Neutral Citation Number: [2017] EWHC 758 (Ch)
Case No: HC-2015 - 00793

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/05/2017

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

JAMES SHEPHERD **Claimant**
- and -
BYRNE AND PARTNERS LLP **Defendant**

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- -

Mr Hugh Jackson and Ms Justina Stewart (instructed by **Irwin Mitchell LLP**) for the Claimant
Mr Bob Moxon-Browne QC and Mr Lucas Fear-Segal (instructed by **Kennedys**) for the Defendant

Hearing dates: 6,7,8,9 and 10 March 2017 (Rolls Building) and 5 May 2017 (Manchester CJC)

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Judgment Approved

HH Judge Pelling QC:

Introduction

1. This is the trial of a claim by the claimant against the defendant for damages for breach of contract or negligence arising out of some advice that it is alleged Mr Byrne (the founder, with others, of the defendant) gave to the claimant concerning how he and his wife might voluntarily disclose to HMRC income that had been credited to accounts opened by the claimant (or in some cases by him in the joint names of himself and his wife) initially with the Geneva branch of HSBC, or its predecessor, and then with the Geneva branch of Barclays Bank Plc ("Barclays") but which had not been declared to tax as and when it should have been.

2. The essence of the allegation is that the defendant should have advised the claimant to disclose the existence of his offshore undeclared income (and his wife's to the extent that she had any) using a facility operated by HMRC, which was available at all material times to those qualified to take advantage of it, known as the Liechtenstein Disclosure Facility ("LDF"). The claimant alleges that Mr Byrne erroneously advised him against attempting to use the LDF and that, in consequence of this advice, he accepted the advice of a specialist tax investigation accountant to voluntarily disclose his untaxed income to HMRC and invite them to investigate the non-declarations under HMRC's Code of Practice 9 ("COP 9"). The claimant's wife formed part of the notification process but their case to HMRC was that she did not have, and never had, any beneficial interest in the relevant income although four of the relevant accounts had been opened in the joint names of the claimant and his wife. In the end a formal letter initiating an enquiry under COP 9 was sent to the claimant's wife but the investigation into her affairs never went further than that and ultimately HMRC accepted that she had no beneficial interest in the income credited to the relevant accounts.

3. It is not in dispute that once a tax payer had been notified by HMRC of a COP 9 investigation, thereafter that tax payer was not eligible to register under the LDF. It is common ground that almost invariably a person seeking to disclose previous undeclared or under declared income will retain a tax investigation professional to make the disclosure, and negotiate a tax settlement with HMRC. This profession crosses various traditional professional boundaries but mostly consists of either specialist chartered accountants or highly skilled ex-employees of HMRC who leave the public service and work in specialist tax investigation departments within firms of accountants, or in practice on their own account. Such professionals will typically undertake all the investigation work required by HMRC and then prepare a report which forms the basis of the voluntary disclosure and settlement with HMRC. The process is essentially the same whether there has been a disclosure under a scheme such as the LDF or there is an investigation under COP 9. However, typically the task is a simpler one where there has been a disclosure using a scheme such as the LDF because the scheme may cap the number of years that must be disclosed below the number that can be investigated during a COP 9 investigation (as in fact was the case with the LDF) and may cap the amount recoverable by way of penalty, as was also the case with the LDF. This last factor means that it is not necessary, or as necessary, to explore facts relevant to the mitigation of the penalty claimed by HMRC.

4. The claimant asserted that the defendant's allegedly erroneous advice caused him loss and damage because (a) the penalties and interest that he had to pay were greater than would have been the case had he taken advantage of the LDF, and (b) he incurred professional fees and expenses that he would otherwise have avoided had he taken advantage of the LDF since the LDF procedure is shorter, less extensive for each of the reasons identified above and thus less costly than a COP 9 investigation. This

latter head of claim was abandoned by the claimant during closing submissions in the circumstances referred to in more detail below.

5. The defendant denies breach of contract and/or duty on the basis that Mr Byrne did not advise that the LDF was not available to the claimant (and his wife) but only that he would make enquiries as to whether it was, and that the claimant instructed an independent firm of tax investigators to initiate a disclosure and request for a COP 9 investigation before that advice had been received, but in any event neither the claimant nor his wife were eligible to register under the LDF (or could reasonably have been advised to register under the LDF even if one or other of them might be eligible given the circumstances surrounding the non-disclosure and the claimant's conduct in the aftermath) or alternatively the claimant's wife was not eligible, and the claimant would not have taken advantage of the LDF if she could not have done so since that would have created the prospect of a COP 9 investigation against her that would have, or was likely to have, defeated any benefit that might accrue by the claimant registering for and participating in the LDF.

6. Alternatively, the defendant maintains that the claimant (and his wife) did not rely on any advice given to him by Mr Byrne but instead acted on the advice of Kinsella Tax Investigations Limited ("Kinsella"), a firm of apparently competent specialist tax investigation advisors retained by the claimant, during the currency of his retainer of the defendant, in making a voluntary disclosure coupled with a request for investigation under COP 9. Kinsella were not asked for, and did not give any advice concerning the availability of the LDF. The claimant maintains that this was because he had received advice as to how to proceed in relation to the LDF from Mr Byrne and that he acted on that advice by instructing Kinsella to make a voluntary disclosure on his behalf and seek HMRC's agreement to investigate under COP 9.

7. Causation is denied on the basis that the LDF was never available to the claimant or his wife or their affairs could not be manipulated to make the LDF available to them. Loss and damage is denied on the basis that the LDF was not available to the claimant and his wife or was not suitable or appropriate for someone in their position. This is essentially a repetition of the points relied on in relation to liability and thus stand or fall with my conclusions on those issues. In relation to the alleged increased costs, it is denied that the additional costs were caused by proceedings using the COP 9 route as opposed to the LDF route but were caused by a protracted and hopeless attempt to obtain all the advantages of the LDF route by negotiation with HMRC notwithstanding that he was not eligible for that route due to him and his wife having been accepted for investigation under COP 9.

8. The issues that matter therefore are whether:

   (a) Mr Byrne advised the claimant that the LDF route was one that he should not seek to take advantage of, or had said merely that he would make enquires about that issue;

   (b) The LDF was available to the claimant or could lawfully be made available to him;

   (c) The LDF was available to the claimant's wife or could lawfully be made available to her;

   (d) The claimant would have taken advantage of the LDF if his wife could not;

   (e) In authorising Kinsella to instigate a COP 9 declaration, the claimant

was acting on the advice of the claimant or Kinsella;

(f) In the circumstances that surrounded the claimant's non-declaration, the claimant could reasonably have been advised to take advantage of the LDF, or would have taken advantage of it, even if it was technically available to him or could be made technically available to him; and

(g) whether the losses claimed have been proved to have been caused by the alleged breach of duty.

9. The trial took place between 6 - 10 March 2017. I heard oral evidence from the claimant, Mr Stephen Besford, the tax investigation specialist who ultimately acted for the claimant and his wife, and Mr David Byrne, the partner in the defendant whose advice is under challenge in these proceedings. Mr John Cassidy gave expert tax investigation evidence. Mr Cassidy was appointed by the claimant. The defendant did not rely on expert evidence.

The Facts

Credibility

10. An assessment of the facts is made difficult by the fact that the claimant has been dishonest (as he admits) by evading his tax liabilities over many years and on a significant scale by causing earnings that should have been declared (and which he knew should have been declared) to tax in the United Kingdom to accumulate in up to 14 bank accounts with HSBC (and its predecessor bank) and then Barclays at their respective Geneva branches.

11. That dishonesty was aggravated by an attempt to "*repatriate*" those undeclared earnings to the UK over several years. This process involved the claimant raising invoices in the name of an English registered company controlled by him through which he offered apparently *bona fide* consultancy services to foreign registered entities controlled by him not merely for sums that could legitimately be invoiced for but also very substantial additional sums that had accumulated in the various offshore accounts that were nominally the accounts of those foreign registered entities. That company then paid tax on the whole sum received as if it was the legitimate income of that company. Whilst the whole of the sums so received were declared to tax by the company that of course is not the point since (a) the sums concerned were subjected to Corporation Tax at the then prevailing rate rather than Income tax at the rate prevailing when the income should have been disclosed, (b) the sums concerned should have been declared many years earlier and tax paid at that stage and (c) the process of "repatriation" involved false accounting, which is unlawful on any view. This process was therefore a calculated and dishonest attempt maintained over several years to obtain the benefit in the UK of the sums that had been accumulated offshore by disguising what in fact was happening, and thus the fact of non-declaration, so as thereby to continue to avoid paying what was legitimately due.

12. Aside from this dishonesty (that is tax evasion and false accounting) the evidence satisfies me that the claimant also evaded (or attempted to evade) VAT once the matters with which these proceedings are concerned started to be addressed by the claimant. This he did by causing Kinsella to invoice the English company for its services, notwithstanding that those services were rendered principally to the claimant, so as to enable the company to reclaim the VAT that would otherwise have had to be paid by the claimant. He invited Mr Byrne to invoice the company as well and for the same reasons, although Mr Byrne did not accede to that invitation. Whilst I accept that the company had the benefit of some advice for which payment was due, the principal recipients of the advice were the claimant and his wife, neither of whom

were registered for VAT. It was this factor that in the end caused the claimant to abandon the fees element of his claim since either the loss was that of the company and thus not recoverable by the claimant or it was truly the loss of the claimant in which case the company would need to disclose that VAT had wrongly been withheld. This conduct further significantly adversely impacts upon the credibility of the claimant as a witness.

