HIGH COURT OF JUSTICE OF THE ISLE OF MAN
COMMON LAW DIVISION SUPERIOR BUSINESS
MONTPELIER v JONES & MORRIS
18 September 2009
His Honour Deemster Newey

Introduction

1. This case is concerned with schemes designed to avoid the effects of legislation foreshadowed by an Inland Revenue press release, referred to as "IR35", of 9 March 1999.

2. IR35 was directed at the practice of using personal service companies (or "PSCs") to avoid income tax and national insurance contributions ("NICs"). Such a company would charge out the services of a particular individual (typically an IT consultant) to a client in return for remuneration paid by the client to the PSC. The PSC would pay the individual performing the services a relatively modest salary in respect of which PAYE income tax would be deducted and NICs paid. The balance of the money paid by clients could be retained by the PSC, which would be owned by the individual or by the individual and his spouse or partner. Alternatively, it could be used to pay a salary to the spouse or partner or to fund dividend payments.

3. Mr Timothy Warr ("Mr Warr"), a chartered accountant who had extensive experience of such arrangements, explained as follows in his witness statement:

"Throughout the 1990's many of our Computer Contractor clients had their affairs arranged so that they and their spouse would hold 1 share each, they would receive a salary equal to the personal allowance, the company would pay dividends to utilise both basic rate bands and any surplus profits would be retained within the company. In this way a Computer Contractor could be generating fees of £100,000 per annum and paying tax of about £20,000."

4. The legislation which was introduced following the IR35 press release took effect in April 2000. As Mr Warr explained:

"Put simply, the legislation applies where, but for the existence of intermediaries (such as an agency and a personal service company), the relationship between the client and the worker would have been one of employment rather than self employment. Where the legislation does apply, 95% of monies received in respect of a contract must be used to discharge schedule E expenses and pay net salary and deductions. If salary is not paid, deductions are due as if that salary has been paid."

5. The relevant provisions were contained in section 60 of, and schedule 12 to, the Finance Act 2000 and sections 75 and 76 of the Welfare Reform and Pensions Act 1999, as implemented by the Social Security Contributions (Intermediaries) Regulations 2000.

The parties

6. As its name suggests, the Plaintiff ("Montpelier") is an Isle of Man company which provides taxation advice. The leading figure in the company, and its chairman, is Mr Watkin Gittins. Montpelier is part of a larger group of companies ("the Group").

7. The First Defendant ("Mr Jones") is a certified accountant. He worked for many years for Midlands Electricity plc, latterly, from 1988 to 1995, as the group taxation manager. In 1995 Mr Jones moved to the Isle of Man to join Whitechapel Corporate Services Limited ("Whitechapel"), a subsidiary of Sedgwick Group plc which offered tax planning services including, in particular, a car ownership scheme which enjoyed wide success. At the beginning of 1996 Mr Jones was appointed as a director of Whitechapel. In 1998, however, Whitechapel was sold to Abbey National plc, and Mr Jones became self-employed.

8. It was at Whitechapel that Mr Jones first met the Second Defendant ("Mr Morris"). Like Mr Jones, Mr Morris was a qualified accountant, and he was director of consultancy and operations for Whitechapel. However, in 1997 Mr Morris left Whitechapel to work for a Mr Ferguson Lacey for some three years. During this period, Mr Morris also, with Mr Ferguson Lacey's agreement, worked with Mr Jones on a number of projects and consultancy assignments for third parties.

Witnesses

9. Mr Gittins, Mr Jones and Mr Morris all gave evidence before me.

10. A sustained attack on Mr Gittins' truthfulness as a witness was made on Mr Morris' behalf. Mr Jones also, though in a more limited way, questioned the veracity of some of Mr Gittins' evidence. In my judgment, however, Mr Gittins was not consciously untruthful in his evidence. I do not think that Mr Gittins' recollection of events was always accurate, and in certain respects it might be said that Mr Gittins' evidence (in particular, some passages in Mr Gittins' early affidavit evidence) was careless. It seemed to me, though, that Mr Gittins gave evidence in accordance with his recollections.

11. I treat Mr Jones' and Mr Morris' evidence with somewhat more caution. It appears to me that Mr Jones and Mr Morris both embellished their accounts to an extent. The evidence they gave of an assignment of rights from Westwood Consultancy Limited ("Westwood") to Mr Jones provides an example. As explained below, I do not think that any such assignment was in fact effected, and I cannot accept that Mr Jones or Mr Morris genuinely believed that there had been one.

12. The following also gave oral evidence:

12.1 Mr John Cuddy ("Mr Cuddy"), the compliance, data protection and anti-money laundering officer for the Group;

12.2 Ms Dawn Bull ("Ms Bull"), who is employed by Montpelier as a senior administrator;

12.3 Mr Warr, the senior partner of Warr & Co, a firm of chartered accountants based in Stockport;

12.4 Mr Phillip Dearden ("Mr Dearden"), another chartered accountant and a director of PKF (Isle of Man) LLC; and

12.5 Mr Greg Jones, a barrister by qualification who is a member of KPMG LLC, the Isle of Man representative practice of KPMG International.

All of these appeared to me to give evidence to the best of their recollections.

Representation

13. Montpelier was represented before me by Mr James Ramsden and Miss Jenny Holt. Mr Jones was legally represented until February 2008, but he has since acted, and he appeared before me, in person. Conversely, Mr Morris represented himself until mid-2008, but before me Mr Alastair Wilson QC and Mr Charles Coleman appeared on Mr Morris' behalf.

The facts

14. By early 2000 Mr Jones and Mr Morris had agreed to collaborate on a project to offer a scheme which would avoid or mitigate the effects of the IR35 legislation. They worked in this respect with Ernst & Young Isle of Man, for whom Mr Jones provided consultancy services. The financial, trust know-how and administrative support which Ernst & Young could provide were seen as important for the success of the project.

15. In April 2000 Westwood, a company then owned by Mr Jones and Mr Morris, obtained advice from Mr David Milne QC on the IR35 proposal. The proposal, as explained in the instructions which were submitted to Mr Milne by Ernst & Young Isle of Man, involved the services of consultants being supplied to clients pursuant to contracts with a new company incorporated and resident in the United Kingdom rather than with the consultants themselves. The consultants were to be employed by the new company (referred to as "Newco") and were also to be shareholders in the company, but no consultant's interest was to exceed 5%. Each consultant would receive a salary equal to about 30% of the gross fees that he would normally have earned as a consultant, it being "hoped that employees will accept lower salaries because of the prospect of large capital gains through the ownership of Newco shares". The instructions stated that Newco intended to award employees bonuses/benefits based on performance, and might do so by "establishing an offshore discretionary Employee Benefit Trust ('EBT') for the benefit of employees", by the award of "tax efficient benefits-in-kind such as £5,000 interest free loans", by offering the "opportunity to participate in Inland Revenue approved share schemes" and by either establishing an occupational pension scheme or making payments to an approved pension scheme. There was also reference in the instructions to the possibility of Newco purchasing PSCs through which consultants' services had previously been provided. In this respect, the instructions contained the following:

"The purchase would be undertaken by a share for share exchange and/or loan notes. The consideration would consist of an initial amount plus a performance related earn out."

16. Mr Milne's advice, which was given in conference on 19 April 2000, is recorded in notes of conference which Mr Milne settled. The notes include the following:

"Counsel advised that, subject to Newco proceeding as outlined in these Instructions and subject to the advice provided in respect of the individual questions below, Newco employees should not be treated as receiving Schedule E income as determined by paragraph 2 of Schedule 12 to the Finance Bill....

Newco should be viewed by the Inland Revenue as a typical trading company insofar as it will employ staff on typical employment terms and conditions and reward them with typical *remuneration packages. Therefore, Counsel could not see any reason why the Inland Revenue could attack the overall proposals as a tax avoidance scheme under the Ramsey doctrine. Moreover Counsel proffered that employees were themselves taking a commercial risk by accepting a lower salary as part of an overall remuneration package where the overall return would – by the very nature of benefits such as approved share options – be uncertain as to total quantum and deferred in respect of timing....*

Counsel did not consider that the number of employee shareholders would impact upon the advice given by Counsel provided that the material interest condition in para 3 [of schedule 12] *were not met i.e. in theory Newco could have as few as 21 employees...."*

17. The IR35 scheme was launched in, it seems, May 2000 via a company called OMPS Limited. A website allowed those interested in making use of the scheme to register online.

18. By a "letter of intent" dated 26 May 2000 Ernst & Young stated that, subject to agreeing all terms and entering into a formal legal agreement on all issues, they would "Enter into a 'joint venture/partnership' agreement for the provision of services to Westwood ... in respect of the project known as IR35". In the following month, however, Mr Jones was told that Ernst & Young Isle of Man had been instructed by Ernst & Young London to withdraw from the IR35 scheme, apparently because it was considered to be a "political 'hot potato'" (in Mr Morris' words). Ernst & Young subsequently instituted legal proceedings against Mr Jones, Mr Morris, Westwood and Contractor Solutions Limited ("CSL"), a company majority-owned by Westwood.

19. At this stage, Mr Jones transferred his share in Westwood to Mr Morris, with the result that Mr Morris became the company's shareholder. Mr Morris also appears to have been the only director of the company. Mr Morris said in evidence that the share transfer could have been a form of asset protection on Mr Jones' part. The share was apparently transferred back to Mr Jones once the litigation with Ernst & Young had been concluded.

20. The litigation with Ernst & Young was settled in August 2000. Among other things, it was agreed that Ernst & Young released their claims to ownership of the IR35 scheme. The agreements effecting the settlement also stipulated that a press release would be issued confirming that Ernst & Young were "no longer interested in the IR35 Scheme which may be continued by the Morris Parties [namely, Mr Morris, CSL and Westwood] or any of them".

21. The IR35 scheme was re-launched using a new company, Executive Solutions Limited ("ESL"). The sole shareholder in ESL was Mr Jones' daughter. When asked why neither he nor Mr Morris was a shareholder, Mr Jones said that this was because he and Mr Morris had "been through a legal dispute with Ernst & Young and ... seen things happen that [they did not] think [were] possible" and that "it was effectively some form of asset protection."

22. On 10 October 2000 an action group called the Professional Contractors Group obtained permission to proceed with a judicial review of IR35. Applications by contractors to ESL virtually ceased. Mr Jones and Mr Morris decided to cease marketing the IR35 scheme until the outcome of the judicial review proceedings was known. By this point, ESL had secured about 20 clients.

23. At this stage, Mr Morris obtained a short-term consultancy assignment which required him to be in France for much of December 2000 and in Mauritius in January and early February 2001. For his part, Mr Jones submitted his CV to two recruitment agencies. One of these, Search & Select Limited, introduced Mr Jones to Mr Gittins.

24. Mr Jones and Mr Gittins met twice in early December 2000. The first meeting took place at Montpelier's offices at Fernleigh House, Palace Road, Douglas on Tuesday 5 December. There was a second meeting, also at Fernleigh House, on Saturday 9 December.

25. I was given somewhat divergent accounts of these meetings. Mr Gittins referred to the meetings as "interviews" and maintained that his priority was to recruit a senior tax consultant. Mr Gittins said that he "explained to [Mr] Jones that [he] was not principally interested in his IR35 planning arrangement and [ESL] although [he] would be interested to know how it worked". Mr Gittins said that he told Mr Jones at their second meeting that Montpelier was prepared to offer him a three-month trial consultancy contract so that Montpelier could assess him and he could assess Montpelier to see if there was any interest in a longer term employment relationship. As regards ESL, Mr Gittins explained the position as follows:

"[Mr] *Jones offered to transfer the business of* [ESL] *to Montpelier as it was of negligible value on the understanding that Montpelier would see if it could market it or refine it whereupon a royalty would be discussed with* [Mr] *Jones. As part of this arrangement I agreed with* [Mr] *Jones that if* [Mr] *Jones accepted the consultancy contract I would procure that MTM (Isle of Man) Limited (an associated company of Montpelier) would provide the administration services to* [ESL] *as an in-house company on the takeover. This would relieve* [Mr] *Jones of the day to day administrative burden of running* [ESL] *even though for a small number of clients.* [Mr] *Jones readily agreed to this and we shook hands on the deal."*

26. In contrast, Mr Jones said that he "was not looking for employment but for a potential investor in [his and Mr Morris'] projects/product ideas". According to Mr Jones, Mr Gittins "was very interested in what [he] had to say about IR35" and he and Mr Gittins "virtually spent the whole [of the 5 December] meeting discussing IR35". Mr Jones further said that he told Mr Gittins that he was "not interested in providing consultancy services to develop someone else's IR35 scheme", and that he and Mr Gittins "agreed that no matter what the composition of the fully developed IR35 Arrangement, it would belong to [Mr Jones]".

27. It is plain, I think, that the IR35 scheme was referred to during the meetings and that Mr Gittins expressed interest in it. Mr Gittins himself said in his first affidavit in these proceedings, sworn on 16 May 2001, that he "explained to [Mr Jones] that he was interested at that time in his IR35 planning arrangement". I accept, too, that Mr Jones, mindful of the litigation there had been with Ernst & Young, insisted on retaining intellectual property rights in the IR35 scheme which had been marketed through ESL. On the other hand, I do not accept that Mr Jones said that he was "not interested in providing consultancy services to develop someone else's IR35 scheme", nor that it was "agreed that no matter what the composition of the fully developed IR35 Arrangement, it would belong to [Mr Jones]". Moreover, I accept that Mr Gittins at least saw the meetings as interviews and that his primary concern was to recruit a tax consultant.

28. Following the meetings, on 11 December 2000 Mr Gittins sent Mr Jones two letters. One of them ("the IR35 Letter"), headed "IR35 Arrangement ('the arrangement')", read as follows:

"I refer to our meeting last Saturday and as promised I set out my proposal concerning the arrangement.

1. With effect from 2nd January 2001 we will take over all administration, marketing and development of the arrangement.

2. We will establish a new company to undertake the work concerned with the arrangement and you will transfer the existing clients using the arrangement to this new company.

3. We will review the overall marketing and fee structure of the arrangement and agree an appropriate fee.

4. The intellectual property rights will at all times rest with you.

I look forward to seeing you and your book-keeper here at 10.00 a.m. on Wednesday, 13th December to complete the handover. The designated person here to perform such duties is Nick Kelly.

