in a speech with which the other members of the court agreed) was that CPR Part 52.11(3) sets out that the appeal court will allow an appeal where the decision of the lower court was either (a) wrong or (b) unjust because of a serious procedural error or other irregularity in the proceedings in the lower court. In that case, judgment had been given and an order made and the judgment contained what was described as a plainly wrong finding of fact. After the judgment had been

handed down the judge had acknowledged that the finding was wrong but declined to correct it as a typographical slip and refused permission to appeal.

The appellant's submissions included that the erroneous finding meant it had not had a fair trial – the wrong finding gave rise to a real doubt as to whether the judge appreciated the importance of the confidentiality factor central to its claim. The judge misunderstood much of the crucial evidence going to the heart of its case, and the error had a knock-on effect as it coloured the judge's assessment of the evidence on other issues.

Mummery LJ did not accept the respondent's suggestion that the error was typographical only. One reason given was that the judge herself had acknowledged the error but did not say it was typographical. He allowed the appeal on the ground that the decision appealed was either wrong or it was unjust as a result of an irregularity. The retention of the erroneous finding was an "irregularity in the proceedings" which makes the decision an unjust one.

We note that Mummery LJ had said that before the correction is made the judge should obviously give both sides an opportunity to make submission on whether there is a valid objection to a proposed amendment. That requirement is embedded in Rule 41(3).

78. In *JS* a theme in the reasoning of the Upper Tribunal (eg at *JS*[35], [36], [40] and [41]) was that the power of review carries a "risk and so an apparent danger" of seeking to defend the Tribunal's decision, and may drift into responding to a representative's criticisms and that "amend" must be interpreted in a way that minimises the risks; this led the Upper Tribunal to conclude that it is "limited to cases in which it would be proper to amend the reasons rather than set aside the decision" (at *JS*[45]). However, we consider that if a Tribunal does, upon review, significantly change the reasoning in the decision, the protections in place are procedural (the requirement in Rule 41(3) that a Tribunal not take any action without first giving every party an opportunity to make representations) and substantive (as a party may apply for permission to appeal within 56 days of the release of notification of the amended decision following a review). There is no need to go further and limit the nature of the amendments which may be made.

79. We therefore respectfully disagree with the Upper Tribunal's decision in *JS* that there is a category of "impermissible amendments" (at *JS*[50]) that cannot be made following a review. We would consider that, provided the FTT has received an application for permission to appeal, identified an error of law, followed the procedure required by Rule 41 and is acting in accordance with the overriding objective, the FTT may amend the decision however is required to record its reasons, and this may include not just clarifying any ambiguity, but also setting out reasons that had not previously been recorded.

80. Mr Woolf also relied on the decision of the Upper Tribunal in *Vital Nut,* in which the Upper Tribunal had considered whether the FTT was entitled to make the revisions to the decision which it made under Rule 41. In that case, they saw "nothing objectionable" in the review that was carried out. In the course of its decision, the Upper Tribunal had referred at *Vital Nut*[45] to the statutory basis in s9 TCEA 2007, and said that Rule 41 (once the "gateway" conditions are met) does not constrain the FTT in terms of the sort of review it undertakes, but stressed at *Vital Nut*[45(4)] and [45(7)] that this does not mean that the FTT is entirely unfettered. They then set out that they adopted the review of relevant authorities in *JS* and (at *Vital Nut*[45(9)]) that "whilst it is perfectly permissible for the FTT to use the review process to clarify what has already been decided, the FTT should refrain from seeking to justify its

decision on other, even better, grounds or from seeking to defend its decision in advance from an attack that is anticipated in an appeal".

81. We acknowledge that, although a decision of the Upper Tribunal is not binding on a later Upper Tribunal (see *Raftopoulou v HMRC* [2018] STC 988 at [24]), as a tribunal of coordinate jurisdiction the later tribunal will normally follow the decision of the earlier one unless it is convinced that the earlier decision is wrong (see *Gilchrist v HMRC* [2014] STC 1713 at [94]). On this issue, we are satisfied that the decisions in *JS* and *Vital Nut* are wrong, and so we will not follow them.

82. We have therefore concluded that there is no restriction on the substance of the amendments which may be made following a review in accordance with Rule 41, and the changes made by the FTT to [143] and [149] were properly made in accordance with the procedure set out by Rule 41.

83. Ground 2 is dismissed. It follows that the remaining grounds on which the Appellants appeal are assessed by reference to the Revised Decision.

GROUND 3 – FTT USED OBJECTIVE REASONING WHEN CONCLUDING INACCURACIES WERE DELIBERATE

84. The Appellants submitted that the FTT erred in law by using objective reasoning when concluding that the inaccuracy in the Appellants' returns was deliberate.

85. We have summarised the Revised Decision of the FTT in some detail above. Having expressed agreement at [163] with the meaning of "deliberate inaccuracy" set out in *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) ("*Auxilium*"), the Revised Decision then sets out its reasoning and conclusion (which we set out in full here):

> "164. We have already established that we find that:-
>
> (a) The appellants had knowingly taken part in a tax avoidance scheme;
>
> (b) They knew that that scheme involved the need to have a trade and thereafter create losses, whereas the reality was that there was no trade;
>
> (c) They knew that the losses would be created by a purported loan on uncommercial terms and that that loan would not be repayable on the elapse of 50 years;
>
> (d) They knew that their other CFD contracts were not even modest but were in fact minimal in size and occurred within a very short period and after the meeting on 3 March 2006;
>
> (e) The only information given to BR was the extent of the alleged trade;
>
> (f) They did not seek tax advice from BR at any stage in relation to the Pendulum Contract.
>
> 165. Therefore we find that each of the appellants knew at the time of filing their respective SATRs that they were not carrying on a trade which entitled them to make a claim for loss relief.
>
> 166. We were wholly unconvinced by the appellants' argument that they were entitled to rely on Montpelier for everything and that they needed to check almost nothing because Montpelier was FSA registered and had a Counsel's Opinion which they had not seen. Had they asked to see it, as they were entitled to do, as Judge Richards says at paragraph 48 of Thomson (which is quoted with approval by Judge Sinfield at para 56 of Sherrington) that Opinion made it clear that Counsel was not endorsing the scheme. We have underlined the key words.

> "He also sought tax advice from UK tax counsel, Mr Shipwright, on the tax consequences for investors. Mr Shipwright's advice included an analysis of the general law, and HMRC practice on what amounted to the carrying on of a trade on a commercial basis with a view to profit. However, that analysis was generic: <u>Mr Shipwright was not purporting to advise as to whether any particular taxpayer met this requirement and he noted that the question was ultimately a question of fact that depended on what a taxpayer actually did</u>."
>
> 167. As can be seen their primary dealings were in fact with Andrew Simpson of City and their Professional Services Agreements were with MTP, neither of which were FSA registered. The documentation made it abundantly clear that there was no FSA protection and nor was there protection in the Seychelles. They had both requested a sophisticated investors certificate, which was provided by Montpelier and which took them out of FSA protection.
>
> 168. Their glib assertions that they were not men with an eye for detail and that they had therefore not read the documents in detail, do not assist them. By any standard, purported indebtedness of £185,000 and £465,000 is not insignificant for individuals of relatively limited means.
>
> 169. The fact that neither of them knew whether they had accepted Pendulum's offer to re-purchase the CFDs and their failure to check what had happened in subsequent years, points to a disregard of anything other than the losses which they had set out to achieve.
>
> 170. This is a self-assessment system. The taxpayer is ultimately responsible for submitting an accurate SATR.
>
> 171. This was not a question of the appellants turning a blind eye. They did not ask questions or read documents because they knew precisely what they were doing. They were trying to create a significant loss and thereafter make substantial claims for repayment of tax. Crucially the appellants do not and never did have any liability to repay a purported loan. Therefore they did not incur expenditure and they incurred no losses that were capable of being relieved. Furthermore they had not been carrying on a trade on a commercial basis with a view to making a profit.
>
> 172. In submitting their SATRs we find that they acted deliberately with a view to claiming non-existent losses. Their intention was to mislead HMRC and obtain repayments of tax.
>
> 173. For all these reasons the appeals are dismissed."

Appellants' submissions

86. Mr Woolf submitted that whilst the FTT had correctly directed itself as to the relevant test, namely that in *Auxilium*, it had then failed to apply that test correctly. His submissions included that the reasoning at [164] to [171] of the Revised Decision explained why the Montpelier Arrangements were not effective, but does not explain why the FTT considered that the Appellants knew that the scheme was not effective (and that therefore they knew their returns were inaccurate), and that the generalised explanations set out therein would apply to any participant in the scheme.

87. In particular, Mr Woolf submitted that:

(1) [164] simply recites the underlying facts which are not a matter of dispute, and, at [164(b)] the FTT imputed to the Appellants its own conclusion (which it had reached at [148]) that there was no trade;

(2) the finding at [165] that the Appellants knew they were not carrying on a trade which entitled them to make a claim for loss relief does not follow from the findings in [164]. The FTT had referred to the Montpelier Materials but then glossed over significant comments made therein about what amounts to a trade that would have made it understandable that the Appellants should consider they were entitled to relief. The relevant consideration was what the Appellants appreciated amounted to a trade giving them an entitlement to a deduction;

(3) the Appellants' reliance (referred to at [166]) on Montpelier must be assessed by reference to the advice from Montpelier, which included that the scheme was backed by counsel, and the Montpelier Materials. Any lack of diligence, eg not asking for a copy of counsel's opinion, may be an indicator of carelessness but not actual knowledge. The reference to the contents of that opinion, which the Appellants had not seen, does not explain why the FTT concluded they had actual knowledge;

(4) the findings in [168], which referred to "glib assertions that they were not men with an eye for detail", may similarly be indicators of carelessness but not knowledge;

(5) the findings at [168] and [169] are consistent with the Appellants being prepared to bear any losses because of the hoped-for tax reliefs, and are consistent with them knowing that they were engaging in a tax avoidance scheme;

(6) the language of [171] echoes the decision of the FTT in *Sacutia Healthcare Ltd v HMRC* [2018] UKFTT 699 (TC) ("*Sacutia*"). The FTT had drawn this case to the parties' attention during the hearing. Mr Woolf submitted that *Sacutia* had incorrectly taken an objective approach to determining knowledge; and

(7) the FTT said at [171] that the Appellants were trying to create a loss and "crucially" do not and never did have any liability to repay a purported loan. This does not address the fact that the Appellants signed loan agreements and thought there was a loan. Mandaconsult did not execute the loan agreements and claimed to have no knowledge of the agreements, but Montpelier did not tell the Appellants of this. There is no explanation for why the finding on the absence of a loan justifies concluding that the conduct was deliberate. The only possible explanation might be if the FTT had thought that there could be no tax loss in the absence of a loan, but that is incorrect in law.

88. Mr Woolf had expanded upon this final submission in the context of his submissions on Grounds 1 and 4. Mr Woolf submitted that the FTT's emphasis of its finding that the loans had not in fact been made and that the Appellants therefore had no liability to repay any loans not only failed to address the Appellants' belief that there were loans, but also indicated that the FTT failed to appreciate the way in which the tax loss arose. The liability to a lender was not an essential requirement to obtain the intended tax benefits – the Appellants had a liability under the Pendulum Contracts and were entitled to claim a loss on that basis. Mr Woolf submitted that the Revised Decision at [116], [154] and [156], as well as its reasoning at [171], suggest that the FTT had considered that a loss can only be claimed if there is a payment by the lender to satisfy the liability under the Pendulum Contracts, and this incorrectly formed part of the FTT's reasoning on deliberate conduct.

HMRC's submissions

89. Ms Choudhury submitted that the FTT made it clear that it was applying the subjective test in *Auxilium*, and a tribunal can be expected to have been seeking faithfully to apply the legal principles expressly identified, and to have done so unless the contrary is clear from the language of the decision (citing *DPP Law v Greenberg* [2021] EWCA Civ 672 ("*Greenberg*")).

90. Whilst the Appellants contend that the FTT's comments have clear echoes of the FTT's decision in *Sacutia*, *Sacutia* is not referred to in the Revised Decision. The closest reference is that in [168] to the Appellants not being "men with an eye for detail". The taxpayer in *Sacutia* had argued that it ought not to be liable for a penalty on the grounds that its director was not a "detail man" (at *Sacutia*[57]). The FTT had rejected this as a basis for escaping the penalty. Moreover, the FTT in *Sacutia* had referred to *Auxilium* and said that some measure of knowledge was required for an inaccuracy to be made deliberately, but it considered that a taxpayer had the required "knowledge" for an inaccuracy to be deliberate where the taxpayer knew that they should take steps to check the accuracy before information is submitted or relied upon and did not do so. The "objective reasoning" in *Sacutia* was in the context of considering whether the appellant in that appeal had acted carelessly.

91. In any event, none of the examples referred to by the Appellants indicate that the FTT had lost sight of the *Auxilium* test, whether due to *Sacutia* or otherwise:

(1) The findings in [164] and [165] are sufficient. In particular, the Appellants had experience of trading in oil futures. There is no basis on which the Appellants could have said they were trading; this is not credible.

