Neutral Citation Number: [2022] EWHC 457 (Ch)

Case No: BL-2018-001516

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Fetter Lane
London EC4A 1NL

Date: 08/03/2022

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

- -

Between :

DAVID McCLEAN and others	**Claimants**
- and -	
ANDREW THORNHILL QC	**Defendant**

- -
- -

Anneliese Day QC, Nik Yeo, Christopher Knowles and Harry Winter (instructed by **Stewarts Law LLP**) for the **Claimants**
Tom Adam QC and Max Schaefer (instructed by **Mayer Brown International LLP**) for the **Defendant**

Hearing dates: 9-12, 15-18, 22-24 November, 2, 3 & 6 December 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Zacaroli :

A: Introduction

1. The claimants are members of one or more of three limited liability partnerships ("LLPs"), formed for the purpose of participation in the distribution of films. Participation in the LLPs was marketed to potential investors on the basis that they would be entitled to tax relief against their income or capital gains for trading losses that the LLPs were anticipated to make (the "Tax Benefits").

2. The three LLPs are Scotts Atlantic Distributors LLP ("SAD1"); The Second Scotts Atlantic Distributors LLP ("SAD2"); and The Third Scotts Atlantic Distributors LLP ("SAD3"). I will refer to them collectively as "the Schemes".

3. SAD1 opened for subscriptions on 24 January 2003 and closed on 4 April 2003. SAD2 opened for subscriptions on 27 October 2003 and closed on 4 April 2004. SAD3 opened for subscriptions on 27 October 2003 and closed on 5 April 2004.

4. The Schemes were promoted by Scotts Private Client Services Limited, in the case of SAD1, and Scotts Atlantic Management Limited, in the case of SAD2 and SAD3 (together, "Scotts").

5. The defendant, Andrew Thornhill QC ("Mr Thornhill") was and is an eminent and experienced barrister specialising in tax. He was engaged to provide advice on the tax consequences of the Schemes to Scotts (in the case of SAD1) and to Scotts and the LLP (in the case of SAD2 and SAD3).

6. Mr Thornhill provided various opinions, including an opinion dated 28 January 2003 in relation to SAD1 (the "SAD1 Opinion") a short form opinion dated 20 October 2003 in relation to SAD2 and SAD3 (the "SAD2/3 Short-form Opinion") and a long form opinion dated 27 February 2004 in relation to SAD2 and SAD3, in materially similar terms to the SAD1 Opinion (the "SAD2/3 Long-form Opinion"). I will refer to these, together, as the Opinions.

7. Each Scheme was promoted to potential investors via an information memorandum ("IM"). Mr Thornhill confirmed in letters to Scotts that there was nothing inconsistent with his Opinions in those parts of the IM explaining the tax consequences of the Schemes.

8. Mr Thornhill was not engaged to advise any of the claimants, and none of the claimants was his client. He consented, however, to being named as tax adviser to Scotts (and the LLPs in SAD2/3) in the IMs and to the Opinions being made available to potential investors, if they requested them.

9. The claimants claim that Mr Thornhill owed them a duty of care in respect of the advice he gave to Scotts and consented to being made available to potential investors, and that they relied on his advice in entering into the Schemes. They contend that he breached that duty. The Tax Benefits which the claimants sought to gain from the Schemes were dependent upon the LLPs (1) carrying on a trade (2) on a commercial basis and (3) with a view to a profit. The claimants contend (in summary) that Mr Thornhill negligently advised that the Schemes would achieve the Tax Benefits because the LLPs would be

carrying on a trade on a commercial basis with a view to profit, which was advice that no reasonably competent tax QC could have given, and/or that he negligently failed to advise that there was a significant risk that the Schemes would be successfully challenged by the Inland Revenue. (The Inland Revenue subsequently merged with HM Customs & Excise to form HMRC. In this judgment, when referring to the time-period in which Mr Thornhill advised, I will refer to it as the "Revenue".)

10. HMRC subsequently refused the tax reliefs claimed by the investors in the Schemes. HMRC issued a "Closure Notice" to SAD1 on 13 September 2016 recording its decision to refuse the claimed tax reliefs. On or around 22 September 2017 HMRC wrote to the individual investors in SAD1, SAD2 and SAD3 making a settlement offer. All of the claimants accepted that offer.

11. The claim form was issued on 5 July 2018. The claims of ten claimants (from a total of over 100) were chosen to be taken to trial first. By an order of 5 December 2019, the claims of all other claimants were stayed pending judgment in relation to the sample claims. The court's determination in respect of certain issues, defined as "Common Issues", will be binding on all claimants. In essence, the Common Issues concern whether Mr Thornhill owed a duty of care to the claimants and whether he breached that duty. The Common Issues include, in addition, certain issues relating to causation (such as whether the Schemes would have been promoted at all in the absence of Mr Thornhill's advice and whether the claimants must give credit for profits made from acquiring the Tax Benefits).

The issues

12. The principal issues, as agreed between the parties, are as follows:

(1) Duty: Did Mr Thornhill owe the claimants, as investors in one or more of the Schemes, a duty to take reasonable care in advising upon tax matters in respect of the Schemes; in approving and endorsing the tax aspects of each IM; and in reviewing and confirming his advice on subsequent occasions?

(2) Breach: Was Mr Thornhill negligent, and in breach of the duty of care owed to the claimants, in providing the Opinions and in endorsing the IMs?

(3) Reliance and causation:

(a) What advice should Mr Thornhill have given if he had acted competently?

(b) If Mr Thornhill had provided advice which the claimants contend would have been competent (including giving warnings of significant risk): would the Schemes have been promoted by Scotts (with appropriate risk warnings)? If so, would any of the claimants have invested in the Schemes? If the Schemes had not been promoted, but the claimants would have been willing to invest given the hypothetical opportunity, is any loss they suffered recoverable in law?

(c) Did the claimants, in deciding to invest in the Schemes, rely on Mr Thornhill's advice and on the fact that they had been endorsed by Mr Thornhill?

(4) Loss: What heads of loss have the claimants suffered as a result of the alleged breaches? Must they give credit for any profits made from the tax advantages they did acquire from the Schemes?

(5) Limitation:

(a) Are the claimants' claims (or any of them) barred under section 2 of the Limitation Act 1980 ("LA 1980"), which essentially turns on when the claimants' causes of action accrued for the purposes of section 2?

(c) Are the SAD1 claimants' claims time-barred under section 14B LA 1980?

(d) On what date did the three-year period provided by section 14A LA 1980 commence, and are the claimants' claims (or any of them) time-barred under this provision?

B: The Schemes in more detail

13. Each of the Schemes operated in materially the same way. For convenience, throughout this judgment I will refer principally to SAD1, pointing out where necessary any differences with SAD2 or SAD3. The following is a high level summary of SAD1. I refer to aspects of the Scheme in greater detail later on in this judgment, when considering specific arguments of the claimants.

The contractual structure in brief

14. SAD1 was established in order to acquire and exploit distribution rights in the US, UK and Canada for an initial portfolio of ten films. It entered into a distribution agreement with Warner Bros (later Warner Bros Pictures) ("WB"), executed on 6 December 2002 but effective from 25 November 2002 (the "DA"). The DA is governed by Californian law, but neither party contended that this differed from English law in any relevant way.

15. Under the DA, WB licensed to SAD1 distribution rights in a portfolio of 10 films (although this was later reduced to 6), subject to WB's right to substitute films. SAD1 agreed to distribute, exploit and exhibit the films, and bound itself to do so via a marketing services agreement ("MSA") with each of the following WB affiliates: Kendall Distributing LLP, Warner Bros Distributors Limited and Warner Home Video (UK) Limited (together, the "Sub-Distributors"). The Sub-Distributors actually carried out the marketing and distribution of the films. SAD1 was required to pay WB royalties from the proceeds of distributing the films.

16. The DA also provided for further pictures (the "Additional Pictures") to be included within its scope.

17. Under each MSA the Sub-Distributor was appointed, exclusively, to sub-distribute, exploit and exhibit the films. SAD1 granted the Sub-Distributor a licence of those of its rights necessary to enable the Sub-Distributor to carry out its obligations. The Sub-Distributor was required to submit to SAD1, for its approval and recommendations, a budget setting out anticipated print and advertising costs ("P&A Costs") and marketing materials.

18. SAD1 employed specialist consultants to advise it on marketing plans.

19. In the event of disagreement over SAD1's recommendations as to the marketing strategy, the parties were required to use their best efforts to agree on a plan. Under the DA, if agreement could nevertheless not be reached, WB had the right to withdraw the relevant film from the slate.

20. In the event of disagreement over the budget for a film, SAD1 would be responsible for paying that part of the budget to which it agreed, and the Sub-Distributor was responsible for the remainder. The Sub-Distributor was then entitled to recoup that excess expenditure out of the receipts of the films, ahead of SAD1, pursuant to the waterfalls which I describe in more detail in Appendix 1. Alternatively, in the event that the budget could not be agreed, WB had the right to withdraw the film from the slate.

21. Pursuant to the MSA the Sub-Distributor was obliged to pay annual advances (the "Annual Advances") throughout the life of the LLP to SAD1, and guaranteed that these sums would be paid when they were due. In addition, the guarantees from the Sub-Distributor ensured that SAD1 would receive, from the combined operation of the waterfalls in the DA and MSA, an amount equal to the Guaranteed Payment (defined as $238,642,500).

22. Under a call option agreement (the "COA"), the Sub-Distributor had the right, at any time after 6 April 2005, to acquire the distribution rights (granted by WB to SAD1), upon payment of the greater of: (1) the fair market value of SAD1's interest in the distribution rights; or (2) a guaranteed minimum sum.

23. Any proceeds from the distribution of the films were passed through payment waterfalls in the MSA and the DA. These are described in more detail in Appendix 1 to this judgment.

The contents of the IM in more detail

24. The SAD1 IM commenced with a "Notice" which, among other things, stated that SAD1 was an unregulated collective investment scheme, the IM was "only directed at investment professionals falling within Article 14(5) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, and other exempt persons…" and that it "must not be relied upon or acted upon by persons in the United Kingdom who do not have professional experience in participating in unregulated schemes or who are not exempt persons". This meant that none of the claimants was entitled to rely directly on the IM, but could only do so through and with the benefit of their own independent financial adviser ("IFA"). This was reinforced by the statement (later in the document) that the Scheme may not be promoted or sold directly to the public, so that "Applications will therefore only be considered when received via a duly authorised intermediary".

25. The Notice also contained the following:

> "Scotts Private Client Services Limited (the "Sponsor") is responsible for the information contained in this document. To the best of the knowledge and belief of the Sponsor (which has taken all reasonable care to ensure that such is the case) the information contained in this document is in accordance with the

> facts and does not omit anything likely to affect the import of such information. The Sponsor accepts responsibility accordingly."

26. Under the heading "Advisers and Administrator", Mr Thornhill was identified as "Taxation Adviser to the Sponsor [i.e. Scotts]."

27. Under the heading "Summary of Key Points", the IM outlined the basic features of the Scheme. This was developed in the section headed "The Offer", which explained the contractual framework in greater detail.

28. The "Financial Summary" section explained the anticipated outcome for investors, depending on whether the call option was exercised or not, and depending on whether the investor invested 100% in cash, or only 29.5% in cash with the remainder funded via a non-recourse loan from Barclays Bank (the "Scheme Loan").

29. On the latter basis, and assuming nothing was generated from the exploitation of the films beyond an amount sufficient to pay the Annual Advances and the minimum guaranteed amount, the illustrations indicated that on an initial gross participation of £1,000,000 the investor would ultimately make a gain of £116,000 after four years if the option was exercised (after taking account of net tax relief/payable of £413,000) but a loss of £130,000 after nine years, if the option was not exercised. In either event, the minimum amount generated would enable the Scheme Loan to be repaid. Investors were specifically warned that these figures were by way of example only: "they are not and should not be construed as forecasts of the likely returns from participating in the Partnership."

30. The net effect for an investor depended therefore on whether the call option was exercised. If it was, it enabled the investor to avoid a portion of their tax liability altogether. If it was not, it enabled the investor in effect to defer payment of a portion of their tax liability for nine years.

31. Under the heading "Taxation Consequences of Investing in the Partnership", the IM contained the following important statement:

> "The tax analysis set out herein is based on the Designated Members' understanding of current tax legislation and published practice and on UK Generally Accepted Accounting Practice ("GAAP"). However, prospective Members are advised to consult their tax advisers and are referred to the Risk Factors on page 19-20.
>
> Whilst no advance ruling procedures are available in the UK for transactions such as this, advice has been received from Mr Andrew Thornhill QC, a senior UK Tax Counsel and head of Pump Court Tax Chambers in respect of tax … Copies of the opinions of counsel … are available from the Sponsor."

32. The IM went on to state that "The Partnership will undertake the trade of acquiring by way of licence and exploiting Distribution Rights to Films in the Territory over the Trading Period [i.e. from commencement until 30 September 2010]". It then explained

that SAD1 was anticipated to be profitable over the whole of the Trading Period, if the option was not exercised, but would make losses in the first two tax years, and identified the "main ways of dealing with the losses for tax purposes". These were:

> "**1 Income Tax relief**
>
> Relief from income tax may be obtained by:
>
> (a) setting off losses against general income in the year of assessment (i.e. in the years ending 5 April 2003 and 5 April 2004);
>
> (b) setting off any losses not completely absorbed in the year of assessment against income of the preceding year i.e. in the years ending 5 April 2002 and 5 April 2003 (in respect of a loss arising in the years ending 5 April 2003 and 5 April 2004 respectively);
>
> (c) reversing the order of set off at (a) and (b);
>
> (d) carrying back losses sustained in the first four years of assessment from commencement of trading for up to three years prior to the tax year in which the relevant loss is sustained, taking the earlier years first (for example, a loss sustained in the year ending 5 April 2003 can be carried back and set off against income for the year ending 5 April 2000 and subsequent years); and
>
> (e) carrying forward trading losses not relieved against general income to set against a Member's future income profits from the same trade.
>
> **2 Capital Gains Tax relief**
>
> Relief from capital gains tax may be obtained by:
>
> (a) setting any losses not fully absorbed by general income of the year of assessment in which the relevant loss is sustained against capital gains for that year; and
>
> (b) setting any such losses not fully absorbed by general income of the preceding year of assessment against capital gains for that year."

33. The IM also explained that any interest payable on loans used to subscribe in SAD1 may be relieved against a member's income from all sources, including but not limited to any profits from SAD1's trade, and that in the event that the call option was exercised, a liability to capital gains tax would arise but since investors should be entitled to full business taper relief, the effect would be that capital gains tax would be payable on an amount equivalent to approximately 10% of the net proceeds, assuming current rates of tax.

34. Under the heading "Limited Liability Partnerships" it was pointed out among other things that – provided an LLP was carrying on a trade or business with a view to profit – it was transparent for tax purposes.

35. Under the heading "Risk Factors", investors were warned of the potential risks of investing "which include but are not limited" to those that followed in the IM. "Tax Risks" included:

(a) "This document has been prepared on the basis of current UK tax legislation and Inland Revenue published practices, concessions and interpretations. If these change, or if the levels and bases of taxation change as a result of amendments to the law, the performance of the investment may be adversely affected. Such changes may be applied retrospectively."

(b) "The Inland Revenue does not give advance rulings on any of the tax issues referred to in this document. The availability of tax reliefs depends on the Inland Revenue's acceptance of the Partnership accounts and tax computations and compliance with detailed rules."

(c) "The Inland Revenue has the right to inquire into any loss relief or interest relief claims made by any Member."

(d) "An individual's tax position depends on his or her particular circumstances and there is no guarantee that the Inland Revenue will agree that the tax reliefs described in this document will be applicable to that individual."

36. Under the heading "General Risks", the IM stated: "Investment in the partnership involves substantial risks including certain tax risks, risks associated with the lack of liquidity of the investment and risks associated with the film business."

37. Under the heading "Application Procedure", Scotts notified investors, as required by the rules of the FSA, that they regarded investors as "execution only customers in respect of their investment in the Partnership", which meant that "it is reasonable for [Scotts] to believe that investors do not expect it to be advising them as to the investment merits of the transaction."

38. Investors warranted, in their subscription agreement for SAD1, that they were experienced in business matters and recognised that the Scheme was a speculative venture. Each also warranted that he/she had "only relied on the advice of, or has only consulted with, his or her own professional advisers with regard to tax, legal, currency and other economic considerations related to subscription in the Partnership." Further, they warranted that they had read and understood the terms of the IM, that they had taken appropriate professional advice and were aware of the risks attached to becoming a member.

39. The investor's IFA was required to sign a checklist for SAD1 under the statement: "We hereby confirm to [Scotts] that the Subscriber is a customer of the Financial Advisor not a customer of [Scotts] and is not receiving advice from [Scotts]."

40. There were similar statements in the IM for SAD2 and SAD3, save that Mr Thornhill was described as taxation adviser to "the Sponsor and the Partnership". The

subscription agreements for the later Schemes contained the same warranties as those set out above relating to SAD1. In addition, by signing the application documents, investors stated that they understood and accepted that:

> "1.1 SAML [i.e. Scotts], the Operator, the LLP and their respective officers and staff: -
>
> 1.1.1 have not provided and do not provide any investment, taxation or other advice or recommendations for me generally and specifically in connection with [the Scheme];
>
> 1.1.2 have not been, and are not, responsible for assessing the suitability of [the Scheme] for me, any needs or any purpose or aim of mine;
>
> 1.1.3 are not, and shall not be, responsible or liable in any manner for any loss resulting from any such advice, recommendations or assessment given by, or any negligence, fraud or otherwise of the independent financial adviser or other suitably qualified person (as referred to in 1.2 below) or resulting from any failure on my part to obtain such advice, recommendations or assessment; and
>
> 1.2 it was, and is, my responsibility to obtain appropriate advice, recommendations and assessment, as referred to above, from an independent financial adviser or other suitably qualified person."

C: The statutory framework

41. The Tax Benefits which the Schemes were designed to achieve arose under the following statutory provisions.

42. By section 380 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), relating to general sideways relief, if a person sustained a loss in a trade carried on in partnership they could, by notice given within two years after the date of assessment, make a claim for relief from income tax on an amount of their income equal to the loss.

43. By section 384(1) ICTA 1988, a loss was not available for relief under section 380 unless, for the year of assessment in which the loss was said to have been sustained, the trade was being carried on a commercial basis and with a view to the realisation of profits in the trade. By section 384(9) trade was deemed to be carried on with a view to the realisation of profits if it was carried on so as to afford a reasonable expectation of profit.

44. By section 381(1) of ICTA 1988, relating to early years sideways relief, an individual carrying on a trade who sustained a loss in the trade in the year of assessment in which they first carried it on or any of the next three years of assessment could, by a notice within two years after the year of assessment in which the loss was sustained, make a claim for the loss to be set against their other income.

45. By section 381(4), however, that relief could not be given in respect of a loss sustained in any period unless the trade was carried on throughout that period on a commercial basis and in such a way that profits in the trade could reasonably be expected to be realised within that period or within a reasonable time thereafter.

46. An individual could rely on the above reliefs to offset losses incurred by an LLP only if the LLP was tax-transparent under section 118ZA of ICTA 1988, which required the LLP to be carrying on a trade or business with a view to a profit.

47. By sections 353 and 362 of ICTA 1988, investors could off-set interest paid on loans taken out to contribute money to the LLP if the money contributed was used wholly for the purpose of a trade carried on by it.

48. The net effect of these provisions is that in order to achieve the Tax Benefits, the LLPs needed to satisfy three statutory tests. Broadly, and leaving aside slight differences in wording, that meant that they needed to be (1) trading; (2) on a commercial basis; (3) with a view to a profit.

D: The advice given by Mr Thornhill

49. Mr Thornhill was engaged by Scotts to advise on various aspects of SAD1 during the course of its development. He was first approached about advising on a proposed film distribution business in August 2002. There followed a series of exchanges and consultations, including a consultation on 1 November 2002, at which he gave advice on various aspects of the proposed schemes.

50. The allegations of negligence focus on the written advice Mr Thornhill gave in relation to the Schemes, and his approval of the tax consequences set out in the IMs.

51. On 16 December 2002, Scotts formally instructed Mr Thornhill to "review the information memorandum in general and the tax section especially and provide us in letter form confirmation that you are in agreement with the contents of the said tax section". Mr Thornhill was told that it was Scotts' intention to include his letter as part of the information memorandum in the short term, and in the new year to request a long form opinion which would be included within a revised information memorandum.

52. It was clear, therefore, before Mr Thornhill provided the advice of which complaint is made in these proceedings, that he was aware it was to be made available to potential investors. In cross-examination Mr Thornhill suggested that he might have understood, when drafting the SAD1 Opinion, that he would subsequently be asked to provide a fuller opinion and it would be that opinion that would be made available to investors. There is no suggestion, however, that the advice in such a fuller opinion would have been any different. I note, in addition, that in his letter to Scotts of 18 July 2003 (to which I refer in more detail below), Mr Thornhill confirmed (for Scotts' internal verification process) that it was his opinion dated 28 January 2003 (i.e. the SAD1 Opinion) which he consented to being made available to investors.

53. On 20 December 2002 Mr Thornhill wrote a letter, addressed to Scotts in the following terms:

> "I have been asked to write a detailed opinion on the tax effects for a United Kingdom resident individual of entering into the partnership on the terms set out in the information memorandum in which this letter appears. Having advised previously on the structure of the arrangements, I am able to say that the explanation in the section "Taxation Consequences of Investing in the Partnership" is correct."

54. On 17 January 2002, Scotts provided Mr Thornhill with a memorial to Counsel (the "Memorial"), the purpose of which was to collate all the questions raised by Scotts in relation to SAD1 with a view to seeking a written opinion. The advice sought was distilled into five questions:

> "1. Does Counsel consider that the LLP will be carrying on a trade in the UK and that relief would be available to Members against other income under sections 380 & 381 ICTA 1988? Counsel will note that even if only the Minimum Guarantees (MGs) are received it is anticipated that the LLP will make a profit over the full trading period.
>
> 2. Does Counsel consider that the use of the Studio's subsidiaries to sub-distribute the films would impact upon the LLP's trading status?
>
> 3. Does Counsel consider that the terms of the profit sharing arrangements between the Studio and the LLP and the sub-distributors would be considered to be consistent with a trade being carried on a commercial basis and with a view to realising a profit?
>
> 4. Are there any other actions, documentation etc., which Counsel considers should be put in place to more clearly evidence trading?
>
> 5. Is Counsel satisfied that the LLP would not fall foul of Section 381(4) ICTA 1988 if, as is projected, the LLP would not be profitable until the accounting period commencing 6 April 2004?"

55. The Memorial was provided to Mr Thornhill under cover of a letter which said that Warner Bros had insisted that Scotts obtain a long form opinion from him before they would be willing to allow the IM to be sent to prospective investors in SAD1. They asked if it would be possible for the opinion to be addressed also to Barclays Bank, but this was in fact never done.

56. Mr Thornhill duly provided the SAD1 Opinion. Section 1 dealt with "Trading Issues". Given its importance, I will set out this section in full:

> "The first question is whether the proposed LLP is trading. In my view, there is no doubt that it is. In essence, part of the overall activities of the business which Warner Bros and its associated

companies carry on is being passed over to the LLP. This is inherently a commercial activity, carried on in the same way as similar activities in the commercial world. It may perhaps be said that it is not really a separate, identifiable part of that activity. In other words, although the essence of a trade is that it is a commercial activity carried on in the same way as analogous activities in the commercial world (see *CIR -v- Livingston* 11 Tax Cas 538 at p.542), nevertheless that does not mean you can take part of what would normally be the overall commercial activity and contend that part is a trade. The answer is that in the film world persons exist who do carry on a separate activity such as the LLP carries on. It is inherently much less risky than producing a film. In my opinion, therefore, there is here a commercial activity with parallels in the real world and carried on in the same commercial way as occurs in the film world. There is a trade.

Could the Revenue argue nevertheless that there is something artificial about this trade. In effect, the LLP acquire rights from Warner Bros and then disposes of them back again. The LLP looks as though it has been placed in the middle of a commercial operation, not, it might be suggested, in order to perform any operation that Warner Bros could not perform, but in order to give its members a tax break. In days gone by, such an argument would have gained credence in the Courts. The founding authority was *FA & AB -v- Lupton* (47 Tax Cas 580) which was sometimes regarded as establishing the proposition that an alleged trade is not a trade if it is carried on for predominantly tax avoidance reasons. In my view, the case does not establish this. What it does establish is that if the way a trade is carried on is for tax (or any other) reasons substantially different from the way it would be carried on commercially, then it is no longer a trade. In other words if the activity is not carried on in the way that it would be carried on in the commercial world, it may well not be a trade. If that is the principle, it does not affect the LLP here.

In my view, the correct principle was followed in the House of Lords in *Ensign Tankers -V- Stokes* [1992] STC 226. There it was argued in all the Courts below that a partnership inserted between a producer and distributor for tax reasons was not trading. Lord Templeman, who gave the leading speech, had no doubt the partnership was trading. The real issue, in his opinion, was whether it had incurred the expenditure it had made. An attempt to resurrect the "Lupton principle" was made by Park J in the recent *Barclays Mercantile* case [2002] STC 1068. It was firmly overruled by the Court of Appeal.

In my opinion, the current position in law is that if a taxpayer carries on a commercial activity in a commercial way although

> his motive may be to obtain a tax advantage and although he is "sandwiched" into a larger commercial activity (as happens here and happened in Ensign Tankers), the activity is and remains a trade. I believe this answers questions 1, 2 and 3. In answer to question 4, 1 do not believe that any further actions or documents are required.
>
> I turn, therefore, to question 5. This concerns loss relief against other income. It is axiomatic that the trade is taxed under Case I (see s.391). In my view, the LLP' s trade is clearly controlled from the United Kingdom and is taxable under Case 1 of Schedule D. Subsection (4) of section 381 requires the trade to be carried on a commercial basis (here I see no problem) and "in such a way that profits in the trade could reasonably be expected to be realised in that period or within a reasonable time thereafter". Profits means profit as measured for tax purposes. Consequently, cash-flow exercises that place a value on tax repayments etc. are irrelevant. The position with the LLP is, as I understand it, that profits in Years 1 and 2 are possible but unlikely. Thereafter, there would be taxable profits. On that basis, Sections 381(4) and 384(1) would not apply."

57. After dealing with matters of which no specific complaint is made, he set out the following, under the heading "Overall Re-Analysis":

> "In my opinion, the analysis so far set out in this Opinion of losses and capital profits is correct. I do not see that it makes any difference that guarantees are backed. It only strengthens the guarantee. I fail to see how the transactions could be recharacterised as a sale and leaseback given the LLP' s ability to make additional profits. I accept that there is a certain circularity involved. However, as already stated, this was a feature of *Ensign Tankers*. It did not lead to a reanalysis in itself."

58. At section 6 of the opinion, he addressed further the *Barclays Mercantile* case (in which Park J at first instance had concluded that the relevant transaction was not a trading transaction because it was so heavily dominated by fiscal considerations (see further below at [206] to [208]), as follows:

> "This has now been firmly reversed, in my view, rightly. However, it remains helpful to identify similar activities in the commercial world. It is said that the LLP's protection is greater. That in itself should not matter. It is a case of more or less risk and more or less upside.
>
> As regards the *Lupton* case, I firmly believe that it has no relevance for reasons already given. What is possible under the *Ensign Tankers -v- Stokes* decision is for the transaction to be commercially re-analysed. In this case, I would suppose the risk to be that the LLP and sub-distributors should be treated as

> though they were in some overall partnership because they are, in effect, carving up the distribution expenses and receipts. However, I do not see this as a credible re-analysis. In *Ensign* the re-analysis was simple. The non-recourse loan of 75 per cent of cost with a right to 75 per cent of income and no repayment was a 75:25 joint venture."

59. Finally, Mr Thornhill provided specific answers to further questions, relevantly as follows:

(1) In answer to the request that he specifically confirm that the section of the IM headed "Taxation Consequences of Investing in the Partnership" was correct, he confirmed that it was;

(2) In answer to the request to confirm that members would be able to set interest payments on borrowings against profits of the LLP and other income, given the importance of interest relief, he confirmed that they would;

(3) He confirmed that losses that could not be set against income could be set against chargeable gains;

(4) He also confirmed that the expenditure of the LLP consisting of advance royalty payments and other royalty payments to Warners, P&A spend and management, sponsorship and administration costs would be deductible in computing trading profits of the LLP.

60. There were further communications between Mr Thornhill and Scotts over the following months, though none of them is relevant to the claimants' claims other than the letter from Mr Thornhill to Scotts of 18 July 2003 (see below at [387]).

61. Mr Thornhill's advice in relation to SAD2 and SAD3 was materially the same as for SAD1. At a consultation with Scotts on 1 October 2003 Mr Thornhill confirmed that amendments in recent tax legislation, cases and non-statutory materials did not impact on his previous opinions concerning SAD1, or cause him to recommend changes to the proposed SAD2.

62. On 16 October 2003, Mr Thornhill was sent a draft IM for SAD2 and SAD3. He was asked to review them and confirm various matters. On 20 October 2003, Mr Thornhill provided the SAD2/3 Short-form Opinion stating as follows:

> "1. I have read the section headed "Taxation Consequences" in the draft Information Memorandum. I approve the contents and note that a Partner's capital contribution will not be established until a withdrawal has been made for the advance interest. If this is done, then a Partner's interest relief under section 362 ICTA 1988 should not be restricted by section 363. I also confirm that the Statement of Taxation Consequences appears to me to be complete and not to contain any material omissions.

> 2. I confirm the Statement attributed to me under "Non-Resident Partner" on what is page 19 in my copy of the Information Memorandum.
>
> 3. I confirm the accuracy of the statements under "Expected Tax Outcome" in the section headed "The Offer".
>
> 4. The statements under "Tax Risks" in the section headed "Risk Factors" are, in my view, a [sic] accurate and complete."

63. On the same date he wrote a further letter to Scotts and SAD2, in the same terms as his letter to Scotts and SAD1 dated 18 July 2003 (see below at [387]), save that what he consented to being made available to prospective investors in his letter of 20 October 2003 was "…a copy of my opinions issued in relation to the taxation aspects of the LLP (a copy of which is attached)". There is an issue as to whether, by reference to opinions (plural), he intended to permit his SAD1 Opinion to be made available to potential investors in SAD2 and SAD3. I deal with this below at [392].

64. On 10 February 2004, the Revenue issued a press release announcing certain rule changes which affected the right to claim sideways loss relief for members of limited liability partnerships. On 12 February 2004, Mr Thornhill provided a further opinion (the "Rule Change Opinion") answering certain questions arising out of the rule change. It is not alleged that the advice in the Rule Change Opinion was wrong.

65. Mr Thornhill provided the SAD2/3 Long-form Opinion, dated 27 February 2004. This was materially the same as the SAD1 Opinion.

66. Various other questions were asked of Mr Thornhill, in respect of which he provided advice in writing, but these are not relevant to the claimants' claims. The allegations of negligence focus on the advice contained in the Opinions, including their endorsement of the tax aspects of the IM.

E: Did Mr Thornhill owe a duty of care to the claimants?

67. It is common ground between the parties that the foundation of liability for negligent misstatement and negligent advice is an assumption of responsibility by the maker of the statement or the giver of the advice.

68. Ms Day QC placed particular reliance on the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, which she referred to as the starting point and "in many ways in this case the end point" of the claimants' case. She referred to Lord Morris at pp.502-503:

> "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his

> skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

69. She also relied on a passage in the speech of Lord Reid at p.486 in which he identified the three choices facing a reasonable person, knowing that they were being trusted or that their skill and judgment was being relied on: (1) keep silent or decline to give the information or advice sought; (2) give an answer with a clear qualification disclaiming responsibility for it; or (3) simply answer without qualification. He said:

> "If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."

70. It is true that *Hedley Byrne* is acknowledged to be the "fountain of most modern economic claims" (in the words of Lord Mance in *Custom and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, at [85]). It is important, however, to read the passages to which Ms Day QC referred both in the context of the decision as a whole and in the light of the further development of the principle since 1964. So far as the case itself is concerned, it was held that no duty arose because the bank, in giving the representation, did so "without responsibility". That was part of the context in which the question whether an undertaking to assume a duty could be inferred (see Lord Reid at p.492).

71. As to later cases, while the assumption of responsibility was identified as the foundation of liability for negligent misrepresentation in *NRAM Ltd v Steel* [2018] UKSC 13; [2018] 1 WLR 1190 ("*NRAM*"), the Supreme Court made it clear that a representor is not to be held to have assumed responsibility towards the representee unless (i) it was reasonable for the representee to have relied on what the representor said and (ii) the representor should reasonably have foreseen that he would do so: *NRAM*, per Lord Wilson at [23]. That lay, according to Lord Wilson at [19], at the heart of the whole decision in *Hedley Byrne* given that the bankers (so it was assumed) carelessly gave false information, but expressly without responsibility. Lord Wilson said: "in the light of the disclaimer, how could it have been reasonable for the appellant to rely on the representation?"

72. This involves an objective question taking into account the representor's or adviser's actual or presumed knowledge and all the circumstances of the case: *Bank of Credit and Commerce International (Overseas) Limited v Price Waterhouse* [1998] BCC 617, at [7.21]. Sir Brian Neill there noted that in *Caparo Industries PLC v Dickman* [1990] 2 AC 605, Lord Oliver had made it clear that even an expressed intention that advice should not be acted upon by anyone other than the immediate recipient could not prevail against "actual or presumed knowledge that it is in fact likely to be relied upon in a particular transaction without independent verification". At [7.20], Sir Brian Neill identified the factors to be taken into account as including:

> "(a) The precise relationship between (to use convenient terms) the adviser and the advisee. This may be a general relationship or a special relationship which has come into existence for the purpose of a particular transaction. But in my opinion counsel for Overseas was correct when he submitted that there may be an important difference between the cases where the adviser and the advisee are dealing at arm's length and cases where they are acting 'on the same side of the fence'.
>
> (b) The precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.
>
> (c) The precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.
>
> (d) The presence or absence of other advisers on whom the advisee would or could rely. This factor is analogous to the likelihood of intermediate examination in product liability cases.
>
> (e) The opportunity, if any, given to the adviser to issue a disclaimer."

73. Of particular relevance to the circumstances of this case is the fourth of these factors: the presence or absence of other advisers. In *NRAM*, Lord Wilson at [23] referred with approval to the observation of Lord Oliver in *Caparo* that "a usual condition of liability is that the representor knew that the representee would act on it without independent inquiry".

74. The question arises in this case in circumstances where Mr Thornhill's client (to whom he undoubtedly owed a duty of care in respect of advice given) was on the opposite side of the transaction to each of the claimants as potential investors. His client was (in the case of SAD1) Scotts as sponsor of the Scheme and (in the case of SAD2 and SAD3) Scotts and the LLP. The relationship between Scotts and the investors was that of seller and buyer. The Schemes were being sold by Scotts to the investors. They prepared the IM with a view to attracting investors to the Schemes. On any objective analysis of the transaction, although the subject matter of the transaction was an investment in a potentially long-term Scheme, Scotts were nevertheless selling participations in the Scheme to investors. In no sense, therefore, was any investor a client of Mr Thornhill.

75. Certain of the claimants said that they viewed their relationship with Scotts as a long-term joint venture rather than buyer and seller, although others accepted that they understood Scotts to be "selling" the Scheme to them. The views expressed by

individual claimants many years after the event, however, are of little relevance. What matters is the nature of the transaction viewed objectively.

76. The fact that none of the investors was a client of Mr Thornhill is equally true in relation to the later Schemes even though he was then also adviser to the LLP. At the point in time at which participation in SAD2 and SAD3 was offered to potential investors, none of those potential investors was a member of the LLP.

77. In NRAM, having noted at [25] that a solicitor generally owes no duty to an opposite party to his client, Lord Wilson reviewed six authorities which may "illuminate the inquiry" into the existence of an assumption of responsibility by a solicitor towards the opposite party. He noted (at [32]) that these demonstrated the necessity of the two ingredients of the general liability in tort for negligent misrepresentation (referred to at [71] above), and that these ingredients were particularly relevant to a claim against a solicitor for the opposite party because the opposite party's reliance on statements by the lawyer for the other party is "presumptively inappropriate". I do not accept, as Ms Day QC submitted, that Lord Wilson's analysis was confined to conveyancing solicitors. It applies wherever a lawyer acting for one side in a transaction is said to owe a duty to a party or parties on the other side, although I do not think this requires making any presumption, as such, against a duty arising; in every case it is necessary to take account of all the circumstances.