13. Given these issues concerning the honesty of the claimant, it necessarily follows that I need to be very cautious before accepting the oral testimony of the claimant save where it is corroborated or is admitted or is against his interest. It necessarily follows that reaching conclusions as to the facts depends principally on testing the claimant's oral evidence against the contemporaneous documentation that is available and inherent probability save where that evidence has been admitted or is against his interest.

14. I am satisfied that Mr Besford was an honest witness whilst being uncompromisingly supportive of the claimant as might be expected given that he acted for him for several years in relation to the COP 9 investigation.

15. Mr Byrne is a more difficult witness to assess, because (a) in answer to several questions he said that he was unable to recall the position, (b) he did not keep any attendance notes relevant to any of the four critical meetings that he had with the claimant, (c) created a time record many weeks after the critical meetings but without having kept any earlier records from which the time record was derived, and (d) did not open a file until well after he first started to advise the claimant. Mr Byrne's explanation for not keeping attendance notes, contained in paragraph 22 of his statement in these proceedings was that he does not "*... make any record of certain elements of instructions when attending clients, for a variety of good reasons, especially when a client admits criminality and/or provides details of the criminal act or acts ...*". That explanation self-evidently creates a question mark as to the credibility of his uncorroborated evidence. In any event, the explanation offered is partial – it does not explain at all why attendance notes in respect of instructions not consisting of admissions of criminality were not kept. Thus, there is no explanation offered as to why there are no such attendance notes.

16. These factors lead me to conclude that the safest course is to test the oral evidence of each of the witnesses who gave evidence during the trial wherever possible against contemporary documentation, admitted and incontrovertible facts, and inherent probabilities. This is entirely conventional - see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 431 – and is particularly appropriate where (as here) the allegations relate to events that occurred years ago and the oral evidence is based on recollection of such events - see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 *per* Leggatt J at ¶15-22. It was this factor that led Leggatt J to observe at ¶22 that:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular

> conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

17. I respectfully agree with that approach, which is the one that I adopt in this case. I would add only this: where inherent probability suggests that there should be contemporaneous documentation relating to events the occurrence of which is disputed, the absence of such material may assist in resolving such disputes if there is no explanation offered for the absence of such documents that is either admitted or against the interests of the party advancing that explanation or is corroborated by other credible evidence.

The Background

18. The claimant was not at any time tax resident in any jurisdiction other than the UK and thus he was under an obligation to declare his worldwide income to tax and pay income tax at the applicable rate as and when assessed to tax on that income by HMRC. This is not in dispute.

19. It is also common ground that the claimant was first employed, then partly employed and partly self-employed, then self-employed, in what he describes as a business consultancy role. Initially be was employed by a company called Jones Consultants Limited, an English registered company controlled by Mr Mohammed Safadi, who the claimant describes in his witness statement as being "*…a very successful Lebanese business man …"*. In addition to his employment, the claimant operated his own business consultancy operation initially using the trading name "*Lodge Consultants*". The claimant operated this business as a sole trader until 31 March 1998 and thereafter down to 31 March 2004 in partnership with his wife. In October 2003, the claimant started carrying on his own consultancy business using a limited liability company registered in England called Coach House Consultants Limited ("CHC"). Over time the business that had hitherto be carried on in the name of Lodge Consultants was carried on in the name of CHC. Some or all the fees generated by these businesses were credited to the accounts maintained with the Geneva branches of first HSBC and then Barclays.

20. A major part of the activity carried on by the claimant while employed by Jones Consultants Limited concerned a project for the supply of planes and other equipment to the Royal Saudi Arabian Air Force known as the Al Yamamah Project ("the Project"). The Project was concerned with the supply of a very large quantity of high value aeronautical products to the Kingdom of Saudi Arabia by a number of major UK based companies. It is common ground that the means by which some of those companies were able to win Project business was the subject of a Serious Fraud Office ("SFO") enquiry. That enquiry was concerned with whether bribes had been paid to Project decision makers via third parties and ended without any charges being made against anyone. Mr Safadi was one of the individuals whose activities were the subject of investigation by the SFO.

21. In late 1992 the claimant and his wife and family moved to Saudi Arabia because it had been thought that such a move would enable the claimant to carry on his activities in relation to the Project more effectively than if he continued to be based in the UK. The claimant and his wife were resident in Saudi Arabia from late 1992 to mid-1993. It was following the claimant's move to Saudi Arabia that the Swiss bank accounts were established. At paragraph 30 of his statement in these proceedings, the claimant maintains that he told Mr Byrne during the initial meeting between them on 26 March 2010 that the accounts were set up "*… with Mr Safadi's encouragement and help to facilitate making payments to third parties"*. It is this point that forms the basis of an

allegation by the defendant that some or all the money credited to the offshore accounts was the proceeds of crime within the meaning of s. 340 of the Proceeds of Crime Act 2002. The potential significance of that allegation is something I return to later in this judgment but in summary the defendant alleges that because this was so, either (a) the claimant was not eligible for registration under the LDF or (b) would not be able to take advantage of the immunity from prosecution provided for by the LDF, and in either event, therefore could not reasonably have been advised to register for the LDF.

22. Following the return of the claimant and his wife to the UK in mid-1993, the accounts remained open. In 2004, Jones Consultants limited ceased to trade but the claimant continued to be paid as a consultant by Mr Safadi. The difference was that the fees paid to him for his services were credited to one or other of the Swiss accounts and not declared to tax.

23. In summary, therefore, by 2004, (a) the claimant was receiving the equivalent of a monthly salary from Mr Safadi that was being credited to the claimant's Swiss accounts, (b) he was causing and/or had caused some or all the fees that were due to CHC and Lodge to be credited to the Swiss accounts and (c) he was causing and/or had caused all the profits derived from a substantial fund management income being generated using funds that had been credited to the Swiss accounts to be credited to those accounts. All the income credited to the Swiss accounts should have been but was not declared for tax to HMRC as income received by the claimant and taxable as such. The precise sum that should have been but was not declared to tax does not matter but the claimant summarises the total concerned in paragraph 5 of his witness statement at £1,769,759.

24. HMRC has for some years been concerned to recover unpaid tax together with penalties and interest from tax payers who have failed to disclose all their income as and when they should have done. To encourage such tax payers to declare their hitherto undeclared income voluntarily HMRC created several schemes under which such tax payers could disclose such income, and pay interest and a fixed penalty that was less than might be imposed had HMRC discovered the existence of that income. Two such schemes were identified during the evidence being first the Offshore Disclosure Facility ("ODF"), which operated during 2007, and the New Disclosure Opportunity ("NDO"), which operated between 1 September 2009 and 12 March 2010. Both these schemes applied to offshore income wherever these schemes were held and capped penalties to 10% of the sum disclosed.

25. On 9 August 2009, HMRC announced the LDF. The origins of this scheme lie in a Memorandum of Understanding between HMRC and the Government of the Principality of Liechtenstein ("MoU"). In summary, the scheme required all financial intermediaries based in Liechtenstein to identify any customer or client that intermediary considered to be a UK tax payer, to notify that person of that fact and require that person to produce within a fixed period a certificate to be obtained from HMRC certifying that the person concerned was not liable to UK tax, failing which facilities were to be withdrawn by the intermediary from the person concerned. The obvious purpose behind this provision was to stimulate tax payers to voluntarily disclose undeclared income to HMRC. Such tax payers were provided with a special disclosure facility by HMRC set out in the MoU under which the penalty payable was limited and the period of assessment was limited as well so that in effect there was a limitation period created in relation to income received prior to the relevant cut-off date. Having registered and disclosed under the LDF, ultimately the tax payer would receive the relevant certificate.

26. There were several qualifications to the scheme. One concerned accounts "*... outside the UK or Liechtenstein which ... was opened through a UK branch or agency of that*

bank …". Tax payers were not entitled to the shorter limitation period or the fixed penalty in relation to such accounts. This exception did not prevent registration under the scheme however and, in any event, would not have affected the claimant since the offshore accounts had been opened without the intervention of a UK branch of the banks concerned and a Liechtenstein account could have been opened by him through the Geneva branch of Barclays. This is not in dispute. The significance of this point is something that I explain further below.

27. By Schedule 1 to the MoU, the LDF was made available to all persons with "*… a beneficial interest in relevant property …"* who at any time after 1 August 2009 had a residential address in the UK or were resident in the UK for tax purposes. "*Relevant property"* for these purposes was defined as including a bank account in Liechtenstein. Paragraph 2 of Schedule 7 to the MoU established that a person eligible to participate in the LDF was eligible to participate "*… with respect to all and any assets and income in respect of which UK tax may apply …"*. Thus, the effect of the scheme was that providing the tax payer had a bank account in Liechtenstein that had not been opened through a UK branch or agency of the bank in question, and registered under the LDF, that tax payer was entitled to the benefits of the scheme in relation to undeclared income wherever it was located if otherwise the scheme applied to that tax payer. It followed that a UK tax payer who had undeclared offshore assets could open an account in Liechtenstein thereby triggering the notification procedure identified above and then disclose all his or her offshore assets wherever in the world they were situated. Such a tax payer would be able to take advantage of the cap on penalties and years investigated provided that the Liechtenstein bank account had not been opened through a UK branch or agency of the bank in question.

