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Case No: CA 2022 001113

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
MR JUSTICE ZACAROLI
[2022] EWHC 457 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2023

Before:

SIR JULIAN FLAUX
CHANCELLOR OF THE HIGH COURT
LADY JUSTICE SIMLER
and
LADY JUSTICE CARR

Between:

DAVID McCLEAN and OTHERS

Appellants/
Claimants

- and -

ANDREW THORNHILL KC

Respondent/
Defendant

Roger Stewart KC, Nik Yeo and Harry Winter (instructed by **Stewarts Law LLP**) for the
Appellants

Tom Adam KC and Max Schaefer (instructed by **Herbert Smith Freehills LLP**) for the
Respondent

Hearing dates: 20, 21, & 22 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. This appeal arises out of the consequences of a number of failed film finance tax schemes. Their marketing involved the issue of an Information Memorandum (“IM”) inviting investors to submit applications and subscribe for membership of one or more of three limited liability partnerships (“LLPs”). The LLPs were formed as a vehicle to carry on a trade consisting of the acquisition of licences and exploitation of distribution rights to films. The schemes were promoted to potential investors on the principal basis that the investor would be entitled (as a partner of the LLP) to tax relief for trading losses the LLP was anticipated to make that they could set off against their personal income or capital gains to reduce their tax liability.
2. The appellants are some of the investors who subscribed for membership of one or both of two LLPs: The Second Scotts Atlantic Distributors LLP (“SAD2”) and The Third Scotts Atlantic Distributors LLP (“SAD3”). Scotts Atlantic Management Limited (“Scotts”) were the sponsor and promoter of these partnerships as investments. 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. I shall refer to SAD2 and SAD3 together as the “Scheme”. For limitation reasons explained below, the claims relating to Scotts Atlantic Distributors LLP (“SAD1”) are no longer in issue on this appeal.
3. The respondent is Andrew Thornhill KC, a well-known specialist in tax, and at the material times, head of Pump Court Tax Chambers. He was engaged by Scotts to advise Scotts on devising and setting up the three LLPs and on the tax consequences of the schemes. He did so in a series of opinions. He also confirmed in letters to Scotts that he had read the IM for each LLP (in particular the section headed “Taxation Consequences of Investing in the Partnership”) and confirmed that there was no statement contained in it in relation to taxation matters which was inconsistent with his opinions. Although not engaged by or to advise any of the appellants, Mr Thornhill consented nonetheless to being identified as tax adviser to Scotts and the LLP in the IM for SAD2 and SAD3, and to a copy of his opinions being made available to prospective investors in the Scheme on request.
4. The availability of tax relief for investors through trading losses incurred by the LLP was predicated on the LLP meeting three statutory tests: (i) it had to be carrying on a trade, (ii) on a commercial basis and (iii) with a view to profit. In about October 2004, Her Majesty’s Commissioners of Inland Revenue (subsequently merged with HM Customs & Excise to form Her Majesty’s Commissioners of Revenue and Customs, and referred to throughout as “HMRC”) began investigating SAD1. An enquiry was opened into SAD1’s tax return for the tax year ending 5 April 2003, and further enquiries were opened by HMRC in relation to subsequent tax years for SAD2 and SAD3. The opening of enquiries into the LLP returns were deemed opening of enquiries into the tax returns of the partner members of each LLP. The enquiries into SAD1 concluded on 13 September 2016 with a closure notice in which HMRC stated (among other things) that SAD1 was not carrying on a trade or business on a commercial basis with a view to profit. Following a settlement offer for an amount lower than that which the appellants would otherwise have had to pay on the premise that the tax benefits

were all disallowed, the appellants entered into a settlement with HMRC in 2017 relating to all three LLPs.

5. These proceedings commenced in 2018 (the claim form was issued on 5 July 2018). The appellants alleged that Mr Thornhill owed them a duty of care which he breached, by negligently advising on the tax implications and asserted tax benefits for investors in the schemes; by approving statements about those implications and tax benefits in the IM by which each scheme was promoted; by expressly agreeing to be named in the IM as having provided advice and for that advice to be made available to potential investors; and subsequently by reconfirming his advice. They claimed that if Mr Thornhill had acted competently, he would have declined to endorse the schemes and/or advised and warned of the significant risk that the schemes would be successfully challenged. Had he done so, the schemes would not have been promoted at all and/or the appellants (who relied on Mr Thornhill's advice) would not have invested in any of them.
6. The claims of ten of the claimants (now appellants) (from a total of over 100) were chosen to be taken to trial first as sample claims. The remaining claims were stayed pending judgment on the sample claims on the basis that the judge's determination of common issues would be binding on all claimants. The trial itself extended over 14 days in November and December 2021. The judge, Zacaroli J, had significant volumes of contemporaneous and other documentary material, and heard evidence from each sample claimant and Mr Thornhill himself. His conspicuously clear and careful judgment (cited as [2022] EWHC 457 (Ch), [2022] BTC 5, [2022] STC 1110) extends to 412 paragraphs over 156 pages, together with an appendix setting out the provisions for distribution of income received from the films and the way these worked ("the payment waterfalls"); and a second appendix containing the findings he made on reliance, causation and limitation in respect of each sample claimant extending to a further 163 paragraphs over 28 pages. The judgment reflects a thorough and detailed analysis of the facts and arguments on both sides. I shall not even attempt to replicate the detailed consideration given by the judge to these matters. Neither side challenges the findings of fact he made. To the extent that his evaluative assessment is challenged, this court will only interfere if it considers the decision to be "wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion'" (see *Re Sprintroom* [2019] EWCA Civ 932; [2019] BCC 1031 at paragraph 76).
7. In the judgment, the judge dismissed the claims. His conclusions on the main issues were in summary:
 - i) Duty of care: the judge applied the assumption of responsibility test re-stated in *Steel v NRAM Ltd (formerly NRAM Plc)* [2018] UKSC 13, [2018] 1 WLR 1190 ("*NRAM*"). He held that Mr Thornhill did not owe a duty of care to the claimants in respect of advice given in connection with the schemes. Although a number of factors pointed towards a duty of care being owed, the terms of the IM were critical, and clearly advised potential investors to consult their own tax advisers on the tax aspects of the schemes. Further, no investor was able to subscribe without warranting that they had relied only on the advice of, or had consulted with, their own adviser. It was objectively reasonable for Mr Thornhill to

assume that independent professional advice was or would have been taken by investors.

- ii) Unfair Contract Terms Act 1977: the judge rejected the argument that the warranties contained in the subscription agreements were insufficiently clear disclaimers of responsibility to satisfy the requirements of reasonableness in section 2. His conclusion that no duty was owed was not based on a disclaimer but rather on the fact that in all the circumstances it was not reasonable to expect investors to rely on Mr Thornhill's advice without independent enquiry and UCTA 1977 did not therefore apply. Even if it did the warranties would have been clear, fair and reasonable in all the circumstances.
- iii) Breach of duty: Mr Thornhill's advice that the LLPs were carrying on a trade on a commercial basis with a view to profit was based on the approach in *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 1 AC 655, [1992] 2 WLR 469 ("*Ensign Tankers*"), which had established that making and exploiting a film was inherently a trading activity. The judge considered the authorities between 2002 - 2004 and concluded that although the approach in *Ensign Tankers* could no longer reasonably be adopted, it was one which a reasonably competent tax silk could have taken at that time. The judge also held that Mr Thornhill had not failed to consider all the facts and circumstances. A reasonably competent tax silk could have concluded that the LLP had a genuine commercial trading purpose and was trading with a view to profit.
- iv) The judge rejected the alternative case advanced that Mr Thornhill breached his duty of care by failing to warn of the significant risk that one or more of the statutory tests would not be met and the schemes would be challenged by HMRC. The duty to warn was affected by the fact that the claimants were not Mr Thornhill's clients and he knew nothing about them, whereas Mr Thornhill would have been aware that his actual clients were highly sophisticated and likely to have anticipated the risks associated with the schemes from their experience of promoting such tax avoidance schemes. The judge concluded that even if such a duty was owed, it did not extend to advising the claimants of the risks of investing on the basis of his advice.
- v) Causation and reliance: The judge rejected the claimants' case on causation, both on a generic and individual basis. Furthermore, even assuming that Mr Thornhill owed a duty of care, including a duty to warn the claimants of the significant risk of the schemes being challenged by HMRC, following a detailed consideration of each claimant's case, the judge rejected the possibility that any claimant would have acted differently if there had been risk warnings from Mr Thornhill. As he stated, notwithstanding the qualifications and risk warnings in the IM (specifically endorsed by Mr Thornhill) every claimant had invested in the schemes.
- vi) Limitation: the causes of action in this case accrued at the time investors joined the schemes, and not when HMRC refused their claims for tax relief in 2016. The claims were therefore barred under section 2 Limitation Act 1980 (the six year limitation period), subject to the possible application of sections 14A and 14B. All claims relating to SAD1 were barred by virtue of the 15 year long stop period pursuant to section 14B. However, with one exception, section 14A

applied to prevent the claims concerning SAD2 and SAD3 from being time-barred.

8. The appeal challenges the judge's conclusions on the following four issues:
 - i) First, whether he was correct to find that Mr Thornhill owed no duty of care to investors in advising on tax matters in respect of the Scheme in his opinions (which he consented to be shown to the appellants), and in approving and endorsing the tax aspects of each IM; and in reviewing and confirming his advice on subsequent occasions.
 - ii) Secondly, whether he was correct to find that a reasonably competent tax silk could have given the tax advice and endorsed each IM as Mr Thornhill did.
 - iii) Thirdly, if the judge was wrong about both of these questions, whether he was nevertheless correct to find that if Mr Thornhill had provided advice claimed to be competent (including giving warnings of significant risk), the Scheme would still have been promoted by Scotts (with appropriate risk warnings), and the appellants would still have invested in the Scheme.
 - iv) Finally, whether the judge was correct to find that in deciding to invest in the Scheme, the appellants did not rely on Mr Thornhill's advice and on the fact that the Scheme was endorsed by Mr Thornhill.

Overview of the respective arguments on this appeal

9. On behalf of the appellants, Roger Stewart KC, who did not appear below, contended that this is a straightforward case: a professional tax silk expressly, voluntarily and for reward, consented to his name and opinions being used to promote investment schemes, without any disclaimer, and made unequivocal (incorrect) statements about the Scheme's efficacy on which investors relied and which ultimately caused the investors loss. He cannot escape liability because of passages in the IM telling investors to obtain their own advice (or giving warranties that they had) since these were, on a fair reading of the documents, directed towards investors' own tax position, not the tax efficacy of the Scheme itself. Any other interpretation would be inconsistent with both the express assumption of responsibility undertaken by Scotts as promoter for the contents of the IM and established common law principles.
10. Mr Stewart submitted that, correctly characterised, this is a prospectus case, which is distinguishable on the facts from *NRAM*. The judge erred in framing the case as Mr Thornhill providing advice to the seller on the opposite side of the transaction. Mr Thornhill was not undertaking a traditional barrister role. Instead, he became part of the sales team, giving advice on the point of critical importance to any potential investor, namely the likelihood of the tax benefits being available, knowing the IM was a marketing document intended to attract investors, and 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 and had given positive advice on the prospects of the tax benefits being achieved. On a true construction of the language and effect of the IM, the subscription agreement and the checklist, nothing in these documents negated the existence of a duty of care. On a proper interpretation of these documents, Scotts properly accepted responsibility for the contents of the IM and represented that they

believed the tax relief would be available to appropriate individuals; they had taken reasonable steps to check this position; those reasonable steps included taking advice from Mr Thornhill; and that Mr Thornhill had given unequivocal advice that the position was as set out in the IM. These representations were reinforced by making available Mr Thornhill's opinions which showed the unequivocal nature of the relevant advice.