Between now and 2nd January 2001 can you kindly start to think about:-

(a) marketing;

(b) the fee structure.

Finally if you are agreeable to the above proposal please sign the attached copy of this letter and return to me."

The other letter was headed "Consultancy" and read as follows:

"I refer to our meeting last Saturday and as promised I set out below my proposal concerning a consultancy arrangement between us.

1. The consultancy period will be for a period of three months commencing on 2nd January 2001 and ending on 30th March 2001.

2. You will charge us a consultancy fee of £200 per diem invoiced monthly in arrears on the basis of a five day working week 9.00 a.m. to 5.15 p.m.

3. You have confirmed that you do not need a work permit having resided and worked in the Isle of Man for more than five years.

4. During the consultancy period you will report directly to me.

5. The objectives of the consultancy period are:-

(a) For you to work on specific projects which I will write to you about separately.

(b) To develop a strategy for the promotion of the IR35 arrangements.

(c) To allow us three months to see of we can work together with a view to a longer term relationship.

If you are agreeable to the above please sign the attached copy of this letter and return to me.

As I do not return to the office until 9th January 2001 my secretary, Carina, will make you welcome and introduce you to all staff. I will leave with Carina a note of the specific matters for you to be looking at prior to 9th January."

Both letters were countersigned by Mr Jones on 13 December 2000 to indicate his agreement.

29. In the course of their oral evidence, Mr Jones and Mr Morris said that in the autumn of 2000 Mr Morris transferred Westwood's rights in the IR35 scheme to Mr Jones. Mr Jones said that an oral assignment took place "just before Mr Morris went to France" for "a penny". When he came to give oral evidence, Mr Morris similarly asserted that he and Mr Jones had agreed that Mr Jones should take the IR35 scheme and that Westwood had thus assigned its rights in the Milne opinion. When, however, he was asked in cross-examination whether he had ever mentioned such an assignment to anybody before, he answered, "No". More particularly, there was no reference to any such assignment in either the affidavit Mr Jones swore on 1 June 2001 or in his witness statements. Nor did Mr Morris mention such an assignment in his witness statement. Nor again was any such assignment suggested by Mr Jones or Mr Morris in their pleadings. Moreover, I find it difficult to see why Mr Jones and Mr Morris should have wanted to transfer rights in the IR35 scheme to Mr Jones. I find, accordingly, that Westwood's rights in the IR35 scheme were not assigned to Mr Jones.

30. On 21 December 2000 computer equipment, furniture and records were moved into Fernleigh House from the offices previously used for ESL. Mr Jones himself moved into Fernleigh House on 2 January 2001 and subsequently undertook work relating to a number of existing clients of Montpelier. Ms Bull took over the administration of ESL.

31. Mr Gittins was on holiday over Christmas in Barbados; Mr Jones' recollection was that Mr Gittins' return was delayed by illness, with the result that he did not come back to the office until 11 or 12 January 2001. In the meantime, Mr Gittins had sent to him by courier, at his request, a copy of the notes of conference recording the advice Mr Milne had given on 19 April 2000. Mr Gittins said that, when he read the advice, he "concluded that there was a commercial flaw with the plan which [he] believed was fatal and made it unworkable". In an early affidavit (dated 6 June 2001) Mr Gittins said that he "did not even think it was necessary for [him] to keep [the opinion], and as [he] was travelling [he] did not do so". Elsewhere, Mr Gittins referred to having torn the opinion up.

32. The "commercial flaw" which Mr Gittins saw in the existing IR35 scheme related to the relationship between the value of a contractor's work and what he could expect to receive from the scheme. The scheme provided for contractors to have fixed (and also, I think, equal) rights. However, a contractor whose services commanded a higher price than those of other contractors using the scheme, or the value of whose services rose, would want to

receive corresponding amounts through the scheme. He would not wish to "subsidise" contractors earning less than him.

33. Mr Gittins said that, when he had returned from holiday, he discussed this problem with Mr Jones and that Mr Jones agreed with him. I accept this evidence. While, however, Mr Gittins regarded the particular scheme which had been marketed through ESL as "unworkable", he remained interested in IR35 and in producing a scheme which would be viable both technically and commercially. On 22 January 2001 Mr Gittins sent Mr Jones a memorandum in the following terms:

"We are of course developing the theme for a new IR35 scheme along three different lines at the moment as you know, namely:-

1. EMI [i.e. enterprise management incentive]*/approved options.*

2. Employee benefit trusts.

3. Outright purchase of shares via loan stock or earn-out.

Hopefully within the next two weeks we should be able to decide whether any of the above or a combination of the above is capable of an unqualified counsel's opinion so that we can market the same in anticipation of the Judicial Review in March going in favour of the Inland Revenue.

However, it did occur to me that [ESL] *in* [its] *present form is capable of converting itself from a scheme relying on approved share options which has the downside of unequal distributions by way of future performance by consultants and all the complications arising therefrom into a scheme which involves the establishment of an offshore employee benefit trust by* [ESL]*.*

The logic here is that any Inland Revenue attack on the basis that there was an arrangement to create employee benefit trusts at the very beginning must surely fail because there was no such agreement. The only consideration however is whether or not when the various employees were signed up for [ESL] *there was an agreement to provide them with an extra reward in the form of share options or rather was there an agreement to consider further awards over and above their salary without specifying the form those rewards would take."*

34. During January 2001 Montpelier sought advice from counsel on a number of occasions at the expense of the Group. On 16 January 2001 Mr Adrian Shipwright of Pump Court Tax Chambers was instructed to advise on a proposal under which a United Kingdom company providing "consultancy services to inter alia the IT industry" with six equal shareholders would give its employees "a modest basic salary of circa £20-30K per annum, enhanced by qualifying EMI [i.e. enterprise management incentive] share options in accordance with Section 62 and Schedule 14 of FA 2000" which could allow the employees "to acquire up to 95% of the ordinary share capital of Newco". Two days later, Mr Shipwright was asked to consider a scheme pursuant to which individuals supplying consultancy services would be employed by a United Kingdom company at a salary of £25,000 per annum and the company would "contribute a substantial proportion of its pre tax profits to a discretionary employee trust ... established in the Isle of Man". On the same day, Mr Philip Baker of Gray's Inn Tax Chambers was instructed to give advice on an

arrangement under which a consultant would sell his service company to an Isle of Man company in return for "the issue of loan notes and earn-out right for two years, such earn-out rights entitling [the consultant] to 95% of the profit before tax of [the service company] over the two years from the date of acquisition". On 22 January Mr Shipwright was also asked to consider this scheme, as well as a variation under which the service company would be bought by a United Kingdom company rather than an Isle of Man one.

35. It was the proposal outlined in instructions to Mr Robert Argles of 24 Old Buildings, Lincoln's Inn which, in the event, was taken forward. The instructions, dated 29 January 2001 and bearing Mr Gittins' name, set out the background in the following terms:

"1. Mr A is a UK IT consultant and is resident, ordinarily resident and domiciled in the UK for tax purposes.

2. Mr A has established an Isle of Man trust ('the trust') of which the trustee is B Limited ('B') an Isle of Man resident company. Mr A has an interest in possession in the trust. The purpose of the trust is to provide IT consultancy services in the UK.

3. If successful the trust will engage Mr A as a consultant to provide IT services and Mr A will be paid £20,000 per annum.

4. The trust envisages annual profits after expenses of £90,000."

Among the questions Mr Argles was asked was:

"Is the trust a Manx Enterprise as defined in Article 2(1)(i) of The Double Tax Treaty? Would it be preferable for the trust to be in partnership with a second Isle of Man Trust settled by Mr A for his children (settler and spouse excluded)."

36. There was a telephone conference with Mr Argles on 31 January 2001. Notes of this record that towards the end of the conference Mr Argles was requested to comment on a structure under which interest-in-possession trusts entered into a partnership. It was agreed that this issue would be the subject of further instructions to counsel, but:

"... Counsel proffered an initial opinion that:

(a) Schedule 12 [to the Finance Act 2000] *would not apply.*

(b) No U.K. branch, therefore, treaty relief available.

(c) Unequal distribution from trust partnerships was possible but needed careful consideration.

(d) Neither S.739 or S.775 [of the Income and Corporation Taxes Act 1988] *would apply."*

37. Mr Argles was sent further instructions, again in Mr Gittins' name, on 7 February 2001. These envisaged the following:

"1. Client sets up IOM IIP [i.e. Isle of Man interest-in-possession] *Trust ('Trust').*

2. Client engaged as an IT consultant by the Trust under a 'bullet-proof' contract thereby seeking to be outside Schedule 12 FA 2000 by virtue of Paragraph 1(c)....

4. Client pays UK income tax ... and Class 4 NIC on his consulting income received from the Trust.

5. Trust enters into contracts with unconnected UK agency (company) to supply services and IP rights. The agency in turn, enters into contracts with other UK agencies and/or end users....

13. If the Client is currently earning £100,000 per annum as an IT consultant but in the above example in the future earns £20,000 in consultancy and £80,000 of income from an IIP are there any grounds for a Revenue attack?"

On the next day, Mr Argles was asked to consider the additional question of "how the partnership could achieve 'unequal distributions'".

38. There was a further telephone conference with Mr Argles on 9 February 2001. The idea arose at this stage that the problem of "unequal distributions" could be solved by giving a managing partner the power to determine profit shares. In his evidence, Mr Gittins credited Mr Argles with devising this solution. In contrast, Mr Jones said that it was he who came up with the idea of a managing partner. Either way, the introduction of a managing partner was regarded as important. Mr Jones spoke in a witness statement of a "Eureka Moment".

39. On 21 February 2001 Mr Argles was instructed to provide written advice on the following scenario:

"1. ABC Limited ('ABC'), an Isle of Man company, wishes to enter into the business of providing IT consultancy services, software and intellectual property ('IP').

2. ABC has identified three IT consultants in the UK who have established separate Isle of Man interest in possession trusts ('trust').

3. ABC and the three trusts are considering forming an Isle of Man partnership which will provide IT consultancy services, software and IP to unrelated third parties.

4. The partnership will have a permanent establishment in the Isle of Man and the management and all associated operations will be undertaken in the Isle of Man, including:-

4.1 all contracts will be negotiated and dealt with from the Isle of Man;

4.2 all instructions will come from the Isle of Man;

4.3 all accounting and admin functions will be dealt with in the Isle of Man;

4.4 the consultants will not have any managerial/contractual authority.

5. The partnership will appoint ABC as the Managing Partner. ABC will be entitled to 5% of the partnership profits. The Managing Partner will have responsibility for the day-to-day *management and administration of the partnership and will be responsible for determining the allocation of the split of profits as between the other partners. If the Managing Partner, for whatever reason, does not determine the allocation of profits, the profits will be equally shared between the other partners.*

6. The partnership will appoint the IT consultants under a 'bullet-proof' contract for the supply of services. The partnership wishes to retain the sole and exclusive rights for the exploitation of any software/IP rights that are created whilst and/or as a result of the consultant supplying services to the partnership and in order to protect the partnership, the contract will reflect this position in the strongest contractual terms. The IT consultant will not be prevented from providing his services to other clients. The contract between the partnership and the IT consultant will be for a specific project and/or duration.

7. The partnership will enter into contracts with an unconnected UK company ('UKCO') to supply IT services, software and/or IP rights. UKCO will insist that the contracts with the partnership reflect the actuality of the services to be undertaken, i.e. that there is no employee/employer relationship between the IT consultants and UKCO. UKCO may be the only UK company with which the partnership enters into contracts.

8. For information purposes, UKCO will in turn enter into contracts with unconnected UK companies to supply IT services, software and/or IP rights. UKCO may 'package' the contracts with its customers so that the selling price of software/IP rights is not distinguished from the selling price of consultancy services or the IP rights may be granted free of charge. UKCO will be operating in a very competitive market and its profit margins will be quite low but return on capital will be high.

9. The partnership will distribute profits to the partners on a regular basis. The trust will distribute the profits to the beneficiaries without delay."

40. Mr Argles set out his advice in a written opinion dated 16 March 2001 and a slightly revised version of 29 March 2001. The revision related to a concern relating to the introduction of UKCO. In his 16 March opinion, Mr Argles commented that the Inland Revenue might be able "to contend that UKCO amounts ... to a permanent establishment of ABC Partnership in the United Kingdom" and that, if it was intended to interpose UKCO, "the contractual terms will need to be carefully worked out and acted on so as to demonstrate that it is carrying on business in its own right and not merely as an agent for the partnership in the Isle of Man". The later opinion noted that "UKCO will both in form and substance be held out as a principal supplying the services referred to above in its own right" and that it "will carry on business in its own right and not as an agent or branch of the ABC Partnership".

41. The scheme which was the subject of Mr Argles' opinion, and which was subsequently marketed, made use of the Double Tax Agreement between the Isle of Man and the United Kingdom. Paragraph 3(2) of this Double Tax Agreement provided as follows:

"The industrial or commercial profits of a Manx enterprise shall not be subject to United Kingdom tax unless the enterprise is engaged in trade or business in the United Kingdom through a permanent establishment situated therein."

The expression "Manx enterprise" was defined to mean "an industrial or commercial enterprise or undertaking carried on by a resident of the Island". A few years earlier, in

1998, Mr Argles had advised the Group on a proposal designed to use the Double Tax Agreement to avoid United Kingdom taxation on some royalties. That proposal envisaged that a company carrying on business in the United Kingdom was in the process of developing a product which would be protected by patents. It was anticipated that the shareholders in this company would establish two trusts in the Isle of Man, that the shareholders would have an interest in possession in one of the trusts while the other would be a discretionary trust from which the shareholders would be excluded from benefiting, that the trustees of the trusts would enter into a partnership agreement under Manx law, and that the resulting partnership would enter into a contract with the company under which patents arising from development work would belong to the partnership. It was hoped that, as a result, neither the United Kingdom company nor its shareholders would be chargeable with United Kingdom income tax in respect of the income of the trust in which the shareholders had an interest in possession, in particular on the basis that:

"As the partnership constitutes a 'Manx enterprise' the provisions of Article 3(2) of the [Double Tax Agreement] *apply to the share of the industrial and commercial profits to which A Limited, in its capacity as a trustee (and accordingly* [the shareholders] *as the person entitled to the interest in possession therein), is entitled with the consequence that such profits are not to be subject of tax in the United Kingdom."*

Mr Argles endorsed the proposal in an opinion dated 23 July 1998, expressing the view that the sums to which the shareholders would be entitled could not be "characterised otherwise than industrial or commercial profits of a Manx enterprise". Mr Argles noted that, following the decision in *Padmore v IRC* [1989] STC 493, section 112 of the of the Income and Corporation Taxes Act 1988 ("the Taxes Act") had been "amended by the inclusion of a new subsection (4) which is intended to have the effect of denying to a United Kingdom resident foreign partner the benefit of the exemption accorded by double tax relief to the profits of a non resident partnership", but said:

"Section 112(4) has no application to [the shareholders] *in this case. The amendment applies only to a person who is a 'member of a partnership' properly so called. I see no possible justification for extending its meaning so as to embrace a person who is entitled to a share of the profits to which one of the several partners is entitled but who is not in any way liable as a partner himself."*

Mr Gittins said, and I accept, that Montpelier subsequently made active use of the scheme which was the subject of Mr Argles' 1998 opinion for purposes other than IT contractors and IR35. In 1999 Mr Shipwright advised the Group on a similar scheme the purpose of which was to eliminate liability to United Kingdom taxation on gains made on land.

