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Case Number: TC09359

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2017/01962 & 05570 & 05449

Heard on: 6, 7, 8, 9, 10,13 and 14 June 2022
Judgment date: 26 November 2024

Before

TRIBUNAL JUDGE HARRIET MORGAN

Between

MR CHRIS HOYLE
DR TREVOR JARMAN
MR ALISTAIR FORSYTH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant:	Mr Andrew Thornhill KC and Mr David Welsh, of counsel, instructed by Clay GBP
For the Respondents:	Ms Elizabeth Wilson KC and Mr Max Schofield, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

PART A - INTRODUCTION

1. These appeals are made in respect of income tax computed under chapter 5 of part 13 of ITA 2007 ("**chapter 5**") or capital gains tax which HMRC seek to impose on sums received by the appellants on the sale of their "Capital Accounts" in certain limited liability partnerships ("**LLPs**"). Between 2004 and 2006, with the advice and assistance of Scotts Atlantic London Limited ("**SA**"), the appellants invested in the LLPs which were formed to acquire and lease films and which claimed tax relief on the expenditure on the films ("**film tax relief**"). The sums on which HMRC seek to impose tax were received by the appellants under arrangements they entered into in January and April 2013 whereby they exited from that structure ("**the exit arrangements**"). All references to legislation in this decision are to chapter 5 unless stated otherwise.

2. The background to film tax relief is helpfully summarised by the Court of Appeal in *Samarkand Film Partnership No. 3 & Others v Revenue And Customs* [2017] STC 926 ("*Samarkand*").

(1) At [13] the Court of Appeal said this:

> "Expenditure on the production or acquisition of a film would normally have been capital expenditure which formerly qualified for 100% first year capital allowances. This gave rise to substantial tax avoidance, however, and in 1982 legislation was introduced which deemed such expenditure to be revenue expenditure to be written off over the lifetime of the film against income from the film. In 1992 a new tax relief was introduced to ease cash flow difficulties faced by film producers, contained in s 42 of the Finance (No 2) Act 1992. This allowed expenditure on the production or acquisition of British qualifying films to be written off over three years rather than matched against income. In 1997, a further new tax relief was introduced with the object of stimulating the production of films in the UK, contained in s 48 of the Finance (No 2) Act 1997. This allowed expenditure on the production or acquisition of British qualifying films with budgets of £15m or less ... to be written off fully on completion."

(2) At [14] the Court of Appeal explained that in practice the actual film-makers could not take advantage of film tax relief because they did not have any income. Instead, the relief was normally exploited indirectly through arrangements with third parties, either subsidiaries of banks or partnerships of wealthy individuals. Where wealthy individuals were involved they usually obtained the benefit of the relief in effect by using their share of the tax loss to shelter other income. That is what happened in this case.

3. In this case, the transactions entered into in 2004 to 2006 operated as follows:

(1) Mr Hoyle was a member of the Avondale Film Partnership LLP ("**Avondale**"), Mr Jarman was a member of both the Chamberlain Film Partnership LLP ("**Chamberlain**") and the Repton Film Partnership LLP ("**Repton**") and Mr Forsyth was a member of the Downing Film Partnership LLP ("**Downing**"). In this decision the individual members of these LLPs are referred to as "**members**" or "**partners**".

(2) Each LLP acquired film rights using capital contributions made by its members and leased the film rights to a lessee company which was typically a special purpose vehicle set up by a film studio. The members funded around 80% of their capital contributions using borrowings from the Bank of Ireland ("**BOI**") which were arranged by SA ("**the loan(s)**") and the remainder from their own personal resources. The loans were made on a "full recourse" basis; repayments and interest were to be met from the members' drawings from the LLP but, if they were insufficient, the members would have had to meet the shortfall from their own resources.

(3) Each LLP (a) claimed film tax relief in respect of its expenditure on the relevant films under s 48 Finance (No.2) Act 1997 and s 42 Finance (No.2) Act 1992 on the basis that it carried on a trade of the exploitation of film rights, and (b) allocated what was considered to be the resulting trading loss ("**the loss**") to the members in accordance with their profit shares in the LLP. The members claimed relief for their share of the loss under s 380 and s 381 of the Income and Corporation Taxes Act 1988 ("**ICTA**") and capital gains tax relief under s 72 Finance Act 1991 ("**the appellants' reliefs**"). The members claimed tax relief for the cost of the interest payable on their loans which HMRC largely allowed.

(4) The film studio entered into the arrangements to secure a fixed amount of funding (termed "**the studio benefit**") from the sale of the film rights to the LLPs, as Mr Dryburgh of SA confirmed, typically of 7% to 10% of the value of the film from which the studio was responsible for meeting its own costs. Mr Dryburgh also confirmed that (a) for the most part the lessee companies were different from the producing company; the lessee was set up specifically to enter into the lease and deal with the LLP, (b) the rental payments due under the leases over 15 years, ignoring tax, were designed to provide the members with sufficient sums to repay the loans over the 15 years, (c) there were arrangements in the lease which ensured that at the end of the deal the film could go back to or be re-acquired by the film studio.

(5) At the outset, the film studio deposited a sum at least equal to the loans with ABN Amro to secure the rental payments due under the leases over 15 years. BOI was further secured by (a) a charge by each LLP over all its assets, and (b) a charge by each member over his interest in the LLP.

(6) Under the terms of a statement of practice in place at the time (SPI/98), HMRC set out a number of matters which they considered were needed for businesses to be able to take advantage of film tax reliefs under a sale and leaseback structure. One of those was that the acquirer/lessor should not be involved in the process of establishing lessee guarantees. Hence it was thought necessary for a bank separate from the lending bank to provide a guarantee of the lease payments. Under the terms of each guarantee, in its capacity as charge holder, BOI had the right, upon the occurrence of certain events but, in any case, after three years, to call for the sum in the deposits equal to the net present value of future lease payments to be transferred to accounts in BOI in the name of the lessees, over which BOI would have a charge.

(7) After three years BOI took over the deposits and it then paid the LLPs the lease payments plus interest. The LLPs paid out profits to members as drawings and the members used the drawings to repay their loans. All this was fully secured (there was a charge over the deposit).

(8) The interest on the deposit and the interest on partner loans was fixed from the outset by swaps. The rate was 5.24 percent.

(9) As at February 2011, some of the lessees involved in the structure with Chamberlain and Repton ("**the dissolved lessees**") had been struck off the register of companies as they had failed to set aside funding from their net benefit to meet ongoing accountancy and company secretarial costs over the 15 year period and had not filed accounts and/or annual returns.

4. As set out in the financial illustration in the investment memorandums produced in 2006 and confirmed by Mr Dryburgh, the economics of these transactions were intended to operate as follows:

(1) For every £100,000 invested in the relevant LLP, the member provided £20,650 from his own resources and funded the rest with his loan. On the basis that the member was a higher rate taxpayer who, at that time, paid tax on income at 40%, he received a tax credit of £39,000 ("**the tax credit**|") and so, in cash terms, obtained around £19,344 which he could use to reinvest (or for such other purposes as he may choose). If the member was able to obtain a return on the tax credit of at least 4.99% (a compounded rate after tax), he would break even under the transaction. This rate was referred to as the hurdle rate.

(2) The member was taxable on the rental income at 40% but in computing his taxable income could deduct interest on the loan. The rent was slightly depressed in amount initially but rose by 5% by the end of year 15. In effect, the member was allowed a greater time value use of the tax credit; he paid less tax at the start of the leasing arrangements as he obtained the greatest amount of relief for interest paid at that time. Mr Dryburgh agreed that, in general terms, the scheme was more painful to the investor's wallet year by year and that the economics of the model were based on the 40% tax rate applying. He said, in effect, that, in cash terms, by the end of the 15 years the investor would pay all of the tax credit back and more but with the benefit of, "the time value of cash you would break even" provided the member obtained the hurdle rate on any investment of the tax credit.

(3) Mr Dryburgh agreed, in effect, that if a member could leave the LLP without any exit charge before his position became negative (in around 2018/19), the tax credit would meet his personal contribution. He noted that the model shows that if the member left in 2013 in cash terms he would be £14,476 ahead. He accepted that there would come a point in the life of the transactions where there would a real cost to the member and the economics of this product were worked out on day 1 on the basis of the member being a 40% tax rate payer.

5. After these transactions were entered into and the exit arrangements were implemented, it was decided in *Samarkand* that film leasing of a type very similar to these arrangements is not a trading activity as the term trade is to be interpreted for tax purposes; it is an investment. On the basis that the LLPs/members were not carrying on a trade, as that term is to be interpreted for tax purposes, they did not satisfy the requirements in the relevant legislation to be entitled to the film tax reliefs, the loss and the appellants' reliefs. However, HMRC did not challenge the position in any material respect, whether on the basis that the LLPs did not trade or otherwise, and are now not able to do so as the relevant time limits have expired.

6. When the exit arrangements were implemented in January and April 2013 it was thought that the LLPs were carrying on a trading activity and that the claims for film tax relief which resulted in the claimed loss and the appellants' reliefs were validly made. HMRC consider that the exit arrangements were intended to enable the appellants to exit the structure whilst sidestepping chapter 5. In very broad terms, chapter 5 operates, in effect, to claw back the benefit of losses/reliefs obtained under structures such as these, where the partners/members enter into

arrangements designed to enable them to exit the structure early without any further tax charge and without disturbing the losses/reliefs. In more detail:

(1) Section 797 applies where (a) an individual makes a "film-related loss" (as defined in s 800) in "a trade" for which he claims certain reliefs such as the appellants' reliefs (a "**relevant claim**"), (b) there is "a disposal of a right of the individual to profits arising out of the trade" (as defined in s 799) (a "**relevant disposal**"), and (c) an "exit event" occurs. A loss is a "film related loss" if the calculation of profits or losses that it results from is made in accordance with any provision of Chapter 9 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 ("**ITTOIA"**).

(2) Section 799 provides that any reference to "a disposal of a right of an individual to profits arising from a trade" includes, in particular, any of events A to D. The parties agreed that the only events of relevance here are A and B:

(a) Event A is "the disposal, giving up or loss by (an) the individual…of a right arising from the trade to income (or any part of any income)". It does not matter for this purpose if the right is disposed of, given up or lost as part of a larger disposal, giving up or loss (s 799(2)).

(b) Event B is "the disposal, giving up or loss of the individual's interest in a firm that carries on the trade" (including the dissolution of the firm) (s 799(3)).

(3) There is an "exit event" for this purpose whenever:

(a) the individual receives non-taxable consideration, defined as consideration not chargeable to income tax (s 798), or

(b) an increase in the individual's claimed film-related losses or a decrease in the individual's capital contribution results in (i) those losses becoming greater than the capital contribution, or (ii) an increase in the amount by which those losses exceed that contribution (s 797(2)). An individual's "capital contribution" is defined by s 801 as the amount which the individual has contributed "to the trade as capital" less so much of that amount (if any) as is within s 801(6), which covers amounts which (a) the individual has previously drawn out or received back, (b) the individual is entitled to draw out or receive back, (c) another person has reimbursed to the individual, (d) the individual is entitled to require another person to reimburse to the individual. References (i) to drawing out, receiving back or reimbursing an amount is to doing so directly or indirectly, and (ii) to reimbursing an amount includes discharging or assuming all or part of a liability of the individual. Sums received back or drawn out are not included if they are chargeable to income tax as profits of a trade.

(4) Where these conditions are satisfied the individual is treated as receiving an amount of income every time a chargeable event occurs (s 797(3)). There is a chargeable event whenever (a) the individual makes a relevant claim (if by that time a relevant disposal and an exit event have occurred), (b) a relevant disposal occurs, (if by that time an exit event has occurred and the individual has made a relevant claim), or (c) an exit event occurs (if by that time a relevant disposal has occurred and the individual has made a relevant claim) (s 797(4)).

(5) The amount of income treated as received when a chargeable event occurs is equal to the sum of (a) the total amount or value of all non-taxable consideration received by the individual or relevant disposals, and (b) and the total amount (if any) by which the individual's claimed film-related losses exceed the individual's capital contribution (s 797(5)).

(6) It does not matter for the purposes of s 797 whether the individual (or anyone else) is still carrying on the trade when the chargeable event occurs or if the individual receives both non-taxable and taxable consideration for a relevant disposal (s 797(6)).

7. In summary, the exit arrangements were designed to enable the appellants to realise the economic value of their interests in the LLPs and exit the structure early, before the tax credit was clawed back in full, without them being taxable on that economic value:

(1) In January 2013, the members assigned their "Capital Accounts" in the relevant LLP (as defined in the agreements governing the LLPs ("**the LLP agreements**")) to Birdcrest Limited ("**Birdcrest**") in return for a price ("**the purchase price**") which (a) was sufficient and, was used, to repay the loans so that the members could exit the arrangements under the second stage, and (b) was considered to be a non-taxable capital sum which was not subject to any charge to tax under chapter 5. Mr Dryburgh confirmed that the idea was the exit arrangements would not attract a material tax charge under chapter 5. The thinking was that the appellants did not make a relevant disposal at this stage

(2) In April 2013, the LLPs paid Panosh Limited ("**Panosh**"), a company incorporated and tax resident in Ireland, around €120,000 to buy all the appellants' remaining interests in the LLPs ("**the residual interests**")

for only €2. The appellants accept that they made a relevant disposal of the residual interests but consider that the resulting income to be brought into charge under chapter 5 is only €2.

8. As explained further in Part C:

(1) In HMRC's view (a) the purchase price received by each appellant is taxable as income under chapter 5 in either the tax year 2012/13 or the tax year 2013/14, or (b), if that is found not to be correct, it is taxable under the capital gains tax regime.

(2) The appellants now argue that (a) chapter 5 is simply not in point. Although, during the periods in which the film lease structure was in place and the exit arrangements were entered into, it was considered that the LLPs carried on a trade, the decision in *Samarkand* later established that the LLPs did not carry on a trade. Hence there is no "loss in trade" and there can be no relevant disposal, (b) if that is not correct, their view remains that chapter 5 does not apply in any event to impose any material tax charge as set out in [7], and (c) there can be no capital gains tax charge on the purchase price.

(3) HMRC appeared to accept that the LLPs did not carry on a trade as that term is usually interpreted. However, in their view, (a) chapter 5 nevertheless applies to the exit arrangements on the basis that, on a purposive interpretation, the term trade, when used in chapter 5, means the activity which is the subject of a successful undisputed claim for film-tax reliefs, and (b) the appellants are wrong that in any event there was no relevant disposal which triggers a tax charge by reference to the full economic value they realised.

9. In summary, for the reasons set out in Part C, we have decided that (1) chapter 5 is not in point as the LLPs did not carry on a trade at the relevant time; we do not accept HMRC's interpretation of the relevant provisions, (2) if we are wrong and chapter 5 is in point, (a) the conditions are satisfied for chapter 5 to apply to tax the purchase price as income, but (b) if that is not correct, the purchase price is not subject to capital gains tax.

Part B - Facts and evidence

10. We have found the facts on the basis of the documents in the bundles and the evidence given by the appellants, Mr Dryburgh of SA and Mr Gordon, Mr Rangeley and Mr Dally whose roles are described below. All of the witnesses attended the hearing and were cross-examined. Our views on the credibility of the witnesses were formed at the time of the hearing. We note that most of the witnesses were evidently very conscious of the appellants' own case. On occasions and to varying degrees, (a) at the hearing some of the witnesses had a tendency to put forward that case rather than focussing on the specific question they were asked, (b) it appears that, in their desire to present the case in its best light, in their witness statements or at the hearing, some of the witnesses made some statements that lack credibility in light of the design of the arrangements and overall evidence, (c) it transpired that some of the witnesses did not have much, if any, actual knowledge of or recollection of the events they described in their witness statements. That comment applies, in particular, to Mr Gordon, Mr Dally and Mr Forsyth. Whilst we do not accept and/or find much of the comments made in the statements as lacking in relevance, we have recorded it in some detail, in case of any appeal from this decision.

Operation of the arrangements

11. Mr Dryburgh confirmed that each LLP had two designated members, Scotts Atlantic Nominees Limited and Scotts Atlantic Secretarial Services Limited, and that all the investors in the LLPs were individuals. He thought the shares in the designated members were owned by SA. As regards the management of the LLPs:

(1) He said that (a) a SA company, Scotts Atlantic Media Tax, was originally engaged to provide accounting, tax and secretarial services, (b) in 2006, SA set up a trust to hold all the money which was paid for the full 15 year period, so it could be used to carry out these services, and at that time 4M Chartered Accountants were to look after all those services, (c) as at 2011, 4M Chartered Accountants provided all of the services that the members of the LLPs saw in terms of the provision of the tax certificates, annual returns, and all of the things that the members might see on a yearly basis, (d) members received annual reports or income statements which set out the rental income from 4M Chartered Accountants, and (e) BOI sent members certificates regarding interest on the borrowings.

(2) He agreed that (a) anything other than purely tax or administrative matters, which fell within the purview of 4M Chartered Accountants, was dealt with by the designated members/SA. He said "at that time we had to answer queries from partners on different things all the time, so that would have taken place, but we had all the knowledge of how things had been set up, people's investments, we'd carried all the financial due diligence that was originally prepared. So…all the knowledge was with [SA]", (b) if one of leases had some important clause that was missing or some other issue and needed amending, SA would identify the problem: "We would be the ones that would have probably identified it, unless it came from a lawyer, but that would have then come to us first, so if there was something identified by somebody else they would have come to [SA] and likewise the banks would have come to us", (c) in that capacity, SA was acting on

behalf of the specific LLP. He said they did very little after everything was set up with the banks and they delegated the accounting. Other than dealing with queries from partners/their advisers from time to time there was very little they had to do.

(3) He did not agree that if there was a problem the designated members were the persons formally instructed or engaged. He said that the designated members were there to ensure the accounts were prepared and submitted and to deal with the tax returns. A designated member has no further statutory requirements other than making sure such things are taken care of. The LLPs specifically did not have a managing partner. They were private partnerships.

Sale of Capital Accounts - Events in 2011

Proposal in February 2011

12. On 14 February 2011 SA wrote to members with a proposal ("**the February letter**") for all members to sell their Capital Accounts to a buyer for 98.9% of the outstanding loan balances due to BOI. The February letter listed three reasons for the proposal:

(1) The first was "Exposure to the risk of Lending Banks and Guaranteeing Banks failing":

> "As a consequence of the turbulence affecting global financial markets from 2007 to the present date and the ensuing well-documented capital adequacy issues which have arisen in the banking sector, Partners are now more aware of the real risk that, in the event of their Lending Bank and/or Guaranteeing Bank failing, the collateral which provides security for the lease rentals distributed as drawings to repay their loans may be forfeited, thereby exposing Partners to the obligation to re-pay capital contribution loans out of their own funds. This issue is made worse where Lending Banks have called, as is their right under their security arrangements over partnerships guarantees, for a Lessee's cash deposit in lieu of a bank guarantee to provide ongoing lease security. In such circumstances, the Partnerships and Partners are relying upon agreements between the relevant Lessees and the Lending Banks to provide security for future lease payments rather than having in place a direct guarantee letter of credit from a Guaranteeing Bank. This leaves Partners more exposed in the event of Lending Bank failure. In addition, a number of Partners have drawn down loans from UK branches of overseas Lending Banks which may become reliant upon fiscal support from the foreign governments."

(2) The second was the increase of the top rate of income to 50%:

> "Whilst this was considered a risk factor when Partners decided to contribute to Partnerships, Partners made their investment decisions to support the British film industry through investing in a film sale and leaseback partnership based partly on those election pledges to keep the top rate of tax at 40%. For those Partners who are now faced with a 50% top rate of income tax, their investment in the sale and leaseback partnerships may well have become uneconomic.

(3) The third was that "Many Partners' financial and personal circumstances have changed or Partners have died or become bankrupt":

> "Despite these issues, Partners are not in a position to sell or gift away or otherwise pass on their interests in the partnerships or resign from Partnership, since to do so they would need permission from the Lending Banks, who have a charge over Partners' interests in their partnerships and over the Partnership assets. Scotts are not aware of any partner receiving such permission. By repaying Partners' capital contribution loans to the Lending Banks in the manner proposed below, Partners would have no further borrowings and hence no further exposure to any bank and would be free to gift or sell their interests in their Partnerships. Partners would also be free to sell or gift their shares in the Partnership subject to the fresh security interests which the Proposed Purchaser would take over their Partnership assets. If a purchaser or giftee is found for such an interest, it is likely to have only a nominal sale value and the advice of senior tax Counsel (Andrew Thornhill QC) is that neither the proposed repayment of loans from the proposed sale of Partners' Capital Accounts nor such a subsequent sale would result in a tax charge beyond a nominal tax charge on any price paid by a purchaser or the market value of any gift, which as mentioned, is believed to be nominal. It must be stressed that any purchaser or giftee would then stand in the place of existing Partners in their Partnerships and there is no certainty that such a purchaser or giftee would be found. Alternatively, following the proposed transaction, Partnerships would be in the position to dispose of their assets subject to the permission of the Proposed Purchaser and subject to the lifting and reimposing of the Proposed Purchaser's charge over those assets. Again there is no certainty that such a purchaser can be found or that the Proposed Purchaser of Partners' Capital Accounts would agree to such a transaction."

13. The proposal was described in the February letter as follows:

> "It is now proposed to Partners that they sell their beneficial interests in their Capital Account to the Proposed Purchaser and use the funds from such a sale to repay their existing capital contribution loans from the relevant Lending Banks. In order to allow the Proposed Purchaser to recoup its investment, it would benefit from Partners' future drawings from the Proposed Purchaser up to the level of drawings arising from secured minimum rentals under the Partnership leases. Following repayment of the existing loans, the Lending Banks

would be able to lift their security interests over Partnership assets which would allow the Proposed Purchaser to take security for its interest in Partners' drawings by taking a charge over the secured minimum rentals. Following completion of the proposed transaction Partners would:

• have no capital contribution loans from the Lending Banks; have no security charges over their Partnership interest;

• would be free to sell or gift their Partnership interest or arrange for their Partnership to sell its assets but would;

• still be liable to income tax on sums equal to their pro rata shares of minimum rentals, as they would still be a Partner in the relevant Partnership and be entitled to the same Partnership share of profits or losses but;

• would not be entitled to interest relief on any payments to the Proposed Purchaser beyond the purchase price paid by the Proposed Purchaser. The proposed transaction would therefore leave Partners with no capital contribution loans and leave them free to sell or gift their interests in their partnerships or arrange for their partnerships to sell their assets but would result in a worse tax position for Partners if they did not subsequently gift or sell their Partnership interests or arrange for their Partnerships to sell their assets."

14. Under a heading "possible subsequent action" it was stated that it was proposed that, following the disposal of Capital Accounts, SA or another party would be engaged to find a purchaser for (1) either "the Partners' remaining interests in their Partnerships, subject to the new security charges over the minimum lease payments" or (2) "the sale of the Partnership's assets subject to obtaining the approval of the Proposed Purchaser and to its agreeing to the lifting and reinstatement of its security". It was noted that it was thought that the proceeds of such a sale would be negligible and, indeed, "it is likely that the Partners would have to pay any purchaser a fee in an amount to be agreed at the relevant time to take over their interests. Hence there is likely to be no sale proceeds for distribution to Partners".

15. It was set out that SA had sought the opinion of tax counsel, Mr Andrew Thornhill QC, on the tax position of the proposed sale of Capital Accounts and any subsequent gift or sale of residual interests. The summary included that counsel considered that it was difficult to see how any taxable capital gain could arise and that he did not consider that chapter 5 would apply or that the proposed transactions would result in a reduction of sideways relief under s 110 ITA for losses in the first four tax years or give rise to any other material tax charge.

16. The February letter set out that:

(1) The disposal of Capital Accounts would be to a company to be set up in the Jersey and managed and controlled by Plectron Trust Company Ltd in Jersey ("**Plectron**"). Burgos Investment Limited ("**Burgos**"), a company also resident in Jersey and managed and controlled by Plectron, was willing in principle to provide a loan facility to the purchaser for the purpose of acquiring the Capital Accounts.

(2) The purchaser would pay a purchase price for the Capital Account equal to 98.9 % of the outstanding loan balance due to the lending banks by each member. Members would have to fund the balance required to repay their loans fully.

(3) Other costs which would have to be met included any fees payable to the lending banks to cover any early redemption costs, broken funding and/or break costs and any and all other charges made by lending banks, legal fees including those incurred by the lending banks, guaranteeing banks and lessees, as well as fees payable to lessees to secure their participation in the transaction, where applicable, costs incurred in reinstating any lessees onto the Companies House register, and fees payable to SA (who were to engage such third parties as required to complete the sale). It was proposed that a sum would be payable by members to cover all of the above costs equal to a percentage of the capital outstanding on their loans as at 5 April 2010 to be notified and that sum would include the amount required to meet the amount by which the purchase price was less than the outstanding loan. The fees payable to SA would be a sum equal to the amount that was left after paying all of the other third party costs associated with the transaction.

(4) The lending banks would require the repayment of all loans in a given LLP.

(5) It was proposed that the LLP agreement should be amended such that in the event that 75% or more of members by number wished to accept a proposal to sell (whether such sale was of Capital Accounts, their partnership interests or the partnership's assets) the consent of those members would be sufficient to approve a partner's consent that every partner should sell.

17. The following "Risk factors" were set out:

"1. There is no certainty that, following a sale of a Partner's Capital Account, a purchaser or giftee could be found for a Partner's interest in his or her Partnership or a buyer found for their Partnership's assets In such eventuality, those Partners will remain liable to tax on a sum equal to his or her share of the Partnership's minimum lease rentals but will not receive the benefit of any interest relief, thereby resulting in a significantly increased tax liability.

2. In the event that Counsel's opinion on the tax analysis is incorrect in any matter, an unanticipated tax charge may arise as a result of the transactions envisaged here.

3. With the litigious approach taken by HMRC today, particularly since 2005, they may seek to challenge tax counsel's view on the taxation analysis in a tax tribunal or to a subsequent appeal court and Partners must be prepared for such an approach. It is also very likely that HMRC will wish to review any transactions outlined here for every Partnership and Partners should be aware that they are likely to open enquiries into their Partnership and Partners tax affairs to allow them to carry out such a review.

SA is not authorised to and does not in fact, give legal, investment, accounting or tax advice and those wishing to participate should therefore seek their own independent investment and tax advice before proceeding. The opinion of Counsel is available to partners and their advisers for information purposes only and may not be relied upon in whole or in part howsoever or at all."