78. This last point was emphasised by the Court of Appeal in *P&P Property Ltd v Owen White & Catlin LLP* [2018] EWCA Civ 1082; [2019] Ch 273. Having rejected the notion that the fact that it was foreseeable by a solicitor that loss will be caused to a third party by a lack of care on the solicitor's part was enough to establish a duty of care to the third party, Patten LJ said (at [76]): "But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair". Those factors will include the contractual framework (see Patten LJ, at [74]).

79. Mr Adam QC placed particular reliance on *Brown v Innovator One* [2012] EWHC 1321 (Comm). One of the issues in that case was whether solicitors engaged in relation to tax schemes owed a duty of care to potential investors. Hamblen J concluded that the solicitors had not assumed any responsibility to the investors. The facts were far removed from the facts of this case. In particular, it did not involve written advice from the promoters' lawyers being made available to investors. Nothing is to be taken merely from the fact that the claim failed.

80. At [1269], however, Hamblen J identified a number of factors which, aside from the issue of assumption of responsibility, militated against the imposition of a duty of care. At the time of this judgment, in 2012, the "assumption of responsibility" test had not emerged as the primary test, but the court was required to have regard to each of three tests (assumption of responsibility, the three-fold test of foreseeability, proximity and fairness in all the circumstances; and the incremental test). Hamblen J's comment that these factors were relevant "aside from the issue of assumption of responsibility" must be seen in that context. I consider that they are equally apposite when considering

whether a duty of care is owed within the single assumption of responsibility test following *NRAM*. Those factors were:

> "(1) The Innovator Schemes were commercial in nature – potential investors were being invited to subscribe to partnerships undertaking commercial trading in the acquisition and exploitation of technology;
>
> (2) The minimum gross investment in the Innovator partnerships was £250,000; these Schemes were not directed at people of modest means; they were directed at HNWIs who had (access to) their own advice and who dealt through IFAs; those IFAs would be expected to advise the Claimants as to the risks inherent in investment into the Schemes;
>
> (3) The Claimants were largely sophisticated investors and would, accordingly, have reasonably been expected to understand those parts of the IM which:
>
> > (i) Stated that Innovator (and thus Innovator's advisers) were not to be regarded as giving any advice, representation or warranty (expressed or implied) to any person in connection with the contents of the IM;
> >
> > (ii) Stressed the need for each potential investor to obtain independent advice;
>
> (4) It was reasonably to be expected that any person with sufficient wealth and potential tax liabilities to be a potential investor would seek and obtain specialist accountancy and/or taxation advice on a regular basis, and thereby have easy and convenient access to independent advice in relation to the contents of the IM;
>
> (5) At least some of the Claimants did obtain independent advice prior to investing in the Schemes;
>
> (6) Those Claimants who did obtain independent advice were apparently informed that the investments were suitable (e.g. Mr Tallaksen, Ms Knight and Mr Jackson);
>
> (7) The terms of the subscription agreements meant it was objectively reasonable to assume that independent professional advice would be taken and that each investor would be able to bear the financial risk of participation."

81. I was referred to a number of cases by both sides where a lawyer or an accountant had been held either to owe a duty, or not to owe a duty, to a party on the other side of a transaction to their client. Little is to be gained by comparing the facts and outcomes in those cases, and I do not need to refer to most of them. I will refer, however, to three cases on which the claimants placed particular reliance, two of which involved a

barrister said to owe a duty to someone other than his client and the third of which involved circumstances where there was an identity of interest between the parties to the transaction.

82. In *Estill v Cowling Swift & Kitchin* [2000] Lloyds LR 378, a barrister was instructed by a settlor to advise on the type of settlement to set up. He recommended and drafted a discretionary trust. This resulted in the trustees becoming liable to tax which could have been avoided. Arden J held that counsel owed a duty of care to the trustees, notwithstanding the fact that they had not been selected or appointed at the time he advised the settlor. Counsel had been specifically instructed to advise on the steps that could be taken to diminish the risk of the trustees being open to attack. The reasoning of Arden J in concluding that counsel owed a duty of care to the trustees was as follows:

> "It was clearly foreseeable that if Mrs Estill [the settlor] was negligently advised and the trustees became liable to pay tax, the trustees would suffer loss. The instructions sought advice for the benefit of the trustees as well as Mrs Estill: see for example questions 2 and 3 in counsel's instructions. The fact that the trustees had not been finally selected at the stage advice was given does not mean that advice could not be sought on their behalf. Accordingly, in my judgment the defendants owed duties of care to the trustees. As I see it, the defendants' clients included the trustees."

83. That case is a long way from the present. As this passage makes clear, Arden J regarded the trustees not merely as persons to whom counsel's advice would be relayed, but as in substance the clients of counsel.

84. In *Mathew v Maughold Life Assurance Co Ltd* [1955-95] P.N.L.R. 309 (1987), Mr Mathew entered into a tax scheme designed to avoid estate duty. Part of the scheme involved Mrs Mathew purchasing a life policy on her husband's life for a term of seven years, with an option to renew the policy for a further seven years provided that notice was given before the seventh anniversary of the scheme. The premium was funded by a loan from the defendant insurer, with the loan being repaid out of the proceeds of the policy. The husband survived for more than seven years, but no notice was given to renew the policy. When he died, accordingly, the policy had lapsed.

85. Mrs Mathew began proceedings against the insurer seeking a declaration that they were not entitled to recover the loan. The insurer counterclaimed for repayment of the loan. On the counterclaim, Mrs Mathew joined as third parties (among others) the solicitors to the purveyor of the scheme, her late husband's accountants and the barrister who had advised the insurer on the efficacy of the scheme. The third parties joined the husband's solicitors. The proceedings on the loan were compromised, and the husband's solicitors admitted liability to indemnify Mrs Mathew in respect of the compromise. The husband's solicitors sought contribution from, among others, the barrister instructed by the insurer.

86. The trial judge held that the barrister was instructed by the solicitor for the insurer. He also found that the barrister owed a duty to the Mathew family "to give an explanation of the scheme which was sufficient for the purposes of the conference having regard to the people who attended it". This referred to a conference with the barrister attended

by, among others, Mr Mathew, at which the barrister had carefully considered the scheme in the presence of Mr Mathew. The trial judge held that the barrister was liable for 15% of the Mathew family's loss. That was overturned on appeal. Other than the reference by O'Connor LJ to the judge having determined that the barrister owed a duty to the Mathew family "having regard to the people who attended" the conference, there is no analysis in the Court of Appeal judgments as to the basis on which it was held that the barrister owed a duty to Mr Mathew. I do not find this case of any assistance in seeking to determine whether Mr Thornhill owed a duty of care to the claimants in this case. The facts are, again, very different, and there is no point of principle to be derived from the decision of the Court of Appeal other than that it is possible for a barrister instructed by one party to a transaction to owe a duty of care to another party to the transaction.

87. In *Dean v Allin* [2001] P.N.L.R. 39, a solicitor retained by the borrower executed promissory notes in favour of the lender (Mr Dean) and agreed to hold certain title deeds to property to Mr Dean's order as security for the loan. In separate proceedings it was determined that no effective security had been created by the mere deposit of title deeds. Mr Dean was unable to recover any of the loan. He sued the solicitor in negligence. The Court of Appeal concluded that the solicitor owed Mr Dean a duty of care. The claimants rely, in particular, on the Court of Appeal's reliance on the fact that, while there was a conflict of interest between the lender and the borrower in respect of many aspects of the transaction, there was an identity of interest in the provision of effective security. It is also important to note, however, that the facts said by Lightman J at [34] (giving the first judgment) to be relevant to the question of duty included that: the solicitor had been instructed by the borrower to take the necessary steps to provide Mr Dean with an effective security; he was instructed on the basis that Mr Dean was not sophisticated in these matters and would *not* be instructing solicitors to protect his interest; and the solicitor did not advise Mr Dean to take separate advice or disclaim owing any duty to him. Robert Walker LJ, at [60], took into account a similar range of factors.

<u>The law applied to the circumstances of this case</u>

88. The parties were agreed that it is necessary to have regard to all the circumstances in determining whether a duty of care is to be imposed on a person and that, in this case, a number of the relevant factors point towards a duty of care being owed. In particular:

(1) Mr Thornhill was a person with special skill;

(2) He gave his advice in the knowledge that it was to be made available to potential investors who asked for it;

(3) He knew that the IM was a marketing document intended to attract investors to the Scheme;

(4) He was aware that potential investors were likely to take comfort from the fact that he, as a leading expert in the field, was named as tax adviser to Scotts (or Scotts and the LLP) and that he had given positive advice on the prospects of the Tax Benefits being achieved;

(5) Mr Thornhill accepted that his advice assisted investors and their IFAs, in the case of the latter by helping them to evaluate whether or not their clients should go into the arrangement;

(6) He knew his advice was on the very point of critical importance to any potential investor, namely the likelihood of them obtaining the Tax Benefits which the Schemes promised.

89. Ms Day QC emphasised in particular the fact that Mr Thornhill's decision to permit potential investors to see his advice was a voluntary one (distinguishing cases such as *Caparo*, where the relevant representation was made pursuant to a regulatory requirement). He could have refused altogether. More importantly, she relied on the fact that he could have agreed only on the condition that a disclaimer of responsibility was inserted in his opinion, whereas in fact it contained no disclaimer of any sort.

90. She also placed significance on the fact (which I accept) that, in relation to the issues on which Mr Thornhill advised, there was no conflict of interest between Scotts and the claimants. Scotts and the claimants both had an interest in the Tax Benefits being achieved, albeit for different reasons: the claimants because that was the only way they could benefit from the Schemes; and Scotts because they were in the business of promoting such schemes to potential investors and that business would be damaged if they promoted schemes that did not achieve the hoped-for tax benefit.

91. Nevertheless, for the reasons I develop below, I have concluded that Mr Thornhill did not owe a duty of care to the claimants in respect of his advice in connection with the Schemes.

92. I consider that there is a distinction to be drawn between two groups of claimants. The first group comprises those who saw one or other of the Opinions or whose adviser saw one or other of the Opinions and either passed on the substance of the advice in it to the claimant, or themselves relied on the Opinion in recommending that their client enter into the transaction. The second group comprises those who saw (and whose adviser saw) only the IM, or whose adviser may have seen one or other of the Opinions but neither passed on the substance to the claimant nor themselves relied on Mr Thornhill's advice in recommending that their client enter into the transaction.

93. The distinction is necessary because, in order to establish whether a duty of care was owed to a claimant, it is necessary to identify what crossed the line between Mr Thornhill and the claimant. I will address first (and predominantly) the first group, turning to deal with the second group briefly at [154] to [156] below.

94. So far as the first group is concerned (where Mr Thornhill's advice crossed the line between him and the claimants), notwithstanding that, as noted above, many factors point towards a duty being owed, they are outweighed in all the circumstances by the terms of the IM and subscription agreement and all the circumstances to which I refer below, such that I consider the claimants could not reasonably rely on Mr Thornhill's advice without making their own independent inquiry, and that Mr Thornhill could not reasonably foresee that they would do so.

95. Critical to this conclusion are the facts that the IM clearly advised potential investors to consult their own tax advisers on the tax aspects of the Scheme and that no investor

could subscribe to the LLP without warranting that he or she had relied *only* on the advice of or had only consulted with their own professional advisers.

96. Ms Day QC submitted (among other matters which I address in detail below) that the language of the IM and the subscription agreement was far from sufficient to preclude a duty arising in this case.

97. As a preliminary point, I reject the contention that simply because there was no language of <u>disclaimer</u> in the Opinions themselves, it was reasonable for investors to rely on Mr Thornhill's advice without making independent inquiry.

98. The Opinions must be seen in the context of all of the information with which potential investors were supplied. Most importantly, the only way investors had access to Mr Thornhill's advice was via the IM. It was only because his Opinion was referred to in the IM that any investor might ask for it. Moreover, an investor could only subscribe to the LLP by giving the warranties contained in the subscription agreement. These facts were known as much to Mr Thornhill as to the investors. Accordingly, the circumstances which must be taken into account in determining whether Mr Thornhill could reasonably foresee that investors would rely upon his advice without taking independent inquiry include the statements made in the IM and the warranties given by investors in the subscription agreement.

99. Ms Day QC submitted that the relevant terms of the IM would reasonably have been understood as referring only to investors' *personal* tax position and for that reason they were ineffective to preclude Mr Thornhill owing a duty in respect of his advice as to the effectiveness of the Scheme, generally, in achieving the Tax Benefits

100. She submitted that in considering the language of the IM for this purpose it is necessary to ask what a reasonable investor (who was highly unlikely to be a lawyer) would make of the language, as opposed to applying principles of contractual construction.

101. I accept that the issue is not one of contractual construction. Mr Thornhill does not rely on anything in the IM for its contractual effect (for example as a contractual term negativing a duty or reliance). He cannot do so as he was not a party to the IM or subscription agreement. Instead, those documents are relied upon as part of the circumstances which must be analysed to determine whether he assumed responsibility for his advice towards the claimants at all.

102. Since, however, as Mr Adam QC pointed out, the process of contractual construction itself involves an objective standard of reasonableness (what the reasonable recipient of the document would have understood it to mean), there is unlikely to be any difference in outcome. In any event, it is important to remember that the Schemes could only be marketed to investors through IFAs, who could reasonably be expected to be familiar with the language, and who it could reasonably be assumed would explain the documentation to their clients.

103. On either approach, I am satisfied that the distinction Ms Day QC sought to draw, between advice as to the investors' personal tax position and the effectiveness of the Scheme from a tax position overall, is not a tenable one.

104. Taking first the reference to "the tax analysis set out herein" in the first sentence at the top of page 14 of the IM, I consider that a reasonable investor would understand that to have been referring to the question whether the Scheme achieved the Tax Benefits. That was (as many of the claimants confirmed) the single most important question for them in deciding whether to subscribe to the LLP. The "tax analysis" set out in the subsequent paragraphs of the IM explained that the LLP was anticipated to make losses from trading in the licence and exploitation of films, and that relief from income tax and/or capital gains may be obtained by members by setting off those losses. The first sentence of this passage in the IM stated that this was based on Scotts' understanding of, among other things, current UK legislation. The fact that the legislation, and the relevant tests (trading, commercially, with a view to a profit) were not identified in the IM does not undermine the conclusion that what was being referred to as "the tax analysis" was the effectiveness of the Scheme in giving rise to the Tax Benefits in light of that legislation.

105. It is clear that the next sentence, which begins "however", is a qualification of the first sentence. In recommending to prospective investors that they consult their tax advisers, therefore, I consider that a reasonable investor would have understood that to be referring to advice on the same matters that were raised by the first sentence, i.e. advice on whether the Scheme achieved the Tax Benefits.

106. It is true that there are passages in the IM which make reference to the individual tax position of investors (where they are also advised to consult their own adviser). That does not mean, however, that where the IM elsewhere recommends that investors take their own advice on tax aspects (as at the top of page 14), it should similarly be understood to be referring only to their personal tax position. If anything, it points in the opposite direction, since the specific reference (for example on page 15) to an issue arising in relation to NICs, and investors being advised to consult their own professional advisers on it, suggests that the earlier recommendation on page 14 related more broadly to the tax aspects of the Scheme itself.

107. I do not accept that this conclusion is undermined by the fact that investors were advised to consult their tax advisers "and" were referred to the risk factors set out further on in the IM. Ms Day QC at times appeared to contend that the recommendation to investors to "consult their tax advisers" was only to consult them in relation to the risk factors. The cross-reference to the risk factors, however, is additional to the recommendation to investors to consult their own tax advisers, and in no way qualifies the nature of the advice on which they should consult their advisers.

108. The cross-reference to the risk factors does not anyway assist the claimants. It is true that some of the risk factors refer to the individual tax position of the investors, for example the fourth paragraph (referring to a member having liability for Class 2 and/or Class 4 NIC depending on his or her particular circumstances) and the sixth paragraph (warning that "an individual's tax position depends on his or her particular circumstances…"). In contrast, the third paragraph (referring to the Revenue not giving advance rulings and the availability of tax relief depending on the Revenue's acceptance of, among other things, compliance with detailed rules) and the fifth paragraph (referring to the Revenue's right to enquire into any loss relief claims) are not so limited. The very fact that some of the risk factors specifically refer to members' individual circumstances reinforces the conclusion that where they are not so limited, they are referring to the risks of the Tax Benefits more generally not being achieved.

109. The terms of the warranties in the subscription agreement are similarly broad. Ms Day QC contended that the warranty that the investor had only relied on or consulted with their own professional adviser in respect of tax and legal matters was qualified by the words "considerations relating to subscription to the Partnership". This was intended to refer, she submitted, only to tax and legal issues relating to their own personal circumstances. I do not accept this. The sole purpose of the subscription agreement was for the investor to subscribe to the LLP. Tax and legal considerations relating to that subscription clearly encompass the central consideration whether the Tax Benefits to which the subscription was intended to give rise would be achieved. This broad reading of the warranty is supported by reading it (as it must be) together with the IM, such that the advice investors were warranting they had relied on was that which they had been advised to get in the body of the IM. I have already concluded that that encompassed the Tax Benefits said to be achieved by the Scheme, and was not limited to advice as to the investors' own personal circumstances.

110. Ms Day QC referred to Scotts' internal training materials, which emphasised that although Scotts' employees were able to provide information – including marketing information – and documents to authorised persons, and answer questions from them, they were prohibited from advising their own clients "as to the suitability of the LLP for the client's own particular circumstances." I do not consider such internal documents, which were not seen by potential investors, to be relevant in deciding what a reasonable investor would have understood from the terms of the IM. In any event, the fact that Scotts' employees were specifically prohibited from giving advice on the suitability of the investment for a client's personal circumstances says nothing as to whether they (let alone Mr Thornhill) were to be understood as offering advice, on which the investors could rely, as to the tax consequences of the Scheme.

111. Mr Adam QC also relied on the terms of a checklist which investors' IFAs were required to fill out and the facility letters that claimants were required to enter into with Barclays (in relation to the non-recourse loan). The former contains merely a confirmation that the investor is not a customer of, and is not receiving advice from, Scotts. The latter contains a broader acknowledgment that the investor had taken such independent legal, taxation, financial and other advice as they considered appropriate. I do not find that either document adds anything either way to the analysis based upon the terms of the SAD1 IM and subscription agreements.

112. The language of the IM for SAD2 and SAD3 is materially the same, and leads to the same conclusion. Additionally, however, the language of the checklist completed by each investor (or its IFA) in relation to SAD2/3 contains a further acknowledgment that neither Scotts nor the LLP nor their officers or staff had provided any investment, taxation or other advice or recommendations for them generally and specifically on the Scheme, and that it was the investor's own responsibility to obtain advice on such matters from an independent financial adviser or other suitably qualified person. This language is not confined to advice on the suitability of the investment given the investor's personal circumstances (as made clear by the fact that a separate acknowledgement relates specifically to suitability). When read together with the IM and subscription agreement for SAD2/3, it reinforces the conclusion that the advice that the investors were advised to take, and warranted they had relied on, was advice as to the Tax Benefits of the Schemes generally, and not limited to their own personal circumstances.

113. It is, as Lord Oliver noted in *Caparo*, not sufficient merely to point to terms in the IM and subscription agreement such as those referred to above, if there is countervailing "actual or presumed knowledge" that the advice was in fact likely to be relied upon without independent verification. In light of the following matters, however, I am satisfied that it would not have been reasonable for investors, in the face of the language of the IM and subscription agreement, to rely on Mr Thornhill's advice without independent inquiry, or that Mr Thornhill ought reasonably to have foreseen they would do so.

114. First, the Schemes were (as in *Brown v Innovator One*) commercial in nature, and marketed only to high net worth individuals. The minimum amount that could be invested was substantial (with a minimum subscription of £400,000 in relation to SAD1). They were designed to enable investors to avoid payment of, or to recover, large amounts of tax on other income. It would have been reasonable to assume that investors had significant wealth such that they would either already have specialist advisers, or were in a position to find such specialist advisers to consult on the merits of the Scheme.

115. Second, Mr Thornhill was in no sense retained as adviser to any of the investors. He was expressly identified as tax adviser to the Sponsor. Any reasonable investor would have understood that, where the IM advised them to consult "their tax advisers" and where they warranted in the subscription agreement that they had relied only on "his or her own professional advisers", it was referring to an adviser other than Mr Thornhill.

116. Ms Day QC sought to make something of the fact that in an earlier draft of the IM it had been stated that "Scotts have taken advice from … Mr Andrew Thornhill QC" whereas, in the IM as published it referred only to advice having been received from Mr Thornhill. The IM must be read as a whole, however. In the earlier version, the list of advisers did not include Mr Thornhill, so that the relevant passage relied on by Ms Day QC was the only reference to him. In the IM as issued, however, Mr Thornhill had already been identified as "taxation adviser to the Sponsor" in the list of advisers, so that when the IM stated "advice has been received from Mr Andrew Thornhill QC", it was clear – reading the IM overall – that such advice had been received *by* Scotts from *their* adviser.

117. The claimants also contend that the fact that Mr Thornhill was (and was stated to be) the tax adviser to Scotts *and the LLP* in relation to SAD2/3 is a material difference. It is contended that as adviser to the LLP, Mr Thornhill owed a duty to investors who would, on subscription, become members of the LLP. I do not accept this. By definition, at the point in time at which any potential investor was provided with the IM and (if applicable) Mr Thornhill's opinion, they were considering becoming members of the LLP. The fact that Mr Thornhill was adviser to the LLP seeking their subscription did not give rise to a duty of care to those from whom subscription was sought, any more than the adviser to a company owes a duty (by reason of that position) to persons invited to subscribe for shares in the company.

118. Third, although I have accepted that there was an identity of interest as between Scotts and the investors in connection with the issues on which Mr Thornhill was asked to advise, it is nevertheless the case that Scotts were selling, and the investors were buying into, the Schemes, such that they were on opposite sides of a transaction. Further, it was clear from the terms of the IM summarised above that Scotts were positively

disclaiming any responsibility to give advice to investors, and were acting on an execution only basis. While Mr Thornhill could have made it clear by including an express disclaimer in his Opinions, I do not think that even without such disclaimer, a reasonable investor, knowing that Scotts was excluding any responsibility to advise them, would nevertheless have understood Mr Thornhill (who was Scotts' adviser, not theirs) to be assuming a responsibility to advise them.

119. Fourth, the Schemes could only be marketed via independent professional advisers so that, by definition, all investors would have the benefit of an IFA to assist them. This meant it would be reasonable for Mr Thornhill to expect, even if the terms of the IM might be unfamiliar to any individual investor, that the significance of the recommendation to the investor to take his or her own advice, of their warranty that they had relied only on their own adviser, and of the fact that Scotts was acting on an execution only basis, would be brought home to them by their IFA. Moreover, it was reasonable to expect that the investor's IFA would appreciate the importance of independent advice, and could either provide that advice on the tax aspects of the Scheme itself (there being at least some IFAs in the market with sufficient expertise to do so) or assist the investor in obtaining independent advice from a suitably qualified specialist. It is relevant to note that at least some claimants did take their own advice (as detailed in Appendix 2 to this judgment) and, where they did so, that advice was to the effect that the Schemes should achieve the Tax Benefits.

120. In light of the above, I consider that it was objectively reasonable to assume that independent professional advice would indeed be taken by investors, as they were advised to do (and were required to warrant that they had done) in the IM and subscription agreement.

121. The claimants advanced a number of arguments against this conclusion, which I address in the following paragraphs.

Comparison with the language in other information memoranda

122. Ms Day QC relied on distinctions between the terms of the IM in this case and the language of disclaimer in information memoranda in other cases. For example, in *Brown v Innovator One* (above, at [890]), the document precluded reliance for any purpose on the information in the information memorandum and, in *Hedley Byrne* (above), the representations were made "without responsibility on the part of this bank and its officials", and in *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) the arranging bank, in the context of a syndicated loan, stated that it made no representation and assumed no responsibility for the accuracy, adequacy, reliability or completeness of the information provided.

123. That language, she submitted, was unequivocal, and to be contrasted with the fact that in this case Scotts positively assumed a responsibility for the information contained in the IM. I deal below with an argument advanced by the claimants that "information" in the IM included the advice provided by Mr Thornhill. For present purposes, it is sufficient to say that comparison with the language used in the documents in other cases, often inserted for a different purpose (e.g. excluding or limiting liability of the sponsor of a scheme or the arranging bank in a syndicated loan) is of limited if any assistance in considering the meaning and impact of the language of the IM on the question whether Mr Thornhill had assumed a responsibility towards the claimants.

Access to documents

124. Ms Day QC submitted that there could be no reasonable expectation that any investor would make their own independent enquiry as to the effectiveness of the Schemes from a tax perspective, because any adviser to the investors could not have had access to the documents (the DA, COA and MSA) which it was necessary to see in order to provide advice.

125. In support of the allegation that the claimants' advisers would not have had access to the contractual documents, Ms Day QC made three points: (1) the documents contained confidentiality provisions; (2) WB would have resisted disclosure because it was sensitive about its financial difficulties; and (3) Scotts would have resisted disclosure because it was sensitive about competitors devising a "copycat" scheme.

126. It is important to note that there is no evidence that any potential investor (or their adviser) ever asked to be provided with a copy of the contractual documents and no evidence, therefore, that either WB or Scotts ever declined to make such a copy available. It is true that the documents contain confidentiality provisions, but it is not unusual for an entity inviting investment (whether as shareholders or partners) to make confidential documents available on provision of a suitable confidentiality undertaking.

127. Ms Day QC referred to the fact that a Mr Churchill, who was writing an article for publication in a specialist journal comparing the merits of various tax schemes, was in communication with Scotts but does not seem to have been offered any of the underlying documents. He was, however, precisely the sort of person that would not have been given confidential material, since his interest was in publishing an article about the Scheme, and as such he would clearly not have given any confidentiality undertaking.

128. The only evidence as to WB's sensitivity about its financial difficulties was Mr Thornhill's evidence that the opportunity for the scheme arose because WB was not in a good financial position and was in need of cash. In cross-examination he referred to having been told that this was not something that should be made public, as WB was "very worried that news of their financial difficulties could get out". I do not see how such concerns would preclude WB consenting to the contractual documents being made available to potential investors. There is nothing in those documents that hints at WB's financial difficulties.

129. As to the concern that a competitor might create a copycat scheme, there is evidence that this was actually done. That shows that sufficient details of the scheme were already made public in the IM for this purpose. It is unlikely that the level of detail contained in the DA, MSA and COA, which represented the product of negotiation between the actual parties involved in the SAD Schemes, would have been of real interest to someone seeking to replicate the essential features of the Schemes with other parties.

130. It was at one point suggested that a distinction can be drawn between those documents which the IM specifically said investors should refer to (e.g. the Members Agreement) and the DA, MSA and COA, where the IM was silent. I do not accept that distinction. The mere fact that documents were not identified in the IM as being available to investors does not mean that, had someone asked to see them, they would have been

refused. Indeed, there is no mention in the IM of the instructions to Mr Thornhill, yet the tax adviser to one of the claimants (Mr Peter Snowden who advised Mr Millar) requested and was provided with a copy of the Memorial in order for him to advise his client.

131. Mr Adam QC had two other lines of defence to this argument, each of which I accept for the reasons he gave.

132. First, even if it was the case that the claimants' own tax advisers could not have had access to the underlying contractual documents, the fact that the defendant may have greater knowledge than the claimant about the subject matter of representations or advice does not diminish the importance and effect (in considering the reasonableness of the claimants relying on the defendant's advice without making their own independent enquiry) of the claimants either being told to take, or warranting that they had taken, their own advice. That is partly by reference to authority, and partly by reference to first principles.

133. So far as authority is concerned, in *Hedley Byrne*, for example, the defendant who gave the representation as to the financial state of its client was uniquely placed to know about its client's finances, with access to information which the representee could not have had. That did not prevent the conclusion, however, that no duty was owed in view of the disclaimer given by the defendant. In *Peach Publishing v Slater* [1998] PNLR 364, the Court of Appeal noted (at p.384) that the lack of information available to the representee's advisers (in the context of representations as to a management company's accounts) was relevant, not to the question ofwhether a duty was owed, but to the extent to which the representee would compensate for that lack of information by requiring increased warranties.

134. As to first principles, the essence of the claimants' case that Mr Thornhill was in breach of duty, assuming one was owed to them, is that he failed to analyse properly or at all the detailed terms of the transaction. The extent to which he did, or did not, have regard to the details of the transaction is apparent from his opinions. If, as the claimants contend, any reasonably competent tax QC would have based their conclusion on the detailed terms of the transaction then (a) they would have been able to advise their client of the flaw in Mr Thornhill's approach having seen his opinions and (b) they would have advised their client that without seeing the underlying contracts they were unable to provide advice, or sufficiently clear advice, on whether the Schemes would achieve the Tax Benefits. In circumstances where the claimants had an entirely free choice as to whether to participate in the Schemes, such advice would in itself be valuable.

135. Second, Mr Adam QC submitted that the features of the Schemes that would (on the claimants' case) have led any reasonably competent tax QC to advise that the LLPs were not trading (or trading commercially, or with a view to profit), or there was at least a significant risk that they were not, were apparent from the face of the documents to which potential investors undoubtedly had access. Those include the IM, Mr Thornhill's opinions and his instructions (in particular the Memorial which, as I have noted above, was made available to at least one adviser to an investor when requested).

136. I address the detail of the claimants' case on breach in section F below. Essential aspects of their claim, and where they appear in the documents to which investors had undoubted access, are as follows:

(1) The claimants contend that the LLPs lacked sufficient control over the choice of films in the slate, because WB had the unfettered choice to substitute a film. For reasons I develop below, I do not accept that WB's choice to substitute films was unfettered, but the Memorial in any event stated: "[WB] will have a right to substitute a film if for any reason, one of the Slate films is not available, in full satisfaction of their completion guarantee."

(2) The claimants contend that the LLPs lacked sufficient control over P&A Costs, given the right of the Sub-Distributors to spend in excess of the budgeted amounts and to recoup such expenditure from future income in priority to the LLP. These rights of the Sub-Distributors' rights were, however, fully explained in the Memorial, and in the IM itself. The Memorial stated that it was "likely" that the Sub-Distributors would meet excess P&A Costs in this way. The IM also stated that surplus income "will be expended" by the LLP on additional films.

(3) The claimants contend that there were no genuine commercial comparators, because the only examples of the business the LLPs were to conduct being conducted elsewhere involved much lower levels of guarantees and greater decision making by the relevant entities. All that is known about the comparators, however, was set out in the Memorial. That included that as a result of the lower level of guarantees in the comparators, "potential losses could be made but they would have a better position on the first revenues". The Memorial was available to those who asked for it.

(4) The claimants contend that the call option's purpose was tax arbitrage, and it was likely to be called. The fact that the exercise of the call option was beyond the LLPs' control was clearly stated in the IM. The explanation given to Mr Thornhill as to the likelihood of it being called was based on publicly available information, including as to WB's practice of calling options in similar circumstances, and deductive reasoning which anyone could carry out (as demonstrated by the fact that Ward Consultancy PLC, one of the financial advisers for a number of investors, advised Mr Watts that there were compelling reasons to believe that WB would exercise the option sooner rather than later). The fact that the call option provided an opportunity for tax arbitrage was specifically flagged in the IM, and was a key selling point for potential investors.

(5) The claimants contend that there was no genuine commercial trading with a view to profit because the LLPs could make only an immaterial loss or immaterial profit. It is true that the risk of loss was substantially protected by the minimum guarantee. This, however, was clearly illustrated in the financial models included in the IM. These indicated, on the basis of the minimum guaranteed amount, only a small loss if the call option was exercised, and no loss if the call option was not exercised. It is true that those models did not indicate the level of potential upside. There is no reason to think, however, that the financial projections that were prepared (and the results of which were made known to Mr Thornhill – see below at [275]) would not have been made available to any investor who wished to see them. The note of conference with Mr Thornhill on 1 November 2002 records that indicative financial figures if the films were successful would be presented to potential investors if requested. I have already referred above to the fact that the Memorial contained reference to the fact that the level of guarantees given to the LLP was such that the potential upside was more limited than would be the case in the comparators.

137. For all these reasons, I reject the contention that it was reasonable for the claimants to rely upon Mr Thornhill without independent enquiry (or that Mr Thornhill should reasonably have foreseen that the claimants would do so) because the claimants' own advisers would have lacked sufficient information for them to give advice as to the likelihood of the Tax Benefits being achieved.

Mr Thornhill as the leading tax specialist and the firmness of his opinion

138. The claimants also contend that there could be no reasonable expectation that any investor would make its own independent enquiry because neither the IM nor Mr Thornhill's opinion gave any hint that there was doubt about the trading status of the LLP, and because as the leading tax QC in the country, it was reasonable to expect investors would consider that going to anyone else for advice would be pointless, since they already had advice from the best.

139. Mr Thornhill was undoubtedly *one* of the leading tax QCs in the country at the time he advised. He accepted that he knew that to be the case. He was not held out (either by himself or by Scotts) as *the* leading tax expert. It is irrelevant whether, as many of the claimants say, he was described to them by their own advisers as the "top" or the "very best" tax barrister. That is not information which he could have reasonably been aware of. Nevertheless, I accept that he would have appreciated that, given his status as one of the leading tax QCs, his advice was likely to carry more weight.

140. It does not follow, however, that he should have reasonably foreseen that investors would rely on his opinion without consulting their own tax adviser as they were recommended to do, and as they warranted they had done, in the IM and subscription agreement. Even if he had been the "top" barrister, it is a nonsense to suggest that because he was the best, there would be no point in a potential investor getting their own advice. There were plenty of advisers (barristers, solicitors and financial advisers) who specialised in tax schemes such as the Schemes, and who could have provided investors with their own independent advice. Any such adviser would additionally have the benefit of Mr Thornhill's opinion – not so they could rely on his advice, but so that they had the benefit of seeing what he had advised when they came to give their own advice. This is what I understood Mr Thornhill to mean when he said that he expected that his advice would assist potential investors' own advisers. That acknowledgment by him is not to be equated with an acknowledgment that he believed investors or their advisers would rely on his advice.

141. The fact that Mr Thornhill's advice (in particular as to whether the LLP was trading) was given in unequivocal terms, while relevant to the question of breach, has no relevance to the reasonableness of potential investors ignoring the recommendation and warranty in the IM and subscription agreement as them consulting their own tax advisers. I do not accept, in particular, Ms Day QC's submission that potential investors' own advisers would be led to believe that they need not ask for the underlying documents because of the confidence with which Mr Thornhill expressed his opinion. An adviser, asked by a potential investor for *their* advice, as required by the terms of the IM and subscription agreement, could not reasonably advise simply that the Schemes would achieve the Tax Benefits because that was Mr Thornhill's opinion, however strongly Mr Thornhill held that opinion. Similarly, I reject the contention that it was not the job of the investors' IFA to "repeat" Mr Thornhill's work. That is precisely what an adviser *to* an investor would be required to do, if they had the requisite

expertise. If they did not, then it was their duty to advise the investor to seek advice from someone who did have the requisite expertise. Importantly, it was not reasonably foreseeable by Mr Thornhill that a potential investor's IFA would fail in their duties to their client in this respect.

142. Ms Day QC also contended, in support of the proposition that Mr Thornhill owed a duty, that Mr Thornhill stepped outside the role of a typical barrister, as did the solicitor in *Al-Kandari v JR Brown* [1988] QB 665. In that case, the solicitor had represented to a wife (who was not his client) that he would keep the husband's passport within his sight at all times. That was clearly beyond the normal role of a solicitor. Ms Day QC suggested that Mr Thornhill's agreement to allow his opinion to be seen by potential investors was equivalent to that conduct. I disagree. The fact that he permitted his opinion to be seen by potential investors gives rise to the possibility that he owed them a duty, but it does not change in any way the nature of the thing he had undertaken to do, namely advise. That was clearly within the typical role of a barrister.

143. She also suggested that it was relevant that he had been intimately involved in the design of the Schemes. I do not accept that. The fact that he had been asked for, and had given, advice on various aspects of SAD1 as it was in the course of development does not mean he stepped outside the role of adviser. In any event, the claim against him relates only to the advice he gave: there is no claim to the effect that as an architect of the Schemes he had any different or additional liability.

Information or advice?

144. In the closing submissions made on behalf of the claimants, much of the focus was on the proposition that Scotts expressly assumed responsibility in the IM for the "information" contained in it, and that information included the contractual arrangements, the fact that the LLP would be trading, the tax consequences of the Scheme and Mr Thornhill's involvement and endorsement of it.