11. Applying the test in *NRAM* on its plain terms, it was objectively reasonable for the investors to have relied on the representations and the assertion that there was no doubt that the Scheme would work to obtain the tax benefits; and equally reasonable for Mr Thornhill to have foreseen that the investors would do so. Mr Thornhill's advice was the next best thing to HMRC clearance of the Scheme which was not available. He chose not to include any disclaimer. He voluntarily chose to act in a way which most barristers would never act and allow his definitive advice to be identified as the basis for investment. There is no reason to treat him in any different way from another negligent expert. Reading the IM fairly, the investors would have correctly understood that Mr Thornhill had given unqualified positive advice upon which they were entitled to rely in relation to obtainable tax benefits – just as the investors in *Ball v Banner* [2000] 6WLUK 792 would have understood that Healey and Baker had given advice as the likely obtainable rents upon which they were entitled to rely.
12. Further, the judge was also wrong to draw any distinction between the investors who saw (or whose independent financial adviser, “IFA”, saw) Mr Thornhill's opinions and those who did not. In the alternative, Mr Stewart contended that UCTA 1977 clearly applied on the facts because the warranties were in substance and effect “no reliance” clauses designed to exclude liability, and the judge erred in finding otherwise.
13. In addition to detailed criticisms made of the judge's conclusions regarding trading with a genuine commercial purpose, and that Mr Thornhill did not breach any duty owed to the appellants, Mr Stewart contended that the judge's central error in relation to breach of duty was in failing to address whether and/or conclude that a reasonably competent tax silk could have provided advice with such certainty that there was “no doubt” that the LLP would be trading, and that the commercial basis test would be passed. Mr Thornhill's very certainty was the reason that the assumption of responsibility test, first set out in *Hedley Byrne*, and restated in *NRAM*, was satisfied.
14. Mr Stewart submitted that if the appeal succeeds and the judge's findings on duty and breach are overturned, the findings on causation fall away. In simple terms, a competent tax silk should have advised that the tax relief would not be available or at least that there was a significant risk that it would be unavailable. In the real world, that would have been the end of the matter. There would have been no Scheme to invest in. But had that advice been fairly set out in the IM (as it would have had to have been), causation would have been established. On a correct approach to the question of breach, it was clear that the appellants would not have invested in a Scheme without the tax benefits being as described. The consequence is that the remaining issues of loss should be remitted for assessment by another judge.
15. Tom Adam KC for Mr Thornhill resisted the appeal on all grounds and submitted that the judge was correct for the reasons he gave in relation to each of the issues on this appeal. In terms of duty of care, the appellants had to establish that it was objectively reasonable for them to rely on Mr Thornhill's advice without independent inquiry, and

that it was objectively foreseeable that they would do so. Critical to the judge's conclusion that the appellants failed to establish this was the fact that, on a fair reading of the IM, it 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.

16. Mr Thornhill was Scotts' adviser at all times as everyone knew. The message given in the IM by Scotts was unmistakable: prospective investors were welcome to see the advice Scotts had received from Mr Thornhill, but they could not rely on it as if it was advice provided to them. Moreover, Scotts did not represent as fact that the tax benefits would be available. All that Scotts said was that they believed the tax benefits would be available, which is a very different thing (especially when the statement of belief was directly followed by the words "*However, prospective Members are advised to consult their tax advisers*"). That Scotts stated expressly that they had taken reasonable steps to check their understanding and advice from Mr Thornhill was also a factual representation that advice had been taken, not a representation that Mr Thornhill's advice was right. Read together, Scotts' statements about tax in the IM fairly implied that the statements were consistent with the advice Scotts had received, as the judge held. But there was no representation at all about whether Mr Thornhill's advice was unequivocal or caveated. Even if such a representation had been made, it would still have been limited to a representation about what his advice was and not about whether it was correct. Together the documents made clear, as the judge held, that Scotts were not accepting responsibility for whether their stated understanding was correct and that it was up to investors to assess the risks for themselves.
17. Further, all the surrounding circumstances point in the same direction. This was a highly commercial, unregulated environment, where the target market was ultra-sophisticated investors with IFAs, and the minimum gross investment was substantial. The general rule is that lawyers do not owe a duty of care to those who are not their clients; it is presumptively inappropriate. Although, as the judge accepted, there may have been an identity of interest between Scotts and the investors in terms of the Scheme working, much more important was the fact that they were on opposite sides of the transaction, as seller and buyers respectively. The issue is not a conflict of interest, but whether it could reasonably have been perceived that Mr Thornhill was serving two masters. He was not acting in an unusual or abnormal capacity as a barrister. In any event, even if he was, he was firmly part of the sales side and not neutral in the transaction. It was not foreseeable that the investors would rely on his advice.
18. Finally in relation to duty, Mr Adam submitted that the judge was correct to differentiate between the two categories of appellant: there could be no assumption of responsibility if the advice was not requested and seen by the investor in question. Alternatively, in relation to UCTA 1977, Mr Adam contended that the short answer to this question is that the judge's finding of fact that the reasonableness test was satisfied should not be interfered with, and was in no way "plainly and obviously wrong". In any event, he submitted that the judge was correct to hold that the warranties were not caught by UCTA 1977.
19. On breach, Mr Adam contended that the appellants' submission that the judge conflated the trading test (which includes genuine commercial purpose), and the commercial basis test is wrong in the circumstances of this case and in light of the way the case was

presented below by the appellants. On trading he submitted that the argument that the judge was wrong to find that Mr Thornhill could reasonably have adopted the *Ensign Tankers* approach is a repeat of points made at trial, and wrong for the reasons explained in the judge's careful analysis. But even were this argument accepted it would go nowhere: the appellants must show not that Mr Thornhill took the wrong conceptual route to his conclusions, but that those conclusions (however reached) were wrong (or at serious risk of being so) on the facts. The judge's detailed findings of fact led him to conclude that the Scheme had a genuine commercial purpose and the commercial basis test was satisfied, and cannot be challenged. Moreover, the concessions that the LLPs were carried on with a view to profit and had a material chance of a material profit are very damaging to the proposition that their affairs were not conducted on a commercial basis. He submitted that the remaining arguments are without merit for the reasons given by the judge.

20. On the central question whether it was negligent to give such unequivocal advice that the arrangements were trading on a commercial basis, the strength of the judge's findings about the reasonableness of the *Ensign Tankers* approach, together with his detailed findings of fact, supported the conclusion that a reasonably competent tax silk could give such advice.
21. Finally Mr Adam supported the judge's conclusions on causation and reliance for the reasons he gave.

The facts relating to the Scheme and the advice given by Mr Thornhill

22. The judge made detailed findings about the operation of the Scheme, the statutory framework and the advice given by Mr Thornhill. I gratefully adopt (with some minor additions) that account.
23. Each individual scheme operated in materially the same way. The judge's references were principally to SAD1. For obvious reasons, where relevant I shall refer to the core documents relating to SAD2 (and SAD3 to the extent necessary where there are differences) but will otherwise adopt his findings about the operation of SAD1.

The operating model for SAD1

24. SAD1 was established 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) ("Warner Bros"), 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.
25. Under the DA, Warner Bros licensed the distribution rights in a portfolio of 10 films (although this was later reduced to six) to SAD1 subject to Warner Bros' right to substitute films. SAD1 agreed to distribute, exploit and exhibit the films, and bound itself to do so through a marketing services agreement ("MSA") with a number of Warner Bros affiliates (Kendall Distributing LLP, Warner Bros Distributors Limited and Warner Home Video (UK) Limited, together, the "Sub-Distributors"). It was the Sub-Distributors who actually carried out the marketing and distribution of the films.

SAD1 was required to pay Warner Bros royalties from the proceeds of distributing the films.

26. The DA also provided for further pictures (the “Additional Pictures”) to be included within its scope.
27. 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 a budget setting out anticipated print and advertising costs (“P&A Costs”) and marketing materials for SAD1’s approval and recommendations.
28. SAD1 employed specialist consultants to advise it on marketing plans for each film.
29. 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 not be reached, Warner Bros had the right to withdraw the relevant film from the slate.
30. 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 described in detail by the judge in appendix 1 of his judgment. Alternatively, in the event that the budget could not be agreed, Warner Bros had the right to withdraw the film from the slate.
31. 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 guaranteed payments made by 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 sum identified as the Guaranteed Payment (defined as \$238,642,500).
32. Under a call option agreement (the “Call Option agreement”), the Sub-Distributor had the right, at any time after 6 April 2005, to acquire the distribution rights (granted by Warner Bros to SAD1), upon payment of the greater of: (i) the fair market value of SAD1’s interest in the distribution rights; or (ii) a guaranteed minimum sum.
33. Any proceeds from the distribution of the films were passed through payment waterfalls in the MSA and the DA, described in appendix 1.

The IM for SAD2

34. The IM inviting subscriptions for participation in SAD2 commenced with a Notice dated 23 October 2003, which began with the following warning:

“If you are in any doubt about the contents of this document, you should consult your ... solicitor, accountant or other authorised financial adviser.”

It then explained that SAD2 and any future LLPs would be “unregulated collective investment schemes as defined in section 235 of the Financial Services and Markets Act 2000 (“FSMA”).” The Notice continued:

“The Partnerships have not been authorised or otherwise approved by the Financial Services Authority and as unregulated schemes cannot be marketed in the UK to the general public. Accordingly, this document is 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 to whom such Order applies and persons who are otherwise permitted by law to receive it. The investment to which this document relates is only available to such persons and this document must not be relied on 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.”

35. This meant not only that potential investors were not entitled to rely directly on the IM, and could only do so through and with the benefit of their own IFA, but also that most of the protections under FSMA did not apply to investments in the LLPs, and compensation under the Financial Services Compensation Scheme was also not available. This was reinforced by the statement (later in the IM) that the Scheme was not permitted to be promoted or sold directly to the public, so that “Applications will therefore only be considered when received via a duly authorised intermediary”.
36. The fourth paragraph of the Notice contained a statement setting out the responsibility accepted by Scotts as follows:

“Scotts Atlantic Management 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.”
37. On page 3, under the heading “Advisers and Administrators” Scotts Atlantic Management Limited were identified as the Sponsor and Film Manager. Other advisers were listed including Mr Thornhill, who was identified as “Taxation Advisor to the Sponsor and the Partnership”.
38. On page 4 there was a summary outlining the basic features of the Scheme under the heading “Summary of Key Points”. The summary was stated to be “qualified in its entirety by, and should be read in conjunction with, the more detailed information included within this memorandum and in particular the Risk Factors on pages 19 and 20”. The summary said (among other things) that the LLP had been established to conduct the trade of acquiring, by way of licence, on or before 5 April 2004, and exploiting, distribution rights to films for a period of no less than 12 years.

39. A section headed “The Offer” explained the contractual framework in greater detail, including the financing arrangements, the exercise of call options and the “Expected Tax Outcome (under current UK taxation legislation and published practice)” as affected by the exercise of the call option to acquire the distribution rights. This stated: Scotts “considers that the Partnership will make a taxable loss in its first financial year ending 5 April 2004. Such loss can be relieved against other income and capital gains of the tax year in which the loss arises and the immediately preceding tax year and against income arising in the two tax years prior to that ...”
40. There was a “Funds Flow Diagram” illustrating the intended cash flows assuming limited recourse borrowing by the investor and participation of £1m invested in the Scheme. This was expressed to be indicative only. The page headed “Financial Summary” explained different methods of funding investments in the Scheme for individuals, and 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 22.5% in cash with the remainder funded through loan facilities (whether limited or full recourse loans that could cover the entire investment).
41. On the basis of an investment of 22.5% in cash with a limited recourse loan to cover the balance, and assuming nothing was generated from the exploitation of the films beyond an amount sufficient to pay the Annual Advances and the Shortfall Guarantees, the illustrations indicated that on an initial gross participation of £1m the investor would ultimately make a gain of £108,000 after four years if the option was exercised (after taking account of net tax relief of £414,000) but a loss of £137,000 after 13 years, if the option was not exercised. In either event, the minimum amounts generated would enable the scheme loan to be repaid. Investors were however warned:

“The figures shown above are by way of example only. They are not and should not be construed as forecasts of the likely returns from participating in the Partnership. Partners should take independent financial and taxation advice in relation to their own circumstances.”

The net effect of investing in the scheme for an investor depended on whether the call option was exercised. If it was, it enabled the investor to avoid a proportion of their tax liability altogether. If it was not, it enabled the investor in effect to defer payment of a proportion of their tax liability for 13 years.

42. Under the heading “Taxation Consequences of Investing in the Partnership” the IM contained the following important statement:

“Accounting and Taxation Principles

The tax analysis set out herein is based on [Scotts’] understanding of current UK tax legislation and published practice and on UK Generally Acceptable Accounting Practice (“GAAP”). However, prospective Members are advised to consult their tax advisers and are referred to the Risk Factors on page 19 and 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 [Scotts].”

This section of the IM continued:

“First Tax Year

The Partnership will undertake the trade of acquiring by way of licence and exploiting Distribution Rights to Films in the Territories over the Trading Period [defined as “The proposed life of the Partnership from the commencement of trading until 30 September 2010”]. The Partnership, based only upon the revenues from the Annual Advances and the Shortfall Guarantees, is budgeted to be profitable over the Trading Period; however, unless the Films perform exceptionally well, it is anticipated that the Partnership will incur a trading loss in the first financial year ending 5 April 2004 and will not recoup any more than the Annual Advances in the second and third financial years (see Financial Summary).”

43. It then explained the “main ways of dealing with the losses for tax purposes” 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 year ending 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 year ending 5 April 2003;

(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 2004 can be carried back and set off against income for the year ending 5 April 2001 and subsequent years); and

(e) carrying forward trading losses not relieved against general income to set against a Partner’s share of 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.”