(2) The Appellants' criticisms of these findings are based on evidence which was not before the FTT (eg, the advice Montpelier was said to have given regarding the need to establish a trade beforehand); evidence which is cherry-picked (eg, one statement in the notes for one slide out of the complete set of notes and slides before the FTT); or evidence which was specifically rejected by the FTT (they expected a tax loss but would have been happy to generate a profit).

(3) As to [166], there was no evidence of what tax advice was given by MTP, why the Appellants chose not to look at the counsel's opinion or what they had been told about it. HMRC submitted the FTT was entitled to take into account, when determining knowledge, that the Appellants had not seen the opinion even though they could have asked for a copy, and, if they had seen the opinion, it would have been clear that the scheme was not backed by counsel.

(4) At [168] the FTT rejected the argument that not having an eye for detail was a sufficient reason for not asking questions or reading documents.

92. The FTT's mode of reasoning leading to its conclusions was not "impermissibl[y] objective": rather, the FTT was fulfilling its duty to give sufficient reasons for its decision by explaining in detail the process by which it had come to its conclusion. The FTT had referred to *Auxilium*, summarised the findings it had already made at [164], stated its conclusion at [165] and then based on this conclusion as to knowledge the FTT went on to conclude at [171] and [172] that the behaviour had been deliberate.

93. Ms Choudhury submitted that, at most, the Revised Decision shows that the FTT considered that the true overall reason that the Appellants' behaviour deviated in several instances from what might have been reasonably expected of individuals in their position was because they knew that their tax returns were inaccurate as a result of claiming a loss to which they were not entitled.

94. Responding to Mr Woolf's submissions in relation to the absence of any loans, Ms Choudhury submitted that the Montpelier Arrangements were premised on the Appellants claiming a loss which was artificial, or not an economic loss. In that situation, it didn't matter whether such a loss arose from a loan or from the terms of the Pendulum Contracts. The existence or absence of the loan was significant because it was key to how the Montpelier

Arrangements were designed and intended to work, and (as the FTT found at [153]) was important to the Appellants.

95. In their written submissions before the hearing, HMRC submitted that the findings at [166] and [168] are consistent with the Appellants having "blind-eye knowledge" that their returns were inaccurate, referring to *CPR Commercials Ltd v HMRC* [2023] UKUT 00061 (TCC) ("*CPR*"), where the Upper Tribunal stated at *CPR*[23]:

> "In our view, where a taxpayer suspects that a document contained an inaccuracy but deliberately and without good reason chooses not to confirm the true position before submitting the document to HMRC then the inaccuracy is deliberate on the part of the taxpayer. If it were otherwise then a person who believed there was a high probability that their return contained errors but chose not to investigate would never be subject to a deliberate penalty. However, the suspicion must be more than merely fanciful. …"

96. HMRC submitted that if we were to conclude that the Appellants had established that the FTT had made an error of law, we should go on to consider whether the Revised Decision could nevertheless be upheld on the basis that its findings were consistent with the Appellants having blind-eye knowledge.

Discussion and conclusions

97. At [158] to [159] the FTT identified that the issue was whether or not the Appellants' behaviour in submitting the tax returns was deliberate. They expressed agreement with the statement of the FTT in *Auxilium* where at *Auxilium*[63] the FTT said in relation to "deliberate inaccuracy" in Schedule 24 Finance Act 2007:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

98. In *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC) ("*CFB*") the Upper Tribunal has, at *CFB*[37], subsequently agreed with these comments of the FTT in *Auxilium*.

99. It was common ground before us that the FTT had set out the correct legal test, and had not misdirected itself. The Appellants submitted that the FTT erred in law in the application of this (subjective) test, by applying what they submitted was objective reasoning.

100. In *Greenberg*, Popplewell LJ (with whom the other members of the court agreed) set out (at *Greenberg*[57]) the principles which govern the approach of an appellate tribunal or court to the reasons given by, in that case, an employment tribunal. These included:

(1) the decision "must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical";

(2) a tribunal "is not required to identify all the evidence relied on in reaching its conclusions of fact…Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek*-compliant"; and

(3) it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind.

101. The reference to "*Meek*-compliant" is a reference to the decision of the Court of Appeal in *Meek v Birmingham City Council* [1987] IRLR 250 in which Bingham LJ set out the fundamental criteria that must be met by the decision of a tribunal as follows:

> "It has on a number of occasions been made plain that the decision of [a Tribunal] is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable [an appellate tribunal] or, on further appeal, this court to see whether any question of law arises…".

102. Significantly, having set out these principles, Popplewell LJ then stated in *Greenberg*:

> "58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

103. This guidance as to the approach to be taken by an appellate tribunal to a challenge based on the FTT having erred in its application of a subjective test when it reached its conclusion that the Appellants knew that their returns were inaccurate emphasises the high bar which must be met by the Appellants, and warns us as the appellate tribunal of the dangers to avoid when considering these submissions, including in particular the need to avoid being hypercritical or focusing on individual phrases or passages in isolation.

104. We have considered carefully the entirety of the Revised Decision when considering whether the FTT's reasoning involves an error of law. We have not, however, addressed Mr Woolf's submissions which were made by reference to the reasoning of the FTT in *Sacutia* – we do not regard it as helpful or relevant when determining this appeal to express any conclusions as to the application of the *Auxilium* test in *Sacutia*, a decision which was not the subject-matter of the appeal before us.

105. When considering the FTT's reasoning and conclusion that the loss of income tax was brought about deliberately by the Appellants, ie that the Appellants knowingly provided HMRC with tax returns which contained an error with the intention that HMRC should rely upon them as accurate, we remind ourselves that in the present context the relevant error was the claim by the Appellants for trading losses in their tax returns for 2005/06. We have described the Montpelier Arrangements under the heading "The scheme" and summarised the FTT's findings under the heading "Decision of the FTT". We comment on two aspects at this stage:

(1) For the Montpelier Arrangements to deliver the intended tax benefits, participants needed to be trading. This is clear from the summary in *Thomson* at [65(1)]. It was emphasised by the FTT in the Revised Decision, and the summary of the Montpelier

Materials at [142] makes clear that the marketing focused on a two-stage process – establishing a trade and then incurring losses. As a matter of law, there would be no need for the trade to be established first, but this is not how the scheme was marketed.

(2) The Montpelier Arrangements had to produce a tax loss without an economic loss. This is explained in *Thomson* at [65(5)], and was achieved by the Margin Call Balance being funded by a loan (there, from Bayridge, for the Appellants, intended to be from Mandaconsult). The FTT found that there was no loan to the Appellants. This raises a question of fact as to the outstanding amount apparently due under the Pendulum Contracts, but we recognise that the absence of the loan would not of itself necessarily render the scheme ineffective – a trader would be claiming a loss arising from the fall in value of the Pendulum Contract, relying on the value implied by the amount of the repurchase offer.

106. We have set out [164] to [173] of the Revised Decision in full above. These paragraphs need to be considered in their entirety, and as part of the whole decision.

107. When reading this part of the Revised Decision there are two significant features which are relevant when assessing Mr Woolf's challenges:

(1) As already identified, the FTT had expressed its agreement with the subjective test for a deliberate inaccuracy as set out in *Auxilium*. That appears at [163] of the Revised Decision, and includes the relevant paragraph from the decision in *Auxilium*. It appears immediately before the FTT's consideration of the application of that test.

(2) The finding which the FTT reaches at [165], namely "Therefore we find that each of the appellants knew at the time of filing their respective SATRs that they were not carrying on a trade which entitled them to make a claim for loss relief", is absolutely clear.

108. [164] summarises six findings which are said to have already been made by the FTT, and then leads to the finding at [165] that "Therefore we find that each of the appellants knew at the time of filing their respective SATRs that they were not carrying on a trade which entitled them to make a claim for loss relief." Ms Choudhury submitted that the findings at [164] were sufficient to reach this conclusion, whereas Mr Woolf submitted that the findings do no more than record that this was a marketed tax avoidance scheme, the Appellants knew this, and they did not seek advice from BR; he submitted that the key finding at [164(b)] that "they knew that that scheme involved the need to have a trade and thereafter create losses, whereas the reality was that there was no trade" was based not on a finding of knowledge of the Appellants but imputing the FTT's own conclusions to the Appellants.

109. We recognise that Mr Woolf's submissions did invite us to undertake the very type of critique which *Greenberg* reminds us is not appropriate. That is particularly significant here as [164] is stated to be a summary of earlier findings which have been made by the FTT ("We have already established that we find…") and should not be analysed in isolation.

110. By this point in the Revised Decision, the FTT had:

(1) made findings as to the transactions which had been entered into, including that the terms of the proposed loan were wholly uncommercial but that in the event there were no loans (at [88]);

(2) assessed the evidence which was before it – this included not only observations on the documentary evidence (including at [49] that one of the "major problems" was that neither Appellant had been able to produce anything remotely like a complete set of

signed documents), but also an assessment of the Appellants as witnesses (describing them as "less than compelling witnesses" at [126]);

(3) described their contact with both BR and the various Montpelier entities, including that any tax advice they obtained was from MTP, and the Appellants' recollections of what they had been told (at [63]);

(4) reached conclusions as to the "true objective" of the Appellants in entering into the Pendulum Contracts being to lose at the end of Phase One so as to create a loss in respect of which they did not bear the full economic cost but which reduced their liability to tax (at [137]);

(5) described and made findings in relation to the Montpelier Materials, concluding that they accurately represent how Montpelier marketed the arrangements (at [138]); and

(6) reached the conclusion that the Appellants did not commence any trade before entering the Pendulum Contracts, and that the CFD contracts other than the Pendulum Contracts were "mere window dressing to give the impression of trading" (at [147]), that very few, if any, of the badges of trade were present and that if you do not have a trade, as Montpelier made very clear, you cannot relieve any losses (at [149]).

111. However, having conducted this exercise, there are then two potential problems which emerge from the FTT's reasoning, and it is those that we assess further below, remaining mindful of the guidance set out in *Greenberg*:

(1) the FTT appears to rely on its own conclusions as to the absence of a trade when concluding that the Appellants had actual subjective knowledge of the same; and

(2) the FTT's emphasis on the Appellants having failed to check anything is reminiscent of an approach to carelessness rather than deliberate, or perhaps blind-eye knowledge (which had not been pleaded before the FTT).

112. The FTT, when reaching its conclusions as to whether the Appellants knew that their tax returns were inaccurate, ie that they knew they were not entitled to the claimed losses, did not need to cross-refer back to each of the findings which it had made on which it relied. It did, however, need to explain its reasons for concluding that the subjective test had been met. It is in this regard that we consider that [164(b)] potentially discloses an error of law.

113. The FTT states that they have already established that they find that "They knew that that scheme involved the need to have a trade and thereafter create losses, whereas the reality was that there was no trade" (at [164(b)]). The reference to "whereas the reality was that there was no trade" appears to refer back to the FTT's own conclusion on the absence of a trade, rather than being a subjective reference to the Appellants' knowledge. On its own, such a concern could be no more than an example of the very real dangers which arise when scrutinising each phrase of a decision too closely. It could have been entirely plausible that the FTT intended to say something along the lines, eg, that "whereas it was obvious to anyone that there was no trade and we infer that the Appellants must also have known this". The difficulty is, and the reason why we consider that the FTT did indeed intend to refer to its own conclusions at this point, is that the FTT's own conclusion as to the absence of a trade is the only relevant finding that had been made as to what amounts to a trade.

114. Explaining this further, it is clear from the opening words of [164] that the FTT was not seeking to make further findings of fact at this point in the Revised Decision. It was simply referring to some of the findings it had already made. The Revised Decision does refer to the other transactions entered into by the Appellants as being "mere window dressing" (at [147]), and we were taken to the Montpelier Materials, the speaking notes forming part of which

include both a statement that a one-off transaction may amount to a trade but also the recommendation that an individual trades daily. The FTT accepted that this is how the Montpelier Arrangements were marketed to the Appellants. However, there is no finding as to what the Appellants understood (however they came by that understanding) to amount to trading – eg, whether they were told that they should undertake "some" unspecified number of further transactions, or that "one or two" would be sufficient, or referring this back to their previous background transacting in oil futures and what they "must have known" based on their own experience. There is, similarly, no finding or inference earlier in the Revised Decision that the Appellants must therefore have known that the number of transactions that they entered into did not amount to trading. This is significant in the context of a subjective test and whether the Appellants knew that they were not trading and therefore knew that they were not entitled to claim the losses. We do recognise that the FTT did then reach a clear conclusion at [165] when it found that the Appellants knew that they were not carrying on a trade, but that is reached by reference to the findings at [164] and potentially contaminated by the reasoning at [164(b)].

115. We concluded that this was then exacerbated by the reasoning which followed from [166] to the conclusion at [172] that "In submitting their SATRs we find that they acted deliberately with a view to claiming non-existent losses".