145. Ms Day QC pointed to the statement on the first page of the IM that Scotts was responsible for the information contained in it.

146. She then pointed to numerous passages in the IM which refer to the LLP "trading". Those, she submitted, combined with the reference to advice having been received from Mr Thornhill gave rise to representations such as: the LLP would be carrying on a trade; the tax analysis in the IM reflects Mr Thornhill's advice; and the LLP will have the taxation consequences set out (those consequences being expressed in an unequivocal way). She further submitted that because Scotts had assumed responsibility for the information in the IM, it was therefore telling investors that they *could* rely on that information. As I understood the submission, that amounted to telling investors they could rely on Mr Thornhill's opinion.

147. There are a number of problems with this approach.

148. First, the fact that Scotts assumed responsibility for the contents of the IM is not relevant to the question of whether Mr Thornhill assumed a responsibility to investors for his advice.

149. That is illustrated by the attempt to fix Mr Thornhill with liability on the basis that his advice was "information" upon which investors could rely. The only representations made in the IM as to the advice from Mr Thornhill were that the tax analysis contained in it was based on Scotts' understanding of current law and practice, that they had obtained advice from their tax adviser, Mr Thornhill, and that (implicitly, therefore) the tax analysis contained in the IM was consistent with his advice. That does not involve any representation as to the accuracy of the contents of Mr Thornhill's Opinions.

150. Second, the contention that the IM contained representations that the LLP was "trading" confuses representations of fact and legal advice. It is true that there are various references to the LLP trading. It is also true that there is nothing in the IM which explains that "trading" is a necessary element in various statutory tests which must be satisfied in order to achieve the Tax Benefits (apart from a sentence explaining when an LLP is transparent for tax purposes). Shorn of the tax implications, the mere statement of fact that the LLP is trading is of no consequence. The claimants do not contend that they relied on a representation of fact that the LLP was trading, in the abstract. Their case against Mr Thornhill relates (as it must) only to his advice as to the tax consequences of the Scheme. To the extent that a statement in the IM that the LLP was trading can have any relevance, therefore, it must be construed as a statement that for the purposes of the relevant statutory provisions the LLP would be considered as a matter of law to be trading. Understood in that way, it is not a statement of fact, but a statement of a legal opinion. That would have been clear to anyone who received a copy of either of Mr Thornhill's long-form Opinions.

151. Third, I reject the contention that the fact that Scotts assumed responsibility for the information in the IM means that they were telling potential investors that they could rely on Mr Thornhill's opinion, including his endorsement of the part of the IM explaining the tax consequences. The statement that Scotts was responsible for the information in the IM meant no more than that (as was spelt out in the notice on the first page of the IM) to the best of their knowledge and belief, the information in the IM was in accordance with the facts and did not omit matters likely to affect the import of the information. So far as Mr Thornhill's advice was concerned, as I have already indicated, the only information contained within the IM was that it had been obtained and (implicitly) the advice in it was consistent with Scotts' understanding of the tax consequences as set out in the IM.

152. It is not possible, in my judgment, to construe anything in the IM as a statement that readers of the IM could *rely* upon Mr Thornhill's advice, and I do not think that any reasonable reader of the IM could have read it that way.

153. Fourth, and for similar reasons, I do not accept that Mr Thornhill's endorsement of the IM can give rise to a claim that he made an unequivocal representation that the Scheme would achieve the Tax Benefits. The fact that the IM stated that the tax analysis was based on Scotts' "understanding" of the law, having received Mr Thornhill's advice, would have made it clear to any reasonable reader of the IM that no such unequivocal representation was being made. While Mr Thornhill's opinion on the issue of trading was stated in unequivocal terms, that does not undermine the conclusion that it was nevertheless presented as (and would have been reasonably understood to be) an opinion as to the legal effect of the Scheme.

The position of claimants where the advice did not cross the line

154. For each claimant who saw (and whose adviser saw) only the IM, then the only relevant matters concerning Mr Thornhill's advice that crossed the line were: (1) he was tax adviser to Scotts (and in SAD2/3 the LLP); (2) Scotts (and in SAD2/3 the LLP) had received advice from Mr Thornhill as to the tax consequences of the Schemes; and (3) it is implicit from these two statements in the IM that Scotts' understanding of the tax consequences was consistent with Mr Thornhill's advice. (Mr Thornhill's advice on certain specific issues is stated in the IM, but it is not alleged that his advice on any of those issues was negligent.)

155. In these circumstances, I accept Mr Adam QC's submission that there can be no duty owed, because no advice from Mr Thornhill was ever communicated to a claimant. No reasonable investor could have understood that Mr Thornhill was making any statement or providing any advice to them at all. An implicit statement by Scotts that the tax analysis in the IM was consistent with Mr Thornhill's advice to Scotts is insufficient, in my judgment, to amount to the provision of advice *by* Mr Thornhill to any potential investor.

156. Insofar as the claim is based on Mr Thornhill's failure to warn that there was a significant risk that his views might be wrong, any claim by those who saw (or whose advisers saw) only the IM is hopeless for the additional reason that the implicit statement that Scotts' understanding of the tax analysis was consistent with Mr Thornhill's opinion told potential investors nothing about the terms in which Mr Thornhill's opinion was expressed, or the extent to which it was caveated by such risk warnings.

Conclusion

157. For the above reasons, I conclude that no duty of care was owed by Mr Thornhill to the claimants for the advice in relation to the Schemes.

Unfair Contract Terms Act

158. By section 2(1) and (2) of UCTA, a person cannot by reference to any contract term "or to a notice given to persons generally or to particular persons" exclude or restrict his liability for liability "except in so far as the term or notice satisfies the requirements of reasonableness."

159. The claimants contend that insofar as Mr Thornhill relies on the warranties contained in the subscription agreements or (in connection with SAD2/3 the checklist), he can only do so to the extent that they satisfied the requirements of reasonableness in UCTA. The warranties in question are that the claimant:

(1) had only relied on the advice of, or only consulted with, their own professional advisers with regard to tax, legal, currency or other economic considerations related to subscription to the LLP;

(2) had read and understood the terms of the IM and had taken appropriate professional advice before submitting their application and was aware of the risks attached to their becoming a Member in the LLP;

(3) accepted that Scotts, the LLP and their respective officers and staff had not provided any investment, taxation or other advice or recommendations in connection with SAD2 or SAD3; and

(4) accepted that it was their responsibility to obtain appropriate advice, recommendations and assessment from an independent financial adviser or other suitably qualified person.

160. Mr Thornhill does not rely on these as contractual terms, since he was not a party to any subscription agreement. Ms Day QC submitted that they constituted "notices" within s.2 of UCTA.

161. Mr Adam QC submitted that the short answer to this part of the claimants' case is that, even assuming UCTA applies, Mr Thornhill satisfies the reasonableness test. Section 11(3) of UCTA provides that in relation to a notice not having contractual effect the requirement of reasonableness is that it should be fair and reasonable to rely on the notice, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen. Mr Adam QC relied in particular on the following matters:

(1) Investors in the Schemes were high net worth and sophisticated individuals who could have walked away (tax avoidance being a voluntary activity) or invested in an alternative tax avoidance scheme at any time (there being a competitive market for tax avoidance schemes at the time);

(2) All claimants ought reasonably to have known of the existence of the warranties, which were clearly set out in the subscription agreement, and checklist, which the claimants were required to sign in order to invest in the Schemes;

(3) Since the Schemes could only be promoted via IFAs, any investor would necessarily have the benefit of an IFA to assist them in understanding the documents;

(4) Advice from tax accountants, solicitors and barristers would have been readily available to investors (as demonstrated by the fact that at least some of the claimants obtained their own independent advice), and the ability for investors to take their own advice was assisted by the provision of the promoter's own tax adviser's advice for scrutiny by those advising the investors.

162. Ms Day QC's principal submission on this aspect was that the warranties were insufficiently clear disclaimers of responsibility to satisfy the test of reasonableness. She referred, by way of example, to *Barclays Bank PLC v Grant Thornton UK LLP* [2015] EWHC 320 (Comm). In that case auditors stated in their report that they did not "accept or assume responsibility to anyone other than the company and the company's directors as a body, for our audit work, for this report, or for the opinion we have formed." At [89]-[91] of his judgment, Cooke J, in finding that the disclaimer was reasonable, placed reliance on, among other things, the fact that the disclaimer of responsibility was clear on its face and would have been read by anyone at Barclays who had read the two page audit reports. Ms Day QC submitted that, in contrast, in this case there is no clear disclaimer of responsibility.

163. I reject that submission. There is no disclaimer of responsibility, as such, in this case at all. My conclusion that no duty was owed is not based on a disclaimer of responsibility, but on the fact that in all the circumstances, including the terms of the IM and subscription agreement, it was not reasonable to expect investors to rely on Mr Thornhill's advice without independent enquiry. The question whether a disclaimer of responsibility was sufficiently clearly stated therefore does not arise. If UCTA were engaged at all in this case (as to which see further below) it is because the warranties are construed as "notices", but for which Mr Thornhill would owe a duty to the claimants. Specifically, if UCTA were engaged, it would be because, without the warranties that the claimants had relied only on their own advisers, Mr Thornhill would have owed a duty. The relevant question is not, therefore, whether the warranties clearly conveyed to the claimants that Mr Thornhill disclaimed responsibility, but whether they clearly conveyed that investors' subscription to the LLPs was made in circumstances where they promised that they had relied only on their own independent advice on tax matters. In my judgement, the warranties in the subscription agreement and checklist were entirely clear in this respect.

164. In addition to the factors that Mr Adam QC specifically referred to as summarised above, much of the reasoning that led to my conclusion that it was reasonable for investors to take their own independent advice before subscribing to the LLPs (see [114] to [120] above) also supports the conclusion that if UCTA is engaged at all, in relation to the warranties, the warranties were fair and reasonable in all the circumstances.

165. While it is strictly unnecessary to decide, therefore, whether UCTA applies, in my judgment it does not apply in this case, for the following reasons.

166. In the contractual context, there is a distinction between terms which exclude or limit liability, and those which do no more than describe one party's primary obligations to the other: *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, per Lewison LJ at [43] (and see Leggatt LJ at [96]).

167. In the same case, at [110], Leggatt LJ noted, obiter, that where a contract term was said to preclude liability arising in tort, the correct approach was "…first to determine whether in the absence of the contract term there would be a tortious liability arising out of an assumption of responsibility and concomitant reliance and 'then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it'", citing *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 193 and *Smith v Eric S Bush* [190] 1 AC 831.

168. The latter case, *Smith v Bush*, is closer to the present case. The defendant valuer provided a valuation report for a building society. The plaintiff obtained a mortgage from the building society. Both the mortgage application form and the valuer's report contained a disclaimer of liability for the accuracy of the report, covering both the building society and the valuer. The plaintiff relied on the report and purchased the house. In an action for negligence against, among others, the valuer, the valuer relied on the disclaimer. The House of Lords held that the disclaimer was subject to s.2 of UCTA.

169. It is important to note, however, that the basis of imposing liability in negligence, adopted in the two speeches which addressed the basis of liability, was different to that

which it is now accepted applies in light of *NRAM* (above). Lord Templeman, at p.848A-B, said: "In general, I am of the opinion that in the absence of a disclaimer of liability the valuer who values a house for the purpose of a mortgage, knowing that the mortgagee will rely and the mortgagor will probably rely on the valuation, knowing that the purchaser has in effect paid for the valuation, is under a duty to exercise reasonable skill and care and that duty is owed to both parties to the mortgage for which the valuation is made." He went on to note that the existence of a duty was tacitly accepted because the notices excluding liability were drafted by the mortgagee and imposed on the purchaser. Lord Jauncey, at p.871C said that "[t]he question must always be whether the particular facts disclose that there is a sufficiently proximate relationship between the provider of the information and the person who has acted on that information to his detriment, such that the former owes a duty of care to the latter." In the analysis of their Lordships, therefore, the wording of the disclaimer was not relevant in establishing the duty in the first place, but went only to excluding it.

170. Following *NRAM* and the other cases to which I have referred above, the test for liability depends on whether it was reasonable for the claimant to have relied on what the representor (or adviser) said and whether the representor (or adviser) should reasonably have foreseen that they would do so, without independent inquiry. That is a question that has to be answered by reference to all the relevant circumstances.

171. In this case, those circumstances include the fact that Mr Thornhill knew that potential investors had been recommended by Scotts to take their own advice on the tax consequences of the Schemes and that in order to invest in the LLPs the investors had to warrant to Scotts that they had relied only on their own professional advisers in relation to tax considerations.

172. In my judgment, whatever the position might have been if Mr Thornhill had himself included a disclaimer of responsibility within his opinion, the existence of the warnings in the IM and the warranties in the subscription agreements and checklists are factors which go to the question whether there is any duty owed by Mr Thornhill in the first place. I do not think, therefore, that the right approach is to ask whether liability would have been established but for the presence of those factors, any more than it should be asked whether liability would have been established but for any other of the factors I have referred to in determining that no duty arose.

F: Breach of duty

173. The claimants contend that no reasonably competent tax QC could have reached the conclusion Mr Thornhill did on the three relevant statutory tests: (1) trading, (2) on a commercial basis, (3) with a view to profit. The major part of the argument from both sides focussed on the first of those tests. It is common ground that the test for "trading" encompasses aspects of the other two tests. Thus, a lack of commerciality is itself a relevant consideration in the question whether an entity is trading. Similarly if the entity's activity is not undertaken with a view to profit, then that too is a relevant consideration in deciding whether it is trading for the purposes of the statutory test.

174. Like the parties, therefore, I will focus principally on the first of these tests.

Trading

175. At the heart of the dispute between the parties lies the correct approach to determining whether an entity was trading on the basis of the authorities in 2002-2004.

176. The claimants contend that those authorities established that the approach was a multi-factorial one, which required an analysis of all aspects of the specific transaction entered into by the LLP, and the application to that transaction of various tests, including whether the "badges of trade" (see further below) were present, whether there was a genuine commercial purpose behind the transaction, whether there was a difference between the shape and character of the alleged trade as carried out by the LLP and as carried out in the commercial world, and taking account of factors such as whether the transaction was speculative, and whether there was a genuine intention to make a profit. I will refer to this as the "ground-up" approach.

177. The essence of the approach adopted by Mr Thornhill was to start with the (uncontroversial) proposition that the activity carried on by WB, of which part was passed over to the LLP, was a trading activity. He then considered whether the fact that the LLP was carrying on only a part of the trade carried on by WB meant that the LLP was not itself trading. He concluded that because there were others in the film world who carried on the part which was passed to the LLP as a separate business, that separate part constituted a trade. While the terms on which the LLP carried out that transaction could negative the conclusion that it was trading, that would only be the case (on the basis of the *Lupton* principle, as to which see below) if the way the trade was carried on for tax (or any other) reasons was substantially different from the way it would be carried on commercially, such that it was "denatured" and thus not trading at all. That approach, Mr Thornhill contends, was mandated by the most recent authority from the House of Lords, *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 1 AC 655. I will refer to it as the "*Ensign* approach".

178. Mr Thornhill maintained in cross-examination that the advice he gave in 2002-2004 in relation to the Schemes was correct. On the central question whether the LLPs were trading, it was his view that the House of Lords in *Ensign Tankers* had established that distributing a film (and equally producing a film) is "inherently a trading activity".

179. He also said that he would reach the same conclusions today, albeit that in light of more recent authority the route he would take to get there would be different. Those recent authorities require a "whole range of factors" to be considered, so that if he were writing his opinion today he would need to indicate the factors he was relying on in coming to that view.

180. In the face of HMRC's challenge to the Schemes (on a basis that the arguments advanced by the claimants in this case reflect), the claimants in 2017 all reached a settlement with HMRC under which they repaid to HMRC an amount equal to the majority of the Tax Benefits received by them, together with interest. Mr Thornhill does not criticise them for doing so. It is not relevant to determine what outcome would have been reached, had a challenge to the Schemes been brought in 2017, but I have to proceed on the assumption that at the very least, on the basis of the law as it stood in 2017, any reasonably competent barrister would have advised that there was a significant risk that the Schemes would not produce the Tax Benefits.

181. The claimants dispute that there has been any change in the law, and contend that no reasonably competent barrister could have concluded that the LLPs were trading and/or commercially and/or with a view to profit, whether in 2002-2004 or in 2017.

182. In the skeleton argument filed on behalf of Mr Thornhill it was contended that a trilogy of cases from 2011 onwards which reached the Court of Appeal effected a "sea change" in the law. The cases are: *Eclipse Film Partners No 35 LLP v HMRC* [2015] EWCA Civ 95; *Samarkand Film Partnership No.3 v HMRC* [2017] EWCA Civ 77; and *Degorce v HMRC* [2017] EWCA Civ 427.

183. In his oral closing argument, however, Mr Adam QC accepted that the sea change was not in the law as such, but in the approach taken by HMRC to challenging film partnership schemes. The "seeds of the modern approach", as he put it, were lying in the law reports in 2002-2004. It was not, however, until after 2010 that HMRC began to challenge film partnership schemes on the basis of those arguments, and the courts, as a result of that change in approach, analysed them in the way set out in the trilogy of Court of Appeal cases. Mr Adam QC maintained that a reasonably competent tax QC could nevertheless have advised, on the basis of the authorities in 2002-2004, as Mr Thornhill did.

184. As a preliminary point, while the IM states that the tax analysis set out in it is based on current UK tax legislation and "Inland Revenue published practices, concessions and interpretations", Mr Adam QC did not contend that there were any published practices, concessions or interpretations of the Revenue which underpinned Mr Thornhill's advice.

185. Given the importance of the *Ensign Tankers* case to Mr Thornhill's case, it is important to set it out in some detail.

Ensign Tankers

186. The taxpayer invested in a limited partnership called Victory Partnership ("the Partnership"), consisting of Victory Film Productions Ltd as general partner (the "General Partner") and the taxpayer and four other companies as limited partners. The purpose of the Partnership was to engage in the production making and/or acquisition and distribution of films, in particular the film called "Escape to Victory".

187. The initial capital of the Partnership was $3,250,000 (being 25% of the anticipated cost of producing the film). The Partnership entered into agreements with the following effect:

(1) The producer of the film, Lorimar Productions Incorporated ("LPI") loaned the Partnership $9,750,000 (being the remaining 75% of the anticipated production cost of the film), and any further sums required to complete the film. These were non-recourse loans, repayable exclusively out of the proceeds of the film.

(2) The Partnership acquired the uncompleted film for $4,780.951, being the cost of making it to date. LPI agreed to complete the film for and on behalf of the Partnership, in accordance with a pre-agreed budget. The Partnership agreed to pay LPI the balance of the approved budget for doing so. Any increase in the cost of the film would be funded by LPI pursuant to the loan referred to in (1) above.

(3) LPI assigned to the Partnership all of its ownership rights in the film.

(4) The Partnership retained the ownership of the master negative, but granted to an associated company of LPI, Lorimar Distribution International Incorporated ("LDII"), in perpetuity, an exclusive licence to distribute and exploit the film outside the UK.

(5) LDII was entitled to retain gross receipts from the film until it had recouped its distribution expenses and share of profit payable to the members of the cast and other participators in the film. The net receipts of the film were payable to the Partnership, and were divisible as follows: 25% to the Partnership and 75% to LPI in repayment of the loan until such point that the Partnership had recovered its outlay of $3,250,000 (at which point, LPI would have recovered the loan of $9,750,000 without interest). Thereafter, net receipts were payable to LPI until it recovered interest on the original loan and any other sums, with interest, it had loaned to complete the film. Thereafter, receipts were divided 25% to the Partnership and 75% to LDII.

188. The taxpayer sought to take advantage of section 41(1) of the Finance Act 1971 which provided an allowance (referred to as a "first-year allowance") to a person carrying on trade who incurs capital expenditure on the provision of machinery or plant for the purposes of the trade, and in consequence of that expenditure the plant or machinery belongs to him at some time during the chargeable period related to the incurring of the expenditure.

189. One of the issues, therefore, was whether the Partnership was carrying on a trade.

190. The Commissioners found the facts as follows (as summarised in the judgement of Sir Nicholas Browne-Wilkinson V.-C. in the Court of Appeal ([1991] 1 WLR 341, at p.349):

> "(1) It was never the intention of the Tilling Group that the taxpayer company should be a commercial success but that its primary purpose was to improve the group's earnings and cash flow by tax deferral. (2) Guinness Mahon (through Mr. Wilde) negotiated the terms of the scheme with L.P.I, as bankers seeking to offer a tax avoidance scheme to investors. As to the commercial terms, Guinness Mahon "took what Lorimar was prepared to give." (3) In considering the importance to the taxpayer company of making a commercial profit, they held that Mr. Whitfield's calculations demonstrated: "that even the cash flow position of 300 per cent cost recovery is markedly inferior to that obtaining on a complete flop. The best position by far... is obtained on 50 per cent cost recovery." (4) The transaction was aptly described in documents which predated the formation of Victory Partnership by Guinness Mahon as "a tax deferral scheme" and by Mr. Black, a senior executive of the Tilling group, as "a scheme." (5) "Escape to Victory" was originally budgeted at $ll.5m., but this budget had increased to $13m. Mr. Whitfield was aware that by 21 June 1980 the film was already $20,000 over the budget of $13m., contingency allowance of

> $lm. having been exhausted, and may have been aware that by 5 July it was $0.50m. over budget. Yet this caused the taxpayer company no concern. (6) The Tilling Group had envisaged that, since the completion of the film was dependent on L.P.I. finance, the possibility of L.P.I.'s insolvency would be covered by a bank guarantee, but no such guarantee was ever sought. (7) There were certain features of the documents executed on 14 July which, in their view, "tended to diminish any faith in their commerciality." (8) The partnership did little after 14 July 1980. (9) Mr. Wilde and Guinness Mahon, as controllers of Victory Productions, did not take very seriously their responsibilities as managing partners, paying little or no regard to cost control of the film. This was inconsistent with "normal commercial behaviour" even taking into account the non-recourse basis of the loans from L.P.I. (10) The taxpayer company's motive and objective in entering into the "Escape to Victory" transaction was to produce for the Tilling Group beneficial tax allowances by means of first-year allowances. (11) The taxpayer company had no commercial motive in entering into the transaction: "it invested in 'Escape to Victory'... for fiscal reasons not caring whether they made a profit or not." (12) The total uncommerciality of the taxpayer company's approach was demonstrated when Mr. Black, in the course of his re-examination, was asked whether the Tilling Group would have entered into the transaction "at any cost," and replied "Yes.""

191. On appeal to the High Court ([1989] 1 WLR 1222), Millett J summarised the law relevant to this issue at p.1232D to p.1234C in nine propositions. First, in order to constitute a transaction in the nature of trade, the transaction in question must possess not only the outward badges of trade but also a genuine commercial purpose. Second, *if the transaction is of a commercial nature and has a genuine commercial purpose*, the presence of a collateral or ulterior purpose to obtain a tax advantage does not "denature" what is essentially a commercial transaction. If, on the other hand, the *sole* purpose of the transaction is to obtain a fiscal advantage, it is logically impossible to postulate the existence of any commercial purpose. Third, where both commercial and fiscal purposes are present, questions of fact and degree may arise, but the question is not which purpose was predominant, but whether the transaction can still fairly be described as being in the nature of trade. Fourth, the purpose or object of the transaction must not be confused with the motive of the taxpayer of entering into it. The question is not *why* he was trading but *whether* he was trading. It is perfectly possible to predict a situation in which a taxpayer with solely fiscal motives becomes a partner with others in an ordinary trading activity carried on by them for a commercial purpose and with a view to a profit. Fifth, the test is an objective one, to be ascertained by a detailed analysis of the terms and circumstances of the transaction itself, without inquiry into the motives and subjective aspirations of those who affected it. Sixth, the transaction must be viewed as a whole and in the context of all *relevant* surrounding circumstances, being those which are capable of throwing light upon the true nature of the transaction or which are alleged to demonstrate a commercial purpose. Seventh, if the purpose or object of a transaction is to make a profit, it does not cease to be a commercial transaction merely because those who engage in it have obtained the necessary finance

from persons who are more interested in achieving a fiscal advantage from their investment. Eighth, the true significance of fiscal motive is as stated by Lord Morris of Borth-y-Gest in *Lupton v F.A. & A.B. Ltd* [1972] AC 634, at p.647, namely that while a fiscal motive is irrelevant in itself, it becomes highly relevant if it affects, not just the shape or structure of the transaction, but its commerciality so that "the shape and character of the transaction is no longer that of a trading transaction". Ninth, the test is accordingly:

> "whether, in the light of all relevant circumstances, the transaction is capable of being fairly regarded as a transaction in the nature of trade, albeit one intended to secure a fiscal advantage or even conditioned in its form by such intention; or is incapable of being fairly so regarded but is in truth a mere device to secure a fiscal advantage, albeit one given the trappings normally associated with trading transactions."

192. The commissioners' decision that the Partnership was not carrying on a trade was based on its conclusion that transactions entered into with fiscal motives as their paramount object are not trading transactions. Millett J, in overturning that decision, held that the commissioners confused the motives of the taxpayer company and the purpose or object of the transaction. He noted (at p.1235C) that the fact that transactions were negotiated by or on behalf of partnerships whose partners were indifferent to making a commercial profit excites a natural suspicion and that:

> "[t]he financial terms of any transaction entered into in such circumstances must be jealously scrutinised to ascertain whether they were nevertheless reasonable commercial terms such as might have been negotiated by parties with a normal concern to make profits, or whether they were so loaded against them as to eliminate or significantly reduce their prospects of making profits."

193. Millett J went on to conclude that the commissioners had conducted no such inquiry. They had not concluded, for example, that the terms on which the Partnership contracted were unfavourable or so loaded against them that their prospects of making a profit were unjustifiably diminished, or remote or illusory. He concluded that the matters which the commissioners *had* taken into account threw no light on the question they were required to decide. Those matters were: (1) the lack of significant activity by the Partnership after the date it entered into the agreements; (2) the lack of control over expenditure on the film by the Partnership; and (3) certain "curious" provisions in the documentation which "tended to diminish any faith in their commerciality".

194. As to the first of these, Millett J said, at 1236A, that it is open to a partnership, like any other trader, to act through agents or independent contractors. As to the second he said, at p.1236C, that the lack of control over expenditure reflected the reality of the situation, that the Partnership was a participant with a minority interest but without any technical expertise in a venture being undertaken on its behalf by the majority participant with the necessary expertise and a far greater interest in keeping the expenditure under control. As to the third, he considered that the commerciality of the agreements (which were not alleged to be shams) could not be impugned by "carping criticisms of minor deficiencies in their drafting".

195. It accordingly fell to Millett J to determine afresh whether the Partnership was trading. He concluded, at p.1237H:

> "In my judgment there is only one possible answer to this question once the facts found by the commissioners are properly assembled and each is placed in its correct setting."

196. He had already held, at p.1232C, that the production of a film, or the purchase of a completed film, with a view to its distribution and exploitation for profit "…are all typical, though highly speculative, commercial transactions in the nature of trade. It is with those words "for profit" that the questions in the present case are primarily concerned." At p.1238H he said that LPI had set out to make the film before the Partnership appeared on the scene and that, in the absence of a finding to the contrary, it must be taken to have done so commercially and with a view to profit. Since if LPI made a profit, then so would the Partnership, "[o]nly one conclusion is possible. Viewed objectively the transactions entered into by [the Partnership] were commercial transactions with a view of profit.

197. He concluded, at p.1239A-B:

> "In these circumstances the question of law which arises from the facts found by the commissioners can be formulated as follows: where a partnership enters into a commercial transaction with a view of profit, can it fairly be regarded as carrying on a trade even if (i) it obtained the necessary finance from investors who were primarily motivated by the hope of obtaining a fiscal advantage rather than a commercial profit and (ii) the transaction itself was deliberately structured in order to secure the fiscal advantage without ceasing to be commercial or jeopardising the prospects of profit? In my judgment, this question must be answered in the affirmative."

198. The claimants point out that Millett J viewed the transaction as having "…all the characteristics of a typical speculative trading transaction and none of the characteristics of an investment", in part because the film might have yielded substantial profits or no net receipts at all (see pp.1239H-1240A).

199. The Court of Appeal overturned Millett J's decision. They held that where the circumstances of the transaction are equivocal, and the purpose may or may not have been commercial, the commissioners are entitled to look at evidence of the subjective intention or motives of the relevant party. That is because "…such motive is evidence, sometimes compelling, on which to decide the legally relevant question, viz. was the *purpose* of the transaction a trading purpose?": [1991] 1 WLR 341 per Sir Nicholas Browne-Wilkinson V.-C. at p.354A. He concluded that the circumstances were indeed equivocal. The provisions involving the vendor of the film (LPI) lending on a non-recourse basis 75 per cent of the purchase price, which was to be repaid out of profits of the film "raises immediate questions as to the true nature of the transaction."

200. The House of Lords restored the decision of Millett J on the question of trading, but concluded that the expenditure towards production and commercial exploitation of the film was limited to the $3,250,000 capital contribution of the partners.

201. Lord Templeman delivered the lead speech. He reviewed (at p.677G to p.679H) the cases which the Court of Appeal had relied upon in which (as he put it) intentions sometimes illuminated and sometimes obscured the identification of a trading purpose. At p.680A-B, he distinguished those cases on the basis that they were dealing with "the identification of a trading transaction" whereas "[i]n the present case a trading transaction can plainly be identified. Victory Partnership expended capital in the making and exploitation of a film. That was a trading transaction which was not a sham and could have resulted in either a profit or a loss."

202. To similar effect, at p.677D, he said "[t]he facts are undisputed and the law is clear. Victory Partnership expended capital of $3¼m for the purpose of producing and exploiting a commercial film. The production and exploitation of a film is a trading activity. The expenditure of capital for the purpose of producing and exploiting a commercial film is a trading purpose". At p.679A, he said of the House of Lords' decision in *Simmons v Inland Revenue Commissioners* [1980] 1 WLR 1196, which concerned the question whether the taxpayer had an intention to trade (as opposed to making an investment), "[t]his case illustrates a difficulty which does not arise in the present case and does not give rise to any question of fact determinable by the commissioners. The only facts are the 17 documents and the activities which were carried out pursuant to those documents."

Lupton: de-naturing a transaction through fiscal motives

203. As Millett J had pointed out in *Ensign Tankers* the House of Lords in *Lupton* had decided that the question of fiscal motive was only relevant if it had caused the shape and character of the transaction to be so altered that it no longer amounted to carrying on a trade.

204. The concept of a transaction whose shape is "so altered" by fiscal considerations is illustrated by the facts of *Lupton*. It involved dividend stripping which consisted, in brief, of the following: A holds shares in a company on which a dividend is shortly to be paid; B purchases the shares for (say) £100; the company declares a dividend of £50 net of withholding tax; B then sells the shares for £50. B claims to have made a loss of £50 which it can set-off against other income. The company recovers the tax suffered on the dividend. As Lord Morris of Borth-y-Gest pointed out (at p.645), if B (in this example) acquired and sold shares in these circumstances knowing of, and intending to gain, the tax advantage, that could not alter the nature of the "ordinary trading transaction". The motive for entering into the transaction is irrelevant to its nature.

205. That was to be contrasted, however, with the nature of the transaction in question in *Lupton*. The purchaser agreed to pay £1,700,000 for the shares in the company. The company was anticipated to pay a dividend of £800,000. The vendor warranted to the purchaser (in substance) that the purchaser would make a loss on the transaction (because the shares would diminish in value by about £800,000 after payment of the dividend) which would entitle them to recover tax from the Revenue. The contract required the vendor to set aside £200,000 of the purchase price, which would be paid as liquidated damages in the event that the warranty was breached. Lord Morris of Borth-y-Gest concluded that this "truly strange arrangement" caused this transaction to be something very different from a share dealing transaction coming within the area of trade of a dealer in shares. This was, therefore, a carefully worked out scheme "which (in the hope of mutual financial benefit) was shaped and moulded by fiscal

possibilities." Lord Guest (at p.651D) agreed, saying that the shares had been bought as "pieces of machinery with which a dividend-stripping operation might be carried out".

The Barclays Mercantile case

206. When Mr Thornhill was first asked to advise on SAD1, Park J's judgment in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2002] EWHC 1527 (Ch) ("*BMBF*") was under appeal to the Court of Appeal. The case was mainly concerned with whether expenditure by BMBF under a transaction involving the sale and leaseback of a gas pipeline was incurred on the provision of the pipeline. The Revenue also argued, however, that even if it had been so expended, BMBF had not incurred expenditure wholly and exclusively for the purposes of its trade. Park J accepted this argument. At [70]-[75], purportedly applying the *Lupton* principle, he had regard to the transaction "as a whole" and concluded that although the transaction did involve the lease of a pipeline, "it was not really a central element: it was not what the transaction was really about. The transaction was really about creating a complex and sophisticated structure which enabled BGE every year to receive payments representing its share of the tax savings (or group relief payments) received by BMBF from the capital allowances."

207. The Court of Appeal handed down its decision on 13 December 2002. The judgments mainly concerned the question whether BMBF had incurred expenditure on the pipeline. Peter Gibson LJ (with whom the other members of the Court agreed) nevertheless dealt briefly with the question whether the expenditure had been incurred for the purposes of a trade. At [46] he concluded that the expenditure had been incurred wholly and exclusively for the purposes of BMBF's trade of providing asset-based finance. He said:

> "It seems plain to me that BMBF incurred expenditure on the provision of the Pipeline by a transaction which, despite having a fiscal element in it, in that capital allowances were to be obtained and passed on to the lessee in the form of lower rentals, was a genuine trading transaction. I would hold that the facts of the present case are far removed from the artificial structure employed in a dividend−stripping scheme such as that used in the Lupton case."

208. The facts of *BMBF* are materially different from those in film partnership scheme cases, notably because BMBF undoubtedly carried on a trade of providing asset-based finance. Its importance in this case, however, lies in the Court of Appeal's rejection of Park J's attempt to apply *Lupton* by asking what the transaction, viewed as a whole, was "really about". In the SAD1 Opinion, Mr Thornhill merely noted that: "An attempt to resurrect the "Lupton principle" was made by Park J in [*BMBF*]. It was firmly overruled by the Court of Appeal." I consider that was a conclusion that a reasonably competent tax QC could have reached.

The modern approach

209. The more recent approach of the courts is neatly encapsulated in the Court of Appeal's decision in *Samarkand*. This was in response to the taxpayers' contention that the

purchase and leasing of a film were transactions "of an essentially trading character", in the same way as the purchase and leaseback of the gas pipeline in *BMBF* formed part of the financial trade of the taxpayer in that case. Henderson LJ (with whom Arden and Richards LJJ agreed) said (at [59]):

> "These submissions were attractively presented by Mr Furness, but I am unable to accept them. At the most basic level, it is now clear from Eclipse, if it was not clear before, that the question whether what the taxpayer actually did constitutes a trade has to be answered by standing back and looking at the whole picture: see [111]. Although it is a matter of law whether a particular activity is capable of constituting a trade, whether or not it does so in any given case 'depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles': see [112]. It follows that it can never be appropriate to extract certain elements from the overall picture and treat them, viewed in isolation, as determinative of the issue. But that, in essence, is what Mr Furness is inviting us to do, when he says that the purchase and leaseback (or onward lease) of a film are inherently trading activities. There is no dispute that such activities are capable of forming part of a trade, and in many contexts the only reasonable conclusion would be that they did form part of a trade. But when the whole picture is examined, the conclusion will not necessarily be the same. The exercise which the FTT has to undertake is one of multi-factorial evaluation, and their conclusion can only be challenged as erroneous in point of law on Edwards v Bairstow grounds: see Eclipse at [113]."

210. I note that this is a different approach to the application of the *Lupton* principle. HMRC's alternative argument before the FTT and UT in *Samarkand* had been that the transaction, if prima facie trading, might be 'denatured' on the basis of the *Lupton* principle. The FTT and UT did not, however, need to address that point and it did not form part of the Court of Appeal's reasoning.

The seeds of the modern approach

211. As I have noted, Mr Thornhill accepts that the seeds that led to the conclusions in *Samarkand* and the other more recent cases were already contained within the existing case law in 2002-2004.

212. The claimants go further, however, and contend that the case law in 2002-2004 already mandated the ground-up approach which the Court of Appeal has recently re-affirmed.