44. This section also explained that any interest payable on loans (whether limited or full recourse) used to subscribe to the LLP could be relieved against a Partner's income from all sources, including but not limited to any profits from the LLP'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.
45. This section also contained two examples of specific warnings given to investors about taking advice in relation to their own circumstances. First, in relation to National Insurance, an explanation was given about the implication for National Insurance Contributions (“NICs”), ending with, “The rules are complex and Partners should consult their professional advisers on this issue”; and secondly, a blue box headed “Companies Controlled By Partners” ended with the words “Partners who control their company should always consult their company's tax adviser to ascertain the impact”.
46. A section of the IM headed “Limited Liability Partnerships” explained, among other things, that although limited liability partnerships are separate legal entities under English law, provided the LLP was carrying on a trade or business with a view to profit, it was “transparent for tax purposes” other than in limited circumstances that do not apply here.
47. The following section contained a summary of the Members Agreement. It explained that “No person shall be admitted as a Partner unless approved by the Operator and unless he or she has executed (in person or under power of attorney) a deed of adherence to the Members Agreement ...”. The minimum capital contribution to SAD2 was £100,000. The minimum capital contribution to SAD3 was initially £400,000 but increased to £500,000.
48. This section explained in relation to Non-Resident Partners, that there were certain risks associated with Partners becoming non-resident and therefore deemed to have retired. In this regard, the IM stated:

“Mr Andrew Thornhill QC has advised that whilst he does not consider that such a deemed retirement of a non-resident Partner would give rise to a clawback of tax relief previously claimed by such non-resident Partner in respect of trading losses of the Partnership and/or interest on any borrowings by such non-resident Partner to finance the acquisition of his or her interest in the Partnership, the matter is not free from risk.”
49. Pages 19 and 20 of the IM set out the Risk Factors. On page 19, investors were warned:

“Partners of the Partnership should consider the potential risks of investing therein which include but are not limited to the following.

...

Tax Risks

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. ...

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. ...

The Inland Revenue has the right to enquire into any loss relief or interest relief claims made by any Partner.

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. ... ”

50. On page 20 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. ...

The interest of the Partners in the Partnership will not be subject to the protection of the FSMA; in particular, Partners will not be covered by the Financial Services Compensation Scheme or by any other compensation scheme.”

51. Under the heading “Application Procedure”, the IM stated that “Interest in the Partnership(s) may not be promoted or sold directly to the public. Applications will therefore only be considered when received via a duly authorised intermediary. ... Applications must be made by completion of the Subscription Agreement, the Deed of Adherence...”. In a blue box at the end of the IM, investors were notified, as required by the rules of the FSA, that they were regarded as “execution only customers in respect of their investment in the Partnership”.
52. The subscription agreement required the investor to the Scheme to give the following warranties:

- “(3) (a) he or she has attained 18 years of age;
- (b) he or she is experienced in business matters and recognises that the Partnership is a speculative venture and has no history of operations or earnings;
- (c) he or she recognises that there is no established market for interests in the Partnership, that it is not expected that there will be such a market that such interests cannot be withdrawn that the transferability of such interests is restricted, and that he or she may have difficulty in selling the interest in the Partnership or obtaining reliable information about its value;
- (d) he or she has read and understood the Information Memorandum dated on or about 23rd October 2003 issued by SAML relating to The Second Scotts Atlantic Distributors LLP (the “Information Memorandum”) and in particular the section headed “Risk Factors”;
- (e) he or she is contributing to the Partnership on his or her own account;
- (f) he or she is resident for tax purposes in the United Kingdom and will continue to remain resident for tax purposes in the United Kingdom for the term of the Trading Period of the Partnership;
- (g) he or she has only relied on the advice of, or has only consulted with, his or her own professional advisers with regard to the tax, legal, currency and other economic considerations related to subscription to the Partnership;
- (h) he or she has the financial ability to bear the economic risk of subscription to the Partnership, has adequate means for providing for his or her current needs and possible contingencies and has no need for liquidity with respect to his or her contribution to the Partnership; and ...
- (5) The Subscriber hereby confirms that he or she has read and understood the terms of the Information Memorandum and has taken appropriate professional advice before submitting this application and is aware of the risks attached to his or her becoming a Member in the Partnership. ...”

53. Each investor and his or her IFA were required to sign a subscription checklist for SAD2. The name of the instructed IFA had to be given, together with the name and details of the investor’s tax adviser/accountant (and each investor was assumed to have one). The last section of the checklist contained the following paragraph to be signed both by the subscriber and the IFA:

“I understand and accept that:

1.1 SAML, 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 Second Scotts Atlantic Distributors LLP;

1.1.2 have not been, and are not, responsible for assessing the suitability of The Second Scotts Atlantic Distributors LLP for me, my 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.”

The underlying statutory framework in relation to the tax benefits

54. The tax benefits designed to be achieved by investment in the Scheme arose under the following statutory provisions.
55. 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.
56. 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.
57. 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.
58. 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.

59. 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.
60. 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.
61. The net effect of these provisions is that in order to achieve the tax benefits summarised above, the LLPs needed to satisfy three statutory tests. Broadly, and leaving aside slight differences in wording, that meant that they needed to be trading; on a commercial basis; with a view to a profit.

The advice given by Mr Thornhill

62. The appellants' allegations of negligence focus on the written advice Mr Thornhill gave in relation to the Scheme, and on his approval of the tax consequences set out in each IM.
63. Mr Thornhill was first approached by Scotts about advising on a proposed film distribution business in August 2002. He was then engaged by Scotts to advise on various aspects of SAD1 during the course of its development. A series of exchanges and consultations, including a consultation on 1 November 2002, followed.
64. 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 IM in the short term, and in the new year to request a long form opinion which would be included within a revised IM. It was therefore clear before Mr Thornhill provided the advice of which complaint was made that he was aware it was to be made available to potential investors.
65. By letter dated 20 December 2002 Mr Thornhill informed 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."
66. In a document referred to as a Memorial (whose purpose was to collate all the questions raised by Scotts in relation to SAD1 with a view to seeking a written opinion, and which attached the core transactional documents for the operation and management of the LLPs, including the DA, the MSA and the Call Option agreement), Scotts sought Mr Thornhill's opinions on a series of questions. 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.

67. The questions asked of Mr Thornhill in section A of the Memorial included, under the heading “Trading” the following:

“It is projected that the LLP will incur trading losses in the first two tax years unless the performance of the Slate [of films] is exceptional. Members may wish to set these off against other income. In order that relief for these trading losses is available to the Members, it is important that the LLP is considered to be carrying on a trade in the UK on a commercial basis with a view to realising a profit. Counsel is therefore asked to consider the following:

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?

2. Does Counsel consider that the use of the Studio’s subsidiaries to sub-distribute the films would impact upon the LLP 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 profit?

4. Are there any other actions, documentations 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 projected, the LLP would not be profitable until the accounting period commencing 6 April 2004?”

68. The Memorial also asked Mr Thornhill to advise (amongst other things) upon the tax implications were the call option to be exercised and the impact on the distribution of income profits on the individual investors' claims for interest and loss relief i.e. the Tax Benefits (Section C). Under the heading “Overall Re-Analysis” Mr Thornhill was asked to advise as to whether HMRC could be successful in seeking to re-analyse the tax treatments of (a) any trading losses arising; and (b) the proceeds of sale in the event of the studio acquiring the LLP interest. Further, under the heading “Other Matters arising from the Barclays Mercantile Case” he was asked to give his opinion on whether “the *Lupton* test” affected his view of the proposed arrangements. There was also a heading “Limited Recourse Loans”, and Mr Thornhill was asked to confirm that the limited recourse loans would be treated as subscribing those sums to the LLP and the LLP expending them once committed to actual distribution costs and whether HMRC could

argue that the LLP had not incurred P&A Costs to the extent that this had been funded by limited recourse lending.

69. Mr Thornhill produced a written opinion dated 28 January 2003 in relation to SAD1. Responding to the questions in section A of the Memorial regarding “Trading” he advised as follows:

“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 acquires 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 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, I 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.”

70. In answer to the question posed under the heading “Overall Re-Analysis” Mr Thornhill stated:

“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.”

71. Mr Thornhill addressed further *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2002] EWCA Civ 1853, [2003] STC 66 (“*Barclays Mercantile*”) in which, at first instance, Park J had concluded that the relevant transaction was not a trading transaction because it was so heavily dominated by fiscal considerations. This judgment had recently been overturned by the Court of Appeal as Mr Thornhill explained:

“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.”

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

- i) 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.
- ii) In answer to the request to confirm that members would be available 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.
- iii) He confirmed that losses that could not be set against income could be set against chargeable gains.
- iv) He also confirmed that the expenditure of the LLP consisting of advance royalty payments and other royalty payments to Warner Bros, P&A spend and management, sponsorship and administration costs would be deductible in computing trading profits of the LLP.

73. There were further communications between Mr Thornhill and Scotts over the following months, though none of them are relevant to these claims, other than the letter from Mr Thornhill to Scotts of 18 July 2003. On 18 July 2003 (shortly before the financial closing of SAD1), Mr Thornhill sent a letter to SAD1 and Scotts, referring to the SAD1 IM and confirming the following:

“I consent to my name being used in the Information Memorandum as tax adviser to the Sponsor and in the section of the Information Memorandum headed “Taxation Consequences of investing in the Partnership” and to a copy of my opinion issued on 28th January 2003 in relation to the taxation aspects of the LLP (a copy of which is annexed hereto) being made available to prospective investors in the LLP.

I have read the Information Memorandum and particularly the section of the Information Memorandum headed “Taxation Consequences of Investing in the Partnership” and can confirm that there is no statement contained therein in relation to taxation matters which is inconsistent with my opinion.”

74. On 29 September 2003 Scotts wrote to Mr Thornhill informing him of Scotts’ intention once again to offer high-net worth individuals the opportunity to invest in an LLP engaged in film distribution. 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. Mr Thornhill’s advice in relation to SAD2 and SAD3 was materially the same as the advice he gave for SAD1, reflected in the 28 January 2003 opinion set out above.
75. 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 a short-form opinion relating to SAD2 and SAD3, 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, accurate and complete.”
76. 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, 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 annexed hereto)”. (There was an issue at trial, not relevant on this appeal, as to whether, by reference to opinions in the plural, Mr Thornhill intended to permit his SAD1 opinion to be made available to potential investors in SAD2 and SAD3. The judge addressed this at paragraph 392 of the judgment, concluding that this was not a reference to the SAD1 opinion dated 28 January 2003).
77. On 10 February 2004, HMRC 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 (about which no complaint is made) answering certain questions arising out of the rule change.

78. Mr Thornhill provided a long-form opinion relating to SAD2 and SAD3, dated 27 February 2004. This was in materially the same terms as the 28 January 2003 SAD1 opinion.
79. Various other questions were asked of Mr Thornhill, in respect of which he provided advice in writing, but these are not relevant to the appeal.

The appeal

80. Against that background I turn to address the issues raised on this appeal.

I. The existence of a duty of care: grounds 1 and 2

81. The judge held that Mr Thornhill owed no duty of care to the appellants, none of whom was his client, because although Mr Thornhill was aware that his advice would be made available to potential investors, Mr Thornhill did not assume responsibility to them in giving his advice. The judge followed the assumption of responsibility approach stemming from *Hedley Byrne v Heller* [1964] AC 465 at 503 and set out by Lord Wilson in *NRAM*. His essential reasoning was as follows.
82. First the judge acknowledged factors that pointed towards Mr Thornhill owing a duty of care to the appellants, including that Mr Thornhill was a person with special skill; who gave his advice in the knowledge that it was to be made available to potential investors who asked for it; knowing that the IM was a marketing document intended to attract investors to the Scheme; and aware that potential investors were likely to take comfort from the fact that as a leading expert in the field, he was named as tax adviser to Scotts (or Scotts and the LLP) and had given positive advice on the prospects of the tax benefits being achieved. Further, Mr Thornhill accepted that his advice assisted investors and their IFAs, in the case of the latter by helping them evaluate whether or not their clients should invest in the Scheme. 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 Scheme promised. There was no conflict of interest between Scotts and the appellants in relation to the issues on which Mr Thornhill advised. They both had an interest in the tax benefits being achieved, albeit for different reasons.
83. However, despite these features, the judge concluded that Mr Thornhill did not owe a duty of care to the appellants because the language of the IM and core contractual documents, together with various contextual factors, made clear to potential investors that they should consult their own tax advisers on the tax aspects of the Scheme. Further, 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. Applying the law to the facts, the judge held that the appellants 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.
84. The judge held that unless an investor or their adviser actually saw Mr Thornhill's opinions, his advice was not communicated to them, so no duty could arise in any event. The judge also held that UCTA 1977 did not apply for the reasons summarised earlier.