28. Finally Paragraph 9 of Schedule 7 to the MoU, provided that an eligible tax payer who made "*… a full accurate and unprompted disclosure to HMRC under the disclosure facility …"* would not be subject to criminal investigation by HMRC for a tax related offence "*… unless the source of the funds from which the relevant person has benefitted or may benefit constitutes "criminal property" within the meaning specified in section 340 of the Proceeds of Crime Act 2002 …"* other than property which was criminal property solely as the result of illegal tax evasion. It is important to note the limited scope of the paragraph. Its qualifications apply only to the immunity from prosecution. It has no application to eligibility to register under the LDF.

29. The LDF commenced on 1 September 2009 (or 1 December 2009 for users who did not already own a Liechtenstein asset) and was initially planned to run until 31 March 2015. It fixed the penalty payable at 10% with a start date for calculating tax due of 5 April 1999 with liabilities prior to that date being ignored and a guarantee of no prosecution for tax offences. As Mr Cassidy puts it in paragraph 2.12 of his report, these advantages led to the LDF becoming "*… the preferred route to COP 9 where offshore assets existed …"* However, "*… once a tax payer had been notified of a COP 9 investigation the LDF could not be accessed"*.

The Events of 2010

30. In March 2010, the claimant learned from his Barclays account manager in Geneva of the unauthorised removal of a large quality of data from HSBC by a former employee. The concern was that data would include data relating to the HSBC accounts opened by the claimant in the names of himself or in the joint names of himself and his wife. The claimant discussed this with Mr Safadi, whose brother in law worked for HSBC in Geneva. Following enquiries by Mr Safadi of his brother in law, he learned and reported to the claimant that whilst no financial data had been lost, the names of account holders had been taken and that was likely to include the claimant and his wife.

31. The claimant's evidence was that Mr Safadi had been heavily implicated in the SFO investigation into the Project, that investigation had only recently come to an end and Mr Safadi was concerned that any enquiry into the claimant's offshore accounts would lead to further enquiries concerning his role in the Project. Mr Byrne is and was an experienced "white collar" criminal law expert who had had acted for Mr Safadi in relation to the SFO's investigation of the Project. Although Mr Byrne was not able to confirm or deny the nature of his instructions from Mr Safadi, since to do so would have breached his duty of confidence to Mr Safadi, I accept the claimant's evidence on this point since there was no reason for him to mislead me on this issue. The claimant's evidence was that he had come to know Mr Byrne because it had been thought that the SFO would attempt to interview the claimant as part of its investigation into the role of Mr Safadi in the Project. I accept this evidence as well since again there was no reason why the claimant would seek to mislead me on this issue. I accept therefore that it was in that context that Mr Safadi recommended that the claimant instruct Mr Byrne in relation to the offshore accounts, and why the claimant instructed Mr Byrne. It was also why the claimant at least hoped to obtain some financial support from Mr Safadi concerning his retainer of Mr Byrne, the disclosure of the offshore accounts to HMRC and the subsequent investigation. That hope came to nothing however. Following his conversation with Mr Safadi, the claimant contacted Mr Byrne by phone and they arranged to meet at midday outside Southwark Crown Court on 26 March 2010.

The Retainer of the Defendant by the Claimant

32. The claimant retained the defendant no later than 26 March 2010, being the date of the first meeting between the claimant and Mr Byrne. The retainer came to an end on receipt by the defendant on 17 September 2010 of a letter dated 13 September 2010 from the claimant terminating the retainer. I address the detail surrounding this correspondence later in this judgment. The scope of the retainer is something I return to when considering breach below.

33. There were four meetings between the claimant and Mr Byrne, being meetings held on (a) 26 March 2010, (b) 31 March 2010, (c) 28 April 2010 and (d) 24 June 2010. As I have said, no attendance notes were kept by Mr Byrne concerning any of these meetings, nor were any letters sent by him to the claimant after any of the meetings other than those that were sent after the 24 June meeting to which I refer further below. The claimant wrote out handwritten agendas for the meetings in a day book kept by him. The day book has been disclosed. The claimant's notes consisted of bullet point reminders to him of issues that he wished to discuss. They were not circulated beforehand or otherwise shared with Mr Byrne. On occasion, the claimant wrote notes concerning what was said during the meetings but those notes were not anything other than partial and skeletal. It is inherently likely in those circumstances that any such notes would record matters of particular significance to the claimant.

The 26 March 2010 Meeting

34. The claimant prepared a day book note prior to the meeting as a reminder of what he wanted to discuss. Mr Byrne does not dispute that the claimant came to the meeting with such a note or that he referred to during the meeting. The note is non-specific in terms of the advice being sought but includes at item 2 "*Likely events to come as it is now"* at item 3 "*Possible explanations"*, and at item 4 "*How an enquiry would unfold – safeguards and approach"*. There is a reference to "*... consequences – possible and likely"* in item 6 and to the house in item 8. I have little doubt that there was a discussion during this meeting about the financial consequences that would follow from an HMRC investigation. The claimant maintains that Mr Byrne told him that "*... there were no current tax amnesties available to me as one which had been extended had just finally expired weeks before hand."*. It is clear that there was some discussion

of voluntary disclosure even at this stage because Mr Byrne alludes to that in paragraph 36 of his statement. Although Mr Byrne maintains that the claimant's assertion that Mr Byrne told him there were no amnesties available is wrong, I consider that to be mis-recollection because it is inconsistent with what Mr Byrne says in paragraph 39 of his statement that he told the claimant about the ODF and NDO and that they "*… had recently expired"*.

35. Although Mr Byrne maintains that the claimant asked about the LDF at this meeting and that he advised that eligibility was technical and that if he was considering disclosure using that route he should take specialist advice on the issue, I think that is mistaken recollection and I reject it. I explain why below when considering what took place at the meeting between the claimant and HSBC officials on 26 April 2010.

36. There is an issue between the parties as to whether and if so when Mr Byrne advised the claimant to consult a specialist tax accountant, and for what purpose. Given that the issues discussed at this initial meeting included likely liabilities in terms of penalties and interest and the ability of the claimant to meet a back-tax claim, I have little doubt that Mr Byrne would have advised the claimant to consult a specialist accountant to calculate what was owed. This is obvious advice to give if as I find was the position, the claimant was concerned that the effect of an assessment following a voluntary disclosure would be to destroy him financially.

37. I think it is also probable that Mr Byrne advised the claimant that he was not the appropriate person to make a voluntary disclosure on behalf of the claimant given that he was a well-known criminal defence solicitors who to the knowledge of HMRC acted on behalf of those charged or likely to be charged with criminal offences arising out of tax evasion. Mr Byrne's concern was that if he was to make the voluntary disclosure on behalf of the claimant that might stimulate HMRC to look at the possibility of a criminal investigation more closely than it would otherwise. This is likely to be advice that Mr Byrne would have given because part of the context of the meeting was the claimant's concern about a criminal prosecution, about the criminal penalties that might be imposed if he was found guilty and how a prosecution might be avoided.

38. The claimant maintains and I accept that Mr Byrne advised him to find out the extent of the information that HSBC had about the claimant and his wife. I am not persuaded that such advice was given at this meeting however. Had it been, I think it highly likely that the claimant would have acted upon it very shortly after it had taken place. In fact, he did not contact HSBC until 26 April 2010. I reach that conclusion because on Mr Byrne's evidence the claimant was very troubled by the position he found himself in and in those circumstances, it is inherently probable that the claimant would have acted speedily on the advice that he was given. That he would have so acted is demonstrated by his conduct to which I refer below.

The 31 March 2010 Meeting

39. The claimant's evidence is that there was a discussion about obtaining information at a second meeting between the claimant, Mr Byrne and another then partner in the defendant firm called Mr Andrew Benson. That meeting took place on 31 March 2010. It is common ground that it took place in a public house. There was a dispute as to which one. That dispute was entirely immaterial other than perhaps for demonstrating or attempting to demonstrate who had the clearer recollection concerning the issues that arise in this case. In the end the dispute did not assist even at that level. The claimant says that it was at that meeting that he was advised to obtain from HSBC all the information held by HSBC concerning the claimant and his wife. I accept that evidence since it was at the first practical opportunity thereafter that the claimant arranged a meeting with and met the Geneva based officials of

HSBC being the meeting referred to below. The claimant also says that during his train journey back to the North of England on 31 March he was advised by a close friend of his that another friend had been assisted in his tax difficulties by Mr Kinsella, the principal of Kinsella. However, the claimant did not contact Mr Kinsella until 25 May 2010.

The 26 April 2010 HSBC Meeting

40. I accept that there was a meeting at the Geneva offices of HSBC on 26 April 2010 attended by the claimant, Ms Alexandre Davies and Ms Isabelle Dufour (an HSBC lawyer) on behalf of the bank. The claimant has a note concerning the meeting in his day book that has been disclosed. It is not suggested that this is anything other than an authentic document. I find that items 1-8 at the top of the right-hand page of the note record items that the claimant planned to discuss at the meeting. Items 1 to 4 reflect advice given by Mr Byrne to find out the extent of the information held by HSBC concerning the claimant and his wife. The notes that appear in the claimant's note book below item 8 on the right-hand page and on the left-hand page are notes taken by him during the meeting.

