Brett Wilson LLP
35-37 St John's Lane
London EC1M 4BJ

6 October 2023

Sent by email to law@BrettWilson.co.uk from dan@taxpolicy.org.uk

Dear Sirs and Madams

Property118, Mark Smith and Cotswold Barristers

Thank you for your letter of 3 October 2023, claiming that our reports on your clients are highly defamatory, and asking us to retract them.

Your letter fails to identify a single specific statement we have made which is false, or with which you disagree.

Our reports aim to be accurate and complete, and we will always correct errors of fact or law as soon as they are pointed out to us. We have, therefore, reviewed your summary of the KC opinion. As we do not have the instructions, it is not clear on what facts and assumptions the opinion is based. I would, nevertheless, summarise our view (in light of that summary), as follows:

1. Your clients market a scheme on the basis that it is "fully compliant for mortgage lending purposes" and is "invisible to lenders unless you alert them". Our view is that in most cases the Property118 scheme breaches the terms of its clients' mortgages, likely leading to a mortgage default. That is our view, the view of every real estate finance specialist we spoke to, and the publicly stated view of UK Finance, the industry body for mortgage lenders.

   It is hard to imagine a more serious problem for your clients than their scheme defaulting their clients' mortgages. Yet your client refused to explain their position to me in correspondence, and the summary KC advice acknowledges that there is a potential breach, but provides no view on the point.

   If this was the only problem with your client's structure, it would be a disaster for their clients (which is why I described it as the "worst tax avoidance scheme ever"). This is, however, not the only problem.

2. Your clients market a scheme for which the main purpose and benefit include the obtaining of a tax advantage. The normal incorporation of a property rental business has many commercial advantages, not least legal segregation and protection from liabilities of the business. Your clients' scheme has none of those advantages, because legal title, and hence all liabilities, remain with the landlord. Its main purpose, and perhaps its sole purpose, is gaining a tax advantage.

   An arrangement where the main purposes and/or main benefits include gaining a tax advantage is subject to numerous anti-avoidance rules, and many people would refer to it as a "tax avoidance scheme".

   An important consequence is that your client's scheme is likely disclosable to HMRC under DOTAS, and their failure to disclose could render them liable to a penalty of up to £1m. Another consequence is that your clients' scheme cannot rely on HMRC guidance, concessions or clearances. Furthermore, no deduction is available under the loan relationships rules. Perhaps most seriously, it means that HMRC could have up to 20 years to challenge Property118's clients and impose tax, interest and penalties.

   (You mention the term "unlawful tax advantage" in your letter; this is not a term I have used, and it has no legal meaning.)

   The summary KC advice does not express any view on these issues. I do not know why that is. An opinion on a tax avoidance scheme which doesn't discuss anti-avoidance rules and principles is worthless.

3. Your clients claim that the Mr Smith carries professional liability insurance of £10m per client, meaning that his clients are "shielded from financial risk". This is a misleading way to describe professional indemnity cover, which omits the minor detail that clients would need to bring a negligence claim against Mr Smith, and win.

   We also understand from the experienced insurance lawyers and underwriters we have spoken to that Mr Smith's insurance is mostly unlikely to provide £10m of cover "per client" – it will be £10m of cover "per claim". This is a very significant distinction. The typical definition of "claim" means that, if Mr Smith has sold the same scheme to 1,000 clients, and each scheme fails for the same reason, then the cover "per claim" will actually be £10,000, not £10m.

   It is our opinion that your clients are misleading their clients into thinking that insurance protects them from the risks their scheme creates. It does not.

4. Your clients claim that "HMRC has confirmed [our] strategy is perfectly above board". HMRC do not provide confirmations of this kind. In our opinion, the claim is false.

5. We observe that Property118 has no staff with any tax qualifications. Indeed, Mr Alexander seemed unaware of the existence of the CTT and CTA qualifications. The only prior connection I can see between Mr Alexander and tax planning is that he was an investor in two failed film relief tax avoidance schemes.

   Cotswold Barristers also has no staff with any tax qualifications. It is not a tax set; Mr Smith revealed (in a discussion on LinkedIn) he had not heard the term "tax set". Mr Smith's

practice ranges from business law, to tax, to criminal defence work, to private prosecutions (including one where he was suspended by a month by the Bar Standards Board for acting negligently and "failing to act with reasonable competence"). Mr Smith's profile on the Cotswold Barristers website in 2017 and 2020 did not include tax in his stated areas of practice.

In light of this, and the advice they have proffered, it is our opinion that Property118 and Cotswold Barristers are unqualified to advise on tax matters.

6. Your clients market an SDLT avoidance scheme for married couples who jointly own a property rental business. The scheme involves retrospectively claiming that the couple has always been a business partnership, and therefore that SDLT "partnership relief" is available. They do this even in cases where there was no partnership agreement, no partnership tax returns, and no extraneous evidence of any kind that a partnership existed. The one decided case on similar facts was thrown out.