85. In challenging the conclusion reached by the judge that no duty of care was owed by Mr Thornhill, Mr Stewart on behalf of the appellants contended that the circumstances of this case are precisely those envisaged by *Hedley Byrne*. He advanced a large number of points in support of his case that the judge was wrong in law to find that Mr Thornhill did not owe a duty of care to investors in the opinions he gave and when advising on the wording of the IM, and/or that the judge reached conclusions that could not reasonably have been reached in relation to the facts underpinning the existence of a duty of care. These can I think be distilled sufficiently in the following essential propositions:
- i) The judge was wrong to treat this case as raising a question whether an adviser on one side of a commercial transaction owed a duty of care to the opposing party. Mr Thornhill was not acting as an advising barrister in any ordinary sense. He was intentionally making himself part of the sale process in relation to its most critical aspect. As the judge found, there was no conflict of interest.
 - ii) Correctly characterised, this is a prospectus case, which is distinguishable on the facts from *NRAM*. A prospectus such as the IM is a classic source of pre-contractual representations despite seller and buyer being on “opposite sides of the transaction”. Mr Thornhill was essential to the selling of the Scheme and expressly consented to the contents of his opinions being reflected in the wording of the IM (which he approved) without any disclaimer of responsibility.
 - iii) In relation to the language and legal effect of the IM and core documents, Scotts properly accepted responsibility for the contents of the IM and represented that:
 - a) it believed the tax benefits would be available to appropriate individuals;
 - b) it had taken reasonable steps to check this position;
 - c) those reasonable steps included taking advice from Mr Thornhill;
 - d) Mr Thornhill had given unequivocal advice that the position was as set out in the IM.
 - iv) Neither the warranties set out in the subscription agreement, nor the statements signed by investors for SAD2 and SAD3 in the checklist, nor the statement in the IM that prospective investors are “advised to consult their tax advisers” affect this analysis. In particular, the judge was wrong to treat relevant provisions of the IM and subscription agreement as requiring investors to obtain duplicative tax advice covering the same ground as covered by Mr Thornhill’s opinions, namely the likely availability of the tax benefits as a matter of general principle. On a proper construction of the relevant provisions, they only required investors to take advice on their own individual tax positions against the backdrop of the advice provided by Mr Thornhill.
 - v) The judge was wrong to conclude that it was unreasonable for investors to rely on Mr Thornhill’s advice without making independent inquiry in relation to the likelihood of the Scheme achieving the tax benefits and that Mr Thornhill could not reasonably have foreseen they would do so. Independent inquiry plays no part in the *NRAM* test at paragraph 19 properly construed. Even if it did, the

inquiry would have to be of an adviser of equivalent status. As the judge himself emphasised, any such inquiry by an investor or their adviser, would to Mr Thornhill's knowledge, absent a disclaimer of responsibility, start with reasonable reliance on Mr Thornhill's unequivocal endorsement of the tax benefits. These facts accordingly supported the existence of a duty of care and did not prevent a duty of care from arising.

- vi) Accordingly, it was reasonable for the appellants to rely on the representations and assertion that there was no doubt that the Scheme would work to obtain the tax benefits; and further, it was reasonable for Mr Thornhill to have foreseen that the investors would do so. He was an expert whose conclusions were central to the investments which the investors were being persuaded to make and chose to allow himself and his advice to be used to sell the Scheme. He voluntarily chose to act in a way which most barristers would never act and allow his definitive advice to be identified as the basis for investment.
- vii) The judge was also wrong to draw any distinction between the investors who saw (or whose IFAs saw) Mr Thornhill's opinions and those who did not. Given the express acceptance of responsibility by Scotts, the naming of Mr Thornhill, the availability of his advice and the statements as to the taxation effects on investment, the IMs were informing the investors of the material terms of Mr Thornhill's opinions. If those opinions had been qualified in any way, the terms of such qualification would have had to be set out in the IMs but they were not.
- viii) The judge was also wrong to decide that UCTA 1977 did not apply so as to make the warranties in the subscription agreement subject to the requirement of reasonableness within section 2. The warranties were in substance and effect, a "no reliance" clause, intended to exclude liability on the part of Scotts and Mr Thornhill. Had the judge correctly concluded that UCTA 1977 applied, he ought then to have decided that the warranties did not satisfy the requirement of reasonableness given their terms, their lack of clarity and the drastic consequences of a requirement that investors were required themselves to investigate whether the tax benefits of the Scheme would be achieved.

The applicable legal principles in relation to the existence of a duty of care

- 86. So far as the applicable legal principles are concerned, there was little controversy. As a general rule, a lawyer owes a duty of care to the party for whom he or she is acting but generally owes no duty to the opposite party: *Ross v Caunters* [1980] Ch 297 at 322 per Megarry VC. However, there are exceptions. Most relevantly for present purposes, the existence of a duty of care might exceptionally arise where the legal adviser for one party makes representations to the other party on which that other party relies. However, even so the general principle that no duty of care is owed usually applies, and it is common ground that whether or not there is such a duty depends on the assumption of responsibility as explained in *NRAM*.
- 87. In *NRAM* the solicitor for a borrower who was selling part of a charged property and intending to use the proceeds to redeem part of the loan secured on it, sent an e-mail to the lender, who was unrepresented, saying inaccurately, that the whole loan was being discharged. The Supreme Court held that no duty was owed by the solicitor to the party on the opposite side of the transaction, the lender. Lord Wilson JSC started his analysis

of the law in *NRAM* with *Hedley Byrne* (described as “the fountain of most economic claims”) noting the emphasis given in that decision to the need for the representee reasonably to have relied on the representation and for the representor reasonably to have foreseen that he would do so. Lord Wilson continued:

“19. ... This is expressly stressed in the speech of Lord Hodson at p514. In fact it lies at the heart of the whole decision: in the light of the disclaimer, how could it have been reasonable for the appellant to rely on the representation? If it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it. If it is not reasonable for a representee to have relied on a representation, it may often follow that it is not reasonable for the representor to have foreseen that he would do so. But the two inquiries remain distinct.”

88. Having considered the approach of the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2AC 605 where the threefold test propounded in *Smith v Eric S Bush* [1990] 1 AC 831 was rejected, Lord Wilson held:

“23. More important for present purposes is the reassertion in the *Caparo Industries* case of the need for a representee to establish that it was reasonable for him to have relied on the representation and that the representor should reasonably have foreseen that he would do so. Thus at pp 620—621 Lord Bridge observed that a salient feature of liability was that the representor knew that it was very likely that the representee would rely on the representation; and at p 638 Lord Oliver observed that a usual condition of liability was that the representor knew that the representee would act on it without independent inquiry. Some months later, in *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 the Court of Appeal, confronted with a similar claim against company accountants, rejected it by reference to the decision in the *Caparo Industries* case. But Neill LJ expanded on the need for foreseeability of reliance. At pp 126—127, he said:

“One should therefore consider whether and to what extent the advisee was entitled to rely on the statement to take the action that he did take. It is also necessary to consider whether he did in fact rely on the statement, whether he did use or should have used his own judgment and whether he did seek or should have sought independent advice. In business transactions conducted at arms’ length it may sometimes be difficult for an advisee to prove that he was entitled to act on a statement without taking any independent advice or to prove that the adviser knew, actually or inferentially, that he would act without taking such advice.” ”

89. The *NRAM* approach thus requires consideration of two distinct questions: first, whether it was reasonable for the representee to have relied on the representation; and secondly, whether the representor should reasonably have foreseen that it was likely he or she would do so. These twin inquiries are the two ingredients of the general liability in tort for negligent misrepresentation, but they are particularly relevant to a claim against a professional by the opposite party because the latter's reliance in that situation is, as Lord Wilson described it, "presumptively inappropriate". While paragraph 19 of *NRAM* sets out the test, paragraph 23 in particular, makes clear that when it comes to assessing the reasonableness of the reliance (looked at objectively), the question whether it was reasonable for the representee to act without making any independent check or inquiry is highly relevant, and in many cases, likely to be determinative. There may be a parallel to be drawn with product liability cases where the likelihood that there will be an intermediate inspection or check negates the existence of a duty of care.
90. Indeed, the fundamental importance of independent inquiry in this context can be traced back to *Hedley Byrne* itself, as Lord Oliver of Aylmerton explained in *Caparo*. At p.638D in *Caparo* he deduced from *Hedley Byrne* that a duty of care might typically be held to exist where:

"(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment."

(See too *Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse (No.2)* [1998] Lloyd's Rep. Bank 85, [1998] BCC 617 Sir Brian Neill at paragraphs 7.20(d) and 8.3).

For these reasons I reject Mr Stewart's contention that independent inquiry plays no part in the *NRAM* test.

91. Alternatively, Mr Stewart submitted that if independent inquiry is relevant at all in this context, it begs the question what type of independent advice is sufficient: what must it be directed at and from whom must it be taken. He submitted that it must mean an inquiry of at least the same nature and type, and on the same point on which reliance would otherwise be placed as the seller's adviser has conducted. In other words, if the seller's adviser is a tax silk, nothing but advice on the same point from an equivalent tax silk will amount to the sort of independent inquiry that could displace the reasonableness of the reliance, and the fact that the advisee has sought advice from an experienced IFA or solicitor will not meet the necessarily high threshold for these purposes. I do not accept that submission. There is nothing in the authorities to support it. Independent advice means just that: advice that is independent of the seller from whomever is available to give it. Whether or not the independent adviser traverses the

same ground as the seller's adviser, or advises on the risks to the buyer in entering the transaction, both situations will be relevant to the reasonableness of the reliance because they reflect independent inquiry by the buyer.

92. Independent inquiry as a central aspect of the reasonableness of reliance also answers the question whether there can be reasonable partial or dual reliance by the representee as Mr Stewart contended. The question in such a case would be whether it is objectively reasonable for a representee to rely both on the seller's adviser and on their own advice, having made independent inquiry. The answer will of course depend on the facts. In many cases, the fact that a party could and should have made their own independent enquiry will lead to the conclusion that reasonable partial reliance is not enough to create a duty of care.
93. Another way of addressing the same points is, as Mr Adam submitted, to consider the representation in the context of the transaction in which it was made. The representor must not only know that the statement is likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be communicated and relied upon by B, if the representor is to be taken to assume responsibility to B: see *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 WLR 4041 at paragraph 11 per Lord Sumption JSC. Relevant to this question will be whether the transaction is an arm's length transaction where it is presumptively inappropriate for anyone on the opposite side to rely on something said by the counterparty's lawyer. Also relevant is whether the statement relied upon is qualified or explained, for example as a statement of belief rather than fact, or as not having been verified for accuracy or completeness. Such statements amount in effect to warnings to the buyer of *caveat emptor*, and flowing from this, to make their own independent inquiry as to whether to enter into the transaction.
94. No directly analogous cases to the present one (involving, for example, a sale by reference to a prospectus in which the opinion of one side's accountant or valuer is referred to and relied on by the seller to induce or encourage the sale) were cited to us. Mr Adam referred the court to *Peach Publishing Ltd v Slater & Co* [1998] PNLR 364. The case involved a share sale in which Slater & Co were the seller's accountants and produced management accounts for the company being marketed, at the buyer's request; but, having refused to certify the management accounts and advised the shareholders against giving any warranties in relation to them, Slater & Co were prevailed on to make a statement to the buyer to the effect that the management accounts were essentially reliable or correct. Discrepancies in the accounts led to litigation, including a claim for damages by the buyer against Slater & Co for negligent misrepresentation. This court reversed Rimer J's finding that a duty of care was owed by Slater & Co, essentially because the underlying transaction was a sale in which both sides had their own advisers and *caveat emptor* applied. Further, while Slater & Co made the statement voluntarily and directly to the buyer, it did not follow that they assumed responsibility to the buyer. The circumstances in which the statement was made had to be considered in order to evaluate the significance of the fact that it was made voluntarily and directly. Yet further as Morritt LJ emphasised, Slater & Co were the vendor's advisers, and not valuers or experts who were independent of any of the parties and exercising some independent judgment on whom those on both sides of the transaction might be expected to rely, as was apparent to both sides.

95. The principle that solicitors can owe a duty of care to the opposite party because they stepped outside their normal role (as happened in *Al-Kandari v JR Brown & Co* [1988] QB 665) was another of the exceptions to the general rule discussed by Lord Wilson in *NRAM* at paragraph 32. There is a question in the present case whether this exception applies. Mr Stewart submitted that it does. First, he contended that this is a prospectus-type case in which investors were being induced by the IM to invest. Secondly, Mr Stewart contended that Mr Thornhill was not acting as an advising barrister in any ordinary sense but was instead both advising his own client, Scotts, and assisting the sale process by allowing his advice which he knew would form the basis of the IM (the terms of which he approved and on which he knew reliance was very likely to be placed) to be given to prospective investors. I will return to this point below. For present purposes, I am not persuaded that the *Al-Kandari* exception has any application to the present case. Mr Thornhill remained the adviser to Scotts (and the LLPs which the investors were being invited to join) throughout. It is true that the IM was prepared to attract and encourage investment, in other words to sell the Scheme. But even if it is fair to regard him in this sense as having become part of the sales team, he did nothing that could be regarded as stepping outside his role as a barrister advising on the scheme and the terms of the IM. He did not abandon his role as Scotts' named tax adviser but remained in that role throughout. He did not at any stage become a neutral or independent expert. Nor is there anything to suggest that he took on a role as acting for all parties or as acting also for the investors.