41. I find that it was at this meeting that the claimant requested Ms Davies to supply copies of all statements available and that she promised to supply them. There was a dispute as to whether she did so directly or via a lawyer in Switzerland but that dispute is not material. That the claimant should request this material is consistent with him having received advice from Mr Byrne to obtain that information and that had received such advice during the meeting with Mr Byrne and Mr Benson on 31 March 2010. As I have said already, had that advice been given earlier then I conclude that it is probable that the claimant would have acted on it prior to 31 March given his concern about the loss of data and the prospect of it coming into the possession of HMRC. I conclude that the advice to obtain information from HSBC was given at the 31 March meeting because it was immediately following that meeting that the meeting with HSBC was arranged.

42. The claimant says and I accept that during the HSBC meeting Ms Defour advised him that he might be able to register under the LDF and that this was the only viable "*amnesty*" open to the claimant. The word "*amnesty*" is used by all parties to mean schemes such as the LDF. I accept this evidence because it reflects what is set out in the notes taken by the claimant during the meeting. The notes record "*... Liechtenstein – 10 years - + interest + essentially 10% ...*" I think it highly likely that this was the first time that the LDF was mentioned by or to the claimant. I reach that conclusion for the following reasons. First, had the claimant been aware of the LDF at that stage, and had it been an issue that he wanted to discuss with the HSBC officials, it is more probable than not that there would have been a note to that effect inserted into the agenda prepared by him for the meeting. There is no mention of it at that point.

43. Secondly, there is no evidence of the claimant taking advice from anyone other than Mr Byrne down to the point when the meeting took place, other than in passing from Mr Benson at the 31 March meeting. It is highly unlikely that the claimant would have known about the LDF by the time of the initial meeting in March between him and Mr Byrne given that on any view it was Mr Byrne who first raised the issue of amnesties. Had the claimant raised the LDF issue then it is probable that it would have appeared in his agenda for that meeting. As I have said it is not mentioned.

44. Thirdly, if he had been sufficiently aware of the LDF to ask Mr Byrne about it during their first meeting, and if Mr Byrne had advised him to seek specialist advice about it from someone else, it is implausible that he would have discussed the matter further with the HSBC officials in any detail, particularly since he had only recently been supplied with the name of Kinsella as a specialist in such matters. Had he been

minded to seek such advice from HSBC it would have appeared in his agenda for the HSBC meeting. There is no mention of the issue there. As I have said the notes that the claimant recorded of meetings were skeletal and limited to matters that he considered significant. I conclude that he recorded what he did about the LDF in his notes of the HSBC meeting because it was new information as far as he was concerned and significant because as the note records the LDF capped both the number of years investigated and the amount of any penalty that would be imposed.

45. Fourthly, had Mr Byrne advised the claimant to seek specialist advice concerning disclosure either by reference to the LDF or at all, in my judgment the claimant would have done something about it. As Mr Byrne emphasised during his evidence and I accept, the claimant was very concerned that the effect of voluntary disclosure would result in a liability inclusive of penalties and interest that would leave him bankrupt or close to bankrupt. Had the claimant thought there was any possibility of capping his liabilities by resorting to the LDF, and had been told by his solicitors to seek independent specialist advice in relation to the availability of the LDF, he would have acted on such advice almost immediately much as he fixed the meeting with HSBC immediately following the 31 March meeting. That is even more the case given that he was supplied with the contact details for Mr Kinsella on 31 March and thus had access to such advice.

46. Finally, the notes made by the claimant prior to his meeting with Mr Byrne on 28 April referred to below support this analysis. Had the LDF already been discussed and advice given to the claimant to seek specialist advice then it would not have appeared in those notes or been discussed further because the claimant would have known that the response would have been the same – to seek specialist advice. This further supports my conclusion that the LDF was not discussed between the claimant and Mr Byrne prior to 28 April. In fact, as Mr Byrne said in his oral evidence referred to in detail below, the principal topic of discussion on 28 April between him and the claimant was the LDF. That would not have been so had the issue been mentioned during the first meeting and had Mr Byrne advised the claimant to seek specialist advice concerning its availability. Had that been so, and had the issue been raised again, then Mr Byrne would simply have repeated what he says he advised initially. In reality it is more likely than not that the claimant would not have mentioned the issue again or would have done so only in passing and would have sought the specialist advice that Mr Byrne maintains he advised the claimant to seek.

The Meeting with Mr Byrne on 28 April 2010

47. This meeting was the subject of a day book pre-meeting note prepared by the claimant. It contains, as item 3, "*Discuss Liechtenstein"*. Consistent with that, the claimant's pleaded case is that at the meeting on 28 April Mr Byrne informed the claimant that he would consult with a colleague as to the merits of the information that he had received from HSBC concerning the LDF. In his statement, the claimant's evidence is different. He says there that Mr Byrne told him "*… he had consulted with a friend on the current amnesty situation (i.e. the Liechtenstein Disclosure Facility) and that he did not advise this course of action as it would antagonise HMRC and could worsen my plight. He said that he would again raise the specific advice from HSBC … and revert to me in due course but that he did not imagine the advice would vary on this …"*. I do not accept that the first part of this is correct because (a) this part of the claimant's evidence is inconsistent with his pleaded case; and (b) for reasons that I have explained I conclude that it is probable that the first mention of the LDF so far as the claimant was concerned was by the HSBC officials at the 26 April meeting. If that is so, then it is highly improbable that Mr Byrne would have had any reason to consult anyone about the applicability of the LDF prior to the 28 April.

48. Mr Byrne's pleaded case is that the claimant did not tell him during the 28 April

meeting that he had been advised by HSBC that he could register under the LDF – see paragraph 23(3) of the Defence – and denied telling the claimant that a disclosure utilising the LDF would antagonise HMRC – see paragraph 23(5) of the Defence. In his statement, Mr Byrne maintains that he told the claimant (again) to consult a specialist accountant "*... to calculate his tax liabilities ...*" but denies saying that he would consult a colleague about the applicability of the LDF. He suggests as one reason why this might be so that the claimant informed him only that HSBC had outlined some of the features of the LDF and thus the issue of eligibility did not arise. He adds that he is "*fairly sure*" that he said he would consult a contact of his only at the final meeting between the parties, which took place on 24 June 2010.

49. During his oral evidence, Mr Byrne accepted that the LDF issue was discussed on 28 April – see T3/232/17 where Mr Byrne said in an answer to a cross examination question, "On *28 April, he was telling me what HSBC had said to him about the LDF. That was the principal part of that conversation."* That being so, I conclude that Mr Byrne is mistaken when he says in his statement that the claimant informed Mr Byrne on 28 April only that HSBC had outlined some of the features of the LDF as he asserts in his statement. I accept that read literally, this is the effect of the manuscript note that the claimant wrote in his day book during the meeting with HSBC officials on 26 April. However, there would be no purpose to such a discussion between the claimant and the HSBC officials unless there was a discussion as to at least the potential eligibility of the claimant and his wife to declare using that scheme and it is even more obvious that there would be no purpose in that issue being discussed between the claimant and Mr Byrne other than in a context that included considering whether the claimant and his wife were or might be eligible to take advantage of the LDF. Whilst a conclusion must await consideration of the events that followed, the evidence I have referred to so far supports a finding that there was a full discussion about the LDF issue at the meeting and that being so it is highly likely that the 28 April discussion would have ended with a conclusion concerning future action of some sort. That would either be advice to seek advice on the issue elsewhere or that Mr Byrne would seek advice from others. For reasons that I set out below, I consider it more probable than not that the issue was left on the latter basis not the former.

First Contact with Mr Kinsella

50. The claimant maintains that he first contacted Mr Kinsella on or about 25 May 2010 by phone. The claimant maintains that nothing much came of this conversation other than that Mr Kinsella said he could assist the claimant if required and that generally the best solution was to disclose everything to HMRC as soon as possible. I accept this evidence because it is consistent with what appears to the attendance note prepared by Mr Kinsella following a meeting between him and the claimant that took place on 1 July 2010 and to which I refer in more detail below.

51. There is no evidence that suggests the availability of the LDF was discussed by the claimant with Mr Kinsella at this or any other time. Had Mr Byrne advised the claimant to seeks specialist advice concerning the availability of the LDF at the meeting on the 28 April, it is close to inconceivable that the claimant would not have (a) spoken to Mr Kinsella much sooner than in fact he did and (b) mentioned the LDF during his initial discussion with Mr Kinsella, if only to ascertain whether Mr Kinsella could provide advice concerning the availability of the LDF as a route for disclosure. That he did not is consistent with him expecting further advice from Mr Byrne concerning the issue. As I have said, it is common ground that the LDF issue was not discussed between the claimant and Mr Kinsella at any stage. Mr Byrne maintains and I accept that throughout this period the claimant was in two minds as to whether to make any disclosure because he was concerned that a disclosure might result in him and his wife losing everything they had. I accept that was very likely to have been a concern for the claimant. That being so, it is almost inevitable that he would have

mentioned the LDF at least in passing to Mr Kinsella if he had been advised by Mr Byrne to seek specialist advice in relation to its availability, because the claimant had been told at the meeting he had with the HSBC officials that the LDF was the only means available by which his liability might be capped.

52. The claimant maintains that his first meeting with Mr Kinsella took place on 1 July 2010. I accept that this is probably the position because that is consistent with an attendance note kept by Mr Kinsella, which has been disclosed. Mr Kinsella did not give evidence in these proceedings but no one suggests that this attendance note is other than authentic. There is nothing within the attendance note that suggests anything of substance had been discussed during the earlier phone call. This provides further support for the conclusion I have reached already that there was no discussion between the claimant and Mr Kinsella on 25 may concerning the availability of the LDF.