18. In his witness statement Mr Dryburgh gave the following reasons for the proposal:

(1) The strike off of the dissolved lessees had the potential for disastrous consequences for Mr Jarman and Mr Forsyth. As at February 2011, BOI's counterparty in relation to the dissolved lessee deposits was the Crown, as owner of bona vacantia. In the event of the Crown disclaiming its bona vacantia rights, which is the Treasury Solicitor's ("**TS**") policy where it cannot benefit, BOI would have no counterparty and so would have no creditor for the deposits; it could have retained the deposits and not paid any lease payments. Had that happened, Mr Jarman and Mr Forsyth and their fellow members of Chamberlain, Downing and Repton would have faced having to meet payments under their loans from their own resources. For both Mr Jarman and Mr Forsyth and no doubt many others, this would most likely have resulted in their bankruptcy. Avondale had no such dissolved lessees. He was extremely concerned about the risk this posed for members and, as a responsible professional, felt he needed to consider ways in which that risk could be reduced or removed.

(2) As a result of the 2008 financial crisis, the Irish state and BOI were at risk of not being able to meet their debt obligations:

(a) As known from publicly available information, (i) a bailout deal for the Irish state was approved by the European Commission in November 2010, but the funds came with a high interest burden, and (ii) following this, the Irish state entered into a bailout agreement with BOI, funded by new cash from the Irish National Pensions Reserve Fund and a promissory note from the Irish state.

(b) In February 2011 the financial position of BOI was at best uncertain. Its well-being was inextricably linked with the Irish state and the Irish property market, in which BOI's loan book was heavily exposed. The Irish state was carrying a high interest burden at a time when its economy was weak. The position of the Irish state was also inextricably linked with that of the wider Euro Zone.

(c) In February 2011, a number of European states were in a similar position to Ireland, most notably Greece, Portugal, Italy and Spain. All were having to meet high interest costs when their economies were weak. Given the high exposure of German and French banks to the bank debts of those struggling countries, the risks of further shocks were significant and the interbank debt market had still not regularised. During the period from 2011 to 2013 newspapers and other media outlets carried a daily commentary on the crisis.

(3) Overall in February 2011 (a) the appellants were wholly reliant upon BOI continuing to meet its obligations to lessees, many of whom had been dissolved, (b) the lessees had no independent capital and could not be relied on to meet any shortfall in lease payments, (c) the LLPs and the appellants had no rights of set off against BOI's obligations under the relevant security arrangements, (d) in the event of bank insolvency, a trustee would immediately cease paying interest on deposits and post-liquidation interest would only be paid on bank debts if there was a surplus available after meeting all the pre-liquidation claims, (e) given that there was a need for BOI to pay interest on the deposits to meet their obligations, that would have resulted in a shortfall in lease payments, (f) if that occurred, the appellants would be required to meet payments on their loans from their own resources. If they were unable to do so, this would have resulted in an "Acceleration Event" under the terms of their loan facility letters resulting in the bank's liquidator calling for a repayment of all outstanding debts and interest under the terms of those letters, (g) if BOI became insolvent and its recovered assets were insufficient to meet pre-liquidation debts, it is likely that payments of post-liquidation lease payments under the terms of the relevant documents would have been even less than the remaining deposits charged under those agreements.

(4) In February 2011 therefore, (a) the members "found themselves dangerously exposed to an insolvency of BOI, a bank whose financial future and ability to raise funding was closely linked to the Irish state and a successful outcome of the European Debt Crisis" and (b) it is unlikely that they had perfect information about

BOI or the Irish state's financial stability. However, all would have been aware of the problems facing them and other European banks and states; there was commentary on the European Debt Crisis on a daily basis:

> "Put simply, at that time the Appellants and their fellow members were facing the real risk of having to meet substantial [loans] either partly or wholly from their own resources. For most that would have been financially disastrous."

(5) He became aware of the risks of bank bankruptcy as far back as 2008 and felt he had a responsibility to find a way to mitigate that risk. In November 2008 he put forward a proposal to HSBC Private Bank to refinance the loans for all of the partnerships and the LLPs for whom SA acted whereby HSBC would only have had recourse to members' drawings from their LLP or partnership and, in the event of a shortfall, no recourse to other resources. The proposals were not approved. They subsequently spoke to Barclays and Investec Bank about providing limited recourse loans. Investec also rejected the proposals and Barclays indicative pricing was prohibitive.

(6) We note that during cross-examination it became clear that any discussion SA had with Barclays about providing limited recourse loans was not in relation to these LLPs.

(7) During this period, he spoke to several people who had an intimate knowledge of bank debt such as Mr Gordon Kerr and Sir Peter Burt. Mr Kerr was involved in discussions surrounding the responses to the financial crisis and in 2010 put forward his views to the European Commission. Sir Peter Burt was the former Chairman and Joint CEO of HBOS PLC. They expressed their concern that more banks would fall and that they would have to meet capital contribution loans from their own resources.

19. In his statement Mr Dryburgh explained how the arrangements for the sale of the Capital Accounts came about as follows:

(1) In October 2010 he was introduced to Mr Stuart Gower of SWG Services Limited ("**SWG**") in Jersey by Mr Rupert English, who had managed ABN Amro's UK film sale and leaseback guarantee business. He put forward a proposal for Mr Gower's client to acquire the beneficial interest in the Capital Accounts at a discount to their value to be negotiated and agreed. He first became aware of the option of refinancing loans in this way from Grant Thornton. He considered that would be attractive to members as they would no longer have any charges over their members' interests. As well as the potential risk of bank bankruptcy, most members suffered substantial investment losses as a consequence of the financial crisis and many members and advisers wanted an option to sell or gift their interests.

(2) Mr Gower indicated that his client was willing to discuss the proposal further and they then established a single purpose company, Birdcrest, in the British Virgin Islands (BVI), to be managed by SWG in Jersey. The level of discount to be enjoyed by Birdcrest for acquiring the beneficial interest the Capital Accounts was subsequently agreed.

(3) They then discussed the proposals with BOI. BOI would not allow any member(s) of an LLP to repay their loans unless all the members of that LLP did so.

(4) (a) Under the then terms of the LLP agreements, any resolutions would only become binding upon the LLP if there was either a unanimous vote in a quorate meeting or there was a written consent by all members, hence, if any one member voted against a proposed resolution, it would be defeated, (b) it became clear that whilst members and their advisers understood the dangers and consequences of BOI's insolvency, not all wished to sell their Capital Accounts but they did wish to escape the problem which would occur if BOI failed. The solution for them was to refinance their fully recourse loans with a replacement loan with recourse only to their drawings from their LLPs to take away the danger of the lender's insolvency. Unfortunately, they were not prepared to pay for the costs associated with this. Revised proposals were required which ensured that those who wished to sell their Capital Accounts bore the costs for all. This led to a new set of proposals which gave rise to the loan option (see [20]).

20. Mr Dryburgh also said in his witness statement that (1) following the sale of Capital Accounts and the release of bank charges over members' interests, he considered that partners/members could subsequently seek a buyer or donee to acquire their interests or the LLPs' assets, if partnerships/LLPs subsequently resolved to allow that, (2) it was never in his mind that such a subsequent sale would be considered before partners/members sold their Capital Accounts, and (3) the February letter was clear in the outline of risk factors that there was no certainty that a purchaser or donee could be found. As set out below, (a) the evidence given at the hearing establishes that Mr Dryburgh had discussed the possibility of a sale of residual interests with a number of potential purchasers prior to the sale of the Capital Accounts and prior to the production of the February letter, and (b) it is reasonable to infer from the evidence that, at the time of the sale of the Capital Accounts, Mr Dryburgh/SA were confident that it would be possible for members to dispose of their residual interests shortly afterwards. We accept Mr Dryburgh's statement in (2) only to the extent that it can be taken to mean that he never had in his mind that, before the sale of

the Capital Accounts, there would be any formal arrangement with a purchaser for the sale of the residual interests or formal consideration of any such sale by the members.

Revised proposal in March 2011

21. On 29 March 2011, SA made a revised proposal ("**the March letter**") for (1) a replacement of the loans ("**loan option**") which was to operate as set out by Mr Dryburgh above, or (2) a sale of Capital Accounts followed by the sale (or gift) of the residual interests ("**sale option**"). The March letter and the explanatory document dated 14 February 2011 accompanying it included the following statements:

> "We are attaching a revised proposal to members to refinance their existing bank loans. Whereas a previous proposal was to refinance only from the proceeds from disposal of members' capital accounts, the revised proposal is to refinance either from a disposal of members' capital accounts or from the proceeds of a replacement loan. The intention of this amended proposal is that those members who have expressed a desire to hold on to their LLP interests throughout the remaining life of the LLP will be able to do so whilst allowing those members who wish to refinance and the proceeds of disposal of their capital accounts to do so. As previously mentioned, the lending bank has made it clear that they will require all their loans to be repaid at the same time and will not accept a partial repayment…Following the repayment of those members bank loans such members would be free to seek a purchaser for their remaining interest in the LLP.
>
> "By repaying Partners' capital contribution loans to the Lending Banks in a manner proposed below, Partners would have no further borrowings and hence no further exposure to any bank and would be free to gift or sell their interests and their Partnerships. Partners would also be free to sell or gift their shares in the Partnership subject to the fresh security interest which is the Proposed Purchaser would take over would Partnership assets. If a Purchaser or giftee is found for such an interest, it is likely only to have the nominal sale value and the advice of senior tax Counsel is that neither the proposed repayment of loans or proposed sale of Partners' Capital Accounts nor such a subsequent sale would result in a tax charge beyond a nominal tax charge on any price paid by a purchaser or the market value of any gift, which as mentioned, is believed to be nominal. It must be stressed that any purchaser or giftee would then stand in the place of existing Partners in their Partnerships and there is no certainty that such a purchaser or giftee could be found. Alternatively, following the proposed transaction, Partnerships would be in the position to dispose of their assets subject to the permission of the Proposed Purchaser and subject to the lifting and reimposing of the Proposed Purchaser's charge over those assets. Again there is no certainty that such a purchaser can be found or that the Proposed Purchaser of Partner's Capital Account would agree to such a transaction."
>
> "The proposal to those who may wish to remain in the LLP … for the remaining of life of the LLP … is that they enter into replacement loan agreement on terms which require them to use the full proceeds of those loans to repay their existing bank loans … and the replacement lenders recourse in the event of a shortfall of lease income would only be to the members' LLP drawings and not to members other assets. This is better than the current position with their existing bank loan where the bank would have recourse to all assets of the members in the event of a failure of the bank."
>
> "Mr Andrew Thornhill QC has confirmed that members availing themselves of such replacement loans would continue to enjoy the benefit of interest relief and there would be no detrimental tax consequences of obtaining such limited recourse replacement loans."

Resolutions in April 2011

22. Also in 2011 SA offered its services as project manager and those of Scotts Secretarial Services Limited and preparatory steps were taken to implement the March proposal but it was not implemented in full until 2013:

(1) On or about 14 April 2011, the LLPs gave their consent to members assigning all or any part of their interest in their "Capital Accounts" to a purchaser, and agreed to charge the LLPs' assets (including the deposits) to the purchaser (as new "beneficial owner" of the "Capital Accounts") to secure the purchaser's rights up to a capped amount (which essentially would ensure that the purchaser could recoup the purchase price with interest). The LLP agreements provided that each member had a "Capital Account" and that:

> " After payment of, or provision for, any expenses of the LLP, allocations and Net Profit and Net Loss shall be made to the relevant Capital Accounts (or, if relevant, current accounts)…Net Profit shall be distributed as soon as reasonably practicable following its determination as aforesaid…"
>
> "No Member shall have the right to withdraw any part of his Capital Account except subject to consent by all members pursuant to a distribution of LLP assets made in accordance with Clause 8"
>
> "Subject to the Bank Security, upon dissolution of the LLP as set forth in Clause 9, distributions to members shall be made as follows … First, pay off liabilities… Then, the balance of the assets shall be distributed to all Members, pro rata, (according to their respective aggregate Capital Contributions)."

HMRC submitted that "Capital Account" is a term of art when used in the LLP agreements. It should not be confused with partnership capital. As Warren J put it in *HMRC v Hamilton & Kinneil (Archerfield) Ltd* [2015] UKUT 0130 (TCC) sums contributed as capital become the property of the LLP. The member has no rights as such to a return of that capital but has rights on departure or winding up as set out in the LLP agreements.

(2) The LLP agreements were amended as necessary including to provide as follows:

> "11.3 No assignment of all or any part of the interest of a Member in the LLP permitted to be made under this Agreement…shall be binding on the LLP unless and until either:
>
> > 11.3.1 a duplicate original of such assignment, duly executed and acknowledged by the assignor; or 11.3.2 a notice of assignment addressed to the LLP and duly executed by the assignor;
> >
> > in each case together with an Adherence Agreement in a form acceptable to the LLP duly executed by the assignee, has been delivered to the LLP.
> >
> > In a case where the part of the interest of a Member in the LLP is assigned is in his Capital Account or part thereof, no Adherence Agreement will be required."

(3) In the letter sent to members with the draft resolutions required to implement these changes it was stated that the effect of the resolutions would be:

(a) to amend the LLP agreement to ensure that members who wished to dispose of their Capital Accounts were "not prevented from selling their LLP Interests in future" and that "Members who wish to finance from the proceeds of a Replacement Loan have certainty that they … won't be forced to dispose of their LLP interests",

(b) to ensure that "those Members wishing to refinance from the proceeds of a Replacement Loan shall not be responsible for any costs associated with the refinancing or subsequent acts of those who sell their Capital Accounts", and

(c) to provide for the LLP to appoint SA to act as project manager on behalf of the LLP and each of the members.

(4) In the notes sent to members with the draft resolutions it was stated that the resolutions were required under the LLP agreement to enable the proposed refinancing by either a disposal of Capital Account or from the proceeds of a "Replacement Loan" and the proposed changes to the LLP agreement would (a) "Ensure that Members who wish to refinance from the proceeds of a Replacement Loan are not in future required to dispose of their interests in the LLP without their written permission and that any Resolutions taken by vote in a meeting which would directly or indirectly result in that would be void to the extent that they would result in that happening", and (b) "Ensure that Members who wish to refinance from the sale of their capital account would have confidence that they could later dispose of their remaining LLP interests should they wish to do so".

Steps taken in 2011 to 2012

23. Further administrative steps were taken throughout 2011 and 2012, including the creation of Birdcrest and of Table Bay Services LLP ("**Table Bay**"), to act as replacement lender to those members who chose the loan option. Mr Dryburgh confirmed that (1) the money for the transactions came from Burgos which he thought was established in the BVI, (2) Plectron was a separate trust company based in Jersey and owned by separate people. He thought Mr Gower's company was very small and did not have the capacity to deal with anti-money laundering accounting, ongoing accounting and the like. So Plectron provided those services. He agreed that the real players were Burgos because they had cash, and Birdcrest, as the purchaser and, he added, SWG, which brought "deal flow". HMRC submitted that Mr Gower and SWG worked with Plectron on other tax avoidance structures (see *Flanagan v HMRC* [2014] UKFTT 175 (TC)) at [59]).

24. Mr Dryburgh confirmed that he formally instructed Mr Gordon in January 2011. He could not recall if at this time he also instructed Mr Donald Simpson of Turcan Connell ("**TC**") who was given as the contact for Table Bay in a number of the documents at TC's address at 12 Stanhope Gate, London. He did not recollect him ever being instructed or TC being involved, but said that Mr Gordon works very closely with TC and TC did know all about this. He said that all the SA partnerships had their offices at TC as the trust which was set up to hold the money to pay the ongoing fees was set up by TC. All the registered offices had to be at TC's address so that if there was any failure to deliver services they would know about it and Mr Simpson would know what to do. Mr Simpson had some clients to whom the proposals were made, so he would have been aware of it from the investors' side. He said that it is not a manned office; there were only about two permanent staff there. So they had to give somebody's name as the contact otherwise when a notice came in there would not have been any communication.

25. Mr Dryburgh agreed that at some point before February 2011, he must have approached BOI to put this proposal to them to see if they would go along with it. He agreed that no one at BOI warned him that they were about to fail or go under. He confirmed that the February 2011 letter was sent out to all the members of all the LLPs. He did not agree that he was looking for something that would work for all four LLPs. He said each LLP could go ahead. The bank's key criteria was that they needed all of the loans in a particular LLP paid off at the same time.

Evidence of Mr Dryburgh and Mr Gordon on the process and the reasons for the delay

26. In his witness statement Mr Dryburgh said that there were five principal reasons why the sale of the Capital Accounts took almost two years to close:

(1) Lessee issues: these included the obtaining of the lessee's agreement to move their security deposits to Birdcrest and Table Bay as lease security, the agreement of documentation, the provision of adequate due diligence and the provision of overseas due diligence and legal opinions.

(2) Bank issues: these primarily arose in relation to the dissolved lessees. However, a significant amount of time was also spent agreeing the wording of the various documents and the methods of closing.

(3) Member issues: These mainly related to chasing down documents including required anti-money laundering documents and fees from those selling their Capital Accounts. No one disagreed with the desire to repay BOI to eliminate the risk of having to meet loan repayments out of their own resources.

(4) Birdcrest issues: These included (a) the agreement of documentation, particularly with their lawyers Carey Olsen, (b) satisfying them and their lawyers that they would not become members of the LLP, (c) closing and due diligence issues with them and Carey Olsen including due diligence on the lessees, (d) the provision of anti-money laundering documents, and (e) concern on closing risks.

(5) Dissolved lessees issues: This was the biggest issue:

(a) SA were concerned to avoid TS disclaiming the Crown's interests as, as set out above, that would result in BOI having no counterparty under the security agreements. Proposals were put forward to TS in September 2011 to acquire the Crown's interests in a new company, Rareteam Film Services Limited ("**Rareteam**"), which would take over the lessee's rights and obligations. That would ensure BOI always had a creditor in relation to the deposit and there was always a party with the obligation to pay the lease payments.

(b) In July 2012 TS's office indicated they would be recommending that the Crown disclaimed its relevant interests. This caused him and Mr Gordon a great deal of concern. Upon such disclaimer BOI would have no obligation to the relevant LLP or any third party to continue making the lease payments. Were its board to take a view that it no longer had any legal responsibility to make payments and the interests of its shareholders dictated that it should only make payments it was legally responsible to make, there would be no further lease payments made in respect of its agreements with the dissolved lessees.

(c) SA asked TS to delay the issuing of such disclaimers to allow them to seek an agreement with BOI to continue to meet the lease payments. Following a negotiation, which included them seeking the benefit of counsel's opinion and board approval, to their great relief, BOI agreed to provide undertakings to the LLPs confirming that BOI would continue to pay lease payments upon the disclaimer.

(d) In September 2012 TS gave notice of its disclaimer which resulted in BOI having an absolute right to the lessee deposits under the relevant documents. BOI received internal approval to continue to make lease payments and to the issue of the undertakings which ensured the ongoing lease payments would continue. Following several months of additional work, the structure and documentation was agreed with BOI to ensure the dissolved lessee deposits continued to be used to meet ongoing lease payments before and after the repayment of the loans. This was a lengthy and difficult process requiring their full attention and focus.

27. We accept that, as the appellants submitted, the correspondence during this period demonstrates the difficulties and delay to which Mr Dryburgh referred.

28. In his witness statement Mr Gordon made the following main comments as regards his involvement in the process for the sale of the Capital Accounts:

(1) In December 2010 and early January 2011 he had many lengthy telephone discussions with Mr Dryburgh when he outlined the problems arising in the aftermath of the banking meltdown from which he understood that:

> "there was a clear and pressing need to remove [BOI] from the existing Partnership arrangements as its potential bankruptcy or entering into administration would precipitate demands for the repayment of loans by the Bank to Partners…As the loans were buttressed by a network of guarantees and charges the removal of the Bank in such a manner would render the arrangements unworkable to the considerable distress of the Partnerships and the Partners. I understood that an orderly removal of the Bank from the structures would enable appropriate changes to be made to enable the Partners to remain in the same position in respect of future profits arising from the leasing of the films. That position was that while Partners remained borrowers…the profits would be reserved towards the repayment of such borrowings and not received by the Partners. Any new lender or purchaser of the Capital Accounts would have rights to such profits in the same manner as the Bank."

(2) In the course of those discussions, the possibility of selling Capital Accounts emerged as a viable solution. He indicated that partners could assign the accounts without ceasing to be partners. He was instructed by an e-mail of 19 January 2011 and pursuant to his advice the relevant resolutions were drafted. On 3 February 2011, he advised that they were apt, appropriate and complete to carry into effect the approval of the scheme for disposal of Capital Accounts. He was closely involved in the draft documentation.

(3) He was aware that the drafting had to allow for the probability that not all members would seek to sell their Capital Accounts as some would re-fund from alternative lenders. All members had to take action to be rid of the loans. He understood that Mr Dryburgh had explored the possibility of finding a new funder to take over all the loans but found that most institutions were either unresponsive or indicated prohibitive costs – this was not a propitious time to be seeking funding from banks or other financial institutions.

(4) He was satisfied that the explanatory letter did not constitute a financial promotion but advised that it should be prepared to the standard of such a promotion as it was essential that all members be fully and appropriately informed as to its purport and effect. During this drafting exercise he was convinced that he was "engaged in a firefighting exercise as a result of the probability rather than possibility of the liquidation of [BOI]". He had considerable experience of the preparation of documentation of tax efficient investment vehicles, beginning in the 1970s. By comparison with such experience the drafting for these consents seemed "helter-skelter". He was aware that Mr Dryburgh was consulting senior tax counsel on any tax implications. He had made it clear to Mr Dryburgh that he could not and would not comment on any tax matters.

(5) That the transactions in respect of the sale of Capital Accounts were not part of a predetermined course of events designed to achieve a tax advantage is well illustrated by the problems which arose on the discovery that several of the lessees had been dissolved. This raised numerous issues which prompted him to take advice from Mr Peter Cranfield on 28 July 2011 and Mr Jonathan Mark Phillips by instructions dated 11 February 2012 and 1 May 2012 on a wide range of issues including the contractual position following the dissolution of lessees, the position of the bank if TS waived the Crown's bona vacantia rights, the proposals made to TS to acquire the rights in a new company, and the position of the bank in the event a dissolved lessee was reinstalled to the register after the LLPs had repaid all loans. Counsels' responses were highly complex and in many instances counsel was unable to give a definitive response, only educated views, as the law was so complex and far from clear.

(6) Mr Dryburgh and he had to grapple with this lack of certainty in seeking a solution to the overall problem of the need to remove BOI from the arrangements:

> "We were faced with the pressure of the Bank for repayment of [the loans], the prospect of the bankruptcy of the Bank and the repercussions of the failure by the proprietors of the Lessee Companies to keep those companies in good standing…They were unexpected contingencies whose consequences could have severe adverse effects on the Partners and the Partnerships. We were struggling to find solutions - not to obtain some tax advantage for the Partners. Indeed, I understood that [SA] sought to ensure there was no unexpected adverse tax consequences to either sellers of capital accounts or replacement borrowers as a result of the proposals made to clear [BOI's] loans. The Partners were each advised to take their own advice from their own tax advisers."

(7) He and Mr Dryburgh had discussions with TS's office. They had to satisfy themselves that there was no residual value for the Crown in the deposits. If there was no value the policy was to disclaim. The policy was also to dispose of assets rather than to enter into long term commercial arrangements. BOI did agree to making arrangements, including the continuation of interest payments on the secured deposit, thus enabling the preparation of an orderly reconstitution of the overall scheme. He recalled:

> "surmising that [BOI] perceived that such an orderly process would benefit the Bank by avoiding the costs and uncertainties of enforcing loan repayments. These matters considerably delayed the exercise of the sale of capital accounts."

(8) On 27 September 2012 TS issued the notices of disclaimer. BOI "was central to the overall arrangements as it was protected from a default by any of the borrowing Partners by a web of mechanisms and security". The loans were on a full recourse basis so any default in meeting interest or capital repayment would render the member fully liable for immediate repayment. Such a demand would have been at least embarrassing but in most cases disastrous as few, if any, of the members would be in a position to obtemper the demand. Some would face bankruptcy. He was in full agreement with Mr Dryburgh's comments in his witness statement relating to this.

(9) Their "simplistic understanding (of which Counsel would certainly disapprove) was that on dissolution, the Crown took the place of the Lessee, at least in respects of the rights of the Lessee, and on disclaimer no entity is in the place of the Lessee". Dissolution was an "Event of Default" in terms of the Lease – but not a termination event – and that enabled BOI to "place and keep to the credit of a separate or suspense account any money received by the Bank" and BOI had taken that action in respect of the deposit but while that gave the Bank some protection, the sums in that account would remain subject to certain terms including a residual right in the Crown.

(10) He found counsel's opinions rather baffling and became convinced that "we required a solution which re-established the original structure by fresh contractual arrangements eliding the uncertainties created by the dissolution of the Lessee and the subsequent Crown Disclaimer". He expected that BOI would be willing to help facilitate this if it included the full repayment of the loans. Mr Dryburgh was in almost continual dialogue with BOI and they agreed the terms of an undertaking. Following the formal disclaimer they were able to set about the sale of Capital Accounts. This involved considerable drafting of fresh documentation but some of that work had proceeded while awaiting resolution of the matters set out above with the result that all parties were content on all matters by early January 2013 and on 18 January 2013 the sales were completed.

Completion of the sale of Capital Accounts and refinancing

29. On or about 18 January 2013, the appellants entered into a "Capital Account Acquisition Agreement" ("**CAA**") with Birdcrest**.** Birdcrest charged a fee for entering into the transaction

equal to 3.15% of the then outstanding balance of the loans, which it shared with Burgos and Plectron. Pursuant to the CAA further agreements were also executed as set out below which together ensured that (1) the purchase price and the new loans from Table Bay were used to repay the loans, and (2) the matching deposit (securing the loans) was released by the lessee to Birdcrest (who transferred it to its backers).

30. The CAA included the following main terms:

(1) Subject to satisfaction of the conditions precedent specified in that agreement, "the Seller shall sell, assign, transfer and convey to the Purchaser its beneficial interest in and to the Capital Account, which assignment shall include (without limitation) Seller's right to receive drawings from the Partnership up to the…Maximum Recoupable Sum…"

(2) The Seller and Purchaser "shall...jointly notify the duly appointed Partnership Secretary that whilst the legal ownership in the Capital Account shall remain in the name of the Seller the beneficial owner of the Capital Account is the Purchaser".

(3) "It is hereby acknowledged by both Parties…that only the Seller's beneficial interest in and to the Capital Account is being sold to Purchaser pursuant to the terms hereof and further that the Seller's legal interest in and to the Capital Account shall remain vested in it. Accordingly, notwithstanding the provisions hereof, to the extent that there remains vested in the Seller any residual beneficial interest in and to the Capital Account, Seller hereby unconditionally and irrevocably confirms and declares that it shall hold such interest on trust for the Purchaser and further undertakes and agrees to do all such acts, deeds and things… to give full effect to the assignment of the Seller's beneficial interest in and to the Capital Account hereby contemplated."