Application of the law to the facts of this case

96. I start with the regulatory and commercial context. The Scheme was an unregulated collective investment scheme as the IM made clear. That meant it was not authorised or otherwise approved by the Financial Services Authority. It could not be promoted or marketed directly to the general public (and the IM itself was only directed at investment professionals). The IM explained that investors did not and would not have the protection of the FSMA or be eligible for any compensation scheme.
97. Mr Stewart relied, by analogy, on provisions in successive Companies Acts as showing what the result should be at common law in a prospectus type case such as this one. The provisions included section 84 Companies Act 1908, section 37 Companies Act 1929, and sections 40(1) and 43(1)(d) Companies Act 1948 which added experts who consented to the use of their reports in a prospectus to the class of those liable to persons subscribing on the faith of a prospectus (with a statutory defence if they could prove the existence of reasonable grounds for believing their statements to be true). I regard this argument as untenable. The regulatory backdrop is one in which Parliament has determined expressly that the statutory protections available for regulated schemes do not apply.
98. The fact that the Scheme was unregulated meant that applications by investors to subscribe to SAD2 and SAD3 were required to come through authorised professionals. That meant, as the judge found, that none of the appellants was entitled to rely directly on the IM, but could only do so through and with the benefit of their own IFA, who owed professional obligations of their own to each investor in relation to investing in the Scheme. Thus as Mr Thornhill knew, the only way investors could obtain access to Mr Thornhill's advice was through the IM which referred to him as adviser and said his advice had been obtained, and that copies could be requested. The consent given by Mr Thornhill to his tax advice to Scotts being provided to prospective investors (if asked

for) was only in the context of documents directly requiring those investors to take and rely on their own professional/tax advice. What is more, no investor could subscribe to the LLP without warranting that he or she had only relied on the advice of or had only consulted with his or her own professional adviser with regard to the tax and other considerations related to subscription to the LLP. I shall return to a more detailed consideration of the detailed terms of the IM and warranties below.

99. The broader commercial context is that Scotts and the investors were on the opposite sides of an arm's length sale transaction. They were commercial counterparties, and Scotts as sellers were seeking to attract investment in the Scheme for their own profit. On the face of it, the principle of *caveat emptor* applied and meant that investors should make their own assessment of the risks of going into the transaction and an independent decision as to whether to invest in the Scheme. The starting point accordingly was that it was presumptively inappropriate for investors to rely on anything said by Scotts' adviser, and not the reverse.
100. As for Mr Thornhill's position, he was at all times identified as the seller's tax adviser in the IM. The fact that he was also described as the LLP's adviser (in the case of SAD2 and SAD3) does not alter that position. Potential investors were being invited to subscribe to membership of a partnership, but they were not yet members of it. Investors could not reasonably have thought that he was their adviser in any relevant sense: they did not pay him, meet him or even communicate with him. Moreover, there was nothing in the IM or other documents that suggested he was an independent expert of any kind.
101. Further, in my judgment and in agreement with the judge, there was nothing unconventional or non-standard about Mr Thornhill's role. He received instructions from his client, Scotts, to advise (both orally and in writing) on the tax implications and consequences of the Scheme, and did as he was instructed to do. I agree with the judge that what he did "*was clearly within the typical role of a barrister*". The fact that Mr Thornhill agreed that Scotts could (on certain terms) show his advice to others made him no more part of the sales team than was the accountant in *Peach Publishing*. In that case, Morritt LJ observed that merely because the defendant accountant was known to have been advising the seller, he did not become "*some valuer or expert, independent of any of the parties and exercising some independent judgment on whom those on both sides of the transaction might be expected to rely*" (see p.386E). Contrary to Mr Stewart's submissions and despite the fact that Mr Thornhill's advice was part of the marketing of the Scheme, there is nothing to suggest that Mr Thornhill stepped outside his role as adviser to Scotts and took on some independent expert role advising both sides. Notwithstanding his consent for his opinions to be shown to potential investors on request, and his endorsement of the IM, he remained at all times on the sales side of the transaction.
102. Significantly, Mr Thornhill's consent to potential investors receiving copies of his opinions was given in the knowledge that the commercial and regulatory context was as I have summarised. These were unregulated schemes outside the protection of FSMA and investors were therefore required by law to have independent advisers. Further, and of central importance, the IM was the only means through which Mr Thornhill's advice to Scotts could be obtained by third parties, and Mr Thornhill only gave his consent to his tax advice being provided to prospective investors (if asked for) on the terms of the IM and other documents that expressly required those investors to take and rely on their own tax advice relating to the Scheme.

103. The judge's finding at paragraph 89 that there was no conflict of interest between Scotts and the investors carries limited weight in these circumstances. The parties may have had a common interest in the Scheme working and it is true that both sides had an interest in the tax benefits being achieved, but they remained commercial counterparties to an arm's length transaction. Moreover, in advising an investor on the merits of entering into the Scheme, an independent adviser to an investor would at the very least take a different approach to the risk analysis for the investor and would not merely duplicate the advice given by Mr Thornhill, even if it was the starting point from which an adviser advised. As the case of Mr Millar (one of the appellants) in particular demonstrated, not only did he receive advice from Ward Consultancy PLC, a substantial IFA specialising in tax avoidance and able to assess and advise on whether the Scheme was likely to work, but he also instructed his own specialist tax solicitor to assess whether SAD1 worked. The judge rejected Mr Millar's evidence that he understood the IM's warning to take advice only to concern his personal circumstances, and held that he consulted a tax adviser about the viability of the scheme "because that was what the IM advised him to do". The solicitor asked for Mr Thornhill's instructions, examined the Scheme and wrote a formal advice opining that it was likely to work but there were risks inherent in investing in the Scheme and could be no guarantee of success. I note that Mr Millar went ahead anyway and invested in the Scheme.
104. So far as the investors themselves were concerned, the Scheme was not directed at vulnerable people of modest means, but at high net worth individuals who either had, or had access to, their own professional advisers and who were required to, and did, deal through IFAs who would be expected to advise them on the risks inherent in the Scheme. The appellants were (as the judge found) largely sophisticated investors and would reasonably have been expected to understand the risk warnings in the IM. It was reasonable to be expected that any person with sufficient wealth and potential tax liabilities to be a potential investor in a tax avoidance scheme of this kind, would seek and obtain specialist accountancy and/or taxation advice on a regular basis, and would thereby have easy and convenient access to independent advice in relation to the contents of the IM.
105. In these circumstances, absent good reason to the contrary, the default expectation was that investors would not simply rely on what they were told about Mr Thornhill's advice, but would, with the help of their IFAs (and other tax advisers where relevant), make their own assessment of the risks of the transaction and an independent decision as to whether to enter into it.
106. Far from negating or contradicting this default position, the Scheme documents support it. For the reasons that follow, I do not accept Mr Stewart's contentions that the IM represented that (i) there would be trading losses; (ii) the tax benefits would materialise; and (iii) advice received from Mr Thornhill regarding the tax benefits and financial summaries in the IM was consistent with these statements; or that the judge was in error in failing to acknowledge that these representations were made.
107. First, while the Notice in the IM said that Scotts were "responsible for the information contained in this document" and had taken care to ensure the information was in accordance with the facts and omitted nothing material, the IM stated that the tax analysis (which must encompass the critical questions whether the Scheme would work and the tax benefits would be available) in the IM was based on Scotts' "understanding of current UK tax legislation and published practice ...". This statement of

understanding qualified the representation being made and made clear that this was a representation of belief. It was not telling investors that the statement was right, or that Mr Thornhill was saying that it was right. It simply told the investors what Scotts believed the position to be. On a fair and objective reading of these statements, there was a representation that Scotts understood (or believed) the Scheme would work (to put it another way – the LLPs would be regarded as a matter of law to be trading) and the tax benefits would be available. However, Scotts did not say they were right to have that understanding (or belief) and there is nothing that can fairly be construed as any sort of guarantee that the tax benefits would materialise. Further, as Mr Adam emphasised, the appellants have never suggested that Scotts did not hold the understanding represented by them in the IM.

108. Secondly, Scotts stated that they had taken “all reasonable care” in forming this understanding, and by implication that included a representation that Scotts had taken reasonable steps to check their understanding of the tax analysis, including taking advice from Mr Thornhill. Again however, on a fair reading this is not a representation that the understanding or the advice was right. Rather these were representations that due diligence had been performed, together with a factual representation that advice had been taken. It is true, as Mr Stewart contended, that this implied that Scotts’ advice from Mr Thornhill supported Scotts’ understanding, and did not say anything to contradict it that had been omitted in the IM. But no more than that can be implied. Mr Thornhill’s advice was not appended to the IM or quoted in it. The only representations made in the IM as to the advice from Mr Thornhill were that the tax analysis contained in the IM was based on Scotts’ understanding of current law and practice, that they had obtained advice from Mr Thornhill, and that the tax analysis contained in the IM was, by implication, consistent with his advice. That involves no representation as to the accuracy of the contents of Mr Thornhill’s advice or opinions, still less that his advice was unequivocal. Nor did Mr Thornhill’s endorsement of the IM give rise to any unequivocal representation that the Scheme would achieve the tax benefits. His unequivocal statements of legal opinion about the legal effects of the Scheme were not statements of fact that there was no doubt that the Scheme would work to obtain the tax benefits.
109. Thirdly, I reject Mr Stewart’s contention that an implied representation was made that Mr Thornhill gave unequivocal advice that the position was as set out in the IM because if he had qualified his advice to any appreciable extent, this would have required a change in the wording of the IM. Mr Stewart submitted that if Mr Thornhill had given different tax advice, Scotts would either have had to set it out or would have been liable to the investors in misrepresentation. If he had expressed doubts about the question of trading (or other associated matters) Scotts would have had to set out such doubts - as it did in relation to the position of investors who ceased to be resident for tax purposes in the UK. I disagree. It seems to me that there are a number of different ways in which Mr Thornhill could have expressed himself in terms that conveyed his view that he was confident of success while acknowledging that there were risk factors pointing the other way that he expected to overcome. Advice expressed in such terms would not have required any change to the IM, and Scotts could quite properly have said exactly what was said in the IM about their understanding of the tax analysis.
110. Moreover, in addition to making clear that the “*tax analysis set out herein is based on the Sponsor’s understanding of current UK tax legislation and published practice ...*”

this was qualified by the sentence that followed immediately, namely: “*However, prospective Members are advised to consult their tax advisers ...*”. A number of points follow from this. The first is that this phrase qualifies what is said about Scotts’ understanding: in other words, they were saying this is our understanding of the tax analysis, but you should take your own advice. Secondly, the direction to take advice is specifically directed at *tax* advice; and there is also a default assumption that investors will have their own tax advisers. Thirdly, the tax advice potential investors were directed to take is tax advice about the “tax analysis” in the IM. There is no reference to taking advice about individual or personal circumstances. The words clearly convey a direction to all potential investors to take their own tax advice about the tax consequences of investing in the Scheme. This is consistent with Mr Thornhill’s known status as Scotts’ adviser and the fact that Scotts were on the opposite side of an arm’s length sale transaction and were themselves positively disclaiming any responsibility to give advice to investors.

111. This message was reinforced rather than undermined by the general risk warnings set out on pages 19 to 20 of the IM: for example, investors were warned to consider potential risks. This included but was not limited to known risks. Further, the IM warned that “the availability of tax reliefs” depended on HMRC accepting “the Partnership accounts and tax computations” and that HMRC had the right to enquire into loss relief claims. In other words, by implication the availability of tax relief for trading losses depended on HMRC accepting that the LLP was trading. More generally, the risk warning said that the investment “involves substantial risks including certain tax risks”. The fact that there were also certain specific risk warnings (some of which are identified above, including in relation to NICs and non-residence status) expressly said to be about the details of investors’ personal circumstances only serves to highlight that the direction to potential investors to consult their own tax advisers about the tax analysis (and other associated warnings) related to the overall efficacy of the Scheme and its tax consequences.
112. In addition to the risk warnings, the appellants all signed the warranties ((g) and (5) in particular, which are set out above) contained in the subscription agreement and the statements set out in the checklist. I accept as Mr Stewart contended in relation to these, that the warranties did not prevent investors from relying on the “information” for which Scotts were accepting responsibility. However, since that information clearly did not extend to whether the Scheme would work or the tax benefits would materialise for the reasons just given, this point does not advance his case. The appellants could not reasonably have understood from the warranties they signed that they were entitled to rely on Scotts (and Scotts’ adviser) as assuming responsibility to them for general tax advice. This construction does not negative the express acceptance of responsibility which Scotts accepted towards the investors in relation to the preparation of the IM, as Mr Stewart contended. Rather, it makes sense of the IM and what Scotts accepted responsibility for, read fairly and together with the warranties and the checklist. It is not in doubt that Scotts owed a duty to investors in relation to the accuracy of the information in the IM and would have been liable to investors for negligently misrepresenting the nature of Mr Thornhill’s advice if that had been done. But Scotts did not misrepresent the nature of Mr Thornhill’s advice, and this was never alleged. Rather, consistently with the statements made in the IM, Scotts said that they understood the Scheme to work and that this understanding was supported by the legal

advice Scotts had received, but investors were required to promise that they had taken and relied on their own tax advice on this centrally important question.