The 24 June Meeting

53. There appears to be a difference between the parties as to whether this meeting took place on the 21 or 24 June 2010. It does not matter which. There is no clear evidence that enables me to resolve that either way. However, I think it is more likely to have been the 24 June if only because there is a reference to a phone call between the claimant and Mr Byrne on 22 June which I think is likely to have been before, and about the arrangements for, the meeting since no one suggests there was any discussion between them after the meeting. For these reasons, I refer to the meeting hereafter as having taken place on 24 June.

54. It is common ground that this meeting started with a meeting at the claimant's home attended by the claimant, his wife and Mr Byrne. After that meeting had been completed, the claimant drove Mr Byrne to another meeting he had in Liverpool and during that journey further discussions took place between the claimant and Mr Byrne. The claimant's pleaded case is that during the meeting at the house, Mr Byrne advised that the facility for limiting the penalty payable to 10% was no longer available. It is alleged that this advice was wrong because the LDF was available. However, in paragraph 32 of the Particulars of Claim, the claimant alleges that during the journey to Liverpool Mr Byrne advised the claimant that "*... he would be ill advised to make use of the LDF as to do so would almost certainly have a detrimental effect upon his position in relation to HMRC"*. This suggests that if what is alleged to have been said at the claimant's home was in fact said, it referred to the ODF and/or the NDO and not the LDF.

55. The claimant's statement confirms what was said at the claimant's home as including those matters referred to in the pleading. In paragraph 45 of the statement, the claimant maintains that during the drive to Liverpool, Mr Byrne told him that "*... he had taken further advice from his colleague who reiterated that he did not advise any attempt to utilise the ..."* LDF. He added that Mr Byrne advised that he should write a letter from him to the claimant "*... which laid out the position so far and showed my willingness to both own up and cooperate with HMRC in every possible way"*. The claimant alleges that Mr Byrne said the letter could remain on his file and that he would give the claimant a copy when next they met. Finally, the claimant maintains that Mr Byrne was going to take some bank account statements that by now had arrived from HSBC, that he would show them to a colleague who would "*... assess the magnitude of the likely case ..."* and that thereafter "*... we would take a decision when and how to commence voluntary disclosure to HMRC"*. At trial this version of events was slightly altered by the claimant. During his cross examination, the claimant said the advice that he received from Mr Byrne was:

"The reason I went into COP 9 was because I had got advice

> that that was the way to go forward to make a disclosure; and my last meeting with Mr Byrne, we resolved that we would do that because there was really no other alternative."

56. Mr Byrne's evidence concerning this meeting as set out in his statement in summary is that he told the claimant and his wife that the claimant needed to decide whether to disclose and that he needed to take specialist advice. He denies any discussion concerning limits on the penalty payable for non-payment of tax, and added that during the trip to Liverpool, the claimant said that he thought he ought to make disclosure and that he and Mr Byrne agreed that Mr Byrne should write to him recording that wish and summarising the advice that he had given. In relation to the delivery of the letter, Mr Byrne said the claimant told him to keep the letter in his office because the claimant did not trust the post that he would pick it up when next he was in London.

Relevant Events After 24 June 2010

57. On 1 July 2010, the claimant had his first meeting with Mr Kinsella. Mr Kinsella's attendance note records his advice that the claimant should make a voluntary disclosure and a letter of the same date from the claimant to Mr Kinsella recorded his agreement that Mr Kinsella should make an anonymised approach to HMRC based on advice from Mr Kinsella that this would provide protection in the event of any action being taken by HMRC after that letter was sent. Mr Kinsella wrote to HMRC as agreed by a letter to HMRC dated 5 July 2010. There was no discussion between Mr Kinsella and the claimant concerning the availability of the LDF or whether the claimant ought to take advantage of it.

58. A lengthy letter of advice was prepared by Mr Byrne following the 24 June meeting. The letter is dated 5 July 2010 and appears to have gone through at least two prior iterations in the form of drafts dated 30 June and 2 July 2010. This letter records Mr Byrne's advice that there had been two "*Swiss tax amnesties"* but that both had come to an end, that the principal benefit of the amnesty is that if used they limited penalties to 10% and that in the absence of an amnesty, HMRC would normally settle civilly and not prosecute if the tax payer made a "*... full voluntary disclosure ...".* In the event of a full voluntary disclosure, there would be interest to pay together with penalties of up to 50%. Although it does not say so, it is plain from the context that this is a reference to what was likely to happen following a voluntary disclosure followed by a COP 9 investigation by HMRC. The letter included the sentence that:

> "Whilst you made it clear that you wish to make a full voluntary disclosure, you must appreciate that HMRC will expect repayment in full. That is tax, interest and penalties …"

There is no mention in the letter of the LDF. The reference to the two "*Swiss tax amnesties"* is a reference to the ODF and the NDO. There is no mention of taking advice from a colleague concerning the availability of the LDF, nor any mention of the claimant having been advised to take specialist advice concerning the availability of the LDF. The letter was never sent to the claimant nor was it collected by him from the Defendant's offices. It only came to light in the circumstances that I refer to below.

59. I am satisfied that the letter was written on or about 5 July 2010. I am satisfied that it was not sent to the claimant at any stage prior to 17 September 2010 in the circumstances referred to below. Although the fact that the letter was not sent out after finalisation of the drafting process might suggest that it was not drafted on the date alleged, I conclude that it probably was, not least because it is common ground that there was a discussion between the claimant and Mr Byrne about such a letter during the journey to Liverpool on 24 June 2010. That it was not sent out is also odd but

again it is common ground between the parties that it was agreed that it would not be sent out although the parties give different reasons as to why that might be. It is not necessary for me to reach any conclusions as to which of the explanations is correct.

60. In my judgment, the significant point that emerges from the letter is that there is no mention either of the LDF or of Mr Byrne's intention to seek advice about that issue from a third party. That is significant in my judgment because it is consistent with Mr Byrne having said (as the claimant alleges) during the 24 June meeting that he had taken advice from a colleague and/or that he did not advise attempting to utilise the LDF. Had a solicitor of Mr Byrne's experience thought that this was a matter on which he was to obtain further information and report back then he would have said so in the letter, particularly in the context of his advice concerning the ODF and the NDO.

61. The explanation that Mr Byrne offers, namely that he did not refer to the LDF because "*... when I wrote the letter I had not made enquiries about it (which I knew was likely to be a complicated issue) and I did not want to say anything which was inaccurate, inappropriate or open to misconstruction"*, is a mis-recollection or perhaps an attempt to reconstruct but in any event I reject it on that basis. None of the points that he makes concerning inaccuracy would arise from a statement in a letter qualifying the advice that he gave concerning the ODF and the NDO by saying that he was obtaining advice or information concerning the availability of the LDF. In any event the letter was at least potentially misleading if the LDF issue remained a live issue between Mr Byrne and the claimant since, if the LDF was available for use by the claimant, the advice given in the letter concerning the incidence of penalties would have been misleading. It is noteworthy that the letter does not contain any mention either of the advice Mr Byrne says he gave at an earlier stage namely that the claimant should seek specialist advice in relation to the availability of the LDF. Given that the letter mentions the ODF and the NDO but not the LDF, it is consistent with Mr Byrne having advised the claimant during the car journey either that the LDF was not available to him or that if it was available the claimant should not take try to use it.

62. The advice contained within the letter concerning both ODF and NDO schemes is consistent with what the claimant says was said about them during the meeting at his home on 24 June 2010. The advice within the letter is also consistent with what the claimant says he was advised at the 24 June meeting at his home concerning the financial implications of voluntary disclosure. He says that Mr Byrne said he was exposed to penalties of up to 100% of the tax payable whereas the letter refers to penalties of up to 50% whilst noting that the maximum is 100%.

63. Mr Byrne maintains that at some stage between the date when the letter was finalised (5 July 2010) and 17 September 2010, he made contact with an old personal contact of his concerning the availability of the LDF. The time record purports to record such a discussion with a Mr Dover on 13 September 2010. The time recording does not record any earlier conversations with anyone concerning this issue. The difficulty about this document is that there are no notes or memoranda disclosed that support any of these entries. Mr Byrne was not sure who he had spoken to. I accept that he spoke to someone on or before 13 September and I conclude that it was probably Mr Dover if only because that was the person identified by Mr Byrne at a time that was much closer to the relevant events. However, who he spoke to is not material.

64. There is no material that sets this contact or discussion in context. There is no attendance note of it and thus no evidence as to whether the claimant contacted his informant because he had told the claimant he would do so or whether the contact was casual and unplanned. The terms of Mr Byrne's letter of 17 September 2010 referred to in more detail below suggests this contact occurred sometime in the first two weeks in September but it is not possible to be any more precise than that since neither the

claimant nor Mr Byrne has disclosed the text messages that both parties agree were sent by Mr Byrne to the claimant on or before 13 September. Given the substantial lapse in time between 24 June and the earliest date when the contact could have occurred, it is more likely to be the latter rather than the former. That this is the correct analysis is supported by the absence from the 5 July letter of any further enquiries concerning the applicability of the LDF or indeed of the LDF at all.