116. In this part of the reasoning, the FTT refers to the Appellants' reliance on Montpelier, their failure to check anything, the contents of counsel's opinion (acknowledging that the Appellants had not asked to see it), that there was no FSA protection, the Appellants' assertions that they were not men with an eye for detail, that they did not know whether they had accepted Pendulum's repurchase offer, and their failure to check what had happened in subsequent years (which we infer is a reference to the loans).

117. We agree with Mr Woolf that the FTT is here assessing whether the Appellants took reasonable steps to ensure their returns were accurate, and is applying an objective test of the kind that the FTT in *Auxilium* had warned against. We have considered two counter-arguments against this:

(1) We did consider whether this part of the Revised Decision could be read in a way which does not prejudice any earlier conclusions reached, potentially by reading the FTT as having effectively reached its conclusion at [164] and [165] (although we have already identified an error in that approach) and having then moved on to consider and dismiss other factors which might otherwise be used to explain the Appellants' conduct, eg that they failed to take reasonable care, did not ask to see and therefore did not read counsel's opinion, and did not read the documents. The difficulty is that the Revised Decision itself does not support such an approach, and Ms Choudhury did not seek to persuade us that it should be read in this way even when invited to do so by the panel at the hearing.

(2) [171] has echoes of a more subjective approach, addressing the FTT's conclusions as to why the Appellants did not ask questions or read documents. However, the answer given by the FTT is that this was because "they knew precisely what they were doing. They were trying to create a significant loss and thereafter make substantial claims for repayment of tax." This reference to the Appellants' knowledge is thus confined to their knowledge that the Montpelier Arrangements were a marketed tax avoidance scheme; it does not address their knowledge as to the lack of a trade.

118. Whilst we have remained mindful of the need to be slow to conclude that where, as here, the FTT has correctly stated the legal principles, it has not applied those principles, we do reach that conclusion here. We have concluded that this is clear from the language used by the FTT when it was assessing the knowledge and intention of the Appellants. We reach this conclusion

based on the language used in [164] (both the reference to the findings already having been made and to the FTT's assessment that the reality was there was no trade), the absence of findings as to the Appellants' understanding of what amounts to a trade, the absence of inferences or conclusions from this as to what the Appellants then knew about their own level of activity and whether that met their understanding of a trade, and the reference to factors which relate to the Appellants' lack of reasonable care rather than their knowledge. This is a material error of law.

GROUNDS 1 AND 4

119. The Appellants submitted that the FTT had made further errors of law. There was considerable overlap between the Appellants' submissions on Grounds 1 and 4 and we had the benefit of full written and oral submissions from both parties. However, in view of our decision on Ground 3 it is not necessary to reach a decision on these further grounds and we do not do so.

DISPOSITION

120. We set aside the Revised Decision made by the FTT pursuant to s12(2)(a) TCEA 2007 because it contained a material error of law.

121. We have considered whether to remit the case to the FTT for its reconsideration or to re-make the decision.

122. In their Notice of Appeal from the FTT the Appellants submitted that the Revised Decision should be quashed and remitted to a new tribunal for redetermination. Mr Woolf maintained this position in his written submissions before us. HMRC submitted in their written submissions that if we were to conclude that the Appellants had established that the FTT had made an error of law, we should go on to consider whether the Revised Decision could nevertheless be upheld on the basis that its findings were consistent with the Appellants having blind-eye knowledge, ie inviting us to re-make the decision.

123. We have significant reservations about remitting the appeal. The losses claimed by the Appellants were stated to relate to the period from 18 April 2005 to 31 March 2006. The meeting between the Appellants and Montpelier took place in March 2006. The Revised Decision acknowledges that the matters occurred 16 years ago and records at [126] that both Appellants repeatedly said that they could not remember what had happened. The position is unlikely to have improved since the hearing before the FTT in March 2021.

124. However, we have concluded that it is necessary in accordance with the overriding objective for us to remit the case to the FTT for a new hearing of the appeal:

(1) we reject HMRC's submission that we could decide the appeal on the basis of blind-eye knowledge – this had not been pleaded by HMRC in their Statement of Case before the FTT and appears to have been first raised by HMRC in their written submissions before this hearing. It would in this situation be completely unfair to the Appellants to make any such decision; and

(2) we are not able to re-make the decision ourselves – we are not able to re-make the decision on the basis of the facts as found by the FTT and, having not heard the evidence or indeed been taken to any transcripts of the hearing before the FTT (if indeed such transcripts exist), we are not in a position to make any additional findings of fact.

125. Accordingly, we remit the case to the FTT to be re-heard by a differently constituted panel.

JUDGE JEANETTE ZAMAN
JUDGE ASHLEY GREENBANK

UPPER TRIBUNAL JUDGES

Release date:

15 July 2024

APPENDIX

The Revised Decision

INCOME TAX – loss relief – whether appellants carrying on a trade – no - whether any trade carried on on a commercial basis with a view to profit – no - whether discovery assessment validly made - yes– whether deliberate behaviour - yes – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2015/03404
TC/2015/03405

BETWEEN

ANTHONY OUTRAM
ROSS OUTRAM **Appellants**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: MICHAEL BELL

The hearing took place on 4 and 5 March 2021. With the consent of the parties, the form of the hearing was the Tribunal video platform.

Jeremy Woolf, of counsel, instructed by Barnes Roffe LLP, for the Appellant

Sadiya Choudhury, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. By Directions and Decision issued on 12 October 2020, Judge Sinfield directed that:

   (a) There should be a hearing of the preliminary issue as to whether the appellants' conduct was deliberate or not,

   and it should be listed for hearing together with

   (b) HMRC's application for strike out of three of the Grounds of Appeal.

The Preliminary issue

2. At the commencement of Closing Submissions Mr Woolf confirmed that, having heard Officer Reilly's evidence he was no longer taking any point on the validity of the discovery assessments. It is therefore common ground that the only issue between the parties is whether there had been a deliberate inaccuracy by the appellants that extends the assessment window under Section 36 Taxes Management Act 1970 ("TMA"). HMRC correctly concede that the burden of proof is upon them to establish that issue.[1]

3. HMRC argue that that deliberate inaccuracy on the part of each appellant was the inclusion in their self-assessment income tax returns ("SATRs") for 2005/2006 of claims for loss relief. The losses arose in relation to what we define below as Pendulum Contracts which HMRC describe as a tax avoidance scheme.

The strike out application

4. HMRC's application was to strike out Grounds 1, 3 and 4 of the appellants' appeals under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") on the basis that they have no reasonable prospect of success following the decisions of the First-tier Tribunal in *Thomson & Others v HMRC*[2] ("Thomson") and *Sherrington & Others v HMRC*[3] ("Sherrington").

5. At the commencement of Closing Submissions Mr Woolf confirmed that the appellants had conceded that those Grounds of Appeal were no longer relied upon. Accordingly, those Grounds of Appeal are struck out.

The Hearing

6. Both the appellants had lodged identical appeals with the Tribunal so the appeals were heard together. There were only minor differences in the underlying facts.

7. At the outset of the hearing Ms Choudhury argued that, given that the Tribunal was conversant with the law and had read the relevant documents, there was no need for Opening Submissions by Counsel. Mr Woolf disagreed. We decided that since we had spent time reading into the appeals, and having due regard to Rule 2 of the Rules, that it was appropriate to proceed to the evidence without the need for Opening Submissions.

8. We heard oral evidence from Officer Reilly and from the appellants. We had the Bundle for the hearing, a supplementary bundle of correspondence, an Authorities Bundle and a supplementary Bundle of Authorities lodged by the appellants which was not in fact referred to in Submissions.

9. We have referenced both *Thomson* and *Sherrington* not because we are bound by them, as we are not, but as Ms Choudhury pointed out the mechanics of the contractual arrangements

[1] Burgess and Brimheath v HMRC 2016 STC579
[2] 2018 UKFTT 396 (CC)
[3] 2020 UKFTT 128 (TC)

and much of the documentary evidence were very similar, so the findings of the FTT in that regard in those cases were relevant if this Tribunal agreed with those findings. She adopted as submissions the arguments at paragraphs 171 and 172 of *Sherrington* and paragraph 65 of *Thomson*.

10. When cross-examining Officer Reilly, Mr Woolf argued that it was relevant to ask the officer about what he had done in terms of deliberate behaviour in other appeals involving the same tax avoidance scheme. It is not. Furthermore, we observe that Judge Sinfield made that point not only in his Directions released on 12 October 2020[4] but also in a letter from the Tribunal to the parties dated 4 November 2020 where he stated:

> "...the reasons (if any) why HMRC did or did not allege deliberate conduct in other cases are irrelevant to the Appellants' appeals. The only issue in relation to deliberate conduct that is relevant in these proceedings is whether the Appellants' conduct was deliberate or not."

We agree.

11. On 15 January 2021, Barnes Roffe LLP ("BR"), the appellants' agent, wrote to HMRC formally confirming that, provided the evidence of Mr Matthew Woolf and Mr Edward Watkins Gittins was not to be challenged, the appellants conceded that "...the scheme was ineffective". They wished Officer Bradley to be available for cross-examination although, in the event, his witness statement was not challenged. HMRC had agreed.

12. We also had the unchallenged witness statements of Messrs Keith Mason and Duncan Stannett of BR.

Findings in Fact

Summary of the Background to the Discovery Assessment

13. We set out more detail under the heading Discovery Assessments below but simply set the scene here.

14. On 29 September 2010, HMRC searched premises belonging to Montpelier in the Isle of Man and the UK as part of an ongoing criminal investigation into both Montpelier and Mr Gittins (see paragraphs 39 and 96 below).

15. During those searches HMRC recovered a large number of documents ("the raid") which showed that the appellants had been users of what HMRC believed was a mass marketed undisclosed tax avoidance scheme. On 23 April 2013, Officer Reilly was allocated the appellants' cases. After a review of the appellants' tax affairs, on 1 July 2013, HMRC opened Code of Practice 9 investigations on the grounds of suspected fraud arising from the submission of incorrect tax returns containing loss claims believed to be knowingly incorrect.

16. On 31 July 2013, the appellants declined HMRC's invitation to enter the Contractual Disclosure facility and make a full disclosure with a view to securing immunity from prosecution.

17. Following separate meetings with each of the appellants on 13 November 2013, for which both HMRC and BR kept notes which are not materially different, correspondence ensued and HMRC, in a letter of 3 December 2013, enclosed schedules of documents and information sought covering the period 6 April 2005 to 5 April 2008 and that by 17 January 2014. That deadline expired without a response.

[4] Paragraphs 20, 21 and 23

18. On 28 January 2014, extensive further material was furnished to Officer Reilly from the materials that had been seized in the raid. That included two undated loan agreements with Mandaconsult AG signed by the appellants but not counter-signed by Mandaconsult AG. Those were in the sums of £186,000 and £465,000 for Anthony and Ross Outram respectively.

19. On 21 and 25 February 2014 further documentation relating to Ross and Anthony Outram respectively were furnished by BR.

20. Further correspondence ensued including the issue of Information Notices under Schedule 36 Finance Act 2008 ("Schedule 36") by HMRC.

21. After analysing the materials furnished by BR and the material that had been seized, on 18 December 2014, Officer Reilly came to the view that the appellants had claimed losses on their tax returns for 2005/06 which had led to a repayment of tax that he decided ought not to have been made. He wrote to the appellants summarising his reasons why he considered there was a discovery and a summary of what he considered to be their deliberate behaviour. Formal notices of assessments were issued on 24 February 2015 and appealed to the Tribunal on 11 March 2015.

The appellants' 2005/06 tax returns

22. The trading losses claimed by both the appellants were stated to relate to the period from 18 April 2005 to 31 March 2006.

Anthony Outram

23. In his SATR for 2005/2006, which was lodged with HMRC on 31 January 2007, he claimed for losses sustained as a self-employed options trader to the value of £216,273. Of those losses £20,405.13 was claimed as set off against other income in the year 2005/06. The rest of the losses were then carried back to set off against income in preceding years as follows: 2004/05 - £55,091; 2003/04 - £69,204 and 2002/03 - £71,573.

24. A revised version of his SATR was submitted on 4 April 2007 and a third version on 23 July 2007. The different versions did not alter the amount of overpayment or the amount of loss to be carried back. None of the returns contained "white space" entries, being the box on the return where additional information can be disclosed to HMRC, beyond identifying the quantum of the losses that were sought to be utilised.

25. The SATR showed previous employment with Refco Overseas Limited ("Refco") in the year to 5 April 2005 and reduced employment income in the year to 5 April 2006. HMRC's PAYE records show that employment income ceased on 18 April 2005. He confirmed that he had frequently traded in oil futures firstly as an employee and then on his own account. He had taken a Trading Exam. He had worked in oil futures for Refco until he was made redundant in the spring of 2005. Between April and December 2005 he traded in futures on his own account but it was not profitable.

26. The bulk of the loss claimed by him in the SATR is said to be created as a result of a financial contract with a Seychelles Incorporated Company, Pendulum Investment Corporation ("the Pendulum Contract" and "Pendulum").