113. Mr Stewart emphasised the fact that the statement in (g) was to the effect that the investor “*only relied on the advice of, or has only consulted with, his or her own professional advisers with regard to the tax, legal ... considerations related to subscription to the Partnership*” and so did not entail that investors did anything more than consult with their IFAs. In other words, he submitted that no investor would be in breach of the warranty if he or she simply consulted with his own professional advisers but relied on the information in the IM. He also submitted that the natural meaning of this warranty is that the advice or consultation is restricted to individual questions of the suitability of the “investment” for a particular investor and the availability of tax relief with regard to his or her particular circumstances, rather than the general question of whether the investment qualified for relief as a matter of principle.
114. I accept that the statement in warranty (g) is to be read disjunctively as Mr Stewart contended. However, in considering the meaning of this warranty it must be remembered that the exercise engaged in is one of determining whether it can reasonably be said there was an assumption of responsibility. It is therefore appropriate to ask what a reasonable investor would have understood by it, rather than applying strict principles of contractual construction. Read in this way it seems to me to be obvious that the default assumption is that consultation with one’s own tax adviser means one has relied on that tax adviser. Moreover, this warranty is broad and extends to tax and legal considerations related to subscription to the LLP. That inevitably encompassed the critical question whether subscription to the LLP would achieve the intended tax benefits, and is not limited in any way to the personal circumstances of the investor. The checklist statements (paragraphs 1.1.1 and 1.2) reinforce this conclusion and in the clearest of terms, told investors that neither Scotts nor the LLP were providing tax advice for the investors, generally or specifically, in connection with the LLP. This plainly conveyed that they were not providing tax advice about the Scheme.
115. Read together, the IM, the subscription agreement for SAD2/3 and the checklist were consistent. The IM reflected Scotts’ understanding that the Scheme worked but warned investors to take their own advice, and highlighted the risks. The subscription agreement built on that by requiring investors to warrant that they had relied on their own advice as to the tax analysis and benefits of the Scheme. The checklist built on both points by requiring investors to acknowledge their understanding that Scotts were not accepting any advisory responsibility to investors about tax outcomes, whether in general or in particular. Moreover, there was a ready market in tax advice in the mandatory presence of IFAs, many of whom were skilled in tax avoidance schemes and who could reasonably be expected to bring home to investors the meaning of the documents and the importance of independent advice.
116. Mr Stewart emphasised the absence of any disclaimer despite Mr Thornhill being given the opportunity to make one, and the significance of this as a factor in favour of the existence of a duty of care. He relied on the emphasis placed by Lord Wilson on the presence of a disclaimer in *NRAM* at paragraph 19; and on dicta in *McCullagh v Lane Fox & Partners Ltd* [1996] 1 EGLR 35 at 45 to the effect that, “The existence of a disclaimer is relevant to answering the relevant questions and thus to the question whether there was a duty of care”, and in *BCCI Ltd v Price Waterhouse* at 635 that a material consideration is “the opportunity, if any, given to the adviser to issue a

disclaimer”. It is a fair point to make that Mr Thornhill could have included a disclaimer, but this was a multifactorial analysis and the absence of an express disclaimer was but one factor in the mix. It was neither a trump factor nor fatal especially given that the advice and opinions were only given to investors through the gateway of the IM with all its caveats.

117. For all these reasons, I am satisfied that the judge was correct to conclude that a correct application of the principles set out in *NRAM* meant that a duty of care did not arise in this case. Taking all the factors identified above into account, including in particular the terms of the IM, the subscription agreement and checklist, fairly understood, it was objectively unreasonable for investors to rely on Mr Thornhill’s advice without making independent inquiry in relation to the likelihood of the Scheme achieving the tax benefits; and Mr Thornhill could not reasonably have foreseen that they would do so.
118. Given this conclusion, the correctness of the distinction drawn by the judge between the two groups of claimants (see paragraph 92 of the judgment) does not arise and I prefer not to express a concluded view on it. Mr Adam contended that the judge was correct because nothing in the IM expressly represented Mr Thornhill’s advice or that the Scheme would achieve the tax benefits. There was an implicit representation that Scotts’ understanding that the Scheme worked was consistent with advice received from Mr Thornhill, but Mr Thornhill only made his advice available through the IM to anyone who requested it, and no advice from Mr Thornhill was ever communicated by him to investors. In those circumstances, the relevant line between Mr Thornhill and the investors was only crossed when copies of Mr Thornhill’s opinions were requested and given to the investors, and the distinction was therefore correctly drawn by the judge. Mr Adam might be right on this point, but I do not consider it to be straightforward. There may be force in the point that the thrust of Mr Thornhill’s advice, namely that it supported Scotts’ understanding that the Scheme worked, was communicated in the IM itself and was sufficient to cross the line. On that basis, there would have been no justification for the distinction drawn between the two groups.
119. My conclusion that the judge was correct to find no duty of care arose also means that the challenge to the judge’s finding, that UCTA 1977 did not apply so as to make the warranties in the subscription agreement and checklist subject to the requirement of reasonableness within section 2, does not arise. The point was not fully argued on this appeal. However, my provisional view, in agreement with the judge, is that the warranties were not a disclaimer of responsibility at all, and this was not the basis of his finding that there was no duty of care. The warranties were not in substance and effect “no reliance” clauses, nor did they seek to limit liability for an obligation that had been undertaken. Instead, taken together with the terms of the IM and its warnings, the subscription agreement and checklist, they delineated or set the boundary of the primary obligations owed. They clearly conveyed to investors that Scotts were not providing recommendations or investment, taxation or other advice to investors in connection with SAD2 or SAD3; and that subscription to the LLPs could only be made by investors who promised that they had read and understood the terms of the Scheme documents, accepted it was their responsibility to obtain appropriate advice and relied only on their own independent tax advice. Accordingly, the judge’s reasoning and conclusions do not appear to me to be contrary to, or inconsistent with, the statements of principle and approach in *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637; and on the basis of

NRAM these were factors that were relevant to the question of the nature and extent of the primary obligations owed.

120. In any event, even assuming that UCTA 1977 applies, the judge's finding that the warranties in the subscription agreement (and the checklist) were not insufficiently clear disclaimers of responsibility to satisfy the test of reasonableness cannot be impugned as plainly and obviously wrong: see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284. As well as clearly conveying the points just identified, the investors were high net worth, sophisticated individuals who could have walked away, or invested in an alternative tax avoidance scheme. They ought reasonably to have known of the existence of the warranties given the requirement to sign the subscription agreement and checklist in order to invest in the scheme. They necessarily had the benefit of an IFA to assist them in understanding the Scheme documents and there was a ready market in advice from tax professionals who could have scrutinised Mr Thornhill's opinions in order to provide advice to them as investors on the risks of investing in the Scheme.

II. Breach of duty – grounds 3 to 5

121. The question of breach also does not arise in light of my conclusion that no duty of care arose. Since it was fully argued, and in case the point might have future relevance, I shall deal with it. By way of preliminary point, although the judge addressed this question as a matter of pure tax law, to the extent that it is relevant, the counterfactual against which the question of breach is to be assessed must assume that a duty of care was owed to the non-client appellants (who were nonetheless sophisticated investors with ready access to IFAs and tax advisers, and could only come to Mr Thornhill's advice through the gateway of the IM and other documents).
122. To achieve the anticipated tax benefits, the LLPs had to be trading, on a commercial basis, and with a view to profit so that they could produce trading losses to be offset against income and gains of the investor members of each LLP. In general these are separate and distinct tests, but there is frequent (often inevitable) overlap: a lack of commerciality in a transaction will be relevant to the question whether it is a trading transaction. Likewise, if the entity does not trade with a view to profit that is likely to reflect on its commerciality and its trading status. Although all three tests were in issue before the judge, it is now common ground on this appeal that the LLPs were conducting their affairs with a view to profit, and had a material chance of making a material profit in doing so. That concession reflects to some extent on the remaining tests.
123. The appellants do not seek to challenge the primary facts found by the judge. They challenge his evaluation of them in determining whether the LLPs could reasonably be regarded as trading on a commercial basis. Their essential case is that on a correct analysis of the applicable tax law (which they say the judge failed to undertake), and on the facts found by the judge, the relief so confidently set out by Mr Thornhill in the opinions (which formed the basis for the IM) was not available and he was, accordingly, wrong. They contend that any competent tax silk would have advised either that the tax benefits were not available; or that they were unlikely to be available; or, at the very least, that there was a significant risk that they would not be available.

124. At the heart of their case is the contention that even if Mr Thornhill could non-negligently opine that the reliefs were available, it was negligent to do so in the unequivocal terms he adopted which pro-actively denied any significant risks. In the context of the sale of the investments, it was only unequivocal statements which would ever be likely to persuade investors to invest – and, indeed, render unnecessary the taking of advice which might otherwise have occurred.
125. Mr Stewart contended that the judge made a series of errors with regard to both the “commercial basis” test and, separately, the “trading” test. I summarise his main arguments as follows:
- i) The judge wrongly conflated the two tests, failing to recognise that commercial basis is not established simply by showing that a transaction has a “genuine commercial purpose” (which is, instead, a requirement of the “trading” test and easier to meet). Rather, the trade must be carried on in a way reflective of someone “seriously interested in profit” per *Wannell v Rothwell (Inspector of Taxes)* [1996] STC 450. A proper consideration of this test would have led to the conclusion that there was a significant risk that it would not be fulfilled, as any reasonably competent tax silk should have advised.
 - ii) The judge wrongly held that Mr Thornhill could competently advise that there was “no doubt” that all of the constituent elements of the “trading” test were met.
 - iii) In doing so the judge failed correctly to consider *Ensign Tankers* in the House of Lords (and in the High Court [1989] 1 WLR 1222). Further, he failed to recognise that a multifactorial evaluation of the transaction (by reference to each of *IRC v Livingston* [1927] SC 251 at 255-256, the “badges of trade”, and the HMRC Manuals) was required to determine whether the entity would be regarded as trading, giving proper weight also to the absence of any real speculation and the presence of a tax avoidance motive (see *Iswera v IRC* [1965] 1 WLR 663). The judge also wrongly concluded that a reasonably competent tax silk could have taken comfort from an HMRC Manual which was not in existence until 2006.
 - iv) If the judge had not erred in relation to these points, individually and/or cumulatively, he would have held on the facts as he had found them, there was a significant risk the trading test would be failed; and that a reasonably competent tax silk should have undertaken an analysis of these features (referred to as a “ground-up” approach by the judge) when advising on whether or not the tax benefits would be achieved.
126. I start with the individual and cumulative criticisms made of the judge’s conclusions about Mr Thornhill’s approach to the trading and commercial basis tests, and only after that, I will return to the appellants’ core argument that even if it was not negligent to advise that the benefits were available, it was negligent to do so in the unequivocal terms he used.
127. The approach adopted by Mr Thornhill in advising on these issues was explained by the judge as follows:

“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".”

128. Mr Thornhill maintained at trial that the advice he gave in 2002-2004 in relation to the Scheme was correct, and that in his view the House of Lords in *Ensign Tankers* had established that producing and distributing a film is “inherently a trading activity” and answered the trading question in this case. While Mr Thornhill maintained that he would have reached these same conclusions in 2021, in light of HMRC’s changed approach towards film partnerships from about 2010 onwards (as reflected in *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 1427) the route he would have taken to get there would have been different because these authorities require a range of factors to be considered. He maintained that a reasonably competent tax silk could nevertheless have advised, on the basis of the authorities in 2002-2004, as he did.
129. The judge described the principle established by *Lupton (Inspector of Taxes) v FA & AB Ltd* [1972] AC 634 and the possibility of denaturing a transaction through fiscal motives, and what occurred in *Barclays Mercantile* which had recently been reversed by the Court of Appeal when Mr Thornhill was advising. He also considered what he described as the “modern approach” reflected by the trilogy of film scheme cases referred to above. These made clear, if it was not clear before, that the question whether what the taxpayer actually did constitutes a trade involves a multifactorial factual evaluation that looks at all the circumstances.
130. The judge concluded that the approach taken by Mr Thornhill in 2002 - 2004 was one a reasonably competent tax silk could have taken. He then considered whether the conclusions reached by Mr Thornhill (on whatever approach) were wrong (or at serious risk of being wrong) on the facts.
131. The judge proceeded, correctly in the circumstances of this case, on the basis that a consideration of all the facts in this case required an understanding of how the transaction worked overall which in turn required an analysis of the critical contractual documents underlying the Scheme. In addressing this question, the judge made detailed

factual findings, including in relation to five key factual conclusions the investors said Mr Thornhill should inevitably have reached when considering the Scheme. On the five key conclusions, the judge concluded as follows:

- i) The appellants argued that the LLPs would have “no real control” over their purported trade of film distribution, either in terms of the slate of films, the prints and advertising budget, or the marketing strategy, but the judge rejected these contentions having conducted a detailed analysis of the contractual documents underlying the Scheme. In particular, he rejected the argument that the studio and sub-distributors would have an incentive to overspend to the LLP’s detriment, and were free to do so.
- ii) The appellants argued that the Scheme had “no genuine commercial comparators” in light of the contractual arrangements that showed they had no control, no realistic prospect of profit, the call option was tax arbitrage etc. and further, the specific real-world comparators that Mr Thornhill was instructed did exist had materially different risk-reward balances. The judge held that in a world where risks can be hedged, there was nothing uncommercial in bargaining for a different balance of risk and reward (a conclusion that would be unsurprising to traders who buy or sell under forward contracts, or otherwise hedge risk).
- iii) The appellants argued that the purpose of the call option granted to the studio under each scheme was tax arbitrage, and it was “very likely” to be called. There was never any dispute that the call option was aimed at tax arbitrage. But the judge found that even if it were highly likely to be exercised, its exercise was not certain and was outside investors’ control.
- iv) The appellants argued that the Scheme allowed “no material chance of material profit” (a weakened version of their pleaded case that there was “a fixed income stream” with “no realistic prospect” of upside). This was investigated in detail by reference to the complex underlying contracts, the financial projections (and who took responsibility for them), and industry expert projections obtained by Scotts. The judge concluded that (a) the maximum potential profit under the contractual scheme was around US \$161m on a US \$313m investment, or more than 50%, not including a residual further 1% in the event of a real blockbuster; and (b) Mr Thornhill could reasonably rely on his instructions, based on the industry expert’s projections (which it was not for Mr Thornhill to second-guess) that there was a prospect of additional upside. While the judge also found that the potential for upside was “significantly curtailed” (in exchange for the risk of loss being likewise curtailed) that does not mean there was no material chance of material profit. On the contrary, the judge found this not to be the case.
- v) The appellants argued that the Scheme would achieve “either an immaterial profit or a loss”. This added nothing material to point (iv). The judge rejected it in any event.