(4) "Following payment of the purchase price, the Purchaser shall, as the beneficial owner of the Seller's Capital Account, be entitled to recoup the amount of the Purchaser's investment in the Seller's Capital Account (being the Purchase Price) plus an additional amount to cover interest and other costs associated with the Purchaser's investment as aforesaid from all the Seller's entitlement to drawings from the Partnership" up to a specified maximum sum, "the Maximum Recoupable Sum".

(5) As security "the Purchaser shall require that (i) the Partnership enters into the Partnership GDSA and the Interparty Deed and (ii) each of the Lessees enters into an Account Acquirer GDSA and the Interparty Deed" further acknowledging that as a consequence of the assignment, the owner of the rights to profits, as against the LLP and third parties was Birdcrest. Entering into the further documents referred to was described as 'conditions precedent' for closing the acquisition of the Capital Account.

31. The "Account Acquirer GDSA" was made usually between Birdcrest and the lessee. Under this:

(1) The lessee agreed to transfer the balance of the deposit which secured the rent ("**Account Acquirer Deposit Balance**") to Birdcrest.

(2) The lessee was liable only to the extent of the deposit and the deposit was not repayable to it except as provided by this agreement.

(3) It was provided that the deposit "shall constitute a debt due from [Birdcrest as deposit holder] to [the lessee] subject to the terms of this Agreement" and save as set out in this agreement the deposit "shall not be repayable to [the lessee] or any other person" and Birdcrest "shall be entitled to use the Partnership Deposit for such purposes as it thinks fit, without limitation…for…repaying amounts outstanding between [it] " and its creditors from time to time provided that [it]…agrees that it shall meet its payment obligations… pursuant to Clause 6".

(4) "Notwithstanding any other provision of this Agreement, the aggregate of all liabilities of [the lessee] under this Agreement shall at all times and for all purposes extend only to the sum of money constituting the Deposit…other than in the case of a liability arising as a result of the fraud of [the lessee], and where as a result of the provisions of this Agreement, the Deposit has been reduced to zero, [the lessee] shall have no further liability hereunder." In effect this meant that the lessee gave up all its rights in the cash deposit because it had no further liability. Birdcrest was allowed to spend that money how it liked, but formally it was recognised that there was indebtedness between the two which was entirely dealt with on paper for the remainder of the 15-year term.

32. The "Partnership GDSA" was made between the LLP and Birdcrest. Under this:

(1) The LLP covenanted to pay "all of the Rent received by the Partnership under the Lease Agreements to [Birdcrest as deposit holder] which payment shall constitute a payment made on behalf of the Partnership under the [CAA] up to the Maximum Recoupable Sum… at such times and in such amounts as set out Schedule 1 hereto" .

(2) It was provided that on each Rent Payment Date, Birdcrest would reduce "the Account Acquirer Deposit Balance by the amount of the rent then add that sum to the Partnership Deposit which shall then be reduced by the amount of the rent". This meant that Birdcrest was free to use the Account Acquirer Deposit Balance and on each Rent Payment Date it carried out book entries – reducing the Account Acquirer Balance/increasing the Partnership Deposit reducing the rent owed by the lessee/accruing the profits to which it was entitled as Purchaser.

33. Mr Dryburgh set out (1) the number of members who sold Capital Accounts in each LLP: Avondale – 22 (65% of members); Chamberlain – 24 (67% of members); Downing – 26 (70% of members); Repton – 29 (82% of members) (2) the number of members who took the loan option: Avondale – 19 (35% of members); Chamberlain – 17 (33% of members); Downing – 18 (30% of members); and Repton – 12 (18% of members).

34. In an email of 18 January 2013 Mr Dryburgh described the completion of the sale of the Capital Accounts as "excellent news" and said SA very much appreciated "everyone's hard work over the last two years to get this done." Around this time he also confirmed to the members that the refinancing of the loans completed on 16 January 2013 and said that moving forwards SA, as secretaries of the LLPs, would arrange for a meeting to take place shortly to consider a number of resolutions to amongst other things:

> "(1) allow all members to sell or gift their interests in the LLP;
>
> (2) agree that members' future profit shares whilst remaining the same in overall percentage and numerical terms would derive solely either from the rents being paid under the replacement lease security with the replacement lender for those members who have repaid their loans from replacement loans or from the rents being paid under the replacement lease security with the acquirer of members' capital accounts (the "Acquirer") in the case of those who sold their interest in their capital accounts; and
>
> (3) appoint [SA] to seek possible buyers either for members' interests or for those leases or shares in lease income which are now the subject of the security taken by the Acquirer.
>
> For the avoidance of doubt, no resolution will be brought forward that amends the overall profit shares of those who took the replacement loan nor to dispose of any assets which will ensure their profit shares remain the same and indeed any resolution to do so would be ineffective as a result of the protective changes made to the Members' Agreement in April, 2011. Nor will any resolution seek to require a sale by any member who does not wish to sell. We would anticipate that notice following later this week."

35. As regards the use of the proceeds from the sale of Capital Accounts to repay the loans:

(1) Mr Dryburgh agreed that (a) it was an important feature of the sale of the Capital Accounts that daylight lending was needed from somebody. He said that he/SA spoke to Mr Eugene Horgan ("**EH**"), who was one of the potential purchasers of the residual interest, about possibly being the funder but EH did not want to do it with actual funding; he did not want actually to find new money but to find some way of book entries which SA were not interested in. Things were going very slowly with Birdcrest and there was no guarantee they would actually get to the end with Birdcrest, so he/SA was looking for another option at that time but doing things by book entries was a non-starter; and (b) when he put the February letter to the members he was fairly confident about going with Mr Gower for the funding. He said they/SA were at a point where SWG had said they were interested, they had some draft documents through Carey Olsen in Jersey, and they believed there was something concrete that they could take to the members.

(2) Mr Dryburgh said, in effect, that to say that all that was required from Burgos was daylight borrowing was understating the complexities of the transaction:

> "…it took us many months of time to negotiate transaction documents and satisfying everybody that the money that came over was secure and would go back. So it was a lot of money and…they were anxious to make sure that everything would work out the way that it was envisaged. So it was a complicated transaction but Burgos provided the money. And there were…in the sale documentation for the sale to Birdcrest payment instructions…".

(3) He confirmed that in cash flow terms, (a) Burgos provided or credited an amount of cash to the account of Birdcrest with BOI, (b) Birdcrest paid that cash to the members as consideration for the sale of the Capital Account; in practice the funds simply moved from one BOI account to another, (c) the members gave an instruction for the money to move to BOI in repayment of their loans and, therefore, BOI released the charges and rights it had over the deposit, and (d) the deposit was released to be used and, under the terms of the documents, Birdcrest had access to that cash account and was permitted to use that money to repay Burgos outright so Burgos got its money back. He said it followed very much the original transaction with the bank; so the transaction produced new money but Burgos got money back, which is exactly what happened with the original transaction back in 2006.

(4) He agreed that Burgos charged a fee for its role and that was arranged by Mr Gower. He said the fee was passed on ultimately to the members; they sold the Capital Accounts at a discount to the outstanding capital and that discount was monies that Birdcrest had to split between it, Plectron and Burgos. He confirmed that Table Bay did not take any fees.

36. Mr Dryburgh confirmed that Mr Gordon assisted in drafting the contracts for the sale of the Capital Accounts. He said that (1) the documents were Birdcrest documents, (2) they were drafted in 2011 and most of them would have been signed by the members probably in 2011 and left undated, (3) they were not legally binding until they were signed by Birdcrest in 2013 and dated at the time of the closing, and (4) he was not sure if he notified the members in advance that the deal was going to go ahead and suspected part of that was because they were in such a fluid situation in terms of knowing when they were going to close:

> "And in some respects I think it was very late in 2012 before we had that comfort…even though we'd completed and got an agreement on the lessee issues, there were many other issues with lawyers and the bank and the bank's lawyers which still had to be sorted out."

37. He said that, once he realised that not everyone would agree to the sale of the Capital Accounts, he must have gone back to Mr Gower. He thought his wife (Mrs Marjorie Dryburgh) and Ms Pamela Brechin of SA were the designated members, and the only members, of Table Bay. He confirmed (1) Table Bay was UK resident and its registered address was TC's address,

and (2) it came in as a replacement lender and, in cash flow terms, the money came from Burgos into various bank accounts with BOI and some of the money would then have gone into a Table Bay account to lend to the relevant members who only wanted to refinance on the basis they would have limited recourse borrowing (rather than the previous full recourse borrowing) so their personal assets would not be at risk.

Further evidence of Mr Dryburgh and Mr Gordon

38. Mr Dryburgh gave the following evidence as regards the refinancing options:

(1) He agreed that, when SA was looking at refinancing options in 2009, one of the parameters was that any refinancing would not put at risk the original loss relief that the partners had obtained or disturb the validity of the original scheme and the structure had to be such that, in his view, it would escape chapter 5. He added that the issue was getting rid of the risk of the partners having to pay the tax but in doing so "what we didn't want to do was to result in a tax liability under [chapter 5]".

(2) It was put to him that a further issue was that the banks that had film finance teams were more cautious at board level politically because the Government had cracked down on banks facilitating such schemes. He said that the banks received a lot of money from the Government and he thought there was some agreement with the Government and the banks as to how they would treat everything, so:

> "even though we would be coming to them trying to refinance, they would be more nervous about doing anything which would disturb the status quo, but not – as we found out later with [BOI] – not so much so that they wouldn't actually do anything which they saw to be legitimate and within their power."

(3) He was taken to correspondence with Sir Peter Burt which took place in 2012. He confirmed that Sir Peter Burt was an investor in the West End Media Partnership who sold his capital account in that partnership in 2012. In an email from him to Sir Peter Burt, he said:

> "…would the lending banks find it attractive in today's climate to be holding substantial producer deposits [while] having their loan repaid? I am sure they would be pleased – every bank seems to need cash! I agree that it would be easier to refinance within the same bank/banking group but I am concerned that Tax Counsel may advise it would be better to find new funding and I am also concerned the banks may find it politically difficult to assist in an internal or intra group refinancing."

(4) He said that there was a clear nervousness about doing anything which could upset the status quo. He agreed that (a) basically any refinance proposal he came up with he would run past tax counsel and said "when…you do anything like this it's wise to go back to tax counsel. It's difficult areas of legislation and you would always seek advice", and (b) the concern was that there was no risk of losing the original loss relief and making sure that the structure did not fall within chapter 5. He added that he wanted to make sure that he could take people out of the risk that they were in with the full recourse loans without creating any tax charge. He explained that when the bank called for the cash they held that deposit, subject to an all-encompassing agreement, to hold and to use it to pay the lease payments and the question to Sir Peter Burt was: would the banks find it attractive to still hold on to that money even though they were paying interest on it at 5%, but to have their loan repaid?; that would have resulted in a net cash inflow to them, so on one side they would have the cash from the partners, on the other side they would have their money from their deposits.

(5) He was taken to a document in which Sir Peter Burt said:

> "…there are two aspects to the proposal. One is a straight arbitrage play – the partners are currently receiving rentals equivalent to, say, [to] 10% and also borrowing at [10].

If the loan could be refinanced and the borrowing rate reduced to say…there is [a] 5% p.a. additional parameter to the partners."

"The second part of your analysis if I read it correctly is even more attractive but is much more complicated and will not have been made easier by the Government's latest comments on tax avoidance and the need for banks not to facilitate such schemes. So getting a bank to finance the new LLP or other entity will need careful handling although there is a good underlying reason to finance because of the fall in interest rates."

He said that in the first comment Sir Peter Burt was raising another potential upside if they could refinance in this way. This was what he came up with, as a senior banker who understands these things. Mr Dryburgh's concern was to alleviate the issue of members having exposure to the bank on a full recourse basis. He said that (a) the whole essence of the suggestion was that it could be quite attractive to another party to lend to the LLP, which would get rid of the full recourse loans, and receive the benefit of the lease income, so they would be able to repay the existing loans and enjoy an income at 5%, which in that market at that time would be extremely attractive, (b) the arbitrage point was something which Sir Peter brought up, which was something really completely different, and (c) the new proposal still required the retention of the cash deposit with a lending bank because without the cash deposit paying that 5% lease income:

"we would have been back asking another bank to just do exactly the same as [BOI]. So what we hoped… was that they would find it attractive still to hold on to the money because money, at that point in time, was very tight to banks, as we know, so that they may be attracted to hold on even though they were paying 5% in the market whilst having their loans repaid".

(6) He said the suggestion in this correspondence of using another bank within the same group as the lending bank was a throwaway comment but they thought that might be unattractive to the bankers or less palatable than getting money from outside: money obtained from within the group would not increase any money to the bank whereas money coming from Barclays into BOI would be new money into the group. He remembered they spoke to Barclays Bank, HSBC and Investec Bank and that HSBC said they did not want to do it because the partners were not existing borrowers. He could not remember what happened with Investec. It became evident that the discussions with Barclays did not relate to these LLPs.

(7) He said SA were trying to find a solution to a problem they knew about. They were not instructed to do so by the members but they were the only ones dealing with those LLPs who had any opportunity to do something to alleviate the problem. They recognised the problem and were trying to find a solution to it and being engaged by the members or not was not really the point: "We knew what the problem was and as any responsible organisation would have done the same, to try and find a solution to the problem".

(8) He agreed that he was trying to put together a proposal which in the end he could sell to/would be attractive to the members of the LLPs. He said that it had to be attractive to all members and he was trying to find a solution to a problem that they saw which would be attractive and would obtain the unanimous approval of everybody as was required under the partnership documents. He agreed that until 2011 they did not have any options on the table to take to the members.

39. At the hearing Mr Dryburgh gave the following evidence as regards the apparent concern that BOI or ABN Amro may fail and issues with the dissolved lessees:

(1) He said that in 2008/2009 they were aware of issue with all the banks, BOI was not the only one, ABN Amro was the biggest bank in terms of guaranteeing the lease payments, and what happened with ABN Amro is public knowledge. As set out below,

he did not, however, identify any specific risks or dates of concern as regards either ABN Amro or BOI. It is clear that to the extent he had a concern, it was based on the general situation for banks at the relevant time, as known from publicly available information as set out in his witness statement.

(2) In terms of the arrangements with ABN Amro, he agreed that (a) he intended to follow the HMRC guidance at the time, whereby for investors to get the tax relief under this model, cash security must not be held with the lending bank for a three year period, (b) the beneficiary of the charge over the deposit was the LLP, so it would serve any notice on ABN Amro to transfer it, but all of that was charged to BOI, and (3) BOI had a film finance team who would have known that it was important that the deposit was with a third party bank for the three year period but that they could call for the deposit after three years. He thought the charge gave the bank the right to call for the deposit and agreed that it was the normal way these things went – and said he thought it was to be expected, that the bank would do so; they would want the cash back at the end of the three years. He noted that in fact after the three years the banks, such as BOI, were calling for the cash that was sitting with ABN Amro, to come in-house and:

> "the guarantees were falling, because the guarantee was an absolute guarantee to meet for those lease payments, instead being replaced by a contractual arrangement whereby the bank had an interest in a deposit with the lessee which it had set that whole arrangement up on day 1…So they were calling for the money into those deposit accounts, and their arrangements were between the bank and the lessees. And…the partnership…were wholly reliant upon those commercial arrangements between the bank and the lessees. So instead of having a guarantee that you're going to get paid, you're wholly reliant on a commercial arrangement between a bank and a third party. And also, of course, at the same time, there was the concern not just [BOI] but across the board of all the banks…that again is public record. So we, during that period, were looking for ways to try and do something about it…"

(3) He explained that (a) SA started speaking to HSBC Private Bank about having a limited recourse loan because they were aware that they had provided such loans for other partnerships who already banked with them. They turned SA down because these LLPs were not original clients of theirs, (b) they approached BOI and Investec Bank but none of that worked and they then thought:

> "is there a commercial solution that we could come up with which would allow monies or borrowings to happen within the LLP which would have de-risked the borrowings then for the partners, because if the borrowings are with the LLP as a limited liability vehicle it would have achieved what we wanted, which was to de-risk the whole thing. And we thought there might be a commercial solution because the lease rates were being paid at a rate of…around about 5%. … Whereas the long-term deposit rates I think had fallen to…about 0.25%, 0.5 %, so we wondered if there was a commercial solution which might involve being able to find somebody to take the lease rental stream and provide money within the partnership to repay the bank. None of that proved successful. So we had been trying for some time to find a means of…de-risking the loans for the partners, but we had never at any stage [been] involved in trying to sell…the residual interest of the partnership, which is…basically selling the partnership interest subject to the existing arrangements with the bank…".

(4) He agreed that the LLPs did not make any effort to extract any value from the residual rights in the films. They simply sat and allowed the rent to come in under what were then sort of paper transactions and the interest to go out, and the part repayment of the loans.

(5) As regards the dissolved lessees:

(a) He confirmed that (i) the lessee companies started being struck off for non-payment of the administrative fees in 2008 and 2009, (ii) he did not know exactly when the LLPs found out about this but on an annual basis either the guarantor, which was mainly ABN Amro, was still paying the rent or, if the banks had called for the deposits after three years, they continued to pay the rents: "So from the perspective of the LLP and the partners, the money was coming in every year and was being drawn out by the bank under their charge structure, so it was coming in, going out. And the accounts were going out. So there was no trigger for the LLPs to know,…as long as the rents were being paid nobody was really looking at that side of things", and (iii) he found out in 2011 (although later he said he knew before then), (d) the banks agreed to lend on the assumption that the lessees may go bust, may go into liquidation or be struck off, whatever: "So the banks designed all of their structure to ensure that if that happened there would still be the ability to pay the lease rentals, and the partnerships had comfort on that as well, and they're all these arrangements, as we've seen, the banks did continue to pay", and (e) the issue happened particularly when TS disclaimed. He said:

> "But I think that the banks were well aware that they did not want – the pricing on these on the whole was done on the basis that things were as de-risked as they could make it and, therefore, it was designed in a way which if there was a lessee failure that the banks were still in the position to meet these payments."

It was put to him that that means that unless and until somebody told SA/the LLPs that there was a problem, they could just assume there was not a problem, and if no-one told them there was a problem, then there was not a problem. He said that in hindsight he would have liked to have known and possibly put in systems, but in the main that was a true statement, because:

> "as long as the rentals were paid and still remained secure, then we were okay…in hindsight….I think I would have liked to have stayed more on top of that…but like many others, we were content and possibly lulled into a false sense of security that these things were okay.."

(6) He agreed that ABN Amro did not lose the deposits and said that for the most part the deposits had started to move back to BOI in about 2009. He said he did not recall when ABN Amro "fell over" and when asked what he meant he said there was nothing specific; he was referring to the generality of what was happening at that time in the banking market. He said that the deposit was safe as long as the bank who took it over remained solvent and, if it became insolvent and there was a shortfall of assets against its obligations of deposits and liabilities, then, whether there was a guarantee or not, then there would be no money to pay it. He confirmed that, to his knowledge, the LLPs and their members did not take any steps to evaluate the risk of ABN Amro failing in the three year period in which it held the deposits and/or to evaluate whether ABN Amro might be a safer or different place to hold the cash than BOI and they did not try to renegotiate the guarantee.

(7) He confirmed that the LLPs themselves and their members did not call a meeting to discuss or to seek advice on the 2008 banking crisis and SA did not contact them to say there might be a problem with the scheme. It was put to him that as in the investment memorandum the risk of the guaranteeing or lending bank losing the deposits was described as a remote risk, the LLP and the members could take that to be the case at the time and on an ongoing basis as they did not hear anything from SA to the contrary. He said, in effect, that at that point some of the members may have considered that risk remote but for others that definitely was not true. For example, Sir Peter Burt, a member

in a partnership who used exactly this structure, and some other members were "in the know". Sir Peter Burt was concerned and did sell his capital account.

(8) He found out that some of the lessees had been dissolved before February 2011, when he was putting together this whole process. So he then set about resolving or at least investigating the dissolved lessees issue for the purposes of enabling the sale. He agreed that to the extent that he asked questions of the advisers about what might happen if, for example, BOI went into liquidation, that was ancillary to the issue regarding the dissolved lessees and said:

> "what we always knew was that if a bank had an insufficiency of capital…and it…went into liquidation there was an issue. That's obvious to anybody with any financial acumen. What we didn't know but suspected there could be a problem is…if there was an insufficiency of capital in the bank there wouldn't be an ability to pay any interest after the event, but the question is what if there was capital and would the bank have any obligation to pay any ongoing interest afterwards…So that was one of the key questions that we wanted answering. And the second was if a bank did fall over….and it did have a sufficiency of capital, what obligations would it have in relation to the arrangements with the lessees… in relation to the deposits…[which] were securing the lease payments for the lessees who had become insolvent or…the company had been struck off. The advice certainly said for sure…there would be no claim on interest after the event of…a liquidation…there would be definitely no interest payable, so a creditor could claim for interest only up to the point of liquidation and not beyond…I think Alistair Gordon alluded to it. It's all very complex law – area of law, and I thought that he did not say that…the partnership would be in the clear if there was sufficient – if the bank went into liquidation there was a sufficiency of capital to pay it, I did not think he was clear that we were definitely – those arrangements would subsist…"

(9) He confirmed the advice was not passed on to the members but it was passed on to the bank. So the counsels' opinions were as much as anything else for the bank and for SA. He did not think they added anything for the members because there was always the risk that, if the bank went into liquidation and there was an insufficiency of funds, there would not be enough money to meet all the obligations. The matter went up to the board of BOI. It had to because, when TS disclaimed the bona vacantia rights, the bank had no third party creditor, so those deposits were owned by the bank. The board, thankfully, chose to honour BOI's obligations to continue to meet the lease payments.

(10) He was asked why the members of Avondale had to wait to complete the sale of the Capital Accounts given the issue regarding the dissolved lessees did not affect Avondale. He said that he was not sure that SA made them wait because in 2012 they did close on a capital account sale and loan repayment for another partnership (not one of these LLPs). It was Burgos and Birdcrest (he was not sure which) who wanted all of these deals done at the same time for all of these four LLPs. It did not need to be the same day but had to be all on in the same week. This information would have come from Mr Gower.

(11) It was put to him that the advantage of doing this as a group for all of the LLPs was that he only had to go to counsel once for advice so there was a single cost which could be shared between the LLPs. He said that (a) the advice was given to SA and not to any of the LLPs, (b) it may be the case that if you did closings at a different time your costs may be higher but they still had to close and there had to be documentation for every partnership and "from Scotts' perspective, we would have loved earlier closings…because we would have made some fees because…we weren't getting paid until these things completed."

40. At the hearing Mr Gordon gave the following evidence:

(1) He said there was a process when he and Mr Dryburgh spoke a great deal on the telephone as they explored the situation that the partners were faced with which then involved detailed research when they decided how to proceed. When asked who advised him that BOI was potentially facing bankruptcy, he said that at that period:

> "banks were collapsing all over the world and indeed states were collapsing. There was a distinct concern that [BOI] was going to fold up, and after all our biggest bank, the Royal Bank of Scotland, had virtually collapsed until Gordon Brown chose to save the world banking system…And [BOI] being a much smaller bank was even more concerning."

(2) He could not specify precisely what date he was referring to or any more specific concern as regards BOI. He said the Royal Bank of Scotland reached the point at which they had to telephone the Government and tell them that "in a few hours-time we will have no money, zero cash" but he did not have a historic register for saying when that was and "that was the atmosphere at the time and we were aware that banks were in trouble, and we were particularly aware that [BOI] was in trouble, and [BOI] was anxious to see these loans repaid". However, he did not have any specific advice about the potential or otherwise bankruptcy of BOI and was not in direct touch with BOI. He discussed these matters with Mr Dryburgh who had some contact with the BOI but he "didn't require to talk to [BOI] to be aware that the bank was facing difficulties" and got his information from normal news sources. It was widely accepted at the time that banks were precarious. It was put to him that when in his witness statement he said that from the discussions there was a clear and pressing need to remove BOI, the source of the information was really Mr Dryburgh. He said:

> "Yes, John Dryburgh but also knowledge of the situation of banks at the time. There was really a clear need and a pressing need because we didn't know what the future of [BOI] would be, didn't know whether it would survive and it was important to find an answer before they collapsed."

(3) It was apparent that he had no first-hand knowledge of the members' concerns or actions at the time.

(a) When asked if he knew that the members did not take any steps to seek any advice on their particular contracts, he said the members were in touch with Mr Dryburgh and he was not in direct touch with them and all of that was a matter for SA. He agreed that he did not know anything about what any specific member did or did not do and said:

> "The situation was that John Dryburgh was discussing with me ways and means of dealing with a situation where the bank may collapse. The last thing that the partnerships wanted to face was a liquidator of the bank, and so it was a question of finding a means to replace [BOI] from the partnership business setup."

(b) He said the members were not his direct client; his client was SA and:

> "you try to find a solution to the problem of [BOI] being a precarious lender and the difficulties that would arise if [BOI] were to go into liquidation or indeed if [BOI] decided to push through every remedy available to them in terms of the loan agreements, which could mean a demand to partners to produce substantial sums of money."

(c) He said that all they were trying to do was find an answer to the problem of a bank that was a trouble for a lender to have; they wanted to get away from that. Whether any suggestion they made would be attractive to members is something to ask Mr Dryburgh about as he was with them. He was simply helping SA find an appropriate and a workable real solution to the problem presented. He understood from Mr Dryburgh that there were some members who would be in a very bad serious financial situation if a demand was made to repay the loan.

(d) When it was put to him that he had no direct knowledge of the actual contractual arrangements entered into by the members or the LLPs, he said he would have seen the documents but he was not "specifically reading back all those documents"; he was working on finding the answer to the then current problem. It was put to him that he was not looking at the actual contractual documentation but was doing something more high level – blue sky thinking – looking at it as an abstract problem. He said it was an actual problem.

(4) He said that all sorts of other problems had arisen because of the dissolved lessees and they had to go to counsel when they realised the difficulties that created. He assumed that Mr Dryburgh had looked at possibilities for refinancing the loans, but in December 2010 it was a very fluid situation, they talked around it, there were certain possibilities, but then they arrived at what they thought would be a workable way through. Then they discovered the dissolved lessees problem, and that created the banking questions which they put to counsel, and they got opinions, which he still cannot pretend to have thoroughly understood. He pointed out that if a partner wanted to sell his interest in a partnership and his partners were not keen, he could not do so, but he could assign his rights to his Capital Account without any concern about the other partners. He had not heard of Grant Thornton, the accountants, offering a similar idea in the market.