27. The signed Statement of Income and Expenditure dated 27 January 2007 for the 2005/06 SATR discloses contracts for difference ("CFD") sales of £87,850 and purchases of £283,944, of which £200,000 related to the Pendulum Contract. The margin on the other CFD sales, which he described as small and as to which there are no details, was £3,906. In the Bundle there were two undated Statement of Income and Expenditure which included no CFD sales. The second version is the same as the dated version with the addition of the CFDs.

28. In evidence he conceded that it was possible that the smaller CFDs might have been completed after he had completed the Pendulum Contract. However, at a meeting with HMRC on 13 November 2013, although he stated that he had not completed any CFDs whilst employed, he had been vague about when and with whom the small CFDs had been transacted. He has not traded in CFDs since March 2006 stating that they did not "suit" him. In summary, at most, his only transactions in CFDs took place in the space of less than four months but in all probability in the space of less than one month.

Ross Outram

29. In his SATR for 2005/2006, which was lodged with HMRC on 31 January 2007, he claimed for losses sustained as a self-employed options trader to the value of £506,370. Of those losses £122,380.90 was claimed as set off against other income in the year 2005/06. The rest of the losses were then carried back to set off against income in preceding years as follows: 2004/05 - £131,383; 2003/04 - £135,507 and 2002/03 - £117,099.

30. A revised version of his SATR was submitted on 4 April 2007 which did not alter the amount of overpayment or the amount of loss to be carried back. Neither return contained "white space" entries, being the box on the return where additional information can be disclosed to HMRC, beyond identifying the quantum of the losses that were sought to be utilised.

31. The SATR showed previous employment with Refco Overseas Limited ("Refco") in the year to 5 April 2005 and reduced employment income in the year to 5 April 2006. HMRC's PAYE records show that employment income ceased on 18 April 2005. We note that in his witness statement he stated that he had been employed by Refco Futures Limited. That discrepancy has not been explained but is not material. He confirmed that he had worked in oil futures for Refco until he was made redundant in the spring of 2005. Between April and December 2005 he had worked for a company called Nymex.

32. The signed Statement of Income and Expenditure for the 2005/06 SATR includes CFD sales of £327,653 and purchases of £817,865, of which £500,000 related to the Pendulum Contract. However, in the Bundle there was also an analysis entitled "Misc CFD Trades 2005/06" showing total purchases of £317,808 and sales of £317,653 between 17 March 2006 and 3 April 2006. BR are unable to reconcile the discrepancy in sales of £10,000 and purchases of £57. However, in oral evidence he conceded that the small number of other sales had produced a loss of £155.

33. As was the case with his brother, in the Bundle there were two undated versions of the Statement of Income and Expenditure, neither of which included CFDs. The first version is the same as the signed version with the addition of the CFDs – see paragraph 36 below.

34. In evidence he conceded that he was not aware of any trade in CFDs prior to 17 March 2006. In summary, his only transactions in CFDs took place in the space of less than one month.

The appellants' contact with BR

35. The uncontested witness statements of Messrs Mason and Stannett of BR confirmed the following:-

(a) Mr Stannett attended a meeting at Montpelier with his client, Mr Matthew Woolf, in 2005 where the Pendulum Contract was discussed in relation to Mr Woolf. Mr Woolf knew the appellants and subsequently introduced them to BR.

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(b) On 16 January 2006 BR issued a letter of engagement to Mr Ross Outram and on 28 February 2006 a letter of engagement was issued to Mr Anthony Outram.
(c) On 20 February 2006, Mr Stannett met with Mr Ross Outram at which meeting what he described as "the planning" was briefly discussed.
(d) On 23 February 2006, Mr Ross Outram emailed BR asking for Montpelier's contact details which were provided on the following day.
(e) On 6 March 2006, at the appellants' request, BR provided money laundering information to Montpelier.
(f) After the end of the 2005/06 tax year, BR wrote to the appellants requesting information for the SATRs for 2005/06. Most of the information was furnished by summer 2006 although details of the Pendulum Contracts were not made available until significantly later. At the time of preparing the SATRs, BR had the Acceptance Confirmation Note, the Pendulum Notice of Obligation to pay and the Repurchase Offer Letter.
(g) They found the information complex and difficult to follow but knew that it was "..a tax planning scheme via Montpelier, and that Montpelier had maintained that it was trading and that they had positive counsel's opinion on it."
(h) BR had received no information from Montpelier in relation to the appellants.
(i) BR were aware that neither appellant was knowledgeable about tax. In submitting their returns they relied on BR and on Montpelier, on whom, to an extent, it was acknowledged that BR relied.

36. We observe from the Bundle, although we were not referred to it, that on 25 September 2006 both appellants met with BR and the notes of meeting records that they discussed the SATRs for 2005/06. There was no mention of any CFD trades. That explains why, in the papers provided to HMRC, the first two undated Statements of Income and Expenditure for each of the appellants did not include CFD trades.

37. We note that there was an internal discussion in BR, apparently not communicated to the appellants, to the effect that there was a possibility that HMRC might challenge the CFD losses but that nevertheless they deemed it "appropriate" to submit the returns on the basis that the appellants had engaged in a trade in CFDs.

38. In summary, in preparing the tax returns, BR state that they relied on what the appellants had told them about what Montpelier had said, including the fact that there was a beneficial Opinion of Counsel. There was nothing in writing, either to BR or to the appellants. BR did act for others who had also used Montpelier.

The Pendulum Contract

39. The arrangements entered into by the appellants were originally devised by a Mr Michael Darwyne and later refined and marketed by Montpelier Tax Planning (Isle of Man) Limited (previously known as MTM (Tax Consultants) Ltd), part of the Montpelier Group of companies ("Montpelier"). Mr Darwyne was at certain material times the sole shareholder and controlling director of Pendulum. Mr Gittins acquired control of Pendulum by purchasing the entire share capital in September 2005[5].

[5] Paragraph 47 Sherrington

40. The principal of Montpelier was Mr Gittins, who was intimately involved in designing the arrangements with Mr Darwyne. The FTT held in both *Thomson* and *Sherrington* that the arrangements constituted a marketed tax avoidance scheme. We agree.

41. In summary, that scheme sought to create an artificial trading loss for tax purposes which the scheme users would be able to set against their general income.

42. The Pendulum Contract was designed to operate by reference to movements on the Financial Times Stock Exchange 100 Index ("FTSE"), potentially over a 25 year period. If the FTSE reached pre-determined values at certain points over the life of the Pendulum Contract, a profit based on percentages set out in the Pendulum Contract would be paid out.

43. The Pendulum Contracts are described as CFDs, but in *Sherrington* it was accepted by Mr Gittins that this was not a correct description as a CFD is based on a movement in a share price or an index multiplied by the stake. The Pendulum Contract was a simple bet that the FTSE would have moved up or down from its level at the date of the contract by a specified range of points at specified dates in the future. The functioning of the Pendulum Contract for the appellants was largely the same as for the taxpayers in *Thomson* and *Sherrington*.

44. In the scheme, as described in *Thomson* and *Sherrington,* before entering into the Pendulum Contract the appellant would have entered into a "Master Agreement" with Pendulum which was not itself the Pendulum Contract but rather set out template contractual terms that would apply to the Pendulum Contract documented under it. Those template terms and conditions would be applied to specific financial terms agreed following the service of an Offer to Trade and Acceptance Confirmation Note.

45. Any CFD entered into under the Master Agreement was expressed to be subject to the law of the Seychelles and to be subject to the jurisdiction of the Seychelles courts.

46. The appellants have not been able to produce a signed copy of the version of the Master Agreement which governed their Pendulum Contracts. The appellants have been able to produce a generic copy of Version 10 of the Master Agreement. That was also the version for one of the appellants in *Thomson*. It is agreed that nothing turns on any differences in wording in the various versions considered in *Thomson* and *Sherrington*.

47. The Master Agreement is described in *Thomson* at paragraph 30 and *Sherrington* at paragraph 91 as providing the following contractual framework to apply to Pendulum Contracts documented under it:-

(1) It provided for payments to be made by reference to the performance of the "Designated Index" specified for those purposes and of course that was the FTSE. Payments would be calculated by applying percentages either to the "Designated Issue Value" of a Pendulum Contract or to other figures related to that Designated Issue Value.

(2) It provided that there would be a maximum of five "Phases" to each Pendulum Contract documented under it.

(3) Phase One of a Pendulum Contract commenced on the Start Date proposed by Pendulum's counterparty, in this case the appellant, and accepted by Pendulum. Phase One ended on an End Date agreed in the same manner.

(4) Pendulum's counterparty agreed to pay the "Initial Margin" to Pendulum. The Initial Margin was a percentage of the Designated Issue Value of that Contract with the precise percentage to be determined in the Offer to Trade and Acceptance Confirmation Note described below.

(5) If the Designated Index moved up, or down, by an amount greater than the Designated Swing Movement over Phase One, the Contract would come to an end on the conclusion of Phase One and Pendulum would be obliged to make a payment of "Trade Profit" to its counterparty. The "Trade Profit" was defined as being twice the Initial Margin.

(6) If a Contract did not terminate following Phase One, it would move into Phase Two. The Master Agreement provided that, if a Contract moved into Phase Two, Pendulum would serve a Notice of Obligation on its counterparty requiring the counterparty to pay Pendulum the "Margin Call Balance" (being the balance of the Designated Issue Value of the Contract less the Initial Margin that had already been paid at the start of Phase One as described at sub-paragraph (3) above). The counterparty was contractually obliged to pay the Margin Call Balance to Pendulum within seven days of service of the Notice of Obligation.

(7) The Master Agreement envisaged that Pendulum and its counterparty would agree, in the Offer to Trade and Acceptance Confirmation Note, how long Phase Two was to last.[6] Payments due to the counterparties under Phase Two would depend on whether the Designated Index was greater than or equal to a specified "Index Target Level" (that Pendulum and its counterparty would agree) at the end of Phase Two. If the Designated Index had a value at least equal to the Index Target Level at the end of Phase Two, the Pendulum Contract would come to an end and Pendulum's counterparty would be entitled to receive a payment of "Trade Profit" from Pendulum.

(8) The Master Agreement provided that, if a Pendulum Contract did not end following Phase Two it would move into Phase Three. A counterparty was not required to make any further payment to Pendulum if a Contract moved into Phase Three (or any subsequent phase) since, as noted at paragraph 47(6) above, the counterparty would have paid the balance of the Designated Issue Value that was due at the beginning of Phase Two. Phase Three was in substance similar to Phase Two: Pendulum and its counterparty would agree how long Phase Three was to last and an Index Target Level applicable to Phase Three. If, at the end of Phase Three, the Designated Index had a value at least equal to the specified Index Target Level, the Contract would come to an end and Pendulum's counterparty would be entitled to receive a payment of "Trade Profit". Otherwise the Pendulum Contract would move into Phase Four, and potentially Phase Five, both of which provided for payments to the counterparty to become due on a similar basis to that applicable to Phase Three.[7] If, at the end of Phase Five, the Designated Index did not have a value at least equal to the specified Index Target Level, the Pendulum Contract would come to an end and the parties would be relieved of all rights and obligations thereunder.

(9) Version 10 of the Master Agreement defined "Trade Profit" for the purposes of Phase One as an amount equal to twice the Initial Margin payment. For the later Phases it was defined as "...in relation to Phases Two, Three, Four or Five (as defined herein) the sum payable to You if the Index Target Level designated on the Acceptance Confirmation Note exceeds the actual level of the Designated Index at the close of

[6] Both appellants' Pendulum Contracts stated that the duration of Phase Two would be two years.

[7] Both appellants' Pendulum Contracts stated that Phase Three would come to an end seven years after commencement of the Pendulum Contract, Phase Four would come to an end 15 years after commencement and Phase Five would come to an end 25 years after commencement.

business on the last day of the CFD period comprising the number of years indicated on the Acceptance Confirmation Note"[8].

48. Agreement on the key contractual terms to which the template set out in the Master Agreement would apply was achieved by a combination of a "CFD Offer to Trade" sent by Pendulum's counterparty and an "Acceptance Confirmation Note" sent by Pendulum after accepting the Offer to Trade[9].

The appellants' contact with Montpelier and Pendulum

49. One of the major problems in this case is that neither appellant has been able to produce anything remotely like a complete set of signed documents. Many documents are in draft and whilst it is conceded that both appellants would have received the same documentation or sent the same letters, in some cases we only have documentation for one appellant and not for the other. Throughout the hearing and for the purposes of this decision we have proceeded on the basis, which was conceded by both appellants, that what one appellant received and/or signed would apply to the other.

50. In his witness statement Ross Outram stated "Prior to entering into the contract with Pendulum, I had never entered into any form of tax planning. I entered into the planning after a fellow trader, Matthew Robert Woolf, recommended Montpelier to me".

51. As we note above, Mr Woolf was also a client of BR and Ross Outram had a discussion with Mr Stannett of BR on 20 February 2006 when the matter was raised. Ross Outram is clear that he did not ask for any tax advice from BR but said that BR had not said that it was in any way inappropriate for him "… to undertake the planning or that Montpelier was not a reputable company".