65. On 13 September 2010, the claimant wrote to Mr Byrne terminating the defendant's retainer, ostensibly because he was being represented by Mr Kinsella who was based locally. The terms of that letter do not matter. There is no evidence that this letter was transmitted by any other means than the post. Mr Byrne responded to this letter by a letter dated 17 September 2010. It was in the following terms:

> "Thank you for your letter of 13 September 2010, which I received this morning.
>
> When we last met I promised to send you a detailed letter, a copy of which is attached.
>
> The main reason that I have been trying to meet with your (*sic*) for the last couple of weeks is that I wanted to make you aware that, despite the fact that the Swiss tax amnesty has come to an end, in practice it is still possible to take advantage of the Liechtenstein tax amnesty. I wanted to discuss this and the details of it with you but no doubt you can raise that with your new advisor …"

The letter is odd in at least three respects. First, it refers to Mr Byrne having promised to send a detailed letter whereas in fact as is common ground it had been agreed that he would write it but not send it. Secondly, the letter purports to attach a copy of the letter, when, of course, the original was supposedly on file and presumably could have been sent with the 17 September letter. Thirdly, notwithstanding that Mr Byrne maintains that instructions had been given not to post the letter, that is precisely what he proceeded to do albeit in the form of a copy.

66. There was no immediate response to the letter until after the claimant received a further letter from Mr Byrne dated 29 September 2010 enclosing a fee note in respect of the defendant's charges to date. This resulted in a composite response by the claimant to both letters. The part concerned with fees is not material to this dispute. In relation to the letter of 17 September, the claimant said:

> "Finally, in reference to your comments in your letter of 17th September … firstly you say you have been advised that the Liechtenstein route is now an option to go down and that I should mention this to my advisor. If you recall our meeting in April, I specifically asked for your advice on the Liechtenstein route as the lawyer at HSBC had indeed suggested it as the only credible way forward – you specifically said that having consulted with your friend that this was not the way to proceed as the best it would do would be to aggravate an already bad situation and that HMRC will almost certainly take a very dim view of anyone trying to adopt this stance and penalise them accordingly. … "

In my judgment, this letter is helpful in attempting to resolve the factual differences between the parties that matter. As I have already concluded, the terms of the letter of 5 July supports the claimant's version of what occurred at the meeting on 24 June. In

my judgment, this letter from the claimant provides further support for that conclusion. I accept that the letter is one that was written by the claimant and to that extent might be regarded as self-serving. However, it was written at a time which is broadly contemporaneous with the events to which it refers and was written mainly as a response to the defendant's fee claims. There is no suggestion that it is being written as a means of generating evidence to support a claim that in the end was made many years after the events to which the letter refers.

67. That letter was responded to by Mr Byrne by a letter dated 30 October 2010. Although he expressed disagreement with some unidentified points, he did not specifically challenge the point made by the claimant concerning what happened at the April meeting nor did he assert (as he might have done in the circumstances) that the reason that he consulted his friend was because he had undertaken to do so during the final part of the June meeting. I regard this last point as a significant one – if what Mr Byrne says was correct then it would be a complete answer to the complaint made by the claimant set out above and thus to his objection to paying all the fees claimed by reference to that complaint. It would have taken no more than a sentence to set out the point.

68. Before reaching a conclusion on the factual issues that matter between the parties, it is necessary to consider a number of essentially forensic points made on behalf of the defendant.

69. A point that was made repeatedly was that Mr Byrne advised the claimant "*... to consult a specialist accountant ...*". In my judgment, this submission elides two separate points. It is undoubtedly the case that Mr Byrne advised the claimant to obtain specialist accounting advice concerning what was owed if a voluntary disclosure was made. It was only with this information that the claimant could work out the impact of voluntary disclosure on the wealth of himself and his wife. As I have said, this was a source of great concern to the claimant from the outset. The question concerning how much was owed was essentially an accounting question not a legal question. It was important from the outset initially in assisting the claimant to decide whether to make a voluntary disclosure – see for example paragraph 26 of Mr Byrne's statement. That this was the question that caused Mr Byrne to advise the claimant to seek specialist advice is apparent for example from paragraph 29 of his statement where he says expressly that he advised the claimant several times to consult a specialist accountant to calculate what he owed.

70. By the time of the third meeting on 28 April, Mr Byrne's advice in relation to accountants was focussed exclusively on the calculation of what was owed – see paragraph 64 of his statement, where he says that he advised the claimant to approach "*... a specialist accountant to calculate his tax liabilities so that he would know if he was able to pay the tax owing, which in turn would hopefully allow him to reach a decision whether to disclose*". Paragraph 67 says that Mr Byrne referred to the need for a specialist accountant to calculate the amount owing but does not suggest taking specialist advice in relation to the availability of the LDF. Indeed, the implication from paragraph 71 is that there was no discussion about the LDF at the meeting and only discussion about it at the final meeting. I do not accept that as accurate for the reasons that I have given but that is immaterial to the point I am now considering. It is not consistent with Mr Byrne having advised the claimant to seek specialist advice about the applicability of the LDF. Had he done so he would not have been saying (either at the third or final meeting) that he would consult a contact about how the LDF worked.

71. Whilst it is true to say that in his statement Mr Byrne also refers to advice that he says he gave to seek expert advice on whether and how to make a disclosure, I do not accept that this is a correct recollection. I reach that conclusion because (a) there are

no attendances notes, correspondence, emails or other communications that suggest any such advice was given, (b) it is not consistent with what he says that he said at either the third or final meeting namely that he would seek advice from a contact as to how the LDF worked, (c) it is not consistent with the carefully limited references to seeking expert advice concerning the amount of tax owed given at the April meeting, and (d) it is inconsistent with the terms of the 5 July letter which does not refer to, and contains no, such advice. That Mr Byrne had advised the claimant to seek specialist advice on this issue is inconsistent with the claimant's letter of 30 September 2010, the relevant part of which is quoted above and which is corroborated by the other matters summarised in this paragraph, and the failure of Mr Byrne to challenge the material part of the letter.

72. Although the defendant relies on the fact that the claimant consulted Mr Kinsella as corroborative of the suggestion that Mr Byrne told the claimant to seek specialist advice, I do not accept that is the proper inference to be drawn, particularly when weighed with the other factors to which I have referred. As is apparent from the chronology set out above, there was a delay between the date when Mr Kinsella was first identified to the claimant and the date when he first contacted him and the first contact took matters no further and certainly did not result in the termination of the defendant's retainer. The first meeting took place on 1 July and it focussed on making a declaration. The effect of that meeting is entirely consistent with the advice that I accept Mr Byrne gave (because it is obviously correct) namely that if the claimant decided to make a voluntary disclosure, he would be the wrong person to do it because he was known to HMRC as a criminal lawyer and thus might lead HMRC to consider more seriously than might otherwise be the case whether to proceed criminally. The letter from the claimant to Mr Byrne of 13 September 2010 does not refer at all to any advice from Mr Byrne to the effect that he ought to seek specialist advice elsewhere. That taken together with the other material referred to earlier in this judgment supports the conclusion that such advice was not given and was not being acted upon by the claimant in deciding to instruct Mr Kinsella. Indeed, the letter makes clear that in instructing Mr Kinsella he was avoiding having to use two advisors. This is entirely inconsistent with him instructing Mr Kinsella based on advice from Mr Byrne that he should go elsewhere. Whilst this letter was written by the claimant and thus must be viewed cautiously, it was written at a time when the parties were not in dispute and there is no reason to suppose that it did not reflect the reality as it was at that time.

73. The defendant relies on the contents of what purports to be a minute of the first COP 9 meeting attended by the claimant with Mr Kinsella. There is a dispute about the accuracy of this note but that is immaterial for present purposes. The relevant part of the note records the claimant as having said:

> "When asked Mr Shepherd explained that a friend of his had put him in touch with Kinsella Tax in Cheadle. Mr Shepherd's solicitor Mr David Byrne had recommended that he should engage a firm of specialist tax advisors to assist with his disclosure to HMRC. On his friend's recommendation, he chose Kinsella Tax."

This material must be read in the round with all the other material to which I have referred above. In my judgment, the part of the note relied on by the defendant is ambiguous. It could support the contention now advanced by the defendant namely that Mr Byrne had advised the claimant to seek specialist advice concerning the availability of the LDF, but on balance and viewed in the context of the other more contemporaneous material, I conclude that such is not its effect. I consider that this does no more than reflect in not very precise terms the advice of Mr Byrne that the claimant should consult a specialist accountant in order that the sums owed could be

calculated and that any disclosure should not be made by him. Such an understanding fits with the other material referred to above.

74. All this leads me to conclude that during the April meeting, there was a full discussion concerning the LDF, and that Mr Byrne said he would consult a contact of his concerning the merits of the claimant registering under the LDF. I conclude that it is probable that Mr Byrne also advised that such a step might antagonise HMRC if an attempt to register was made when he was not eligible. Mr Byrne accepts as probable that he gave advice to this effect – see paragraph 68 of his statement. Although the claimant says that he was advised that attempting to register might antagonise HMRC, I consider he is almost certainly mistaken about that. HMRC could not be antagonised by an attempt to register by someone was eligible to register. They might be however by someone attempting to register for a voluntary disclosure scheme that they were not eligible for, because such schemes carried several advantages for the discloser not available to other tax evaders.

75. By the time of the final meeting the one thing that is clear is that Mr Byrne had not spoken to his contact. I do not accept that there was no discussion about disclosure facilities at the meeting at the claimant's house. Such a discussion was well-nigh inevitable in the context of a discussion concerning the consequences of disclosure. According to the claimant, Mr Byrne told him during the drive to Liverpool that he had taken further advice from his contact "*... who reiterated that he did not advise any attempt to utilise ...*" the LDF. I reject the suggestion that Mr Byrne referred to earlier advice because as I have concluded already there had been no earlier occasion when Mr Byrne could have taken such advice or purported to share such advice with the claimant. However, I conclude that there must have been some discussion of the issue at some stage during either the home meeting or the car journey because of the way the issue had been left at the end of the April meeting. I conclude that it is probable that Mr Byrne either stated or implied that he had discussed the issue with his contact and that he did not advise attempting to rely on the LDF. This is consistent with what the claimant said in his letter of 30 September and it was not disputed specifically by Mr Byrne in his letter in reply.