   It is our opinion that it will only be in rare cases that this strategy succeeds, and SDLT relief applies. We also expect HMRC to contest the availability of relief. The fundamental problem is that relations between a married couple are very different from relations between members of a business partnership. Furthermore, anti-avoidance legislation could potentially apply even if a partnership was found to retrospectively exist.

   The KC correctly states the law in this area but provides no view on whether SDLT will be available – she says "This is a question of fact and we cannot comment more specifically at this stage". The KC then provides no view on the anti-avoidance point. Again, I don't know why that is.

7. Your clients claim that CGT incorporation relief applies on the establishment of their structure. Our opinion is that it does not, because the fact the company is becoming a beneficiary, without legal title – and will stay in that position for at least the term of the mortgage – means that the landlord's original business did not in fact transfer to the company. An additional problem is that the HMRC concession on which your client's scheme relies cannot be used for tax avoidance. There are then further questions about the impact on the CGT analysis of a sale that is in breach of a mortgage.

   The KC states that incorporation relief applies but does not seem to appreciate the long-term nature of the trust. The KC does not address the avoidance point or the breach point. Once more, I don't know why.

8. Your clients claimed that the company could claim a tax deduction for the mortgage interest, even though it is the landlord (not the company) who is the borrower under the mortgage. Our view is that this is probably not possible. The KC disagrees, but does not address our arguments around s330A CTA 2009, and does not consider the loan relationship anti-avoidance rules. I do not know why.

9. Your clients claimed that the company makes payments to the landlord to cover the landlord's own interest payments, but the landlord wouldn't be taxed on these payments. They were unable to explain why. We said in our report that either the landlord would be taxed (income treatment), or the company wouldn't obtain a deduction (capital treatment): you can't have your cake and eat it.

The KC's view on this is not clear to me. It is possible she is a "cakeist", and believes there can be a deduction on one side, without taxable income on the other, but that seems unlikely, and it is perhaps more likely that I am misunderstanding her position.

I should add that some of the law in this area is complex, particularly the interaction between the income/capital distinction, the annual payments rule (and the pure income profit test established in *Conservators of Epping Forest*), and the scope of the miscellaneous income rule (given the continuing relevance of the old 19th century Schedule D Case VI caselaw such as *Attorney-General v Black*).

This and point 8 are important, because Property118 rely on "cakeism" for their structure to work – they need the company to have a deduction, but the landlord to have no income tax. This is a very unlikely outcome. That means we expect Property118's clients will end up in a worse position, on these two points alone, than if they hadn't effected the structure at all.

10. Your clients marketed a scheme as an "amazing opportunity". It involves the creation of a bridge loan for no purpose other than the obtaining of a tax advantage. In our view, the scheme fails for a variety of technical reasons, and is likely (again) disclosable under DOTAS. The KC thinks the scheme is acceptable, but the caselaw and HMRC guidance she refers to relate to a different type of transaction entirely. I do not know why that is.

11. Your clients market a scheme under which "growth" shares are created, entitling the holder to all the future growth of a company. Yet they argue these shares have no value. Our opinion is that they do have value. The KC declined to express a view on the valuation point. I do not know why.

    It is our view that shares with a strong chance of upside, and zero chance of downside, will not have a value of zero. If your clients still disagree, please tell them that I would be interested in acquiring some of these shares, and I am prepared to pay well over the odds (up to £10, subject to contract).

12. You say in your letter we make the incorrect assumption that your clients give the same advice to all clients. We make no such assumption. We simply note that we have reviewed multiple copies of advice from your client recommending an essentially identical scheme, and viewed promotional material published by your clients reflecting that same scheme. If your clients believe we have inaccurately described any aspect of their scheme, or if they are currently marketing other schemes, then please let us know.

I would be grateful if you could let me know if there are any errors of fact or law in the above, and we will strive to correct them.

What we will not do, however, is change or retract our opinion because it is inconvenient to your clients. I say "our" opinion because, whilst I take sole responsibility for the content of Tax Policy Associates' reports, they reflect the views of a large team of experienced tax advisers. This includes KCs, solicitors, tax accountants and retired HMRC officials. Most of those advisers cannot be named, for professional reasons, but you will note that those that we do name are some of the most eminent in their field, who literally "wrote the book" on the taxes in question. We believe that our views reflect that of the wider profession (and the comments on social media from other advisers reflect that).

We are committed to transparency and will publish this correspondence, an annotated copy of the KC opinion summary, and all further correspondence between us.

Your clients may wish to consider notifying their insurer.

Yours faithfully

Dan Neidle
Tax Policy Associates Ltd