(5) He confirmed that in January 2011 he was formally instructed by SA and he made it clear from the start that he would not advise on tax. At this time he was asked either to draft or assist in the drafting of the documents required for sale of the Capital Account. It was put to him that at this time Mr Dryburgh wanted from him an idea about how one might sell different interests in a partnership and was looking to access his knowledge of partnership law. He said that certainly the law of partnership was part of the consideration. It was put to him that he had formulated this proposal which involved two sequential sales. He said that the two happened consecutively but not by prior planning - certainly not his prior planning that he was involved in. They found an answer to the question of the loans and utilising the accounts and then the question was raised as to whether the partners should dispose of the remaining interest in the partnerships. He did not advise on tax, so did not consider it appropriate for him to point out anything about the tax position of the partners from the disposal of Capital Accounts. Mr Dryburgh took appropriate advice on tax elsewhere. He did not attend any conferences with Mr Andrew Thornhill QC.

(6) He remembered the February letter. He was concerned first to satisfy himself that it was not technically a financial services promotion as set out in his witness statement. They discussed the letter and he was involved in drafting it; he and Mr Dryburgh discussed elements of it all the way through. He would not have advised on the tax statement.

(7) It was put to him that the February letter does not say that there is actually a risk of the banks failing and he did not give that advice to the members. He suggested that was clear from the concerns raised. He thought it was a little later on that they talked to counsel about banking matters. He was asked what his evidence was for the statement that BOI were putting pressure on members to repay their loans. He said he did not see it directly and his evidence on that was based on what Mr Dryburgh reported.

(8) Whilst he remembered the revised proposal in the March letter and was aware that Birdcrest was the buyer of the Capital Accounts, he did not remember the detail of the loan option. He said that he was not arranging the refinancing; he was preparing the

documentation to explain things to the members. It appears that he was not involved in drafting the documents relating to the refinancing. He said that would be arranged by the relevant members themselves with their own lenders but other evidence demonstrates that was not the case.

(9) He agreed that BOI respected fully the contractual arrangements with the LLPs even where the lessee company had been dissolved. In his comments in his statement about why BOI respected the arrangements he was surmising that their line of thought was that it was much more convenient for them for there to be an orderly arrangement than some kind of collapse and:

> "The intention was to replace [BOI] in terms – [BOI] was a risky lender who might turn and demand a repayment almost at any time if things weren't going for the bank, which we thought was quite possible. So, yes, we were proposing a means by which their involvement could be removed in an orderly manner".

(10) He was taken to a letter he drafted to TS which included the following:

> "The result in those cases is that the leases have become bona vacantia. Where the call for deposits is made prior to those companies being struck off the deposits have been charged to accounts in the name of the dissolved company. In some other cases the banks incorporated arrangements in a deposit and charge where lessee companies are struck off and the deposits are in alternate charged accounts. In [other] cases the funds are in the lending bank and suspense accounts over which those banks have a charge. In all cases those deposits are being used to fund the ongoing lease payments. *This situation is unacceptable to the partnerships as they have additional rights under the leases at the end of the primary period to a share of the residual market value of the rights* … " (Emphasis added).

He agreed that (a) he wanted to know what residual rights would pass on the sale of the partnership interests and that is why he wanted to get this problem sorted out – by getting back the residual rights in the films, (b) he could simply have had the relevant lessee companies restored to the register but that would have involved getting accounts for six years at a typical cost of £5,000 per company and all the fines and annual returns would have had to be paid/made at a cost of thousands. He said that would be a lengthy and laborious process with considerable expense. He was asked if he thought that the members would have been willing to contribute money to the LLPs to bear that expense. He said they were presented with this explanation of the situation and counsel was underestimating what was involved. They would have had to get hold of the directors and get them involved and the accountants would have had to prepare the accounts for the periods that the lessee had been struck off, "and then get them all launched in order to reach a position where we could ask for the company to be reinstated". That is a complicated and lengthy process. It was put to him that he was trying to put together a proposal which he could sell to all the members at an acceptable cost to them. He said it was a proposal to achieve what would seem to be the desired end; he didn't know what more to say on it.

(11) It was put to him that SA were not willing to pay the costs needed to get the owners of the relevant companies to sort the problem out. He said that in order to get the companies "back on the books you need the cooperation of the former directors, so you've got to track them down, you've got to persuade them and presumably you'd be making payments in cash to them to cooperate in getting the company reinstated. And you couldn't forecast how long or how expensive that exercise would be". It was put to him that he did not tell TS that there was a risk that if TS did not help the cash deposits might be lost altogether. He said: "What's more to say. I just stated pretty plainly".

(12) He said counsel was reluctant that steps be taken to encourage the Crown to disclaim, but in fact that is what they were told to do, because the Crown indicated they were going to do that, and there was a question of timing it right and they took up the solution of a new vehicle. He agreed that BOI did not take any point that it might have done on the disclaimer and treated the cash deposit sitting in its account as being available security for the rental payments. He agreed that he was not directly involved in any negotiations with BOI.

41. We note the following as regards the evidence of Mr Dryburgh and Mr Gordon:

(1) We accept Mr Dryburgh's evidence that he/SA wanted to provide members with the ability to remove the risks inherent in having a loan on "full recourse" terms and can see that perhaps this seemed particularly desirable in light of the general situation banks were in during the years in question. However, the evidence does not establish that there was any specific risk, known to him/SA as regards BOI/ABN Amro at any particular point in time or that concerns for the status of those banks was the driving force, the sole or only main reason for the proposal for the exit arrangements. We note that (a) although Mr Dryburgh cites the risk of the relevant banks failing, becoming insolvent or falling over as the main concern from 2008/09, there was no specific communication with the members regarding this until 2011, it appears the banks did not raise any concern with SA, and the sale of the Capital Accounts did not take place until 2013, even for the LLP which was not affected by dissolved lessees, (b) Mr Dryburgh was not able to specify any particular time of concern or specific reason for a concern as regards either BOI or ABN Amro; his concerns were based on the general situation at the time as reported in the press and not on any discussions with these particular banks or anything specific to them, (c) he confirmed here and elsewhere that, in planning the structure, there was a concern from the outset to make sure the loss/appellants' reliefs were not prejudiced and that chapter 5 would not apply, and (d) neither the fact that Mr Dryburgh had discussions with Sir Peter Burt about refinancing loans used in structures such as those under consideration here nor the evidence on the content of those discussions demonstrates that he/SA had any particular concern with BOI/ABN Amro.

(2) The evidence does not support Mr Dryburgh's statement that the fact that certain lessee companies were struck off of itself had the potential for disastrous consequences for Mr Jarman and Mr Forsyth or other relevant members. We note, in particular, that the structure was designed to cater for such scenarios, it appears Mr Dryburgh found out about the situation by accident; there was no ongoing monitoring or active interest in the position, the banking advice eventually sought was not passed on to the members and in fact BOI honoured its obligations to meet the lease payments.

(3) It is evident from the above evidence and that set out below that Mr Gordon had no direct involvement with the members or BOI, he was entirely detached from anything concerning tax in relation to the exit arrangements and had a limited role as regards drafting documents and providing banking law advice as he set out. On that basis:

(a) We accept his evidence so far as it reflects his recollection of what occurred as regards his direct involvement in drafting documents and giving and obtaining advice relating to the dissolved lessees and the sale of Capital Accounts.

(b) We consider that otherwise his comments should be disregarded. In particular, we cannot see that he had any factual basis for (i) his comments regarding the lack of tax motivation for the transactions and/or that in his view the transactions were not part of a pre-determined course of events or as to whether the sale of the residual interests was planned before the sale of the Capital Accounts, (ii) his comments that the need to remove BOI was "clear and pressing", at the relevant time there was a "probability" rather than a possibility of BOI being liquidated or that he/SA were "faced with the pressure" of BOI for repayment of the loans. He had no particular knowledge of the situation of BOI at the relevant time or (iii) his comments in which he suggests he had knowledge of members' personal circumstances in which he suggests he had knowledge of members' personal circumstances.

Role of Mr Dally in 2011

42. At the relevant time Mr Dally was a consultant at New Media Law LLP ("**NML**"). In his witness statement he said that (1) in 2011 he was instructed by Rarebird Films Limited, a Jersey incorporated company ("**Rarebird**") to review documents relating to the proposed movement of deposits from BOI in relation to the film La Vie En Rose in order to ensure that that there would be no obligation on Rarebird if the new deposit holder went into liquidation or defaulted on payment and (2) the proposals and draft documents came from SA acting for Avondale and:

> "*The danger of [BOI's] failure at that time and the consequences thereof was a concern for Rarebird and no doubt for [SA]*, although I was only ever instructed by Rarebird in this connection." (Emphasis added.)

43. At the hearing, Mr Dally gave the following evidence from which it is apparent that in 2011 Mr Dally did not advise Rarebird in any material respect, he did not know with any specificity what Rarebird's concern was, he had very little recollection of how he was instructed, when the instruction came to an end and generally of his dealings with Rarebird in 2011 and had no basis for the highlighted statement above:

(1) He dealt with Rarebird when he was at the law firm Bird & Bird quite a lot in different ways. He did not know who owned it and did not remember how he was instructed. He would have understood where it sat in a classic sale and leaseback of a tax deferral variety. He said that he probably worked on Avondale because Rarebird was set up specifically to funnel the rights through Jersey and he was very much part of that; Avondale's name is very familiar and he probably acted on the original sale and leaseback. He said that it would have been the idea of Mr Sirish Malde, an accountant at Malde & Co. We note that Mr Malde was involved in the *Samarkand* sale and leaseback structure (see *Samarkand Film Partnership No. 3 and others v HMRC* [2011] UKFTT 610 (TC) at [43]).

(2) NML was basically an early kind of remote law firm where everybody was a consultant. He did not know if Mr Dryburgh nominated him to Rarebird but he had acted for him since 1997 and he had known Mr Malde even longer and was and remains very close to him, so "I don't know quite how that all happened but …It might have been just a very brief call with Sirish followed up by a conversation with John most likely." He did not remember that the LLPs or Avondale paid for the work done by NML and really did not know if that would have been a condition of Mr Malde or Rarebird.

(3) He said that he would have spoken to Mr Malde initially, and then Mr Dryburgh. He thought he mainly gave his advice in exchanges of emails. He agreed that it was a specific project or one piece of advice that was sought. He thought that the instructions came to an end when "we took it so far and it became clear that…it was much more of a commercial corporate kind of a deal than the film deals that I was used to" and that he brought in a corporate colleague. In effect it reached a point where it was outside his area of expertise and he thought that ultimately it was passed on to another law firm.

(4) He agreed that Rarebird wanted comfort or perhaps even definitive advice on whether they would be liable in any way if the new lender or the new entities, Birdcrest or possibly Table Bay, became bankrupt or went into liquidation. It was put to him that the correspondence between Mr Dryburgh and Mr Malde in his capacity as the owner of

50% of Rareteam shows that the lessee was asked to consent to the reorganisation of the original film scheme in a way whereby the deposit would pass through Birdcrest and Table Bay back to Burgos. He said that he was not involved at this stage.

(5) He agreed that at the time he was asked to advise on whether the lessee would be completely protected if the deposit was transferred to Birdcrest to be used to repay the lending from Burgos and to provide advice to the effect that Rarebird had no risk of being liable under this new arrangement. It was put to him that on the face of the draft contracts for the transaction which Mr Dryburgh provided to him, there was no way in reality or practice that after it had signed up to this deal, Rarebird would ever be called on to start paying any more rent; it was just cut out of any risk in the new transaction. He said "I don't think I was that involved in that level and if I was I can't remember".

(6) He then agreed that (a) he could not help on what Rarebird was concerned about in terms of quantifiable financial risks or legal liabilities in this deal. He said that he had a look through the correspondence and he could not see any point at which he was actually giving that advice but maybe he did. He thought it sounded more likely that he did not give Rarebird the comfort they were seeking as he passed it on to his corporate colleagues or another law firm and he did not give them any definitive answer at all because he realised the question he was being asked was outside his area of expertise, and (b) he did not actually advise Rarebird but he probably passed them on to somebody. His recollection was that, although the details were very different to anything he did before or since, he was nevertheless engaged for pretty well the same reason he was always engaged – to get the deal done. That is basically what he does. He thought it was fair to say that he could not help with any detail about what Rarebird and Mr Malde were actually concerned about – it is too long ago – and he could not really help on when his instructions from Rarebird came to an end.

Events in February to April 2013 – sale of residual interests

Process for and completion of the sale

44. In his statement, Mr Dryburgh set out the following as regards the sale of the residual interests:

(1) Following the sale of the Capital Accounts (1) Birdcrest became entitled to the benefit of the members' ongoing drawings but was not a member of the LLPs or liable for income tax on their profits (2) the appellants remained members with the same shares in the ongoing profits of the LLPs and liable to income tax on them, (3) the appellants no longer had any loans or a security charge over their interests in their LLPs but were not free to dispose or gift those interests under the agreement. Had no further transaction taken place the appellants would have continued to pay income tax on exactly the same level of profits over the remaining trading years as they would otherwise have done and would have continued to receive no distributions in cash. Some of the members who disposed of their Capital Accounts did not carry out any further transaction. None of those who replaced their loan sold their interests but he was not aware whether any of those members subsequently gifted their interests (as they could following the passing of the February 2013 resolutions).

(2) SA sent letters to all members and their advisers explaining the position for those who sold their Capital Accounts and those who refinanced from a replacement loan. Those letters "reiterated the important points made above, particularly that all members continue to benefit from the same shares of LLP profits". Resolutions were put forward and approved which (a) allowed all members to gift or dispose of their interests in the LLPs, (b) allowed the LLPs to seek a purchaser for a part of the LLPs' businesses, and (c) provided for SA to be appointed by the LLPs to seek possible buyers and to negotiate

outline terms. Several members or their advisers did consider the gifting of members' interests. Mr Dryburgh thought a member could have subsequently gifted his interest, for example, to a family member who had a lower taxable income, without triggering a charge under chapter 5. He was not aware whether anyone who sold their Capital Account did this and members were required to take their own tax advice.

(3) The proposed resolutions were all passed on 11 February 2013 or thereabouts. No members voted against the resolutions and other than a small number, those who sold their Capital Accounts now wished to find a buyer: "They proceeded in stand-alone steps". Members had no right to sell until these resolutions were approved and they did not dictate just one course of action. The LLPs could have sold their films and members were free to gift their interests. No sale or gift "was assured" at the time members sold their Capital Accounts and any such sale was not possible until these were adopted.

It is clear that no sale could be completed until the necessary formal steps were undertaken. However, we do not accept without qualification Mr Dryburgh's comments that the two steps involved in the arrangements can be described as "stand alone" and that no sale or gift was "assured". We have commented on this in our conclusions in Part C.

(4) Following this, SA commenced work seeking buyers either for residual interests or for the assets of the LLPs and:

> "I can say that there were no negotiations whatsoever with any party for the sale of the members' interests or LLP assets before 11th February 2013. We had mentioned to several parties over the months and years leading up to 18th January 2013 that if members of certain LLPs could repay their existing [loans], which was by no means certain, they may subsequently wish to and may be in a position to seek a buyer of their members' interests or of their LLP assets. Five of the parties which whom we had those discussions had indicated that they should like to be notified were that to happen. I would add that Stuart Gower's client was involved in financing and had no interest in acquiring film partnerships and indeed went out of their way to obtain legal opinion that they would not become partners upon acquisition of the beneficial interest in members capital accounts."

As set out below, Mr Dyrburgh had spoken to all the potential buyers of the residual interests before he sent out the February letter. We have commented on this further below.

45. HMRC noted that some of the amendments made to the agreements on 11 February 2013 were intended to clarify what rights had been sold to Birdcrest and identify some "capital" profits that could be reserved to a purchaser of the residual interests. In particular, a resolution provided that:

> "those Members who have sold their Member's Capital Account…to Birdcrest… shall, with effect from 18th January, 2013, be entitled to share only such Net Profit…from those lease rentals payable…to the extent of those sums payable to the LLP in accordance with Schedule 1 of [the Account Acquirer GDSA]."

46. Following this:

(1) The relevant members entered into Sale and Purchase Agreements dated 23 April 2013 for the sale of the residual interests for €2. Panosh was admitted as a member of the LLPs and executed Deeds of Adherence as a condition of the sale and the appellants retired as members. Panosh was an Irish tax resident company. An inducement fee equal to 3.15% was paid to Panosh. This was funded by the selling members making additional capital contributions to the relevant LLP which then paid Panosh. Repton paid £43,428, Downing paid £25,977, Chamberlain paid £22,181 and Avondale paid £25,150.

(2) Panosh acquired voting control of each LLP (as this was a condition of purchase). Steps were taken to emigrate the trade and the LLPs to Ireland. SA resigned as secretary of the LLPs. Two non-UK resident companies (Throwra Ltd and Crannog Films Ltd) became designated members of the LLPs.

(3) The members who chose the loan option continued as members but with limited recourse financing which eliminated their personal liability to BOI (or anyone).

(4) Panosh and Birdcrest (as non-UK residents) did not return UK income tax on what was now regarded as foreign source trading profits generated through the leases.

47. In his witness statement Mr Dryburgh said this as regards finding a purchaser for the residual interests and the process for completing the sale:

(1) On 4 March 2013, SA engaged Mr Dally of NML to assist it. Mr Dally had advised SA on various film related matters from 2000 onwards. He was knowledgeable about sale and leaseback contracts, had advised two lessees in relation to the LLP's proposals to repay BOI and was therefore knowledgeable on the structure of the January 2013 transactions. Mr Dryburgh was keen to continue engaging him where his skills and knowledge could assist.

(2) On 5 March 2013, NML emailed a letter and enclosures to the five parties SA suggested they approach. SA also asked NML verbally to communicate with any other parties they thought could be interested. NML had immediate responses expressing interest from EH, and Conor Harrington ("**CH**"). EH indicated that his company, Finance and Equity, was acting for a client who would be interested in considering a purchase and CH indicated that his companies would be interested to consider a purchase. EH is a former banker and Finance and Equity raised finance for projects, including those involving films, in the UK and Ireland. Both EH and CH and their companies are resident and their businesses are situated in Ireland. CH indicated that his company, Crannog, or an associate would be interested and requested further information, particularly in relation to certain films. CH is a film and television producer and his companies had also been involved with film distribution.

(3) Further information was provided by NML to each of the five parties. Mr Jeff Bowman responded verbally and asked for further information, particularly in relation to the financial structure of the LLPs and draft heads of terms. He had gone to Australia on business and was not readily available. An email was sent by Mr Bowman chasing the further information on 19 March 2013 by which time meetings had already taken place with EH and CH. Mr Edwards was slow to respond and the only follow up from him was a text confirming he had received the documents and was awaiting clearance from his compliance department before responding. No response was received from Mr Simpson to the best of Mr Dryburgh's knowledge.

(4) Following email and telephone exchanges and the provision of additional information, a meeting took place on the morning of 13 March 2013 at the offices of NML with EH, Mr Dryburgh and one of Mr Dally's associates, Mr Richard Homer. The matters discussed included the current structure, the opportunity to generate additional income from film rights, in particular, where lessees had been dissolved and the films could be exploited as principal, EH's client's requirement for the LLPs to become resident in Ireland and deal pricing and structure.

(5) A further meeting took place on the afternoon of 13 March 2013 at the offices of NML with CH, Mr Dryburgh and Richard Homer of NML. They discussed the same matters as were discussed at the earlier meeting. Mr Dryburgh agreed to put CH's pricing and deal structure to the members of the LLPs and another general partnership. CH indicated that he was particularly interested in the opportunity to generate income from

the exploitation of films where the LLPs' beneficial rights as owner had reverted following the dissolution of the lessees. He commented that organisations such as Netflix needed content and they could be interested in a deal to exploit those films.

(6) NML then had further email exchanges with EH culminating in indicative deal terms to be put forward to the LLPs and the general partnership. Having received indicative pricing and deal structures from both CH and EH, SA called meetings with the LLPs and general partnership and provided the members and partners with the details of the two separate offers. They also circulated an email to members of each LLP inviting any alternative views of those expressed at the meeting. In both cases, the sellers would be required to contribute further capital into their LLPs to enable a fee to be paid upon closing. It is normal for a new managing partner to be paid an upfront fee as an incentive.

(7) Members/partners of the LLPs and the general partnership all attended the same call-in meeting on 21 March 2013. A further call-in meeting was scheduled for 22 March which only two or three members/partners attended. Although the terms offered by EH on behalf of his client were better than the terms offered by CH's company, the unanimous view was that CH's company, given CH's involvement in film and television, was more likely to generate income from the films beyond the guaranteed minimums, particularly so in the case of films where the lessees had been dissolved. All members/partners unanimously voted to give CH exclusivity subject to his commercial terms being improved. SA were instructed to seek a closing on or before 5 April 2013. No members of any LLP indicated a contrary view following that meeting. They were satisfied that SA had given potential sellers every opportunity to express their views.

(8) Following an exchange of emails with CH, improved pricing terms were agreed. He then informed EH of the position by telephone. EH expressed his disappointment and indicated that he may have been able to find someone in the film industry to assist his client to generate further income. He agreed that he would let EH know if SA could not conclude a deal.

(9) SA initially requested assistance from NML to help negotiate and create the legal documents required. Following discussions with Mr Homer they decided to use the services of Mr Gordon. He had both the experience needed and the flexibility to be able to dedicate the substantial number of hours they considered were necessary to close a deal. On 24 March 2013 Mr Gordon was instructed by SA and over the next few days and weeks SA and he jointly produced the necessary draft documents.

(10) Panosh required that the LLPs become resident in Ireland where CH and his companies resided. Advice was taken from Mr Simon Gough of DLA Piper and following a telephone and email on 21 March 2013 a request for advice was given on 22 March 2013 which Mr Gordon sought to reflect through the documents to satisfy Panosh's legal and accounting advisors. On 28 March 2013, Mr Gough was asked to and did confirm that the draft properly reflected his advice.

(11) On 21 March 2013 SA circulated the latest draft of the sale and purchase agreement. One of the members of Downing, Emma Simmons, wrote to SA with a number of questions and suggested amendments. Over the next few weeks Emma Simmons exchanged several further emails in relation to the transaction documents, asking additional questions and making further suggestions for amendment.

(12) In early April 2013 an email was sent to all members providing an update on what was required to close a sale of members' interests and providing a number of documents including a notice of meeting on 4 April 2013 incorporating proposed resolutions to enter into a sale of a majority interest in the LLP to Panosh, to appoint Panosh as managing partner, to enter into all other transaction documents and to take all other steps required

of the LLP under the sale agreement. On 4 April 2013 Downing and Repton approved the proposed resolutions. On 8 April 2013 Avondale and Chamberlain also approved all the proposed resolutions.

(13) SA also sought Irish legal advice and assistance. The conditions precedent required SA to supply a substantial amount of material including lease amendment agreements. These required a substantial amount of work, including input from Mr Gordon and Mr Dally. Panosh appointed advisers in Ireland to advise them on legal issues, initially Simon McAleese solicitors and later Flynn ODriscoll ("**FOD**") which SA first became aware of on 17 April 2013.

(14) Until FOD was appointed, progress towards closing was slower that it should have been. Mr Dryburgh was concerned during this period that either CH's or Panosh's advisers would advise CH against closing the transactions. The transactions were complex and would undoubtedly have required the advisers to become comfortable on Irish taxation (particularly residency issues), accounting and regulatory matters. They were particularly concerned that Simon McAleese Solicitors had not grasped the commercial nature of the proposed transaction. Their apparent silence suggested that was so. Following FOD's appointment, matters progressed much quicker and FOD began to challenge the documents and their client and properly engage in the process leading to the closing meeting at their offices on 23 April 2013.

(15) Prior to the transactions concluding on 23 April 2013, there was no agreement or any verbal or written understanding, side-letter, undertaking, promise or any other obligation between the LLPs, the sellers, Mr Dryburgh/SA or any entity or person(s) associated with them and CH, Crannog, Panosh or any other entity or person or entity associated with them. Nor was there any certainty, during the period from the sellers giving CH/Crannog the period of exclusivity to conclude a deal, that the transactions would indeed conclude in a sale until the closing. The contracts and documents all had to be prepared from scratch, CH's advisers had to be satisfied with the conditions precedent which led the LLPs to become resident in Ireland, advice had to be taken on both sides and appropriate documentation agreed, funds and appropriate documents had to be forthcoming from proposed sellers and there had to be no changes in law which could have prevented a sale happening nor any discoveries made during due diligence.

(16) The sale of the Capital Accounts and the later sale of the members' residual interests were not part of a single arrangement. There were no arrangements in place to sell those interests when the Capital Accounts were sold. It was made very clear to members that would be so, and that they must sell their Capital Accounts knowing that to be so. All the constitutional changes to allow an onward sale took place after the sale of Capital Accounts, a proper process took place to identify a preferred purchaser and negotiate commercial terms and there was always doubt that a sale of interests would take place until that later transaction was concluded.

(17) For a number of practical/commercial reasons (which he set out) it was not possible for (1) the members to sell their interests in their LLPs without first selling their Capital Accounts and repaying the loans, (2) to first repay all the loans in any one LLP by arranging for every member to do so with a new limited recourse loan and then seek a purchaser for the interests of those who wished to sell and use the proceeds to repay their replacement loans, (3) for some members to repay their existing loans from the proceeds of a limited recourse replacement loan and for others to repay their loans from the proceeds of the sale of their interests.

(18) The sale of the Capital Accounts was not an artificial step inserted into a scheme to sell members' interests without falling foul of a charge under chapter 5. It was the only

commercial way possible to put those who wished to sell their interests in a position to be able to do so. No other option was available and for the reasons given above, it was not possible to sell interests directly to a purchaser. Those who chose to sell their Capital Accounts all had very good reasons to wish to do so and it was their right to be able to do so and to subsequently seek a purchaser for their interests. The way they did so was a practical solution, was carried out at arm's length and was not artificial.

(19) Theoretically it might have been possible for some members to take replacement loans and for those who wished to dispose of their interests to sell their Capital Accounts to Birdcrest thereby clearing the loans and at the same time sell their interests to another party. In practice, that was never a possibility. SA only had a small staff and Mr Gordon assisting with legal drafting. It took almost two years to close the refinancing and sale of Capital Accounts and their resources were stretched to a point where they could not have focused on a second major transaction, even if they had considered doing so, which they did not.

48. We do not accept without qualification the points made by Mr Dryburgh at (15) to (19). We note here, in particular, that Mr Dryburgh did not provide any convincing commercial reason why matters were arranged so that there was a gap between the sale of the Capital Accounts and the sale of the residual interests. Mr Dryburgh suggests that it was not practicable to deal with the two transactions at the same time due to constraints on resources. However, the additional time required to deal with it would not seem to be very significant given the evidence set out above and below demonstrates that the pool of potential purchasers had known what would be involved for some time and the alacrity and relative ease with which the deal was agreed and the sale of the residual interests was completed. We have commented further on the assertion that there was no single arrangement in our conclusions in Part C.