52. In fact, although not referred to in the hearing, there is in the Bundle a detailed note of that meeting prepared by Mr Stannett. He sent a copy of that note to Ross Outram on 22 February 2006. It is clear that the primary focus of that meeting was Ross Outram's proposed venture into spread betting. The only reference to Montpelier is:

> "Finally, Ross did comment that he is going to meet with Peter Crawford, who is the independent financial advisor who has given advice to Matt Woolf in this area.
>
> Ross will keep me informed of any decision he makes on this activity."

As we indicate at paragraph 35(c) above, Mr Stannett's uncontested witness statement says only that what he also described as "the planning" was briefly discussed.

53. We find that it is clear that Ross Outram was looking for tax planning advice from Montpelier.

54. Following that meeting he contacted BR asking for contact details for Montpelier because Mr Woolf was away.

55. He arranged a meeting with Montpelier.

56. On 27 February 2006, he emailed BR asking for copies of his P60s going back to 2002/03 "…for that thing im (sic) doing with Montpelier". In his witness statement he stated that he needed that so that he could work out "…what losses I could potentially utilise if I made a loss".

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[8] Both appellants' Pendulum Contracts stated that the Trade Profit for Phase Two was 130%, for Phase Three was 210%, for Phase Four was 450% and for Phase Five was 1200%.
[9] *Thomson* at [31] to [33], *Sherrington* at [91] and [92].

57. In his witness statement, Anthony Outram stated that his brother had introduced him to Montpelier but in the hearing, he said that Mr Matthew Woolf and his brother had told him about Montpelier.

58. Montpelier wrote to both appellants on 28 February 2006. That letter was from Montpelier Financial Services Limited ("Finance") in London and it stated that they were writing as Authorised Persons and they were regulated by the FSA.

59. However, more importantly, the letters pointed out that in regard to the information provided about CFDs (presumably Pendulum) that "…this company appears to be offshore and unregulated" and that they would need a sophisticated investor certificate before they could receive further information. Each appellant was told "You should consult your accountant or a tax specialist" as they, Montpelier, were not giving advice on the tax treatment of CFDs.

60. On 1 March 2006, the appellants each signed and returned a letter sent to them by Montpelier which, apart from noting a number of disclaimers by Montpelier, stated that he understood that if he had any doubts about the "investment" he should consult a "…professional investor specialising in advising on CFD investments." and requesting a certificate as a sophisticated investor. They each confirmed that:

> "I understand that you are not advising me as to me (sic) tax situation in relation to any gains or losses …and that I must seek the advice of an accountant or tax specialist."

They both went on to confirm that they fully understood the contents of the letter.

61. Montpelier, in the guise of Montpelier Tax Consultants (City) Ltd ("City"), emailed both appellants on either 1 or 2 March 2006 stating:

> "Could you let me have the following details so that I can pre populate (sic) the documents that we will be completing at our meeting on Friday…".

We observe from other correspondence that City is not FSA registered.

62. On 3 March 2006 both appellants attended a meeting with Peter Crawford from Finance and Andrew Simpson from City, both of which are part of Montpelier.

63. The appellants' recollection was that they were told that the scheme had been backed by Counsel and that it was legitimate. Anthony Outram said that no detail was given about that Opinion. In cross-examination he conceded that he was aware that Montpelier marketed tax planning and what he called "investments". Neither could remember much else that they had been told although Ross Outram conceded that he had been aware that Montpelier marketed tax planning and that they were tax advisers. He said in cross-examination that Montpelier had marketed both tax planning and "trade" at the meeting. He said that it was "very possible" that tax advice had been given at the meeting. He said that he had been told that the fees were built into the cost of the CFD and that a loan was available to fund the Margin Call Balance ("MCB") if it became payable. In his witness statement Anthony Outram said that he recollected that "…the fees were wrapped-up in the price paid for the CFD contract." In cross-examination he could not remember if it was included in the initial Margin.

64. In cross-examination Anthony Outram was asked whether Montpelier had marketed the Pendulum Contract to him as a tax planning arrangement and he said that he could not remember.

65. The documents that we know were signed on 3 March 2006, because they are in the Bundle, and they all relate to Anthony Outram, include:-

(a) A Montpelier Group – Isle of Man clients "Know your customer requirements" form in which he put in the box described as reason for engaging Montpelier "tax planning".

(b) A confidentiality agreement relating to information furnished to him by Montpelier Tax Planning (Isle of Man) Limited.

(c) A Professional Services Agreement with Montpelier Tax Planning (Isle of Man) Limited in which at paragraph 2.1 the services provided were defined as "Montpelier will provide taxation advice ('advice') or ('the advice') to the client in connection with matters described in Schedule 1" and Schedule 1 reads:

> 'The taxation advice is given in respect of the UK tax implications and consequences of the client commencing the trade of purchase and sale of derivative contracts including but not limited to:
>
> (a) General advice on the law;
> (b) Specific advice to the client;
> (c) Assistance with the preparation of accounts;
> (d) Assistance with tax returns and any negotiations with the Inland Revenue.

(d) Schedule 2 states that as Outram agreed to pay Montpelier a fee of £500 plus VAT and:-

"2. Montpelier agrees that in the event that the Inland Revenue determines that the client is not trading in derivatives in accordance with the tax advice per Schedule 1 and the Client appeals against such a determination to the General or Special Commissioners or pursues or defends an appeal from the General or Special Commissioners, Montpelier will at its sole expense pursue or defend an appeal from the General or Special Commissioners to the High Court. The costs of any further appeals to the Court of Appeal or House of Lords will be by mutual agreement between the Parties."

66. Although we refer hereafter to Montpelier Tax Planning (Isle of Man) Limited, the Isle of Man company, as "MTP" we have set the name out in full because neither appellant could, or should, have been in doubt that they were dealing with an offshore tax planning company that was not FSA registered. Those documents fly in the face of any suggestion that Anthony Outram did not think that it was a tax planning matter. Ross Outram conceded that he would have signed the same documents. Since neither appellant sought tax advice from BR, we can only assume that the only tax advice, if any, that they received (see paragraphs 59 and 60 above) was from Montpelier in the shape of MTP.

67. Following that meeting later that day, Montpelier emailed both brothers asking for money laundering identification ("ID"), and a cheque for £500 plus VAT. (We observe that the cheque issued by Anthony Outram carried no payee details or date, the invoice was raised subsequently by MTP and that their records record it as "Income Loss (Derivative Trade)").

68. The email confirmed that Montpelier would contact Pendulum that day and that provided they had received the ID and cheque by the following Monday they would "...send the completed Master Agreement and Passport Application to Pendulum." Once the appellants had the CFD Passport numbers they would be able to trade.

69. Patently, although the same email said that Pendulum would send documentation on the following Monday (see the next paragraph) Montpelier had all of the documentation already, presumably signed by both appellants at the meeting. Ross Outram said that he had signed a lot of documents but could not recall when. Furthermore, in cross-examination, Anthony Outram confirmed that there had only ever been one meeting with Montpelier and every document that he had signed had been signed at that meeting.

70. On 6 March 2006, Pendulum emailed Ross Outram with a copy to Montpelier with what was described as "...a covering letter and Information Pack in relation to our CFD product.". Under the heading "IMPORTANT NOTICE" there were extensive warnings, the first of which was to the effect that Pendulum was not regulated by the Seychelles authorities and at the end of that paragraph it stated that its paid up capital and reserves was €1,000.

71. The covering letter noted that the appellant had furnished them with a sophisticated investor certificate (furnished to the appellants by Montpelier). Pertinently, although it enclosed two copies of the Master Agreement for signature (stating that one would be returned once executed by them) it stated:

> "If, after reading the Information Memorandum and CFD Trading Passport Application form, and taking appropriate professional advice, you decide to apply....".

The Information Memorandum carries many warnings and again reiterates that Pendulum is not regulated and has capital and reserves of €1,000.

72. There is a signed CFD Offer to Trade purportedly dated 15 March 2006, from Anthony Outram which records that the proposed issue value of the Contract was £200,000 and that it would essentially consist of a number of "Future Trading Target Levels" identified by Pendulum in relation to the FTSE. The terms and conditions of the Pendulum Contract were said to be set out in the Master Agreement.

73. We use the word purportedly deliberately, since, as can be seen from paragraph 85 below the loan agreement was witnessed by Peter Crawford from Montpelier. Both appellants have confirmed that there had only been one meeting with Montpelier. Anthony Outram confirmed that all documents had been signed at that meeting. We find that every document, and not many have been produced in a signed form, was signed on 3 March 2006 notwithstanding the date, if any, on the document.

74. Neither appellant could recall if they had signed blank documents. They did not deny that possibility when that was put to them.

75. According to the pre-printed dates on his Offer to Trade, the first phase in Anthony Outram's Pendulum Contract lasted for seven days between 15 March 2005 and 21 March 2005. Of course that should have read 2006 as the handwritten documentation further up the page indicated. He states that he did not notice and he could not be sure whether the handwriting was his, albeit the signature was his. The designated swing movement was both up and down 140 points of the close of FTSE trading on the previous day.

76. Ross Outram's Offer to Trade was dated the same day but had the correct dates. Neither appellant could be sure that the handwriting on the documents was their own other than the signatures.

77. Neither appellant can recall who fixed the designated swing movement but both appellants thought that it might have been suggested by Montpelier.

78. Both appellants agreed to pay an Initial Margin on the Pendulum Contract being 7% of the issue value within five business days of the start date. The Pendulum Contract was accepted by Pendulum on the same date as is recorded in the Acceptance Confirmation Note (the

"ACN") and the Initial Margins were paid on 16 March 2006. Anthony Outram paid £14,000 and Ross Outram paid £35,000.

79. We observe that the ACN carried a warning that it was not approved by an authorised person[10], that Pendulum was not regulated by the Seychelles Securities Authority and that its paid up capital and reserves amounted to €2,000[11]. The ACN is version 10 as is the version of the Master Agreement but the latter states that Pendulum was not regulated by the Seychelles Securities Authority and that its paid up capital and reserves amounted to €1,000. The Master Agreement also carries other warnings including one to the effect that Pendulum is not authorised or regulated in the UK.[12]

80. As the FTSE had failed to exceed the designated swing movement at the end of Phase One in the Pendulum Contracts, both entered Phase Two. Under the terms of the Master Agreement the appellants were required to pay the balance of the Designated Issue Value (ie the Margin Call Balance (the "MCB")) under the Pendulum Contracts on being served with a Notice of Obligation to pay the MCB from Pendulum. As can be seen from paragraph 63 above, service of those Notices should have triggered a draw down of the loans.

81. Pendulum served Notices of Obligation on the appellants on 27 March 2006. In Anthony Outram's case that was in the sum of £186,000 and in Ross Outram's case that was in the sum of £465,000.

82. We observe that the footnote on the first page of the Notice of Obligation highlights, by underlining the words "Not regulated", the fact that Pendulum is not regulated in either the Seychelles or the UK. It also draws attention, again by underlining, to the attached "Warnings" which are stated to form part of the document.

83. The appellants both stated that they signed loan agreements with Mandaconsult AG. Anthony Outram says that he did so when he signed the Offer to Trade and Ross Outram alleges that he signed it when he responded to Pendulum's email of 6 February 2006. The copies produced to HMRC are undated and signed only by the appellants. Clause 2 reads:

> "2. Amount of Loan and Draw Down
>
> The amount of loan is £186,000 [£465,000 for Ross Outram] which must be drawn down within six weeks of the date of this agreement failing which this agreement shall terminate."

84. The loan was not interest bearing but the lender was entitled to a fee as specified in Appendix II, the payment was to be made to a nominated account (and there was none specified), repayment was due on the 50th anniversary of the agreement but was also due in the event of specified defaults such as being of unsound mind or bankruptcy but not in the event of death. The borrower is free to assign the CFD without consent. Appendix II specifies that fees equal to varying levels of profit (30%, 50% or 70% dependent on timing) will be payable in the event that profits were made. If fees were paid the loan was repayable. Profit is not defined anywhere.

85. Both were witnessed by Peter Crawford, one of the Montpelier employees with whom the appellants had met on 3 March 2006. Both were undated. In the case of Ross Outram, although he is named as a party to the agreement on the first page, the name opposite his signature is that of someone completely different. We find that they were both signed on 3 March 2006.

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[10] Page 4 of the ACN
[11] Page 5 of the ACN
[12] Paragraphs 4.1and 4.5 page 9 of 39

86. HMRC having instigated an enquiry, on 20 June 2014, BR wrote to Mandaconsult AG seeking information and documents relating to that loan.

87. On 23 June 2014, Mandaconsult AG replied stating:

> "Mandaconsult AG never signed any Loan Agreements and never made any payments to Ross Peter Outram or Anthony Patrick Outram and has therefore no debts owed by either of the above named individuals.
>
> We further confirm that Mandaconsult AG had no contact with either Montpelier Tax Consultants or Pendulum Investment Corporation".