76. In my judgment is highly improbable that the claimant would have proceeded as he did with Mr Kinsella if he was waiting to hear further from Mr Byrne on the basis that Mr Byrne was going to speak to his contact. Indeed, given the pressure that the claimant was under at the time, and given that he was anxious to minimise what he would have to pay, it is overwhelming likely that the claimant would have been pressing Mr Byrne for a response or he would have sought such advice from Mr Kinsella. That there was no such pressure, and no mention of the LDF by the claimant to Mr Kinsella, is consistent with the position being as the claimant described in in his letter of 30 September – that he closed the door on the LDF option based on the advice that he had received from Mr Byrne. I would add that there is no hint of a complaint from the claimant in his letter of termination dated 13 September 2010 about awaiting further advice concerning the availability of the LDF which supports my conclusion that this issue had been closed off by the end of the 24 June meeting.

77. In reaching these conclusions I make clear that I have not concluded and do not conclude that Mr Byrne has in any sense given dishonest evidence. Rather, I consider that his evidence is an honest but unsuccessful attempt to recall or reconstruct what occurred in circumstances where (a) he is and was a busy solicitor (b) who kept no attendance notes in relation to meetings that he no doubt considered to be preliminary in nature and which took place many years ago and (c) did not send any letters or emails which summarised the advice that he gave no doubt for similar reasons.

Breach

Scope of Retainer

78. The claimant's pleaded case is that the defendant by Mr Byrne was under a duty to advise the claimant as to his eligibility for the LDF, as to the operation of COP 9 and as to the likely outcome under each of those regimes. The defendant challenges this as properly setting out the scope of the defendant's retainer.

79. I agree that had Mr Byrne been conducting himself as he should have, a letter of retainer would have been generated that specified the scope of the retainer together with all relevant matters including fee structure and a complaints procedure. He chose not to do that. This makes ascertaining the scope of the retainer difficult. However, although generated well after being initially consulted, Mr Byrne did initiate the opening of a file using his firm's internal procedures. That required the provision of some limited "*Matter Information"*. That part of the form was completed in handwriting by Mr Byrne This he did by (a) drawing a line pointing towards the box entitled "*Criminal Inv. – Private*". At the top of the line he wrote "*HMRC*". This suggests strongly that part of the retainer concerned a potential prosecution by or on behalf of HMRC. The context suggests this was either in respect of tax evasion or false accounting in relation to the repatriation of funds. There cannot be much dispute about that because that was the focus of much of the advice that was given on any view. However, matters did not rest there. Mr Byrne also ringed a matter head consisting of "*Civil Tax & Revenue*" within the column entitled "*Civil Inv. – Private"*. This is consistent with the scope of the retainer covering at least the matters that I have summarised above. Finally, in the box entitled "*Type of Court"* Mr Byrne ticked the box saying "*No Court"* to which he added in handwriting "*hopefully*". This is consistent with the likely approach being voluntary disclosure whether using a facility or scheme if available or disclosing in the hope that HMRC would then investigate under COP 9.

80. The only other guide to the scope of the retainer is the letter dated 5 July 2010. That summarises the instructions given by the claimant to Mr Byrne as being first to explain the details of a tax amnesty that the claimant thought was in place in relation to Swiss accounts and whether it would apply to the claimant. The advice that Mr Byrne gave in the letter and had given during the meetings as described above was that there were two but each had come to an end. The further issue identified in the letter as being part of the retainer was to advise concerning would happen if the claimant was to disclose voluntarily. All this is apparent from the final paragraph on the first page of the letter.

81. Some assistance might have been obtained from a narrative in the fees invoice of the work done for which fees were claimed. However, Mr Byrne permitted fee notes to be issued that contained no narrative of the work done.

82. On this material, I conclude that the defendant was retained to provide at least the advice identified above. Whilst there is no express mention within the 5 July letter of the LDF, the letter makes clear that advice is being sought concerning disclosure routes. That includes advice on all such routes known to Mr Byrne or ought reasonably to have been known to a solicitor of reasonable competence and skill practicing in the area.

Reliance

83. For the reasons set out above, by no later than 24 June 2010 the claimant had been advised by Mr Byrne that there were no relevant voluntary declaration schemes available that he could be advised to use and that if a voluntary disclosure was to take place then it was likely that there would be a COP 9 investigation culminating in a

requirement to pay the outstanding tax, interest and penalties up to 100% of the unpaid tax but practically likely to be no more than 50% of the tax due. Although COP 9 is not identified in terms in the 5 July letter, the third paragraph on page 2 is clearly a description of what Mr Byrne believed would be the outcome of such an enquiry not least because of the description of the penalty position. This advice was incorrect in the sense that the LDF was in existence and if capable of being utilised would have resulted in a significantly better outcome than would follow from the COP 9 enquiry both because of the penalty cap and because of the limitation period that applied to declaration made pursuant to the LDF.

84. The claimant approached Mr Kinsella on 1 July 2010. This was plainly foreseeable to Mr Byrne since he had advised the claimant that he needed specialist accounting advice to calculate what was due and that if he was to make a voluntary disclosure he (Mr Byrne) was not the person to do it because he was and was known to HMRC to be a criminal solicitor specialising in white collar criminal cases and thus any disclosure by him might encourage HMRC to embark on a criminal investigation when otherwise they may not.

85. The claimant instructed Mr Kinsella to approach HMRC with a view to initiating a voluntary disclosure – see the letter from the claimant to Mr Kinsella dated 1 July 2010. Mr Kinsella acted in accordance with those instructions almost immediately – see his letter to HMRC dated 5 July 2010 copied to the claimant by an email of the same date, in which Mr Kinsella advised amongst other things that nothing was going to happen while the claimant was away on holiday. That remark does not suggest any degree of urgency at that stage.

86. On 12 July 2010, the full names and address of the claimant and his wife were supplied to HMRC by Mr Kinsella – see the attendance note of that date. On 15 July 2010, the claimant was tipped off by HSBC in Geneva that the list of customers stolen from it was about to be handed to HMRC – see the draft email dated 29 July 2010 prepared by the claimant and sent to Mr Kinsella that refers in passing to this information. This information was provided to Mr Kinsella by no later than 19 July 2010 – see Mr Kinsella's attendance note of that date. On 20 July, the formal voluntary disclosure letter was sent to HMRC in which disposal using COP 9 was requested. HMRC informed the claimant that they would proceed by way of COP 9 investigation by a letter dated 3 September 2010. The claimant wrote to the defendant terminating its retainer on 13 September and on 17 September Mr Byrne wrote to the claimant suggesting that he might be able to take advantage of the LDF. By then of course it was too late because HMRC had accepted the claimant's voluntary disclosure and had indicated it intended to proceed under COP 9. As noted above, once a tax payer had been notified of a COP 9 investigation the LDF could not be accessed.

87. Given my findings concerning what happened at the April and June meetings, I accept as true the claimant's evidence that by the end of the June meeting the claimant had as he put it "*dispensed in my mind of the Liechtenstein Disclosure facility as a credible alternative"*. I reach that conclusion because (a) that is inherently likely to be so in the circumstances, (b) he does not appear to have mentioned the possibility of taking advantage of the LDF to Mr Kinsella when first speaking to him in July but rather appears to have approached him for the purpose of making a voluntary disclosure in accordance with the advice of Mr Byrne that he was not the most appropriate person to be making a disclosure on his behalf and (c) it is consistent with what the claimant says in his letter of 30 September 2010.

88. In my judgment on these facts, the claimant has established that in proceeding as he did he acted on the advice that he received from the defendant.

Causation and Loss

89. The focus for this part of the case lies in the contention that either the claimant was not eligible to participate in the LDF or his wife was not and that if the latter was the case then he would not have participated because it would have exposed her to greater risk than him and would not have resulted in the reduction of tax interest and penalties that might otherwise result from the use of the LDF. The first of these points depends on a submission that at least some of the funds deposited in at least some of the Swiss account were the proceeds of crime.

90. Before turning to those points, there are a number of other causation submissions made on behalf of the defendant that I can conveniently address at this point. It was submitted that the claimant was aware of the existence of the LDF and its potential advantages by July 2010. It was submitted on behalf of the defendant that by mid-2010, it must have appeared to the claimant that it was doubtful whether he or his wife were eligible for the LDF or at any rate had any prospect of becoming eligible within the urgent time scale that applied. In my judgment, the implied suggestion that the claimant would not have taken advantage of the LDF because he knew or suspected that he or his wife were not eligible for it, or could not make themselves eligible within the time that remained before a disclosure had to be made is without foundation.

91. The only evidence that the claimant received any information about the availability of the LDF comes from what he says happened at his meeting with HSBC in Geneva. I have set out this evidence in detail above and do not intend to do so again. Armed with this evidence, the claimant then attended the meeting with Mr Byrne on 28 April. As Mr Byrne put it in his evidence, in an answer to a cross examination question, "*On 28 April, he was telling me what HSBC had said to him about the LDF. That was the principal part of that conversation."* As I have found already, the 28 April meeting ended with Mr Byrne promising that he would consult a contact about the availability of the LDF. That issue was closed out at the meeting on 24 June as I have set out above, following which, as the claimant put it in his 30 September letter to Mr Byrne "*... closed the door to this option based on your advice"*. The issue of eligibility was not considered further in the light of the advice given by Mr Byrne.