49. In his witness statement Mr Dally said that (1) on 4 March 2013 he was instructed in relation to the sale of the members' interests in the LLPs. He had not previously been involved with the sale of the Capital Accounts, (2) his recollection was that the work he was instructed to carry out appeared to be a standalone process and was conducted as such. He was not aware of any pre-agreement between the parties or of anything that suggested the sale process or proposed transactions were a sham, and (3) coincidentally CH was someone who he had met through the Media Business School and with whom he had a good business/social relationship. CH would have certainly told him if the deal was prearranged. Mr Dally was not responsible for bringing him to the deal. It is evident from the evidence set out below that Mr Dally in fact had little substantive involvement in the process for the sale of the residual interests and, as he accepted, he was not in a position to comment on whether there was a pre-agreement for the sale or what took place between CH and SA/the LLPs.

50. At the hearing Mr Dryburgh and Mr Dally gave the following evidence as regards the sale of residual interests:

(1) Mr Dryburgh confirmed in effect that (a) before the sale of the Capital Accounts, he had identified the following people who he thought might be interested in buying the residual interests: CH of Crannog Films, EH of Degani Capital, Mr Donald Simpson of TC, Mr Jeff Bowman of Bowman and Associates, and Mr Adrian Edwards of Cim Group Australia, and (b) he had discussions with all of them before February 2011.

(2) He said that in 2011 (a) the persons were aware of what SA were doing and hoped to do once they were able to sell the Capital Accounts, (b) they understood what a plain vanilla sale and leaseback scheme was except possibly Mr Bowman who asked very basic questions, (c) he did not discuss with them the sort of ballpark figures that they or their clients might accept for taking this on: "We had an aspiration but we didn't discuss fees or that in detail with anybody. We just talked the concept of what we were doing and

what the next stage was", (d) other than Mr Simpson (and possibly Mr Bowman), they all asked to be notified as soon as the first sale had gone through. He could not remember the actual dates of discussions with them but it was prior to January 2011. He did not take any notes as in most of the cases they were talking about other things; there were no specific meetings set up specifically to discuss any of these things with them, (e) in re-examination he said, in effect, that prior to the writing of the February letter he did not have any "discussions" about buying members' interests with these five persons or the people who they might have introduced, but he mentioned "what we were doing and what we were looking to do at the end". We take Mr Dryburgh to mean here that he did not have detailed negotiations with the potential purchasers in 2011 but it is plain from his other evidence that he certainly made all of them aware of what he proposed to put to the members as regards the sale of the Capital Accounts followed by the sale of the residual interests.

(3) As regards the potential purchasers:

(a) Mr Dryburgh said that CH lived and worked in Dublin. He occasionally came over to London and he very occasionally had a cup of coffee with him. CH had carried out sale and leaseback transactions in Ireland and understood that market well and his company had been involved in film for some time. He had a film distribution company, and he certainly understood his way around that.

(b) When they were seeking to bring him in as the funder of the sale of the Capital Accounts, EH was given really quite considerable detail about the transactions and so was well aware of the original transactions. He thought EH was raising money for windmills at the time on seeking the benefit of any tax reliefs and passing it down through the rentals and he asked SA if they had any clients that might be interested to go down that route. In re-examination, he said, in effect, that (i) EH did not do anything for SA in December 2011. They asked him then if he could come in as an alternate lender to Birdcrest but nothing came of those discussions, (ii) he did not believe that at that time there was any discussion between them about purchasing residual interests after the Capital Accounts had been purchased, and (iii) he thought EH's company may be a buyer but he knew also that EH acted with many others who were funders, so it was done with a broader view and he certainly knew that he was capable as an ex-banker. He remembered that EH said he had some investors who might be interested when he responded to the initial email from NML.

(c) Mr Bowman was introduced by somebody else – he did not have an awful lot of conversations with him and did not know much about him. He thought he was introduced to him in January 2013 and that he only had some telephone calls with him.

(d) Mr Edwards was a South African lawyer who acted for people who Mr Dryburgh knew in the UK. He thought he had discussions with him in 2011. At the time he seemed the most interested in actually being involved in the second stage and Mr Dryburgh thought he would be the most likely purchaser. He had done some sale and leaseback transactions in the UK, he was a very good, very commercial lawyer, and he understood the sale and leaseback transactions inside out. He had a feeling that he might be the one and thought that, given time, if the partners had not been in such a rush he may well have come in. He came back and said he was waiting for the compliance department to give him the go ahead (as required in that type of trust company) but that got overtaken by the other events.

(e) He was not thinking of Mr Simpson of TC as being a purchaser himself. TC at that time owned a trust company in Guernsey, and he was aware that they acted for a number of offshore entities/trusts and wondered if any of those clients, especially in their Guernsey office, may be interested in this type of purchase.

(4) Mr Dryburgh agreed that on 4 March 2013 he gave formal instructions to NML regarding the sale of the residual interests, he had called Mr Dally the day before to say these instructions were coming, he would have checked in advance that Mr Dally was going to be available around this time, in the relevant email he attached the details of the five potential purchasers, gave very clear instructions about what to do and attached a letter to the potential purchasers which he had drafted for Mr Dally which stated on it that it was to be typed on NML headed notepaper. In his email Mr Dryburgh said also:

> "You may also be aware of potential purchasers or advisers who may have clients who are interested and I would be grateful if you would be able to circulate the finalised letter to them. I will also give more thought but…if you can send letters out to those contacts it will be a good start. Given the international nature of the potential purchasers you may [want] to send a copy of the letters by email as well. If so, please copy me in. As mentioned, please can you also let us have certified copies of the sent letters. Thanks again for your help … We look forward to working with you."

(5) Mr Dally confirmed that he received formal instructions in early March 2013. He could not remember when Mr Dryburgh first got in contact with him. He was not in as continuous contact with him as previously, because they had stopped being able to do sale and leaseback deals but "he was someone I would still see at film festivals and different things" and it was a connection that he keeps up. He thought Mr Dryburgh would not give him advance warning of pretty urgent work but we note he had no recollection and Mr Dryburgh said he did contact him in advance.

(6) Mr Dally agreed that his task was very clear from Mr Dryburgh's email – to put the five names into the NML headed paper, send the letters out, email them if international, copy Mr Dryburgh in and then get certified copies of the sent letters. He confirmed he sent the letters only to the five named persons and they were sent out by a receptionist at NML on 5 March 2013 at 4.30pm. He said it was fairly normal to be asked if he could think of anyone else, but on this occasion he was not able to help "because it was such an unusual deal that I really didn't know anybody that would…" Mr Dryburgh noted that Mr Dally did not have any other clients who the letter could have been sent to which would have been nice.

(7) Mr Dally agreed that (a) it would be useful to evidence that he had sent out the letters to get certified copies of them and that is why such copies were wanted, (b) his task in sending out the letters was actually pretty purely administrative but he said that it was just the beginning, and (c) he had not really added any value to these letters other than providing the administrative assistance at this stage. When Mr Dryburgh was asked if he asked for certified copies of the sent letters with a view to producing a document bundle for litigation, he said in anything like this one would want to make sure there is a proper record of what happened. He agreed that he was copied in to the letters and that EH and CH replied very quickly.

(8) One of the potential purchasers had an interested client within only three days, and two of them made offers within eight days which were put swiftly before a meeting of members:

(a) In an email of 5 March 2013 sent at 4.38pm EH replied "thank you for your letter which I will need to consider further. I will be in contact shortly" and in an email of 7 March 2013 EH said, "I have now had a chance to review your letter and you will agree the proposal is quite complex. However, I may have some interested investors particularly because of the particular residual value in the films at the end of the leases. I will be in London next Wednesday, 13^{th}…." He also asked for more information. Mr Dryburgh responded to this request then asked Mr Dally to arrange a meeting. Mr Dally confirmed that he helped set up the meeting and booked the room.

(b) Mr Dryburgh agreed that by 7 March 2013 he had a meeting set up with EH for 13 March 2013. It was put to him that he would not have left this to Mr Dally, because he was really the one in charge of the negotiations. He said that he had the detail at his fingertips, so he needed to be at that meeting and SA were also appointed to do the work.

(c) In the note of the meeting, it is recorded that EH said: "Minimum payment at this stage has no real value at this time. So could arrange that partners get a kick back from future value as and when generated?" Mr Dryburgh is recorded as replying: "That is something to consider – we would need to think about structure in detail and revert to the partners with a specific structure of sums sought". Mr Thornhill submitted that this demonstrated that this was not straightforward; it could be structured in various ways and was not a plain straight vanilla sale.

(d) In an email of 6 March 2013 CH asked for details of the "key cast, crew year, etc" for the relevant films. Mr Dryburgh thought CH was seeking here to get clarity on which films were involved, so he could go to IMDb, which is "the kind of bible for films", which Mr Dryburgh considered was a sensible thing to do. SA sent the requested information to CH on 8 March 2023 in an email which was copied to Mr Dally and to the other potential purchasers. Mr Dally agreed, in effect, that Mr Dryburgh collated all the requested information, replied with the requested information and arranged a meeting on 13 March 2013 and that his administrative team sent the information that was collated for CH to the other possible purchasers. He did not remember who asked them to do that but thought it would have been Mr Dryburgh.

(e) Mr Dally initially thought he was at the meetings with EH and CH but when shown relevant documents agreed that he was not at them – they were attended by Mr Homer. The correspondence shows that CH asked for and was provided with various documents before the meeting which Mr Dryburgh said are standard across the films and partnerships. Mr Dally agreed that the documents were reasonably standard documents, "some of them – they tended to be pretty standard" and that if one knew and understood the film scheme industry and was au fait with the market for film schemes, one would have a fair idea of what you were likely to see but would not know the precise detail".

(9) As regards the other potential purchasers:

(a) Mr Dally did not remember receiving any written response or communication with Mr Simpson.

(b) Mr Bowman responded to the initial letter on 8 March 2013 and requested a diagram of what was proposed and draft heads of terms. Mr Dally said that he did not think he did ever follow up with Mr Bowman. There appeared to be no response to Mr Bowman's email of 19 March 2013 chasing for the information. Mr Dally did not know if there was a response. He noted that he chased Mr Dryburgh and he was just copied in and said they did not get any further with him. Mr Dryburgh confirmed they did not have heads of terms prepared at that time and then events were overtaken by the meetings with CH and EH who then provided offers that he was able to take back to the members. He agreed that there was not any need to provide what Mr Bowman asked for because at the time he already had two people fighting for it almost daily. He thought he would have replied to the email of 19 March 2013 but by that time he had had the meeting with the members and had an instruction to give CH exclusivity so by then Mr Bowman had missed the boat. He thought that EH and CH knew that there were consecutive meetings and they would have known they had competition.

(c) Mr Thornhill noted there was an email to Mr Bowman in which it was explained to him what the position was with regard to the various leases. He submitted that this shows that it was necessary to give these specialist buyers quite a lot of detailed information to see whether they really were interested.

(d) Mr Dryburgh agreed that Mr Edwards was chased to give his certified receipt of the letter.

(10) Mr Dryburgh confirmed that each of the potential purchasers knew that he was speaking to others and that they were not getting some exclusive rights to be the only possible buyer and there could be competition.

(11) Mr Dryburgh said that the idea that if the residual rights were exploited and did produce some income over a threshold, possibly some money could come back was mentioned in the original letter. He explained that the relevant leases were no longer in place where the lessees had "fallen over" and ownership of the relevant films had reverted back to the LLPs; with those films there was the opportunity to do something and that opportunity was always something that they envisaged would be a carrot to a potential purchaser. He thought that probably it was some time in 2012 that they could see that there was an opportunity "if and when we could get to that stage" but the first time the potential purchasers would have got any detail on this was when the letters went out from Mr Dally.

(12) Mr Dryburgh said that after the meetings on 13 March 2013 he had enough to go back to the members to give them a choice. He thought they had to go back to EH as he had not provided terms to say they had terms from somebody else so he would need to provide draft terms. In an email of 14 March 2013 EH said that his client was prepared to move forward with the proposal for an all-inclusive payment by the selling partners of £120,000 for the purchase of their interest. Mr Dally did not remember this offer. CH also emailed on 14 March 2014 with an offer to go ahead for a price of £140,000. Mr Dryburgh did not agree that he was just keeping EH warm at this point because by then CH's offer had been accepted. He thought EH came back with the details on 20 March 2013 in time for the meetings on 21 March 2013. The correspondence shows that he wrote to EH on 22 March 2013 informing him the other offer was being considered. It was put to him that he had two buyers who were really competing with each other to be paid to buy the partnership shares and that was what he had aspired to. He said that is what he/SA wanted; they wanted buyers and some competition. He thought that the partnership instructed them to go back to CH, having decided they wanted to go with him, to ask him to meet or match EH's lower offer. CH agreed to that. The documents show that CH's offer was accepted on 26 March 2013.

(13) Mr Dally said it sounded right that when CH's offer was accepted really that was the end of NML's involvement in this. It was put to him that his firm had not really done anything that a good administrative assistant could have not have done and they provided purely an administrative service. He said he did not regard it like that himself. He seemed to agree that whilst in his witness statement he said "[CH] didn't tell me the sale was pre-arranged", he could not really speak to precisely why CH did or did not say something

to him as he was not involved in the negotiations. When asked in re-examination what part he played in this transaction and contributed to it, he said:

> "Well, I certainly would discuss the terms with John. I would have discussed the terms that were going backwards and forwards with John, would be fairly normal. And in that discussion of terms, I mean, was a solution arrived at fairly quickly or were there toings and froings, proposals going both ways. It took a little while if I remember. A couple of weeks I think."

(14) Mr Dryburgh agreed in effect that (a) realistically what mattered to the partners was that somebody was willing to buy the residual interests off them and what they were asking to be paid upfront was entirely reasonable for each individual partnership, because the sum was spread across the LLPs and was well within the 1.5% threshold which meant that SA would get some fees out of this, (b) as regards the payback element, the acquirer would have had to get their own money back before they would start even to consider paying any money back to the partnership and it was out of the partners' control as to what in fact the acquirer would do outside of the jurisdiction after. He agreed that was a bit of icing on the cake and described it as a carrot, (c) CH was given the exclusivity to try and close the deal and then they really set about getting the documents in place to give effect to the deal and instructed Mr Gordon to help with that with the benefit of the DLA Piper advice, and (d) DLA Piper understood how to draft the documents to ensure that the trade emigrated outside the UK and they approved Mr Gordon's work both in terms of the resolutions and all the transaction documents.

(15) In re-examination he said that he thought that CH won the day as, at that partners' meeting, the feeling was that he is a film producer, whereas EH was an ex-banker and had not identified who his investors were and the partners wanted to go with someone who could potentially generate this additional income. They wanted to make the sale for a price that was within the boundary that they had identified but the thing that swayed them was that CH had come up with this identified ability to possibly make some money down the line. He thought that had EH been a bit more organised he could have done the same but he did not at the time of the meeting. In the deal that CH agreed within the documents there was an incentive in that, if one made enough money from the re-exploitation of the films, particularly those where the lessees had become dissolved, then the partners would share in the upside from them. He said that the meeting with CH was the first time there was any detailed discussion of the uplift arrangement.

(16) Mr Dryburgh confirmed the relevant persons were instructed to make every effort to get the sale done by 5 April 2013. He did not agree that neither party acted in such a way that there was any genuine risk to the deal actually going through. He explained that (1) CH had an accountant, who advised on tax matters, and he was absolutely certain that CH would have had to get their blessing to go ahead because he would have to consider both the UK and the Irish tax position, and that was clearly a complex matter for him, and (2) he also needed his lawyers to be happy, (3) initially they heard nothing really from CH and his lawyers for some weeks and it was only when he appointed FOD that they actually saw some progress being made, and (4) by 12 April 2013 he had an email saying CH was confident he was on track to close by 18 April. He agreed essentially there were only niggles to deal with at that point. One of the partners, Ms Emma Simmonds, did get rather interested in the deal but she was interested in the detail and, while she was asking questions, she had already given SA her signed powers of attorney and paid the fees so she was not standing in the way.

(17) Mr Dally agreed that NML and/or Mr Homer were asked to draft the SPA for the sale of the residual interests, but said it was not their area of expertise, and Mr Gordon or somebody else did that. Mr Dryburgh said it was clearly a bespoke transaction

requiring bespoke documents and he was under pressure to move quickly and NML did not have the bandwidth within the firm or any precedents to start with. His intention when he appointed NML was that they would see the whole process through but that did not happen.

(18) Mr Dryburgh agreed that (a) as was apparent from the notes of meetings with EH and CH in March 2013, DLA Piper sort of gave him the key bullet points on what had to be done as regards moving the LLPs to Ireland and whilst they did not draft the documentation they did provide the advice; their knowledge and expertise was available to him/SA. He added that they checked everything which Mr Gordon did. He drafted based on their advice, and then the documents were all provided back to them to confirm that they were in line with their advice. He was not sure when he first instructed or contacted DLA Piper and could not remember if he had checked the relevant personnel's availability to deal with this, and (b) in accordance with the DLA Piper advice, the service providers had to be replaced with non-UK equivalents. He thought that the reference to sums due to NML for services provided to Rarebird which were to be borne by LLP related to the work that Mr Dally was asked to do for Rarebird in relation to La Vie en Rose and it was actually an additional fee. He agreed that the LLP picked up his costs.

(19) He said he did not have any knowledge of anybody making a gift of a residual interest, but they may well have done. He thought there was one party who did contact them about that, but he did not know if they went ahead. He agreed that (a) the idea was to gift to a person who had a lower rate of income tax, and (b) members were free to make a gift (or to sell (and the LLP was free to sell)) once the relevant resolutions were passed. They had their own right to do that.

(20) He confirmed that he had not agreed with any one of the five potential purchasers that they were going to be the purchaser and he did not know before he sold the Capital Accounts that the sale of the residual interests would be to CH rather than EH. It was put to him that Mr Rangeley's evidence was very clear that in the course of drafting his April 2011 paper he was told that there was a market for this kind of residual interest (see below). He said he did not recall saying that there was a market but thought that he may well have said that he could see that there would be a market from overseas purchasers who would be able to purchase that but "there was, as a fact, no precedent for this type of transaction". He confirmed that he had no personal experience of doing this transaction beforehand. He said he was not aware of any other such transactions, neither was Mr Dally. He said again that he did not recollect having any conversation with Mr Rangeley that said there is a market. He thought that he would have said he believed that overseas buyers may be prepared to buy on this. In re-examination, Mr Dryburgh said that he agreed with Mr Dally that sales of residual interests in film leasing partnerships were "very unusual", he personally had not seen any and it was clearly a complex thing to achieve.

51. It is reasonable to infer from the evidence that Mr Dryburgh calculated a percentage fee for the whole proposal in 2011. Inherent within that fee was the cost in relation to and proportionate to the sum payable to an acquirer of the residual interests. Certainly, by the time of the sale of the Capital Accounts in January 2013, Mr Dryburgh must have had an idea of the ball-park figure for the sale and thus his fee:

(1) It was put to Mr Dryburgh that in the 2011 proposal letters he suggested that the fees would be in the region of 3.51%. He said (i) it started lower and then increased when they moved to the two-stage proposal as those who sold their Capital Accounts had to bear the cost, and (ii) because of the timescales, the legal costs were much higher than was anticipated and there were some excess costs that had not been paid.

(2) He agreed that there was to be an upfront payment of 0.51% of members' capital accounts, a fee to SA of 0.5%; and a further fee equal to 1.5% of members' Capital Accounts before the sale less the sum payable, if any, to the acquirer and the further fee would come out of the sum paid to Panosh. He said that anything that had to be paid to the acquirer came off that fee, so that had to be negotiated, and they hoped to keep the additional contribution, which they anticipated being the incentive to a purchaser, below the 1.5% mark.

(3) He did not agree that by February 2011 he had "a pretty good idea" of what he would have to pay an acquirer to buy the residual interests but said there was an aspiration to keep it below that 1.5% number. He thought £140,000 was below that and that sum was spread across the LLPs. He thought that when the proposal was made to members everyone accepted that there would have to be an incentive for someone to buy the LLPs. In February 2011 he had an aspiration of what that number would be and hoped to keep that number below the 1.5%.

(4) It was put to him that he would not have put forward the deal if he had known that the fee the purchaser would require was 10% of the Capital Accounts. He said that was the wrong way round; he thought that, had it been that sum those who sold their Capital Account would not necessarily have sold. Some may have done so, but he was not sure that that all the members would have sold.

(5) It was put to him that he put the February letter forward to all the members of all the LLPs so he must have been confident at that time that the likely fee would be acceptable to all of the members. He said a number of times that the aspiration and hope was to keep it below the 1.5%; he hoped it was a realistic expectation.

(6) He then agreed, in effect, that the aspiration was to keep it well below 1.5% and £140,000 was well within or met that criterion.

(7) He did not agree that it was uncommercial that no one gave an indication of what the cap on the fee might be when he was having discussions with the potential purchasers in 2013. He said:

> "It's only uncommercial if you've…got a scheme which is all put together at one time. That wasn't how this was. We only started to speak to potential buyers after the first transaction had happened. We had a number in our head."

(8) He did not agree that he did not name a figure or a ballpark figure for what might be paid to the purchaser in 2013 because it was obvious to everybody what the right kind of price would be. He said again he had an aspiration of the price that he thought would be palatable to the members and that's "what we had in our mind" but they didn't put that number to either CH or EH. It was a number they had in their mind. But they are commercial people as well. They would know that if they came up with a massive number that (a) they may have competition and (b) the members may well refuse it. So they would have been commercial individuals when they came up with their numbers:

> "I mean, these are obvious things. If you charge too much money the buyer is not going to buy and also, again, any commercial individual would know that…they're not being given a sole run of this, so they would have to price it competitively. That's the commercial world."

52. Mr Gordon said the following in his witness statement:

(1) By mid-March 2013 he became aware that Mr Dryburgh and the members were engaged in finding potential purchasers of the residual interests. He was not involved in that process, having no useful information or contacts in that line of business but Mr Dryburgh tended to keep him informed about the overall position and as a result of such telephone discussions in March 2013 he formed a rough, outline, understanding of the

members' desire to sell their interests. He understood that the disposal of the Capital Accounts under pressure from the distressed BOI had left the members exposed to unrelieved taxable income for the duration of the partnership or of their continued interests therein. As he was not involved in the tax side of things he did not at first realise the pressure of that tax position. He was concerned to find the appropriate mechanisms to carry out a sale of the Capital Accounts.

(2) Mr Dryburgh expressed to him informally some of the frustration he felt when several of the potential offerors seemed to take what seemed an inordinate time to respond with detailed proposals and he was relieved and pleased when he was able to present a choice to the sellers who chose to proceed with CH's proposal because he demonstrated considerable experience in the field of film distribution and accordingly was the offeror most likely to manage the film licences to greater and longer-term profit with the prospect that there might be future participation in such residual profits for the sellers – a contingency which was later duly provided for in the drafting. Such a marketing and selection exercise is not characteristic of tax avoidance. In an email dated 20 March 2013 to Mr Homer copied to Mr Dryburgh CH indicated that he was contemplating providing that 25% of monies received by the managing partner in relation to the further exploitation of the films up to the point of recoupment of the original fee would be the share payable to the partners from future income.

(3) Mr Dryburgh gave him instructions dated 25 March 2013 for the drafting of documentation for the sale. These took into account advice given by DLA Piper following the requirement that the partnerships should become resident in Ireland. It is clear from the need to take that advice and the instructions that:

> "we were engaged in original drafting from scratch in order to deal with a novel circumstance arising from the unplanned disposal of Capital Accounts because of the Bank pressure. This does not fit with a categorisation of the activity as the implementation of a pre-planned tax avoidance scheme. This was rather an exercise in extreme firefighting under pressure."

The time aspect of that pressure is illustrated in Mr Dryburgh's email to Mr Gough of DLA Piper dated 22 March 2013 which includes the statement: "We are instructed by the selling partners to make every effort to close the sale of their interests by 5th April, if at all possible."

(4) There was no pre-existing pro forma to guide the drafting. This was a dynamic ever-changing process of original drafting: "I would not expect to draft a tax avoidance scheme in such a hectic manner. I was drafting for a commercial deal. Commercial deals often demand hectic drafting". He was aware that the drafts were part of the ongoing negotiation and that nothing was agreed until all was agreed so there was some fluidity in the drafting as the deal became more fully formulated. This is characteristic of a commercial deal but not of a tax avoidance scheme.

(5) Although he was not directly engaged in the search for potential purchasers he was aware of some of the possibilities explored. There were various interested parties but he understood that the appointment of NML with their experience and contacts in this area spurred the search to a pretty rapid conclusion, with the members having a choice of purchasers which they exercised in favour of CH on the very commercial basis that he evinced the greater experience and so potential for yielding some future profit. The sale may have been effected on a peppercorn purchase price of €2 but the decisive factor was the long-term prospect of future profit for the selling members. This was a commercially motivated decision. The terms of the final documentation of that deal and the modes of execution (with extensive conditions precedent to be fulfilled) are redolent of a rolling commercial deal and would have been unacceptable in setting up a tax driven scheme. A

failure of any of the multifarious matters to be cleared before the agreement could be considered complete, delivered and effective would have defeated the exercise – no tax scheme in his experience has been set up with so much at hazard.

(6) An unusual feature of the deal was that CH insisted that the purchaser be able to repatriate the partnership as an Irish entity. This was a matter on which Mr Dryburgh obtained the advice of DLA Piper. His understanding was that CH simply preferred to operate within a jurisdiction familiar to him. He was not aware whether there was any tax advantage in such flexibility:

> "When drafting for tax purposes I expect to be fully advised as to the tax purpose so that I might draw attention to any matter which I might apprehend as a possible risk to the tax purpose. I was not so advised in this matter. In summary I am satisfied that the exercise I was engaged in was a bona fide commercial transaction where the outcome was uncertain until final closing. The characterisation of the exercise as a tax avoidance scheme is erroneous and unsupported by the nature of the exercise."

53. At the hearing Mr Gordon gave the following evidence:

(1) It was put to him that he would have understood that members who sold their Capital Accounts, would be liable still to the income tax on the rental income. He said that he was not dealing with anything to do with tax. He made that clear to Mr Dryburgh right at the start. Having a limited practice as a sole practitioner he had decided that he could not keep up to date with such matters and was not going to advise Mr Dryburgh or anybody else on any tax matters related to the problems they were dealing with. It was put to him that that explains why Mr Dryburgh would not have talked to him about the fact that the residual interests would be sold to a non-resident buyer. He said that the question of a non-resident cropped up very late when they were at the stage of identifying a purchaser, and CH was chosen as the appropriate purchaser and he insisted that he wanted to control the partnership in the area of his jurisdiction and Mr Dryburgh took separate advice on that question.