213. First, the claimants pointed to a number of authorities in which it was said that the determination whether an entity was trading depended upon an analysis of all the facts. I need only refer to a few examples:

(1) *Jenkinson v Freedland* (1960) 39 TC 636, where Donovan LJ said, at pp.647: "It cannot be right, therefore, to assert, as the Crown did before us, that whenever something is bought to re-sell at a profit an adventure or concern in the nature of trade necessarily results, and any finding of the Commissioners to

the contrary must be perverse. Otherwise, there would hardly be any need to introduce a capital gains tax. It would virtually be here already. The true position, in my opinion, is that all the facts in each case must be considered, not merely the motive of acquisition, and a conclusion arrived at from such a comprehensive review."

(2) *Lupton* (above) where, at p.660, Lord Simon said: "share-dealings and other business transactions vary almost infinitely; and to determine whether the transaction is, on the one hand, a share-dealing which is part of the trade of dealing in shares or, on the other, merely a device to secure a fiscal advantage, all the circumstances of the particular case must be considered."

(3) *Ransom v Higgs* [1974] 1 WLR 1594, where, at p.1606 Lord Morris said: "in considering whether a person carried on" a trade it seems to me to be essential to discover and examine what exactly it was that the person did."

214. Second, the claimants referred to various authorities which emphasised the importance of the "badges of trade" in determining whether an entity was trading. These derive from *Marson v Morton* [1986] 1 WLR 1343. In that case the taxpayers made a one-off purchase of a piece of land, which they later sold for a profit. They were assessed to income tax on the profits arising from the transaction. This depended on whether the transaction constituted an adventure in the nature of trade. Sir Nicholas Browne-Wilkinson V.-C. concluded that it did not. At p.1348B he said:

> "It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case."

215. He then identified a list of factors – by no means comprehensive or decisive – which were treated as "badges of trade": (1) whether the transaction was a one-off – the lack of repetition pointing against trade; (2) whether the transaction is related to the trade the taxpayer otherwise carries on; (3) whether the transaction involves a commodity which is normally the subject matter of trade; (4) whether the transaction was carried through in a way that was typical of the trade in a commodity of that nature; (5) whether the transaction was financed with borrowing, which might indicate an intention to sell in the short term; (6) whether work was done on an item purchased for re-sale; (7) whether the purchase was resold in one lot or broken into saleable lots; (8) whether the purchaser's intentions at the time of purchase was to resell in the short term; (9) whether the item purchased provided enjoyment, or income, pending resale. In order to reach an assessment "…it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question – and for this purpose it is no bad thing to back to the words of the statute – was this an adventure in the nature of trade?". In some cases, it may be more appropriate to ask "…was the taxpayer investing the money or was he doing a deal?".

216. Third, the claimants referred to authorities which emphasised the importance of the purpose or object of the taxpayer. In *Iswera v IRC* [1965] 1 WLR 663, for example, Lord Reid said, at p.668: "if, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone

cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances."

217. Fourth, the claimants relied on the fact that it had long been established that it was relevant to enquire whether the activity in question is one which is "of the same kind, *and carried on in the same way*, as those which are characteristic of ordinary trading in the line of business in which the venture was made" (emphasis added): *IR v Livingston* [1927] SC 251, at pp.255-6 per Lord President Clyde.

218. Fifth, the claimants relied on numerous Revenue manuals which stressed the importance of analysing all of the circumstances. For example, in IM121 (dated 1 January 2003) headed "trade: overview", it was said that while there was little guidance in the statute on what amounts to trading, case law established that (1) trade cannot be precisely defined; (2) certain characteristics can be identified which are normally those of trade; and (3) other characteristics can be found which preclude a profit from being that of a trade. The reader was warned: "Before you can take an informed view as to whether particular activities amount to trading you must obtain and carefully consider all the facts." In IM123, dated 19 January 2003, further guidance was provided as to what a consideration of all the facts entailed. An investigative approach was said to be required, including an examination of all the background detail which may affect the treatment for tax purposes: "you should not take a firm view of the nature of the transaction until after you have made" such a review. IM124a repeated similar guidance, citing *Ransom v Higgs* and *Marson v Morton*, and IM125a set out a summary of the nine badges of trade derived from *Marson v Morton*.

Discussion: the approach to trading in 2002-2004

219. In my judgment, based on the state of the authorities in 2002-2004, the *Ensign* approach which Mr Thornhill took was one which a reasonably competent tax QC could have taken.

220. In particular, I consider that a reasonably competent tax QC could have concluded that a different approach to that mandated by the cases on which the claimants rely was possible where the transaction in question involved the taxpayer assuming part of what was undoubtedly a trading activity carried on by another. Such a tax QC could have construed both Lord Templeman and Millett J in the passages from *Ensign Tankers* quoted above as essentially adopting that approach and might reasonably have concluded that the cases relied on by the claimants in which the ground-up approach was adopted were distinguishable.

221. Many of those cases concerned a one-off transaction, such as the acquisition of an asset before selling it on, with or without work having been done on it (as in *Jenkinson v Freedland*, *Marson v Morton* or *Iswera*). The question in those cases was whether the activity could be considered trading at all (usually in order for a charge to tax to arise in the first place), so the starting point that the activity which the taxpayer was involved in was unquestionably a trade (at least when carried on by someone else) was not present.

222. Although the badges of trade are important in considering whether a particular activity is trading at all, they have little role to play in the *Ensign* type of case. Even under the

modern approach, the Court of Appeal has reached a similar conclusion. In *Eclipse* at [114], the Court noted that the cases by reference to which the list of badges of trade had been compiled in *Marson v Morton* were "not sufficiently analogous to the facts of the present case to make the list of value in these proceedings." As for *Ransom v Higgs*, while it is important to ask what the LLP itself did, the facts of that case were far removed; there, the taxpayer had no actual role at all in the scheme he set up.

223. Cases such as *Iswera*, which identified purpose or object as a material factor, must be read in the light of two matters. First, the important distinction later drawn by Millett J in *Ensign Tankers* (and at least implicitly endorsed by the House of Lords in that case) between subjective motive and objective purpose and, second, the explanation in *Ensign Tankers* of the *Lupton* principle, that it was only where the sole purpose (objectively construed) of the transaction was a fiscal one, such that there could be no genuine commercial purpose, that the transaction is "de-natured" so that it did not constitute trading at all.

224. So far as the *Livingston* test is concerned, I consider that the reasonably competent tax QC could have concluded that the fact that the separate activity carried on by the taxpayer was carried on for a purpose that was at least in part commercial (so not solely for fiscal purposes), would be supported by the fact that such separate activity was itself carried on in the commercial world. While this involved determining whether it was carried on in the commercial world *in a similar way*, it was reasonable to take the view that this required focus on the activity being undertaken, as opposed to, for example, the terms on which profits were divided between those involved in the activity. The latter would be relevant to the question whether the trade was being carried on commercially with a view to profit, but a reasonably competent tax QC might have concluded that differences in the level of upside potential, or downside risk, were not relevant to the question whether the part of the trade assumed by the LLP was carried on in the same way as in the commercial world.

225. As for the numerous Revenue Manuals to which I was referred, save in one respect to which I refer below, I do not find these of much assistance. They were not a source of the law at the time, but were intended to reflect the law. The law was to be found in the legislation and decisions of the courts. While the manuals might be relevant if the issue was whether an adviser had missed something, because it could be said that a reasonably competent tax QC would be aware of what was in the manuals at the time, that is not this case. The claimants' complaint is not that Mr Thornhill was unaware of the relevant law, but that he failed to apply it to the detailed circumstances of the Schemes in a way which any reasonably competent tax barrister would have done.

226. As I have noted, it is common ground that the *Ensign* approach could not reasonably be adopted today. The trilogy of Court of Appeal cases has made that clear, as encapsulated in the passage cited from *Samarkand* above. I agree with Mr Adam QC that the change is largely due to the different approach taken by HMRC in challenging film partnership schemes to that which it took in *Ensign Tankers*. Thus, in *Ensign Tankers*, the Revenue's approach was to focus on the relevance of the motive of those entering into the transaction to obtain a fiscal advantage. That was reflected in many of the findings reached by the Commissioners (see [190] above). The motive to save tax was at the heart of the approach taken by the Court of Appeal which was rejected in the House of Lords. The Revenue relied on *Lupton*, arguing that, as the House of Lords held in that case that tax avoidance is not trading, the tax avoidance scheme in

Ensign was not trading (see p.670H). Lord Templeman noted (at p.671A) that the Court of Appeal had followed *Lupton*. He rejected the Revenue's submission on the basis that in the dividend-stripping cases such as *Lupton* "the tax avoidance scheme negatives trading because on the true analysis of the transaction the trader does not trade at all". The challenge to the transaction in *BMBF* and Park J's reasons for concluding that it did not involve trading were similarly based on an attempt to resurrect a version of the *Lupton* principle which the House of Lords had rejected in *Ensign Tankers*.

227. I have considered whether a reasonably competent tax QC would not simply have relied, in answering the question whether the LLPs in this case were trading, on *Ensign Tankers*, but should have had regard to what decision a court was likely to come to if the Revenue sought to challenge the Schemes on a different basis. While this is a factor which I consider is relevant to the nature of any warning that ought to be given (as to which see below at [326] to [340]), I consider that a reasonably competent tax QC could have taken the same view as Mr Thornhill – that as the most recent word from the highest appeal court, *Ensign Tankers* represented the current state of the law.

228. It is true that, since the function of the court is, usually at least, to decide the issues placed before it on the basis of the competing arguments made by the parties, it is not sufficient, in seeking to predict how the courts might decide a case in the future, to point to a case which appears to answer the question, without analysing the arguments that were presented to the court. In cases concerned with tax avoidance schemes, that generally means identifying the basis of challenge made by the Revenue and the arguments presented by them in support of that challenge.

229. That does not mean, however, that the reasonably competent tax QC is required to anticipate all possible approaches the Revenue might take. I bear in mind in this connection that any reasonably competent tax QC specialising in advising on film partnership schemes in 2002-2004 was likely to be aware of the nature of the objections raised by the Revenue to such schemes in the decade since *Ensign Tankers*. There is no evidence that the Revenue's approach had changed in that period. Mr Thornhill pointed to three decisions in the six years after he advised on the Schemes, involving film partnership schemes, in which HMRC did *not* take the point that the relevant entity was not trading: *Halcyon Films LLP v HMRC* [2008] STC (SCD) 1016; *Micro Fusion 2004-1 LLP v HMRC* [2008] STC (SCD) 952; and *Icebreaker 1 LLP v HMRC* [2010] UKFTT 6. While these are not directly relevant, since they post-date his advice in this case, they do provide some support for the conclusion that the Revenue had not by the time he advised changed its approach to challenging the trading aspect of such schemes since *Ensign*. This lends support, in my judgment, to the view that a reasonably competent tax QC might rely upon *Ensign Tankers* as authoritative guidance from the highest court.

230. Some further support is to be found in one of the Revenue's own manuals, relating to sale and leaseback film schemes. In the Business Income Manual 56455, the Revenue described a "plain vanilla" sale and leaseback scheme. This involves a partnership doing no more than purchasing a film from a production company, then immediately leasing-back to the production company. While the Schemes were not sale and leaseback schemes, I consider that a reasonably competent tax QC advising in 2002-2004 could have taken comfort from the fact that the Revenue had described the partnership in this example as "carrying on a trade of exploitation of master versions of

films". I note in particular that the LLPs carried out considerably more activity than the taxpayer entities in the sale and leaseback scheme described in the Revenue's manual.

231. For these reasons, I reject the claim that the approach Mr Thornhill adopted to the question of trading was one which no reasonably competent tax QC could have come to.

The claimants' criticisms of Mr Thornhill's conclusions

232. Even if Mr Thornhill's general approach was not negligent, the claimants contend that no reasonably competent tax QC, having considered in detail the terms of the Schemes, could have concluded as Mr Thornhill did.

233. This breaks down into two issues. First, what conclusions would any reasonably competent tax QC have reached as to the terms of the Schemes, in particular the terms of the DA, MSA and COA. Second, in light of those facts what would any reasonably competent tax QC have concluded as a matter of law.

234. So far as the facts are concerned, in their closing argument, the claimants distilled their case into five key factual conclusions which would have been reached, they contend, by any reasonably competent tax QC. I will first determine to what extent these five factual conclusions are made out on the evidence, before considering what conclusions a reasonably competent tax QC might have come to in light of them.

<u>The five key factual conclusions</u>

(1) No control over the films, budget or marketing

235. The first key conclusion is that the LLPs had no "real control" over the slate of films, the budget for P&A Costs or marketing.

236. As to the slate of films, the claimants contend that WB had absolute discretion to withdraw any of the initial films from the slate, over the identity of any substituted films, and over the identity of any Additional Pictures to be added to the slate of films.

237. I do not accept that WB had an absolute discretion to withdraw any of the initial pictures. By section 2.1(a) of the DA, WB granted to the LLP an exclusive licence "following the completion of each Picture" of the Distribution Rights in such Picture (defined as those listed in Schedule A, any picture substituted under section 2.4 and any Additional Picture). By section 2.4, WB was entitled "in the event that any of the Pictures referred to in Section 2.2(a) (being the initial slate of 10 films listed in Schedule A) is not made available by the Grantor to the Distributor for Theatrical release in the Territory", to substitute another picture. Mr Adam QC contended, and I accept, that these two provisions must be read together. Section 2.4 provides what is to happen *if* a film is not available, but it does not determine *when* WB is entitled to withdraw a film. One obvious circumstance when section 2.4 would apply is where a film is not completed, and thus never subject to the licence in section 2.2(a). Another possibility is that a film is completed but no agreement is reached as to the budget or marketing strategy and, as a result, the licence is rescinded under section 2.1(c). Read together in this way, WB did not have an unfettered right to withdraw a picture simply because (for

example, as the claimants contend) it looked like it was going to be particularly profitable.

238. The claimants contend that if, having either not completed a film or rescinded a licence for a film, WB provided a substitute film, the LLP's choices were limited. Section 2.4 provides, however, that the LLP may not "unreasonably" reject any film proposed to be substituted. It follows, by implication, that the LLP may reject the proposed film if it has reasonable grounds to do so. The section is silent as to what would happen if it did reasonably reject a film but, in my judgment, the better view is that WB would need to propose a different film. That is supported by the opening sentence of section 2.4 which refers to the "Substitute Picture" as one which "will be substituted". This suggests that the parties' intention was that the withdrawal of a film from the slate would result in another film being substituted, and the remainder of section 2.4 is dealing with the mechanics as to how that is to be achieved.

239. The claimants are correct, however, that the LLP has no control over what Additional Pictures will be added to the slate: by section 2.5 of the DA, the LLP consents to "any designations by the Grantor of motion pictures as Additional Pictures".

240. As to P&A Costs, the claimants are correct to point out that the LLP has no express contractual control over the amount spent. That is, first, because the Sub-Distributor is free to spend on P&A Costs in excess of the budgeted amount as approved by the LLP, with a right to recoup that excess expenditure out of the proceeds of the films in priority to the LLP: see sections 2.2(b), 6.1(a)(iii) and 6.(b)(iii) of the MSA. Second, if the LLP does not approve the full amount of the P&A Costs included in the Budget for a particular Picture, WB has the right to rescind its licence of the distribution rights for that picture. The incentive to exercise that right is, however, diminished by the first point (i.e. the Sub-Distributor's right to spend more than the approved budget) and by the fact that the rescission of the licence would (for the reasons set out above) result in another film being substituted.

241. The claimants contend that this lack of control is significant because WB and the Sub-Distributors would be likely to *over*spend on P&A Costs since they not only have the right to recoup these before any proceeds of the films reach the LLPs but also have the right to recoup from the proceeds of films a fee (of 20% of the amount expended). Spending more on P&A Costs thus enables them to make a further profit at the expense of the LLP. I do not accept this point, which overlooks the fact that the Sub-Distributors are under an obligation to use "good faith reasonable efforts" in marketing and distributing the films "in accordance with the Budget". That does provide the LLPs with a measure of contractual control against the risk that the Sub-Distributors might overspend on P&A Costs. The claimants' contention also ignores the fact that at the point in time at which P&A Costs are incurred, there is no certainty about the level of income the film will produce, so that excess spending is at risk. Given the existence of the guarantees from the Sub-Distributors, it is the Sub-Distributors who bear that risk. That would act as a commercial restraint on over-spending on P&A Costs.

242. As to marketing, the claimants contend that the MSA envisages marketing materials being made available to the LLP at a time when it is simply impossible for the LLP to have any meaningful input, such that the LLP's right to approve marketing materials is in effect illusory. Section 2.2(b) of the MSA provides that the Sub-Distributor is required to make available marketing materials to the LLP for its review "when such

materials are available, but no later than the date which is fourteen (14) days prior to the initial Theatrical release date of the Picture to which such Marketing Materials relate." Ms Day QC submitted that 14 days is clearly insufficient time for the LLP to have any real input into marketing strategy. That, however, ignores the fact that the primary obligation on the Sub-Distributor is to make marketing materials available to the LLP "when such materials are available". The 14 day period is merely a backstop date. It is inherently unlikely that the Sub-Distributor would produce marketing materials at such a late stage, particularly when the remainder of section 2.2(b) of the MSA requires the parties, in the event that the LLP makes recommendations for marketing with which the Sub-Distributor disagrees, to consult in an effort to seek agreement. It is only if agreement cannot be reached that WB has the right to rescind the licence of the Distribution Rights for the relevant picture under section 2.1(c) of the DA. It is true that this latter provision means that ultimate control over marketing strategy rests with WB, not the LLP. It does not mean, however, that even the LLP's more limited role of making recommendations on marketing strategy is illusory.

(2) No genuine commercial comparators

243. The claimants contend that in connection with the *Livingston* test, the comparators that Mr Thornhill was told about were not genuine commercial comparators.

244. Mr Thornhill identified that an important question was whether there were people in the film world who carried on the type of business undertaken by the LLPs. He asked for confirmation on this from Scotts. He was instructed (as recorded in the Memorial) as follows:

> "Our research has shown that this business is indeed carried on in at least two separate contexts. The first is independent investors providing funding through dedicated companies distributing films. Beyond decision taking on amount of spend and films they, like the proposed LLP, they [sic] have no film distribution infrastructure.
>
> The second are the major the [sic] Studios who will enter into arrangements with independent producers whereby they would (among other things) distribute their films and provide the funds for doing so on agreed terms.
>
> In both cases the levels of minimum guarantees, if indeed there were any, are thought to be much less. As a result potential losses could be made but they would have a better position on first revenues, resulting in a much lower hurdle rate for revenues beyond the minimum sums."

245. Ms Day QC submitted that this demonstrated that there were in fact *no* genuine commercial comparators: first, because where this type of business existed elsewhere in the film industry there were either no, or much reduced, guarantees and, second, because – in the first example at least – there were "decisions" taken on the amount of spend, and films.

246. I accept that any reasonably competent tax QC would have appreciated that the comparators said to exist were different, because of the difference in the level of guarantees. I have no doubt, however, that Mr Thornhill appreciated this difference. It was specifically flagged for his attention, at the conference with him on 1 November 2002, when he was asked whether the level of guarantee proposed was likely to result in the LLP being differentiated from the business norm. Whether that would have led a reasonably competent tax QC to the conclusion that there was therefore no genuine commercial comparator is addressed below.

247. The second alleged difference relates to the extent to which the LLP was really involved in making decisions. No detail was provided as to the extent to which the "independent investors" referred to in the Memorial had real control over decisions as to spending and choice of films. I do not think it is possible, therefore, to conclude that any reasonably competent tax QC would have concluded that there was a material difference in this respect, such that the comparators identified were not genuine commercial comparators.

248. The claimants' real complaint (and the principal issue in this respect) is that the terms of the SAD transactions were so uncommercial as to negate trading. That is an issue which I address after considering the remainder of the key factual conclusions.

(3) The call option

249. The claimants contend that any reasonably competent tax QC would have concluded that the call option's purpose was tax arbitrage, and it was very likely to have been exercised.

250. I accept that any reasonably competent QC would have recognised that the call option had the effect – if exercised – of enabling investors to arbitrage the difference between the tax rate (including taper relief) applied to the gain made on exercise of the option and their marginal rate of income tax. I also have no doubt that Mr Thornhill appreciated this. Indeed, the financial models included in the IM made it clear that investors would make a significant profit principally due to the fact that the capital gains tax payable on exercise of the option (giving rise to a distribution of £817,000) would be only £82,000.

251. I also accept that any reasonably competent tax QC would have recognised that it was likely that the option would be called. Again, I am satisfied that Mr Thornhill recognised this. He was told (by Scotts in a letter dated 12 September 2002) that sophisticated investors were likely to perform due diligence on the likelihood of WB exercising the call option, and that they would learn that "whilst they can receive no guarantees or written or verbal assurances" they would learn that WB had been in the habit of exercising their options in similar circumstances. The context for this is that the financial models included in the IM showed that investors were likely to make a profit (assuming exploitation of the films generated only minimum guaranteed amounts) in the event that the call option was exercised, but not otherwise. This meant that they would be incentivised to participate in the Schemes if the call option was likely to be exercised.

252. I am also satisfied, however, that a reasonably competent tax QC could have concluded (as Mr Thornhill did) that the exercise of the call option was outside the LLP's control,

and that there was no *certainty* that WB would exercise it. In cross-examination, Mr Thornhill provided two reasons for this. The first was that it was WB's shortage of cash which meant they were prepared to enter into the Schemes in the first place: the benefit to WB was the upfront receipt of funding from the LLP for at least a substantial part of P&A Costs. Whether WB would in fact exercise the call option depended on whether its cash-flow position, in and after September 2005, meant that it was in its interests to do so. Secondly, he said that the likelihood of the call option being exercised depended on the profitability of the slate of films. If they all performed poorly, so that the value of the rights being repurchased under the call option was less than the guaranteed minimum price, then that could well operate as a disincentive to exercise of the call option. In my judgment, the conclusion that – for these reasons – there was at least some real measure of uncertainty as to whether the call option would be exercised was one which a reasonably competent tax QC could have come to.

(4) No material chance of material profit

253. The claimants contend that no reasonably competent tax QC would have concluded that there was any material chance that the LLP would make a material profit – in the sense of "commercial" profit (net inflows minus net outflows). They contend that this can be demonstrated by the fact that (a) the guaranteed minimum profit was not material and (b) there was no material chance of any profit arising above that guaranteed minimum.

254. As to the first point, the claimants illustrate this by reference to SAD1, and contend that on the assumption that the call option was not exercised and that income was limited to the minimum guaranteed amount, SAD1 would have made a profit of $4 million over the entire period of trading (approximately 1% of its commitment).

255. Mr Thornhill disputes this, and contends that the relevant profit would have been over $34 million (or approximately 11% of its commitment).

256. The debate turns on the interpretation of the guarantee given by the Sub-Distributors. This guaranteed to the LLP two things (I note that the actual figures set out in the documents were later substantially reduced as a result of lower than anticipated subscription levels):

(1) that the aggregate cumulative share of the "Combined Defined Proceeds" (being such proceeds of exploitation of the films that make their way out of the waterfall provisions in the three MSAs to flow into the waterfall in the DA) less the aggregate amount of royalties due to WB under the waterfall in the DA would be equal to: (a) the amount of the Guaranteed Payment ($238,642,500); <u>plus</u> (b) the Additional Payment (defined as $27,080,000); <u>less</u> (c) all amounts retained by the LLP, and not re-expended under section 5.2 of the DA; and

(2) that the Annual Advances (which total $81,628,978) would be paid when they were due.

257. The claimants contend that, on a "zero case", that is where there are no proceeds to flow into the waterfall in the DA, the minimum guaranteed amount would be:

(1) the Guaranteed Payment ($238,642,500);

(2) plus the Additional Payment ($27,080,000);

(3) less the Annual Advances ($81,628,978, because they are to be deducted as amounts retained by the LLP and not re-expended under section 5.2 of the DA);

(4) plus a sum equal to the Royalty Advance which the LLP is required to pay WB ($50,775,000);

(5) plus the Annual Advances ($81,628,978), under section 7.1(a)(ii) of the MSA.

That results in a payment of $316,497,500. It is common ground that the LLP's commitment was $313,112,500, so that the minimum guaranteed amount represented a profit, on the claimants' calculation, of less than $4 million, or around 1% of the LLP's commitment over the whole trading period of the LLP.

258. Mr Thornhill disputes this calculation. Mr Adam QC submitted that the deduction of the Annual Advances (at step 3 of the calculation as described in the preceding paragraph) was wrong, because they were never part of the "Combined Defined Proceeds". Accordingly, it makes no sense – in calculating an amount which is intended to represent the minimum amount of "Combined Defined Proceeds … less the aggregate amount of royalties due to [WB]" – to make a deduction of the Annual Allowances. On his calculation, therefore, the minimum guaranteed amount (assuming zero receipts) would be:

(1) the Guaranteed Payment ($238,642,500);

(2) plus the Additional Payment ($27,080,000);

(3) plus the Annual Advances ($81,628,978) , because they are to be deducted as amounts retained by the LLP and not re-expended under section 5.2 of the DA).

That results in the sum of $347,351,478 and an excess of income over expenditure of approximately $34 million, or around 11% of the LLP's commitment.

259. Mr Adam QC supported this by reference to an amendment to the MSAs in respect of SAD1 on 4 April 2003 which made clear two things. First, (by an amendment to section 7.1(a)) the amount of the guarantee was *at least* the Guaranteed Payment ($238,642,500) because the calculation of the minimum guaranteed amount involved no deduction at all from this. Instead to the extent any deduction was to be made, it was to be made only from the Additional Payment. Second, the amount that was to be deducted from the Additional Payment was now defined as "Prior Defined Proceeds Payments", which was in turn defined by reference to "Defined Proceeds" which clearly does not include the Annual Advances.

260. He further supported it by reference to the funds flow diagram and financial models in the IM, which indicated that on a notional participation of £1,000,000 the LLP's outlay would be £925,000 (£775,000 on P&A cost and £150,000 on Royalty Advance), the LLP would recover by way of distributions (on the minimum case) £1,026,000, which is a return of approximately 11%.

261. In my judgment, Mr Adam QC's analysis is to be preferred, for the reasons he gave (as summarised above). Ms Day QC nevertheless pointed out that the profit made on the

minimum guaranteed amount was – even if it was $34 million over the trading life of the LLP – so small as to be commercially insignificant. The Bank of England's base rate in 2003 was approximately 4%. If the LLP had put $313 million in the bank in 2003 it would have made $34 million in interest within two to three years at most, so that in real terms it would be losing money for the remainder of the trading period to 2010.

262. As to the second point (that there was no material chance of a return greater than the minimum guaranteed amount), the theoretical maximum profit that SAD1 could have made was in the region of $161 million, plus a further 1% of Defined Proceeds over about $770 million:

(1) Pursuant to the waterfall in the DA in relation to the initial Pictures (including any films substituted for the initial slate), the maximum amount that the LLP stood to receive (if the films were sufficiently successful) was $468,046,478, being the sum of all the amounts that the LLP was theoretically entitled to under section 5.2(a)(i) to (v) of the DA, excluding 5.2(a)(v)(D). In addition, the LLP was entitled to 1% of receipts over and above approximately $770 million, under section 5.2(a)(v)(D) of the DA.

(2) Apart from the Annual Advances, the bulk of the sums which the LLP received would either be reinvested in Excess P&A Costs or P&A Costs of Additional Pictures or was not payable until 30 September 2010. If expended on Excess P&A Costs then there would have been a reasonable expectation that the further expenditure would increase the income from the relevant picture further down the line. If expended on P&A Costs of Additional Pictures, then there would have been a reasonable expectation that the amount expended could be recovered under the waterfall in respect of Additional Pictures.

(3) Pursuant to the waterfall in the DA in relation to Additional Pictures, the potential upside for the LLP was limited to a maximum of $6,500,000 under section 5.2(b)(iii).

(4) The theoretical maximum profit, therefore, was (excluding the entitlement to 1% of receipts above $770 million and using rounded numbers): $468 million + $6.5 million - $313 million, i.e. approximately $161 million.

263. Ms Day QC submitted, however, that there was no material chance of such profit in fact materialising, for the following reasons.

264. First, she submitted that there was no material chance of any greater return than the guaranteed minimum because WB and the Sub-Distributors would take advantage of the terms of the MSA and DA which enabled them to minimise the chance of funds flowing to the LLP. In particular, the Sub-Distributors could ramp up expenditure on P&A Costs, which they could recoup, together with their 20% fee on such costs, in priority to the LLP; and as soon as a film looked like being a commercial success, WB could withdraw it from the slate.

265. I reject this submission which was based (for reasons I have developed above) on a mis-reading of the contractual provisions. The Sub-Distributors were not free to overspend on P&A Costs for the purpose of depriving the LLP of income, but were under an

obligation to make good faith reasonable efforts to sub-distribute the films in accordance with the Budget. Moreover, WB as a rational commercial concern was unlikely to be incentivised to *over*spend on P&A Costs when its only possibility of recouping that sum was from the proceeds of the films, from which it also had to fund the guaranteed minimum payment to the LLP. Additionally, the circumstances in which WB could withdraw a film from the slate were limited, and did not include simply concluding that the film might be highly successful.

266. It is true that there was a greater likelihood of funds recouped by the LLP under the waterfall in relation to the initial Pictures being re-invested on P&A Costs relating to Additional Pictures. The probability of this happening was flagged in the IM. Because, however, the LLP was entitled to recover all such costs under the waterfall in respect of Additional Pictures (subject only to the risk that the Additional Pictures as a whole would make insufficient money to enable all P&A Costs to be recovered), there was a reasonable prospect, at least, that this would operate merely as a postponement of the relevant funds being received and retained by the LLP.

267. Second, Ms Day QC submitted that any reasonably competent tax QC would have appreciated that the projections provided by the expert retained by Scotts (a Mr Jed Daly) were flawed because they failed accurately to reflect the waterfall provisions in the MSA/DA.

268. This raises the question as to what Mr Thornhill saw or was told in 2002-2003 as to the potential profit to be made from the films.

269. Mr Thornhill's evidence in his witness statement was that, while the financial models in the IM indicated the likely outcome for investors on the basis that only the minimum guaranteed level of income was achieved, in which case there was a small profit over the lifetime of the LLP, his instructions were that there were "prospects of better profits, depending on the films' success." He did not consider that the contractual arrangements conflicted with those instructions. As to this latter point, I accept that it was a reasonable conclusion, given, as I have noted above, the contractual structure did indeed provide for the possibility that the LLP would receive over its lifetime a sum in the region of $161 million above its commitment of $313 million.

270. There is in evidence a report by Mr Daly dated 5 December 2002, to which was appended a number of spreadsheets. These showed, for each of the ten films in the initial slate, possible projections of income and expenditure, based (necessarily) on assumptions and his own skill in estimating future income. Five possible outcomes were given – from "disaster" to "blockbuster". These were accompanied by his warning that any attempt to project the results of films is "fraught with uncertainty" and that while he had used reasonable ranges for potential results, based on history, experience and information from WB, it was critical to note that there will be instances where films fall outside these ranges.

271. One of the appendices collated the projections for all of the films, on the "high" basis alone, and ran the revenues and P&A Costs through a simplified version of the waterfalls in the MSA and DA, and without modelling the timing of cashflows. This produced a bottom line share of the net revenues for the LLP, over and above the guaranteed minimum amount, of $97,504,000. It is this document that Ms Day QC submitted was flawed for a number of reasons.

272. There is no reference in Mr Thornhill's witness statement to Mr Daly, his report, or the projections prepared by him. There is no documentary evidence that he ever saw them at the time. There is a record of the documents Mr Thornhill was provided with for the purposes of producing his opinion on SAD1, and Mr Daly's report and projections are not among them. In his oral evidence, not surprisingly given the passage of time, and given that he has undoubtedly seen the projections since, Mr Thornhill was unsure whether he had actually seen them before producing the SAD1 Opinion. He was adamant, however, that he was at least made aware at the time that Mr Daly had produced projections which showed the possibility of profit in the tens of millions for the LLP.

273. In the absence of any evidence of the projections being sent to Mr Thornhill, the only other possibility is that he was taken through them in a meeting. The evidence indicates, however, that any contact Mr Thornhill had with Scotts between 5 December 2002 (the date of Mr Daly's report) and the date of his SAD1 Opinion took place over the telephone. There is no evidence of any physical meetings when he might have been taken through the figures in Mr Daly's report.

274. In light of the above, I find on the balance of probabilities that Mr Thornhill did not actually see Mr Daly's projections before providing the SAD1 Opinion. I find, nevertheless, for the following reasons, that he was aware that Mr Daly had produced projections which demonstrated at least the possibility of more than nominal profit for the LLP.

275. First, Mr Thornhill was undoubtedly alive to the need for the LLP to be trading with a view to profit (he advised on 1 November 2002, for example, that the LLP "should make a profit which was more than a token profit"). Second, the note of conference of 1 November 2002 refers to Mr Thornhill asking whether potential investors would have access not only to the financial position in the event that only the minimum guaranteed figures were received, but also to "indicative financial figures in the event that the films were successful". Third, the Memorial refers to Mr Thornhill being sent the agenda for the initial board meeting of the LLP on 6 December 2002. The minutes of that meeting are in evidence, which show that it was convened to discuss two principal matters, the first of which was "in the light of the financial analysis and reports prepared by the consultants to the LLP Board, should the LLP proceed with the Kendall/Warner transaction?" Given that he was alive to the need for the LLP to make a more than nominal profit and that he knew Mr Daly had been instructed to provide projections as to possible profitability of the LLP, I find that it is inherently likely that Mr Thornhill's recollection that he was told that Mr Daly had produced such projections is correct.

276. The next question is whether it was negligent for Mr Thornhill not to have asked to see Mr Daly's projections before advising on whether the LLP was trading with a view to profit.

277. In my judgment, it was not: a reasonably competent tax QC could reasonably have relied on being told by Scotts that a person with the requisite expertise had concluded that there was a possibility that the LLP could make a more than nominal profit.

278. So far as Mr Daly was required to estimate likely expenditure on, and income from, the films, that was clearly not something that Scotts (or any investor) could reasonably have expected from Mr Thornhill. It obviously fell outside Mr Thornhill's area of expertise.

279. So far as such person was required to apply the waterfall provisions in the MSA/DA correctly in projecting the likely outcome for the LLP, while that is a question of law (and therefore something a reasonably competent tax QC could be expected to review), I consider that a tax QC instructed to advise on tax matters would not have been required to question instructions from the promoter of the Scheme, who could itself be expected to have a proper understanding of the contractual framework, as to the basis on which the likelihood of profits arising from the business had been calculated by the expert instructed by them.

280. I stress that this is a different question from whether the contractual framework was such that it was impossible for the LLP to make any meaningful profit. That is something which any reasonably competent tax QC would be required to consider but, for the reasons I have already addressed, the contractual framework of the DA and MSA did not make that impossible.

281. In light of these conclusions, it is unnecessary to consider whether Mr Daly's projections were based on a flawed analysis of the waterfall provisions.

(5) The LLP's financial outcome would be either an immaterial profit or a loss

282. The fifth key factual conclusion follows logically from the fourth. In dealing with the fourth key factual conclusion I have rejected the contention that any reasonably competent tax QC would have concluded that the LLP could only make an <u>immaterial</u> profit.

283. I accept, nevertheless, that any reasonably competent tax QC would have concluded that (1) by reason of the minimum guaranteed amount, the LLP was protected from anything other than a small loss (if the call option was exercised) or protected from any loss (if the call option was not exercised); and (2) the potential upside for the LLP in the event that the films performed well was significantly curtailed.

284. I consider below the extent to which that ought to have led any reasonably competent tax QC to conclude that the LLP was not trading commercially with a view to profit.

Summary of findings as to the claimants' alleged five key factual conclusions

285. My findings as to the five key factual conclusions as alleged by the claimants are, in summary, as follows.

(1) <u>Lack of control</u>.

a) The original slate of films was as agreed between the parties. WB's right to substitute was not unlimited, but arose only where the film was not completed or the DA otherwise gave WB the right to withdraw a film (e.g. because the Sub-Distributor and the LLP could not reach agreement on budget or marketing strategy).

b) The LLP had a right reasonably to reject WB's proposal as to the film to be substituted.

c) WB had absolute control over the Additional Pictures to be added to the slate.

d) The LLP had no express contractual control over the amount of Excess P&A Cost, but the Sub-Distributors were not free to abuse the right to spend on Excess P&A Costs. They had to make reasonable and good faith efforts to distribute films in accordance with the Budget. That gave the LLP at least a measure of control over excess spending.

e) The provisions as to the LLP making recommendations on marketing strategy were not illusory because of the backstop date, of 14 days before release, on the Sub-Distributor providing the LLP with that strategy, although it is true that the Sub-Distributor had ultimate control on strategy because it could withdraw a film from the slate if no agreement was reached.