92. It was also submitted on behalf of the defendant that there was simply no time in which the various steps necessary to take advantage of the LDF. The underlying basis for this submission is that to do so it would be necessary first to open and fund a bank account in Liechtenstein to the minimum level that such a bank would require. I am not able to accept this submission. First, there is simply no evidence that such is the case. Plainly on the evidence there were still substantial assets held in the remaining Barclays accounts. Equally plainly, it would have been open to the claimant if properly advised to open an account with a bank in Liechtenstein without breaching the bar to the availability of the facility in respect of accounts "*... outside the UK or Liechtenstein which ... was opened through a UK branch or agency of that bank ...".* This could have been achieved by the simple expedient of having Barclays' Geneva Branch open such an account at its Liechtenstein branch or procuring one to be opened by a locally based institution with which it had a correspondent relationship. The evidence from both Mr Besford and Mr Cassidy is that most Liechtenstein banks were more than willing to open accounts to facilitate use of the LDF for deposits of as little as £11,000 and from Mr Cassidy was of personal professional experience concerning the acquisition of a relevant Liechtenstein asset for £30,000 in 2009 as a mechanism for disclosing assets in Switzerland of over £1m. These sums were apparently well within the reach of the claimant given the sums held on deposit in the offshore accounts as is apparent for example from the sums he was willing to transfer from those accounts to Mr Kinsella both as payments of fees and to make payments on account to HMRC. There is no evidence as to how long it would have taken to open an account in Liechtenstein. Had the defendants wished to adduce such evidence

they could have done so. It is on the defendants that rests the evidential burden of establishing any positive case they wished to advance. In the absence of such evidence I am prepared to assume that such accounts could have been opened within a matter of a few days at most.

93. Although the defendant maintains that the claimant was under great pressure, I do not accept that this was so at any rate until mid-July 2010. Prior to that he had been alerted to the data loss but there is nothing within the evidence that suggested that the stolen data was imminently about to be disclosed to HMRC between the end of March and the end of June 2010. There is no reason therefore why the necessary arrangements could not have been made well before the data made its way to HMRC. Had this not been the case it is unlikely that HSBC's Swiss management would have been advising about the scheme in the way they were. The reality is that the claimant only came under real pressure of time on and after 15 July 2010, when the claimant was tipped off by HSBC in Geneva that the list of customers stolen from it was about to be handed to HMRC. By then, had the claimant been advised properly all the necessary administrative steps to allow him to take advantage of the LDF could have been taken.

Claimant's Eligibility to Register Under LDF

94. It is now necessary to consider the eligibility criteria for the LDF in more depth than has so far been necessary. First, there can be no doubt that at least the claimant could have been made eligible for the LDF by opening a bank account in Liechtenstein because he was at all times a UK tax payer. That is not in dispute. An individual was only barred from registration if he had been arrested, cautioned or notified by HMRC that an investigation under COP 9 had been commenced. None of these conditions applied to the claimant (or his wife) down to 3 September 2010 when HMRC informed the claimant that they would proceed by way of a COP 9 investigation.

95. The submissions made on behalf of the defendants in relation to this part of the case were all founded on Schedule 7, paragraph (9) of the Memorandum of Understanding by which the LDF was established. In so far as if material, it provided:

> "A relevant person who makes a full, accurate and unprompted disclosure to HMRC under the disclosure facility, will not be subject to criminal investigation by HMRC for a tax related offence, unless the source of the funds from which the relevant person has benefitted or may benefit constitutes "criminal property" within the meaning specified in section 340 of the Proceeds of Crime Act 2002 (provided that the definition of criminal property for this purpose will not include property that has arisen solely as a result of illegal tax evasion) "

96. The defendant submitted that the claimant and/or his wife were either not entitled to register under the LDF or if properly advised would not have registered under the LDF because of their probable inability to bring themselves within the scope of Schedule 7, paragraph (9). In my judgment, these submissions were mistaken. My reasons for reaching that conclusion are as follows.

97. It was submitted first that the claimant's voluntary disclosure was "*... in no sense ...*" unprompted, because it was driven by an acute fear of imminent discovery. In my judgment, this point is without relevant foundation. As I have explained, an individual was only barred from registration under the LDF if he had been arrested, cautioned or notified by HMRC that an investigation under COP 9 had been commenced, and as I have also explained, none of these conditions applied to the claimant or his wife down to the date when, acting by Mr Kinsella, he made voluntary disclosure to HMRC. It is

undoubtedly true that what prompted the claimant's voluntary disclosure was a fear that HMRC was imminently about to discover the existence of the HSBC accounts by disclosure to HMRC of the stolen data referred to above. However, that does not lead to the conclusion that the disclosure was "*unprompted*" in any relevant sense. The disclosure was voluntary and took place before any contact had been made with the claimant by HMRC or before HMRC received any relevant information.

98. That this is the correct analysis derives some inferential support from the material referred to by Mr Cassidy in his second supplemental report. As he says, after receipt by HMRC of the data stolen from HSBC, HMRC issued a standard letter to each affected tax payer giving that tax payer three options, being (a) to confirm that no tax has been undeclared, (b) that undeclared income needed to be disclosed and that the LDF would be used to make such a disclosure or (c) that under declared income needed to be disclosed but the LDF would not be used to make such disclosure. As Mr Cassidy says, this demonstrates that "*... neither fear of discovery nor HMRC being aware of apparently unaccounted for overseas assets was a bar to entry to the LDF*".

99. The defendant places some reliance on a letter dated 18 November 2014 as containing a dishonest misrepresentation concerning his state of knowledge at the time when the voluntary disclosure was made. Notwithstanding the attempts to explain away this correspondence, I am satisfied that on any natural reading of the letters they materially misrepresented the position. Although the focus of the letters was said to be on whether the claimant had received a notification letter from HSBC, the letter went much further than that. However, the context of the correspondence was different from that which I am now considering. The correspondence was written well after the COP 9 investigation had been commenced and the issue being addressed was relevant to the resolution of that investigation. It was concerned with the degree to which the penalties otherwise payable should be mitigated by the fact and degree of voluntary disclosure. That issue simply did not arise in relation to disclosure using the LDF where the penalties payable were capped as I have explained. The position adopted by HMRC in that context does not detract from what I have said so far concerning the availability of the LDF. In any event, as I explain below, Schedule 9 paragraph (7) is concerned with the availability of the immunity from prosecution referred to in that paragraph and not eligibility to register under the LDF.

100. It is next necessary for me to consider the defendant's submission that the LDF is not available in respect of offshore assets that HMRC suspect may comprise criminal property. Schedule 9, paragraph (7) is not concerned with eligibility to register under the LDF, nor is it concerned with the availability of the LDF in respect of alleged "*criminal Property"*. Paragraph (7) is concerned with the availability of immunity from prosecution for tax related offences. In that regard the position under the LDF was not materially different from that which applied in relation to a COP 9 investigation. That this is so is apparent from the terms of COP 9 itself – see the Civil Investigation of Fraud Statement within the Code. The LDF is simply a mechanism by which voluntary disclosure can be made, which, if utilised, results in advantages for the tax payer that would not otherwise be available. HMRC's discretion to prosecute is the same whether the investigation is being conducted under COP 9 or in the context of a disclosure using the LDF machinery. The reality is that the claimant was not prosecuted following his voluntary disclosure and there are no reasons to suppose that if the same disclosure had been undertaken in the context of an LDF registration the outcome would have been any different. In light of this conclusion, it is not necessary for me to make findings as to whether some or all the sums credited to the offshore account were the proceeds of crime in the sense that phrase is used within the MoU.

101. The final issue that needs to be considered concerns the position of the claimant's

wife. The defendant submits and it is not in dispute that the claimant's wife was for a period a partner in Lodge Consulting, was a shareholder in and company secretary of CHCL and the joint holder with the claimant of four of the HSBC accounts. By the end of the trial it was common ground that the claimant's wife was eligible to register under the LDF but would not have been entitled to many of its benefits because she did not have an overseas asset on 1 September 2009. It was always the claimant's case that his wife did not have a beneficial interest in any of the offshore assets. In fact, although an investigation was opened against the claimant's wife, that investigation did not progress beyond the issue of a formal letter to her. The reality must be this: if the position is that the claimant's wife had no beneficial interest in any of the offshore assets (and the contrary has not been proved) then she had nothing to fear from a tax investigation. HMRC could not prosecute her because the overseas assets did not belong to her beneficially. Nor could they apply sanctions to her in respect of under or non-declaration because she had nothing relevant to declare.

Loss

102. The claim in respect of additional fees was abandoned by the claimant during his closing submissions.

103. I do not understand there to be any dispute between the parties that the difference between what the claimant in fact paid by way of penalties and interest and what he would have paid had he registered under the LDF is £318,372.10. In my judgment, no issue concerning loss of a chance arises because as I have explained, had the claimant been properly advised, he would have registered for the LDF and his liabilities would have been capped at the level provided for by the scheme. The claimant had decided to make a voluntary disclosure by the end of his final meeting with Mr Byrne. The only issue that remained was whether it should be engineered using the methodology adopted by Mr Kinsella or by registering under the LDF.