42. Mr Gittins explained, and Mr Jones agreed, that the scheme on which Mr Argles advised in 2001, and which was then marketed, which I shall refer to as "the Disputed Scheme", had the following key characteristics:

42.1 it was specifically for consultants and typically IT consultants;

42.2 it relied on two or more Isle of Man trusts in partnership;

42.3 it relied on the income of the partners being exempt from United Kingdom tax under article 3 of the Double Tax Agreement;

42.4 it relied on one of the partners acting as the managing partner with in particular the right to determine the profit sharing ratios between the partners.

43. Mr Jones gave evidence that in February 2001, or possibly March, Mr Gittins verbally agreed that he should receive 20% of the profits from the Disputed Scheme. For his part, Mr Morris said that Mr Jones had told him on the telephone at the time that a 20% figure had been agreed, going on to say that he (Mr Morris) would be entitled to half of this. This evidence is consistent with a passage in an affidavit Mr Gittins swore in June 2001 in which he stated:

"The truth is that [Mr Jones] *asked me in early March if the Plaintiff would be extending the consultancy agreement and if so whether he could have an equity interest in the Plaintiff's solution. I agreed that* [Mr Jones] *would receive 20% of the profits of the Plaintiff's solution in return for managing the Plaintiff's solution and for ESL acting as the UK agency."*

When giving evidence before me, Mr Gittins was inclined to think that this sentence referred to the 21 March agreement mentioned below, but on balance I think that the likelihood is that Mr Gittins had agreed before this that Mr Jones should have 20% of the profits. However, Mr Gittins maintained, and I accept, that the 20% share was not characterised as being in respect of intellectual property rights.

44. At some stage, it came to be accepted that ESL's clients would not, after all, be transferred to a new company (as had been envisaged in the IR35 Letter) and that ESL would be charged for administrative services supplied by Ms Bull. In an early affidavit, Mr Gittins explained this as follows:

"when we [i.e. Mr Gittins and Mr Jones] *met on 11th January 2001 on my return from holiday, I told* [Mr Jones] *that I considered the AJ solution commercially unworkable and that, although MTM (Isle of Man) Limited would continue to administer the clients of ESL in order to free* [Mr Jones'] *time as agreed, I no longer felt able to transfer the ESL clients to a new company owned by the Plaintiff as originally envisaged in the letter dated 11th December 2000."*

In similar vein, Ms Bull said in her witness statement:

"... when Mr Gittins returned from his Christmas vacation, I was instructed that we would not be taking Mr Jones' scheme over ... . As planned, however, I was still to provide administrative services to the company although such services were billed to ESL now that Mr Jones' IR35 scheme was not to be used."

This evidence is consistent both with the fact that ESL's clients were not in fact transferred and with the fact that ESL was invoiced, and paid, for Ms Bull's services. It was pointed out to me that the invoices to ESL for Ms Bull's work, although covering the period from January 2001, were not raised until March, suggesting that it may not have been until then that it was agreed that ESL should pay. However, Ms Bull said in cross-examination that she remembered waiting to see what time was being spent on ESL before a decision was made as to the amount to be charged. Even supposing that Ms Bull was mistaken (and I see no good reason for thinking that she was), it would remain the case that payment was made with effect from January.

45. During March 2001 Mr Jones proposed that Mr Morris should be introduced to the IR35 project. In this regard, Mr Gittins explained as follows:

"Alan Jones claimed that the use of a website was a marketing method familiar to IT consultants and that they would feel very comfortable in using the website in this way. Alan Jones told me that his partner in [ESL] *(Giles Morris) was highly computer literate and could be interested in assisting Montpelier in a consultancy capacity with a view to the establishment of a website to market the solution."*

Mr Jones confirmed that he had discussed Mr Morris' internet skills with Mr Gittins and also referred to Mr Morris' operational experience with management information systems, invoicing, accounting systems and procedures.

46. Mr Gittins and Mr Morris first met on 20 March 2001; Mr Jones was also present. At, probably, a further meeting on the next day, Mr Jones and Mr Morris agreed to a proposal reflected in a document dated 21 March 2001 which Mr Gittins prepared. The document read as follows:

"1. MTM Consultants Limited ('Consultants') is formed as a 100% Isle of Man subsidiary of MTM (Tax Consultants) Limited ('Tax Consultants').

2. Tax Consultants employs ABC Limited (A & G [i.e. Alan Jones and Giles Morris]*) to provide consultancy services for a guaranteed fee of £100,000 per annum.*

3. Consultants markets the car scheme and the IR35 scheme and any other scheme agreed by Tax Consultants.

4. Consultants will be a zero overhead business save for below.

5. Consultants will enter into an agreement with MTM (Isle of Man) Limited ('MTM') under which MTM will provide all administration services to Consultants for a fee equal to 25% of the fees of Consultants subject to a minimum fee of £200,000.

6. ABC will enter into a contract with Consultants for a fee of 40% of the net profits of Consultants after commissions and administration fees….

7. ABC will be entitled to a discretionary bonus from Tax Consultants for work done by ABC other than through Consultants."

A table provided "Illustrative Examples".

47. Mr Gittins explained the proposal as follows in his witness statement:

"The principle of the deal which I offered to Alan Jones and Giles Morris on behalf of Montpelier was that Montpelier would engage Alan Jones and Giles Morris as consultants to develop the website and market the revised solution in return for a consultancy fee of £100,000 per annum paid monthly in arrears to their joint company and that [ESL] *would be entitled to 40% of any income derived by Montpelier from the exploitation by it of its revised solution in return for providing UK agency services subject to Montpelier being absolutely entitled to the first 25% of such income or £200,000 whichever was the higher."*

Mr Jones described the proposal in his evidence as "very attractive" and said that he and Mr Morris accepted it, subject to contract.

48. Mr Morris started work at Fernleigh House on 26 March 2001. By 29 March a website for the Disputed Scheme had been constructed and launched. The website address was "www.suomotu.com", derived from the Latin "suo motu", meaning "on one's own initiative" or "by one's own initiative"; the domain name was registered in the name of Westwood. At first, the website apparently comprised only one page, but it was gradually expanded by Mr Morris and Mr Jones.

49. On 2 April 2001 Mr Justice Burton gave judgment in favour of the Inland Revenue in the judicial review application brought by the Professional Contractors Group. I was told that that very day the Suo Motu website had over 1,200 visitors with some 170 contractors registering for more information. By 24 April around 800 contractors had registered.

50. The Suo Motu website initially contained a field headed "your details" where a person could give his name and address. However, on 24 April the website was closed to new registrants. The "sign in" page of the website thereafter explained:

"We are now only accepting registrations on a referral basis - if you know one of our existing members or clients ask them to send us an email introducing you to us and we'll see if we can help you."

51. Pages of the website were headed "Suo Motu one's own initiative". An introductory page stated as follows:

*"**Your own initiative?***

A real and sustainable alternative to IR35 based, in simple terms, upon:

· a UK company acting in much the same way as your PSC;

· that is registered for VAT (the same as your PSC);

· that will enter into contracts with your Agency (instead of your PSC) and

· that will undertake timesheet and invoicing procedures (in a similar fashion to your PSC).

Moreover:

*· your after tax 'earnings' will be substantially higher than your **pre-IR35** earnings (this is not a typo!) and;*

*· we **GUARANTEE** to 'hold you harmless' ie., your worst case position can **never** be worse than failing IR35.*

*· the frequency of payments to you will be on a monthly basis i.e., every month contractors will receive approximately **87% of gross fees** without any further liability to income tax, NI or fees."*

A reader interested in the scheme would be asked to complete a confidentiality agreement ("the Confidentiality Agreement") and a "Know Your Customer" form for anti-money laundering compliance ("the KYC Form"). The Confidentiality Agreement was in the following terms:

"We ('MTM (Tax Consultants) Limited') agree to disclose to you from time to time in writing certain tax planning schemes (hereinafter referred to as 'the schemes').

1. You will treat the schemes disclosed to you by us as strictly confidential and in particular shall not use the schemes or any part(s) thereof for any unauthorised purpose or disclose such schemes to any person for so long as and to the extent that the schemes.

1.1 are not and continue not to be in the public domain.

1.2 Are not known to you at the date of disclosure as evidenced from your written records.

2. The above exceptions from confidentiality apply only if identical or substantially similar schemes or portions thereof are available by virtue of paragraphs 1.1 and/or 1.2 above.

3. You recognise and agree that the schemes made available to you by us constitute valuable intellectual of MTM (Tax Consultants) Limited.

4. You agree that you shall not copy, reproduce, use for any unauthorised purpose or part with possession of any documents or materials made available by MTM (Tax Consultants) Limited in connection with the schemes or conduct any unauthorised examination of any material supplied to you by us and shall promptly return all documents or materials relating to the schemes (and copies of them whether authorised or not) to us on our request at any time.

5. No rights are granted to you in respect of any scheme disclosed pursuant to this letter or in connection with its subject matters."

The KYC Form stated that it was to be returned to "Suo Motu, Fernleigh House,Palace Road, Douglas, Isle of Man, IM2 4LB" and provided for the information given to be "used by MTM (Tax Consultants) Limited and MTM (Isle of Man) Limited". A page headed "Suo Motu Fact Sheet" included the following:

*"**Who is offering the solution?***

MTM (Tax Consultants) Limited is part of the MTM Group. The business was established in 1984 and provides highly sophisticated advice to high net worth individuals on an entirely discreet basis.

MTM's trust division administers trusts for its private clients with a net worth in excess of £300 million.

MTM is headquartered in the Isle of Man but also has offices in London....

Please tell me about the solution!

In brief the solution is highly innovative and extremely tax efficient, i.e. on a monthly basis you will receive approximately 87% of your gross fees net of all taxes, NIC and fees....

Tax Counsel has approved the solution in the form of a detailed written opinion...."

52. Those expressing interest in the Disputed Scheme would be invited to seminars. Between 5 April and 9 May Mr Jones held ten seminars in the United Kingdom and nine in the Isle of Man. When giving the seminars, Mr Jones would use a Powerpoint presentation. The slides had, among others, the following features:

52.1 one of the slides was headed "About MTM Group";

52.2 another slide, headed "Confidentiality", included "Do not discuss with colleagues" and "We will protect our IP". It was elsewhere stated, "No making notes";

52.3 a diagram indicated that for every £100 earned by a contractor, the contractor would receive £94, "ExecCo" £3 and MTM £3;

52.4 a slide headed "Tax Efficacy" referred to "Tax Counsel's Opinion", and the next two slides contained quotations from Mr Argles' opinion.

53. A person wishing to proceed with the scheme was to execute a deed creating an Isle of Man trust in which he was to have an interest in possession and into which he would pay the initial sum of £1,000. The trustee of that trust was then to enter into a partnership deed with two other, similar trusts and with MTM (Consultants) Limited as managing partner. The partnership would enter into a contract with ESL to supply the services of the three individuals who had established the trusts which belonged to the partnership. Each individual would in turn enter into a "modified self employment contract for services". This would provide for the payment to the individual of a "retainer" fee of £20,000 per annum.

54. The partnership deed for each partnership would give MTM (Consultants) Limited, as the managing partner, power to make decisions on behalf of the partnership including in relation to the distribution of profits. Schedule 5 spelt the position out:

"The Managing Partner shall at all times be entitled to 10% of the partnership profits. The amount and frequency of distributions of partnership profits and the division of profits among the Three Partners [i.e. partners other than the managing partner] *shall be determined solely by the Managing Partner from time to time."*

Mr Jones observed in a witness statement, "Obviously in actual practice [the managing partner] chose to distribute the profits in a manner that reflected the respective earnings of the beneficiaries of the trusts."

55. Between 29 March and 17 April, Mr Gittins was away on holiday in Bermuda.

56. During late April and early May 2001 Mr Jones and Mr Morris were dissatisfied with Montpelier in a number of respects. They felt that the Group was providing insufficient support for the Disputed Scheme. One of their concerns was that the Group was taking too long to provide documentation and services for the implementation of the Disputed Scheme.

57. At a meeting with Mr Gittins on 29 April 2001, Mr Jones voiced dissatisfaction with Montpelier's performance and also with the fact that there was no written contract.

58. On Friday 4 May 2001, when there was a meeting between Mr Gittins, Mr Jones and Mr Morris, Mr Jones and Mr Morris expected to be provided with a draft contract. Instead, Mr Gittins produced a manuscript document which put forward a "straight 40/60" profit split and explained that this was "preferred as it is important that the partnerships and Execo demonstrate their arms length status". In this connection, Mr Jones commented in a witness statement:

"Legal advice had ... made it clear that it was ... important that this company [i.e. the United Kingdom company in the position of ESL] *should be completely independent of* [Montpelier]*, which is why shortly before the break up of our relationship with* [Montpelier] *it had been agreed that* [ESL] *was exclusively the Defendants' company, totally separate from* [Montpelier]*."*

59. During the weekend which followed, Mr Jones and Mr Morris discussed the new proposal and realised that in certain circumstances it could be less advantageous to them than the 21 March arrangement. When, therefore, Mr Gittins and Mr Jones met on 8 May 2001 to discuss the revised proposal, Mr Jones said that he and Mr Morris preferred the earlier arrangement. In response, Mr Gittins suggested that the March scheme should apply for the first 250 contractors recruited and that the May version should operate above this figure. Having discussed matters with Mr Morris, Mr Jones confirmed to Mr Gittins that this composite proposal was accepted. Mr Gittins agreed to provide documentation to give formal effect to the agreement. As I understand it, it is common ground that the agreement was already contractually binding.