(2) Genuine commercial comparators. Although there were comparators in the commercial world for an entity carrying out the distribution functions undertaken by the LLP, there was one important difference, namely that the level of guarantees provided were much lower (so that the risk of downside, and potential for upside, were greater) in the comparator examples given.

(3) Call option as tax arbitrage. The call option had the effect of enabling investors to engage in tax arbitrage, and it was likely that the call option would be exercised. Its exercise lay outside the control of the LLP and it was not certain, albeit highly likely, that it would be exercised.

(4) Lack of material chance of material profit.

a) The LLP's profit, on the basis of the minimum payment guarantee, was 11% of the amount committed, over the life of the LLP. The maximum further profit theoretically available to the LLP under the waterfalls in the MSA and DA was $161 million (on the assumption the LLP had committed the full $313 million envisaged in the IM), plus the possibility of a further 1% of excess profits in the event of a real blockbuster. Whether the films could in practice produce income to ensure that enough flowed through the waterfalls to enable that theoretical profit to be realised was not a matter on which a reasonably competent tax QC would be expected to opine. He or she could rely on their instructions and the work of a suitable expert in the field.

b) Nevertheless, these limitations on the likely profit for the LLP meant that its prospects of any material upside were significantly curtailed because the bulk of the profits would be distributed to WB and the Sub-Distributors. Moreover, the receipt of much of those profits by the LLP was delayed for a considerable period.

(5) Financial outcome either immaterial loss or profit.

a) In the event that the call option was exercised, then on the basis of the minimum guaranteed amount, the LLP would make a small loss. There remained the possibility that the amount paid under the call option would be higher, if one or more of the films turned out to be a blockbuster,

because the amount payable was the higher of the minimum guaranteed amount and the fair market value of the future income stream.

b) The potential downside for the LLP if the films failed was either completely protected (in the event that the call option was not exercised) or mostly protected (if the call option was exercised), so there was no chance of making a material loss.

The detailed criticisms made by the claimants

286. The claimants contend that, in light of the five key factual conclusions, no reasonably competent tax QC could have advised that (1) the transaction entered into by the LLP had a genuine commercial purpose; (2) the *Livingston* test was satisfied; (3) the badges of trade pointed to there being no trade; and (4) other relevant principles pointed to there being no trade, namely that management activity is not trading activity and the lack of speculation or subjective profit motive.

287. The first criticism the claimants make of Mr Thornhill's advice is that he failed to consider, in analysing whether the LLP was trading, "all the facts and circumstances", whereas any reasonably competent tax QC would have appreciated that this was essential. In fact, they contend that Mr Thornhill admitted that he did not do so, as he took the view that there was no need to do so.

288. This was primarily based on the series of cases and Revenue manuals I have referred to above, in which it has repeatedly been said that in order to determine whether there is a trade, it is necessary to consider all the facts.

289. I do not accept this criticism. In the circumstances of this case, a consideration of "all the facts" required an understanding of the manner in which the transaction worked overall, which in turn required an analysis of the key contractual documents: the DA, MSA and COA (similar to the position in *Ensign*, according to Lord Templeman at [1992] 1 AC 655 at p.679A). Mr Thornhill accepted that although his view at the time was that the transactions undertaken by the LLPs in this case were inherently in the nature of trade, there might be terms of the transaction which negatived trading, and that in order to determine whether there were such terms it was necessary to review the contractual documents. Although the claimants contend that Mr Thornhill admitted that he had not read these documents "line by line", I am satisfied from his evidence overall that he did understand at the time the importance of the contractual documents and that – by a combination of being taken through the documents in meetings with Scotts and reading them on his own – he did review them carefully and take them into consideration at the time.

290. In any event, the critical question is, irrespective of whether Mr Thornhill reviewed the contractual documents properly, could a reasonably competent tax QC who *had* properly reviewed them have reached the same conclusions as Mr Thornhill. That is the question to which I now turn.

Genuine commercial purpose

291. I consider that a reasonably competent tax QC, taking into account my findings as to the five key factual conclusions, could have concluded that the LLP had a genuine commercial trading purpose.

292. It is important, as Mr Adam QC submitted, to have regard to the commercial background to the transaction when considering whether – as the claimants contend – the terms of the DA, MSA and COA were so uncommercial as to negate any genuine commercial purpose. That background included the following points.

293. First, the distribution of the films was not confined to the initial release in cinemas but included video, DVD and TV rentals and sales over a potentially prolonged period thereafter. WB, as the owner of the films, retained a commercial interest in maximising revenues from the films over the whole of that period.

294. Second, WB's commercial incentive in entering into the transaction was to enable it to acquire upfront a large proportion of the amount required to spend on initial P&A Costs. That was driven by its short-term cash requirements.

295. Third, it was always acknowledged that the amount to be paid by the LLP was only a part of the overall P&A Costs that the marketing and distribution of the films would require. Accordingly, it was a key part of the deal that there would be further P&A Costs, which would be met by WB/the Sub-Distributors.

296. Fourth, although WB's requirements could have been met had the LLP paid a larger share of P&A Costs in respect of a smaller slate of films, the deal was structured so as to provide the LLP with a larger slate of films, which provided it with a better spread. That is an important factor in a world where there is great uncertainty over a given film's likelihood of making a substantial return, and where experience shows only a very small proportion of films made end up as blockbusters.

297. Fifth, as a result of the guarantee as to the minimum amount payable, given by the Sub-Distributors to the LLP, the risk that the films overall would fail to meet the costs of distributing them was ultimately WB's risk.

298. Against that background, I do not think that the five key factual conclusions could only have led a reasonably competent tax QC to conclude that there was no genuine commercial purpose. The deal, comprising the DA, MSA and COA, strikes a balance between the competing commercial interests of WB and the LLP in myriad ways.

299. As owner of the films throughout, it was not inherently uncommercial for WB to wish to retain substantial control over how much should be spent in distributing them, the overall strategy, and which Additional Pictures to add to the slate.

300. In fact the measure of (albeit limited) control exercisable by the LLP over spending and strategy, combined with the work actually to be done by it in making recommendations and seeking to agree budgets, and in actually making payments to third parties, amounts to considerably more activity than the Victory Partnership undertook in *Ensign Tankers* or was envisaged to be done by the taxpayer in the vanilla sale and leaseback transaction described in the Business Income Manual 56455 (see [230] above).

301. It is true that there are important differences between this case and the facts in *Ensign*, in particular the fact that in *Ensign*, once the lending to the partnership had been repaid, the partnership was entitled to 25% of the profits, and its downside risk was not protected. It is not however, and taking into account the commercial incentives in this case outlined above, inherently uncommercial for an entity entering the film distribution market to remove most of the risk of recouping the amount committed by it on terms that the possibility of upside would be significantly reduced. Any such entity would expect its counterparty (such as WB), which was bearing the risk of the films making insufficient profits to recoup the P&A Costs, to extract significant concessions in return for its own financing costs being covered by a guarantee. In light of the commercial context referred to above, the concessions which the LLP agreed to, including ploughing its share of receipts into further distribution costs, thus delaying the benefit it would ultimately recoup from the venture, and agreeing to WB having by far the lion's share of any upside, are not so uncommercial as to deny the transaction any commercial purpose.

302. I would accept (although it is unnecessary to reach a view on this) that it may well be said on the modern approach that the extent to which the LLP's downside was protected (covering the principal and interest on its members' borrowings) and the severity of the limitations on its upside, particularly when the most likely financial outcome was that dependent on exercise of the call option, means that the transaction should overall be construed as an investment rather than a trading transaction. On the *Ensign* approach, however, I think that a reasonably competent tax QC could have advised that these features were not so inherently uncommercial, or such as to mean there was no genuine intention to make a profit, so as to render the transaction not trading at all.

The Livingston Test

303. The claimants contend that "ordinary traders" would not enter into a transaction of this nature, given the five key factual conclusions. That is substantially the same as the argument that it was not genuine commercial trading, which I have already addressed.

304. Additionally, they contend that the actual comparators with which Mr Thornhill was presented did not involve the trade being carried on in a similar way, because of the lower level of guarantees. Mr Thornhill's response to that was that the level of guaranteed income available was not relevant to whether the *operations* undertaken by the LLP were of the same kind and being carried out in the same way elsewhere in the commercial world. As I have noted above, a reasonably competent tax QC could have taken the view that the differing level of guarantee was a factor that was relevant to the extent of speculation and the likely level of profit and loss, but did not impact on the way in which the trade was carried out.

305. The claimants cited *Lupton* as a comparable case where the *Livingston* test failed. The critical feature of the transaction in *Lupton*, however, that meant that it failed the *Livingston* test was the requirement that the vendor warranted to the purchaser that the transaction would achieve the hoped for tax losses, and indemnified the purchaser for loss if they did not materialise. There is nothing comparable in the transaction documents relating to the SAD Schemes.

306. Finally on this point, the claimants referred to a case (*Clavis Liberty Fund 1 LP v HMRC* [2017] UKUT 418 (TCC)) in which Mr Thornhill's argument (that a taxpayer had

undertaken a normal dividend purchase) was rejected by the Upper Tribunal on the basis that it focused on the bare facts of the acquisition and ignored the rest of the background. I do not find this case to be of any help. It was 14 years after Mr Thornhill's advice on the Schemes and involved a very different transaction. He said in cross-examination that he fully recognised the difficulties in the argument he had been advancing: it was a "hopeless case and one had to do the best".

The badges of trade

307. As I have already noted, I think that a reasonably competent tax QC could have taken the view in 2002-2004 that the badges of trade were not of assistance in determining whether a transaction of the type undertaken by the LLP was in the nature of trade.

308. I do not accept the claimants' contention that the Court of Appeal's comment in *Samarkand* to that effect is a recent development, and that it would have been different at the time Mr Thornhill was advising.

309. Nor do I accept that the LLP was engaging in a one-off transaction (entering into the various contracts at the outset). The LLP carried out functions, beyond entering into the transaction documents, of a kind and duration greater than those entered into by Victory Partnership in *Ensign Tankers*.

Other principles relevant to trading

310. As to the claimants' remaining arguments (that the LLP was carrying out no more than management activity, relying on *Webb v Conelee Properties Ltd* [1982] 56 TC 149; that there was an absence of real speculation; and that the LLP's subjective intentions as to profit are relevant and would point against trading) I do not think that these are more than arguments that *a* reasonably competent tax QC might have deployed. They do not amount, however, to conclusions which *any* reasonably competent tax QC *must* have reached. As such, I did not find them to be of help in considering the question of breach in this case.

Commercial Basis

311. The leading authority at the time Mr Thornhill advised was *Wannell v Rothwell* [1996] STC 450. At p.461b-d, Robert Walker J said this:

> "…it was suggested that the best guide is to view 'commercial' as the antithesis of 'uncommercial', and I do find that a useful approach. A trade may be conducted in an uncommercial way either because the terms of the trade are uncommercial (for example, the hobby market-gardening enterprise where the prices of fruit and vegetables do not realistically reflect the overheads and variable costs of the enterprise) or because the way in which the trade is conducted in uncommercial in other respect (for instance, the hobby art gallery or antique shop where the opening hours are unpredictable and depend simply on the owner's convenience). The distinction is between the serious trader who, whatever his shortcomings in skill, experience or

capital, is seriously interested in profit, and the amateur or dilettante."

312. The claimants' contention, that applying the reasoning in *Wannell* to the five key factual conclusions must lead to the conclusion that the LLP did not carry on trade on a commercial basis, involves a re-run of its arguments that the transaction had no genuine commercial purpose so as to constitute trading. My conclusion that a reasonably competent tax QC could have concluded that the LLP was trading is, therefore, an answer to this point.

View to a profit

313. Sections 118ZA(1) (concerning tax transparency) and 384(1) (concerning sideways loss relief) of ICTA 1988 required that the LLP was trading, respectively, "with a view to profit" and "with a view to the realisation of profits in the trade".

314. It is common ground that for the purpose of these provisions the question whether a taxpayer carries on trade with a view to profit, or to the realisation of profits, is a subjective one, and that profits in this context means overall income less overall expenditure ("commercial" profit) rather than profits as computed for tax purposes.

315. In the SAD1 Opinion, Mr Thornhill appears to say that for the purposes of section 384(1), profits means profits as measured for tax purposes. It is, however, not entirely clear because the question he was addressing when he made that statement was the availability of early years loss relief under section 381(4) ICTA 1988. It is the final sentence of the relevant passage in his opinion, where he said "On that basis, sections 381(4) *and 384(1)* would not apply" (emphasis added) that suggests he thought that profits meant taxable profits for the latter provision as well.

316. Nothing, however, turns on this point because – at least in relation to sections 118ZA(1) and 384(1) – the claimants do not point to any facet of income or expenditure in the financial models in the IM which was wrongly included or excluded in the computation of profits on a commercial basis.

317. More broadly, the claimants' contention that there was no subjective view to (commercial) profit is based on the same arguments (applied to the five key factual conclusions) that underpin their contention that there was no genuine commercial purpose, and thus no trading.

318. Specifically, the claimants contend that the absence of the LLP's ability to "pull the levers" that would affect profitability, the lack of genuine commercial comparators, the fact that the call option's purpose was to enable tax arbitrage, the lack of a material chance of making a material profit, and the fact that the LLP's financial outcome was either an immaterial profit or loss, negate the possibility that there was a subjective intention to make a profit.

319. I have already considered and rejected the contention that the five key factual conclusions (as found by me) negated the possibility that the LLP was trading, including because there was no genuine intention to make a profit. The same reasoning is an answer to the contention that the LLP failed the stand-alone test of subjective view to a profit.

320. While I accept that the cumulative effect of those key conclusions is that the LLP's upside was materially reduced, and its downside mostly protected, I do not find that to be inconsistent with the conclusion that its subjective intention was nevertheless to make at least some profit. I was not taken to any authority which indicated that any particular level of profit was required in order to satisfy the standalone "view to a profit" requirement.

Section 381(4) ICTA 1988

321. This provision stipulates that early-years sideways loss relief "shall not be given .. in respect of any loss sustained in any period unless the trade was carried on … in such a way that profits in the trade … could reasonably be expected to be realised in that period or within a reasonable time thereafter."

322. In their skeleton for trial, the claimants contended that, since the LLP would not be anticipated to be in profit in a commercial sense until 2010 if the call option was not exercised, that fell outside the time period envisaged by section 381(4) ICAT 1988. They contend that Mr Thornhill failed to grapple with this point because he incorrectly took profits (in section 381(4)) to mean profits for tax purposes, and incorrectly took it to refer to annual, not cumulative, profits.

323. I will deal with the latter point first, since if Mr Thornhill is correct, it was not suggested that reference to profits on a commercial, rather than taxable, basis would make any difference.

324. The claimants cited no authority for the proposition that profits in section 381(4) means cumulative, as opposed to annual, profits. In one of the cases cited by them, however, *Walls v Livesey* [1995] STC (SCD) 1, Special Commissioner Shirley clearly contemplated that the test in section 381(4) was met by reference to *annual* profits being made within a reasonable time (see p.14g-h and p.16d-g). On the basis of the arguments presented to me, I consider that a reasonably competent tax QC could have concluded, as Mr Thornhill did, that the section refers to annual profits and would thus have been satisfied in the case of the LLP.

325. In these circumstances, it is unnecessary to determine whether section 381(4) refers to taxable or commercial profits. The only authority cited by the claimants on this point was another decision of Special Commissioner Shirley, *Brown v Richardson* [1997] STC (SCD) 233. That case concerned a taxpayer who let out his holiday home and claimed early-years sideways loss relief under section 381. The main issue was whether the property was let on a commercial basis with a view to the realisation of profit, so as to be a commercial letter within section 504 ICTA 1988. The Special Commissioner concluded that it was not. That made it unnecessary to determine whether section 381(4) was satisfied. He concluded, obiter, that it was not, but in a single sentence which does not reveal whether he viewed it as referring to profits in a commercial or taxable sense. That obiter reference in a non-binding authority is far from sufficient to enable me to conclude that Mr Thornhill's opinion that section 381(4) refers to taxable profits was negligent.

Duty to warn

326. The claimants' alternative case is that Mr Thornhill breached a duty of care in failing to give a specific warning that there was a significant risk that one, other or all of the three statutory tests would be failed, so that the tax benefits promised would not be available.

327. The circumstances in which such a warning is required were considered by the Court of Appeal in *Barker v Baxendale Walker Solicitors* [2018] 1 WLR 1905. In that case, the claimant had established a scheme to avoid capital gains and inheritance tax liabilities, acting on the professional advice of the defendant solicitor. The success of the scheme depended upon the true construction of section 28(4) of the Inheritance Tax Act 1984. That disapplied section 28(1) (which exempted certain transfers) if the trusts permitted any of the settled property to be applied at any time for the benefit of four classes of person, set out in sub-paragraphs (a) to (d). The defendant solicitor concluded that the scheme was not excluded by section 28(4), because the exclusionary conditions in sub-paragraphs (a) to (d) applied at the time when trust property was applied for the person's benefit, not the time when the shares were transferred.

328. At first instance, the Judge concluded that the defendant solicitor's advice in this respect was probably correct. He also held that the solicitor negligently failed to make clear that since the transfer of shares was a tax avoidance scheme there was a possibility that it would be challenged by HMRC, and that if it were necessary to defend the arrangements in legal proceedings there was a possibility that they would not be upheld (a "general warning"). He concluded, however, that such a general warning would not have deterred the claimant from going ahead with the scheme.

329. The claimant had contended that the solicitor ought also to have given a warning that there was a significant risk that the scheme would fail to deliver the hoped for tax advantages because section 28(4) might be construed, contrary to his view, so as to disapply subsection (1) (a "specific warning"). The Judge rejected that contention, concluding that it was difficult to see that solicitors whose interpretation was likely to be correct were none the less in breach of duty for failing to warn the client that they may be wrong.

330. That decision was overturned on appeal. The Court of Appeal concluded that the defendant solicitor was negligent in failing to give a specific warning. At [60] Asplin LJ said that the advice which a reasonably competent solicitor would give turns substantially upon the view that he could take of the provision on which it turns, and "upon whether contrary arguments as to construction are of sufficient significance to require specific mention when taken with the degree of risk in the circumstances and the importance in those circumstances of a balanced view of the provision." At [61] she set out the following principles to be applied:

> "(i) The question of whether a solicitor is in breach of a duty to explain the risk that a court may come to a different interpretation from that which he advises is correct is highly fact-sensitive: the *Queen Elizabeth's Grammar School* case [2002] PNLR 14, *Herrmann's* case [2012] PNLR 28, *Balogun's* case [2017] PNLR 20 and the *Levicom* case [2010] PNLR 29;
>
> (ii) If the construction of the provision is clear, it is very likely that whatever the circumstances, the threshold of "significant

> risk" will not be met and it will not be necessary to caveat the advice given and explain the risks involved;
>
> (iii) However, depending on the circumstances, it is perfectly possible to be correct about the construction of a provision or, at least, not negligent in that regard, but nevertheless to be under a duty to point out the risks involved and to have been negligent in not having done so (the *Levicom* case and *Balogun's* case);
>
> (iv) It is more likely that there will be a duty to point out the risks, or to put the matter another way, that a reasonably competent solicitor would not fail to point them out when advising, if litigation is already on foot or the point has already been taken, although this need not necessarily be the case (the *Queen Elizabeth's Grammar School* case to be compared with *Balogun's* case); and
>
> (v) The issue is not one of percentages or whether opposing possible constructions are "finely balanced" but is more nuanced."

331. Arden LJ, in a passage from her judgment in *Queen Elizabeth Grammar School Blackburn Ltd v Banks Wilson (A Firm)* [2001] EWCA Civ 1360, cited by Asplin LJ in *Baxendale-Walker* at [51], said that "….it behoves a solicitor to urge caution and to point out risks to a lay client even if they would perhaps have been obvious to a fellow lawyer. The extent to which he has such an obligation must clearly depend upon the facts in the particular case…" If such an obligation is owed, then as the above passage from Asplin LJ's judgment shows, the question whether the solicitor is in breach of that duty is itself highly fact specific.

332. In *Barker v Baxendale-Walker*, and the other authorities cited by Asplin LJ in that case, the question whether a solicitor had breached a duty to provide a specific warning arose in the context of a duty owed to their client. In this case, the claimants were never Mr Thornhill's clients. In my judgment, this is an important consideration in considering the existence and scope of any duty to warn (and thus whether it was breached).

333. As Sedley LJ put it in the *Queen Elizabeth Grammar School* case, at [50], "[c]lients, I know, want two inconsistent things. They want confident advice on which they can act, and they want cautionary advice about the risks of doing so. It is a solicitor's unhappy lot to have to try to satisfy both requirements simultaneously."

334. That was not, however, the role expected of Mr Thornhill, even if he owed a duty of care to the claimants in respect of the advice he gave. The claimants were not his clients. In circumstances where no advance clearance from the Revenue could be obtained, the promoters of the Scheme sought the view of an eminent tax QC on the question whether the Scheme would achieve the Tax Benefits. That was what Mr Thornhill did. The nature and content of an appropriate warning by an adviser to their client is fact specific, and will depend on matters such as the terms of the instructions and the adviser's knowledge of the client's circumstances, sophistication and existing understanding of the issues. Mr Thornhill would have been aware, for example, that his actual clients, Scotts, were themselves highly sophisticated and likely to have been

fully aware from their experience in promoting tax avoidance schemes of the issues to which they gave rise, and the risks associated with them. In contrast, not only were the investors not Mr Thornhill's clients, but he knew nothing about their individual circumstances, other than that they were likely to be high net worth individuals and that they had been warned to take (and warranted that they relied only on) their own advice.

335. For these reasons, together with those I have already relied on for concluding that no duty was owed at all, I do not think that, if a duty was owed, it extended to advising the claimants on the risks to them of acting on that advice.

336. If that is wrong, however, and Mr Thornhill did owe a duty to caveat his advice with an appropriate warning, I go on to consider whether Mr Thornhill breached that duty. While the IM contained risk warnings these were of a general nature. The IM itself did not contain any detail as to the statutory tests of trading, commercially or with a view to a profit, and so contained no warnings specific to whether those tests were satisfied. I consider that the warnings it did contain equate to the "general" risk warning which was found to be insufficient on the facts in *Baxendale-Walker*. In my judgment, and on the assumption that a duty of this nature was owed, then I consider that such a duty would have required in this case a warning specifically related to the satisfaction of the statutory tests.

337. In order to address issues of reliance and causation it is necessary (for reasons explained in section G below) to consider what a non-negligent opinion, containing the appropriate risk warning, could have looked like. There are two related points here: the manner in which the positive part of the opinion was expressed and the way in which the warning was expressed.

338. As to the first point, if (as I have concluded) it was reasonable to reach the view that the Tax Benefits would be achieved, then I do not think it would be negligent to express a clear and firmly held view to that effect, provided that the way in which the view was expressed did not negate or undermine the accompanying risk warning. In this case, in the SAD1 Opinion and the SAD2/3 Opinion, Mr Thornhill said that there was "no doubt" that the LLP was trading (albeit with the caveat that this was his view, not a guarantee of any sort). I do not think that even this would necessarily constitute negligence, if accompanied by an appropriate risk warning. Nevertheless, the greater degree of firmness in the way the opinion was expressed, the greater the need for it to be caveated by reference to a clear risk warning.

339. As to the second question, a reasonable risk warning would not have required identification of each possible argument against the conclusion reached by Mr Thornhill. The two long-form Opinions did, in fact, address at least some of the possible opposing arguments: e.g. the risk that the trade carried on by the LLP was not a separate identifiable part of the activity carried on by WB; the risk of the Revenue saying there was something artificial about the trade, or that it was not a trade because it was carried on for predominantly tax avoidance reasons; and the risk that the transaction could be commercially re-analysed under the *Ensign* decision.

340. It would, however, have required some acknowledgement that as no two cases are the same, no existing authority could be said to cover the circumstances of this case exactly and that it was possible that others could reach a different view. Moreover, taking into account my conclusions on the legal position as at 2002-2004 set out in detail in section

F above, it would have required some acknowledgment of the risk that the current law on the meaning of trading, commercially, with a view to a profit, was based on the challenges so far made to film partnership schemes by the Revenue, that there was a risk the Revenue would investigate the Schemes, particularly if used by individuals to avoid substantial amounts of tax, and that it was possible that a change in the Revenue's approach to challenging such schemes might lead to a different conclusion being reached by the courts. I will refer to this, in the remainder of this judgment, as the "Relevant Risk Warning".

G: Reliance and causation

341. I address the questions of reliance and causation on the assumption that, contrary to my conclusions so far, Mr Thornhill owed a duty of care to the claimants – which he breached – to include the Relevant Risk Warning in his Opinions. (I readily accept that where Mr Thornhill's advice was communicated to any of the claimants (or to their IFA) then, if he had advised that the Tax Benefits would not be achieved, the relevant claimant would not have invested in the Schemes.) Neither side dealt with the position of the individual claimants during oral closing submissions. In Appendix 2, I address the position of each claimant separately, based on the evidence adduced at trial and the written submissions of the parties.

342. The claimants' principal case on causation is that if Mr Thornhill had given the Relevant Risk Warning then the Schemes would not have been marketed by Scotts at all, and so none of the claimants would have invested.

343. I reject this case for two reasons. First, I consider that it is wrong in law. Second, I do not think that it is made out on the facts.

344. So far as the law is concerned, no authority was cited by Ms Day QC in support of the contention. Mr Adam QC submitted that it failed because it depended on a different duty of care to that which was relied on in this case. The duty relied on by the claimants is the duty to take reasonable care that advice *provided to them* was correct. This causation argument depends, however, on a duty being owed to the claimants to take care that the advice given to Scotts was correct. Such a duty would sidestep established jurisprudence as to assumption of responsibility, because no question of reliance on the advice by the claimants, reasonable or otherwise, would arise. It would instead impose on a range of advisers a duty as "gatekeeper" to prevent their client from doing things that might cause other people loss, as long as it could be proved that the client would not have done those things but for the professional's advice. It would in effect render the professional adviser liable "in an indeterminate amount for an indeterminate time to an indeterminate class", in the words of Cardozo CJ in *Ultramares Corpn v Touche* (1931) 174 NE 441, 444 cited with approval by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605, itself cited with approval by Lord Sumption in *Playboy Club London Ltd v Banca Nazionale del Lavora SpA* [2018] 1 WLR 4041, at [8]. For these reasons, Mr Adam QC contended, no such duty of care existed.

345. Ms Day QC's answer to this was that it is necessary to approach the issue stage by stage. Having established that Mr Thornhill owed a duty to the claimants to take reasonable care in the advice that was provided to them, and having established that he

breached that duty, it is then simply necessary to ask what would have happened had Mr Thornhill not been negligent. The answer to that, she submitted, was that if he had not been negligent then there would have been no scheme. That, however, involves a logical impossibility: because had there been no scheme, then there would have been no advice provided to any claimant, which would have precluded the very duty relied upon from having arisen. That demonstrates, in my judgment, that this argument depends upon a different duty, as to which I prefer the arguments of Mr Adam QC, for the reasons he gave as outlined above, and to which there was no substantive answer from the claimants.

346. The claimants rely on the following matters to establish the factual basis for this contention. First, Mr Thornhill's acceptance (in his amended defence) that Leading Counsel's opinion would "likely determine" whether a scheme such as the Schemes was marketed to potential investors at all. Second, in Scotts' internal approvals checklist, one of the items is: "Does Tax opinion provide unequivocal agreement to the statements made in relation to taxation?" Third, WB insisted on Mr Thornhill's "sign-off" on the Schemes. Fourth, the claimants suggest that Mr Thornhill admitted in cross examination that if he had advised competently the Schemes would have been abandoned.

347. As to these matters, neither the fact that *a* Leading Counsel's opinion was a pre-requisite of schemes such as these being marketed, nor the fact that WB required Mr Thornhill's sign-off assists in determining what would have happened if Mr Thornhill's advice had contained a risk warning. I accept that, on the face of it, Scotts' internal procedures required an unequivocal advice from Mr Thornhill. Mr Thornhill's alleged admission, however, was that if he had said the Scheme "didn't work" then *either* Scotts would have abandoned it or possibly "gone to someone else who they thought could give more sensible advice". This does not address what would have happened if Mr Thornhill's advice had contained the Relevant Risk Warning.

348. It is for the claimants to establish what would have happened if Mr Thornhill had given the Relevant Risk Warning. On the basis of the very limited evidence presented on this point, I do not think that the claimants have established that there would have been no Scheme.

349. First, there was no evidence from Scotts or WB as to what they would have done if Mr Thornhill's Opinions had contained the Relevant Risk Warning. There was therefore no exploration, for example, of what Scotts meant by "unequivocal" agreement to the statements made in relation to taxation. As I have already noted, the first (and critical) question Mr Thornhill was asked in the Memorial was essentially a binary one: did he consider that the LLP would be carrying on a trade. It required Mr Thornhill to give *his* opinion on that binary question. It is not necessarily inconsistent with a requirement that his opinion be "unequivocal" that it contained the Relevant Risk Warning. Mr Thornhill could at one and the same time hold a very firm view as to what the answer to that question was, while acknowledging that an alternative view might be taken by others.

350. Second, there was insufficient evidence from which I could draw the conclusion that – had Mr Thornhill not provided an opinion with which Scotts were happy – they would not have been able to find another eminent tax QC who would have given non-negligent advice on the basis of which they would have proceeded with the Scheme. To the extent

that there was any evidence in the case relevant to this point, it was to the effect that there were many film partnership schemes in the market at the time and that these had the backing of senior tax counsel: see for example the article from Mr Churchill in Tax Efficient Review in March 2003.

351. Turning to reliance and causation more generally, these give rise to the following linked questions of fact: (1) did each claimant rely upon Mr Thornhill's advice in deciding to enter into the relevant Scheme or Schemes? (2) if that advice had contained the Relevant Risk Warning, would they have decided not to invest? The questions are linked because, where the question is whether a claimant relied on advice, it is common ground that this involves asking what the claimant would have done differently had non-negligent advice been given, in other words (given my finding above), what would have happened if advice had been given that the Schemes would achieve the Tax Benefits, but caveated by the Relevant Risk Warning?

352. As to the first question, Mr Thornhill's advice does not need to have been the sole reason a claimant entered into the Scheme. It would be enough that it played a "real and substantial part, though not by itself a decisive part" in inducing them to act: *JEB Fasteners Ltd v Marks Bloom* [1983] 1 All ER 583 (CA), at pp.588-9. The claimants accept that it is nevertheless necessary to show that Mr Thornhill's advice was causative in a "but for" sense, that is that the claimant would not have entered into the Scheme but for Mr Thornhill's advice (even though there may have been other "but for" causes): *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland PLC* [2010] EWHC 1392 (Comm), per Christopher Clarke J at [171].

353. Mr Thornhill relies on the same contents of the IM in relation to the question of reliance as he does in relation to the question of duty. Mr Adam QC accepted, however, that on the issue of reliance the contents of the IM play only an evidential role. It is not suggested, for example, that because a claimant warranted (to Scotts) that they had only relied on the advice of their own professional advisers, they are precluded from saying that they did *in fact* rely on Mr Thornhill's advice.

354. The difference between the opinion being made available so as to provide "comfort" to claimants, so that they could be assured that Scotts' understanding of the tax position was based on a firm and reasonable foundation, and the opinion being made available in circumstances that give rise to a duty of care is a critical one in the context of the question whether a duty arises. But once the legal conclusion that Mr Thornhill owes the claimants a duty of care in respect of his advice is established, I do not find the distinction between "taking comfort from" and "relying on" the opinion a helpful one. The only question is whether, but for Mr Thornhill's advice, the claimants would nevertheless have invested in the Scheme.

355. The claimants' generic pleaded case is that they relied on Mr Thornhill's advice in deciding to invest in the Schemes, and that they would not have invested had Mr Thornhill warned that there was a "significant risk that the Schemes would be successfully challenged by HMRC, on the basis that the LLPs were not trading, on a commercial basis and/or with a view to a profit such that the Tax Benefits would or may not be available."

356. The evidence of each of the claimants was that they did rely on Mr Thornhill's advice. In their witness statements, the claimants were, in varying degrees, adamant that they

would not have invested had there been, variously "any qualifications or risk warnings" from Mr Thornhill or a warning that there was "a significant or material risk" that the Schemes would fail to achieve the Tax Benefits. In closing argument, the claimants' case was put on the latter basis.

357. At a distance of 18 years since the events in question, I treat the claimants' statements – particularly as to what they would have done if Mr Thornhill's advice had been different – with great care. I was reminded in this context of the often-cited comments of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse* [2020] 1 CLC 428 at [22]. It is difficult enough for a person to remember what they saw or heard on a date 18 years ago. It is that much more difficult to expect a person accurately to remember what factors influenced their decision – to the extent that but for that factor they would not have decided as they did – after such a long time. While I would expect a claimant to be readily able to say what they would have done if Mr Thornhill had advised that the Tax Benefits would not have been achieved, it is understandably much more difficult for them to be sure as to what they would have done if he had advised that the Tax Benefits would be achieved, but had caveated the advice in the form of the Relevant Risk Warning.

358. Moreover, the question of causation has to be assessed in light of the terms of the Relevant Risk Warning that I have concluded a reasonably competent tax QC could have given. To a lawyer, it might be correct to equate that Relevant Risk Warning (see [340] above) with a material or significant risk that the Tax Benefits would not be achieved, because material might be seen as anything which is not immaterial, and significant might be seen as anything which is not insignificant. I consider that a layman, however, would view "material risk" or "significant risk" as involving a more serious degree of risk than that.

359. The claimants' statements as to what they would have done in those circumstances are necessarily to a large degree speculation. I reject the possibility that any claimant would have acted differently had there been merely "any qualifications or risk warnings" from Mr Thornhill because, as I note elsewhere, there were indeed qualifications and risk warnings in the IM (which Mr Thornhill specifically endorsed), yet every claimant invested anyway.

360. The reliability of any view, given by a claimant today, as what they would have done if there had been the Relevant Risk Warning is also inevitably weakened by fact that the Schemes have in fact failed to achieve the Tax Benefits, with disastrous results for the claimants.

361. Accordingly, my decision is influenced principally by the contemporaneous documents and inherent probabilities.

362. Before looking at each claimant individually (see Appendix 1) there are certain matters which have application across either all, or a number of, the claimants.

363. First, where Mr Thornhill's advice was not conveyed (either directly or via their IFA) to a claimant and if, contrary to my conclusion above, a duty was owed, I do not see how that claimant could establish that they would have acted any differently had the advice contained the Relevant Risk Warning. If they were not aware of the contents of his Opinions, they cannot have known that they did not contain the Relevant Risk

Warning. While that does not preclude the theoretical possibility that such a claimant could establish reliance and causation through what their IFA would have done, that would require evidence from the relevant IFA, and there is no evidence from any claimant's IFA.

364. Second, the possible impact of the Relevant Risk Warning on a claimant must be considered in the context that the IM already informed them there were substantial risks, including certain tax risks, associated with investing in the Schemes, including: that the performance of the investment may be affected by any changes (which could have retrospective effect) in the Revenue's published "practices, concessions and interpretations"; that the Revenue could inquire into any loss relief claimed by an investor; and that the Revenue did not give advance rulings and the availability of tax reliefs depended upon the Revenue's acceptance of, among other things, detailed rules. Many of the claimants were given specific additional risk warnings by their IFA or other adviser.

365. Third, in the case of many claimants, Mr Thornhill's advice reached them through the filter of their IFA – either completely, where the claimant did not see any of the Opinions, or partially, where a claimant saw one or other of the Opinions but relied on their IFA's summary of it when providing a recommendation. Accordingly, an important element in the inquiry is what difference the Relevant Risk Warning would have made to the way in which the IFA referred to that advice in discussion with the claimant. As I have noted, there is no evidence from any of the claimants' IFAs. Many of the claimants referred to their IFA having emphasised the fact that an eminent (or *the* pre-eminent) tax QC had endorsed the Schemes. From the limited evidence presented, there were clearly other film finance partnership schemes around, each of which appears to have been endorsed by an eminent tax counsel. In the counterfactual world, where a non-negligent opinion reached the same conclusion as Mr Thornhill, I cannot discount the real possibility that the relevant IFAs would have recommended the Schemes on the same basis and in materially the same language even if the eminent tax QC had included the Relevant Risk Warning. It is for the claimants to establish reliance and causation, and the lack of any evidence from their IFAs is a significant hurdle in this respect.