(2) It was put to him that it was known by 24 April 2011 that it was expected that the buyer would be non-resident, he was not aware of that aspect and Mr Dryburgh did not discuss the whole of the arrangement with him; he only discussed with him those elements on which he had expertise. He said Mr Dryburgh was dealing with the problem presented. He had made it clear he would not deal with tax matters, so if there were tax matters Mr Dryburgh would go elsewhere.

(3) He agreed, in effect, that he had no personal direct knowledge of what NML were doing at any point in time as regards finding purchasers. He said he had no contact with them. When it was put to him that he had no direct personal knowledge of what the members did or decided, he said that he advised SA and SA acted as secretaries and general advisers/managers to the partnerships and conducted discussions with the members. When it was put to him that he had no direct personal knowledge of what was known to any of the potential purchasers about the deal at any time, he said that he assisted SA in drafting the documentation for presentation to them. He agreed that anything he might have known about what was going on in terms of the sale would have come to him from Mr Dryburgh or his secretary or assistant.

(4) He could not recall the dates when he had telephone calls in which Mr Dryburgh told him how frustrated he was with the delays. There were clearly constant telephone conversations to finish this off. So precisely when, which call, he did not know. He agreed that Mr Dryburgh hoped and expected that it would all go through quite efficiently so he was frustrated that there were some delays. He said that he expressed his frustration to him. Some people were simply not answering. Other people were taking their time. He agreed that otherwise he did not know any of the detail about what was actually going on

on the ground, other than what Mr Dryburgh said to him on the phone. He did not contribute to that. He had no contacts in that area of business. There was nothing useful he could do. He would merely have been muddying the waters if he had gone wading in.

(5) He said "we were advised that partners were keen to have everything finished off before the 5 April, that put some pressure on". He said he could not comment on whether it was also hectic because SA did not want to start the formal drafting of the sale agreement of the residual interests until after the sale of the Capital Accounts. He said that he was merely aware that "we were delayed because of the problems that arose in respect of the lessee companies being knocked off the register". That caused considerable delay while they debated the situation with TS and other advisers. That was the delaying factor. He agreed that after that long delay, everyone was keen to get on with it and so they moved as quickly as they could. He added that "We were really deciding the course of action. It was just a question of waiting until all the bits came together and one of the bits being [TS] formally disclaiming". It was put to him that it was perhaps also hectic because SA were doing it mainly in-house. He said that he did not know. He put in his statement what he knew.

(6) He said that his memory was jogged by the opportunity to reread some of the documents. It was put to him that he said in his statement that his memory was jogged by an advance draft of Mr Dryburgh's statement. He said that came because he had passed on his practice by the time this cropped up and did not have any of the documents. So Mr Dryburgh sent him a box of 15 kilos worth of documents, which he then went through, and that enabled him to recall what he did and to write the witness statement. Reading the documents reminded him of what the transaction had been about and what he had been involved in, and his memory came back. As for any other transaction in the past, he had put it all out of his mind and if he had to get back into hearing it, he would have to get the documents, see the documents and that would remind him. Later on when he was preparing his witness statement he had the opportunity to read Mr Dryburgh's witness statement and that is why he was able to say there was a big chunk of his that he could not simply adopt without writing it all out again and everything in his witness statement is within his range of knowledge.

54. It is evident from the above evidence and that set out earlier that Mr Gordon did not know how the buyers were found, what occurred between them and SA/the LLPs, what occurred between SA and the members and/or what the members' thinking was as regards any aspect of these arrangements, and that he was entirely detached from anything concerning tax in relation to the transactions under consideration. On that basis we consider that his comments regarding the motivation for the exit arrangements are to be disregarded.

Mr Dryburgh's further evidence on the rationale for the transactions

55. Mr Dryburgh confirmed that in January 2013 he had never organised or assisted in the organisation of the sale of residual interests in film leasing partnerships and was not aware that anyone else had accomplished such a sale. He agreed that prior to 2011 neither the LLPs nor SA acting on their behalf had exploited any residual rights in the partnership films.

56. Mr Dryburgh did not agree that in 2009/10 he knew that there were in the marketplace "emigration schemes" where, broadly, a partnership was incorporated under a foreign law, non-domiciled individuals invested in it and, having done a "plain vanilla" sale and leaseback and obtained loss relief, the partnership emigrated to a jurisdiction outside the UK so that the individuals would no longer be taxed on the rental income unless the money was remitted. He said he learned about such structures when he read the *Samarkand* case. He could not remember when he read that case but that was the first time he saw partnerships which were designed from the get-go to allow people to come out. He said he really did not know what counsel

meant when she put to him that there was another similar arrangement for partners who might be interested in becoming non-resident. It was put to him that Mr Rangeley's evidence was that in April 2011 it was expected that the LLP would become non-resident. He said (1) it was his own view at the time that the obvious potential purchaser for these interests would be someone who was overseas who would be able to arrange their own tax affairs so that they would not have any large ongoing tax liability, (2) so there was an expectation that would be the likely potential purchaser and the business would become controlled and managed from outside the UK because the LLPs could not be moved as they were registered in the UK, and (3) when it was put to him that he would have known before February 2011 that emigrating the partnership so that the partners did not pay income tax on the rent was a clear possibility, he said:

> "We believed that the likely purchaser would be overseas and would be a party which would be able to arrange their own affairs such that the partnerships would be controlled and managed from outside the United Kingdom…I have no recollection of any discussion with Mr Rangeley…in my mind the most likely purchaser would be somebody outside the United Kingdom".

57. It was put to him that Mr Malde was involved in the schemes in Samarkand which were set up in 2005/06 and that Mr Malde assisted SA with this proposal. He said (1) Mr Malde did not assist in any way with this proposal. He acted for Rarebird in that the producers and the lessees who went into that were his clients. Mr Dryburgh had nothing at all to do with that, other than where Mr Malde's clients sold films to SA partnerships and were the lessee, (2) one of Mr Malde's producers produced La Vie en Rose that was subject to the arrangements with Avondale and he got involved because "he was my first point of call when we were looking to do this because we needed to have the lessees with us because they needed to sign and buy into the revised security arrangements", (3) he took this to Mr Malde on behalf of his client and Mr Malde would have consulted with his client. Mr Dryburgh would have consulted with the trust company in Jersey and he in turn brought in Mr Dally to advise his clients, and (4) Rareteam was originally set up to hold the lease payments from the dissolved lessees but that did not happen. He thought that company was used by Rarebird to hold the deposits in the UK. So it was used as part of the refinancing of La Vie en Rose. He initially said he thought Mr Malde was involved in that and became a director but then said that he did not remember if he was a director, but Mr Malde was never involved in any of these things beyond acting for his clients on the other side. He agreed Mr Malde was involved before Rareteam was set up.

58. He agreed that SA took advice from DLA Piper on what was necessary to assist in emigrating the trade to Ireland. He said that was post-January 2013.

59. It was put to him that in his witness statement he also mentioned that in 2009/2010 Grant Thornton were promoting an idea which was part of the genesis of his proposal. He said that (1) he could not remember the exact details but recalled Grant Thornton had put together a proposal which they wanted the SA partnerships to take part in, and it involved the sale of capital accounts and, up until that point, he had never even seen the concept. It was what would be termed an exit scheme but he could not remember if it involved emigration, (2) it did not come close to solving the issue that he saw at that time, which was the exposure of the partners to the banks: "It was a mechanism at that stage that did not involve any refinancing of any banks. And, from memory, it certainly did seek to exit partners but the loans remained. It just got them out of… the tax charges but loans remained…the whole thing was a paper exercise it was put to us…It certainly….wasn't something which I thought was worth taking or even considering further", and (3) Mr Gordon knows partnerships very well and advised him on the partnership law part of it and "he understood very well the concept, more than I did. I picked up the concept from…the Grant Thornton document. That was the first time I remember seeing something like that. But the detail of actually what that meant and how it would go about came from Alistair. I don't recall him taking credit for it but, yes, we did discuss these things for

sure". Mr Gordon had a broader remit than advising on partnership law; he did not advise on tax law but he knew his way around financial services and he was also a corporate commercial lawyer. He agreed that Grant Thornton gave him the shape of the proposal but he did not like at all the way they were doing it and then he spoke and chatted it through with Mr Gordon and ended up with the proposal.

60. He agreed that looking back with hindsight the idea was that the members would sell their Capital Accounts, which would release the deposit to repay BOI and there had to be two disposals which were sequential necessarily and logically: (1) first, the disposal of the Capital Account whilst the investor was a partner, and (2) second the disposal of what was left. He added that there was a charge over the members' interests in favour of the banks, as part of their overall security package, which prevented the members doing anything with their membership interest because clearly otherwise the partners could have voted to change their constitution and, for example, allowed members to resign. He said that to just try and sell the whole interest and then pay off the bank from that was not possible because unanimity of people to sell was needed. That would have been much easier and would not have taken two or three years of his life. But they could not do these things. They "had to go through the natural steps, which was to repay the bank and release those charges, and it was only at that point that the members had any ability to sell their interests, gift their interests or whatever".

61. It was put to him that he could have made the two disposals conditional on each other so that there was no risk to any partner of being left with tax on the partnership share and no interest relief. He said that from a practical perspective he did not know how attractive that would be to a purchaser, but theoretically it would have been possible. It was put to him that he would never have put it forward as a possibility to the members or considered it because not falling within chapter 5 was one of the parameters of any idea. He said in effect that it was true that it had to be done in separate steps, with a view to it at least seeking to not fall foul of chapter 5:

> "It had to be done in the two steps and our understanding was if we did it in two steps and we didn't get involved in seeking to sell the second part, that there would not be a tax charge."

62. He was cross examined on the contingencies or risks as to the second disposal not occurring:

(1) He agreed that the risk as regards the constitutional changes required to the LLP agreement to allow the sale of a partnership share was in the control of the members themselves and they did vote to make the changes. He was not sure if he or Mr Gordon drafted the explanatory note to the April 2011 resolution; it would have been one of them.

(2) He agreed that there was a need to secure the amendment to the LLP agreement to enable the second sale and that was done in stages: there was an amendment so that the majority could vote in favour of the second disposal and then a vote of the majority in favour. He seemed to agree that that was part of enabling the members to be confident that if they wanted to sell they could go on and sell but said that none of that was guaranteed. He agreed that the effect of these resolutions was that within the self-selected group who sold their Capital Accounts only a majority vote was needed to enable them to sell their residual interests.

(3) It was put to him that another potential contingency was that the new owners of the Capital Accounts might not agree to the disposal of the residual interests and Mr Gower, who assisted in setting up Birdcrest, would have known that there was this other aspect to the proposal. He said once Birdcrest was set up it was run by Plectron, not by Mr Gower. It was put to him that if he had had any doubt that Birdcrest, Burgos or Plectron

might not allow a sale of the residual interests, he would not have used that sort of funding. He said:

> "We didn't have that conversation, but…we couldn't see any reasons…why they would object but there was never a discussion as to whether they would. But there was no reason that we could see why they would object if it was done properly. But like everything else, that had to be put to Plectron's lawyers, who were a completely different entity and had nothing to do with…Burgos, not as far as I'm aware, that was Stuart Gower's contact. They were really the people administering everything afterwards. So we had no reason to believe they would as long as they and their lawyers were happy with everything and there was nothing cutting across what they did. There was certainly no reason why they should have."

Mr Rangeley's evidence in relation to his report to members

63. In his witness statement Mr Rangeley made the following main statements:

(1) From about early 2011 he was aware that, following the 2008 banking crisis, concerns were being expressed over the long-term nature of members' exposure to banks which had been lending to film partnership members or holding the defeasance deposits. There was particular concern about the solvency of BOI, one of the financial institutions heavily involved in film finance. Additionally some investors in film partnerships were now paying a top rate of tax of 50% compared to the 40% rate when they invested and had costed the scheme accordingly.

(2) In 2011, he was approached by SA who advised that they were offering the sale option and the loan option. In 2011, the possibility was also suggested that, once a member had disposed of his capital account, repaid the loan and was henceforth liable to tax on their full share of leasing income without any loan interest to deduct and had no security charges over their interest in the partnership, the partnerships could seek possible buyers for his residual interest or for the partnership assets. His enquiries satisfied him that any such disposal would not be pre-ordained and at the time of entering an agreement to dispose of the capital account there was no commitment, actual or implied, that somebody would agree to acquire the member's residual interest.

(3) He studied Counsel's opinion but independently came to the view that a member who disposed of his capital account and subsequently, in a separate and independent transaction, sold his residual interest should not come within the anti-avoidance provisions, nor within the judicial doctrine emerging from such cases as *Furniss v Dawson* and *Craven v White*. He wrote to all his relevant clients setting out the anti-avoidance provisions, the options available, the risks of either doing nothing or disposing of the capital account, or taking the loan option, and the possible implications of later proceeding to dispose of their member's interest. He made it clear that, at the time of the disposal of the capital account there was absolutely no guarantee that it would be possible to make a later disposal of one's residual interest to a purchaser. Some clients opted just to take the new finance and others disposed of their capital accounts in January 2013 and then, when subsequently approached in March 2013, agreed to sell. He was not regularly in touch with all those to whom he had promoted the film partnerships, and there were some who did not tell him what they had done and he only found out later. He did not at any time push the sale of capital accounts. His report comprehensively set out the facts, the law and the risks and he left it to the clients to decide what to do.

(4) At no time did SA lead him to believe that prior to or at the time of the sale of capital accounts a deal had been brokered for the sale of residual interests and he believed that those of his clients who sold their capital accounts did so on the basis that there may never be a buyer for their interests or for the partnership assets. We note, however, that

it appears from Mr Rangeley's other evidence that in fact he had little recollection of his clients' motivations.

(5) The breakdown between clients who took the sale option and those who took the loan option is: Avondale: 1:3; Chamberlain 3:3; Downing 4:2 Renton 4:5. He did not have perfect recall of the reasons given by those clients who chose the loan option and had not retained emails from them. However, he clearly recalls one client telling him that he was risk-averse and did not want to do anything other than remove the risk of having to meet his loan out of his own resources in the event of BOI's insolvency and another client telling him that he was content to remain in the partnership because that was what he had signed up to but he did want to remove that risk, a risk which he had not signed up to. At the hearing he said that he was trying to say here that those were the only two explanations that he recalls receiving from clients as to why they did what they did in choosing the loan option.

(6) He is clear that there was no prospect that all of his clients would have chosen to sell their capital accounts under the proposals. There are those in life who want a quiet life or who are incapable of making a decision. Removing the risk of having to meet their loans from their own resources in the event of BOI's insolvency was a completely sensible, prudent and necessary course of action which, because it was arranged for them and at no cost, was straightforward and without risk. In contrast, selling capital accounts came at a cost and those who sold would no longer benefit from interest relief and faced the risk that no buyer or donee would subsequently transpire or would not transpire at an acceptable cost.

(7) He considers that there were not any alternative proposals which could have been made to those who chose to avail themselves of the loan option, which could have persuaded them to sell their capital accounts or their interests in their LLPs. Any proposals made to those clients which would have obligated them to do so would have been doomed to failure. At least a proportion of those clients would inevitably have voted against such proposals. Since any one member voting against such proposals would lead to them being defeated, he is clear that any such proposals could never have been implemented. In fact, the original proposal would have obligated every member to sell their capital accounts and repay BOI. Members, including his client Andrew Gavan, made it clear to SA that such a proposal would be defeated by individual members voting against. Following that, the new proposals were made. Given that proposals which obligated members only to sell their capital accounts would have been voted down, he can say with certainty that any proposals obligating every member to sell their member's interests to repay the loans would likewise have been voted down. He understands that BOI would not have allowed a piecemeal repayment of their loans and would only allow repayment if all members of an LLP were repaying at the same time. Given that the interest rates for the loans and for the deposits were set before 2008, that is completely logical. If the bank was paying higher than deposit rates but was benefiting from higher than market loan interest they were in a neutral position. However, if instead of receiving members drawings to pay off their loans they were having to pay them to a third party they would have made substantial losses, which they would never have allowed.

64. In examination in chief:

(1) Mr Rangeley explained that (a) he had known SA for some years and had put clients into some of their sale and leaseback film partnerships, (b) he imagined that they contacted him as probably they wanted to sort of test his views of the proposed arrangements at the time, but he could not be 100% sure of that, (c) he considered that as a result of that involvement he had a good picture of the proposals. He remembered certainly that he would have asked a number of questions of Mr Dryburgh about some of

the details of those arrangements, and (d) he produced a 16-page report in April 2011, purely for the benefit of such of his clients who had invested in the relevant film partnerships – they were not all regular clients, he just did that for some of them and nothing else. He thought there were probably about 10 or 12 such clients but he later accepted that the documents show that in fact there were about 20 and about half did each option. He thought he had invested in one of these LLPs but he later accepted that was not the case. In fact he was not a member of the LLPs but was a member of other sale and leaseback schemes in which he invested around 2005/6 and 2006/07 and some of them were with SA.

(2) He was taken to his report where he talked about the financing of the partnerships, the lessee defaulting and the bank not being able to produce the returns on the deposit and was asked if he had any view of the severity of this risk or any experience. He said he had to have some view of that:

> "I mean, being a chartered accountant I'm sort of expected to keep my finger on the economic pulse and I was well aware that (a) there was a banking crisis and (b) the Irish banks were particularly badly affected, and being an investor myself in one of the partnerships it was, from a personal view, a matter of concern because I felt that probably I'd find it financially painful if the worst were to happen….they wouldn't pay the interest on the deposit, which is the interest which basically finances the interest on the investor's loan. Which would have left the investors having to pay it themselves."

(3) He was taken to the following comments in his note:

> "disposal of your beneficial interest in your capital account…The use of the funds raised, plus a small cash contribution from yourself, to repay the loan…This does not at this stage involve your retirement from LLP or giving up your right to profits…Since you have not, however, given up your right to profits, you would initially be in a worse position because you would have no loan interest to set against your share of profits. You have therefore at this stage, taken on a certain commercial risk…At that point you would be free to dispose of your interest in the profits, either by way of sale or gift. It is not clear as to whom you would gift the interest, as it represents a tax liability but no income."
>
> "It is understood that any purchaser will be likely to purchase the interest, and a cost of doing so including other disposal costs and placing the money in a fund to deal with tax disputes would not exceed 3% …but there is no certainty of this and no undertaking to do so as part of the first step…I list below the factors you should take into account.

(4) He said a gift was not something that he thought his clients should seriously consider – he was just surmising as to what the options would have been at that time, and was not aware that a single client expressed any interest whatsoever in that route. He said he was not pushing his clients in the direction of one option as opposed to another – far from it:

> "The whole tenor of this part of the report is to set out the risks and to leave the decision to the client because every individual client has a different attitude to risk, which may be related to their own personal circumstances or it just may be an inbuilt attitude to risk, but it was not my job to tell them what to do, merely set out the options, cover all the aspects of risk and leave it to the clients to decide which way they wanted to go".

He thought it was roughly 50/50 in terms of clients going for the sale of the capital account and those going for the loan replacement.

(5) As regards the section in his note headed "Casting your vote", he said that he was encouraging his clients to vote, to make a decision and then vote based on which way they wanted to go.

65. He said that the report was his own initiative but if a client wanted a report they would have to pay for it. He could not remember how much he asked for payment but it would not have been an awful lot and they each paid equally the same amount. He did not get any further fee depending on whether they went ahead with the scheme and which option they chose did not affect his fees.

66. He said, in effect, that (1) it is highly probable that he would have received a phone call or two from some but not all of his old clients for his views when they received the February and March letters, (2) some he never heard further from and he did not find out for some time afterwards which way they had gone, but there would certainly have been some clients who rang him to ask supplementary questions. He would not have used that as an opportunity to push them in one direction or the other, and (3) he had some contact with Mr Dryburgh in producing the report; he certainly had some supplementary questions of a modest nature, nothing fundamental, he was not questioning the fundamentals of the scheme.

67. He was taken to his report where he said "Exposure to banks. In the post-Lehman era, lenders and borrowers are more alive to the risks, however remote they might appear, of this arrangement breaking down." He agreed that he did not say there that BOI was going to fail and the investors were going to lose their cash deposit. He said:

> "anybody who read the financial press at the time would be well aware there were concerns about…some of the Irish banks, and BOI in particular, particularly because it was a very substantial lender in the case of these partnerships…I can't grade the level of concern because, of course, it's a third party aspect that we have no control over, but we only know what we read about at the time".

68. He agreed that (1) in the report he did not go into the detail of the different kinds of ways in which the arrangement might break down, (2) in referring to a risk that interest would not be paid on the deposit, he meant that there might be a risk, looking at the documents, that post-liquidation of BOI the liquidator would not pay interest on the deposit and that would add a cost to the ongoing scheme.

69. He was taken to the report where under a heading "Why should we now be concerned?" he referred to the increase to the top tax rate to 50% and said that would not only be more painful but would increase the hurdle rate and that it had to be assumed that rate would be there for some time. He agreed that (1) this was a known quantifiable risk to the investors. He said the rate was at 50% in the year in which he wrote that report and then it dropped down to 45% and members paid tax at those rates, and (2) to address that concern an investor would need to achieve both disposals – if the investor decided to sell his Capital Account he would have to go on and sell his residual interest.

70. As regards non-fiscal points of concern he said in the report: "… in the event of a complete failure by both the film lessee and [the bank] your assets could be at risk". He agreed that scenario would be a catastrophe. He also talked about change of lifestyle in his note, saying:

> "things…happen basically. I mean, you could be talking to somebody in his mid-40s who has a fairly well-paid city job…and certainly expects to be earning at that sort of rate for the next 15 years, but it doesn't always pan out that way and, therefore, I was just putting it down because this is a generic report, this is for everybody who subscribed to it, irrespective of their personal circumstances, and it might have been a point that resonated with one or more of the readers, but…particularly if their circumstances had changed. Maybe they decided to make a change of career course and go and run a farm in Cornwall. Who knows? Well, it happens."

71. In that context, he raised in the report issues such as divorce and death. He noted that although he had at an early stage made some enquiries and was told that maybe the banks would not push for the loan to be repaid on death, SA said that was not their experience and,

therefore, on the death of a member the cash would have to be found to repay the loan from somewhere. He could not recall if that would have been explained to members on day 1 when they invested. He agreed that if they managed to find the money to repay the loan, the estate would not want to be left in a position where it still had to pay income tax year on year on year. He also mentioned in the report factors such as life-threatening disease and noted that actually the members' interest in the LLP was basically worthless. He said that these film partnerships are "plain vanilla", so that there was just the income that was produced by the lease contract. There was no possibility of sharing in sort of super profits from the film. There were film partnerships out there that offered that facility, but they always cost more to go into, so they had higher hurdle rates and, in his experience, they were not all that popular. Certainly he was always very cautious about them because most films do not make a profit, "so why take that risk? Just go for the certainty of the plain vanilla sale and leaseback."

72. As regards the exit arrangements:

(1) He was asked what he meant in the section dealing with partnership risk. He noted that this was something which he had not been aware of before, and he said in the report that: "Quite what all the consequences of this could be are not completely clear…". He said he was informed that where a non-resident partner does not pay tax on their share there is a facility to enable HMRC to collect the tax from the other partners. He had never seen it happen but thought he would put it in – he was trying to cover every conceivable aspect. He agreed that to escape this risk, an investor would want to cease to be a member and said there were a number of exit schemes in the market place which were developing and:

> "It was a sort of Holy Grail to some extent, but…whenever an exit scheme crossed my desk I found plenty of reasons not to go ahead. It's…risky…you've got section 797 here, which everybody attempts to deal with, but the trouble is that most schemes are very badly put together and as a tax consultant (a) I've taken an intellectual interest in this sort of thing but (b) there's no way I would recommend one to a client if I felt it was destined to fail."

He said the main players behind such arrangements were Ingenious, Invicta, Grosvenor Park, Scotts Atlantic, Matrix. There were some others but he did not do business with them.

(2) He was referred to this comment in the report:

> "All of this lengthy preamble serves to put the taxpayer on notice that (whilst the Government is still apparently incapable of distinguishing avoidance from evasion) there are, and will be more, tools intent on annihilating tax avoidance. As regards the [SA] proposals …it is fair to assume that should a GAAR be introduced later on this year or maybe Budget 2012, such future strategies are unlikely to work. This could therefore [be] the reader's last opportunity to extract oneself from future tax liabilities."

(3) He agreed that (a) the proposals he referred to here were those that he was advising his clients on, namely, those for extracting oneself from future tax liabilities and he was assuming that this provided an opportunity for an investor to retire. He said he was covering the probability or possibility that a GAAR was coming in fairly soon, and (b) he was saying here that "if you did want to exit the partnership…do both sell the capital account and then go on and sell the partnership share, that's what you need to do and you need to decide whether you want to do it now". He said "Yes, because there's nothing fiscally aggressive in just taking the replacement loan, or not that I'm aware of" and agreed it would involve the sale of the capital account and then going on and selling the residual interest: "Hopefully if a buyer turned up, yes".

(4) He accepted that in the report he gave his opinion on *Ramsay* and agreed that his job was to help his clients make a rational decision about what option to choose based on

their personal circumstances. It was put to him, in effect, that he was saying in his report that if a person chose to sell the capital account but did not sell the residual interest, he would be left with a certain obligation to pay tax for the rest of the 15 years without any interest relief, so if the person did not want to sell his partnership share after selling the capital account, common sense would say he should choose the loan option. He said:

> "I wouldn't say it is common sense because there are two completely different options available to the member. They can just go for the rollover because that's simply what they want and they don't want to take any kind of risk or they've decided that that's what they bought into and they'll stay…with it for the full term of the lease…If somebody is minded to sell their capital account, then clearly they have to accept the risk that a purchaser will not come along any time soon and they would be left with the liability to pay the tax…I go to some pains to emphasise that that's a decision for the client."