60. Also on 8 May 2001 the Disputed Scheme was discussed with members of the Group's staff. Those present included Mr Jones, Mr Morris and Mr Cuddy. The likelihood is that it was accepted at this meeting that references to the Group should (or at least could) be excised from the Suo Motu website. Mr Jones and Mr Morris both gave evidence to this effect. Further, while Mr Cuddy had no recollection of this by the time he came to give oral evidence (in 2009), an affidavit (or draft affidavit) of Mr Cuddy dating from June 2001 (and so prepared much closer to the relevant events) included the following:

"My involvement has been from a data protection and compliance perspective whereby, from many years experience of reviewing advertisements, I considered that any client would consider that the [Suo Motu website] *was being run by* [Montpelier] *and that the personal information the client was providing would be used by* [Montpelier]*. Accordingly, if all references to* [Montpelier] *were removed from the site, then I confirmed I would not have any data protection or compliance concerns in relation to that site."*

Mr Jones' and Mr Morris' evidence is, moreover, consistent with the fact that on 11 May one of the Group's staff partially completed an application for data protection registration for ESL to file and with the fact that on the same date MTM (Suo Motu) Limited changed its name to MTM (Consultants) Limited. Mr Morris said, and on balance I accept, that he began removing references to Montpelier from the Suo Motu website on or around 9 May.

61. In his affidavit of 1 June 2001, with which Mr Morris expressed agreement in an affidavit of his own of the same date, Mr Jones referred to a further meeting which took place on 8 or 9 May. He described this as follows:

"[Mr Jones] *stated that, as there was no succession planning, the company would 'fold' if anything was to happen to* [Mr Gittins]*.* [Mr Gittins] *obviously did not care about this issue as he stated 'so what – it's been like this for last 10 years'. The discussions then became heated;* [Mr Morris] *calmed the atmosphere by stating that* [Mr Jones/Mr Morris] *did not want to appear as 'prima donnas' football players but that they did have genuine concerns and ... were sensitive because they had been let down previously by business partners because they had failed to reach agreement in writing."*

62. During this week, there was controversy over remarks that a Mr Macdonald had posted on a bulletin board about the Disputed Scheme after, it seems, he had attended a seminar led by Mr Jones. Mr Macdonald agreed to make an apology, but on 10 May 2001, the Thursday, Mr Jones told Mr Gittins that he was no longer prepared to present any seminars. Mr Gittins said that he would take over responsibility for the seminar which was to take place on Saturday 12 May.

63. After working hours on Friday 11 May 2001, Mr Jones and Mr Morris removed their possessions from Fernleigh House. Early the next morning, Mr Jones and Mr Morris went to see Mr Gittins at Fernleigh House. Mr Gittins dictated a file note immediately after this meeting. This reads as follows:

"I was in early this morning in order to finalise the draft seminar documents for the presentation which I am about to give today to some 17 people coming from the UK interested in the IR35 scheme.

At around 8.45 a.m. this morning Alan Jones and Giles Morris came into my office.

Alan said at the outset that they had decided to 'pack up'. I took this to mean that neither they as consultants to MTM (Tax Consultants) Limited or [ESL] *of which they are directors were prepared to continue with the IR35 scheme as devised by MTM (Tax Consultants) Limited.*

I asked for an explanation. Alan said that he did not feel that the infra-structure of MTM (Isle of Man) Limited was strong enough to support the increasing level of IR35 business. I replied that they had to understand that the MTM Group had fees of circa £3 million and a substantial number of clients and that as far as I was concerned the daily check list that I received insofar as concerned the IR35 clients taken on (some 110 to date) was completely up to date and there were no back logs save for those caused by the FSC [i.e. Financial Supervision Commission] *not responding fast enough to Claire on the incorporation of new companies.*

Alan then said that they had taken legal advice and that they did not have a 'cast iron written agreement' insofar as concerns their interest in the IR35 project. I replied that the matter had been agreed from the very outset as set out in my written note to them and that this had been slightly varied recently but not materially.

Giles said that they were disappointed not to have received their consultancy cheque earlier than Friday for their consultancy fees to the end of April. I reminded Giles that the first invoice we had received was actually passed to me on Wednesday, 2^{nd} May payable within 7 days. I approved the invoice on Tuesday, 8^{th} May (Monday 7^{th} May being a bank holiday). Before this could be paid however a new invoice was presented on Wednesday, 9^{th} May to supercede the previous invoice. I could not deal with this new invoice on that *day as I was in Manchester and Belfast and did not arrive back on the Isle of Man until 8.30 p.m. I approved the new invoice on Thursday, 10th May and it was duly paid on Friday, 11th May. I expressed my view to Alan and Giles that in my opinion there had been no unreasonable delay on our part in the settlement of the invoice.*

I then told Alan and Giles that in the circumstances I was happy to accept their termination of the consultancy agreements and also the termination of the interest of [ESL] *in the IR35 project. However I added that because they had taken legal advice on the matter it was only fair and proper for MTM to be able to take its own legal advice on Monday morning and that in the circumstances none of the papers or other computer information relating to the IR35 scheme held at Fernleigh should be removed from the building. Alan replied that they had already removed everything the previous night.*

At that point I expressed my extreme dissatisfaction with their behaviour both professionally and morally and asked them to consider their conscience of promoting an arrangement to many hundreds of clients including those who have put themselves to the expense of coming to the Isle of Man simply on what I believe to be a 'whim' of dissatisfaction. I then asked about the copy of counsel's opinion and other documents relating to the scheme being the intellectual property of MTM (Tax Consultants) Limited to the IR35 arrangement. Alan stated categorically that they had no interest or wish whatsoever to copy the scheme and that they were in fact planning to launch an alternative scheme.

Alan then said that as far as they were concerned the database of information collected for the IR35 scheme and the Suo Motu name belonged to them. I replied that that was ridiculous as the site was in the name of MTM (Tax Consultants) Limited and we have paid for everything. At that point I asked them to leave the building. They handed me their respective sets of keys and left."

64. Mr Gittins confirmed in his affidavit of 16 May 2001 that the "first thing that [Mr Jones] said [at the 12 May meeting] was that they had decided to 'pack up'". Mr Jones and Mr Morris accepted in their evidence that Mr Jones had said words to this effect. Both in his affidavit of 1 June 2001 and in his witness statement, Mr Jones said that he had "explained to [Mr Gittins] that [he and Mr Morris] had 'given up' on MTM". In his 1 June 2001 affidavit, Mr Jones further said that he and Mr Morris "had in fact give[n] up on [Montpelier]" and that they were "of the opinion that [Montpelier] had proven itself to be an inappropriate partner to enter into agreement with to further the IR35 solution".

65. Mr Jones and Mr Morris each suggested that there had been a subsequent attempt to achieve a resolution. In his witness statement, Mr Morris said that in "an attempt to restore calm [he] tried explaining to [Mr Gittins] that we were not 'a pair of high maintenance primadonna footballer types' but rather had genuine concerns about being in a similar situation as we had with Ernst and Young where we had failed to obtain a written agreement, and that all we wanted to do was to avoid falling out".

66. I am unable to accept this account. In his evidence, Mr Gittins rejected the suggestion that there had been an attempt to achieve a resolution; when asked in cross-examination whether Mr Morris had attempted to conciliate, Mr Gittins replied, "They never said any such thing; they said 'we are packing up, we are going'." Further, and importantly, there is no reference in the note Mr Gittins dictated immediately after the meeting to any attempt by Mr Jones and Mr Morris to achieve a resolution. Moreover, the affidavits which Mr

Jones and Mr Morris swore soon after the meeting, in 2001, contain no account of such an attempt. Mr Morris is likely to have referred to "prima donnas" at the mid-week meeting, not on 12 May.

67. The probability is, I think, that Mr Jones and Mr Morris had decided in advance of their meeting with Mr Gittins that they were, as Mr Jones told Mr Gittins at the meeting, to "pack up" and that they had removed their possessions from Fernleigh House with this in view. They are also likely to have planned before the meeting how they would proceed once they had broken with the Group. Mr Jones and Mr Morris suggested otherwise; for example, Mr Jones said in his witness statement that "because the 'fall out' with [Montpelier] had not been intended or planned for, [he and Mr Morris] had no idea how [they] were to take the IR35 Arrangement forward". However, the likelihood is that, contrary to this evidence, Mr Jones and Mr Morris had already considered what scheme they would market, just as they had already prepared for the "fall out" by the removal of their possessions.

68. On 13 May 2001 Mr Jones and Mr Morris sent an email to contractors who had registered their details on the Suo Motu website. This read as follows:

"You will recall from the seminar that you attended that Executive Solutions Ltd ('ExecCo') is a UK company (Alan Jones and Giles Morris are the Directors) which has been entering into contracts with most of the major UK agencies for some time.

You will also recall that ExecCo was considering entering into contracts for services with Isle of Man Partnerships established by the Trustees of your Trust (the Partners normally comprise three trusts and a Managing Partner which is an MTM company). In turn the Partnership (NOT ExecCo) would consider offering you a self-employed contract for services.

PLEASE NOTE THAT

(1) ExecCo has decided NOT to enter into contracts with any Partnerships managed by MTM.

(2) Alan Jones and Giles Morris (the owners of Suo Motu – who have been working on IR35 since 21 March 2000) remain committed to providing a valuable service to Contractors.

IF YOU HAVE SIGNED AND RETURNED YOUR TRUST DEEDS OUR ADVICE TO YOU is to contact:

(A) Watkin Gittins – MTM – on 01624 623422

AND/OR

(B) If you are a client of and/or were referred to Suo Motu by Warr & Co. Please contact Tim Warr."

On the next day, 14 May, Mr Gittins himself wrote to contractors in the following terms:

"You may have received an email over the weekend from Alan Jones and Giles Morris.

Please note the following:-

1. MTM (Tax Consultants) Limited ('MTM') has no further connection with Mr Jones and Mr Morris or their UK agency known as Executive Solutions Limited ('ESL').

2. The intellectual property in MTM's IR35 solution belongs <u>exclusively</u> to MTM. It was developed by MTM and totally paid for by MTM....

3. MTM has issued instructions to its legal representatives to commence proceedings against ESL for damages and to seek an injunction to prevent ESL from making unauthorised use of MTM's IR35 solution.

4. To preserve continuity and protect the interest of its clients, MTM has appointed Montpelier Consultants ('Montpelier') to act as the UK agency instead of ESL....

5. MTM's commitment to its IR35 solution remains unaffected save only that Montpelier is being substituted for ESL.

6. MTM will honour its commitment to assist you in winding down of your existing PSC and in preparation of your tax returns.

7. A representative of Montpelier will contact you within the next 48 hours.

8. MTM regrets this matter which is not of its choice and it is hoped it will not affect your decision to take advantage of MTM's IR35 solution. However if for any reason you wish to abandon your trust structure MTM will reverse it forthwith and return your initial settlement funds upon request."

69. By 14 May 2001 the Suo Motu website had been amended so as no longer to refer to the Group (as had probably been envisaged at the 8 May meeting) and also in certain other, limited respects. The introductory page was in the same terms as before, except that (a) it now referred to contractors receiving approximately 85% of gross fees (as opposed to 87%) and (b) in place of the "hold harmless" guarantee, it stated, "Your worst case position is unlikely to be worse than failing IR35". The website still provided for a confidentiality agreement and "know your customer" form to be completed, and these differed from those previously used only as regards the omission of references to the Group. There was still, too, a page headed "Suo Motu Fact Sheet". This no longer referred to, or provided any information about, the Group, but it was otherwise almost identical to the earlier version. It continued to include a section headed "**Please tell me about the solution!**", which stated (among other things):

"In brief the solution is highly innovative and extremely tax efficient, i.e. on a monthly basis you will receive approximately 85% of your gross fees net of all taxes, NIC and fees....

Tax Counsel has approved the solution in the form of a detailed written opinion...."

This wording accorded with that used previously, save as regards the percentage of gross fees (i.e. 85% instead of 87%) which contractors would receive.

70. The disclosed documents include the first and last pages of a partnership agreement (for "The First Ilex Partners") entered into later in May 2001 at the instigation of Mr Jones

and Mr Morris. The parties to the agreement are named as Murilo Limited ("Murilo"), as trustee for some 11 different trusts, and Ilex Management Services Limited ("Ilex"), defined as the "Managing Partner"; the agreement was signed on behalf of Murilo by Mr Morris. The first and last pages of a number of other partnership agreements to which Murilo and Ilex were parties ("The Second Ilex Partners", "The Masters Partnership", "Alpha Partners" and "Beta Partners") are also available, as are the first pages of partnership agreements with the same parties for "Charlie Partners" and "Delta Partners". A full copy of the draft partnership agreement for "Echo Partners" is in the bundles, too. The draft identifies the intended parties as Murilo, as trustee of five separate trusts, and Ilex. The draft states that the profits and losses of the partnership for each accounting period are to be shared between the various partners "in proportion to the number of Points to which they are entitled at the end of the Accounting Period". A signed partnership agreement dated 21 September 2001, for "Cashew Partners", similarly provided for profits and losses to be shared by reference to numbers of points held at the end of the relevant accounting period, but it differed from the "Echo Partners" draft (a) in giving the parties simply as Murilo and Ilex, without stating for how many or which trusts Murilo was trustee, and (b) in specifying that 97 points were allocated to Murilo and 3 to Ilex.