366. It is relevant in this context that the Opinions – particularly the SAD1 Opinion and the SAD2/3 Long-form Opinion – were not drafted with a lay reader in mind. They were drafted in a form which assumed a substantial degree of prior knowledge of the relevant law and principles. There was no attempt, for example, to set out the statutory provisions under consideration or to explain the relevance of any of the questions addressed. Moreover, none of the questions which the Opinions set out to answer were included within them, and there were various shorthand references to documents or sections of documents (e.g."D2 and E1", or "F1 para 1" under section 8 of the SAD1 Opinion) which it was impossible to identify from the Opinions alone. One claimant (Mr Whiteley) frankly accepted that he would not have understood the Opinion if he had read it, comparing it to a "surgeon's report".

367. Fourth, it is important to distinguish between reliance on the content of Mr Thornhill's advice and reliance merely on the fact that that he had given positive advice. The potential impact of the Relevant Risk Warning is reduced in the latter context. This is illustrated in the case of Mr Whiteley who I consider, as I describe in Appendix 2, was influenced by the fact that persons and entities as eminent as Mr Thornhill, Ernst &

Young and Barclays were involved in the Scheme, and by the fact that the latter two would not (he thought) have been involved unless they were satisfied that the Schemes worked. I consider that such a person is unlikely to have acted differently, depending on whether or not the advice contained the Relevant Risk Warning.

368. The second to fourth considerations apply, in varying degrees, to all the claimants and contribute significantly to my conclusion that none of them has established causation on the balance of probabilities. The specific reasons why that is so in relation to each claimant are set out in Appendix 2.

H: Limitation

369. The claims in this action are subject to the six-year limitation period that applies to claims in tort: LA 1980, section 2. That is, however, subject to two further provisions:

(1) Section 14A LA 1980, which extends the limitation period where facts relevant to the cause of action are not known at the date the cause of action accrues; and

(2) Section 14B LA 1980, which provides a long-stop date of 15 years from the date or dates on which there occurred any act or omission which is alleged to constitute negligence and to which the damage, in respect of which damages are claimed, is alleged to be attributable in whole or in part. This long-stop applies even if the cause of action has not yet accrued.

When did the cause of action accrue?

370. It is common ground that a cause of action in tort giving rise to economic loss accrues when the claimant enters into an arrangement which causes actual damage, by comparison to the position they would have been in but for the tort.

371. The claimants contend that no cause of action accrued until HMRC refused their claims for loss relief because, until that point, they were no worse off than had they not entered the Schemes. That means, they contend, that until that point any loss was purely contingent, as in *Law Society v Sephton* [2006] 2 AC 543, and *Evan v PricewaterhouseCoopers LLP* [2019] EWHC 1505 (Ch). In relation to SAD1, that state of affairs persisted until 2016 when HRMC issued a closure notice or – in the case of those claimants in respect of whom a discovery assessment was made – the date such assessment was made in December 2009.

372. In further support of this argument, the claimants contend that under the Taxes Management Act 1970 ("TMA") no tax debt arose until a certain number of days after a closure notice was issued, or a discovery assessment made: see in particular sections 28A, 28B, 29 and Schedule 3ZA to the TMA.

373. Mr Thornhill on the other hand contends that each claimant's cause of action arose at the point at which they made their investment in the relevant Scheme. While the point has not been the subject of decision in a disputed case before, that is the position which has been adopted in previous decisions such as *Cole v Scion Ltd* [2020] EWHC 1022 (Ch). In that case, the claimants having invested in a tax avoidance scheme which it later turned out did not provide the hoped for tax benefits, Nugee J noted at [12]: "It is

not disputed that the date when the Claimants suffered their claimed losses was when they made their investments."

374. In *Law Society v Sephton*, the defendant had prepared and certified a solicitor's accounts over a period of several years and had failed to report that the solicitor was misappropriating money. Some of the solicitor's clients made a claim on the Solicitors Compensation Fund, and the Law Society then sued the defendant in negligence. The House of Lords concluded that the Law Society's cause of action accrued each time a claim was made on the Compensation Fund. Until that point, any loss to the Law Society was purely contingent: any particular client might in the end not have lost money, or might not have made a claim on the Compensation Fund.

375. The position is materially different in this case. The principal loss that the claimants have suffered in this case is the amount of capital that they irrevocably committed to the LLP at the outset of their investment. The cash-flow illustration in the IM, assuming an investment of £1 million with 29.5% cash with a limited recourse loan to cover the remaining 70.5% and assuming that the call option was exercised, demonstrated the following: (1) the investor committed £290,000 on day one; (2) distributions from the LLP would be £51,000 in 2005 and £817,000 in 2006; (3) the whole of the sum distributed in 2005 of that sum would be used to repay interest on the bank loan; (4) of the sum distributed in 2006, £737,000 would be used to repay interest and principal on the bank loan, leaving £80,000, which was just short of the sum required to pay capital gains tax arising on the exercise of the call option; (5) accordingly, unless the investor received the Tax Benefits (which in the illustration amounted to £413,000) the member would recover nothing of their capital investment of £295,000, and would therefore be materially worse off than if they had not entered into the transaction.

376. Whether the Scheme achieved the Tax Benefits is a question of law. In fact, that is a question which has so far not been answered, and neither party requires me to answer it in this judgment. The claimants' case proceeds on the assumption that the answer is that it did *not* entitle them to the Tax Benefits, so that they were justified in reaching a settlement with HMRC which involved them repaying most of the Tax Benefits and interest. Accordingly, on that assumption the claimants irrevocably committed capital to a Scheme in 2003 which as a matter of law did *not* entitle them to the Tax Benefits.

377. In my judgment, the correct analysis is that the claimants therefore suffered damage upon making the investment at the time they entered into the Scheme. That was actual, not contingent, damage because they entered into a transaction which did not, as a matter of law, give rise to an entitlement to receive the Tax Benefits which Mr Thornhill advised they would get.

378. It is true that they did in fact initially receive the anticipated Tax Benefits, and held on to them for approximately 14 years before being required to repay most of them. That, however, does not alter the fact that the transaction they entered into was one which was intrinsically less valuable to them than if they had not invested at all.

379. This conclusion is supported by *Halsall v Champion Consulting Ltd* [2017] EWHC 1079 (QB). In that case, the defendant's negligent advice caused the claimant to enter into two tax schemes, including a film scheme intended to give rise to sideways loss relief. Both schemes were eventually successfully challenged by the Revenue. HHJ Moulder (as she then was, sitting as a deputy judge of the High Court) held that the

cause of action in negligence arose when the claimant entered into the schemes. At [227] she concluded, in relation to one of the schemes, that when the claimants contracted to purchase shares, they suffered damage – not because the shares were then worth less than the claimants paid for them – but because the purchase of the shares would not give them the result (i.e. tax relief) which the defendant had assured the claimants they would get: "it was not inevitable at that point that they would be denied the tax relief and they may have been financially better off as a result of being exposed to the risk, but it was at that point that they were tied into the "commercial straightjacket"." She reached the same conclusion (at [343]) in relation to the film scheme: "the claimants entered into the contractual documentation for the film scheme in July 2007 and it was at that point that they suffered the damage; at that point the 'defect' in the form of advice was incapable of cure and they were tied into the "commercial straightjacket"."

380. At [225], HHJ Moulder relied on the following passage from [32] of the judgment of Richard Sheldon QC, sitting as a deputy High Court judge, in *Integral Memory Plc v Haines Watts* [2012] S.T.I. 1385, in which the argument that actual damage is not suffered until an HMRC tribunal decision was rejected:

> "The claimant's liability to pay interest on the unpaid NIC to HMRC was in no relevant sense contingent. A contingent liability is a liability which, by reason of something done by the person bound, may or may not arise depending on the happening of a future event… That was not the position in the present case. There was either an actual liability to pay NIC and interest on arrears or there was not. The existence of such liability is not contingent on HMRC succeeding or failing in a tax tribunal… All the tribunal or court is deciding is whether or not there is an actual liability…The fallacy…is demonstrated by [counsel's] submission that where a debt is incurred, but disputed, and court proceedings follow, the liability is contingent until the court gives judgment in favour of the creditor… That submission is clearly wrong."

381. The claimants accept that the conclusion in *Integral Memory* is correct, but contend that HHJ Moulder was wrong to rely on it in support of the conclusion that damage was suffered when the claimants were tied into the scheme. That is because, the claimants contend, HMRC might or might not decide to investigate, and unless they issued a closure notice or a discovery assessment, then there could be no debt to the Crown. I reject that contention. There is no relevant distinction in my judgment between a decision by HMRC whether to investigate, a decision by HMRC to issue a closure notice or discovery assessment, and a decision by a tribunal upon an appeal made to it against a decision of HMRC. The provisions of the TMA on which the claimants rely are about the timing of payment obligations and not about whether there exists a liability to pay (or repay) tax.

382. For the above reasons, I conclude that the claimants' causes of action accrued when they invested in the relevant Scheme. In each case that was long before the date falling six years before the issue of the Claim Form (5 July 2018).

<u>Section 14B</u>

383. As I have noted above, section 14B LA 1980 bars any claim which is brought more than 15 years after the date on which there occurred any act or omission alleged to constitute negligence and to which the damage in respect of which damages are claimed is alleged to have occurred.

384. The defendant contends that section 14B bars the claim of each claimant in respect of SAD1, as the acts and omissions complained of all relate to the SAD1 Opinion, dated 28 January 2003.

385. The claimants offered no convincing answer to this contention, which I consider is correct to the extent that the act or omission alleged to constitute negligence is Mr Thornhill's advice in the SAD1 Opinion.

386. The claimants advance instead alternative claims in relation to SAD1, based on different acts or omissions alleged to constitute negligence which occurred within 15 years of the date of issue of the claim form. I address each of these in turn below.

(i) Letter of 18 July 2003.

387. In paragraph 49.15.1 of the Particulars of Claim, the claimants plead that Mr Thornhill negligently confirmed his SAD1 Opinion when he provided it under cover of his letter dated 18 July 2003 to Scotts. This letter, drafted by Scotts and signed by Mr Thornhill, was provided in response to a request in a fax from Nazeera Moola of Scotts to Mr Thornhill of 17 July 2003, in which she noted that she was engaged in "a spot of housekeeping to make sure my files are ready for closing". Among other things, she enclosed a draft letter asking Mr Thornhill to have it re-typed on his letterhead before signing it and returning it. She said: "I require this for compliance purposes." In the draft letter, which Mr Thornhill duly had re-typed and signed and returned on 18 July 2003, he confirmed to Scotts "for the purposes of your internal verification" that he consented to his name being used in the IM as tax adviser to the Sponsor and to the SAD1 Opinion being made available to prospective investors in the LLP. He also confirmed that he had read the IM and that there was no statement in it in relation to tax matters which was inconsistent with his opinion.

388. I reject the contention that this amounted to a further breach of duty by Mr Thornhill. That is because there is no evidence that this letter or its contents was ever sent, shown, or relayed to any claimant. It was, as it stated on its face, for Scotts' internal verification purposes only. Accordingly, I do not see how any act or omission of Mr Thornhill in relation to this letter can have constituted an act of negligence, or can have been causative of any conduct giving rise to loss on the part of the claimants.

389. In the alternative, the claimants plead in paragraph 69 of the Particulars of Claim that the occasion on which Mr Thornhill wrote the letter of 18 July 2003 was one on which he could have, but failed to, correct his earlier advice. It is, however, clearly established that a continuing failure to correct earlier advice neither constitutes a fresh cause of action accruing day by day, nor is concurrently causative of losses caused by the original acts of negligence: *Capita (Banstead 2011) Ltd v RFIB Group* [2015] EWCA Civ 1310, per Longmore LJ at [23], and Henderson LJ at [45].

(ii) Confirming advice in connection with SAD2/3

390. In paragraph 49.15.2 and 49.15.3 of the Particulars of Claim, the claimants contend that Mr Thornhill confirmed his advice in a meeting with Scotts on 1 October 2003 in respect of SAD2/3 and that he consented, in his letter of 20 October 2003, to the SAD1 Opinion being shared with prospective investors in SAD2/3.

391. The meeting with Scotts on 1 October 2003 concerned only SAD2/3. Mr Thornhill's advice at that meeting was to Scotts and there is no evidence that it crossed the line so as to reach any claimant, let alone any claimant in respect of SAD1.

392. Although the letter of 20 October 2003 from Mr Thornhill refers to "opinions" (plural), I find that this was *not* a reference to his SAD1 Opinion. The relevant opinions were stated to be "attached hereto". In the version contained within the core bundle, the letter is page 2 of a 10-page fax sent from Mr Thornhill's chambers on 20 October 2003. The SAD2/3 Short-form Opinion is at pages 3 and 4 of that fax. A note, merely stating what he was enclosing, is at pages 5 and 6. A note of consultation held on 1 October 2003 is at pages 7 to 10 of the fax. There is no record of the SAD1 Opinion having been attached.

393. In any event, I reject (for similar reasons to those given above in relation to the letter of 18 July 2003) the contention that – had Mr Thornhill consented to his SAD1 Opinion being made available to prospective investors in SAD2/3 –it would have constituted an act of negligence in relation to investors in SAD1, or could have been causative of any conduct giving rise to loss on the part of any claimant in their capacity as an investor in SAD1.

(iii) Failure to correct advice in 2005 and 2009

394. In paragraph 70 of the Particulars of Claim, an alternative claim is advanced that Mr Thornhill failed to correct his SAD1 Opinion in connection with letters from Scotts to investors dated 2 November 2005 and 14 December 2009.

395. This alternative claim was not heavily pressed in argument. The loss flowing from any breach of duty committed in November 2005 or December 2009 can only have been limited to the difference, if any, between such settlement as might have been reached with HMRC on or shortly after those dates, and the settlement that was ultimately achieved. There was no evidence led on the basis of which I could conclude that the claimants would have sought to reach an earlier settlement with HMRC, which I find to have been an inherently unlikely proposition given that (as I explain in more detail in considering section 14A LA 1980 below) HMRC were not actively progressing an investigation into the Schemes at these times.

396. In any event, the short answer to this alternative claim is, as I have noted above, there is no separate breach of duty and no concurrent cause of loss in a failure to correct earlier advice.

Conclusion on section 14B

397. For the above reasons, I conclude that had claimants had claims in respect of loss flowing from investment in SAD1 they would have been statute barred by virtue of section 14B of LA 1980.

Section 14A LA 1980

398. Section 14A provides for an extended limitation period in cases of latent damage. The period is three years after the starting date defined by subsection (5), which provides as follows:

> "(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action."

399. By ss.(6), the knowledge required for bringing an action for damages in respect of the relevant damage means knowledge both:

> "(a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below."

400. By ss.(7), the material facts about the damage are "such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

401. By ss.(8) the other facts referred to in subsection (6)(b) above are—

> "(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (b) the identity of the defendant; and
>
> (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant."

402. By ss.(9), knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

403. By ss.(10), a person's knowledge includes knowledge which he might reasonably have been expected to acquire:

> "(a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

> but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

404. The approach to this section, as developed in case law since its introduction in 1986, was helpfully summarised by Nugee J in *Cole v Scion Ltd* [2020] EWHC 1022 (Ch), at [6], from which the following is of particular relevance in this case:

    (1) The burden of proof under s. 14A is on the claimant to establish that he brought his claim in time. It is incumbent on the defendant, as with all limitation defences, to raise the issue by pleading it, but once it has been raised, it is for the claimant to prove that he first had the requisite knowledge 3 years or less before the proceedings were brought.

    (2) "Knowledge" does not require knowing with certainty, but it requires more than suspicion: "It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence"; *Haward v Fawcetts* [2006] 1 WLR 682, per Lord Nicholls at [8]-[10].

    (3) Not only does the claimant not need to know with certainty, he also does not need to know in detail. This was put in various ways in the *Haward* case: such as that a claimant needed to know "in general terms" that her complaint was capable of being attributed to an operation, or that a claimant needed to know the "essence" of the relevant act or omission, or have "in broad terms" knowledge of the facts on which the complaint is based; or knowledge of the "essence" or "essential thrust of the case" or facts which "distil what [the complainant] is complaining about".

    (4) What is required is knowledge in broad terms of: (a) the facts on which the claimant's complaint is based; (b) the defendant's acts or omissions; and (c) that there was a real possibility that those acts or omissions had been a cause of the damage.

    (5) For the purposes of constructive knowledge, the test is an objective one, based on what a reasonable person with the general characteristics of the claimant would have done (as opposed to the particular characteristics of the actual claimant).

    (6) In this context, a reasonable person is expected to read his correspondence.

405. Knowledge of the material facts about the damage also requires the claimant to know that the damage is sufficiently serious to justify instituting proceedings: *Scion* at [27].

406. The claimants rely on Nugee J's comment, at [27] to [29] of *Scion* that where the claim is that the claimant would not have entered into a transaction at all if they had received non-negligent advice, then it is necessary to show that they appreciated that they are worse off than if they had never have gone into the transaction. That cannot mean, however, particularly where the claim is that the defendant was negligent in not advising them of the risk that his or her advice was wrong, that the limitation period

only commences when they know that the Scheme has certainly failed to achieve the Tax Benefits. That would be inconsistent with the fact that damage was suffered when they entered into the transaction. In such a case, what is required – as to knowledge of damage – is knowledge that if the Scheme did not attract the Tax Benefits, then the claimant would be sufficiently worse off, than if they had not entered into the Scheme at all, to justify instituting proceedings.

407. This issue is claimant specific. Mr Thornhill, however, contends that by December 2009 *all* claimants had knowledge of sufficient matters that would have prompted a reasonable person to seek independent expert advice. Since the claimants' case is that any reasonably competent adviser would have given the claimants the very advice which they contend would have dissuaded them from entering into the Scheme, they would have had actual knowledge, by early 2010 (allowing them a reasonable time to take advice) sufficient to trigger the start of the limitation period under section 14A. This contention is based on the following:

(1) Quite soon after the Schemes were implemented, although all claimants were able to reclaim tax (or avoid paying tax) as a result of the tax reliefs to which the Schemes gave rise, the Revenue put all of the claimants on notice that their tax returns were under enquiry. This happened at various times in 2004 and 2005.

(2) Mr Thornhill accepts, however, that on the basis of reassuring correspondence received from Scotts, by letter dated 2 November 2005 (saying that this was routine and in line with normal enquiries into partnerships attracting taxation benefits), a reasonable person in the position of the claimants would not have been prompted to seek independent advice at that stage.

(3) The position changed in December 2009, however, by reason of two matters: (a) HMRC issued Discovery Assessments to *some* members of the LLPs and (b) Mr Dryburgh of Scotts wrote to all members on 14 December 2009.

(4) Mr Thornhill relies on the following matters in that letter:

a) Scotts explained that HMRC had told them that the reason for issuing the Discovery Assessments was because they had received advice "that the enquiry notices they placed on each member's tax affairs when they issued the enquiry notices on the LLPs may not be sufficient to prevent a member seeking to claim closure of their tax affairs in the particular year and hence they feel they need the 'belt and braces approach' of also issuing a Discovery Assessment to keep a member's tax position open until the LLPs' tax affairs are finalised."

b) Anyone who had received a Discovery Assessment was advised of the need to appeal it because, if they did not, then the Assessment would become final and the member would lose the loss reliefs currently given.

c) Mr Dryburgh had recently corresponded with HMRC for the first time in over three years, providing them with information concerning the Board of the LLPs and the professional advisers and that he "again refuted HMRC's latest arguments that the LLP was not trading in a

commercial fashion with the anticipation of profit within the foreseeable future".

d) Scotts attached the opinion of Mr Thornhill, saying that he had been involved in advising on correspondence with HMRC, and that he "retains his original opinion that the LLPs were trading and did so in a commercial fashion."

e) The letter concluded with the following:

> "We do not know whether the Inspector will successfully persuade his head office to back his arguments. He has thus far failed to do so. IIMRC are already pursuing so many cases and using up the budget that was allocated to them for this purpose that we do not know whether they will pursue this matter particularly where the law was changed a long time ago to dissuade further investments. If he is successful in getting his head office to back his arguments he will issue closure notices and the LLP's will have to appeal these. A fund is being held of c £300,000 to pursue an appeal, if necessary and Scotts Atlantic will continue to provide its time without charge up to and during any appeal to the First Tier Tribunal."

408. Mr Thornhill contends that on receipt of this letter the claimants knew that HMRC's enquiry was (far from being dormant, as it had been up until this point in time) "very much active", that the HMRC inspector had advanced reasoned arguments as to why the tax relief was not available by reference to the statutory requirements that the LLP was trading, commercially with a view to a profit, and that these arguments – if correct – would show that Mr Thornhill's advice had been wrong. He contends that a reasonable person with the claimants' characteristics would have sought independent advice.

409. In my judgment, this letter would not have caused a reasonable person in the position of the claimants to take independent legal advice. Such a person would have known (because the IM told them) that among the "substantial risks" were tax risks including that the availability of tax reliefs depended upon the Revenue's acceptance of the Partnership accounts, tax computations and compliance with detailed rules, and that the Revenue had the right to enquire into loss relief or interest relief claims made by any member. An enquiry by the Revenue necessarily infers the possibility that the Revenue contemplated that the tax reliefs may have been wrongly claimed. The letter was accordingly telling claimants something that was consistent with, and foreshadowed by the IM, which Mr Thornhill's advice had endorsed.

410. As to the issues of the Discovery Assessments, a reasonable person in the claimants' position would have taken Scotts' information as to what HMRC had said at face value. Far from indicating a change in HMRC's approach (from dormant to active enquiry), this implied that HMRC had issued the Assessments purely in order to buy more time, having not yet decided whether actively to challenge the Schemes. The fact (as stated

in the conclusion of the letter) that the inspector who was raising arguments had not yet been able to persuade his head office corroborated that.

H: Conclusion

411. For the reasons set out above, I conclude (by reference to the issues set out at [12]) as follows:

(1) Duty. Mr Thornhill owed no duty of care to the claimants in respect of the advice he gave in relation to the Schemes.

(2) Breach.

a) Had Mr Thornhill owed a duty of care to the claimants, he would not have breached that duty in providing his opinion that the Schemes would achieve the Tax Benefits.

b) So far as concerns a duty to warn the claimants of the risk that his advice may be wrong, Mr Thornhill owed no such duty but, if he did, he would have breached it in failing to include the Relevant Risk Warning.

(3) Reliance and causation.

a) In the event that a duty to include the Relevant Risk Warning was owed, and was breached, none of the sample claimants has established that the loss suffered by them was caused by any breach of duty by Mr Thornhill.

b) The claimants are unable to claim on the basis that the Schemes would not have been promoted at all if Mr Thornhill had given advice which they contend would have been competent, both as a matter of law and because the claimants have not established that there would have been no Schemes as a matter of fact.

(4) Limitation.

a) The claimants' causes of action accrued on the day they invested in the relevant Scheme, such that the claims are barred (subject to the possible application of s.14A) under section 2 of LA 1980.

b) Each of the claims in respect of SAD1 is time-barred by reason of s.14B of LA 1980. For the reasons set out at [387] to [396] above, Mr Thornhill is not liable to the claimants for either confirming his advice in July 2003 or October 2003, or failing to correct his advice on those dates or in November 2005 or December 2009.

c) None of the claimants' claims in respect of SAD2/3 would have been time-barred, save for Mr Watts, because the starting date for the purposes of s.14A of LA 1980 was within three years of the issue of the claim form. In the case of Mr Watts, however, the starting date for the purposes of section 14A of LA 1980 was more than three years before the issue of the claim form, and his claim would have been time-barred.

(5) Loss and damage. I received no oral submissions, and heard no evidence, in respect of the issues arising under this head. They were dealt with solely in writing. If I am wrong on each of the issues so far dealt with in this judgment, another judge will be equally well placed to consider those submissions. Accordingly, and in view of the conclusions I have already reached, I will not lengthen or delay this judgment further by dealing with them here.

412. I am grateful to all counsel and their instructing solicitors for the high quality of the written and oral presentation of each side's case throughout the trial.

Appendix 1: The Payment Waterfalls

1. Both the MSA and the DA made different provision as to the distribution of income received from the films, depending on whether they are the initial pictures (the "Pictures" as listed in Schedule A to the DA, or those substituted for them) or Additional Pictures.

2. In relation to the Pictures, the MSA, at §6.1, provided that the "Defined Gross" (defined as all proceeds from the exploitation of the films) shall be allocated as follows:

   (1) The first 25% is retained by the Sub-Distributor;

   (2) The Sub-Distributor shall be entitled to recoup and retain the "Participation Share" of third party participants (such as actors and producers);

   (3) The Sub-Distributor shall be entitled to recoup and retain the amounts expended by it as P&A Costs in excess of the amount already paid to it by SAD1 pursuant to clause 5.1(a), i.e. the amount up to the P&A Cap (plus a "services fee" of 20% of the P&A Costs incurred in the North American Territory);

   (4) The Sub-Distributor shall next be entitled to recoup and retain an amount equal to the Annual Advances that it has made to SAD1 pursuant to §6.2;

   (5) The remaining sum constitutes "Defined Proceeds", which flow into the waterfall under the DA.

3. In relation to the Additional Pictures, the MSA entitled the Sub-Distributor to recoup and retain from the Defined Gross: the first 25%; all third party participations; and an amount equal to any P&A Costs attributable to Additional Pictures in excess of the aggregate amount of P&A Costs paid by SAD1 under §5.1. The remainder then flowed into the waterfall under the DA.

4. Under the DA, the Defined Proceeds from the Picture *and* the Annual Advances received by SAD1 were allocated as follows:

   (1) SAD1 was entitled to retain an amount equal to the aggregate amount of the Annual Advances made by the Sub-Distributor;

   (2) SAD1 was entitled to recoup and retain from Defined Proceeds earned after 5 April 2003, the amount of the Royalty Advance (of $50,775,000) which SAD1 paid to WB under §5.1 of the DA. However, any such amount so recouped had to be re-expended in Excess P&A Costs and/or P&A Costs in respect of Additional Pictures;

   (3) WB was entitled to the next tranche of Defined Proceeds, until it received US$250,000,000;

   (4) Next, SAD1 was entitled to retain an amount equal to the excess of US$238,642,500 over any amount which is *not* re-expended (in Excess P&A Costs and/or P&A Costs in Additional Pictures) under §5.2(a)(ii) and is thus distributed to SAD1 under that section. However, any amounts accrued prior to 30 September 2005 were payable to SAD1 only on 30 September 2010; and any amounts accrued after 30 September

2005 were either payable on Excess P&A Costs and/or P&A Costs of Additional Pictures, or (if not so re-expended) payable to SAD1 only on 30 September 2010;

(5) Thereafter, the remaining Defined Proceeds were payable as follows:

(a) the first US$50,000,000 was paid 90% to SAD1 and 10% to WB;

(b) the next US$50,000,000 was payable 65% to SAD1 and 35% to WB; and

(c) the next US$50,000,000 was payable 40% to SAD1 and 60% to WB; and

(d) the remainder was payable 1% to SAD1 and 99% to WB.

All amounts accruing after 30 September 2005, however, were to be expended on any Excess P&A Costs and/or the P&A Costs of Additional Pictures (if any).

5. The DA made the following provision for Defined Proceeds arising in respect of Additional Pictures:

(1) First, an amount equal to 75% of the P&A Costs incurred by the Sub-Distributor with respect to the Additional Pictures was paid to WB;

(2) Second, an amount equal to the P&A Costs paid by SAD1 in respect of Additional Pictures was retained by SAD1. Any such amounts accruing after 30 September 2005, however, were either to be re-expended on Excess P&A Costs and/or P&A Costs of Additional Pictures (if any) or payable only on 30 September 2010;

(3) Third, an amount equal to 2.5% of the P&A Costs actually re-expended by SAD1 were to be retained by SAD1 until it had received US$6,500,000;

(4) The remainder of Defined Proceeds were payable to WB.

Appendix 2: Reliance, Causation and Limitation in respect of each Claimant

(1) Mr Simon Brickman

1. At the time of his investment in SAD3, Mr Brickman was a qualified actuary, employed as Chief Actuary at XL Reinsurance. He invested £515,000 gross (£114,863 cash) in SAD3, completing his subscription agreement on 19 December 2003.

2. In 2003 Mr Brickman had an existing IFA named Perfect Day but, for the purposes of his investment in SAD3, Perfect Day passed him onto an IFA with greater specialism in (among other things) tax matters, 20Twenty Independent Limited ("20Twenty").

3. A Dr Mark Martin of 20Twenty wrote to Mr Brickman on 25 November 2003 providing him with "a comprehensive financial plan, which is tailored to your specific needs and circumstances" following a meeting, at which he had been presented with 20Twenty's Terms of Business. The letter recorded Mr Brickman's immediate objectives being to look at the most appropriate way of sheltering his income tax bill for the previous three years. It then recorded that Dr Martin had recommended that Mr Brickman shelter his income tax bill with a film partnership, specifically the SAD Scheme. The letter went on to explain film partnership schemes, and the difference between sale and leaseback schemes and film distribution schemes (like SAD). The recommendation to invest in SAD3 was made "having researched the market using Allenbridge tax shelter reports" and was made because SAD3 "was found to be one of the few Film Partnerships to provide the combination of benefits that you require." Dr Martin drew Mr Brickman's attention to risks applicable to Film Partnerships, including that "you are advised to take advice from an accountant and solicitor concerning the legal and tax aspects of this investment."

4. In cross examination, Mr Brickman accepted that this was an important decision for him, and with a lot of money being staked on the Scheme working he did not rely simply on what he was told by Scotts. In response to the question, "you wanted to have personal advice on the risks for you, didn't you?" he said: "I was getting that advice from Dr Martin". He accepted that this was advice on all aspects of the investment, including tax. He did not seek advice from anyone else.

5. There is no mention in Dr Martin's letter of Mr Thornhill or his advice.

6. In his Points of Claim, Mr Brickman said that he had a meeting with Dr Martin in or around November 2003, at which Dr Martin said that Scotts had obtained a favourable opinion from Mr Thornhill. Dr Martin said he was a leading expert in the field "and he [Mr Brickman] could therefore be assured that the Scheme was safe". The Points of Claim then state that "during the meeting", Dr Martin provided Mr Brickman with a copy of an opinion from Mr Thornhill which he read at the meeting and noted the unequivocal nature of Mr Thornhill's opinion. He could not recall whether it was a long form or short form opinion.

7. In his witness statement, and in his oral evidence, Mr Brickman said that he had a second, follow-up meeting with Dr Martin, and it was at this meeting that he was shown a copy of Mr Thornhill's opinion. He now recalled that it was the short opinion. He said that Dr Martin told him that Mr Thornhill was "the leading expert and basically the authority on the subject". He said that he could not recall Dr Martin telling him that he needed his own independent advice. He felt that as to whether the Scheme in general worked, getting his own advice would add nothing to what Mr Thornhill had done. Having referred to the

various warnings in the IM, Mr Brickman said in his witness statement that he accepts that his own tax, legal, currency and other economic considerations are not the responsibility of Scotts, and he felt comfortable with his own judgment to decide whether his tax position made him a suitable candidate to utilise the tax losses under the Scheme. His main concern was about the tax treatment of the Scheme, "and that had been dealt with by Mr Thornhill. I believed I could rely on his opinion as it was unequivocal and presented to us as being correct and from a top professional."

8. In addition to the reasons identified in the body of this judgment for treating Mr Brickman's purported recollection of events with care, there are important inconsistencies between his pleaded case (supported by a statement of truth) and his witness statement, in particular whether he was shown Mr Thornhill's opinion at a single meeting with Dr Martin, or at a follow-up meeting and whether it was a short or long version of the opinion. Although he suggested that his confusion over which opinion he might have seen was cleared up after he saw the documents again, that cannot be right because (as he accepted in cross-examination) he had seen all of Mr Thornhill's opinions in October 2019 (before he signed his particulars of claim) when they were sent under cover of questionnaires to potential sample claimants.

9. As to the second meeting, in the witness box, he variously said that it was arranged because he was "concerned about the tax position", that he could not recall why it happened and that Dr Martin "invited me back for another meeting to go through this opinion". He accepted that he would not have had any reason to think about his meeting or meetings with Dr Martin, probably until about 2017.

10. Although Mr Brickman maintained that he saw Mr Thornhill's opinion and relied on it at the time, I find for the following reasons, based on the totality of the evidence, that he did not do so. On the contrary, I find that he relied on Dr Martin's recommendation as recorded in his letter of 25 November 2003, for the reasons referred to in it, none of which included the content of Mr Thornhill's advice.

    (1) It is common ground that Mr Brickman never had a copy of Mr Thornhill's opinions. He claims only to have read through the SAD2/3 Short-form Opinion, at a meeting with Dr Martin.

    (2) The only contemporaneous record of the matters Mr Brickman relied on in entering into the SAD3 Scheme is the letter from Dr Martin of 25 November 2003, which was written following their meeting. That letter purported to include a comprehensive account of Dr Martin's reasons for recommending the Scheme to Mr Brickman. The suggestion that Dr Martin had showed Mr Brickman Mr Thornhill's Opinion during the meeting is inconsistent with two important features of the letter. First, the fact there is no reference in it at all to Mr Thornhill or his advice, just a recommendation that Mr Brickman consult his own solicitor or accountant concerning the legal and tax aspects. Second, and in contrast to the lack of reference to any opinion of Mr Thornhill, the letter referred to a "key features document", said to set out the "specifics of the Scheme and how the actual mechanics worked", which "we went through in detail during our meeting".

    (3) That does not mean that Dr Martin cannot have said anything about Mr Thornhill at all. I accept that it is likely that Dr Martin referred to the fact – as disclosed by the IM – that Mr Thornhill had advised Scotts on the Scheme, and that Dr Martin emphasised Mr Thornhill's credentials as an expert in the area. Given, however, the lack of any

reference to Mr Thornhill in the letter, and the recommendation that Mr Brickman get his own tax and legal advice, I consider that he is unlikely to have said anything more than that about Mr Thornhill's advice.

(4) I do not accept that there was a second meeting at which Mr Brickman was provided with a copy of Mr Thornhill's short opinion to read but not take away. Mr Brickman's evidence on this point is equivocal at best, and there is no convincing explanation as to why I should prefer his recollection in his witness statement over his recollection reflected in the Points of Claim. No other reason has been suggested for a second meeting, other than in order to go through the opinion. The short opinion is in such brief terms and, in itself, does no more than confirm various aspects of the IM, that it would not have been necessary to arrange a meeting for Mr Brickman to have been taken through it. Moreover, had Dr Martin thought it sufficiently important to have done so, then I consider it more likely than not that he would have followed the meeting up with a letter supplemental to his letter of 25 November 2003, so as to record in full the basis upon which his recommendation had been made. There is no evidence, however, that he did.

(5) The fact that Mr Brickman cannot recall Dr Martin advising him of the need to take his own legal and tax advice undermines his evidence that he drew a distinction at the time between advice as to his personal circumstances (which he said he knew Scotts could not give him) and advice as to whether the Scheme worked (to which he said that "[Mr Thornhill's] professional opinion provided all the assurance I needed"). That evidence is also undermined by his acceptance in cross-examination that Dr Martin gave him independent advice about the investment, including all aspects of the investment.

(6) I accept, as Ms Day QC submitted, that the fact that Mr Brickman relied on Dr Martin is not fatal to a claim against Mr Thornhill, if it was the case that Dr Martin had in turn seen and relied on Mr Thornhill's opinion in recommending the Scheme to Mr Brickman. The problem with that proposition is that there is no evidence from Dr Martin at all, and the only evidence as to his thought process is his letter to Mr Brickman, which makes no mention of Mr Thornhill's advice. Even assuming (as Ms Day QC submitted I should) Dr Martin had himself obtained a copy of the SAD2/3 Short-form Opinion, there is no evidence from which to conclude that Dr Martin relied on Mr Thornhill's advice, or that he would have made any different recommendation to Mr Brickman had Mr Thornhill's advice contained the Relevant Risk Warning.

11. For these reasons, I am not satisfied that Mr Brickman relied on Mr Thornhill's advice or that it was causative of any of his loss.

Limitation

12. Mr Brickman received notices of enquiry from HMRC in respect of SAD3 on 24 October 2005 and 15 December 2008. He received a discovery assessment in December 2009, and Scotts' standard letter to investors dated 17 December 2009. For the reasons set out in the main body of this judgment, a reasonable person in Mr Brickman's position would not have been led by any of those documents to obtain independent legal advice.

13. It is true that in an email to his accountant shortly after receipt of the discovery assessment, Mr Brickman referred to it as a "bombshell", and that in cross-examination, he accepted that he knew by that stage that what Scotts had been saying about how things were going

with HMRC was not reliable, that the arguments advanced by HMRC contradicted Mr Thornhill's advice, that it could be headed for expensive litigation and he stood to lose a lot of money. As Mr Brickman himself pointed out, however, Scotts' letter of 17 December 2009 – while acknowledging those things – was ultimately reassuring, in particular in stating that the discovery assessments were not an indication of actual challenge by HMRC, but necessary so that the tax position could be kept open.