88. The appellants in *Thomson* and two of the appellants in *Sherrington* had entered into loan agreements with another Montpelier company[13], Bayridge Investments LLC ("Bayridge") for payment of the MCB under their CFD contracts. The FTT in both *Thomson* and *Sherrington* found the terms of the Bayridge loans to be wholly uncommercial and that they were intended to enable the appellants to "ramp up" their claims for tax relief.[14] The terms of the unsigned Mandaconsult AG loan agreement are identical to those of the Bayridge loans. We agree that the terms of the proposed loan were wholly uncommercial but, of course, in the event there were no loans.

89. At no time has either appellant contacted Pendulum to check if the MCB had been paid and if so by whom.

90. Neither appellant could say whether or not they had accepted Pendulum's offer to buy back the contract.

91. Neither appellant had contacted Pendulum at the end of the subsequent phases to ascertain whether or not they had made a profit or if there was a different valuation for the contract. Although to be fair, Ross Outram did say that he knew he had not made a profit.

The Discovery Assessments

92. The relevant provisions are to be found in sections 29 and 36 TMA and the versions in force in 2014/15 read as follows:

The Taxes Management Act 1970

29 Assessment where loss of tax discovered

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) ....
>
> The officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

[13] Sherrington at paragraph 54

[14] Thomson at paragraphs 42 to 43 and Sherrington at paragraphs 103-105

…

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) Ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) Informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) It is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) …"

36 Loss of tax brought about carelessly or deliberately etc

…

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax-

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7, […]

(c) attributable to arrangements in respect tof which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), [or]

[

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,

] may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

….

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made [in a case] mentioned in subsection (1) [or (1A)] above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

…

118 …

(7) In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person."

93. As we indicate at paragraph 2 above, Mr Woolf conceded, after hearing Officer Reilly's evidence that the discovery assessment had been validly made. The only question for the Tribunal was therefore whether the appellants' behaviour had been deliberate or not.

94. We found that Officer Reilly's evidence was clear, succinct and wholly credible.

95. On 23 April 2013, he was allocated three cases as part of a project into taxpayers who had purchased CFDs from Pendulum. HMRC's belief at that time was that taxpayers who purchased CFDs from Pendulum were users of a mass marketed undisclosed tax avoidance scheme, sold and promoted by Montpelier. Two of the cases were those of these appellants.

96. As we have indicated above, the background is that premises in the Isle of Man and the UK belonging to Montpelier were searched by HMRC on 29 September 2010 as part of an ongoing criminal investigation into both them and their guiding mind, Mr Gittins, who of course, also owned Pendulum. A significant quantity of material was seized and it became apparent that amongst the documents seized were documents relevant to the civil investigations into certain taxpayers and that further investigations would be appropriate. On checking the tax affairs of the appellants it was clear that they had claimed losses in their SATRs for 2005/2006, and lodged with HMRC on 31 January 2007, but with no indication as to the source of the losses.

97. Following the review of the appellants' tax affairs, both of the appellants' cases were sent for approval to an authorised officer of HMRC to open a Code of Practice 9 ("COP 9") investigation on the grounds of suspected fraud arising from the submission of an incorrect tax return containing a claim for loss believed to be knowingly incorrect. This was approved on 21 June 2013. On 1 July 2013, HMRC advised the appellants that they were intending to investigate their affairs under COP 9. On 31 July 2013 the appellants declined HMRC's invitation to enter the Contractual Disclosure facility with a view to securing immunity from prosecution.

98. On 13 November 2013 Officer Reilly and another officer met separately with each appellant and BR. Both HMRC and BR kept extensive notes of those meetings and, amongst other things, the following matters were established namely:-

Anthony Outram

(a) The appellant confirmed that he wished to insist on his claim to loss relief.
(b) He stated that he had commenced the CFD trade in 2005/06 after he ceased employment and that he had become involved in a few trades in futures in the same tax year and stated that he had "just about broken even".
(c) He could not recall how he had become aware of Pendulum but stated that Montpelier had introduced him and his brother to the Scheme.
(d) When asked whether he believed the arrangement with Pendulum to be a tax planning scheme he said that it "was some sort of tax system" but that the scheme was a trade and not tax avoidance. BR also had it noted that it was a "tax system".
(e) He confirmed that he had made no enquiry in relation to either Pendulum or Montpelier to satisfy himself that the arrangements were *bona fide*. He had relied on the fact that Montpelier were FSA registered.
(f) He advised that he had made no provision for repayment of the loan either personally or out of the value of his estate.
(g) BR's notes of the meeting record that:-

> "Reilly asked for a potted history from first meeting Montpelier to the income tax return entries.
>
> Outram replied as follows:-
>
> (a) He met with Montpellier;
> (b) They set up the CFD trading account with one of their companies;
> (c) He traded;
> (d) He made a loss."

In cross-examination Anthony Outram was asked what he meant by the use of the word "their" which we have underlined and he said that he had meant Pendulum because in his words "they had a relationship with them". He argued that Montpelier had effectively acted as a broker.

Ross Outram

(a) The appellant confirmed that he wished to insist on his claim to loss relief.
(b) He could not recall how he had become aware of Pendulum but stated that he had met Montpelier in London and they had introduced him to the Scheme along with his brother.
(c) When asked whether he believed the arrangement with Pendulum to be a tax planning scheme he said that it "was an investment".
(d) He confirmed that he had made no enquiry in relation to either Pendulum or Montpelier to satisfy himself that the arrangements were *bona fide*. He had relied on the fact that Montpelier were FSA registered and he "... had faith in their systems".
(e) He stated that he had entered the arrangements to make a loss. BR recorded that "He expected a loss ... You wanted a loss but you could have had a win."
(f) He said that all of the paperwork had been signed in the Montpelier offices.
(g) He maintained that he had dealings in CFDs prior to the Pendulum Contract.
(h) BR's notes of the meeting record that:-

"Outram commented that it was all a long time ago. However, he suggested that the chronology was something along the following lines:-

a. He went to see Montpellier (sic);
b. He discussed the scheme and wanted a loss;
c. He set a date for the trade;
d. He did the trade;
e. He waited for completion;
f. You won or your (sic) lost;
g. The result went on his income tax return."

In cross-examination when referred to this paragraph he said that he had "worded himself poorly". He had been aware that he could make a loss and he could use that loss but he had wanted a profit.

99. BR recorded that both appellants had stated that they thought that the chances of winning were about 50:50 and that a long time had elapsed between the first contact with Montpelier and the deal. Ross Outram said it was a few months and Anthony Outram said it was about six to eight weeks. Of course, in fact, it was much less than a month.

99. Correspondence ensued and Officer Reilly requested that further documents and information be provided by 17 January 2014. There was no response.

100. On 28 January 2014 the officer received extensive further documentation which was specific to the appellants from the materials seized in the raid. That included a number of the documents to which we have referred above but, he regarded as key amongst the documents,

the undated loan agreements between Mandaconsult AG and the appellants for loans specifically to pay any MCB due to Pendulum (see paragraph 18 above).

101. On 12 February 2014, BR stated that they would be responding to Officer Reilly's request dated 3 December 2013. Further documents and information were provided on 21 and 25 February 2014. The key point is that the appellants did not hold, and seemed never to have held, signed copies of most of the primary documentation and produced, for example an undated blank application for a CFD trading passport from Pendulum and an undated blank Master Agreement for a CFD from Pendulum.

102. Having reviewed not only the further seized information and the documentation provided by BR, on 4 April 2014, Officer Reilly issued an Information Notice under Schedule 36 seeking further documents and information.

103. On 2 May 2014, Officer Reilly received 23 further pieces of documentation for Ross Outram including the Statements of Income and Expenditure to which we have referred above, the BR Client Tax Return checklist (which asked no questions about CFDs but which, when completed, held no information about such trades) and a copy of the undated loan agreements.

104. He received 19 further pieces of documentation for Anthony Outram which were similar to those for Ross Outram.

105. On 30 May 2014, Officer Reilly wrote to the appellants with a view of the matter letter in relation to the Schedule 36 Notices and BR responded on 27 June 2014 and accepted the offer of a review.

106. In that letter, BR raised a number of issues including:-

(a) An admission that, in the absence of any other lender, the appellants had suffered no economic loss beyond the initial margin payment since there appeared to be no loan with Mandaconsult AG.
(b) A claim that there may have been a false presentation by Montpelier and that BR considered that the appellants may have been victims of fraud.
(c) Copy correspondence including a letter from Mandaconsult AG dated 23 June 2014 which stated that there were no records relating to the appellants and that they had never signed any loan agreements or made any payments to the appellants. They denied having had any contact with Montpelier Tax Consultants or Pendulum Investment Corporation. (BR had said that those two companies had provided "financial planning")
(d) In respect of Ross Outram they produced an undated summary of his CFD trades (see paragraph 32 above).

107. On 6 August 2014, Officer Reilly wrote to BR acknowledging that the appellants had suffered no economic loss and asked whether a complaint of fraud had been made to the police or the Serious Fraud Office. He set out in considerable detail his view of the matter. Amongst the many points that he made, he pointed out that:

(a) The appellants had entered into the Pendulum Contracts. Those were a highly leveraged product with longer term options and success/fail criteria over one week and two, seven, 15 and 25 years which purported to be financed by a non-existent interest free loan with a duration of 50 years.

(b) The appellants had not personally paid the claimed additional loss and had not entered into a contractual obligation to borrow the money from anyone else.

(c) The appellants had undertaken no due diligence checks and sought no independent professional advice.

(d) Although the appellants had entered Phase Two they had never checked whether they had made a profit or loss. They had never made checks about subsequent years.

(e) The appellants had knowingly submitted the SATRs claiming the losses knowing that they had not paid the MCB nor had they entered into any alternative arrangements for payment. Therefore they could not have had an honest belief that their SATRs were accurate.

108. The next communication received from BR was on 18 September 2014 and it included a number of claims, namely:

(a) They had received a communication from Mr Gittins confirming that Mandaconsult AG were not the lender but that an entity called Bayridge[15] would have been the lender and that that was being investigated.
(b) It may have been too early to concede that there was no economic loss.
(c) The appellants may have spoken to Bayridge at the meeting with Montpelier as they understood from their knowledge of other cases that Bayridge operated from the same premises.
(d) It was posited that it was possible that another loan existed and that it was possible that the appellants had had contact with a lender or someone purporting to be a lender at the meeting with Montpelier.

109. Nothing further having been received, on 18 December 2014, Officer Reilly issued his discovery decisions to the appellants with copies to BR. The letters summarised the reasons for his decisions outlining the lack of genuine trading or intention to make a profit. In those decisions he denied the appellants £200,000 and £500,000, respectively, of the losses claimed for 2005/06 on the basis that:

(a) The loss was predicated on a claim to have entered into a loan agreement to fund that loss together with the Initial Margin payment.

(b) In response to the Schedule 36 Notice BR had provided as evidence of the payment, the undated but witnessed loan agreements. These had been relied upon by the appellants to establish an economic loss in relation to trading on the basis that the loans covered the contractual obligation.

(c) Subsequently evidence was provided to show that Mandaconsult AG had never entered into loan agreements and nor had they heard of Montpelier or Pendulum.

(d) BR's letter of 18 September 2014 speculated that there might have been some other lender but nothing had been produced to evidence that.

(e) Neither appellant had provided any purported lender with any financial information to secure the loans. No genuine lender advancing funds on a commercial basis would be prepared to enter into an agreement on the basis of such minimal evidence.

[15] Paragraph 100 of Sherrington – "Bayridge … is owned and controlled by Mr Gittins".

(f) Neither appellant had ever met with any lender or seen any signed loan agreement so at the time that the SATRs were submitted the appellants must have known that the loan did not exist.

(g) The appellants cannot have relied on the possibilities of payment by some unknown party to claim losses on the SATR.

(h) At no point had either appellant sought clarification on the level of their indebtedness or indeed notified other creditors of the substantial debt.

(i) The purported loan facility was offered on wholly uncommercial terms, bearing no interest, requiring no security and only repayable after 50 years.

(j) In the case of Ross Outram the loan agreement bears the name of an unknown third party.

(k) In the case of Ross Outram his stated intention was to make a loss.

(l) No evidence had been provided that the MCB was paid either by the appellants or by any other lender.

(m) In the case of Anthony Outram he had stated that the scheme was an investment and an opportunity to make money.

(n) HMRC have information that suggests that the appellants entered into the arrangements with Montpelier solely for tax planning and not for the purposes of genuine commercial trading with a view to making a profit.

110. He said that the assessments would follow.

111. On 9 January 2015, BR appealed both decisions.

112. On 15 January 2015, yet more documentation from the material seized from the raid was furnished to Officer Reilly. Included in that was an email chain that was internal to Montpelier dated 12 January 2005 where Mr Gittins responded to the Sales and Marketing Director who said

> "I am getting a few questions around the loan after 50 years. I know that in reality it won't be called. However, it is difficult for the client to believe that, as there is nothing to say that in any paperwork…"

with the statement that

> "It is crucial to the deal that they are seen to pay the full price for the cfd. (sic) the net present value of a 50 year loan is under 40% so immaterial when you think a 40% tax credit/rebate is due.".