71. Mr Jones gave evidence to the effect that, immediately after the 12 May meeting with Mr Gittins, the "first scheme [he] thought about offering was the offshore employee benefit scheme discussed in [his] Milne QC opinion dated May 2000". It was, he said, only after he had had a "brainstorming meeting with Andrew Flowers of Steeplejack [a consultancy company] on or around 15/16/17 May 2001", during which Mr Flowers had been "unenthusiastic about the employee benefit trust approach" that he had decided not to adopt it. According to Mr Jones, as at (say) 14 May the Suo Motu website's reference to tax counsel having "approved the solution in the form of a detailed written opinion" related to the advice given by Mr Milne in 2000, as confirmed in the notes of conference settled by Mr Milne. In cross-examination, Mr Jones said:

"because there had been no pre-planning of our actions, on Saturday 12th May or Saturday 13th May reality dawned upon us that we hadn't got any, we hadn't got any form of income ... . We had to think very quickly on our feet and basically ... the website, because the Suomotu website has never given any details of any scheme, that website could apply to, probably one of six different schemes because ... it says nothing other than 'counsel's opinion' and 'we offer you a guaranteed return'. We were aware, we had counsel's opinion that said EBTs worked, we were aware of other companies offering IR35 via a plain vanilla EBT and that was, and that was something that, at that point in time, ... that was what we were going to do."

72. I am unable to accept this version of events. My reasons include the following:

72.1 as mentioned above, the likelihood is, in my judgment, that Mr Jones and Mr Morris considered in advance of the 12 May meeting with Mr Gittins what scheme they would market after they had broken with the Group. They will not, therefore, have needed to "think very quickly on [their] feet";

72.2 Mr Jones and Mr Morris would, I think, have considered a scheme utilising a "plain vanilla EBT" to have been substantially inferior to, and less commercially attractive than, the Disputed Scheme. I doubt whether Mr Jones and Mr Morris would have decided to break with the Group if they had not envisaged offering a better product;

72.3 I am not aware of any documentation for a product "offering IR35 via a plain vanilla EBT";

72.4 there was no reference in, for example, Mr Jones' affidavit of 1 June 2001 or his witness statements to such a product being offered;

72.5 Montpelier's Statement of Case has from the outset contained an allegation that Mr Jones and Mr Morris "provided a tax scheme identical to or substantially based upon the Solution [i.e. the Disputed Scheme] in competition to [Montpelier]". Until their Defences were re-re-amended in 2008, Mr Jones' and Mr Morris' response was simply to aver that they "were entitled to provide the Solution in competition with [Montpelier]". It was not disputed that Mr Jones and Mr Morris had "provided a tax scheme identical to or based upon" the Disputed Scheme, and, in particular, there was no reference to promoting a scheme using an EBT;

72.6 before the 12 May meeting, the Suo Motu website's reference to the approval of tax counsel in a "detailed written opinion" clearly related to Mr Argles' March advice. The relevant wording remained unchanged in the following week (and thereafter). Nothing on the website indicated that different advice was now being referred to, nor, more generally, that a different sort of scheme was being offered. Further, the words "detailed written opinion" did not accurately describe the notes of conference settled by Mr Milne in 2000, and those contained relatively little about EBTs.

I conclude that, from 12 May onwards, Mr Jones and Mr Morris were intending to pursue, and promoted, a scheme akin to the Disputed Scheme.

73. In the meantime, on 16 May 2001, Montpelier had presented a petition seeking, among other things, an order restraining Mr Jones and Mr Morris from making use of "the solution developed by [Montpelier] and set out in the opinions of Mr Robert Argles dated 16th March 2001 and 29th March 2001". On 7 June His Honour Deemster Cain dismissed the petition on the basis of the terms set out in a schedule to the order. The schedule stated as follows:

"1. AJ/GM [i.e. Mr Jones and Mr Morris] *shall not make any reference to any tax opinion given to* [Montpelier] *by any of the following:-*

(a) Professor Adrian Shipwright of Pump Court Chambers

(b) Mr Philip Baker of Gray's Inn Tax Chambers

(c) Mr Robert Argles of 24 Old Buildings, Lincoln's Inn

on the Suo Motu web site or any of their promotional literature, but AJ/GM are not precluded from making any reference to any tax opinion they may independently commission.

2. AJ/GM shall not disclose to any person or entity any Tax Opinion of which they have knowledge from their dealings with [Montpelier] *without* [Montpelier's] *written authority and shall return all copies of such opinions to* [Montpelier] *save those are necessary for the purposes of the main action ... ;*

3. AJ/GM will not market or promote any IR35 scheme or solution to any of the 110 registrants ... who have already become clients of [Montpelier]*.... This is however not to be interpreted as a prohibition for AJ/GM from doing business with any such persons should they choose to do so of their own free choice;*

4. AJ/GM shall retain the full legal title to the Suo Motu web site and trade name and its associated data bases, soft ware and server base. [Montpelier] *shall transfer the Manx business name registration for Suo Motu to AJ/GM or their nominated company and revoke any other* [Montpelier] *registration of that trade name;*

5. AJ/GM shall supply to [Montpelier] *a copy of any and all information which has been inputted by any registrant to the Suo Motu web site to the date hereof either by electronic means or printed copy. AJ/GM will make all reasonable endeavours to provide this information as soon as possible and in any event, will provide a printed copy of the full names, postal address and email address of all such registrants by the end of business today ... ;*

8. AJ/GM and [Montpelier] *respectively undertake to keep an account of any and all dealings with clients for the purposes of an IR35 solution for the purposes of any future assessment of damages against either party ...."*

74. On the day after this order was made, Mr Jones, on behalf of Westwood, sent Mr Milne QC instructions to advise on an "IR 35 proposal". The proposal was summarised as follows in the instructions:

"UK based Contractors (unconnected with each other) will each establish Interest in Possession Trusts ('the Trust') by settling £1,000. The Contractors will be the income beneficiaries ('the Beneficiary') of their respective Trusts.

The Trustee will be an Isle of Man resident company ('Trustee'). The Trust Deed will give the Trustees wide ranging powers to carry on any legitimate business or trade.

The Trustee in respect of say ten Trusts will establish an Isle of Man resident Partnership ('Partnership'). The Managing Partner of the Partnership – an Isle of Man incorporated and resident company – will have responsibility for the day to day running and management of the Partnership. The Partnership will offer Consultancy services to third party companies based mainly in the UK ('UKCO's') that will be performed mainly in the U.K.

The UKCO's will be unconnected with the Partnership and/or its partners.

In order to fulfil its contracts with the UKCO's, the Partnership will enter into contracts for the supply of services with the Contractors i.e. the settlers of the Trusts that are members of the Partnership.

The Contractors – resident in the UK for tax purposes – are sole traders assessable to income tax under Schedule D, Case 1 or 2.

The fees paid by the Partnership are unlikely to be less than an annual equivalent of £20,000. It is important to note that the fee to be paid by the Partnership to the Contractor is not a 'retainer' but a fee to be agreed on a contract-by-contract basis.

The profits of the Partnership will be distributed to the partners in accordance with the terms of the Partnership agreement.

The Trustee will distribute the income received by the Trust from the Partnership to the Beneficiary without delay in order to avoid changing the character/source of the original income.

The Beneficiary will declare the trust income on his/her self-assessment return but will claim exemption from income tax under the United Kingdom/Isle of Man Double Tax Treaty...."

75. Mr Milne QC advised in an opinion dated 26 July 2001, later supplemented by a note of 8 November 2001. His conclusions were relatively unfavourable. He stated in his July opinion:

"... I do not consider that the proposal automatically avoids a charge under Schedule 12 FA 2000 or the NIC regulations. To avoid such a charge it will be necessary to fall outside paragraph 1(1)(c) of Schedule 12 and paragraph 6(1)(c) of the NIC regulations."

In August 2001 Mr Jones sought a second opinion from Mr Fitzpatrick. He, I gather, gave advice to similar effect.

76. In the course of the trial, Montpelier undertook a detailed comparison of the instructions submitted to Mr Fitzpatrick in August 2001 (which were identical, or virtually identical, to the instructions which had been delivered to Mr Milne in June 2001) and Mr Argles' opinions of March 2001. It was evident from this exercise that there were very many similarities between the matters on which Mr Fitzpatrick and Mr Milne were asked to advise and those which were the subject of Mr Argles' March opinions.

77. It is not in dispute that, for the purposes of the IR35 scheme they promoted until the latter part of 2001 ("the Post-Split Scheme"), Mr Jones and Mr Morris made use of the same form of trust deed as the Disputed Scheme. Mr Jones and Mr Morris said that they had been supplied with such a deed by a third party and did not know that it was a copy of the trust deed used for the Disputed Scheme. Their explanation received support from Mr Warr's evidence.

78. It was Mr Jones' evidence, and I have no reason to doubt, that following receipt of the advice from Mr Milne and Mr Fitzpatrick, he devised a new scheme. As Mr Jones said, "in its truest sense this new scheme was not an IR35 scheme". Mr Jones explained that the scheme "would not avoid the IR35 legislation and could not avoid income tax under the Double Tax Agreement" for most contractors, but was nonetheless capable of achieving certain national insurance and tax savings. Mr Gittins accepted that this scheme was "totally different" from the Scheme. Since Montpelier makes no complaint about this scheme, I do not need to consider it further. I was told that the scheme was closed down in January 2003.

<u>The strike out application</u>

79. Before considering the parties' respective claims and counterclaims, I should address the strike-out application made by Mr Jones.

80. On 28 June 2006 Mr Jones issued an application for Montpelier's pleadings to be struck out in their entirety pursuant to Order 23 rule (16)(1) of the Rules of the High Court of Justice of the Isle of Man. That rule provides as follows:

"If any party who is required ... to make discovery of documents or to produce any documents for the purpose of inspection ... fails to comply [with such requirement] *then ... the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment entered accordingly."*

81. The application was made on the basis that Montpelier had not fulfilled its obligations relating to discovery of documents. The premise underlying Mr Jones' complaints was that Montpelier had failed in its duty to preserve documents and in fact had allowed the destruction or loss of all its intact email records and archives concerning the period prior to and immediately after May 2001. It was further said that the loss of the email records had not been disclosed before April 2006 and then only under a Court order. It was contended that Montpelier's conduct indicated "a real unwillingness to submit forthrightly to the jurisdiction of the court in matters of discovery" and brought "the efficacy and bona fides of [Montpelier's] entire discovery exercise and preservation of documents into question" and that "in these circumstances [Mr Jones] is irrevocably prejudiced and cannot be assured with a fair trial of the issues in the action".

82. Various affidavits were sworn in opposition to the application. The longest of these was sworn by Mr Gittins on 13 October 2006. Affidavits were sworn on the same date by Mr Billy Lightfoot, who installed a networked email system for the Group in late 2001, Ms Carina McWhinnie, who has been Mr Gittins' personal assistant, Ms Barbara Warham, who joined the Group at the beginning of 2001 as the secretary to the taxation department, Ms Joanne Younger, who worked for the Group as a general office assistant during 2000 and 2001, and Ms Ann O'Neill, who was employed by the Group as a receptionist during 20001 and 2001.

83. Mr Gittins stated in his affidavit that, in response to Mr Jones' application, he had "instigated a new and comprehensive search of documents" on the advice of new counsel and that Montpelier was serving a further list of documents as a result. Mr Gittins attributed the "initial problem with discovery" to "the position taken by [Montpelier] in relation to documents held by associated companies"; he explained:

"I can advise the Court that this position was on the advice of counsel whereas I had wanted to disclose everything because from a commercial point of view I wanted the [trial] *of this matter to proceed as quickly as possible. In the event however my advisers were adamant and I took their advice."*

Mr Gittins also pointed out that Mr Jones had been offered the opportunity to inspect the electronic archives but had not done so. He said:

"... the most effective way in which to provide fail-safe discovery in these proceedings, and a way now commonly adopted with the advent of wholly electronic archives, is to grant unrestricted access and inspection of that system. That is precisely what [Montpelier] *has already offered to* [Mr Jones]*. It is highly relevant to this application ... that this invitation has been refused by* [Mr Jones]*."*

He concluded that "no documents relevant to these proceedings have been lost or destroyed by [Montpelier]."

84. In November 2006, Mr Jones made an application for further discovery on the basis that Montpelier had by serving Mr Gittins' affidavit waived privilege in advice given regarding discovery. That application succeeded before His Honour Deemster Doyle, but the Staff of Government Division allowed an appeal from Deemster Doyle's order. Mr Jones petitioned the Privy Council for special leave to appeal the judgment of the Staff of Government Division, and on 22 August 2007 Deemster Doyle ordered that the motion dated 28 June 2006 should be adjourned generally. However, at a hearing on 4 December 2007 the Privy Council declined to grant leave to appeal.

85. In advance of the trial, Mr Jones served witness summonses on, among others, Mr Lightfoot, Ms McWhinnie, Ms Warham, Ms Younger and Ms O'Neill (all of whom, as already mentioned, had sworn affidavits in connection with the strike out application). In the event, Mr Jones indicated as the trial progressed that he was content that I should set aside these summonses, which I accordingly did. In the circumstances, Mr Lightfoot, Ms McWhinnie, Ms Warham, Ms Younger and Ms O'Neill did not give evidence orally. I doubt whether it would in any event have been proper for Mr Jones to call these witnesses with a view to cross-examining them on their affidavits, especially having regard to the principles summarised by Beatson J at paragraph 86 of his judgment in *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm).

86. Mr Gittins, Mr Cuddy and Ms Bull, each of whom was called as a witness by Montpelier, were all cross-examined in relation to discovery of documents. The evidence they gave (in particular, Mr Gittins' evidence) suggested that some contemporary documentation might have been lost or destroyed. In particular, it is possible that certain internal handwritten notes were "thrown away" without being scanned into the Group's document management system. It seems, too, that Mr Jones and Mr Morris did not take with them when they left Fernleigh House the confidentiality agreements which contractors had completed, but that these agreements were not included in Montpelier's discovery.

87. However, I do not believe that any documents were destroyed or otherwise disposed of with a view to avoiding their disclosure in these proceedings. Nor was I persuaded that Montpelier had in any other respect deliberately failed to comply with its obligations in respect of discovery.