14. For these reasons, if Mr Brickman had a claim against Mr Thornhill, I do not think that it would be time-barred.

(2) Mr James Rogers

15. At the time of his investment in SAD3, Mr Rogers was a stockbroker at Goldman Sachs. He invested £745,000 gross (£167,625 cash) in SAD3, completing his subscription agreement on 18 December 2003.

16. Mr Rogers was introduced to SAD3 by an IFA called Bernie Walsh of the firm My New Financial Adviser. He was acting for Mr Rogers, however, on an execution only basis. Mr Rogers said he regarded him as "a salesman who could sell snow to Eskimos". Mr Rogers was not looking to Mr Walsh for independent advice in relation to the Scheme.

17. At a meeting, the date of which is uncertain but sometime shortly before the end of September 2003, Mr Walsh met with Mr Rogers and explained the Scheme to him. After that meeting, on 30 September 2003 Mr Walsh emailed Mr Rogers, attaching a copy of the IM for SAD1 (which Mr Walsh had obtained from Scotts), and pointing out where changes would be made in the IM for the new Scheme. He told Mr Rogers that if he or his accountant had any questions, they should not hesitate to contact him. That was because Mr Rogers had told him that he would be getting his accountants, Learer Roberts, to review the Scheme based on the information provided in the SAD1 IM.

18. Mr Rogers had evidently arranged about this time to meet Mr John Pickard, of Learer Roberts, as confirmed by an email from Mr Pickard to Mr Rogers of 30 September 2003, referring to a meeting at Learer Roberts' offices on 2 October 2003 at 12:30. Shortly after that meeting Mr Rogers forwarded Mr Walsh's email of 30 September 2003 to Mr Pickard.

19. Mr Pickard's advice was contained in a letter to Mr Rogers of 9 October 2003. The letter stated that it was intended to "provide an explanation of how investments in film partnerships, and the subsequent sale and leaseback arrangements, work, and to review the [Scotts] scheme in particular." Mr Pickard said that opportunities to invest in these types of scheme had existed for many years, that they represented "mainstream tax planning insofar as the tax advantages are readily accepted by the Inland Revenue provided such schemes comply with certain conditions and are operated along normal commercial finance leasing lines." The scope of Mr Pickard's report was stated to be to "comment on the extent to which the Scheme contains the essential features of other existing schemes and how it complies with Inland Revenue requirements for eligibility for tax concessions", and that it was "restricted to a review of the legal, technical and taxation aspects of the Scheme as described in the literature provided and supplemented by any ancillary information provided by your independent financial adviser, Bernie Walsh."

20. Mr Pickard's letter then proceeded to give an overview of film schemes generally followed by a review of the SAD Scheme. He commented that the SAD Scheme appeared to operate

along the lines of the traditional model, but noted differences such as the call-option (which he described as highly likely to be exercised) and the fact that surplus income after 30 September 2005 would be ploughed back into marketing and distributing films. He then identified “key aspects” of the Scheme as to its status and tax position, in particular: “It is of vital importance that the Partnership is seen to be carrying on a trade…”

21. Mr Pickard set out the factors that are to be taken into account in considering whether trading is taking place, including the scale of activity, the organisation structure in place, and the regularity of operations. He concluded that “based on the information contained in the [IM], the activities carried on by the Partnership should be regarded as trading activities and the expected tax losses on acquisition should be valid for relief purposes.”

22. In a section considering the impact of security arrangements which minimised or eliminated the risk for a lessor in a sale and leaseback arrangement, he concluded that “the relevant conditions are met and there should not be any risk of the Revenue seeking to assert that security arrangements were in place, therefore negating the trading status of the Partnership.”

23. Under the heading “Conclusions”, Mr Pickard stated: “In general our opinion is that the Scheme appears to contain the expected features of a film exploitation partnership and that it is structured so as to satisfy the conditions necessary to achieve Inland Revenue recognition of its trading status.”

24. There is no evidence that Mr Rogers was ever provided with copies of any of Mr Thornhill’s opinions. Neither Mr Thornhill nor his opinions are referred to in any of the email correspondence between Mr Rogers and Mr Walsh, or between Mr Rogers and Mr Pickard.

25. In that part of his witness statement detailing his communications with Mr Walsh, Mr Rogers says only that he categorically remembers Mr Walsh “telling me about” the opinion of Mr Thornhill QC, that Mr Walsh homed in on it and made a big point of it, that he said that “Mr Thornhill QC was one of the best guys in the country” and that “if Mr Thornhill QC said it was going to work, then it was going to work”. Mr Rogers said that while he knew that Mr Walsh was a salesman, so that he had to be “more sceptical” of his advice, he felt that Mr Thornhill was a person of “such standing, qualifications, and status that I could rely on his advice more than on that of someone else”. Later in his witness statement, referring to the copies of Mr Thornhill’s opinions dated 20 October 2003 (the SAD2/3 Short-form Opinion) and 27 February 2004 (the Rule Change Opinion), he said that he had been provided with these in early January 2020, and that “while my memory of them is not strong, I thought then that these documents looked familiar (and remain of that view) and I believe that I was probably shown them at the time but was not given copies”.

26. In his oral evidence, he reiterated that Mr Walsh had told him about Mr Thornhill’s opinion, saying:

> “I just remember in the meeting Bernie Walsh was a great sales guy, he explained the scheme to me, drew some flow diagrams, how it would work, he could see I was interested. It was his trump card right at the end to say that Mr Thornhill, one of the best tax barristers in the land -- and, “If he said it's going to work, it's going to work.” I remember it like it was yesterday. He

> leaned forward in his chair with a smiling face and said that. It was his trump card. I can remember it very clearly."

27. There is in evidence a document entitled "A Business Opportunity in Film Distribution", which contained an outline of SAD2/3 provided by Scotts for the benefit of IFAs. This copy was provided to My New Financial Adviser. Mr Rogers' evidence is that he was given this, either by Scotts or Mr Walsh, in the early days of looking at the investment, and that the annotations on it are his writing, relating to bits he did not understand. There is no reference to Mr Thornhill or his advice in the document.

28. It is Mr Rogers' case that he relied on Mr Thornhill's opinion. In his witness statement he said:

> "In deciding to join SAD3, I relied upon Mr Thornhill QC's opinion and endorsement. I would not have invested if his opinion as to whether the Scheme would work had not been obtained: I knew it was a tax scheme and if it had not been backed by a tax specialist then, even with my limited knowledge at the time, I would have challenged it. I am clear that if his advice had been that there was a material or higher risk that SAD3 would fail, I would not have invested in it. My risk appetite was just not there, and never has been. If there had been any qualifications or risk warnings from Mr Thornhill QC associated with investing in the Scheme, I would not have invested."

29. Notwithstanding this evidence, however, I find on the basis of all of the evidence I have seen and heard that Mr Rogers did not rely on Mr Thornhill's advice in entering into the Scheme, and that the addition of the Relevant Risk Warning to Mr Thornhill's advice would have made any difference to Mr Rogers' decision to invest in the Scheme. Critically, I find that Mr Thornhill's advice was neither seen by Mr Rogers, nor conveyed to him, at the time.

30. I reject Mr Rogers' evidence that he was shown the SAD2/3 Short-form Opinion at the time. He accepted that his memory on this was "not strong", and is probably clouded by the fact that he *did* see the Rules Change Opinion in February 2004. The only occasion when he might have been shown the SAD2/3 Short-form Opinion was the meeting he had with Mr Walsh, but his description of that meeting (both in his witness statement and in cross-examination, as I have set out above) is that Mr Walsh merely revealed, as his "trump card" at the end of the meeting, the *fact* that Mr Thornhill had advised on the Scheme and that if he said it would work then it would work. He does not say that the substance of Mr Thornhill's opinion was relayed to him by Mr Walsh or that Mr Walsh handed him the opinion to look at in the meeting. What he recalls Mr Walsh telling him was information which could be gleaned from the IM because, as I have noted in the body of this Judgment, the IM stated expressly that the tax analysis was based on Scotts' understanding of the law and that this was based on advice from Mr Thornhill so that, implicitly, their understanding reflected Mr Thornhill's advice.

31. I am prepared to accept that Mr Walsh, engaged in a sales pitch to Mr Rogers, may well have played up the mention of Mr Thornhill in the IM in the way in which Mr Rogers

recalls it. I do not accept, however, that it follows from this that the SAD2/3 Short-form Opinion, or its substance, was made available or relayed at all to Mr Rogers at the meeting.

32. Had Mr Rogers seen Mr Thornhill's opinion then, aside from the fact that it would likely have been referred to in at least one contemporaneous communication with Mr Walsh, I consider it likely that Mr Rogers would have at the very least ensured that Mr Pickard was told about it, and more likely than not that he would have asked for a copy of it to be provided to Mr Pickard, but he did neither.

33. Mr Rogers maintained that he had not gone to Learer Roberts in an "advisory capacity". He said that they had told him in a telephone call that they were not tax consultants, and that he thought that their letter was largely cut and pasted from other film schemes they had maybe looked at. I reject this evidence. The letter from Learer Roberts is clearly a letter of advice on the tax consequences of the Scheme. In reviewing the Scheme itself, it goes into some depth on what the law requires in order to ensure that the LLP is trading, and gives a firm view that the requirements are met. There was no suggestion from Mr Rogers at the time that Learer Roberts had given him advice he had not asked for (such that, for example, they did not deserve the fee they had charged). It is implausible that Learer Roberts could have written such a letter but at the same time told Mr Rogers that they were not tax consultants. I also reject Mr Rogers' evidence that he did not go to them in an advisory capacity because he would only have taken their advice if they had told him "not to touch it". The fact that someone asking for advice has already formed a provisional view on how to act does not mean that when they ask an adviser for a view – in the hopes that it confirms their provisional view – they are not to be taken as relying on that adviser in *maintaining* their provisional view.

34. In any event, irrespective of the reasons why Mr Rogers went to Learer Roberts, it does not assist in establishing reliance on Mr Thornhill. He said in cross-examination that he "took" their advice only in the sense that it concurred with his own view. That view, he said, was "based on what I had already read in the IM". This is important for what he did *not* say: he did not say that he had already based his decision on the advice he had seen from Mr Thornhill.

35. There is no possibility, in the case of Mr Rogers, that he could establish reliance on Mr Thornhill's opinion by reason of the fact that Mr Walsh, as his adviser, had relied on it, for three reasons. First, because there is no evidence that Mr Walsh had seen a copy of Mr Thornhill's opinion. Second, because Mr Walsh was not giving any advice or recommendation to Mr Rogers, but acting on an execution only basis, so his decision-making process is irrelevant to the question of reliance by Mr Rogers. Third, because even if Mr Walsh's decision-making process was relevant, there is no evidence at all as to what reliance *he* placed on Mr Thornhill's opinion.

36. Accordingly, I am not satisfied that Mr Rogers relied on Mr Thornhill's advice or that it was causative of any of his loss.

Limitation

37. In order to challenge Mr Rogers' contention that he did not have the requisite knowledge required by s.14A LA 1980 before July 2015, Mr Thornhill points to the following: (1) Mr Rogers was sent an email by Mr Walsh on 25 October 2004 alerting him to the Revenue's review of all film based tax schemes; (2) on 2 November 2005 Scotts sent Mr Rogers a

letter noting that the Revenue wished to enquire into the LLP's tax return, and that a similar enquiry was ongoing into an earlier SAD partnership; (3) Mr Rogers received the standard Scotts letter of 17 December 2009; and (4) Mr Rogers was sufficiently concerned, in July 2014, to consult his accountant in relation to the Revenue's announcement about accelerated payment notices.

38. As to the first three matters relied on, for the reasons set out in the body of this judgment, I do not think that they would have caused a reasonable person in the position of Mr Rogers to obtain independent legal advice. (I note that Mr Rogers denies ever reading Scotts' letter of 17 December 2009. Mr Adam QC submitted that a reasonable person in Mr Rogers' position would be taken to read his correspondence and would therefore have been aware of its contents. I agree, but this does not matter given my conclusion as to the impact of that letter on a reasonable recipient.)

39. Similarly, I do not think that the fourth matter ought to have caused Mr Rogers to take independent legal advice. It was not prompted by any suggested change in HMRC's approach or view of the Schemes, and the feedback from Mr Rogers' accountant was that "it is not clear as to whether HMRC are still aware that this structure is under enquiry".

40. Accordingly, if Mr Rogers had a claim against Mr Thornhill arising from his investment in SAD3, it would not have been time-barred.

<u>(3) Mr Mark Yeates</u>

41. At the time Mr Yeates invested in SAD1 and SAD2, he worked in the investment banking arm of Deutsche Bank. He invested £885,000 gross (£261,075 cash) in SAD1, completing his subscription agreement on 25 March 2003 (although this was for a gross amount of £1,000,000 and is likely to have been subsequently amended). He invested a further £157,791 gross (£35,543 cash) in SAD2, completing his subscription agreement sometime in February 2004.

42. Mr Yeates' financial adviser was Mr Alistdair Wilson-Gough of Kirkham Motte Limited ("KM"). He said that he would have met with KM periodically and would have had email exchanges with them. None of his communications with KM have survived, apart from letters sent to him after he had invested in, respectively, SAD1 and SAD2.

43. In his witness statement, Mr Yeates said that he believed that KM told him that there had been a positive opinion from tax counsel about SAD1, that he believed he read the SAD1 Opinion prior to investing in SAD1 and that he was aware that Mr Thornhill's advice was that the Scheme was a bona fide investment and would satisfy the requirements of the Revenue. He regarded KM as a "facilitator", who sourced investment opportunities, and he would not have invested in the Schemes simply in reliance on what KM told him. He said: "I was aware of tax counsel opining, and I considered that to be expert opinion: Mr Wilson-Gough's opinion could never come close to being as important as that. There had to be some expert other than him confirming that it was not something the Revenue would have had a problem with. I have a very vivid memory that it was the fact that there was leading counsel that made me think this was all bona fide."

44. Mr Yeates also said in his statement: "I believe I read the [SAD1 Opinion] prior to investing in SAD1. I was aware that Mr Thornhill QC's advice was that the Scheme was a bona fide investment that would satisfy the requirements of HMRC." His evidence that he believed

he had read the SAD1 Opinion was not challenged in cross examination (although his later evidence that he believed he had seen a copy of the SAD2/3 Long-form Opinion was challenged on the grounds that his memory was unreliable). In closing submissions filed on behalf of Mr Thornhill it was pointed out that there is no documentary evidence as to *when* Mr Yeates was provided with the SAD1 Opinion. The possibility that he was provided with it at a later date was not, however, explored in cross-examination with him. Indeed, his cross-examination appeared to proceed on the basis that he was aware of the advice that Mr Thornhill had given, but only took "comfort" from it, as opposed to relying on it. On balance, therefore, I find that Mr Yeates did see the SAD1 Opinion before investing in SAD1.

45. In cross-examination, Mr Yeates accepted that it was KM's job (as his IFA) to advise him on the Schemes and to make him aware of the risks in investing, and that KM did advise him in relation to the Schemes, including that the Revenue would not have a problem with them. He accepted that he knew that Mr Thornhill was adviser to Scotts. He suggested that he regarded Mr Thornhill as having advised "the Schemes", by which he meant that he understood there to be a structure where he was the investor and there had been people employed to put it together, including "expert legal, expert EY". He accepted however that he knew Mr Thornhill was not advising him.

46. He nevertheless maintained that he took comfort from the fact that Mr Thornhill had advised Scotts. He agreed he had not taken independent taxation advice from Mr Thornhill, but said: "I didn't need to take it from Mr Thornhill because as far as I was concerned, Mr Thornhill had already advised the scheme that I was investing into and therefore – we have gone through this before. I mean, my understanding was that I was investing into a scheme that was very robust. It had the right people signing off on it with their opinion."

47. Even though I accept that Mr Yeates saw the SAD1 Opinion (so that this is not a case where Mr Thornhill's advice reached him <u>only</u> through the filter of his IFA), in determining what Mr Yeates would have done had the SAD1 Opinion contained the Relevant Risk Warning, it is nevertheless highly relevant that he was acting on the recommendation of his IFA. Mr Yeates sought to downplay KM's involvement by describing them as "a facilitator" who sourced opportunities and not as expert tax advisers. I do not accept that. As I have noted above, he accepted in cross-examination that KM's job was to advise him, which they did.

48. Even though KM may not have been specialist tax advisers, is clear from one document that Mr Yeates did keep that it was their practice to give their own advice to their clients, having satisfied themselves by consulting specialists. For example, in their update to their clients (including Mr Yeates) on the rule change in February 2004, they said:

> "…we have taken extensive advice from our own Tax Consultants, from the providers of the schemes themselves and from Independent Tax Counsel. What we can report back to the Clients of Kirkham Motte is very heartening. We can confirm that the Legislation highlights that any scheme which existed before February 10th 2004; that has audited expenditure prior to this date; and is a genuine Production vehicle, will be eligible for Tax relief on losses incurred. These specific attributes apply to the schemes marketed by us i.e. Scott's and Defender…"

49. It is likely in my judgment that KM adopted the same approach in recommending that Mr Yeates invest in SAD1 in the first place.

50. I also consider that it was the <u>fact</u> that someone of Mr Thornhill's standing had advised in respect of the Scheme, rather than the content of his advice which was of most importance to Mr Yeates. First, although he said that he believed he read the SAD1 Opinion, he did not purport to have any recollection of reading it. As I have noted above, in his witness statement, he said that: KM had told him at the outset that there was a positive opinion from tax counsel; he was "aware" that Mr Thornhill had advised the Scheme was bona fide and would satisfy the requirements of the Revenue. Importantly, the "vivid memory" he said he had was of the <u>fact</u> that there was leading counsel's opinion that made him think this was all bona fide.

51. It is also relevant (as I note in the main body of this judgment) that the SAD1 Opinion was written in such a way that it was not readily accessible to a lay reader. This supports the view that Mr Yeates would have been reliant to a great extent on what KM told him about the merits of the Scheme generally, and Mr Thornhill's advice in particular.

52. Accordingly, a critical piece of the picture is what KM would have said to him if Mr Thornhill's advice had contained the Relevant Risk Warning. There is no evidence as to that. I do not accept that it is possible to infer that, had such a warning been included in the SAD1 Opinion, KM would have given materially different advice to Mr Yeates. KM were experienced advisers in this area and, as I have noted, it appears to have been their practice to obtain their own specialist advice before making recommendations to clients. There would still have been a positive opinion from an eminent tax QC endorsing the Scheme and, taking into account the factors I have identified at [363] to [368] of the main body of this judgment, I am not satisfied that the Relevant Risk Warning would have made a material difference to what KM said to Mr Yeates.

53. For these reasons, I am not satisfied that Mr Yeates has discharged the burden of establishing that had Mr Thornhill included the Relevant Risk Warning in the SAD1 Opinion he would not have invested in the Scheme.

54. Mr Yeates was similarly recommended by KM to invest in SAD2, and there is no evidence as to what they would have advised had there been the Relevant Risk Warning in relation to Mr Thornhill's advice in respect of SAD2. For the same reason, therefore, I consider that Mr Yeates has not discharged the burden of establishing causation in relation to his investment in SAD2.

Limitation

55. For the reasons set out in the body of this judgment, had Mr Yeates had a claim against Mr Thornhill in respect of his investment in SAD1, that claim would have been time-barred pursuant to s.14B LA 1980.

56. The matters relied upon by Mr Thornhill to challenge Mr Yeates' contention that he did not have the requisite knowledge for the purposes of s.14A LA 1980 prior to July 2015 (in respect of his investment in SAD2) are: the fact that he received enquiry notices from HMRC dated 24 October 2005, 11 June 2007 and 8 December 2008, a discovery assessment in December 2009 and the standard Scotts' letter of 17 December 2009. For reasons set

out in the main body of this judgment, I do not consider that these would have led a reasonable person in Mr Yeates' position to take independent legal advice.

57. Accordingly, if Mr Yeates had a claim against Mr Thornhill in respect of his investment in SAD2 it would not have been time-barred.

(4) Mr Jonathan Watts

58. At the time that he invested in SAD2 and SAD3, Mr Watts was managing director of Colt Communications. He invested £2,800,000 gross (£630,000 cash) in SAD2, completing his subscription agreement on 11 December 2003. He invested £525,000 gross (£118,125 cash) in SAD3, completing a subscription agreement on 10 March 2004.

59. Mr Watts' IFA was Ward Consultancy PLC ("Ward"). There is in evidence a letter of recommendation from Ward dated 9 March 2004 relating to Mr Watts' investment in SAD3. This included the following paragraph:

> "As stated on the Risk Warning Notice neither Ward Consultancy PLC nor the partnership provides any guarantee that the arrangements will be acceptable to the Inland Revenue, and hence that tax relief will be granted. However, there are good reasons to expect that the arrangements will be accepted and relief granted."

60. Mr Watts has not disclosed a similar letter from Ward relating to his investment in SAD2. He has also not disclosed the Risk Warning Notice referred to in the letter of 9 March 2004. He does not accept that he received either of these documents. I find, however, that he would have done so. On his own admission, Mr Watts' record keeping was sporadic at best. It is not surprising that he does not recall receiving specific communications from Ward some 17 years ago. The fact that he does not have copies of these documents, and does not recall receiving them, is therefore of little weight. On the other hand, I think it is highly likely that an experienced IFA such as Ward would have provided their client with a written record of any recommendation made by it. The fact that it did so in relation to SAD3 indicates its practice was to do so. As the Risk Warning Notice is specifically referred to in their letter of 9 March 2004, I find it more likely than not that it was sent to Mr Watts.

61. Mr Watts countersigned the letter of 9 March 2004 on 1 April 2004, adding in manuscript: "Investment made on advice from Ward that govt announcements of feb 10th 2004 will not jeopardise returns or scheme." This is a reference to the Revenue's rule change in February 2004. On 16 February 2004, Mr Boulton of Ward had emailed Mr Watts in connection with the rule change, stating that "Tax Barrister Andrew Thornhill has confirmed that this will not affect the tax relief on your investment…"

62. A copy of the SAD2/3 Short-form Opinion was disclosed by Mr Watts as having been in his possession. Two copies of the SAD1 Opinion were also disclosed by him (albeit one was disclosed extremely late). Both of these copies contain a fax header indicating that they were part of a longer fax (the first page of the opinion being page 8 of the fax) purportedly sent by Scott to an unidentified number on 24 October 2003. One was an unmarked copy and another contained manuscript additions by way of underlining and the word "safferys" on the front page. This is a reference to Saffery Champness, from whom

Mr Watts sought advice in 2015. The SAD2/3 Short-form Opinion in Mr Watts' possession also contains what appear to be two fax headers, one over the top of the other and both partially obscured. One of them appears (from the part of the lettering that is visible) to be sent by Scotts.

63. Mr Watts' evidence as to which of the Opinions he saw is confused. In his witness statement Mr Watts said that Ward had sent him the IM, that he had noticed the reference to Mr Thornhill's opinion and asked for – and been given – a copy of it by Ward. The opinion that he there said he received was the SAD2/3 Short-form Opinion. There is no documentary evidence of this opinion (or indeed any of them) ever being provided to him (other than their being in his possession). In cross-examination he said that he thought it may have been faxed to him, but he was then cross-examined on this passage in his witness statement on the premise that the document he was referring to was the SAD1 Opinion. In re-examination, when the copy of the SAD1 Opinion with the manuscript annotations was put to him, he said that it was this opinion that he had relied on in entering into the Schemes. When he sought advice from Saffery Champneys he had copied the original, marked it up and sent it to them.

64. Although Mr Watts could not demonstrate how he was provided with copies of Mr Thornhill's Opinions, the fact that both the SAD2/3 Short-form Opinion and the SAD1 Opinion were in his possession is evidence in itself that he was provided with them. The fact that both of them were in a form that had been faxed by Scotts (at least in the case of the SAD1 Opinion) in 2003 shows that they were not versions which were sent to the claimants in the course of preparing for these proceedings. While it is possible that he could have been sent copies at any time between 2003 and 2015, the most likely time to have been provided with them was at the time he was considering entering into the Schemes.

65. In his witness statement Mr Watts said that his impression on reading Mr Thornhill's opinion was that "Mr Thornhill QC was confident that the Scheme would pass muster and do the job." He said that he asked Mr Boultwood and Mr Ward where the Scheme fell on the risk scale, and that they told him it was "low risk", and that "there was only a very slight chance of the Revenue rejecting the Scheme, because of Mr Thornhill QC's opinion", that Mr Thornhill was reputable and an eminent QC who specialised in tax law, and that he should rely on Mr Thornhill's opinion. This was all said to be recollection, refreshed by the documents he had seen.

66. As with the other claimants, this purported recollection of what happened 18 years previously needs to be treated with caution. Although he said that his recollection was enhanced by the fact that the investment "had a big impact on our lives", he accepted that it was only with hindsight, many years later, that the impact was realised. The fact that his witness statement identified the SAD2/3 Short-form Opinion as the one he was given by Ward, whereas in cross-examination he identified the relevant opinion as the SAD1 Opinion suggests (since one is less than a page in length and the other spans nine pages) that he does not have any actual recollection of reading it. Insofar as his recollection is said to have been refreshed generally by documents, Mr Watts has not disclosed any documents relating to the several discussions he says took place with Ward in October and November 2003. For the same reasons I give in relation to other claimants, I do not accept Mr Watts' evidence that he was told by Ward that he could rely on Mr Thornhill's advice. I find it inherently unlikely that an experienced IFA such as Ward, who would have well understood

Mr Thornhill's role and the importance of the language in the IM and the subscription agreements, would have given advice that contradicted that language.

67. What his evidence does demonstrate, however, is that even though he saw Mr Thornhill's opinions, in deciding to invest in the Scheme he was largely relying on Ward, and Ward's view of the advice, certainly as regards the risks involved. This conclusion is reinforced, as with other claimants, by the fact that the Opinions were not readily understandable by a layman. Mr Watts accepted in cross-examination that he had sought advice from Ward about how risky the investment was, that the advice was personal to him, and that Ward had advised him that the investment was low risk.

68. Mr Watts said that he would not have invested if Mr Thornhill had said there was a "significant risk that the Scheme would be successfully challenged". Given his reliance on Ward, as with other claimants a key part of the picture is what Ward would have done differently if the Opinions had contained the Relevant Risk Warning. As I have indicated above, in the letter of 19 March 2004 recommending that Mr Watts invest in SAD3, Ward referred to the fact that neither Ward nor the LLP provided any guarantee that the arrangements would be acceptable to the Revenue, or the tax reliefs would be granted, and said there were "good reasons" to expect that the arrangements would be accepted and relief granted. I infer – since nothing had materially changed between 2003 and 2004 – that the advice Ward would have given Mr Watts in relation to his investment in SAD2 would have been materially the same. In the absence of any evidence from Ward, I am not persuaded that, armed with an opinion from an eminent tax QC that reached the same conclusion as Mr Thornhill, but caveated with the Relevant Risk Warning, Ward would have given materially different advice to Mr Watts. There would still have been "good reasons" to expect the Scheme to achieve the Tax Benefits.

69. I note that Mr Watts also said that he would not have invested if Ward had told him that Mr Thornhill's advice was just for the promoters. I do not accept this. I have already rejected his suggestion that Ward told him that he could rely on Mr Thornhill's opinion. As I have explained in the body of this judgment, the IM made it clear that Mr Thornhill was not advising potential investors, who were advised to get their own advice. He also said that he would not have invested "without Mr Thornhill QC's advice". That, however, takes matters no further forward, since on the basis of my findings in the body of this judgment, in the relevant counterfactual world there would still have been an opinion from eminent tax counsel that the Tax Benefits would be achieved.

70. In all the circumstances, therefore, I am not satisfied that Mr Watts would have refrained from investing in SAD2 had the Opinions contained the Relevant Risk Warning.

71. I reach the same conclusion in relation to Mr Watts' investment in SAD3, since there was no material change in the Schemes, the advice in fact provided by Mr Thornhill or the nature of the Relevant Risk Warning that should have been given.

Limitation

72. Had Mr Watts had a claim against Mr Thornhill in respect of his investment in SAD2 and SAD3, I consider it would have been time-barred for the following reasons.

73. In May 2015, Mr Watts discussed the Schemes with his financial adviser, Mr John Halley of Strabens Hall. Mr Halley's note of their meeting on 13 May 2015 includes the following:

"Liquidator has been in touch re Scott's film schemes. Nothing from HMRC but concerned about the position and will retain cash to cover (est. c. £3m)." Mr Watts denied that it had been his idea to set aside cash, but accepted that this was the agreed outcome of the meeting. It was also agreed that he would seek advice from specialists who worked on film schemes, Saffery Champness.

74. At a meeting on 16 June 2015, Saffery Champness advised Mr Watts that the Schemes were not going to work and that he should settle with the Revenue in order to reduce the size of the large cheque he would have to write.

75. In my judgment, by 16 June 2015 at the latest, Mr Watts had the requisite knowledge required for bringing an action. At the very least he knew that there was a material risk that the Tax Benefits would not be achieved. He also knew that the financial consequences for him would be very serious – given that he had already accepted the advice to set aside approximately £3 million.

76. What is said on Mr Watts' behalf is that, by reference to documents and correspondence subsequent to 16 June 2015, Saffery Champness' advice did not cause him to change his views immediately, and that he took time after that meeting to make further investigations and take further professional advice. In cross-examination he said that he was now in possession of two differing views (from Saffery Champness and from Ward), he was having to balance the two, and it did not mean that he had yet made a decision one way or the other. In the claimants' closing submissions it was suggested that this later documentation (which was not explored with Mr Watts in cross-examination) supported Mr Watts' position that he had not acquired knowledge that Mr Thornhill's advice was "wrong".

77. The relevant question, however, is not what Mr Watts thought, but what would the advice received from Saffery Champness cause a reasonable person in Mr Watts' position to conclude. Moreover, it is also irrelevant to ask when such a person would have acquired knowledge that Mr Thornhill's advice was "wrong". What matters (in connection with the claim that Mr Thornhill was negligent not to include the Relevant Risk Warning) is when such a person would have acquired knowledge that there was a material risk that the Tax Benefits would not be achieved. I am satisfied that a reasonable person in Mr Watts' position would have appreciated that this was the case, at the latest on receipt of Saffery Champness' advice, so that they had the requisite knowledge under s.14A on that date. Since that was more than three years before the claim form was issued, any claim that Mr Watts may have had would have been time-barred by 5 July 2018.

(5) Mr Alistair Cox

78. At the time of his investment in SAD3, Mr Cox was Chief Executive Officer of Xansa, a technology business. He invested £1,000,000 gross (£225,000 cash) in SAD3. Many of the documents relating to his subscription have not been located. There is in evidence a subscription agreement bearing the date 25 March 2004, signed by Mr Cox, but this relates to a gross investment of only £312,500. A letter from Scotts to Mourant dated 29 March 2004 refers to a letter (attached, but now missing) indicating that Mr Cox wished to increase his subscription to £1,000,000. The documents relating to the increased amount are missing, apart from a facility letter relating to a loan from Barclays of £775,000 signed by Mr Cox on 26 March 2004.

79. Mr Cox's IFA was Ward. Mr Cox's communications with Ward are in evidence. The first is an email from Mr Willans to Mr Cox on 23 March 2004, thanking him for his time that morning. The email attached illustrations for sheltering Mr Cox's higher rate tax liabilities for the last year and current year. It referred to a further meeting planned for Thursday 25 March 2004 for the purposes of completing the application. There is no note of what occurred at the meeting on 23 March 2004, but Mr Cox made manuscript notes on the email of that date, which he said it was his habit to do, "…because I find it an easier way to remind myself after the event."

80. In his witness statement, Mr Cox said that he recalled (having been shown the email of 23 March 2004 from Mr Willans) "a number of meetings" with Mr Ward of Ward in early 2004. He said that Mr Ward sat in his office, explained how SAD3 worked and ran through some indicative financial projections. He recalled that Mr Ward told him that "the tax benefits of SAD3 were absolutely solid, as a leading queen's counsel, Mr Thornhill QC, had been appointed to advise on just those points." He also said that he was provided with the IM in the meeting, which he read in the meeting and returned to Ward. In particular he read the section entitled "Taxation Consequences of Investing in the Partnership". He said that he was "made aware that Mr Thornhill QC's opinion was that the business would be classed as a trade and under that branch of the tax law therefore, members would be able to claim tax relief against any trading losses against their taxable income."

81. He then said that he also remembered Ward gave him a copy of an opinion by Mr Thornhill, which he read. He said that he understood from his solicitors that Mr Thornhill had written an earlier opinion on an earlier iteration of SAD3 and then another shorter opinion to cover SAD3 itself, but he could not remember which of them he saw. He returned the opinion to Mr Ward in the meeting, having read it.

82. In cross-examination, Mr Cox confirmed that it was at the meeting on 23 March 2004 that SAD3 was proposed to him, and that he saw the IM for the first time, and that he read through the whole of it, and an opinion of Mr Thornhill at the meeting.

83. The second communication from Ward is an email from Mr Willans of 25 March 2004, sent at 17:53, thanking Mr Cox for "your time again this morning", when the paperwork had been completed for the investment. Mr Willans said in this email: "I fully understand your concerns but trust the attached Counsels Opinion and the Letters of Comfort from Scotts ease your mind. I believe the issue became clear when we ran through the Revenue statements but to clarify Counsels Opinion is that because the expenditure was committed before the 10th February the old rules apply even for those Partners entering the Partnership after this date." The opinion attached was the Rule Change Opinion.

84. In his witness statement, Mr Cox said that he recalled that the email and its attachments were crystal clear and unambiguous "that the world expert said it was ok to go ahead, so I went ahead. I read the attached opinion and it was the final piece of the jigsaw". In cross-examination, however, he insisted that he had been shown the Rule Change Opinion in his meeting with Mr Willans that day, so that it was being sent to him for confirmation. This is important because it was at the meeting earlier in the day that Mr Cox completed the paperwork for his investment. On this point, I consider that the evidence in his witness statement is to be preferred. The sense of the email from Mr Willans of 25 March 2004 is that he had sought to explain the issue relating to the rule change to Mr Cox in the meeting, and had done so by reference to the Revenue statements, and he was now – for the first

time – sending Mr Cox the Rule Change Opinion "to clarify" why it was that the rule change did not affect Mr Cox's investment.

85. Mr Cox's purported recollection of the detail of what happened in March 2003 must in my judgment be treated with care. I consider that to a large extent this is reconstruction that is clearly influenced by considering the issues and arguments during the course of his preparation for this case.

86. For example, in his statement of case, filed in May 2020, Mr Cox had no clear recollection of being shown either the IM or any opinion of Mr Thornhill at the meeting on 23 March 2004. Instead, he pleaded that he had been provided with a list of documents (comprising the IM, one or other of Mr Thornhill's opinions on SAD1 or SAD2/3, the Rule Change Opinion letters from Scotts relating to it) either at *or after* one or other of the meetings he had with Ward in mid-March or afterwards. This is at odds with his later apparently clear recollection that he had been shown – and read carefully through – both the IM and Mr Thornhill's opinion at the meeting on 23 March 2004. The improvement in his recollection cannot be explained by reference to any of the contemporaneous documents, because (as I explain below) they do not provide any support for the suggestion that Mr Cox read through the IM and Mr Thornhill's opinion in the meeting with Ward. I find this proposition inherently unlikely in any event, because it would have taken a considerable amount of time (Mr Cox estimated 45 minutes) just to read through the IM and it is not likely that an IFA would simply present the document to their client and sit back while the client read it.

87. The suggestion that Mr Cox read through an opinion of Mr Thornhill's at the meeting on 23 March 2004 is undermined by the content of his manuscript notes on Mr Willans' email of that date. I find, for the following reasons, that Mr Cox did not in fact read through any of the Opinions before investing in SAD3.

88. First, Mr Cox's manuscript notes on Mr Willans' email make no mention of Mr Thornhill or his opinion.

89. Second, in describing the purpose of the Scheme in his manuscript notes on the email, namely that it "utilises tax losses", he refers to "sect 42/48", neither of which is referred to in any of Mr Thornhill's opinions. This suggests that his understanding of the tax impact of the Scheme was derived from Ward's explanation, and not from Mr Thornhill's opinion.