Having regard to this analysis and his detailed findings about the Scheme, its background and the contractual documents, the judge concluded that a reasonably

competent tax silk could have concluded that the LLP had a genuine commercial trading purpose; and that there was trading on a commercial basis and with a view to profit.

132. Given the centrality of *Ensign Tankers* to Mr Thornhill's approach, it is convenient at this stage to summarise the scheme in that case and the approach of the courts to it. The case concerned the activities of Victory Partnership, a film partnership consisting of Victory Film Productions Ltd as general partner and the taxpayer investor and four other companies as limited partners. Its purpose was to engage in the production and/or acquisition and distribution of films, in particular a film called "Escape to Victory". The initial capital outlay by Victory Partnership was \$3,250,000 (25% of the anticipated cost of producing the film).
133. Agreements were entered into in summary as follows. The film's producer, Lorimar Productions Incorporated ("LPI") lent Victory Partnership \$9,750,000 (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. Victory Partnership acquired the uncompleted master negative of the film for \$4,780,951, the cost of making it to date. LPI agreed to complete the film for and on behalf of Victory Partnership who agreed to pay LPI the balance of the approved budget for doing so, with any increase in the cost of the film funded by LPI under the non-recourse loan.
134. LPI assigned its ownership rights in the film to Victory Partnership, who retained ownership of the master negative of the film, but granted an exclusive licence to distribute and exploit the film outside the UK to an associate company of LPI, Lorimar Distribution International Incorporated ("LDII"), in perpetuity.
135. 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 Victory Partnership, as follows: 25% to Victory Partnership and 75% to LPI in repayment of the loan until such point that Victory 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 Victory Partnership and 75% to LDII.
136. The taxpayer sought to take advantage of section 41(1) of the Finance Act 1971 which provided a first-year capital 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. The argument was that the master negative of the film was plant acquired by Victory Partnership for the purposes of the trade in exploiting and distributing films carried on by it.
137. The scheme was challenged by the Inland Revenue. At first instance, the Commissioners found the facts (taken from the summary in the judgment of Sir Nicholas Browne-Wilkinson VC in the Court of Appeal, [1991] 1 WLR 341 at p.349) as follows:

“(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 \$11.5m., 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 \$1m. 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."”

The Commissioners' decision that Victory Partnership was not carrying on a trade was thus based on the conclusion that transactions entered into with fiscal motives as their paramount object are inherently not trading transactions.

138. On appeal from the decision of the Commissioners (see [1989] 1 WLR 1222 at p.1232D to p.1234C), Millett J identified nine propositions of law relevant to the trading question. First, to constitute a transaction in the nature of trade, the transaction must possess not only the outward badges of trade but also a genuine commercial purpose. Second, if the transaction is commercial in nature with a genuine commercial purpose, the presence of a collateral purpose to obtain a tax advantage does not “denature” what is essentially a commercial transaction. On the other hand, if 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 in entering into it. The question is not *why* he was trading but *whether* he was trading. There may be situations where 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 objective, 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 affected by it. Sixth, the transaction must be viewed as a whole and in the context of all *relevant* surrounding circumstances that are capable of throwing light on the true nature of the transaction or demonstrate a commercial purpose. Seventh, if the purpose 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 in *Lupton* 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 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.”
139. Millett J overturned the Commissioners' decision, holding that they had confused the motives of the taxpayer company and the purpose of the transaction; and had not undertaken the necessary analysis of the terms and circumstances of the transaction itself, for example, to determine whether the terms were so loaded against Victory Partnership that their prospects of making a profit were so remote or illusory. He held 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.”

140. Further, Millett J concluded that factors that the Commissioners had taken into account, in fact threw no light on the question to be determined. These factors were the lack of significant activity by Victory Partnership after the date it entered into the agreements; Victory Partnership's lack of control over expenditure on the film; and certain "curious" provisions in the documentation which "tended to diminish any faith in their commerciality". As Millett J explained (at p.1236-7) it was open to a partnership, like any other trader, to act through agents or independent contractors. A lack of control over expenditure reflected the reality of the situation, that Victory 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. Moreover, 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".
141. LPI had set out to make the film before Victory Partnership appeared on the scene and, 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 Victory Partnership, only one conclusion on the facts as found was possible: "Viewed objectively the transactions entered into by Victory Partnership were commercial transactions with a view of profit".
142. The Court of Appeal overturned Millett J's decision, holding 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. The circumstances were equivocal, including in particular the fact of non-recourse lending to be repaid out of profits of the film.
143. 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. In his leading speech Lord Templeman distinguished the cases relied on by the Court of Appeal on the basis that they were dealing with "the identification of a trading transaction" whereas in 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." (see p.680A-B).
144. 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."
145. This was the leading authority on tax avoidance film schemes at the time Mr Thornhill advised on the Scheme. It remained the leading authority until the more modern approach, encapsulated in *Samarkand*, emerged. Even in *Samarkand* in 2017, the taxpayer sought to argue that the purchase and leaseback (or onward lease) of a film are inherently trading activities. This submission was firmly rejected in *Samarkand* by

Henderson LJ (with whom the other members of the Court of Appeal agreed). He accepted that there was no dispute that such activities are capable as a matter of law of forming part of a trade, and in many contexts the only reasonable conclusion would be that they did form part of a trade. However, whether or not they do so in a particular case depends upon a multifactorial evaluation of all the facts against the background of the applicable legal principles.

146. However, in 2002-2004, by parity of reasoning with what happened in *Ensign Tankers*, and on the approach adopted by the House of Lords in that case, Mr Thornhill reasoned that the LLPs were being established to acquire and exploit the distribution rights in a portfolio of films, and would be spending money to acquire licences and then exploit the distribution rights in the films. In doing so they would be taking over part of the activities carried on by Warner Bros (or its associated companies), who were making and exploiting films by distributing them. These were inherently commercial trading activities done by Warner Bros with a view to profit. The LLPs' activities would be conducted in the same way as similar activities in the film world and as Mr Thornhill was instructed, there were entities in the film world carrying on part of the activities like those the LLPs would be carrying on. All this led to the conclusion, as it had done in *Ensign Tankers*, that the LLPs would be trading commercially. Mr Thornhill also reasoned in those circumstances, for the same reasons as were given in *Ensign Tankers*, that the question of "denaturing" did not apply, and the presence of a tax avoidance motive did not undermine the conclusion that the commercial activities amounted to trading. Based on the state of the authorities in 2002-2004, I consider that the nine propositions identified by Millett J and his approach to the transactions undertaken by Victory Partnership, together with the speech of Lord Templeman in *Ensign Tankers* (stating that the production and exploitation of a film is a trading activity) supported Mr Thornhill's reasoning in these respects. His approach overall was one which, at that time and on this basis, a reasonably competent tax silk could have taken. In my judgment the judge made no error in reaching this conclusion.
147. That meant also that it was reasonable and not negligent for Mr Thornhill not to adopt the ground-up approach advocated by the appellants and that cases in which a ground-up approach was adopted (including *Marson (Inspector of Taxes) v Morton* [1986] 1 WLR 1343) were distinguishable as the judge found. While important to determining whether a particular activity is trading at all, the factors described in the HMRC Manuals and the badges of trade could reasonably have been thought to have little role to play in an *Ensign Tankers* type case where the starting point is that the activities of the LLP were undoubtedly commercial trading activities when carried out by Warner Bros (or its associates) before the LLP came along. Furthermore, although it is true that Millett J identified in his first proposition that to constitute a transaction in the nature of trade, the transaction must possess not only the outward badges of trade but also a genuine commercial purpose, Millett J allowed the appeal on the trading issue in *Ensign Tankers* without ever applying the badges of trade to the arrangements in question. This was no doubt because of his conclusion that viewed objectively, the transactions entered into by Victory Partnership, who appeared on the scene well after LPI had set out to make the film on a commercial basis with a view to profit, and absent any finding to the contrary, had to be taken to have been done commercially and with a view to profit. This was the approach adopted by Mr Thornhill.

148. In any event, and separately, the judge conducted a detailed analysis of all the facts and circumstances to assess whether, even if Mr Thornhill's general approach was not negligent, the factual and legal conclusions he reached in light of the detailed arrangements were negligent. When Mr Thornhill advised, the LLPs had not yet purported to start trading and the exercise was essentially a prospective one. As the judge rightly observed, it required an analysis of the central contractual documents: the DA, the MSA, the Call Option agreement.
149. The judge set out the commercial background to the transaction, including the fact that film distribution continues for potentially lengthy periods with DVD and other sales, and Warner Bros retained a commercial interest in maximising revenues over the whole period. Moreover, by virtue of the minimum guaranteed amounts payable, the risk that the films overall would fail to meet the costs of distributing them was Warner Bros' risk. Against that background, the judge concluded that the deal struck by the contractual documents, struck a balance between the competing commercial interests of Warner Bros and the LLPs in myriad ways. He rejected the contention that the terms of the contractual documents were so uncommercial as to negate any genuine commercial purpose. Further, at paragraph 133 above, I have summarised the five key factual conclusions he reached.
150. The detailed analysis of the financial terms, the financial projections (and who took responsibility for them), and industry expert projections obtained by Scotts led to the judge's ultimate conclusions that the LLPs' 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 silk would be expected to opine. He or she could rely on their instructions and the work of a suitable expert in the field.
151. In the light of those detailed findings of fact, the judge concluded that a reasonably competent tax silk, taking into account the findings, could have concluded that the LLPs were trading with a genuine commercial trading purpose and that the commercial basis test was satisfied. In my judgment the judge was entitled to reach that conclusion.
152. In particular, I do not accept the appellants' criticism of the judge's approach to the so-called *Livingston* test (namely whether the Scheme's activities were carried on in the same way in the commercial world). The criticism is centred on the fact that profit is said to be at the heart of trading but the judge wrongly concluded that it was unnecessary to consider profit allocation when considering whether ordinary traders would carry on the activity in the same way or enter into a transaction like this Scheme. Quite apart from the fact that the appellants have now conceded that the LLPs were operating with a view to profit, and had a material chance of a material profit, the judge was correct to hold that a reasonably competent silk could distinguish, as Mr Thornhill did, between how the activities were "*carried on*" and how profits were allocated. Commercial traders strike different bargains as to risk and reward every day without ceasing to trade as a matter of law. I can see no basis for doubting this approach or thinking that ordinary traders would not enter a scheme that had a material chance of material profit.