88. The relevant legal principles can be seen from *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 and *Douglas v Hello! Ltd* [2003] 1 All ER 1087. In the former case, Chadwick LJ said:

"I adopt, as a general principle, the observations of Millett J in <u>Logicrose Ltd</u> v <u>Southend United Football Club Ltd</u> (1988) Times, 5 March, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the

court from doing justice, the court is entitled, indeed I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

In *Douglas v Hello! Ltd*, Morritt V-C distinguished between the loss of documents (a) in advance of the institution of proceedings and (b) after proceedings have been issued. With regard to the former, Morritt V-C explained:

"There is ... a distinction to be drawn between those [documents] *which were destroyed or disposed of before these proceedings were commenced and those which were destroyed or disposed of thereafter. With regard to the former category it is established in the very recent decision of the Court of Appeal for the State of Victoria in* <u>British American Tobacco Australia Services Ltd</u> *v* <u>Cowell (as representing the estate of McCabe, decd)</u> *(6 December 2002, unreported) (paras 173, 175) that the criterion for the court's intervention of the type sought on this application is whether that destruction or disposal amounts to an attempt to pervert the course of justice. There being no English authority on this point I propose to apply that principle, not only because the decision of the Court of Appeal for the State of Victoria is persuasive authority but because I respectfully consider it to be right."*

As for the loss of documents post-issue, Morritt V-C referred to the *Logicrose* and *Arrow Nominees* cases and said, "The issues are whether the rules have been transgressed, if so whether a fair trial is achievable and if not what to do about it."

89. In the present case, there is, in my judgment, no question of the loss of any documents before the proceedings were commenced having represented an attempt to pervert the course of justice. Further, I have not been persuaded that the loss of any documentation post-issue (if there was any, which is less than clear) precluded a fair trial or, more generally, that any shortcomings in Montpelier's discovery justify an order striking out the claim or any part of it. I shall, accordingly, dismiss Mr Jones' application dated 28 June 2006.

<u>Claims and counterclaims in summary</u>

90. In its Statement of Case, Montpelier advances claims of breach of confidence, breach of copyright, passing off and procuring breaches of contract.

91. Taking these briefly in turn:

91.1 *Breach of confidence*

Montpelier alleges that consultancy contracts between Montpelier on the one hand and Mr Jones and Mr Morris on the other incorporated implied terms as to confidentiality and that, in any event, information was disclosed to Mr Jones and Mr Morris in confidence. It is said that in breach of their consultancy contracts and/or in breach of confidence Mr Jones and Mr Morris have:

"a. retained copies of the documents relating to the Solution after the termination of their consultancy work for [Montpelier]*. The said documents retained by* [Mr Jones and Mr Morris] *include inter alia copies of:*

i. the written advices of Mr Argles dated 16th day of March 2001 and 29th March 2001,

ii. copies of instructions to counsel in relation to the Solution and notes of conferences with counsel

iii. documents relating to the Solution created by [Mr Jones and Mr Morris] *during the course of their consultancy work for* [Montpelier]

iv. *the computer software for the Suo Motu web site including the text displayed when customers access the Suo Motu web site which was created by* [Mr Jones and Mr Morris] *during the course of their consultancy work for* [Montpelier]

v. documents relating to the Solution created by Mr Gittins and other employees of [Montpelier]

b. provided a tax scheme identical to or substantially based upon the Solution in competition to [Montpelier] *and in the course of the same disclosed the details of the Solution to prospective clients of* [Mr Jones and Mr Morris]

c. promoted [Mr Jones' and Mr Morris'] *said tax scheme for their own benefit on the basis that Tax counsel has approved the solution in the form of a detailed written opinion.*

d. retained after the termination of their consultancy work copies of the Client Database

e. not allowed [Montpelier] *from having access to the Client Database after the termination of the Defendants' consultancy contracts*

f. used the Client Database after the termination of their consultancy agreements to contact the said customers in the course of carrying on a business on their own account and in competition with [Montpelier's] *business"*

91.2 *Breach of copyright*

Montpelier alleged in its Statement of Case that it was the owner of the copyright in the Confidentiality Agreement, the KYC Form, and the trust deed, partnership agreement and self-employment contract for services used in connection with the Disputed Scheme and that Mr Jones and Mr Morris retained these documents and "used the same for their own commercial purposes and in direct competition with [Montpelier]". In the course of the trial, however, Montpelier limited its breach of copyright claim to the Confidentiality Agreement, KYC Form and trust deed. Montpelier accepted that the partnership agreement and self-employment contract for services had not been copied.

91.3 *Passing off*

Montpelier claims that Montpelier has "acquired a very substantial goodwill and reputation in relation to [the name Suo Motu and the domain name www.suomotu.com] which indicate and have at all material times indicated the tax advisory services and in particular the Solution of [Montpelier] and none other". It is said that Mr Jones and Mr Morris have continued to offer tax advisory services and the "Solution" using the name Suo Motu and the domain name www.suomotu.com, that "the look and feel and the majority of the contents of the web site remain the same" and that Mr Jones and Mr Morris have consequently "passed off their ... services and business not being those of [Montpelier] or connected in the course of trade with [Montpelier] as and for such services or business".

91.4 *Procuring breaches of contract*

Montpelier's pleaded case includes a claim to the effect that Mr Jones and Mr Morris have interfered with Montpelier's contractual relations with its clients. However, Mr Jones and Mr Morris argued that no contract had in fact been concluded between Montpelier and anyone interested in the Disputed Scheme by the relevant dates. In the course of the trial, Montpelier accepted this. Accordingly, this head of claim is no longer pursued by Montpelier.

92. Mr Jones, as well as denying liability in respect of the claims made by Montpelier, has advanced claims of his own against Montpelier. By his Counterclaim, Mr Jones contends that he "was the owner of all rights in the new tax planning arrangements and any development thereof carried out pursuant to the terms of the Consultancy letter and the IR 35 letter including the Solution" and he claims a variety of remedies on this footing. He further claims to be entitled to damages on the basis that Montpelier repudiated the contractual arrangements between itself, Mr Jones and Mr Morris. Mr Jones' pleaded case is that the repudiation had taken place by 11 May 2001 as a result of "a series of failures by [Montpelier], Mr Gittins and [Montpelier's] staff" or, alternatively, that repudiation occurred as a result of Mr Gittins' behaviour at the 12 May 2001 meeting.

93. Mr Morris similarly alleges by his Counterclaim that Montpelier repudiated its contractual arrangements with himself and Mr Jones.

94. I am concerned only with issues of liability.

<u>The construction and effect of the IR35 Letter</u>

95. The construction and effect of the IR35 Letter (set out in paragraph 28 above) are of significance in relation to both Montpelier's claims and Mr Jones' counterclaim. Argument focused, in particular, on the words, "The intellectual property rights will at all times rest with you" (in paragraph 4 of the letter).

96. Mr Jones and Mr Morris contended that the IR35 Letter provided for Mr Jones to be entitled not only to the intellectual property rights in the IR35 scheme to which Mr Milne QC's 2000 advice related but to such new intellectual property rights as might be generated as matters progressed. Regardless, therefore, of whether the final IR35 scheme (i.e. the Disputed Scheme) had its origin in the Milne advice, intellectual property rights in respect of it belonged to Mr Jones and not Montpelier. In the alternative, Mr Jones and Mr Morris submitted that there was "a clear line of development leading from the Milne opinion to the [Disputed Scheme]", as a result of which Mr Jones was entitled to the intellectual property rights in the Disputed Scheme. In contrast, Montpelier submitted that the rights which were to "rest" with Mr Jones were limited to rights which already subsisted as at the date of the letter (viz. 11 December 2000) and that, in any event, they did not extend to the intellectual property rights in the Disputed Scheme.

97. The arguments advanced in support of Mr Jones' and Mr Morris' position included the following:

97.1 Mr Jones and Mr Gittins had agreed at their meetings on a joint venture arrangement for, among other things, the *development* of the IR35 arrangement;

97.2 the IR35 Letter gave effect to that agreement;

97.3 the words "at all times" were broad and reflected the fact that new intellectual property rights might be generated as matters progressed and that they would belong to Mr Jones;

97.4 to differentiate between IR35 schemes which can, and those which cannot, be shown to have an origin in the Milne opinion would lead to difficult issues of degree and fact which the parties are unlikely to have intended;

97.5 conduct subsequent to the date of the letter tended to confirm that Mr Jones was intended to have the intellectual property rights in the IR35 scheme (viz. the Disputed Scheme) which was ultimately pursued.

98. With regard to the last of these points, amongst the matters relied on were the following:

98.1 the fact that Mr Gittins asked Mr Jones to work on what was on any basis Mr Jones' own IR35 project in early January 2001;

98.2 in a memorandum to Mr Jones of 22 January 2001 (see paragraph 33 above), Mr Gittins discussed three developing schemes, two of which he was aware derived directly from the Milne opinion and the third of which he appears to have thought was not so derived, all under the heading "Executive Solutions"; and

98.3 when the parties discussed financial terms in March 2001, no distinction was made between (a) the IR35 scheme to which Mr Milne's 2000 advice related, (b) the IR35 scheme then being pursued or (c) the "car scheme" in which Montpelier undoubtedly had no prior intellectual property rights.

99. For its part, Montpelier put forward the following, among other, arguments in support of its position:

99.1 the IR35 Letter related to a takeover of the business of a company (namely, ESL) whose only activity was to run an existing tax scheme;

99.2 the reference in the letter to "existing clients using the arrangement" showed that the "arrangement" was already in existence and that to which Mr Milne's 2000 advice related;

99.3 the word "development" (in paragraph 1 of the letter) referred to *commercial* development (as by opening new markets and promoting the product) rather than *technical* development. As at the date of the letter, there was no reason for Mr Gittins to think that the "arrangement" even needed technical development;

99.4 the word "rest" indicated that the intellectual property rights in question already existed;

99.5 from a commercial viewpoint, Montpelier would not have wished Mr Jones to have intellectual property rights arising in the future;

99.6 in the event, the substance of the agreement was never performed and it was abandoned by mutual consent. The IR35 Letter provided for ESL's clients to be transferred to a new company established by Montpelier "to undertake the work concerned with the arrangement", but no such transfer ever happened. ESL was rather charged for the administration work Montpelier undertook.

100. I can summarise my own conclusions on the construction of the IR35 Letter as follows:

100.1 while the IR35 Letter assumed that there was an existing IR35 "arrangement", it also allowed for the "arrangement" to be developed in the future. I do not consider that the word "development" in paragraph 1 of the letter should be interpreted as referring merely to commercial development. In fact, construed in the manner for which Montpelier contended the word "development" would add little (if anything) to the previous "marketing". Read naturally in the context ("administration, marketing and development"), the word "development" extends in my judgment to technical development. It was thus contemplated that the "arrangement" might be developed technically as well as in any other way;

100.2 paragraph 4 of the IR35 Letter plainly provided for existing intellectual property rights to remain with Mr Jones. The letter thus envisaged that, if the "arrangement" continued in its then existing form, a company established by the Group would administer and market a scheme the intellectual property rights in which were held by Mr Jones;

100.3 on balance, I take the view that the position was to be similar if the "arrangement" was varied as a result of "development". Although, as I have found, the IR35 Letter provided for technical development of the "arrangement", paragraph 4 did not draw any express distinction between intellectual property rights in the existing scheme and intellectual property rights in a scheme which had been amended in consequence of development, and I do not think that the word "rest" justifies the drawing of such a distinction. Nor, in my judgment, is there any other indication that the parties intended to limit the intellectual property rights which Mr Jones was to have to the existing "arrangement". To the contrary, it seems to me that the IR35 Letter did not distinguish between the "arrangement" in its existing form and after it had been varied through "development". In either case, the intellectual property rights were to be vested in Mr Jones;

100.4 on the other hand, I do not read the IR35 Letter as providing for Mr Jones to be given intellectual property rights in an IR35 scheme which did not represent a "development" of the original "arrangement". The letter was concerned with an existing scheme which it was envisaged could be the subject of "development". It says nothing about, and was simply not concerned with, schemes which did not represent developments of the scheme on which Mr Milne advised in 2000. That is unsurprising since Mr Gittins and Mr Jones had been addressing themselves to an existing "arrangement". Moreover, Montpelier can hardly be supposed to have intended to agree that Mr Jones should have the intellectual property rights in *any* IR35 scheme which might be devised, regardless of whether it had its origins in the Milne advice or even of whether Mr Jones had had any involvement with it;

100.5 it is true that, as Mr Jones and Mr Morris submitted, differentiating between IR35 schemes which had been varied as a result of "development" and those which differed more radically was capable of giving rise to difficult issues of degree and fact. However, it is not uncommon for commercial agreements to give rise to questions of comparable difficulty. In any case, I do not think that the existence of such potential problems could warrant the (to my mind, improbable) conclusion that *all* IR35 schemes, regardless of their derivation, were to vest in Mr Jones.

101. With regard to the suggestion that I should take into account conduct of the parties subsequent to the date of the IR35 Letter, I do not consider, having regard to the authorities cited in Chitty on Contracts, 30th edition, at paragraph 12-126, that I am entitled to have regard to such conduct when construing the letter. Even had it been open to me to take account of conduct postdating the letter, I would not have found it helpful. The matters to which Mr Jones and Mr Morris referred me would not, in my judgment, have given any clear guidance as to what the parties intended paragraph 4 of the IR35 Letter to mean.

102. On the facts, I take the view that the Disputed Scheme did not represent merely a variation of the original scheme as a result of "development". The scheme on which Mr Milne advised involved contractors having shareholdings in a United Kingdom company which would employ them and make their services available to clients and/or their agents. The scheme did not depend in any way on the Double Tax Agreement between the United Kingdom and the Isle of Man (or any other Double Tax Agreement), and neither Mr Milne's instructions nor the notes of the conference with him incorporated any element of offshore taxation, save that the instructions referred to the possibility of establishing an "offshore discretionary Employment Benefit Trust". The Disputed Scheme was fundamentally different. It depended on Isle of Man interest-in-possession trusts entering into an Isle of Man partnership in order to take advantage of the Double Tax Agreement. Further, contractors were to be employed by the Isle of Man partnership which would enter into contracts with a United Kingdom company which, in turn, would supply the contractors' services to clients and/or their agents. The Disputed Scheme represented, in my judgment, not a variation or development of the scheme on which Mr Milne advised in 2000, but an adaptation of a scheme which Montpelier had itself previously used in relation to royalties and land (see paragraph 41 above). I therefore do not consider that the IR35 Letter provided for Mr Jones to have the intellectual property rights in the Disputed Scheme.

103. In any case, in my judgment the IR35 Letter did not in the event become contractually binding. The letter provided for the parties to "agree an appropriate fee"; unless and until that was done, the terms were, as I see it, insufficiently certain to be contractually enforceable. Mr Jones and Mr Morris suggest that agreement on an "appropriate fee" was reached on 21 March 2001, but by then it had come to be accepted between the parties that ESL's existing clients would not be transferred to a company established by the Group (and they never were). The agreement achieved on 21 March was a new one, not a perfection of the terms of the IR35 Letter. Even, therefore, if (contrary to my view) the IR35 Letter had on its true construction provided for intellectual property rights in the final IR35 scheme to be vested in Mr Jones, they would not in fact have done so, because the IR35 Letter did not take effect.