(5) He agreed (a) the thought process was (i) if an investor was minded to sell the Capital Account but did not sell the residual interest he would be left with a certain obligation to pay tax for the rest of the 15 years with no interest relief, and (ii) if he sold the residual interest he might walk away with a substantial tax saving if the scheme succeeded but the tax risk is that chapter applies and the tax is accelerated, (b) he was saying the choice was between (i) not selling the residual interest and having a certain obligation to pay tax for 15 years or (ii) a risk that that the certain tax was accelerated but also the opportunity of not paying any tax at all. He said that he emphasised that that is a risk which the client must assess for themselves. In the report he said: "If your financial circumstances are that – even allowing for time to build up a tax reserve ... you would have difficulty paying the tax then, unless you are still prepared to take that risk, common sense suggests that you should not do it…you should instead opt for the loan rollover." He said he was trying to help the client to make that risk assessment without actually saying, "Do this. Do that". He agreed that it is implicit in this that an investor would not sell his Capital Account unless he had decided to do the second disposal if the opportunity was given to do that and in evaluating which option to choose an investor would, therefore, have to have a view about whether he wanted to sell his residual interest. When it was put to him that if an investor were exercising common sense or being rational, if he chose to sell his Capital Account he would also want to sell his residual share, he said "Yes, some people have a more – I wouldn't use the word 'cavalier' but they certainly have more interest in going down that route than others would." He agreed that half of his clients went one way and half went the other.

(6) He agreed that one of the factors that his clients would have taken into account in making the decision which way to go was the costs of actually doing the transaction and he knew at the time what the cost was for those who sold the Capital Account and that there was no cost at all for those who chose the loan option. He seemed to agree that he would have made it clear that the loan option was effectively free because the costs were to be borne by those who wanted to sell the Capital Account. He said there were no costs of refinance to be borne by the members who chose the loan option. It was his understanding that another factor to be taken into account was the costs of litigation and the fees for the sale of the Capital Accounts included putting some money into a litigation fund which was organised after the sale of the residual interests.

(7) It was put to him that when he said in his report that the bottom line was that "if *the scheme* succeeds most of you will save a substantial amount of tax" (emphasis added) he meant both the sale of the Capital Accounts and of the residual interests. He said "I don't want to be trapped into this because it's not an overall scheme as we're trying to

show, but the arrangements taken as a whole, if you like, there would have been a tax saving, yes." He then agreed that he included in that the sale of the residual interests.

(8) In the report he said that for those taking the loan option, "the original loan will simply be replaced with another loan from an offshore lender from an EEC country and Counsel has confirmed that such investors would continue to benefit from tax relief on the loan interest and that it will make no difference if, as expected, the partnership will become non-resident." He agreed that (a) he understood when he wrote the report that the background to the disposal of the residual interests was presumably that the purchaser would emigrate the partnership business or would be non-resident. He added that all his clients were resident in the UK, so it would not have made any difference to them anyway, (b) he was saying to the relevant clients who remained UK resident partners that it would not make any difference if, as expected, the partnership business became non-resident and (c) the idea was that if management and control was outside the UK the income would not be taxable in the UK in the hands of non-resident partners. He again said that he did not have any non-resident clients who were affected by this. He agreed that by this stage the expectation was that that second disposal would involve the partnership business moving outside the UK.

(9) He agreed that he would have understood in April 2011 that there was no point just going out and finding a buyer for the residual interests, as that would have been caught by chapter 5 and SA had devised the idea of selling first all the economic value of the partnership to realise the cash to repay BOI and, on his analysis, that would not be caught by chapter 5 and that was the thinking behind the scheme by those promoting the idea; the sale the Capital Accounts would not be caught by chapter 5 and then an investor could go on and sell the residual interest which would be caught but each investor would taxed only on his share of 2 euros received on that sale.

(10) It was put to him that he would not expect SA to put forward the proposal if they thought they could not actually achieve a sale of the residual interests or there was not any real chance that they could sell them. He said:

> "Clearly if somebody was going to sell their capital account they were hoping and expecting that somebody then would be found to acquire their residual interest in the partnership, but I think I've emphasised in my report that at the point in time at which the partner sells his capital account there is absolutely no prior arrangement commitment, whatever, by anybody to come in and purchase the residual interest…That's something which my clients had to take on board…the clients, I suppose, were hoping that [SA] would find somebody who would acquire that residual interest, but I went to great lengths to make it clear that there was no such commitment, nobody waiting in the wings at that particular time."

(11) It was put to him that he said in the report a number of times there was no guarantee or words to that effect and that is because, for example, the two sales were not conditional on each other. In the report he said:

> "At that point you would be free to dispose of your interest in the profits, either by way of sale or gift. It is not clear as to whom you would gift the interest, as it represents a tax liability but no income. It is understood that any purchaser would be likely to purchase the interest, and the costs of doing so including other disposal costs and placing the money in a fund to deal with tax disputes would not exceed 3% but there is no certainty of this and no undertaking to do it as part of the first step."

He did not accept that he was saying that it was likely that a purchaser would purchase:

> "I was just using my own language to emphasise that there was no certainty. Things can happen and…Well, I wouldn't say it was likely. At that particular time, there might have been, and I'm surmising now, there might have been somebody who had expressed

> an interest in acquiring the residual interests in the partnership but at that time had made no commitment to do so, certainly not transmitted their interest to the selling members, and, therefore, that uncertainty remained, and anything could have happened in that interim period… that particular prospective purchaser could have decided to go and do something else."

He agreed that it was his understanding that that there was no sort of written undertaking that could be sued on or enforced.

73. He confirmed that he did not later revisit this report, he was not paid to give updated advice and in the end he did not actually know what happened as a matter of fact in the implementation of this unless and until his clients told him what they had done. He confirmed that he did not know what happened behind the scenes between Mr Dryburgh and Mr Dally or even that Mr Dally was involved and did not know anything about how the scheme was actually implemented in a granular way.

74. As regards his comment in the report that the loan option was less risky, he noted that he said in the report that there are those who want a quiet life who are incapable of making a decision and:

> "they may not have assessed the risk…they may have just said, "I'll leave things as they are and take the rollover", and may not have given any further thought to it…you have to remember that clients are not tax experts. And some clients have a fairly short attention span to this sort of thing. One does one's best, one puts information in front of them, but clients are clients."

75. He said in the report that BOI made it very clear that all the loans had to be repaid or none of them could be. He agreed that the reason for the splitting the sale of the capital account from the sale of the residual interest was as he had confirmed earlier that it had to be done on his thinking to avoid chapter 5 applying.

76. In re-examination:

(1) He was asked to clarify his understanding of the position as regards buyers for the residual interests. He said that the statement that hopefully a buyer will turn up is a pretty glib response and:

> "I've been at pains to point out that at the time of the disposal of the interest in the capital account there was no buyer for the residual interest in the partnership, and it seemed to me that the GAAR risk would only come to light if both steps were duly taken".

(2) When asked what commercially such a buyer would obtain he said the buyer bought the income stream and the tax liability that goes with it (if there is a tax liability) and it was not for him to say if economically the buyer got anything of value. His understanding was that there was a market at the time for these particular types of assets, but he had no contact with those markets and did not really know what the economics were. He then confirmed that there was a market is what he was told at the time. He thought in the relevant passage in his report he was saying that:

> "we've already discussed the possibility, no more than that, that there would be a purchaser for the residual interest. But what I'm saying…is what would happen if you sold the capital account…Yes, there are two completely…different risks there. If you sell the capital account and nothing else happens, then you will pay tax at your top rate on the partnership profits. If you went ahead and were offered by someone to purchase your residual interest and you went ahead and did that, then my assumption is that that might have fallen foul of section 797 and, therefore, there would have been the concertinaed…tax liability."

He was asked what an investor who chose the loan option would achieve apart from getting rid of BOI. He said "you wouldn't have achieved anything else because you were just replacing one qualifying loan with another". He said he thought it was a correct statement of the risk when he said in his report that those who sold their capital accounts would lose their interest relief and "and faced the risk that no buyer or donee would subsequently transpire or would not transpire at an acceptable cost".

Evidence of the appellants

Dr Jarman's evidence

77. In his witness statement Dr Jarman made the following main statements:

(1) In February 2011 he was made aware by SA of the vulnerable financial position of BOI and the potentially serious financial consequences for him should BOI fall in bankruptcy with him being required to repay the substantial loans made to him from his own resources.

(2) He agreed to SA acting for the LLPs to seek resolutions to this situation and made payment to enable this. The preferred solution agreed to by him in May 2011 was to sell his Capital Accounts. In agreeing to do so, it was clear to him that his membership of the LLPs would continue and that the benefits and the obligations attached to this would continue after the sale. His motivation was to remove the risk of the BOI loans to him being called in.

(3) He was aware that the sale of the Capital Account and the removal of the loan risk could present the LLPs and him with new options and opportunities, one of these being the disposal of his interest in the LLPs. Interest in the acquisition of the member's interests in LLPs was notified in March 2013 from more than one party and this resulted in the sale of the member's interests in April 2013.

(4) He believed at the time and still believed that the two transactions were completely separate involving different parties and at different times.

> "The first transaction may have made the second transaction more attractive but I was not aware of any direct linkage of any kind between the two transactions. I can categorically say that prior to the sale of the Capital Accounts [SA] never mentioned any arrangements with any party to sell on my members' interests or alluded to any prior agreement which would make a second transaction more likely. I was clear that I was carrying out the first transaction as a stand-alone matter."

78. At the hearing Dr Jarman confirmed that he invested in 2005/2006 in Chamberlain and Repton. At the time he had an accountant and a financial adviser. He was taken through the economic model of the original transaction and plainly understood the negative effect of the structure as the years went by. He agreed that (1) year on year there was an increased cost to his wallet due to the amount of tax he had to pay on the lease rentals and the reduction in the interest relief, (2) about two-thirds or three-quarters of the way through, there came a point when there was a negative figure (in 2019/2020) and at that point he had repaid the whole of the £19,000 net tax saving, (3) by the end of the 15 years the Government would have recouped £8,000 of the tax. He did not recall the figures but in general terms that is what he understood would happen and in effect he had had an interest bearing loan from the Government. That is basically as it was presented to him by his financial adviser, as a tax deferral, which enabled him to make other investments with the net tax saving such as in venture capital trusts which were not without their risk but were tax efficient and in a number of early stage companies.

79. He confirmed that (1) SA managed the entire film scheme and all its activities and he would have signed powers of attorney so that they could do everything on his behalf. He thought that year on year he received income/financial statements from the LLPs which he would have passed straight to his accountant, and (2) SA micromanaged the enquiries and were the ones in control.

80. He did not recall SA contacting him in 2008 to let him know that one of the lessee companies involved with Repton had been struck off the register of companies. He agreed that he would have expected SA to have informed him of this if it had dangerously exposed him to some kind of personal financial cost and the only contact he had with SA was in relation to the income statements and HMRC's enquiry. He did not recall being told that the deposit (and he did not remember being aware of the deposit) was moved from ABN Amro to BOI.

81. It is plain from his evidence that Dr Jarman did not receive any communication concerning exposure as a result of the banking crisis until he received the February letter. He gave the following evidence as regards the February letter:

(1) He agreed that (a) the February letter to an extent came out of the blue and was generic in that it was written to all the members and was not tailored to him personally, (b) in that letter, the first risk was put in very high level terms, there was no banking law advice and no detail or advice about the actual transaction and he was not told that BOI or any lending bank actually would fail.

(2) He said that he understood at some point that there was a high risk of BOI failing. When it was put to him that SA could not properly give him that advice as they were not banking law experts, he said he did not know what their capabilities in that area were. He said "it's not stated in this document, but I believe it was stated elsewhere at points in time, which I can't relate to this document". He agreed this document did not tell him that and that in his witness statement he did not point to any document and he could not say what that document was and/or where it was that he got any such advice. He said his recall was that he did get that advice by some means but he could not identify it as at this moment.

(3) He agreed that SA then embarked on a two year project to enable him to sell his Capital Account and then ultimately his residual interest. It was put to him that that is not consistent with an urgent or dangerous personal risk to him at the date of the letter. He said he understood at the time there was a lot of uncertainty and deals take time to do; he was concerned about the length of time but he understood that it was a complex transaction.

(4) He was asked if he appreciated that the deal that SA negotiated was one for all of the SA partnerships. He said he did not have the full picture but he understood that there were other partnerships which were being handled in parallel. He added that there were bespoke documents regarding Repton and Chamberlain but SA were not specifically addressing his personal risk, and he thought it would have been very difficult for SA to appreciate what his personal risk was, apart from the loans which were due to be repaid.

(5) He agreed that the investment model was worked out on the basis of him being a 40% higher rate taxpayer and that paying tax at 50% would affect the economics of the scheme for him. It was put to him that he was such a taxpayer from 2012/2013 and that is something his financial adviser would have known. He thought he consulted his adviser and that he discussed this with SA at some point but did not recall at what point and whether it was specifically as regards this letter. He agreed his adviser should have understood the point about the increase in the rate and would have explained it to him; he could not remember it being explained in great detail but thought there would have been a conversation about it. He agreed in general terms that he understood that the issue with the 50% rate was an aspect of him being a partner in the partnership; it was because he was a partner that he was paying tax on the partnership income and if he wanted to resolve that issue he would need to retire from the LLP.

(6) It was put to him that in the February letter SA gave him a solution, which answered all of the three issues they raised, and which had two aspects (1) the sale of the Capital

Account, and (2) then the sale of the residual interest. He said that he thought the focus at this point was on selling the Capital Account but then, after that, he could sell the residual interest, which would mean that he would retire and would be free of the 50% tax rate on partnership income, which "was presented as a possibility but not a…definite".

(7) He accepted that before they sent this letter SA got the blessing of Mr Thornhill QC on both disposals taking place (as set out in the letter) but said it was not directly linking them as far as he could see. It was put to him that his accountant would have been able to explain to him that counsel had said in the letter that these two transactions would not give rise to a tax charge on him. He did not think he had that conversation with his accountant but agreed it would have been important to him that these proposed transactions did not result in him losing the original tax relief and he would not have wished the two transactions themselves to result in a massive income tax charge on him and that mattered.

(8) It was put to him that he was really being told in the February letter that it was open to him to do both the sale of the Capital Account and then sell his residual interest and it was put to him as a genuine possibility he could do both. He said "it was put…that both transactions were possible but it wasn't put to me that both transactions were linked". He agreed that he understood from this note that both transactions had the blessing of Mr Thornhill; he could do both and could go into the first sale knowing that the second was possible. It was put to him that he was told very clearly that if he sold the Capital Account and did not go on and sell his residual interest, the amount of tax he paid under the structure would go up. He said that he did not think he understood that at the time and it was not pointed out to him. It was put to him that the only reason why it might not be pointed out to him is that it was so obvious that he would go on and sell his residual interest. He said he did not think that was obvious at all and he did not think his personal financial adviser was completely on top of this and:

> "the details – the conversations I had with him were pretty much in outline. We didn't go through this document line by line. I think I asked him if selling the capital was a sensible thing to do and he came back and said, 'Yes'. So … I don't think we went into the tax implications in any detail."

82. As regards the March letter:

(1) Dr Jarman said that he was not aware that there was a hiatus when it became clear that not everyone wanted to sell their partnership share and that they would not consent to the disposal of the Capital Account.

(2) He said he probably received the March letter but could not remember in detail. It was put to him that this revised offer gave him a choice; he could either refinance at no cost to himself without loss of any interest relief, on the basis that he could never be personally liable to repay any borrowing, or he could sell his Capital Account leaving him free to sell his residual interest. He did not think he discussed this with his financial adviser: "For me, at this point, I think being exposed to the potential risk of [BOI] I was in no mood to refinance".

(3) It was put to him that it was very clearly set out in the March letter that both options removed any risk of him having to repay BOI or personally repay anybody. He agreed that is what it seemed to say and it provided a complete answer to the worry about the BOI failing and the loan option was "a very attractive offer…if you're just worried about [BOI] failing."

(4) He said he did not consider in detail that if he chose the loan option he did not have to bear the costs of that transaction: "I just dismissed the fact that I didn't want to go for

an alternative lending". He agreed he just dismissed out of hand the loan option and went with the sale option. It was put to him, in effect, that, as was made clear in the March letter, the day after he sold his Capital Account he lost all his interest relief, so he was really commercially compelled to go on and sell his residual interest. He said "Looking back, I believe that I was unaware of that at the time." It was put to him that this is written on both of the proposals and even a moderately competent adviser would have mentioned it to him. He said that he might have had a conversation with his adviser but "we didn't go into these implications in detail". It was put to him that it is just one of the core basic implications that immediately after selling the Capital Account he would have to pay more tax and it would be very surprising if his personal adviser had not mentioned that to him. He said he could not recall it being mentioned.

83. He agreed that he would have known that the sale of the Capital Account carried the risk of challenge by HMRC but said that he did not think he did a risk analysis and considered that point. He did not remember approving the amendments required to allow the disposals to take place. He said that he understood that the change enabled the possibility of selling the partnership assets but it did not give certainty to that. He then agreed that it meant that he could be confident that the possibility of the partnership assets sale was enabled.

84. It was put to him that he would expect that SA would not have used Birdcrest and Plectron in these arrangements if they would have blocked that second sale or there was any serious risk of that. He said he really did not know. He said, in effect, that he did not know that Table Bay had as its chairman and member PB and Marjorie Dryburgh who seemed to be relatives of Mr Dryburgh and he did not know about them and whether they would have consented to the sale. He agreed he cannot assess or judge any of these uncertainties or contingencies.

85. He seemed to agree that it was clear that the sale of the Capital Accounts was necessary before the sale of the residual interests could be considered and the deal done; that was what was put to him. When it was put to him that was a sort of self-imposed restriction, he said that it made sense to him that there was a need to accept due process. He was not close enough to comment on whether it was normal and whether SA could have drafted the contracts so that the second sale was conditional on the first happening. He said in effect that he did not know that (1) Mr Dryburgh had identified five potential purchasers well before the date he sold his Capital Account and he was "aware of potential purchasers after the sale of the Capital Account but not before it", (2) one of the potential purchasers had seen all of the documentation for the sale to Birdcrest well before January 2013, (3) SA had a fallback, namely, that if he could not sell his residual interest, he could give it away. When it was pointed out that was in the proposals he said "Well, yes, if I read it that would be so, but I didn't know it." It was put to him that he would expect that SA would not have put forward a proposal that they could not make work. He said " Well, yes, but I always understood that there was no guarantees for that and, you know, I understand that there's many reasons why…things could come about where deals fall apart".

86. He said he could not remember the detail but, when there was a delay, he didn't think that there was complete silence: "I can't remember how, but I was updated that there was a delay but there was still a prospect." He did not know that some of the delay was to do with the dissolved lessees. He said that he was unaware that in 2012 SA took some banking law/commercial banking advice but he was not close enough to this to expect to be told that. At some point he became aware that things were back on track. He recalled signing various documents when the sale went through on 18 January 2013 but did not speak again with his financial adviser and just signed what he was asked to sign and sent it back. He agreed that having done that, he would expect to hear from SA about the sale of the residual interest, as he did. He said he recalled that two days later he got an email which refers to arranging a meeting among all the partners to resolve, amongst other things, to appoint SA to seek possible buyers.

He agreed that (1) the next thing he would have heard from SA was that they had some offers to be discussed at a partners' meeting but he did not specifically recall that, (2) there would have been some contact between him and SA for formalities – and clearly he voted in favour, and (3) that would be an obvious thing to do because, once he had sold his Capital Account, the obvious next step was to get on with selling his residual interest. He added that "in my particular case…I was very happy to get rid of it and move forward".

87. He remembered there was a call on 21 March 2013 to discuss the possible buyers but did not remember it in any detail. He said that he remembered the point about the early closing by 5 April 2013. He did not remember the pricing of the transaction and agreed that he did not really remember the call. He thought he was unaware that there was an idea that if Panosh could turn the residual rights to account in some way, once it had recouped a certain amount, there was some very remote possibility that it might pay some money back to the partnerships.

88. It was put to him that on 22 March 2013 SA reported to all of the members and summarised the outcome of that meeting and then there were some further steps such as the members appointing SA to provide tax services to deal with any challenges from HMRC. He agreed that (1) he must have signed up to that and paid into a litigation fund for that purpose. He did not recall any problem with the members approving that the sales could go through from a constitutional point of view, (2) he was on board and would have voted in favour, and (3) he only knew what SA were doing as regards everything that happened before 18 January 2013 up to the contracts being signed from what they told him they were doing; they were controlling the flow of information and managing the project.

89. In re-examination he said that (1) it is very difficult to recall in detail the events at the relevant times and he is not really a detail person: "So I was a partner, I was relying on some advice, but…I'm not sure that I ever digested the documents in detail, and recall is difficult", and (2) he did recall the three issues set out in the February letter. When he was asked if he had any feeling for which were the more serious issues he said: "It was a risk of [BOI] going into liquidation and my loan being recalled, which really was the outstanding issue for me". When asked what his perception was as to whether the subsequent sale was going to happen when he chose the sale of his Capital Account, he said that his perception was that SA would use its best efforts to secure the partnership deal, but certainly there was no guarantee and so it was down to their best efforts to achieve it.

Comments on Dr Jarman's evidence

90. We do not accept that Dr Jarman's sole motivation for selling his Capital Account, as he suggested in his witness statement, was to rid himself of the loan due to the risk of BOI going into liquidation and/or that he thought he was undertaking the sale of the Capital Account as "a standalone matter". We consider that it is reasonable to infer from the evidence that, whilst Dr Jarman may well have considered that there was a risk he may not be able to dispose of his residual interest following the sale of his Capital Account and he was not given details of any potential buyer for the residual interest before he undertook that sale, he chose the sale option with the intention and expectation that he would be able to dispose of it and, as it was plainly put to the members, thereby exit from the arrangements without disturbing the appellants' relief claimed or any further tax charge:

(1) The concern with BOI's position does not fully explain the choice of the sale option. Plainly a member could remove that risk, at no cost, by taking the loan option. Dr Jarman had no answer when it was put to him that it made no commercial sense to choose to sell his Capital Account unless that was going to be followed by the disposal of his residual interest as he would plainly be worse off if that were not the case and he accepted, the loan option would have addressed his apparent BOI concern at no cost to him.

(2) Dr Jarman did not identify any specific risk in relation to BOI, he received no communication from SA about BOI until the February letter, he could not remember being told that the cash deposit moved to BOI from ABN Amro and he could not identify what advice he had received as regards BOI and had no explanation as to why the two year delay in implementing the sale of the Capital Accounts was not an issue if the concern over BOI was pressing.

(3) The February letter plainly identified the benefits of a member choosing the sale option. It lacks plausibility that the other risks identified in the February letter were not a concern and motivating factor in choosing that option. Dr Jarman plainly understood the economics of the original transaction and the impact of the increase in tax rate and accepted that it was important to him that the exit did not result in a tax charge or disturb the original loss relief.

(4) Dr Jarman accepted that it was possible that the residual interest would be sold and he could be confident that such a sale was enabled (by the passing of the relevant resolutions), in effect, that is what he expected to happen and was the natural next step once the Capital Account was sold; he thought SA would use its best efforts to secure the partnership deal, although there was no guarantee and he said he was very happy to get rid of his interest.

91. We consider that Dr Jarman's repeated assertion that the two sales were not "linked" or that they were "separate" is to be disregarded. In making such comments he was plainly very conscious that this is part of the appellants' case and, in any event, on occasions he was effectively making submissions rather than giving factual evidence.

Mr Hoyle's evidence

92. Mr Hoyle said the following in his witness statement:

(1) On or around 14 April 2011 he first received the February letter. This document presented to him issues which he was not previously aware of and put forward a proposal to deal with those issues through the disposal of his member's capital account and use of the sale proceeds to repay his loan.

(2) This proposal was revised by including the additional opportunity to refinance his loan via a limited recourse loan and was communicated to him around 29 March 2011. He understood that "this was a self-contained proposal" to have a third party buy out his capital account in Avondale, and to clear all debt, which he would have to pay a sum of money to facilitate. It was apparent from the documentation that out of any sale proceeds he would have to pay back the loan but would still remain a partner with a full profit share and therefore be liable to ongoing tax.

(3) He is not a financial expert however:

> "at a general level I did understand that, if completed, this was an opportunity to extinguish my liability to an Irish bank [BOI], which was experiencing serious financial difficulties in the wake of the global financial crisis, allowing me to extinguish the potential liability I would face in the event of its insolvency."

(4) When he received notification this brought home to him that he had a personal, financial risk directly connected with the problems in the Irish banking sector, as he had a loan from a troubled Irish bank. He read the documentation supplied to him although he cannot pretend that he understood all the technical issues. The documentation stated that any failure on the part of BOI to meet ongoing lease payments would have required members who had a loan to finance this from their own resources. He did not have the means to meet such a liability. If this had occurred then the likelihood is that the BOI would have called in the loan. He referenced "Acceleration Events" in the documents

and said that he “didn’t know the likelihood of that but equally I had no communication to say that everything was fine, notwithstanding the financial crash”.

(5) He knew generally that Ireland appeared to have overreached itself financially and he knew from friends of people in Ireland in serious financial difficulty and properties being sold for unreasonably low valuations as people had a desperate need for cash and the banks seemed to be running out cash. Moreover, at the height of the global financial crisis it did not seem credible that he could obtain a cash loan of such magnitude from a non-Irish financial lender. The troubles in the Irish economy were well known and his exposure to BOI was for a prolonged period but he saw himself as powerless to remedy this exposure to the bank until the first opportunity had been consummated. He was therefore pleased when this finally happened.

> “Indeed, in March 2011 the Irish Central Bank and Irish Stock Exchange had suspended [BOI’s] shares “to avoid the possibility of a disorderly market”.”

(6) Other than this disposal nothing else really changed for him as the documentation sent to him made it clear that he remained a full profit sharing member of Avondale, with no change to his profit share.

(7) He understood that if the first opportunity was successfully completed he would then be free to seek to dispose of his residual interest. It would also leave the partnership free to sell its assets He understood that this was never guaranteed. So, he didn’t really turn his mind “to the prospects of the second opportunity happening because it’s trite, but true to say that unless a deal is agreed and a contract is signed, it doesn’t exist”. He also did not know what variations might ultimately emerge from any negotiations and so had not made his mind up at that time what to do about the second opportunity. He was not committed to it and was content to adopt a “wait and see” attitude. In short, it was an aspiration but not an expectation. This was borne out by the length of time between the two opportunities. It seemed to take ages to close the first transaction, and thus appeared to be somewhat problematic to complete. Given that he had not had any assurances about the second opportunity he had no expectation about the prospects for the second opportunity.

(8) He therefore viewed the sale of his residual interest as a self-contained opportunity, which if it had never completed would nevertheless have been fine, given his stance on the first opportunity. He understood that the second opportunity would have been perceived to have a negative financial value to a purchaser so he anticipated that he would have to pay a sum of money to facilitate this. Importantly, at the time of the sale of his capital account he did not know what this sum of money would have been as he had not had any communication on that issue. That said, he would then have ceased to be a member of Avondale and would thus have no income (and no tax to pay in respect of the same). He saw this as prudent financial planning, if it were to come to pass.