153. Likewise, I do not accept the appellants' contention that to constitute a trade there must be speculation, and the judge failed to give appropriate weight to the absence of any real speculation. While in many cases, the carrying on of a trade will involve risk and speculation, this is not a necessary feature in every case regardless of the facts, and it is certainly not the case that the absence of speculation is fatal to a finding that there was a trading. Speculation or risk is just another of many potential factors that might or might not be relevant depending on the factual matrix of the particular transaction and its context. In any event, as already indicated, the judge's detailed analysis of the Scheme's financial terms and projections led him to reject the argument that the Scheme allowed no material chance of material profit. While the risk of loss and profit were both curtailed, no particular level of profit or risk of loss is required to establish speculation or to satisfy the requirement that the LLPs were operating with a view to profit as is now conceded.
154. A further criticism is advanced by reference to a typographical error in paragraph 230 of the judgment relating to HMRC Manual BIM 56455. This manual was not published until 2006, and dealt with the treatment of "plain vanilla" sale and leaseback schemes. The judge concluded that although the Scheme in this case was not a sale and leaseback scheme, nonetheless a competent tax silk could take some comfort from the fact that HMRC described such partnerships as "carrying on a trade of exploitation of master versions of films" and by implication accepted they were trading. I accept (as did Mr Adam) that this manual could not have provided direct comfort before its publication in 2006. Moreover, it was concerned with specific reliefs that were not in play in the Scheme and that applied to a trade or business, a wider concept than trading. Nevertheless, the material substance of the point made by the judge applies. Although these were different schemes, the fact that even in 2006 HMRC were describing sale and leaseback partnerships as "carrying on a trade of exploitation of master versions of films" is indicative of their earlier approach. The final criticism of the judge's conclusion that a competent tax silk could have advised there was trading relates to the presence of a tax avoidance motive and has been addressed above.
155. It is true that having dismissed the appellants' case on trading with a genuine commercial purpose, the judge's analysis of commercial basis was brief. He set out the statement in the leading authority (*Wannell v Rothwell*) that the distinction between commercial and uncommercial "is between the serious trader ... seriously interested in profit, and the amateur or dilettante" and then held that the same factual arguments were being run as had been argued to challenge "genuine commercial purpose" as part of the trading test, and that his factual findings for that purpose also disposed of this argument. Mr Stewart contended that this was an error and the judge thereby conflated the commercial basis test and the separate trading test (both of which needed to be independently passed for the tax benefits to be achieved).
156. Leaving aside the fact that the appellants themselves submitted below that the commerciality point was answered by their trading arguments and in closing presented "commercial basis" as a re-run of the facts relied on to challenge "genuine commercial purpose", I disagree with this submission. Separate consideration was unnecessary in this particular case given the nature of the transactions underlying the Scheme and the significant overlap in features relevant to the two tests.
157. Moreover, the particular points relied on by the appellants in seeking to undermine the judge's conclusion on this point are all points addressed by the judge in the context of

addressing the general commercial purpose of the trading. Thus, for example, the judge recognised Warner Bros' wide right to substitute films but rejected as a matter of fact the contention that the LLPs had "*no real control*" over their purported trade of film distribution, either in terms of the slate of films, the prints and advertising budget, or the marketing strategy. The judge dealt with commercial comparators who might well have had a different allocation of risk but held that there was nothing uncommercial in bargaining for a different balance of risk and reward. Further there was never any dispute that the call option was aimed at tax arbitrage, but as the judge found, even if it was highly likely to be exercised, its exercise was not certain and was outside investors' control, and so did not make the arrangement uncommercial. Finally, the concessions that the LLPs operated with a view to profit and had a material chance of a material profit are damaging to the proposition that they were not operated on a commercial basis since a hallmark of commerciality is a serious interest in profit, but involves no requirement that there be a minimum level of profit.

158. Thus far I have not engaged with the appellants' core allegation that Mr Thornhill could not competently advise that there was "no doubt" that all of the constituent elements of the "trading" test were met. In other words, even if Mr Thornhill's approach was not negligent, and he was entitled to advise non-negligently that the tax benefits were available, was it negligent to do so in the unequivocal terms he adopted in his opinions?
159. Mr Adam submitted that the strength of the judge's finding that Mr Thornhill's approach (based on *Ensign Tankers*) was reasonable, together with his detailed factual assessment of the complex contractual documentation comprising the transaction, which entitled Mr Thornhill to conclude that the transaction was inherently a trading transaction, justifies the unequivocal advice he gave that there was no doubt this was trading commercially for profit. Mr Adam emphasised that on the *Ensign Tankers* approach, Mr Thornhill concluded that since Warner Bros were undoubtedly trading on a commercial basis, when the LLP stepped in and took over part of the activities previously done by Warner Bros, carried on in the same way, and there were parallels in the film world of people carrying on a separate activity such as that carried on by the LLP that meant this too was trading on a commercial basis. Mr Thornhill recognised the possibility of this conclusion being undermined by an argument based on "denaturing", in other words, if the way a trade is carried on is for tax (or other) reasons substantially different from the way it would be carried on commercially then it might no longer be a trade, but for the reasons given, concluded that this did not affect the LLP. Mr Adam submitted that if Mr Thornhill was entitled to adopt that approach, he was entitled to express himself in strong and unequivocal terms. Moreover, in relation to the detailed factual findings and evaluation made by the judge which supported Mr Thornhill's conclusions, Mr Adam submitted that this court cannot interfere with these unless satisfied that the judge's assessment was plainly and obviously wrong. Mr Adam accepted however, that when it comes to whether or not a reasonably competent professional could or could not advise as Mr Thornhill did, this is a hard edged question of law, and the judge was either right or wrong in determining it.
160. To recap, the judge took the question of breach of duty in two stages: first he dealt with Mr Thornhill's approach as a matter of tax law, concluding that it was an approach a reasonably competent tax silk could have taken at the time Mr Thornhill advised. Secondly, he addressed the detailed criticisms made by reference to the detailed terms of the DA, MSA and Call Option agreement to determine whether, in light of the facts

and the wider circumstances, a reasonably competent tax silk could have concluded that the LLPs had a genuine commercial trading purpose, and would be trading as a matter of law, concluding that such a tax silk could have concluded that the LLP had such a purpose and would be trading commercially with a view to profit. Having dealt with the question of breach in those two stages, the judge separately addressed what he described as the appellants' alternative case of breach of duty in failing to give a specific warning that there was a significant risk that one, other or all of the three statutory tests would fail so that the tax benefits promised would not be available (see paragraphs 326 to 340). The judge held that even if Mr Thornhill owed a duty of care to the investors in respect of the advice he gave, the investors were not his clients, and they had been warned to take (and warranted that they relied only on) their own advice: paragraph 334. In these circumstances, and for all the reasons leading to the conclusion that no duty of care was owed at all, the judge held that even if there was a duty, it did not extend to advising the investors on the risks to them of acting on his advice: see paragraph 335.

161. In the alternative, and if he was wrong on that point, the judge held:

“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.”

He dealt with what a non-negligent opinion containing the appropriate risk warning would have looked like as follows:

“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".

162. The fundamental question remains whether the judge addressed the gravamen of the appellants' case: even if Mr Thornhill's approach was not negligent, and he could advise non-negligently that there would be trading as a matter of law so that the tax benefits would be available, was it negligent to do so in such unequivocal terms without any caveat as to the degrees of risk, both in his opinions which he consented to be shown to potential investors, or in the IM (based on his opinions), the material sections of which he approved and in which he consented to his name being used?
163. Mr Stewart submitted that the judge failed to grapple with this question. Had he done so, he submitted that it is abundantly clear that the judge would have concluded that to advise so confidently and in a way that pro-actively denied any significant risks was negligent. In the context of the sale of investments of this kind, any material doubt would have had to be reflected in the IM to avoid Scotts being guilty of misrepresentation. But it was only unequivocal statements which were ever likely to persuade investors to invest – and, indeed, render unnecessary the taking of advice which might otherwise have occurred.
164. It seems to me that there is some confusion in the way the judge approached the question of breach and whether he addressed the gravamen of the case advanced by the appellants. It may be that the appellants' case had a different principal focus and the emphasis has shifted. But whether that is correct or not, I am not sure that the judge squarely addressed this question. The closest the judge came to doing so was at

paragraph 338 (as Mr Adam accepted), but this was in the context of the alternative case on duty to warn and when dealing with the nature of such warning.

165. There is a single composite question that does not appear to have been answered by the judge, namely, could a reasonably competent tax silk have advised that there was no doubt that the LLP was trading on a commercial basis with a view to profit without any qualification at all. This is not about whether there was a separate duty to warn. This is a question of what reasonably competent advice would have been in the counterfactual circumstances where a duty was owed by Mr Thornhill to potential investors who read the IM and to whom his advice was available on request. In this counterfactual, Mr Thornhill knew that his advice was required on the point of critical importance to investors, and would be used to assist in selling the Scheme to investors who were being encouraged by the IM to invest substantial sums in the Scheme, and to whom he owed a duty, albeit as non-clients.
166. As the judge held on the alternative case, expressing his opinion on the trading issue in unequivocal terms was not negligent provided that the way in which Mr Thornhill's view was expressed did not negate or undermine the accompanying risk warning in the IM; and the more unequivocal the terms in which the opinion was expressed, the greater would be the corresponding need for it to be caveated by reference to a clear risk warning. On the judge's findings, not only was absolute and unequivocal advice given by Mr Thornhill on the composite question of trading without any risk warning, but while the IM contained certain risk warnings, these were of a general nature only and contained no detail as to the three statutory tests of trading, commercially or with a view to a profit. That meant there were no specific warnings given to investors as to the satisfaction of those tests.
167. In the circumstances of this case and in light of his findings, it seems to me that had the judge addressed the gravamen of the appellants' case on breach, he could not but have concluded that no reasonably competent tax silk could have expressed such an unequivocal view in relation to the three statutory tests, even on the strength of *Ensign Tankers*. This unequivocal view did undermine the accompanying warnings in the IM. Non-negligent advice would, at least, have acknowledged that no two cases are factually the same, and accordingly no existing authority could be said to cover the circumstances of the LLPs' case exactly; and that the three statutory tests each engaged a risk of challenge by HMRC. Accordingly, notwithstanding the presence of IFAs and the requirement for investors to take their own tax advice on the tax consequences of the Scheme, I consider that reasonably competent tax advice should have identified the risks. To this extent only, in my judgment the judge was wrong to conclude that had a duty of care been owed by Mr Thornhill to the appellants, it would not have been breached.

III. Causation and reliance

168. Once again these grounds do not arise. I will, however, deal with the appellants' generic case on causation, albeit briefly.
169. The appellants' case was that if Mr Thornhill had given non-negligent advice, the IM which Mr Thornhill approved and Mr Thornhill's opinions could not have been expressed in the terms they were; the Scheme would, accordingly, never have been

presented to investors; and in any event even if it was, no investor would have invested in the Scheme.

170. Even if Mr Thornhill negligently overstated his advice, I am not persuaded that non-negligent advice would have warned that there was a significant risk of a successful challenge to this Scheme. This was the appellants' own self-imposed threshold for success on causation on the above basis. The appellants came nowhere close to establishing this or that the IM would have had to be differently worded, for the reasons given by the judge. As the judge held, Mr Thornhill could at one and the same time hold and express a very firm view as to the answer to the trading question, while acknowledging that an alternative view might be taken by others. On this basis I cannot see that the IM would have required any different wording. In my view the judge's conclusion on this aspect of the case on causation cannot be impugned.
171. It is thus unnecessary to consider further the judge's specific findings on individual causation and on reliance, and in all the circumstances, I prefer not to do so.

Conclusion

172. For all these reasons I have concluded that the appeal should be dismissed. As the judge correctly held, it was not reasonable for investors, in light of the terms of the IM, subscription agreement and checklist and given the factual circumstances and context, to rely on Mr Thornhill's advice and opinions without independent inquiry, and it was not reasonably foreseeable by Mr Thornhill that they would do so. Accordingly, Mr Thornhill owed no duty of care to potential investors for the advice and opinions he gave in relation to the Scheme, and in approving the IM.
173. It would be remiss of me to conclude this judgment without acknowledging the professionalism and care with which the documents in the appeal were prepared, and the excellence of the written and oral arguments on both sides of the appeal (not only from Mr Stewart and Mr Adam, but from the counsel and solicitor teams sitting behind them) which have been of great assistance to me. I am very grateful to them all.

Lady Justice Carr:

174. I agree that this appeal should be dismissed. However, since I had initial reservations about such an outcome on the question of whether or not a duty of care was owed, I add a few words of my own on that topic.
175. A specialist professional who voluntarily provides unequivocally positive advice to their client in the knowledge:
- i) that the advice would be made available to a third party without any express disclaimer of responsibility; and
 - ii) that the third party would be likely to "take comfort" from that advice and (with their advisers) be assisted by it in deciding whether to enter into a financial transaction,

exposes themselves to the risk of a claim that they owed the third party a duty of care based on an assumption of responsibility.

176. As the Judge pointed out (at [88] to [90]), there were in this case multiple factors pointing in favour of the existence of a duty of care on the part of Mr Thornhill towards investors. These factors included the absence of any disclaimer of responsibility; the fact that he gave his (positive and unequivocal) advice in the knowledge that it was to be made available to potential investors who asked for it; 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 and had given positive advice on the prospects of the tax benefits being achieved; his advice assisted potential investors and their IFAs – it was on the very point of “critical importance”, namely the prospects of achieving the relevant tax benefits, an issue on which there was no conflict of interest between Scotts and potential investors.
177. However, for the reasons identified by Simler LJ, these factors are not enough to get the appellants home. The only gateway to Mr Thornhill’s opinion was through the IM. As the Judge said, the terms of the IM are “critical”: on a fair reading, potential investors were advised to consult their own tax advisers on the tax aspects of the Scheme. Further, to Mr Thornhill’s knowledge, no investor could subscribe to the LLP without warranting that they had relied only on the advice of or had only consulted with their own professional advisers. The requirement for such a warranty was entirely unsurprising, not least given the mandatory involvement of an IFA on behalf of each and every potential investor.

The Chancellor:

178. I agree with both judgments.