104. In all the circumstances, I conclude that the IR35 Letter did not give Mr Jones any intellectual property rights in the Disputed Scheme.

Repudiation and acceptance

405. An issue of relevance to both claims and counterclaims relates to repudiation of the contract between Montpelier, Mr Jones and Mr Morris.

106. As mentioned above, Mr Jones and Mr Morris both allege by their Counterclaims that Montpelier repudiated the contractual arrangements, and they claim damages accordingly.

107. The pleaded counterclaims allege that Montpelier had repudiated the contract by 11 May 2001 as a result of:

"a series of failures by [Montpelier]*, Mr Gittins and* [Montpelier's] *staff to:-*

(i) put in place the necessary mechanisms, procedures and documents to implement the Solution for contractors timeously or at all;

(ii) understand or implement the computerised real-time database, accounting and invoicing systems developed and being developed for the Solution by [Mr Morris] *to automate the various stages of the Solution;*

(iii) finalise the joint venture agreement between [Montpelier] *and* [Mr Jones and Mr Morris] *or even to produce draft documentation"*.

In the alternative, it is said that Mr Gittins' behaviour at the 12 May meeting constituted a repudiation of the contract. In this regard, the Counterclaims allege:

"Mr Gittins made no attempt to satisfy [Mr Jones and Mr Morris] *that* [Montpelier] *could deliver its part of the deal and immediately ordered* [Mr Jones and Mr Morris] *off the premises refusing them the opportunity to remover remaining furniture equipment and personal possessions"*.

108. In their closing submissions, Mr Jones and Mr Morris put the argument as follows:

"[Mr Gittins] *repudiated* [the contract] *both by what he said at the meeting on 12 May, and by his conduct prior to the meeting (in particular failing to get a proper agreement drafted despite his agreement in March to do so, coupled with the fact that on 9 May he announced that he could pull the plug on the project at any time, thereby indicating and intention not to be bound by the joint venture agreement)."*

109. Relevant legal principles are summarised as follows in Chitty on Contracts, 30th edition, in paragraphs 24-018, 24-021, 24-039 and 24-040:

"A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect ... .

If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion *that he does not intend to fulfil his part, this constitutes an 'anticipatory breach' of the contract and entitles the other party to take one of two courses. He may 'accept' the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue ... .*

... Any failure of performance which constitutes a breach of condition entitles the innocent party to treat himself as discharged from further liability under the contract ... .

Where the failure of performance is not a breach of condition, but of an 'intermediate' term, it may still justify the innocent party in treating himself as discharged. But in such a case regard must be had to the nature and consequences of the breach in order to determine whether this right has arisen. A number of expressions have been used to describe the circumstances that warrant discharge, the most common being that the breach must 'go to the root of the contract'. It has also been said that the breach must 'affect the very substance of the contract', or 'frustrate the commercial purpose of the venture', and, at the present day, a test which is frequently applied is that stated by Diplock L.J. in <u>Hongkong Fir Shipping Co Ltd</u> *v* <u>Kawasaki Kisen Kaisha Ltd</u>*:*

'Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?'"

110. I have not been persuaded that the contract was repudiated by Montpelier. In my judgment, the true position is that it was Mr Jones and Mr Morris who repudiated the contract, and Mr Gittins accepted that repudiation on behalf of Montpelier.

111. With regard to the preparation of a written contract, Mr Gittins was away on holiday between 29 March and 17 April 2001. Following his return, Mr Gittins felt, for understandable reasons, that Montpelier's arrangements with Mr Jones and Mr Morris should be altered to ensure that ESL was seen as completely independent of Montpelier. Discussions between the parties on 4 May led to a revised agreement being concluded on Tuesday 8 May. In the circumstances, I do not think that Mr Gittins' failure to provide draft documentation by the time of the Saturday meeting, just four days later, can have amounted to repudiation.

112. Nor, in my judgment, can any other deficiencies in Montpelier's performance, either taken alone or in conjunction with the absence of draft documentation, have constituted repudiation. In their closing submissions, Mr Jones and Mr Morris did not press the argument that Montpelier had repudiated its contract as a result of such deficiencies. At all events, while Mr Jones and Mr Morris had become dissatisfied with Montpelier in certain respects by 12 May 2001, there is, to my mind, no question of any deficiencies in its performance having involved a breach of condition or having been such as to deprive Mr Jones and Mr Morris of substantially the whole benefit which they were intended to obtain (to adapt the words of Diplock LJ in the *Honglong Fir* case).

113. As for Mr Jones' and Mr Morris' reliance, in their closing submissions, on "the fact that on 9 May [Mr Gittins] announced that he could pull the plug on the project at any time", so far as I can see this was not one of the matters identified as giving rise to repudiation in the Defences and Counterclaims. Further, while Mr Gittins accepted in cross-examination that he could have "pulled this scheme at any time", I do not remember the question of

whether (and, if so, when) he "announced that he could pull the plug at any time" being explored with him in cross-examination. In any case, the evidence does not appear to me to establish that Mr Gittins referred to the possibility of "pulling the plug" after agreement had been reached on 8 May, as would surely have to have been the case for Mr Jones and Mr Morris to be able to rely on such an "announcement" as a repudiation of the 8 May agreement. Further, I do not consider that a statement to the effect that Mr Gittins could "pull the plug", even if made after 8 May, would have amounted to a repudiation. Mr Gittins would not thereby have stated that Montpelier would not perform its obligations.

114. I have commented on the 12 May meeting in paragraphs 63 to 67 above. In my judgment, Mr Jones and Mr Morris repudiated their contract with Montpelier when Mr Jones told Mr Gittins that they had decided to "pack up". Further, I do not accept that Mr Morris (or Mr Jones) subsequently attempted to achieve a resolution.

Conclusions on the counterclaims

115. The conclusions I have arrived at thus far allow me to dispose of the Counterclaims.

116. Mr Jones claimed to own intellectual property rights in the Disputed Scheme on the strength of the IR35 Letter. However, I have held that the IR35 Letter did not in fact give Mr Jones any intellectual property rights in the Disputed Scheme. There is the further point that, in my judgment, Westwood never transferred to Mr Jones its intellectual property rights in the scheme on which Mr Milne advised in 2000 (see paragraph 29 above).

117. With regard to the counterclaims advanced on the basis that Montpelier repudiated its contract with Mr Jones and Mr Morris, as I have explained above Montpelier did not, in my judgment, repudiate that contract.

118. I shall, accordingly, dismiss the counterclaims of both Mr Jones and Mr Morris.

Breach of copyright

119. I can also deal quite shortly with the breach of copyright claims.

120. As already mentioned, Montpelier alleges breach of copyright in the Confidentiality Agreement, the KYC Form and the trust deed used in connection with the Disputed Scheme ("the Trust Deed").

121. With regard to the Trust Deed, Mr Gittins accepted when giving evidence that the owner of the copyright in the Trust Deed was not Montpelier, but another company in the Group, namely MTM Isle of Man Limited. Likewise, the evidence showed that copyright in the KYC Form and the Confidentiality Agreement was acquired by companies in the Group other than Montpelier. With regard to the KYC Form, Mr Bernard O'Kelley, a director of Montpelier, swearing an affidavit in response to an order relating to "documents relevant to the creation" of the documents on which the copyright claim was based, explained that he had located four documents relating to the KYC Form and that they were the property of Montpelier (Trust and Corporate Services) Limited (formerly MTM Isle of Man Limited), and Mr Gittins confirmed in evidence that the KYC Form had been devised by Montpelier (Trust and Corporate Services) Limited. As for the Confidentiality Agreement, the earliest known version, dated 19 February 2001, was in the name of MTM (Isle of Man) Limited,

and Mr Cuddy accepted in the course of his evidence that the document appeared to have been drafted by or for that company.

122. Montpelier accepted in its closing submissions that it had become apparent that ownership of the KYC Form, Confidentiality Agreement and Trust Deed had not originally been vested in Montpelier. It nonetheless argued that it was in a position to complain of breach of copyright in two ways:

"i. That regardless of copyright existing previously in each of the documents as freestanding documents; fresh copyright subsisted as of the time the scheme mechanics were drawn up and the core documentation was employed in this fresh manner.

ii. In any event, the Court is asked to infer title deriving from either an exclusive licence to use the documents in question or by virtue of some equitable ownership."

123. I am not persuaded by these arguments. In the first place, I do not accept that the use of the various documents in the context of the Disputed Scheme will have given rise to new copyright divorced from copyright in the individual documents. In my judgment, Montpelier needs to establish title to sue in relation to the documents individually.

124. Secondly, while the Copyright Act 1991 provides for proceedings for breach of copyright to be brought by an exclusive licensee, a licence cannot be an exclusive licence within the meaning of the Act unless it is in writing signed by or on behalf of the assignor (see section 92(1)). In the present case, it is not suggested that Montpelier was granted any licence in respect of the relevant copyrights in writing. It follows that Montpelier cannot be entitled to maintain breach of copyright claims as an exclusive licensee.

125. Even aside from the requirement for an exclusive licence to be in writing, the evidence would not have established that Montpelier had been granted such a licence, nor that Montpelier had acquired equitable ownership of the relevant copyrights. There is no direct factual evidence of any attempt to grant Montpelier either an exclusive licence or equitable ownership. Moreover, I cannot see any sufficient reason to infer such a grant. Montpelier will not have needed more than a *non-exclusive* licence to use the documents for the Disputed Scheme.

126. In the circumstances, Montpelier has not established that it has title to sue for breach of copyright as regards the KYC Form, Confidentiality Agreement or Trust Deed. The claims for breach of copyright therefore fail.

Passing off

127. In *Warninck (Erven) BV v J. Townsend & Sons (Hull) Ltd* [1979] AC 731, Lord Diplock explained the ingredients of passing off in the following terms:

"My Lords, Spalding v Gamage and the later cases make it possible to identify five characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation (2) made in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so."

128. In the present case, Montpelier argues that, following their split from Montpelier, Mr Jones and Mr Morris marketed services in direct competition with Montpelier using the name (viz. Suo Motu) and domain name (viz. www.suomotu.com) previously used in connection with the Disputed Scheme and in circumstances in which the look and feel of the majority of the website remained the same. It is said that there was, as a consequence, "a misrepresentation that [Mr Jones' and Mr Morris'] services and/or business [were] those of [Montpelier] or connected in the course of trade with [Montpelier]".

129. In response, Mr Jones and Mr Morris argued that their use of the Suo Motu name and website did not involve any misrepresentation. In support of this argument, they made the following points:

129.1 the schedule to the order made by Deemster Cain on 7 June 2001 provided for Mr Jones and Mr Morris to "retain the full legal title to the Suo Motu web site and trade name". The Suo Motu name and website were therefore to be considered to have belonged to Mr Jones and Mr Morris;

129.2 the Suo Motu website was in the nature of a shop window. If Mr Jones and Mr Morris decided to stop selling Montpelier's brand in what was (having regard to paragraph 129.1 above) plainly *their* shop window, there was no need for them to rebuild the shop;

129.3 following the split from Montpelier, Mr Jones and Mr Morris removed all references to Montpelier from the Suo Motu website;

129.4 even before the split, no one visiting the Suo Motu website could have seen any reference to Montpelier without registering his details on the website;

129.5 all those who had registered their details on the Suo Motu website were sent emails by the parties on 13 and 14 May 2001 explaining that there was no longer any connection between Montpelier on the one hand and Mr Jones and Mr Morris on the other.

130. In the course of submissions, Montpelier accepted that the last of these points meant that its complaint did not extend to those who registered their details before the split. Montpelier suggested, however, that contractors who had not registered their details might nevertheless have "accessed the scheme prior to the split and either seen the reference to [Montpelier] or, indeed, simply accessed it in the knowledge that at the time [Montpelier] was involved and then returned after 12th May and assumed, because the website had the same look and feel that [Montpelier] were still operating the scheme".

131. As I understand it, however, it was impossible for a contractor to see any reference to Montpelier on the Suo Motu website without having registered his details. Nor would there seem to be any real likelihood of a contractor having "accessed [the website] in the knowledge that at the time [Montpelier] was involved and then returned after 12th May and assumed, because the website had the same look and feel that [Montpelier] were still operating the scheme", especially since anyone visiting the website after 24 April 2001 would have seen no more than the notice quoted in paragraph 50 above unless he registered. Even, therefore, if I had been persuaded that there had been misrepresentation, there would seem to have been little chance of Montpelier having suffered damage as a result

132. I have concluded, however, that there was in fact no misrepresentation. I do not consider that Mr Jones' and Mr Morris' continued use of the Suo Motu name and website amounted to a representation that "[Mr Jones' and Mr Morris'] services and/or business [were] those of [Montpelier] or connected in the course of trade with [Montpelier]", particularly when (a) the name and website belonged to Mr Jones and Mr Morris, (b) the website contained no reference to Montpelier after the split, (c) no one visiting the website even before the split could have seen any reference to Montpelier unless he had registered his details, in which event he would have received the emails of 13 and 14 May 2001 from which it was clear that there was now no connection between the Suo Motu website and Montpelier and (d) likewise, no one visiting the website post the split could have appreciated that "the look and feel of the majority of the website remained the same" (as Montpelier alleges) unless he had had general access to the website prior to the split, for which he would have had to register his details, as a result of which he would have received the emails of 13 and 14 May.

133. The passing off claim accordingly fails.

<u>Breach of confidence</u>

134. There remain to be considered Montpelier's breach of confidence claims.

<u>The legal framework</u>

135. In *Coco v A. N. Clark (Engineers) Ltd* [1969] RPC 41, Megarry J noted that "three elements are normally required if, apart from contract, a case of breach of confidence is to succeed." He identified these elements as follows:

"First, the information itself ... must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

With regard to the first of these requirements (to the effect that the information must be of a confidential nature), Megarry J said this:

"As Lord Greene said in the <u>Saltman</u> case ... , 'something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty the more commonplace its components. ... [W]hether it is described as originality or novelty or ingenuity or otherwise, I think there must be some product of the human brain which suffices to confer a confidential nature upon the information ... .