113. We note, and agree with Judge Sinfield in *Sherrington* at paragraph 174 when he says in regard to that, that:

> "…it seems to us that it is good evidence of what those clients were told and, therefore, the basis on which they entered into the arrangements with Pendulum and Bayridge. That is especially true in this case, given the Appellants' lack of due diligence and reliance on what they were told by their respective advisers…. We consider that the true meaning of Mr Gittins' words is the more natural reading, namely that the clients would never actually pay the full price of entering into the Pendulum Contracts but would only be seen to do so."

114. It also included a PowerPoint presentation by Andrew Simpson of Finance, and who had attended the meeting with the appellants on 3 March 2006, albeit it is dated 10 May 2006. The accompanying speaking notes set out the details of the Scheme. Officer Reilly was particularly interested in the notes for slide 8 which reads:-

> "There are two main components to this opportunity.
> The basis for this tax planning is that you will create a trading loss. There you must have a trade. As I would imagine the majority of you are employed, you will have to establish yourselves as a self-employed trader.
>
> Once you have set up this self-employed trade and you have been trading on the markets we will enable you to create a trading loss and this loss will be used to gain a rebate on taxes paid."

115. The notes for slide 16 resolved the issue of repayment of the loan by stating that the loan was repayable "However it is uncertain what will happen to …the company in the future. There is a very". We agree with Judge Sinfield at paragraph 175 of *Sherrington* where he stated:

> "The note ends abruptly on the word 'very'. In our view, it is likely that the missing words, if they were ever written down, or words supplied by the speaker would, given the reference to the uncertain future of Pendulum and Mandaconsult (later replaced by Bayridge), state something like 'There is a very [good chance that neither would be around in 50 years to enforce the payment of amounts under the contracts]'".

116. In our view, on the balance of probability, given that evidence and Judge Sinfield's analysis, it is unlikely that either appellant would have had any reason to believe that even if there had been a loan that it would be repayable.

117. Officer Reilly also noted that the notes and slides had the same Phases and Index Target Levels as those in the appellants' documentation.

118. On 17 February 2015, Officer Reilly responded to the appeals by BR with a detailed explanation of his decision. At the heart of that he argued that neither appellant had been trading, or trading commercially as the characteristics of trading were missing. In particular, he pointed to the following issues:-

(a) The appellants had not acted as other traders in the business of futures. They were not turning over large volumes at a dealing margin, hedging against market movements to keep exposure limited or generally trading in more complex ways than simply entering into a contract and waiting for the price to move.

(b) There is a substantial, if not overwhelming, element of chance in what they were doing.

(c) They were not exercising specific acumen, experience or research in the business in which they alleged that they were trading.

(d) The holding is extremely long term and they were at the mercy of the market with no customers. The only market place for sale was realistically only to Pendulum. There were no hedge or stop loss provisions in place.

(e) The financing of the Pendulum Contract through loans with Mandaconsult AG was untrue and in any event the draft loan agreement had no commercial characteristics.

119. In support of that Officer Reilly cited, not comprehensively, the following:-

(a) They should have known that Pendulum was an unregulated offshore company with capital of only €1000 and yet they did no due diligence.

(b) There was no evidence that the MCB had been paid in that there was no receipt from Pendulum, no acknowledgement from the lender and no account statement.

(c) The draft loan agreements were not evidence of loans and in the absence of any further evidence there were no loans.

(d) The CFDs were not actually CFDs as defined in the Financial Services & Markets Act 2000 but rather a "Binary Contract". Furthermore there was a spurious accuracy to some of the figures used since no one could predict the FTSE level to the nearest 1000 points 25 years in the future as was the case for Phase Five. The reality was that the appellants' position was based on a generalised view that the stock market would rise over time.

120. He went on to explain that the materials from those seized in the raid on Montpelier supported the view that there were concerted arrangements and that that affected the question as to whether or not the appellants were trading or whether the arrangements were purely put in place to obtain tax relief.

121. Officer Reilly described the PowerPoint presentation and the speaking notes and he offered a sight of that presentation and the emails internal to Montpelier to both the appellants and BR. That offer was not taken up.

122. He offered a review of the decision.

123. On 11 March 2015, BR appealed on behalf of the appellants. The argument was that the appellants had acted in accordance with the advice of Montpelier, the appellants had acted in good faith and the time limit in terms of Section 36(1) TMA had expired.

124. On 30 April 2015, Officer Boyle having reviewed the decision, not only upheld the decision and assessments but did so on the basis that "HMRC formed the opinion that you were not carrying on a trade and therefore, had not incurred an allowable loss relating to that aspect. Consequently, HMRC disallowed those losses and raised the adjustments and assessments to collect the additional tax due ...".

Summary of the appellants' arguments

125. The appellants continue to insist that:

(a) They did engage in a genuine trade.

(b) They thought, and think that they owed £186,000 and £465,000 respectively for loans to "someone".

(c) Therefore the losses are genuine.

(d) They went into the Pendulum Contracts knowing that they would be able to relieve losses if necessary but they had always intended to make a profit. Although both had told Officer Reilly at the meeting on 13 November 2013 that they had thought that there was a 50:50 chance of a profit in Phase One, Anthony Outram conceded that that diminished sharply thereafter to a minimal possibility by 25 years. In the case of Ross Outram he departed from the 50:50 argument and argued that he thought that there was a good chance of getting into Phase Two (ie making a loss in Phase One) which was good

because he believed that there was a significant chance of a profit in Phase Two and it was a good investment. Phase Two was his primary focus as it was the "main driver".

(e) Both appellants claimed that they were not "a man for detail", they knew little about tax and they had relied on Montpelier at all times. They had been told that Montpelier had a positive Opinion of Counsel. They had assumed that as Montpelier were FSA registered they would have "protected" them and done all necessary diligence. They had thought that everything was *bona fide* or legitimate and would have expected that if that had not been the case then BR would have warned them. They knew the "gist" of the deal.

(f) They had assumed that Montpelier would have drawn down the loan. In the absence of any demand for payment, and given the terms of the letter of 10 May 2014 sent by Pendulum with the offer to repurchase the Pendulum Contract that payment under the terms of the Loan Agreement had certainly been made.

(g) Both relied on the fact that Mr Matthew Woolf had made a profit so there was a possibility of winning and he had recommended Montpelier to them.

(h) Both said that they "tried" the CFD product to see if it "suited" them and decided that it did not.

(i) Neither could remember the detail due to the elapse of time.

Discussion

126. Both appellants were less than compelling witnesses. Whilst we appreciate that these matters occurred 16 years ago, both have had access to the Bundle (although there had to be a recess for the Bundle to be provided to them) for some time yet seemed unaware of numerous pertinent matters. Both repeatedly said that they could not remember what had happened. Their witness statements were dated November 2016.

127. In terms of evidence, we start with Mr Matthew Woolf whom the appellants said had recommended Montpelier to them. The introduction to Montpelier was certainly in late February 2006. Neither was able to say why Mr Woolf would have recommended Montpelier (and the Pendulum Contract to them) given that Mr Woolf's unchallenged first witness statement, dated 16 November 2016, stated that at the end of 2005 things started to go wrong and he had become disillusioned with Pendulum. The second witness statement dated 23 May 2017 confirmed the disillusionment stating that problems had started in late October 2005 and they had been slow in paying him his profit.

128. The third witness statement dated 29 October 2020 is very brief. He points out that his memory is sketchy and says that "…having had an opportunity to consider the circumstances under which I introduced Ross Outram to…" the Pendulum CFD arrangement he thought that it might have been in late 2005 as "..he felt that it was perfectly possible to make gains…and thought the arrangements were attractive for that reason, in addition to the possibility of tax losses and soft finance if…not successful".

129. In fact Ross Outram said in evidence that he thought that that discussion happened in early 2006 albeit he could not remember the detail. We find that it seems very unlikely that it was in 2005.

130. Furthermore, as Ms Choudhury pointed out, both appellants' argument that Mr Woolf made profits is not accurate. He did initially, but at best he ultimately recovered only his initial investment being the Initial Margin.

131. In summary, both appellants say that they heard about Montpelier from him but neither can remember when. On the balance of probability, we find that his earlier witness statements which are broadly consistent, the one with the other, and speak of disillusionment, months before Ross Outram approached Montpelier and met with them, are accurate. We find that Mr Woolf's evidence was adduced purely in an attempt to give rise to an inference that there was always an intention to make a profit because they said that he had done so. His evidence does not assist in any material way.

132. By contrast we had the unchallenged evidence of Mr Bradley and Ms Choudhury, very appropriately, relied on the findings of the FTT in *Sherrington* at paragraphs 171 and 172. We add a small part of the explanation at paragraph 170. The relevant excerpts read:

> "170. Mr Bradley produced a schedule analysing all the Pendulum Contracts known to HMRC. HMRC had identified 253 contracts which were the same or similar to those entered into by the Appellants.... We accept that Mr Bradley's schedule is broadly correct and shows that only 11.5% of Pendulum Contracts achieved success at Phase One. For the successful 29 contracts, the total Trade Profit was £434,500, leaving Pendulum with £2.62m in net Initial Margin receipts. In relation to the Pendulum Contracts that were not successful at Phase One, Pendulum was owed a total of £36,017,867 in Margin Call Balances. Pendulum's offers to re-purchase the Appellants' Pendulum Contracts show that Pendulum assessed the chances of those contracts achieving the relevant Index Target Level as negligible.
>
> 171. Mr Bradley explained why a person might prefer to lose at the end of Phase One and continue into Phase Two and subsequent Phases rather than win. The different economic benefits that flowed from success and failure at Phase One of a Pendulum Contract can be seen by examining the figures from Mr Sherrington's three contracts (which all had an Issue Value of £300,000). In each case, Mr Sherrington paid a 5% Initial Margin of £15,000. Mr Sherrington was unsuccessful at Phase One in all three contracts but had he won at Phase One, he would have received twice the Initial Margin, ie £30,000, as Trade Profit. Mr Sherrington would thus have made a profit of £15,000 on which, as a higher rate taxpayer, he would have paid tax at 40% leaving a net gain of £9,000 on each contract that was successful at Phase One. In fact, Mr Sherrington always lost at Phase One and was left with three contracts, each with an Issue Value of £300,000, which were valued by Pendulum at £3,501, £4,000 and £4,199 respectively. That gave Mr Sherrington a total loss of £888,300 which he used to claim relief from tax in the current and previous years giving him a right to a repayment of £355,320. As he had paid three Initial Margins amounting to £45,000, Mr Sherrington's net position, having lost at Phase One, was a gain of £310,320. Against that, Mr Sherrington had a liability to repay Bayridge the three loans of £285,000, ie £855,000 in total, after 50 years which we consider below.
>
> 172. Mr Bradley's evidence was that all the people who made a 'Trade Profit' at Phase One went on to re-invest their proceeds into further contracts, which then went on to lose at Phase One. *Mr Bradley explained that, in reality, the individuals had far more to gain from losing at Phase One than from winning because of the economics of the Pendulum Contract. Mr Bradley's view was that, given the benefits of losing, no one would have wanted to win at Phase One which is why, if they did, the participants in the Pendulum Contracts, including the Appellants, went on to enter into new contracts and lose at Phase One of those contracts. Mr Bradley's view was that the participants entered into the Pendulum Contracts solely in order to generate a loss. We accept Mr Bradley's analysis and conclusions.* We find that the true objective of the Appellants in entering into the Pendulum contracts was not to make a profit at the end of any Phase but to lose

at the end of Phase One so as to create a loss in respect of which they did not bear the full economic cost but which reduced their liability to tax.

133. We particularly agree with the analysis which we have highlighted in italics and we adopt it together with the findings of Judge Sinfield and Mrs Bridge in the following sentence of that paragraph.

134. It is clear from the evidence that both appellants were seeking a method of minimising their taxes. They did not go to a trading platform which would have been the logical thing to have done if their motive had been to make a profit. That is supported by the fact that both appellants signed a contract for tax planning services[16] with MTP, an offshore company that most certainly was not FSA approved (see paragraph 65 above). Ross Outram's need for his P60's for the three preceding years makes it explicit that he thought that it was all about tax losses. Clearly, in advance of the meeting he wanted to quantify the extent of the losses that might potentially be utilisable.

135. Although in the hearing Ross Outram argued that his use of words had been poor, as both BR and HMRC record, he had freely admitted at the meeting with HMRC on 13 November 2013 that his intention had been to achieve losses. BR had recorded him as saying "You want a loss but you could have had a win." HMRC recorded that: "RO confirmed that it was his intent to make a loss and that it seemed a very logical thing to do". Clearly, on the balance of probability, that was his motivation at the time.

136. Mr Bradley's evidence is clear that even if one made a profit, as Mr Woolf did briefly, by entering a new contract there would be access to losses once the loan was made.

137. We too find that the true objective of the appellants in entering into the Pendulum Contracts was not to make a profit at the end of any Phase but to lose at the end of Phase One so as to create a loss in respect of which they did not bear the full economic cost but which reduced their liability to tax.