90. Third, his notes also include the following: "– have IR seen & approved scheme." In cross-examination, Mr Cox suggested that this was not posing a question (there is no question mark on the note), because he already knew – having read the IM in the meeting with Ward that day – that the Revenue had not approved the scheme. This was, however, mere conjecture on the part of Mr Cox, as he accepted that he did not recall writing the note. In my judgment, it can only be read as a question, and as indicating that at that point in time Mr Cox was not sure whether the Revenue had approved the scheme. It cannot be interpreted as a statement that the Revenue *had* seen and approved the scheme, because it is not possible that Ward told him that. Nor can it sensibly be interpreted as a statement that the Revenue had *not* seen and approved it. The only other alternative is that it was posing the question whether the Revenue had seen and approved it. Had Mr Cox read through the IM in detail and Mr Thornhill's opinion in the meeting, it is not credible that he would have failed to pick up on the key point that the Revenue do not give approval of such schemes, so that Scotts' understanding of the tax aspects was informed by Mr Thornhill's opinion. The fact that he posed the question in his manuscript notes made

shortly after the meeting undermines, therefore, his supposed recollection that he read through the opinion at the meeting.

91. Fourth, his notes refer to the Revenue rule change announced on 10 February 2004, and to the fact that the "existing partnerships have contracts in place so future members would enjoy benefits from trading loss regardless of when coming in…". This indicates that this was a particular focus of his concern at the first meeting. It was not, however, a matter dealt with at all in any of Mr Thornhill's opinions, other than the Rule Change Opinion which he was provided with only on 25 March. It is not surprising that the principal focus of his concern, and of his discussions with Ward, related to the rule change, since he was investing in the Scheme after rule change had been announced.

92. That this was the focus of his concern is supported by an email from Ms Julie Bullivant, a senior tax consultant at Ernst & Young at 12:30pm on 25 March 2004. This enclosed two Revenue articles issued in February relating to the rule change. Mr Cox wrote in manuscript on this email: "Julie, Many thanks for this. I appreciate your input into this…" and then stating that he had double-checked the issue and had been assured "by the fund and the advisers, supported by QC evidence (A. Thornhill)" that because the LLP had incurred losses prior to 10 February 2004 he would be able to claim relief against those prior losses. His manuscript note ended: "I hope this sheds some light but would really appreciate any guidance you might supply on the efficacy and robustness of the arguments presented which imply the viability of the tax offset". Mr Cox said that he never sent that note to Ms Bullivant. There is no evidence of him sending a reply to her email, and I accept that he did not in fact do so. He also said that he never sought any input from Ms Bullivant, and that the email came out of the blue. I do not accept that evidence, which is inconsistent with the tone of the email, and his draft manuscript response.

93. Fifth, the suggestion that Mr Cox had read through the opinion at the meeting is also undermined by the attempt – which I have rejected – to improve in his oral evidence on his recollection in his witness statement as to when he saw the Rule Change Opinion.

94. Sixth, the very fact that he cannot remember whether the opinion he saw was a long-form opinion (running to nine pages) or one that covered less than a page undermines his purported recollection of reading it at the time. Mr Cox's recollection that he saw *an* opinion of Mr Thornhill – but that he cannot remember which one – is readily explained by the fact that he *did* see an opinion at the time, but it was the Rule Change Opinion.

95. Finally, Mr Cox's evidence changed during the course of cross-examination. Having previously said that he was provided at the meeting on 23 March 2004 with a pack of documents, including the IM and Mr Thornhill's opinion to read through – this being the first time he had seen any of the documents relating to SAD – he subsequently said that he had "sought out" Mr Thornhill's opinion, and that he was presented with it when he asked to see it. The later evidence was given in the context of questions about how he could have relied on Mr Thornhill as *his* adviser and the warranty he gave in the subscription agreement that he had taken his own advice. Mr Cox's answer was that he had taken advice from Ward, but did not rely on them for "advice on the deep tax legal aspects". I consider that his later answers about having asked to see Mr Thornhill's opinion (which I do not accept), were a subconscious effort to bolster this distinction between his reliance on Ward and his reliance on Mr Thornhill. It is, however, entirely plausible that he asked to see Mr Thornhill's Rule Change Opinion (since it was supplied to him by email after his meeting

on 25 March 2004), and that he was confusing his request to see that Opinion with what happened on 23 March.

96. Nevertheless, while I have rejected much of Mr Cox's purported recollection of events, I consider it more likely than not that the substance of Mr Thornhill's advice in one or other of the Opinions was conveyed to him by Ward who had themselves seen those documents. Ward acted as IFA to a number of investors and, as I note in dealing with some of the other claimants, it was Ward that supplied others with copies of one or other of the Opinions.

97. That means, however, that Mr Thornhill's advice was received by Mr Cox only through the filter of Mr Ward and Mr Willans. As I have already noted, Mr Cox's manuscript notes on Mr Willans' email of 23 March 2004 reflect details of the advice given to him by Ward which was not in Mr Thornhill's Opinions. In cross-examination, Mr Cox also said that Mr Ward advised him that there were differences between SAD3 and earlier film partnerships that had fallen foul of tax law (something else that was not derived from Mr Thornhill).

98. The critical question, then, is what difference it would have made to the recommendation made by Ward to Mr Cox if there had been the Relevant Risk Warning in the Opinions.

99. Ward were themselves experienced in offering independent financial advice in relation to tax schemes and were well aware of the risks associated with investing in film partnership schemes, as evidenced by their standard "Risk Warning Notice: Investments in Feature Film Distribution Partnerships" (a copy of which was provided to Mr Cox). Even with the Relevant Risk Warning, a non-negligent opinion from Mr Thornhill could have relayed his view, even his firm view, that the Tax Benefits were likely to be achieved. That would still have justified Ward recommending the Scheme to Mr Cox.

100. In considering whether Mr Cox can establish causation, it is critical to know with some precision what Ward would have said differently if there had been the Relevant Risk Warning. That is because the materials that Mr Cox did see (including the IM and Ward's Risk Warning Notice) already told him that the investment involved "substantial" risks, including tax risks, that there was no possibility of obtaining clearance from the Revenue and no guarantee that the tax relief would be granted, and that he should obtain his own legal advice. As to the last of these, Mr Cox said he saw this as "standard boilerplate coverage on any investment". Although he had said, in his witness statement, that he was deterred from taking his own independent advice because of the cost, he said in cross-examination that this was "not a cost issue", but there had simply been insufficient time to take advice, given that he was first introduced by Ward to the Scheme on 23 March 2004 and his investment had to be made within 48 hours. The time pressure was of his own making, given that he did not have to invest in the Scheme. This suggests that Mr Cox took a relatively robust view to the risks attaching to the investment, which reinforces the need to demonstrate precisely what form Ward's recommendation would have taken had the Scheme been endorsed by Mr Thornhill's positive opinion, but caveated with the Relevant Risk Warning.

101. There is, however, no evidence at all from Ward. What they would have done differently is a matter of speculation. In these circumstances, I conclude that Mr Cox has not discharged the burden of establishing that, had Mr Thornhill's advice contained the Relevant Risk Warning, he would not have invested in the Schemes.

Limitation

102. The matters relied upon by Mr Thornhill to challenge Mr Cox's contention that he did not have the requisite knowledge for the purposes of s.14A of the 1980 Act prior to July 2015 are: the fact that he received an enquiry notice from HMRC dated 24 October 2005, and communications from Scotts in December 2009 concerning the discovery assessments to be issued by HMRC (including the standard Scotts' letter of 17 December 2009). For reasons set out in the main body of this judgment, I do not consider that these would have led a reasonable person in Mr Cox's position to take independent legal advice.

103. Accordingly, if Mr Cox had a claim against Mr Thornhill in respect of his investment in SAD3 it would not have been time-barred.

(6) Mr Mark Morgan

104. Mr Morgan was, at the time that he invested in SAD3, a chartered surveyor and partner in Morgan Williams. Two of his partners also invested in SAD3. He invested £3,996,894 gross (£899,301 in cash), via two subscription agreements: one dated 16 December 2003 (referring to a subscription amount of £3,046,894) and one dated 12 February 2004 (referring a subscription amount of £950,000).

105. Neither in his particulars of claim nor in his witness statement did Mr Morgan claim to have been provided with, or to have seen, any of Mr Thornhill's opinions at the time. His pleaded case is that he was told by his IFA, Mr Hugh Wallace of Charterhouse, that Scotts had obtained a favourable opinion from Mr Thornhill "which confirmed that the LLP would be trading and that the Tax Benefits would be achieved." In his witness statement, Mr Morgan frankly accepted that he could not remember the detail of any of his meetings with Mr Wallace. He said that he could recall, however, that he had been told that Barclays were involved and that there was a "supportive" counsel's opinion: "Mr Wallace did say that counsel's opinion had been sought and that was why he felt confident recommending the scheme".

106. In cross-examination, Mr Morgan contended that Mr Wallace had not been his IFA, but had only introduced the Scheme to him. I reject that evidence, which is inconsistent with his pleaded case and with his answer to the questionnaire put to all claimants (in which he identified Mr Wallace as his IFA). Nevertheless, it appears to be the case that such advice as Mr Wallace gave to Mr Morgan was limited to providing a summary of the Scheme.

107. The only reference to Mr Thornhill's opinion in any contemporaneous document, and the only evidence of what passed between Mr Wallace and Mr Morgan, is a letter of 3 October 2003 from Mr Wallace to Mr Morgan and his partners. This contains a summary of the "salient points" relating to the Scheme. Under the heading "conclusion", the following appears:

> "I would also remind you that this scheme is currently not inland revenue approved, although clients of Scotts have already received the tax back on the 2002/03 product. Council's [sic] opinion is reasonably confident it will receive approval and, as we discussed, the LLP will be trading under the normal rules that apply to all Partnerships and LLP."

108. The letter enclosed a document headed "executive summary" and something referred to as a "brochure", said to include an in-depth explanation of the LLP "including all the risk warnings". It did not refer to the opinion being provided as well.

109. In cross-examination, Mr Morgan suggested for the first time that he had been provided with a copy of the SAD1 Opinion, on the basis that there is a copy in his possession. I reject that suggestion. He accepted that he had no recollection of having received or read it in 2003, and that his belief that it was likely he would have asked for it was based only on the fact that it is in his possession. There is no evidence, such as a covering letter, email or fax, suggesting that any opinion of Mr Thornhill was sent to Mr Morgan at the time of his investment in SAD3. Mr Morgan has not adduced any evidence from either of his partners (who were advised at the same time by Mr Wallace) that the opinion was provided to them in 2003. Nor has he adduced any evidence from Mr Wallace himself, or from Mr Andrew Shepherd (his accountant), to whom Mr Wallace's letter of 3 October 2003 was copied and who he listed in his answer to the questionnaire sent to claimants as someone with whom he had discussed Mr Thornhill's opinion.

110. The fact that an opinion of Mr Thornhill is now in Mr Morgan's possession is some evidence that he had it in 2003, but in all the circumstances it is not compelling. In addition to the lack of any evidence that it was provided to him in 2003 and the fact that there is no mention of this possibility in his pleading or witness statement, I make the following two points. First, the opinion in his possession is neither of the opinions which Mr Thornhill provided in connection with the Scheme into which Mr Morgan was investing (SAD3). Second, had it been provided to Mr Morgan at all, the most likely time would have been when Mr Morgan sent him his letter of 3 October 2003, which referred to the Opinion, and with which was enclosed other documents intended to provide Mr Morgan and his partners with an in-depth explanation of the LLP. It was not, however, provided then.

111. As Mr Morgan did not himself see an opinion of Mr Thornhill and was solely reliant on what he was told about it by Mr Wallace, the question as to what would have happened if Mr Thornhill's advice had contained the Relevant Risk Warning is dependent on what Mr Wallace would have done.

112. There is no direct evidence as to what Mr Wallace would have done, had he seen Mr Thornhill's opinion and had that opinion contained the Relevant Risk Warning. The only indirect evidence is what Mr Wallace said in his letter of 3 October 2003. I find it more likely than not that Mr Wallace had not himself seen any opinion of Mr Thornhill. In 2015, when Mr Wallace was asked for documents relating to the Scheme, he did not then have in his possession a copy of Mr Thornhill's opinion. It is possible that he had once had a copy, but no longer retained it in 2015. The fact, however, that his description of "Council's [sic] opinion" is that counsel was "reasonably confident" that the Scheme would receive approval would suggest that he had not seen it at the time, given that the only Opinion in circulation at that time was the SAD1 Opinion, and it referred to counsel having "no doubt" as to the trading status of the LLP.

113. If that is wrong, and Mr Wallace had seen Mr Thornhill's opinion, his description of it in the letter leads me to the conclusion that, had it contained the Relevant Risk Warning, it would not affected the way in which he described it to Mr Morgan. Based on my conclusions in the main body of this judgment, a non-negligent opinion from eminent tax counsel that the Scheme would achieve the Tax Benefits, but caveated by the Relevant Risk

Warning, could readily be summarised as "reasonably confident" that the Tax Benefits would be achieved.

114. Accordingly, I find that Mr Morgan has not established that any negligence of Mr Thornhill caused him to enter into the Scheme.

Limitation

115. The principal matters relied upon by Mr Thornhill to challenge Mr Morgan's contention that he did not have the requisite knowledge prior to July 2015 are: the fact that he received an enquiry notice from HMRC dated 24 October 2005 and the standard Scotts' letter of 17 December 2009. For reasons set out in the main body of this judgment, I do not consider that these would have led a reasonable person in Mr Morgan's position to take independent legal advice.

116. Mr Adam QC also pointed to certain correspondence in 2008 and 2009 in which Mr Morgan and his partners explored their downside risk if the Schemes failed, and discovered that the worst case liability was 40% of the total investment. This demonstrates that Mr Morgan had sufficient knowledge of the significance of any loss, but in itself would not have led a reasonable person to question whether they had been in receipt of negligent advice and thus take independent advice.

117. Accordingly, if Mr Morgan had a claim against Mr Thornhill in respect of his investment in SAD3, I find that it would not have been time-barred.

<u>(7) Mr Stephen Lark</u>

118. At the time of his investment in SAD2, Mr Lark was a director at Lark Group, an insurance broker. He invested £245,000 gross (£55,1125 cash) in SAD2, completing a subscription agreement on 15 January 2004.

119. Mr Lark's IFA was Mr Tim Boultwood at Ward. On 5 November 2003 Mr Boultwood wrote to Mr Lark enclosing various documents, including a copy of "Counsel's Opinion". Mr Lark cannot recall which version of Mr Thornhill's opinion this was. It is no longer in his possession. On the basis that the discussion with Ward was over investing in SAD2 and that he was sent the Opinion only weeks after the SAD2/3 Short-form Opinion had been produced, I find it more likely than not that it was the SAD2/3 Short-form Opinion which was sent to Mr Lark.

120. The letter of 5 November 2003 also stated that it enclosed Ward's "Risk Warning Notice." Mr Lark accepted that he must have received this. Although he has not retained his copy, I infer that it would have been in similar terms to the risk warning notice that Ward had sent to Mr Harrison which, among other things, referred to the fact that investment in Feature Film Distribution Partnerships involved a degree of risk, there was no certainty that investors would get back any part of their investment, and there was no guarantee that the tax relief would be granted.

121. Mr Lark received a letter of recommendation from Ward, dated 15 March 2004. This set out the reasoning behind Mr Boultwood's advice and was in materially the same terms as the letter from Mr Boultwood to Mr Watts of 9 March 2004 referred to above at [59]. This said that neither Ward nor the LLP provides any guarantee that the arrangements would be

acceptable to the Revenue, but "there are good reasons to expect that the arrangements will be accepted and relief granted".

122. Mr Lark's evidence at trial was that he relied "in large part" on Mr Thornhill's opinion and endorsement: "the fact that there was the legal opinion of a prominent Queen's Counsel who was a specialist in the area gave me comfort. If his advice had been that there was a material or higher risk that SAD2 would fail, I would not have invested in it because it would have meant that the Scheme would not have done what it was designed to do … If there had been a qualification or risk warning from Mr Thornhill that there was a concern that the partnership was not trading, that would have influenced my decision."

123. Although Mr Lark saw the SAD2/3 Short-form Opinion, so that Mr Thornhill's advice did not reach him only through the filter of his IFA, I nevertheless consider that he particularly relied on what Ward told him as to Mr Thornhill's opinion. His lack of recollection as to whether the Opinion he saw was half a page or nine pages, shows that he has no actual recollection of reading it. I reject his evidence that he looked to Ward only for advice as to his personal circumstances as reconstruction influenced by the arguments being presented in this case on behalf of all claimants. As he saw only the SAD2/3 Short-form Opinion (which did no more than confirm the accuracy of the relevant parts of the IM), he had not seen any detailed advice from Mr Thornhill or any supporting reasoning such as the issues Mr Thornhill had taken into account or addressed in reaching his conclusion. For similar reasons to those I have set out dealing with Ward's involvement with other claimants, I am not persuaded that the Relevant Risk Warning would have led to Ward's recommendation being different from there being "good reasons to expect" that the tax relief would be granted (as they had in fact advised Mr Lark).

124. Putting together what Mr Lark saw from the IM and Ward's letters to him, he was told that there were "significant" tax risks, that there was no advance clearance from the Revenue, and no guarantee that the Tax Benefits would be achieved. Given that Mr Lark was content to act on Ward's recommendation in light of those risks, I am not satisfied that the Relevant Risk Warning would have caused him to decline the investment opportunity. The Scheme would still have been endorsed with the opinion from an eminent tax QC that the Tax Benefits would be achieved, and a risk warning of that kind would have not been inconsistent with the advice Mr Lark received from Ward that there were "good reasons" to expect that the tax relief would be granted.

125. Accordingly, I conclude that Mr Lark has not established that his loss was caused by the negligent failure of Mr Thornhill to give the Relevant Risk Warning.

Limitation

126. The only matters relied upon by Mr Thornhill to challenge Mr Lark's contention that he did not have the requisite knowledge prior to July 2015 is the fact that he received an enquiry notice from HMRC dated 24 October 2005 and the standard Scotts' letter of 17 December 2009. For reasons set out in the body of this judgment, neither of those matters would have caused a reasonable person in Mr Lark's position to take legal advice. Accordingly, I conclude that had Mr Lark had a claim against Mr Thornhill in respect of his investment in SAD2, it would not have been time-barred.

(8) Mr Iain Whiteley

127. At the time of his investment in SAD3, Mr Whiteley was a stockbroker at JP Morgan. He invested £1,000,000 gross (£225,000 cash) in SAD3, completing his subscription agreement on 24 February 2004.

128. His IFAs were Stuart Cunningham and David Kelly of 20Twenty. He said in his witness statement that he had about three or four meetings with them. He was concerned about the tax aspects "…but they assured me tax counsel had looked at it and that it had been approved." He asked them who it was, and he was told that "it was the top guy in the country".

129. Mr Whiteley's various recollections as to whether he saw any of the Opinions were internally inconsistent. In filling out the questionnaire to claimants, he said that he had seen or received copies of each of the SAD1 Opinion, the SAD2/3 Short-form and Long-form Opinions and the Rule Change Opinion. In his particulars of claim, he said that he had been provided, at a meeting with Mr Cunningham and Mr Kelly in or around January 2004, with one opinion of Mr Thornhill which was either the SAD1 Opinion or the SAD2/3 Short-form Opinion. In his witness statement, he said that at a meeting with Mr Cunningham and Mr Kelly he believed that he read through an opinion of Mr Thornhill (but did not take a copy away). He said:

> "Such an opinion would have been technical, and, like a surgeon's report, probably would not have made any sense to me. I was satisfied that as it appeared good enough for Barclays and Ernst & Young to be involved in the Scheme and that was good enough for me."

130. In the absence of contemporaneous evidence that any of the Opinions were shown to Mr Whiteley, or read by him, at the time, and taking into account he has no actual memory of reading one (as he cannot recall whether he saw a document that was half a page in length or one that spanned nine pages), I conclude that Mr Whiteley did not see the Opinions at the time. I do not accept the reason he gave in cross-examination for not taking a copy away, which was that 20Twenty did not want him to leave their office with hard copies of anything other than the IM. There was no reason why an IFA could not let their client take away a copy of the opinion. The IM expressly said that copies were available, and other IFAs sent copies to their clients. His evidence that the opinion probably would not have made any sense to him further undermines his apparent recollection of having read it.

131. Even if Mr Whiteley had seen one of the Opinions, I conclude he has not established that Mr Thornhill's advice was causative of his loss. Specifically, had Mr Thornhill's advice been caveated by the Relevant Risk Warning, I do not think that would have led to Mr Whiteley not investing in the Scheme. This is partly because (as he acknowledged) he would not have understood whatever it was that he read, and because, on the basis of the evidence I refer to in the following paragraphs, he relied not on the content of any advice from Mr Thornhill, but merely on the fact of the involvement of Mr Thornhill – and the other professional advisers (Ernst & Young and Barclays) – with the Scheme.

132. As to Ernst & Young's involvement, Mr Whiteley said: "I felt that an entity like Ernst & Young would not have got involved unless they had done their own due diligence". Ernst & Young were also Mr Whiteley's personal tax accountants, although he says that he did not specifically ask them for advice on the Scheme, as he would have had to pay for it.

133. He said, in relation to the recommendation in the IM that he take independent tax advice, which he said he recalled seeing:

> "…but I thought I had checked with my tax accountants Ernst & Young. If I had got independent advice it would have been at a lower level than that of one of the senior tax counsel in the country, and it would have been illogical when my own accountants (i.e. Ernst & Young) and my own bank (i.e. Barclays) had seemed to rubber-stamp the Scheme based on his advice.

134. As to the disclaimers in the IM, he said he thought they were just standard disclaimers; "everybody involved must have examined the tax advice from the senior adviser to the scheme – Mr Thornhill QC."

135. He confirmed in cross-examination that he believed Ernst & Young and Barclays would not have got involved without having their own lawyers "so it seemed like there is a number of elements of cross-checking". He said he knew there had been a number of such schemes, and as he understood it "it was kind of a bit of a rubber stamping exercise for these things coming through on a conveyor belt." "We have the most senior tax counsel in the country and everyone is mutually reliant on that tax advice in the middle."

136. He did not recall being told by 20Twenty to get independent advice. When shown, however, the letter from 20Twenty to Mr Brickman dated 25 November 2003 he accepted it was at least possible that he would have received a similar letter, and that they would (as it was standard practice) have advised him to get taxation advice from a solicitor or accountant. I find that it is more likely than not that he would have received a letter in similar form to that which 20Twenty sent to Mr Brickman, which would – far from referring to Mr Thornhill's opinion – have given Mr Whiteley a specific warning to get his own tax advice from a solicitor or accountant.

137. As to the possibility that 20Twenty had themselves seen Mr Thornhill's opinion and conveyed the substance of it to Mr Whiteley, I reject that for similar reasons as in relation to Mr Brickman. There is no evidence that 20Twenty had Mr Thornhill's opinion themselves. Their letter to Mr Brickman (which I find would have been replicated in a similar letter to Mr Whiteley) makes no reference to it. Nor is there any evidence from which it might be inferred that 20Twenty themselves had relied on Mr Thornhill's advice. In referring to the tax risks in their letter to Mr Brickman, they merely warned him to get his own advice. In any event, there is no evidence from 20Twenty from which it could be inferred that, had Mr Thornhill's advice contained the Relevant Risk Warning, the explanation they gave to him of the Scheme would have been any different.

Limitation

138. The evidence relied upon by Mr Thornhill to challenge Mr Whiteley's contention that he did not have the requisite knowledge prior to July 2015 is the fact of HMRC having sent notices of enquiry (in 2005 and 2008), the issue of a discovery assessment against him in December 2009 and his receipt of the standard letter from Scotts of 17 December 2009. For the reasons set out in the main body of this judgment, I conclude that none of these matters would have caused a reasonable person in Mr Whiteley's position to take

independent legal advice. Accordingly, had Mr Whiteley had a claim against Mr Thornhill in respect of his investment in SAD3, I conclude that it would not have been time-barred.

(9) Mr Stephen Harrison

139. At the time of his first investment, in SAD1, Mr Harrison was Chief Operating Officer of Leeds United Football Club. He invested £250,000 gross (£73,750 cash) in SAD1, completing a subscription agreement on 25 March 2003. He invested £182,000 gross (£40,950 cash) in SAD2, completing a subscription agreement on 22 February 2004.

140. Mr Harrison was advised by Mr Willans of Ward. He accepted that he had not asked to see, and not read, any of Mr Thornhill's opinions. His evidence is, however, that Mr Willans told him that Mr Thornhill's written opinion concluded that there was no doubt that the scheme would be trading, which was the key point underpinning the delivery of the Tax Benefits.

141. Mr Harrison has not kept any notes of meetings or conversations with Mr Willans, and has not kept any correspondence that he had with Ward at the time. The only matters to go on, therefore, are his unaided memory, 18 years after the event, and the inherent probabilities. As to the latter, I have already concluded in relation to other claimants that Ward themselves had a copy of the Opinions, including the SAD1 Opinion. While I do not accept that Mr Harrison can recall at this distance of time precisely what Mr Willans said, I consider it is more likely than not that Mr Willans, who had a copy of the SAD1 Opinion and was aware of its contents, would have relayed the gist of the advice contained in it to Mr Harrison.

142. As to his investment in SAD2, Mr Harrison's recollection as to the number of opinions of Mr Thornhill that he relied on was confused. He said that when he invested in SAD2 he had been told about (and so relied on) three opinions of Mr Thornhill. These were the SAD1 Opinion, *an* opinion of Mr Thornhill to similar effect in relation to SAD2/3 (which I infer – since Mr Harrison met with Mr Willans in relation to investing in SAD2 in January 2004 – was the SAD2/3 Short-form Opinion) and the Rule Change Opinion. I am satisfied, however, that he signed the subscription agreement, and related documents, for his investment in SAD2 on Sunday 22 February 2004 (the date appearing on the documents, corroborated by the fact that the documents had been posted to him at home to be signed and returned, and were witnessed by his then girlfriend). He was only told about the Rule Change Opinion on 24 February 2004. Accordingly, at most he can only have been told about two of the Opinions by the time he executed his subscription agreement.

143. Nevertheless, I consider it inherently likely that in his discussion with Mr Willans, of which no record remains, he was told that Mr Thornhill had given similar advice in relation to SAD2/3 as he had for SAD1.

144. The difficulty in establishing causation in Mr Harrison's case is one that I have considered in the body of this judgment, and in relation to other claimants, namely that Mr Thornhill's advice was entirely filtered through his IFA. There is no evidence from Ward as to whether, and if so how, Mr Willans' explanation to Mr Harrison would have been any different had Mr Thornhill's advice contained the Relevant Risk Warning. I cannot accept that the presence of such a caveat would necessarily have led Mr Willans to describe the Schemes, or the risks associated with them, any differently. As I have noted elsewhere, Ward were experienced in offering independent financial advice in relation to tax schemes

and were well aware of the risks associated with investing in such schemes, and film partnership schemes in particular, as evidenced by their standard "Risk Warning Notice: Investments in Feature Film Distribution Partnerships" (a copy of which was provided to Mr Millar, as I discuss below). Even with the Relevant Risk Warning, a non-negligent opinion from Mr Thornhill could have relayed his view, even his firm view, that the Tax Benefits were likely to be achieved. That would still have justified Mr Willans telling Mr Harrison that "there was an opinion from the leading counsel in the field which underpinned the effectiveness and lack of risk of the structure being used" which is, according to Mr Harrison, what Mr Willans said at the time. Whether he would have done so, or whether he would have been more circumspect, is however pure speculation. It is for the claimant to establish reliance and causation. I conclude that Mr Harrison has not discharged the burden of establishing that, had Mr Thornhill's advice contained the Relevant Risk Warning, he would not have invested in the Schemes.

Limitation

145. Had Mr Harrison had a claim against Mr Thornhill in respect of SAD1, it would have been time-barred for the reasons set out in the body of this judgment.

146. So far as SAD2 is concerned, Mr Harrison received notices of enquiry from HMRC on 24 October 2005 and 8 December 2008. He received a letter from Ward of 11 December 2008 referring to the notice of enquiry, and referring to it as "standard practise [sic]". He did not get a discovery assessment but did receive an email from Ms Greenen of Ward on 11 December 2009 referring to a letter that he may have received, or may soon receive, from HMRC concerning discovery assessments. The email referred to these as a "precautionary measure … in order to protect their tax position". Mr Harrison denies that he received the standard letter from Scotts of 14 December 2009 but, had he done so, for the reasons set out in the body of this judgment, it should not have alerted him to take legal advice. For the same reasons, I do not think that the email he did receive from Ward ought to have so alerted him.

147. In July 2014, Mr Harrison was in contact with Ms Greenen again (who by this time had moved from Ward to HFM Columbus). This was prompted by the announcement concerning accelerated payment notices from HMRC. Ms Greenen, having communicated with Scotts, emailed Mr Harrison to reassure him that the Schemes were not part of the accelerated payments regime. She went on to say that it was conceivable that HMRC could issue "follower notices arguing that the case is similar to something going through the courts at the moment. The risk of further challenge cannot, therefore, be discounted." I do not think that this exchange – unprompted by any action by HMRC, and referring only to a risk not being discounted – would have caused a reasonable person to take independent legal advice in respect of the Schemes.

148. Accordingly, had Mr Harrison had a claim in respect of his investment in SAD2, I find that it would not have been time-barred.

<u>(10) Mr John Millar</u>

149. At the time of his investment in the Schemes, Mr Millar was the founder, director and principal of Charteris plc, an IT business that had floated on the AIM. He invested £680,000 gross (£200,600 cash) in SAD1, executing a subscription agreement on 24 March

2003. He invested a further £910,000 gross (£204,750 cash) in SAD3, executing a subscription agreement on 9 March 2004.

150. He said that, while he had a "very careful" attitude to risk up until the mid 1990s, he later become more adventurous with his investments. He accepted in cross-examination that this was a high risk venture, with high stakes.

151. Mr Millar's IFA was Ward (acting mostly through Mr Boultwood). Mr Millar's evidence is that he was told of Mr Thornhill's opinion on SAD1, and asked for (and was sent) a copy to read. A copy of the SAD1 Opinion was provided by Ward to Mr Millar's own adviser, as I explain below. Mr Millar was sent a copy of the SAD2/3 Short-form Opinion by Mr Boultwood on 24 November 2003.

152. In his witness statement, Mr Millar said that Mr Boultwood strongly assured him that the Scheme took a "well-trodden path" and that it was supported by top people, including Mr Thornhill, who would not engage in anything that was not "good and proper". He also said that Mr Boultwood told him that he could rely on Mr Thornhill's view and that he took his own advice because he was a "naturally cautious person". As to the recommendation in the IM that he take his own advice, he says that he saw that as referring only to his personal tax position, and not the overall viability of the Scheme.

153. In cross-examination, Mr Millar candidly accepted that, while he had tried to provide his recollection of events, it was difficult to separate recollection from reconstruction having looked at the documents in preparing his evidence. I consider that his purported recollections that Mr Boultwood told him he could rely on Mr Thornhill's opinion, that he took his own advice because he was naturally cautious and that he understood the recommendation in the IM to take advice as limited to his personal circumstances are based on reconstruction. It is inherently unlikely that, faced with the clear terms of the IM and the subscription agreement as to the need for investors to take and rely upon their own advisers, an experienced IFA such as Ward would have told their client they could simply rely on what Mr Thornhill had said. He in fact took advice on the overall viability of the Scheme from his own adviser. It is more likely, in my judgment, that he took his own advice – and took advice on the viability of the Scheme, not merely his personal tax position – because that was what the IM advised him to do.

154. He was separately advised by Mr Peter Snowden, prior to investing in SAD1. In his letter of 24 March 2003, Mr Snowden said:

(1) He had studied the Scheme and Mr Thornhill's advice and on this basis – subject to certain caveats – the Scheme had attractions for Mr Millar's purposes, including because the Scheme was "not a sophisticated 'cutting edge' one relying on a series of complex (or circular) transactions. At [sic] such it is likely to be less provocative to the Revenue than some Film Investment Schemes in circulation", and because the advisers to the scheme were well known and reputable firms: Osborne Clarke, Ernst & Young and Mr Thornhill QC "one of the most highly respected members of the UK Tax Bar".

(2) The risks included that "[t]his particular film partnership is a new one and has no track record" and that "[a]lthough in my view leading Counsel has correctly analysed the tax treatment of the scheme there is no guarantee and of course each individual case will be treated by the Revenue on its merits".

(3) While Mr Snowden had had only a limited time to assess the Scheme, he concluded that "it has been well thought out and presented" and that "high level advice on the tax aspects has been properly obtained which appear to be correct."

(4) He warned, however, that "it takes the form of a speculative investment with the attendant risks referred to in the Information Memorandum and referred to above."

155. While the mere fact that Mr Millar was also advised by Mr Snowden does not mean that he cannot establish that he relied on Mr Thornhill, or that Mr Thornhill's advice caused him to invest in SAD1, on balance I conclude for the following reasons that had Mr Thornhill's advice contained the Relevant Risk Warning it would not have made a difference to Mr Millar's decision to invest in SAD1.

156. As I have noted, in addition to the risk warnings contained in the IM, Mr Millar was specifically warned by his own adviser that the investment was speculative, that while it was "less" provocative to the Revenue than others it had no track record, and that he should not go into it unless he appreciated that there were risks involved. The fact that, in the face of this advice, coupled with the IM stating that there were "substantial" risks, including tax risks, Mr Millar decided to invest provides strong support for the view that the Relevant Risk Warning would not have made the difference for him.

157. In response to the question that the reason he felt confident, notwithstanding the high risk nature of the Scheme, was because he had advice from his own tax lawyer, Mr Millar said that his own lawyer had relied on the opinion of Mr Thornhill. While it is true that Mr Snowden's letter refers to Mr Thornhill's opinion, it purports to provide an independent view ("in my view leading Counsel has correctly analysed the tax treatment"). There is no evidence from Mr Snowden himself. I note that he asked to see, and was provided with, the Memorial. I do not accept that having been instructed to give his advice Mr Snowden would then rely on Mr Thornhill's view.

158. I have considered, but rejected, the possibility that, had Mr Thornhill's advice contained the Relevant Risk Warning, then Mr Millar would not have sought advice from Mr Snowden at all. Mr Millar's evidence (as I have noted above) was that in recommending the Scheme to him, Mr Boultwood had stressed its "well-trodden path" and the quality of those involved with it. In the absence of any evidence from Mr Boultwood (and for similar reasons to those I have set out in relation to Ward's involvement with other claimants) I am not persuaded that the presence of the Relevant Risk Warning would have made any difference to Ward's recommendation to Mr Millar.

159. My conclusion is not affected by the fact that Mr Millar himself saw the SAD1 Opinion. As I have noted in the main body of this judgment, the SAD1 Opinion was not written with a lay reader in mind, and much of it made sense only in conjunction with other documents which Mr Millar did not have. He accepted that much of it "went over my head". He would in my judgment, therefore, have been reliant on what he was told by Ward and, subsequently, by what Mr Snowden advised him.

160. So far as his investment in SAD2/3 is concerned, Mr Millar saw only the SAD2/3 Short-form Opinion. If (as I have concluded) he would have invested in SAD1 notwithstanding the Relevant Risk Warning in the SAD1 Opinion, I do not think the presence of the same warning in the much shorter Opinion would have caused Mr Millar not to invest in SAD2/3.

Limitation

161. If Mr Millar had a claim in respect of SAD1 it would be time-barred for the reasons set out in the body of this judgment.

162. So far as his claim in respect of SAD3 is concerned, Mr Millar received notices of enquiry in respect of SAD3 on 24 October 2005 and 15 December 2008. In July 2009, in an email from his accountant dealing primarily with his capital gains tax position. The email included reference to the possibility that HMRC could amend his claim for loss relief. There is nothing in that email in my view that should have alerted him to take independent legal advice. On 16 December 2009 he received a discovery assessment in respect of SAD1. He also received Scotts' standard letter about HMRC's discovery assessments. For the reasons set out in the main body of this judgment, I find that these communications would not have caused a reasonable person to take independent legal advice and are therefore not sufficient to establish knowledge for the purposes of s.14A of the 1980 Act.

163. The fact that Mr Millar accepted in cross-examination that had he been told by Mr Snowden, or Mr Thornhill, that HMRC would challenge the Scheme and that in five or six years it might end up before the FTT then he would not have invested does not affect my conclusion. The issue of the discovery assessments, combined with the explanation in Scotts' standard letter, did not equate to learning that HMRC would challenge the Scheme and that it would end up before the FTT. Accordingly, if Mr Millar had a claim in respect of SAD3, it would not have been time-barred.