... [W]here confidential information is communicated in circumstances of confidence the obligation thus created endures, perhaps in a modified form, even after all the information has been published or is ascertainable by the public; for the recipient must not use the

communication as a spring-board ... . I should add that ... the mere simplicity of an idea does not prevent it being confidential ... . Indeed, the simpler an idea, the more likely it is to need protection."

136. The Court of Appeal decision in *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 provides guidance as to the law of confidence in the context of an employment relationship. Neill LJ, delivering the judgment of the Court, summarised the relevant principles as follows:

"(1) Where the parties are, or have been, linked by a contract of employment, the obligations of the employee are to be determined by the contract between him and his employer ... .

(2) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.

(1) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee ... .

(2) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae ... , or designs or special methods of construction ... , and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret. The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only 'confidential' in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of th duty of good faith ... .

(3) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid:

(a) The nature of the employment. Thus employment in a capacity where 'confidential' material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.

(b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine ... .

It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets, though the secrecy of some information may be only short-lived. In addition, the fact that the circulation of certain *information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality.*

(c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employee cannot prevent the use or disclosure merely *by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret ... .*

(d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose ... .

For our part we would not regard the separability of the information in question as being conclusive, but the fact that the alleged 'confidential' information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret."

Montpelier's case

137. Although Montpelier put its case somewhat more widely in its Statement of Case (see paragraph 91.1 above), Mr Ramsden and Miss Holt focused in their closing submissions on the overall concept and architecture of the Disputed Scheme.

138. Montpelier contends, in summary, that the Disputed Scheme had the necessary quality of confidence and that Mr Jones and Mr Morris made wrongful use of it by replicating it in its entirety or substantially. Montpelier suggests that it is clear on the facts that the mechanics of the scheme and the way in which it employed its different components was not something that someone could obtain solely from public domain sources. It is asked, rhetorically, "What would be the incentive for any business person to expend money and time in creating a scheme if any person within his employ could simply leave and set up in competition the very next day running the same or a materially similar scheme [?]" Montpelier contends that importance is to be attached to the fact that, as it says, the details of the scheme were jealously guarded and a clear system was in place to prevent its general dissemination.

139. Mr Ramsden and Miss Holt did not press the pleaded allegations of breach of confidence in relation to the client database . In any case, on the evidence as it emerged at trial it seems to me that Mr Jones and Mr Morris had compelling answers to the breach of confidence claims insofar as they related to the client database.

Mr Jones' and Mr Morris' case

140. Mr Jones and Morris advance a number of defences to Montpelier's claim. They argue that all or much of the Disputed Scheme was already in the public domain and so did not represent confidential information. In any case, Mr Jones and Mr Morris submit, the "*Faccenda* principle" applies: whether or not, they say, the Disputed Scheme was properly to be regarded as confidential information in the hands of third parties (such as customers), Mr Jones could hardly be expected not to carry away in his head such concepts as he did use in the course of his next scheme. In conjunction with these arguments, it is contended that the scheme which Mr Jones and Mr Morris pursued after splitting from Montpelier did not replicate the Disputed Scheme but differed from it in

important respects. Finally, Mr Jones and Mr Morris maintain that, in any event, under the IR35 Letter any confidential information in the Disputed Scheme was the property of Mr Jones.

141. I have already stated my conclusions in relation to the IR35 Letter (see paragraphs 95 to 104 above). I consider below the other points mentioned in the last paragraph.

Public domain

142. Mr Jones and Mr Morris do not go so far as to contend that there can never be confidential information in a tax avoidance scheme. On the facts of the present case, however, they argue that the device of using offshore trusts in offshore partnerships was already known within the trade and that, while the device may not previously have been applied in an employment context, there can be no confidentiality rights in the idea of utilising a known tax scheme for a new purpose for which it was plainly potentially suitable.

143. Reference was made to passages in the "International Tax Handbook" which the Inland Revenue published in 2000. I was referred in particular to paragraphs 1645 and 1660 of the Handbook. Paragraph 1645 read as follows:

"Taxpayers sometimes try to achieve the desired result – of linking all the United Kingdom partners with the overseas partnership – by arranging for the overseas partners to practice as trustees for themselves and the other United Kingdom partners as beneficiaries. Our Solicitor has advised that if a trust is to be established then the requirements of trust law must be met. The consequences are that such a beneficiary cannot be said to immediately derive his share of the profits from the carrying on of a trade. The income will not be earned income or relevant earnings for retirement annuity purposes. The United Kingdom partners who are the trustees immediately derive their income from the carrying on of the trade and will be entitled to have their income treated as earned income and relevant earnings.

This arrangement – of having some of the overseas partners practice as trustees for themselves and the other United Kingdom partners – is suggested in a partnership textbook. The reason for the arrangement, it is said, is that it may be inconvenient for all the members of a large United Kingdom partnership to be also members of the overseas firm. (There is another snag – more significant in the days of the 25 per cent deduction and which is not mentioned – that if all the United Kingdom partners are members of the overseas firm it may be more difficult to show that control and management is in fact overseas.)

The authors recognise that treatment as earned income may be at risk – because the United Kingdom partners who are not also partners abroad may not be personally acting in the trade. The authors do not however seem to recognise the difficulty that the partners may not 'immediately derive' their income from the trade. (This arrangement of a trust seemed for a time entirely theoretical but has in fact been used.)"

Paragraph 1660 referred to legislation passed in 1988 in response to the decision of the Court of Appeal in *Padmore v Commissioners of Inland Revenue* [1987] STC 493. The paragraph continued:

"The legislation is written in terms of United Kingdom residents who are partners but some tax planners have already suggested that it may be possible to develop the Padmore principle to apply to other situations where there are primary and secondary taxpayers for example where there is a trading trust with non-resident trustees and the profits pass to a United Kingdom resident life tenant. These further refinements will be kept under review. It has also been suggested that the legislation has not succeeded in overriding the treaties…."

144. These passages seem to me to be of little help to Mr Jones and Mr Morris. It is true that they contain reference to (a) the use of an arrangement under which overseas partners practised as trustees for themselves and United Kingdom partners and (b) the possibility of using a trading trust with non-resident trustees but a United Kingdom resident life tenant to exploit the *Padmore* principle. They do not, however, provide any real evidence of any use of offshore trusts in partnership, let alone of their use in an IR35 context. Nor, in my judgment, can the passages fairly be said themselves to reveal to the public that offshore trusts in partnership could be used to avoid the operation of the IR35 legislation, let alone how.

145. Of more assistance to Mr Jones and Mr Morris is the evidence given by Mr Greg Jones. Mr Greg Jones said that he first became aware of a taxation scheme involving the creation of offshore trading partnerships, where the partners were trustees of offshore interest-in-possession trusts, in about 1998 from an individual who was then at KPMG in Leeds. Mr Greg Jones said that in the late 1990's he advised two clients to set up a structure through which to operate this scheme; the clients in question ran a property business, and the scheme was used to acquire and dispose of property instead of this being sold through the business. Mr Greg Jones explained that he had subsequently lost touch with the scheme, but that he had become reacquainted with it in about 2003 or 2004 in circumstances where the "scheme was not used to acquire property *per* se, but instead to take options over land". Mr Greg Jones said that he had later helped with many similar transactions, in the great majority of which "the offshore partnership took options over land rather than land itself". However, the schemes of which Mr Greg Jones had experience related only to land/options until rather later than 2000/2001.

146. Materials which Mr Jones produced from a conference in 1997 on "Using tax efficient overseas structures for investing and dealing in UK land" also tend to suggest that tax practitioners were aware of the possibility of using interest-in-possession trusts in partnership to mitigate tax on profits from land.

147. On balance, I take the view that the possibility of using offshore interest-in-possession trusts in partnership to avoid tax on land transactions was sufficiently widely known among tax practitioners by 2000 to be considered to have been in the public domain. On the other hand, I am aware of no evidence indicating that tax practitioners were aware in 2000 or 2001 that interest-in-possession trusts in partnership could be used to avoid the IR35 legislation. Neither Mr Greg Jones' evidence, nor any other evidence, suggests that anyone other than Montpelier/Mr Jones had even thought of addressing the IR35 legislation in this way. A fortiori, the evidence did not establish that tax practitioners had devised IR35 schemes with structures similar to that of the Disputed Scheme.

148. Mr Jones and Mr Morris contended that the idea of using a known "tax dodge" (to use words of Mr Wilson QC) in a new context could not be considered to be confidential information. I disagree. It seems to me that, on the facts of this case, the idea of using

offshore interest-in-possession trusts in partnership to avoid the IR35 legislation had the "necessary quality of confidence". It is to be noted that:

148.1 it is evident from the *Coco* case that "something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality" and that "the mere simplicity of an idea does not prevent it being confidential";

148.2 the fact that other tax practitioners did not think of using offshore interest-in-possession trusts in partnership to avoid the IR35 legislation indicates that the idea was not an obvious one;

148.3 the value of the idea is apparent from the fact that Montpelier went on to make considerable profits from the Disputed Scheme.

149. I consider, moreover, that information about the *manner* in which the Disputed Scheme used offshore interest-in-possession trusts in partnership was confidential. It may be that, had another tax practitioner thought of using offshore interest-in-possession trusts in partnership to avoid the IR35 legislation, he might have devised a similar arrangement, but, on the evidence, no one had in fact done so by 2001. Individual elements of the Disputed Scheme may have been well-known among tax practitioners, but the way in which they were combined to produce an IR35 scheme was not. In the circumstances, the overall architecture of the Disputed Scheme represented confidential information.

150. Finally, I do not understand it to be seriously disputed (and I in any event find) that the advice given by Mr Argles in 2001 (in particular, his March opinions) constituted confidential information.

151. In short, I consider that, in a variety of ways, information relating to the Disputed Scheme represented confidential information which Montpelier was entitled to protect as against third parties generally.

The Faccenda *principle*

152. As already mentioned, it is Mr Jones' and Mr Morris' case that, even if information about the Disputed Scheme was properly to be regarded as confidential information in the hands of third parties generally, Montpelier was not entitled to prevent Mr Jones and Mr Morris from using it. On the strength of the *Faccenda* case, they argue that Mr Jones "is entitled to say that he could hardly be expected not to carry away in his head such concepts as he did use in the course of his next scheme".

153. I take a different view. In my judgment, information about the Disputed Scheme can "properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine" (to quote from the judgment of the Court of Appeal in *Faccenda*). It is important in this context that considerable care was taken to protect information about the Disputed Scheme. A contractor could not access any significant information about the Disputed Scheme without completing a confidentiality agreement, and Mr Jones would himself stress confidentiality at the seminars he gave (see paragraph 53 above). Mr Jones can have been in no doubt about the fact that Montpelier regarded information about the Disputed Scheme as highly

confidential. Further, Montpelier's successful exploitation of the Disputed Scheme confirms that it was in fact valuable.

154. I agree with Montpelier that it would be strange if an employee (or consultant) involved with a scheme such as the Disputed Scheme could properly leave his employer and immediately set up in competition marketing a similar scheme. I do not consider that Mr Jones and Mr Morris were so entitled.

155. More particularly, the advice given by Mr Argles in 2001 plainly, in my view, represented confidential information in the hands of Mr Jones and Mr Morris as well as in the hands of others.

<u>*Use of the information*</u>

156. There can be no doubt but that the Post-Split Scheme was based on the idea of using offshore interest-in-possession trusts in partnership to avoid the IR35 legislation. As I have already stated, in my judgment that idea, which also underlay the Disputed Scheme, represented confidential information.

157. Further, I consider that, in constructing the Post-Split Scheme, Mr Jones and Mr Morris will have made use of confidential information about the manner in which the Disputed Scheme used offshore interest-in-possession trusts in partnership.

158. Mr Jones listed a number of differences between the Disputed Scheme and the Post-Split Scheme in an affidavit he swore on 23 December 2008. The differences he identified were, in summary, as follows:

158.1 whereas the Disputed Scheme used partnerships consisting of three trusts and a managing partner, Post-Split Scheme partnerships comprised 19 trusts and a managing partner;

158.2 whereas Disputed Scheme partnerships gave the managing partner a discretion as to how to divide all the partnership income, Post-Split Scheme partnerships gave each partner "a pre-determined percentage of the profits based on his anticipated fees as a percentage of total anticipated fees for all of the partners";

158.3 instead of being paid a retainer of £20,000 per annum, under the Post-Split Scheme individual contractors would be paid a daily rate for the days they actually worked;

158.4 "Instead of the Managing Partner taking 10% out of the income passing through the partnership, the managing partner in the replacement scheme takes 6% and another 2% is used as a buffer that is distributed to provide for minor adjustments in equalising profits";

158.5 it was accepted that section 134 of the Taxes Act would apply to the Post-Split Scheme.

159. It remains the case, however, that the architecture of the Post-Split Scheme was similar to, and I am sure derived from, the architecture of the Disputed Scheme. The differences between the schemes listed by Mr Jones do not appear to me, either individually or together, to detract from this conclusion. Such differences notwithstanding, the overall structure of the two schemes was very comparable. Further:

159.1 I can see no fundamental distinction between partnerships including three trusts and partnerships including 19 trusts. In any case, the pages which have been disclosed from Post-Split Scheme partnership agreements show that such partnerships did not always have 19 trust partners;

159.2 the 2% buffer used "to provide for minor adjustments in equalising profits" at, as I understand it, the discretion of the managing partner under the Post-Split Scheme performed a similar function to the discretion to determine profit sharing ratios given to the managing partner under the Disputed Scheme.

160. I consider, too, that, in promoting the Post-Split Scheme, Mr Jones and Mr Morris made use of Mr Argles' March opinions. As I see it, the references to tax counsel having "approved the solution in the form of detailed written opinion" related to, and so disclosed confidential information about, Mr Argles' March advice.

Conclusion

161. In summary, in my judgment Mr Jones and Mr Morris made wrongful use of (a) the idea of using offshore interest-in-possession trusts in partnership to avoid the IR35 legislation, (b) information about the manner in which the Disputed Scheme was constructed and (c) Mr Argles' March opinions.

Overall conclusion

162. Montpelier has satisfied me that Mr Jones and Mr Morris are liable to it for wrongful use of confidential information.

163. Montpelier's other claims, and the counterclaims, fail.

164. I shall also dismiss Mr Jones' strike out application.