138. Like the FTT in both *Sherrington* and *Thomson* we had the PowerPoint presentation and speaking notes and whilst we accept that they are dated approximately two months after the date of the appellants' Pendulum Contracts, we conclude that they accurately represent how Montpelier marketed the arrangements. In this case, however, the position is even more clear cut. The author was Andrew Simpson from City and it was he who sent the email indicating that he needed details to enable him to pre-populate the documents, he who attended the meeting on 3 March 2006 and he who wrote the email that afternoon which makes it explicit that the documents that purported to be dated after that date had already been signed (see paragraphs 61-62 and 68 above). It is inherently incredible that he would have departed from the sales pitch that had been used the previous year for the appellants in *Sherrington* and *Thomson* and which he formalised a few weeks after his meeting with the appellants.

139. The fact that Anthony Outram's records at MTP are labelled "Income Loss (Derivative Trade)" is also significant as it was Andrew Simpson who had completed the documentation that included that and which he sent to MTP on 8 March 2006.

140. Like the FTT in *Sherrington* and *Thomson* we find that the Pendulum Contracts were marketed to the appellants as a tax avoidance scheme; indeed the slide headed "Montpelier Tax Consultants" which includes the bullet point "Counsels (sic) opinion" commences with a bullet point "Tax avoidance not evasion!". Further we find that the appellants knew that.

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[16] We only had a signed Professional Services Agreement for Anthony Outram but Ross Outram conceded in cross examination that he would have signed one too.

141. However, that is not the end of the matter. Before moving to our other findings, for the avoidance of doubt, BR's concession, on behalf of the appellants, to the effect that the scheme was ineffective (see paragraph 10 above) has carried no weight in our consideration of the other factors.

142. Montpelier's marketing focussed on a two stage process, establishing a trade and then incurring losses.

143. Unfortunately for the appellants that part of the message does not appear to have been acted upon by them. As Judge Richards makes very clear (in relation to an email but the same point is made in the Montpelier slides and speaking notes) at paragraph 51 of *Thomson*:

> "This email indicates that Montpelier intended the Pendulum arrangements to function as a device to deliver a trading loss to a user of the scheme but that, before such a loss could be delivered, the user first needed to commence a trade of dealing in derivatives."

The appellants did not commence any trade first.

144. Both Pendulum Contracts were dated 15 March 2006, albeit effectively put in place on 3 March 2014. Ross Outram's first other CFD trade was on 17 March 2006 and the last on 3 April 2006. Self-evidently, he only commenced trading after the Pendulum Contract.

145. The position in regard to Anthony Outram is less clear since he has no recollection as to when he did any trades and there is no evidence. However, he conceded in cross-examination, that the trades were probably after the Pendulum Contract. On the balance of probability that seems very likely since both appellants seemed to have acted in concert. Both only entered a very small number of other CFD contracts.

146. We note that both state that CFD contracts did not "suit" them. We find that what did suit them was the losses created by the loans in the Pendulum Contracts. Both agreed that they would not have entered the Pendulum Contracts if the loans, on such very advantageous terms, had not been available.

147. We find that the CFD contracts other than the Pendulum Contracts were mere window dressing to give the impression of trading.

148. For all of the reasons advanced by Officer Reilly (see paragraphs 109 and 118-121 above), which we do not intend to rehearse again here, but with which we agree and adopt, we do not accept that either appellant was trading in CFDs and even if we are wrong, they were certainly not doing so on a commercial basis with a view to a profit. Very few, if any, of the badges of trade are present.

149. If you do not have a trade, as Montpelier made very clear, you cannot relieve any losses.

150. In the words of Judge Richards in *Thomson* at paragraph 65(5)

> "For the arrangements to function as a tax avoidance scheme, the arrangements had to produce a tax loss <u>without</u> an economic loss. That was achieved by the … Loan … The Loan … operated to 'ramp up' the amount that the appellants would claim they invested in the Pendulum CFD even though they had not in any economically real sense invested the full Designated Issue Value."

We agree entirely.

151. We are wholly unpersuaded by BR's suggestions, that are unsupported by any evidence whatsoever, that it was possible that another loan existed and that the appellants might have

had contact with such a lender during the meeting with Montpelier (see paragraph 108 above). Quite apart from anything else, neither appellant supported that assertion.

152. Mr Woolf relied on paragraphs 13 and 14 of Mr Gittins' witness statement which read as follows:

> "13. It was the policy of Bayridge to advise Montpelier staff discussing Pendulum CFD's to offer the Bayridge loan for the reason stated above. At the beginning of the Pendulum trading a company called Mandaconsult AG was intended to offer the loans instead of Bayridge but it never did. This led in some cases to traders executing agreements with Mandaconsult AG which were later replaced by Bayridge. At all material times however irrespective of the identity of the lender verbal assurances were given to all potential traders that any margin call under a CFD would be met on the terms advised. This was the clear understanding of each trader.
>
> 14. In the case of most traders I can locate executed loan agreements with traders but for reasons unknown I cannot locate agreements signed by the Appellants. Consequently both Bayridge and I presume the Appellants rely on the verbal agreements when they traded with Pendulum."

153. His argument was that that could be relied upon to evidence the fact that there must have been some sort of verbal loan. There is absolutely no evidence to that effect. As can be seen from paragraphs 83 to 87 above, both appellants signed loan agreements copies of which were produced to HMRC but it was only when HMRC instigated enquiries in 2014 that it transpired that Mandaconsult AG had never signed the agreements. The witness statements of both appellants refer to the loans and both said that they assumed that Mandaconsult AG had executed the loan agreements. There is absolutely no reference to any verbal loan; indeed both state that they proceeded on the basis that the loan agreements were key to the arrangements and existed. In oral evidence Anthony Outram said that he would not have entered into the Pendulum Contracts without the loan and Ross Outram said that it was the existence of the loan that made it attractive and the existence of the loan was the 'deciding factor'.

154. The fact that in the many years that have passed since the Pendulum Contracts, the appellants have done absolutely nothing to establish the extent of their indebtedness beyond the enquiries triggered by HMRC points to an understanding that the loans were unlikely to be repayable.

155. We are dealing here with deliberate behaviour as opposed to the much higher standard of alleged fraudulent or negligent behaviour but we agree with Judge Falk (and Mr Bell) in *Bayliss v HMRC*[17] at paragraph 52 where it states: "Subsequent conduct is relevant only insofar as it provides evidence of whether that earlier conduct was indeed fraudulent or negligent."

156. We are not looking at conduct *per se* but it is very clear that, although not in the documentation, it was made explicit to those who invested in a Pendulum Contract that the loan would never be repayable (see paragraphs 112 to 116 above). That presumably accounts for the fact that the appellants were unconcerned about the loans. In reality the loans too were mere window dressing although, of course, for these appellants since there are no loans that really does not matter. However, the point is that, on the balance of probability we accept that the appellants would have had reasons to believe that they had suffered no economic loss.

[17] 2016 UKFTT 500 (TC)

157. We do not accept that there was any loan constituted in any way. The appellants suffered no economic loss.

158. The remaining issue, therefore, is whether or not the appellants' behaviour in submitting their tax returns containing the losses was deliberate. There is no doubt that it did give rise to tax losses.

159. What we have here is what is agreed to be a validly issued discovery assessment under Section 29(4) TMA and HMRC are arguing that it is subject to the extended time limit in Section 36(1A) TMA because the appellants' behaviour was deliberate.

160. Although there is extensive case law on what amounts to deliberate behaviour in the context of penalties, there is very little in the context of discovery assessments.

161. HMRC rely on Floyd LJ in *Tooth v HMRC*[18] in the Court of Appeal where Floyd LJ gave the following analysis:

> "86. The deliberateness requirements of section 29(4) and 36(1A)(a) require HMRC to prove that the taxpayer intended to bring about a particular fiscal result. In the case of section 29(4) it is an intention to bring about a situation in which an assessment to tax is insufficient, and in the case of section 36(1A)(a) it is an intention to bring about a loss of tax. I agree with HMRC's contention, however, that section 118(7) is a deeming provision which means that HMRC can establish the relevant intention by showing that there was a deliberate inaccuracy in a document given to HMRC by or on behalf of the taxpayer, and that the loss of tax followed "as a result of" the deliberate inaccuracy. That is no more than what the language of the statute conveys. It follows that the enquiry about the taxpayer's intention stops once it is established there is a deliberate inaccuracy in a document. Thereafter one enquires into whether the loss of tax or other situation occurred as a result of the inaccuracy. That is simply a question of factual causation.
>
> 89. The triggers for the 20 year time limit identified in section 36(1A)(a) to (d) also do not include a consistent requirement of blameworthy conduct by the taxpayer. Sub-paragraph (b) includes a failure by a person who is chargeable to income tax for any year of assessment and who has not delivered a return of his profits, gains or income for that year to give notice that he is so chargeable. The failure is not required to be negligent or deliberate. Such a failure could occur, for example, as a result of incorrect advice.
>
> 90. In the light of these considerations, I do not regard it as surprising that, as a result of the expanded meaning given to the sub-sections by section 118(7), conduct which is overall not blameworthy is brought within the definition.
>
> …
>
> 94. I approach this second sub-issue on the assumption (contrary to my conclusion on the first sub-issue) that there is an inaccuracy in the document. If there is no inaccuracy then there is no deliberate inaccuracy either. If there is an inaccuracy, however, that must be because it is incorrect to construe the tax return as a whole, and correct to focus on the individual inaccuracy on the partnership pages of the return. The incorrect insertion of the employment losses in the boxes reserved for partnership losses was, viewed in this way, a deliberate …".

162. Mr Woolf agrees the relevance of *Tooth,* relying on it to demonstrate that it must be established that the appellants knew that there was an inaccuracy in the SATRs and the test as to whether or not the behaviour was deliberate is linked to knowledge.

[18] 2019 EWCA Civ 826

163. Although it deals with different statutory provisions we agree with the Tribunal in *Auxilium Project Management v HMRC*[19] where Judge Greenbank (and Mr Bell) said at paragraph 63:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

164. We have already established that we find that:-

(a) The appellants had knowingly taken part in a tax avoidance scheme;

(b) They knew that that scheme involved the need to have a trade and thereafter create losses, whereas the reality was that there was no trade;

(c) They knew that the losses would be created by a purported loan on uncommercial terms and that that loan would not be repayable on the elapse of 50 years;

(d) They knew that their other CFD contracts were not even modest but were in fact minimal in size and occurred within a very short period and after the meeting on 3 March 2006;

(e) The only information given to BR was the extent of the alleged trade;

(f) They did not seek tax advice from BR at any stage in relation to the Pendulum Contract.

165. Therefore we find that each of the appellants knew at the time of filing their respective SATRs that they were not carrying on a trade which entitled them to make a claim for loss relief.

166. We were wholly unconvinced by the appellants' argument that they were entitled to rely on Montpelier for everything and that they needed to check almost nothing because Montpelier was FSA registered and had a Counsel's Opinion which they had not seen. Had they asked to see it, as they were entitled to do, as Judge Richards says at paragraph 48 of *Thomson* (which is quoted with approval by Judge Sinfield at para 56 of *Sherrington*) that Opinion made it clear that Counsel was not endorsing the scheme. We have underlined the key words.

> "He also sought tax advice from UK tax counsel, Mr Shipwright, on the tax consequences for investors. Mr Shipwright's advice included an analysis of the general law, and HMRC practice on what amounted to the carrying on of a trade on a commercial basis with a view to profit. However, that analysis was generic: Mr Shipwright was not purporting to advise as to whether any particular taxpayer met this requirement and he noted that the question was ultimately a question of fact that depended on what a taxpayer actually did."

167. As can be seen their primary dealings were in fact with Andrew Simpson of City and their Professional Services Agreements were with MTP, neither of which were FSA registered. The documentation made it abundantly clear that there was no FSA protection and nor was there protection in the Seychelles. They had both requested a sophisticated investors certificate, which was provided by Montpelier and which took them out of FSA protection.

[19] 2016 UKFTT 249 (TC)

168. Their glib assertions that they were not men with an eye for detail and that they had therefore not read the documents in detail, do not assist them. By any standard, purported indebtedness of £185,000 and £465,000 is not insignificant for individuals of relatively limited means.

169. The fact that neither of them knew whether they had accepted Pendulum's offer to re-purchase the CFDs and their failure to check what had happened in subsequent years, points to a disregard of anything other than the losses which they had set out to achieve.

170. This is a self-assessment system. The taxpayer is ultimately responsible for submitting an accurate SATR.

171. This was not a question of the appellants turning a blind eye. They did not ask questions or read documents because they knew precisely what they were doing. They were trying to create a significant loss and thereafter make substantial claims for repayment of tax. Crucially the appellants do not and never did have any liability to repay a purported loan. Therefore they did not incur expenditure and they incurred no losses that were capable of being relieved. Furthermore they had not been carrying on a trade on a commercial basis with a view to making a profit.

172. In submitting their SATRs we find that they acted deliberately with a view to claiming non-existent losses. Their intention was to mislead HMRC and obtain repayments of tax.

173. For all these reasons the appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

174. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 25 September 2023

Amended pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) on 21 September 2023.