(9) His then financial advisor, Malcom Hamilton-Martin, who was also an Avondale member, stated to him that all the members he had introduced to Avondale, including himself, were voting in favour of the first opportunity and, if it were ever to occur, the second opportunity. As he was not experienced in film sale and leaseback he did not look to him for advice on the technical merits of the proposed transactions, but rather to see what the trend of opinion was amongst the Avondale partnership. The person he looked to in order to understand the technical issues was Mr Dryburgh.

(10) All communications he received on the technical issues of the proposed transactions were either from, or on behalf of Mr Dryburgh. To the best of his knowledge and belief he did not have any individual conversations or individual communications with him as he relied on written communications sent out generally to all the members.

(11) The second opportunity was not straightforward at all. There were alternative proposals to consider from different parties so it was not clear what to do. He was present at a telephone meeting on 21 March 2013 at which it was decided how to proceed; once the details of the different offers were clarified, it seemed to make sense to proceed, and those present on the call were unanimous. Further clarity on the final outcome eventually emerged from the negotiations, so that it seemed to still make sense to proceed with it, but even then, he did not know if the partnership would consent to it, as life is inherently uncertain and not everyone appeared to be of the same mind. Nevertheless, following receipt of all necessary approvals, the second opportunity was consummated on 23 April 2013.

(12) As a result of the closure notices he is now aware that HMRC claim that the two transactions should be treated as a single transaction:

> "I am not a tax expert but there was nothing communicated to me which led me to consider that the second opportunity was already negotiated or in any way certain at the time of completing the first opportunity. Moreover, I didn't consider them as one transaction, not least because there were different parties involved in each. It seemed to me that the first opportunity was entirely justified on its own terms, without reference to the second. The first opportunity solved a problem, not only for me but also for all other Avondale members. The second opportunity was a separate matter which, when it occurred, allowed me to dispose of my interest and retire as a member, and when it did happen, which wasn't certain, I saw this as a prudent step to take for the reason given in paragraph 14 above."

93. Mr Hoyle confirmed he had a financial adviser but said that the adviser told him he knew very little about these film funding schemes and he would have considered the investment memorandum and worked through the model himself. He agreed that:

(1) The economic effects of the transaction are as counsel set out (as set out above) and he realised that at the time he made the investment it was essentially a tax deferral whereby he:

> "had that big tax credit up front, which was the tax saved, but then you're expected to pay it back incrementally over the remaining 15 years…there's a cost of money associated with that, and I got the benefit of being able to use that latitude of time…to pay down the mortgage on our home, so I saw that as an immediate benefit balancing against a long-term net aggregate potential increase in cost to me."

(2) He would also have understood that the economics were worked out on the basis of him paying tax at the 40% rate and that if he became a 50% taxpayer, then the economics of the deal were a bit different because it would cost him more to get the benefit of that upfront cash flow advantage, and he would have been aware of that when he thought about going into this. He did not think he had any thoughts about that when it started being mooted that the tax rate might rise to 50%.

(3) He understood that (a) he was taxable on his share of the rent each year but the tax could be offset by the interest relief on the interest element of what he repaid to the bank, the repayment to the bank was part capital repayment and part interest so that, as the years went on, he repaid more of the capital and there was a reducing amount of interest relief but on the other hand the rent was incrementally increased by 5% each year, (b) the intention of whoever thought up these schemes, was to give him sort of the time value of money really – in the sense that he got the most benefit of the use of his money early on because the rent was slightly depressed and the interest relief was at its highest but, as time went on, the taxable income went up but his interest relief went down, and (c) it was built into the scheme that

it becomes a bit more painful to his wallet year on year. He said that was definitely the case in the later years.

(4) In 2013 he paid the 50% tax rate, and he then paid about a third more tax compared with what he paid in 2011.

94. He agreed that (1) his participation in the relevant LLP consisted of contributing cash, but beyond that he certainly was not involved in any of its activities. He said it was a pure investment vehicle, and (2) it was not a true partnership in the sense of partners meeting together regularly to conduct business. There was nothing of that kind at all and he would have received income statements or some kind of financial statement each year from the LLP in order that he knew what to put into his tax return. He said he did not regard those as evidence of any activity. There was just the loan rentals to be dealt with. When it was put to him that as far as he was concerned, SA managed the LLP, he said that he did not think "you can say the partnership was managed at all. It was a pure investment vehicle…[SA] did the tax returns but there was no activity, no trade, nothing that you would describe by way of what a true partnership would do in terms of the partners meeting together on a regular basis to conduct the business of the investment vehicle…. [SA] would send out the annual financial statements". He agreed that if there was something to do SA would do it and he would trust them to do it.

95. He recollected HMRC opening their enquiries in 2007 but could not remember if his advisers assisted him in dealing with the enquiries into his return for his loss relief claim. He did not recall ever asking SA to manage the enquiry about the validity or effectiveness of his loss relief claim or his investment in the LLP. He said he was aware of relevant details but then agreed that he did not recollect.

96. He said he did not obtain extra assistance when he received the February letter. As regards the apparent concern with BOI failing:

(1) When it was put to him that on the plain meaning of the words he was not told in this document that any lending bank would fail, he said that he did not need a document to tell him whether or not a bank would fail: "We've all seen the queues outside Northern Rock when there was the run on the bank, and the last time I saw that was black and white movies of the great depression." He thought that was some time around 2008/2009. When it was put to him that was the period when there was complete silence from SA about any risk to his scheme, he said:

> "but one's also aware about world events and the troubles, particularly with [BOI] and the entire Irish situation. Bank of Allied Irish bank I think was nationalised in 08/09, I can't remember. [BOI] I think came within a whisker of failing in 2011, as I recall, and I think there was some foreign money injected, so maybe in hindsight it would have been better if it had been similarly nationalised. So, as far as I was concerned, the effects of the global financial crisis were significant, pervasive and long lasting and they continued, and just because somebody has given an equity injection into a bank doesn't mean that the bank is, therefore, fully solvent. So I fully expected those problems to continue."

(2) He thought BOI came within a whisker of failing, as he put it, sometime in the middle of 2011. He confirmed that he was referring to BOI shares being suspended. He said: "it was all over the news, to ensure that there was an orderly market in the shares". When it was put to him that was a one-day suspension, trading was resumed the following day and there was no further downgrading of any ratings, he said that was simply an example and:

> "The fact of the matter is that, from my perception, the troubles with – well, the entire Irish banking sector, not just [BOI], were pervasive and I didn't want to have anything more to do with them, quite frankly."

(3) It was put to him that if SA had actually thought that he was at dangerous risk as regards having to repay the loan he would have had a direct personal communication from them dealing in detail with his contractual arrangements with his specific bank. He replied that would seem rather impractical as there were presumably hundreds of different investors and confirmed that he did not receive any such individual communication. It was put to him that it is not impractical for SA to seek instructions from him as a partner to spend money to get proper legal advice on the robustness of his contractual arrangements and securities with BOI in the event of any kind of failure. He said: "To the best of my knowledge and belief, [SA] did not volunteer to provide advice and it was up to the individual investors whether or not they took independent advice."

97. Mr Hoyle confirmed that he paid tax at 50% but said that the 50% tax rate was not something that concerned him overly because the previous financial forecasting presented to him showed a net increase in tax payable from around £2,000 to £6,000 so he did not regard an approximately £4,000 increase in tax as a significant factor; paying an extra £4,000 to £5,000 each and every year for the remainder of the scheme's lifetime was something that he could have afforded. He agreed, however, that that was clearly not attractive and, in fact, he did avoid that charge by engaging in the proposal but said that was not his motivation for entering into the two "separate" transactions.

98. It was put to him that the sale of the Capital Account and of the residual interest was an inherently sequential transaction. He said:

> "I don't think it was a foregone conclusion in the slightest…because to look at it in a scenario where there's more than one possible outcome it's a logical fallacy to say that that which occurred was in fact preordained. I mean, it's like saying after this, therefore, because of this. That's a logical fallacy…the first transaction removed the capital account vis à vis [BOI], correct, yes. And I realise that following that I was still very much a member of the partnership and would, therefore, be liable to, you know, income tax on the residuals. That's absolutely fine with me because one had removed the risk, as I saw it, of an acceleration event vis à vis [BOI]. So, yes, once the rest – once the capital account had been disposed of effectively, I mean, you describe it as a husk. Frankly, I think it was a bit more than a husk, wasn't it, because I was still a full member of the partnership exposed to all the risks and liable for tax on a yearly basis? I knew that and I understood that, but there you are. It wasn't a husk."

99. He was questioned further about his motivation for entering into the transactions:

(1) It was put to him that it is clear from the February letter that both transactions were needed to resolve the three problems identified in that letter. He said that as a matter of pure logic he accepted that but "the increase in tax to 50% was not a motivation for my acting". It was put to him that the February letter makes it clear that SA sought and obtained the blessing of a tax expert counsel to the effect that he could do both transactions and there would not be a tax downside to him. He said he thought it is another misconception to say that a negotiation will always produce a successful outcome: "There have been countless examples in history where negotiations have commenced but ultimately failed. In real estate I believe it is called gazumping."

(2) He agreed that (a) it is clear from the February letter that having sold his Capital Account he would still be liable to income tax on his share of the partnership profits and that he would no longer be entitled to any interest relief on any payments, (b) so he would be paying tax at 50% on the gross rental income with no deductions at all, and (c) therefore, it was not just a question of an extra £4,000; it was whatever 50% of the gross rental payments is and the February letter very explicitly says it would result in a worse tax position if he didn't subsequently gift or sell his residual interest.

(3) He agreed that he understood that when the March letter was produced there was another option – the loan option. When it was put to him that he understood that the benefit of that option was to eliminate all liability to BOI, he said he understood that this was a loan proposed by BOI. It was put to him that the letter does not say who would make the replacement loan, but it does say that those who took the loan option would have no further personal liability in the event of any default. He said he had understood that when he read this letter. It was put to him that, therefore, it did not matter who the lender/replacement lender was because the effect of the new refinancing was that the individual actually had no further personal risk. He said "the first proposal seemed to me to be eminently sensible and I couldn't quite understand the need for a second proposal. So when I had something that seemed to me to be clear and something that seemed to me to be not entirely clear I chose the former option".

(4) He agreed that when he read the statements in the March letter set out above, he did not regard himself as in the category of members who expressed a desire to hold on to their LLP interests throughout the remaining life of the LLP. He confirmed that he understood that there was now on the table a choice of removing all personal risk on the bank lending but remaining in the partnership. He agreed that (a) the sale option was for those who did not want to stay in the LLP for the remainder of the term and said that he understood very clearly that there were two different proposals, (b) a further advantage of staying in the partnership if he chose the loan option was that not only would he have no personal liability to the lending bank but he would continue to get interest relief, (3) he understood that if he stayed in the partnership he would carry on paying tax on the rental income for the remainder of the term but with interest relief and that if he left the LLP, he would not carry on paying that tax on rental income and so that would be a very attractive feature of leaving the LLP.

(5) When asked again about the impact of the change in tax rate to 50 % he said "it simply was not a driver for my actions". He agreed that nonetheless, he chose the sale option on the basis that it was for those who wished to leave the LLP. He confirmed that he understood also that those who took the refinancing option would not bear any costs of that. The costs would be rolled into the fees paid by those who chose the sale option and that increased his costs by about 0.2% to 3.15% of his capital contribution. He said that he was also aware that:

> "we had confirmation from a QC that the tax position of members who wished to dispose of their capital accounts would not change as a result of…other members availing themselves of a replacement loan…you can never guarantee anything, but you can almost predict that some people will always, given a choice, choose one or other option. You won't get 100%. So what that said to me was that I would be no worse off if some members availed themselves of the option of the replacement loan."

(6) When it was put to him that counsel's tax advice set out in the February letter was given on the footing that he would both sell his Capital Account and go on and sell his residual interest, so that he would indeed leave the LLP, he said "Yes, that advice is very clear" and added:

> "but just because advice is rendered as to a potential scenario it is not a guarantee that that scenario actually out turns. It is merely advice as to a theoretical one of a number of possible future events. So I did not take the fact that the advice had been rendered as any evidence that in fact what out turned in the end would in fact occur, because there were many other members who all had to make their own individual decisions and, as I had no communication with any of the members, I had no indication of how as a collective the members were thinking."

(7) He accepted that SA had taken advice from counsel experienced in this area, to ensure that were the full arrangement to come to fruition there would be no tax downside for him at all and he read and understood that at the time. It was put to him that if the advice had been that he would lose his original loss relief he would not have wanted to go into this arrangement. He said that would have been a very material factor against doing what he ultimately ended up doing.

(8) It was put to him that he would not have proceeded if the advice had been that as a result there would be a tax charge on a sum equal to the money paid to him to repay the replacement loan. He said there was nothing to that effect in the documentation and agreed that counsel's advice was positively the other way but added: "Then again, an opinion is just that and, at the end of the day, it's the learned judge's opinion that actually is the only one that matters".

(9) It was put to him that he said previously that his only motivation was removing the risk of having to repay the lending bank out of his personal assets but in fact he chose the option that gave him much more by allowing him to exit the partnership. He said:

> "it didn't guarantee the outcome that actually out turned. It was simply the option that I chose at the time. You cross one bridge at a time and you only deal with the instant transaction. Yes, it seemed to me more favourable but, as far as I was concerned, that was it, full stop".

(10) It was put to him that it was more favourable because if the arrangement was successful one achieves a substantial tax saving; one does not have to pay any tax for the remainder of the 15 years. He seemed to accept that. He said his understanding was that that would not have been the case for the first transaction. It was only when the second transaction was consummated that that eventuality occurred. He was asked why he regarded selling his Capital Account as favourable unless he wanted and hoped to be able to sell his residual interest. He said "No. When I look back, and I refer you to the documentation where it says that under the replacement loan there would still be some element of recourse to the members." It was put to him that the note makes clear that there would be no personal liability to him. He said:

> "I think we are discussing arcane points of tax law, but – so in answer to your question…why did I choose the option that I ultimately chose? Yes, I could not ignore the possibility that there might be a further transaction because that had been clearly laid out as a possibility. So I kept my mind open to that and I chose that first option because it seemed to me…I got rid of my exposure to [BOI], which was the driver, and I didn't foreclose a possible future course of action. Yes, that was clearly laid out as a possibility, not a probability."

(11) It was put to him that he meant that if, having sold his Capital Account, SA then produced a purchaser for the residual share he would have been fully on board to selling it. He said:

> "I can't guarantee that because you have to look at the facts when they're presented to you. So I, frankly, kept an open mind. I didn't know how the other members would react. I didn't know what sort of majority would be required. Frankly, I did nothing to promote that, and that's the thing…the suggestion clearly is that we were all acting in concert, then where was the WhatsApp group? Where was the sort of email grouping whereby we could all exchange information in pursuit of the alleged common purpose, you know, whereby we could sort of get information from time to time from [SA]? It simply wasn't there. And, you know, to suggest that somehow these two transactions…conjoined is…a…confected concoction of suspicion, nothing more, supposition."

(12) He was asked if, having sold his capital share, he personally wanted now to sell his residual interest. He said:

> "I was quite relaxed as to whether or not that happened. I was content to adopt a wait and see attitude because I knew that it simply wasn't in my hands, so…you can't predict in advance of seeing the actual proposition that's put in front of you. You know, there will be something in the fine print, for example, that might cause you to pause and reflect. So unless and until you see the key terms of a deal you can't really form any judgment as to what you should do. You have to look at the evidence…I had no firm intention to dispose of the − to make the second transaction, and I only made up my mind when the proposals were put and they were considered. Until then, frankly, I adopted a wait and see attitude."

(13) He agreed that (1) if there had been a three month delay he could have afforded to pay the tax on the rent for that period, and (2) that is the kind of risk he would have factored in; he did not need the sale to be because he could have afforded some delay – he added an indefinite period of delay.

100. He was questioned about the process for completing the transactions and the delay in doing so:

(1) He had no recollection of voting for the amendments to the partnership deed which were made in April 2011. He agreed that in April 2011 he took the first step to making sure that nothing in the constitution would prevent the sale of the residual interests. It was put to him that this created a category of those who wanted to sell their interests who were likely to go on then to vote to allow it; once an investor was locked into an option which only really commercially made sense if the investor were to sell his interest, the chances are that he would vote for that. He disagreed with the word "likely" and said the reference should be that it was "possible".

(2) He said that he did not recall receiving any communication about the subsequent delay and recalled that he was not "perturbed by the interregnum". He agreed that by the end of 2011 BOI was still there and had not failed and added that was only thanks to some foreign money. When it was put to him that he had not had any call on him to make any additional capital contribution to the LLP, he said "just because it hadn't happened didn't mean that it couldn't". He said he did not know the reason for the ongoing delay through 2012 from SA's point of view. He was not aware that one of the major reasons was that some of the lessee companies had had been struck off the register of companies. He did not know that actually none of that affected Avondale and considered that if there had been some effect on Avondale the members would have been informed, but he was not aware there was any such communication to Avondale members about the other partnerships. He agreed that it was the designated members which were both SA entities that he would have expected that communication to come from.

(3) He did not recall when he signed a contract selling his Capital Account or any communication regarding it. It was put to him that once that had happened he would expect to hear from SA about the next stage of selling the residual interest. He said that the only communications are those which are in the bundles of evidence. He was taken to an email of January 2013 from Mr Dryburgh to another investor's financial adviser. He said that he did not receive anything and he did not have an adviser from whom he sought advice at this point who would have received anything. He thought he must have received notice of the meeting of 11 February 2013 but did not recall receiving it.

(4) He recalled being asked to attend the meeting of 21 March 2013 simply to make up a quorum, and that was the basis on which he attended. He must have had a phone call from Mr Dryburgh asking him to attend the meeting on that basis. He did not otherwise discuss the proposal with his adviser or with Mr Dryburgh on that telephone call and he did not take an active part in the discussions at the meeting; it would have been the other people in the meeting who had the discussions – he did not remember their names. He

agreed that he did not provide his own views to the meeting or contribute but sat and listened and he was there to vote. He said that the fact that he did not actively contribute does not mean he did not listen or that he was unaware of what was discussed and: "It seemed to me to make sense because, as I recall, the winning proposal, they had I think a better track record…in the film industry."

(5) He said that he knew that there was a payment to ensure that the purchaser made the acquisition, and recalled they were unanimous in choosing CH as he was suggested to have a better background in the film industry.

(6) Mr Hoyle thought that it had been suggested that the purchaser might be able to make something of the residual film rights because "they presumably would have bought it to do something with it and, therefore, having that asset and being able to not resell it but re-use it to make profits would clearly have been a motivation for them, and the fact that they were experienced in the film industry meant it was more likely that they would actually wish to buy because they could see a way of making some further monies out of that acquisition". He did not recall that the idea had emerged that if the purchaser could make more than a certain amount of money by exploiting those residual rights the LLP might recoup a little bit of their original fee. He confirmed that he did not know what SA went on to do behind the scenes and had no communication and did not recall that those present at the meeting were all very keen to get the sale done before the year end. It was put to him that on 22 March 2013 SA emailed the members reporting on the outcome of the meeting he attended on the telephone and referred to that proposal and to trying to close the sale by 5 April 2013. He did not remember receiving this email but assumed he did.

(7) He remembered the members appointing SA to provide taxation services to deal with the effect of selling. It was put to him that on 4 April 2013 SA sent out another notice of meeting and at that meeting the partners made the final decision actually to go ahead in a proper constitutional format. He did not recollect receiving the notice but thought he must have done. The resolutions referred to the Purchaser being appointed as managing partner and the cessation of activity in the UK on the basis business was to be conducted in Ireland. When asked whether he recalled agreeing or considering these resolutions, he said that when he received a document he read it and, therefore, he would have considered it. He did not specifically recall this document but he knew he must have done that as it is an important legal document and he would have read it carefully. He seemed to confirm that he understood that the detail was sort of unimportant to him in the sense that it was about what happened when he was no longer a partner. He could not recall being at this meeting to make up the numbers. In fact the meeting was adjourned as those present thought that everyone should have a chance to vote but some people were on holiday. He could not recall voting or whether he gave his vote to a proxy. He confirmed he had no communication between 4 and 18 April 2013 and did not get any advice from Mr Dryburgh.

101. He said he wrote his witness statement himself and did not get any comments or suggestions. When asked why therefore his statement was very similar to that of Mr Forsyth, he said that he had not seen his statement. He confirmed that at the time of writing his witness statement, and today even, he clearly understood the legal case that was being put by his team and had his own understanding of the importance of the second disposal not being in his words "certain" at the time of the sale of the Capital Account.

102. In giving oral evidence, on several occasions Mr Hoyle was defensive of SA's position, argued the appellants' case rather than directly responding to the question posed and was sometimes resistant to agreeing to what were evidently correct propositions as regards the workings/economic effect of the arrangements. In light of that and otherwise essentially for

the same reasons as those set out in relation to Dr Jarman's evidence, we do not accept that Mr Hoyle's only motivation for adopting the sale option solely related to a concern as regards BOI. We consider that it is reasonable to infer from the evidence that he sold his Capital Account with a view to exiting from the structure so that he would not have to pay further tax in respect of receipts from the transaction. We note the following:

(1) Mr Hoyle did not identify any specific risk in relation to BOI failing and despite his repeated claim it was a matter for the individuals there is no evidence of him taking financial/tax/accountancy/banking advice or of him chasing SA to express his concern about the viability of BOI.

(2) He understood the economics of the original transaction and the impact of an increase in the tax rate. Whilst he claimed he did not regard the increase in the tax rate as a significant factor he agreed that it was clearly not an attractive prospect and he understood that it was an attractive feature of the sale option that if he left the LLP no further tax would be due. He chose that option on the basis it was for those who wanted to leave the LLP and it would have been a very material factor against doing what he ultimately ended up doing if he thought there was a real prospect of losing the loss relief/appellants' reliefs. This option was more favourable as, if successful, he would not have to pay tax on an ongoing basis.

(3) He also said he could not ignore the possibility that there might be a further transaction because that had been clearly laid out as a possibility, albeit he maintained getting rid of exposure to BOI was the driver and it was not a probability.

Evidence of Mr Forsyth

103. Mr Forsyth made statements in his witness statements in virtually the same form as those made by Mr Hoyle as set out at [93] above. He said:

(1) On or around 14 April 2011 he first received the February letter which presented to him issues which he was not previously aware of and put forward a proposal to deal with them. Until then he had little or no understanding of his role in the partnership and always thought of this as simple investment in the film industry, which carried some tax advantages. He was unaware that such a substantial liability to BOI existed in his name. He was aware, through newspaper and other media, that HMRC were looking into investments in the film industry partnerships and looked at this proposal as an opportunity to at least relieve him of this indebtedness.

(2) It was apparent from the documentation that, while he would still remain a partner, he would be able, out of any sale proceeds of the capital account, to extinguish his liability to BOI, which he was told was experiencing serious financial difficulties in the wake of the global financial crisis. In particular it was stated that in the event of any failure on the part of BOI to meet ongoing lease payments, members who had a loan would be required to finance this from their own resources. He did not have the means to meet such a liability and understood that in these circumstances it is likely that BOI would have called in the loan. He referenced a document entitled "Acceleration Events". While such a catastrophic event was by no means certain, the prospect of such an outcome and its effect on his family worried him intently and after full consideration the repayment of the loan, even if he did not get all of his money back, became the sensible thing to do in the circumstances.

(3) At a general level he did understand that, if completed, this was an opportunity to clear any indebtedness to BOI and for that reason he supported the proposal and agreed to dispose of his capital account.

(4) The receipt of the notification of the first opportunity, for the first time since the initial investment, made him realise that this was a much more risky investment than had

been explained to him by his financial advisors at the outset. He was likewise made aware that around that time the Irish Central Bank and Irish Stock Exchange had suspended the Bank of Ireland's shares "to avoid the possibility of a disorderly market". He therefore "embraced the opportunity as a godsend and one that I dare not miss".

(5) The first opportunity was finally consummated on 15 January 2013 after which he was informed by letter from SA and by BOI that his capital account had been acquired by Birdcrest and that his loan had been repaid from the proceeds of the sale: "Other than this disposal nothing else really changed for me as the documentation sent to me made it clear that I remained a full profit sharing member of Downing, with no change to my profit share."

> "While I had never really considered disposing of my interest in Downing I understood that if the first opportunity was successfully completed I would then be free to consider my position and seek to dispose of my partnership interest in Downing, subject to the approval by the members. The documents however made it clear that after the sale of my capital account, as detailed above, I would still be a member in the partnership and that I would still share in the profits but without the risky loan and on balance this seemed more in line with the situation I envisaged at the outset."

(6) The first opportunity however had prompted him to look more closely at his financial affairs and by the time the second opportunity came along, he had come to the conclusion that his current investments were not all they should be. The various properties he owned gave him little or no return and their value had depreciated considerably since their purchase. As for the partnership investment, while the first opportunity had relieved him of his indebtedness to BOI, it appeared unlikely that there would be further returns from this investment in the near future.

(7) All communications he received on the technical issues of the proposed transactions were through his then financial advisors and were, either from, or on behalf of, SA. To the best of his knowledge and belief he did not have any individual conversations or individual communications with them as he relied on written communications sent out generally to all the members. His then financial advisors were unable to guide him or effect a solution but thought he should follow the majority view of the partnership members.

(8) While he was not certain when he finally made this decision to sell his residual interest, at the time of the first opportunity he did not consider his partnership membership to be a risk per se and at that point only looked critically at his exposure to BOI and viewed the sale of his capital account "as a self-contained opportunity to repay the bank loan".

(9) The second opportunity when it came was unfortunately not straightforward as there were alternative proposals to consider from different parties. He discussed his situation with various friends some of whom were partners in Downing and the general view was that they were in favour of selling their interest. Given all that had transpired by the time of the second opportunity he just wanted to sever his ties with the partnership.

(10) He was later informed that the partnership as a whole agreed and following receipt of all necessary approvals, the second opportunity was consummated on 23 April 2013.

(11) He commented on the structure as follows:

> "I am not a tax expert but there was nothing communicated to me which led me to consider that the second opportunity was already negotiated or in any way certain at the time of completing the first opportunity. Moreover, I didn't consider them as one transaction, not least because there were different parties involved in each. It seemed to me that the first opportunity was entirely justified on its own terms, without reference to the second. The first opportunity solved a problem, not only for me but also for all

other Downing members. The second opportunity was a separate matter which, when it occurred, allowed me to dispose of my interest and retire as a member, and when it did happen, which wasn't certain, I saw this as a prudent step to take for the reason given above."

104. At the hearing it was apparent that Mr Forsyth did not in fact have knowledge of the matters referenced in his witness statement and, therefore, we consider that his comments in his statement should be disregarded in their entirety. In summary, at the hearing:

(1) He confirmed that he was an investor in Downing and that he made that investment in March 2007. Back then he had a management company, an agent, who looked after all of his affairs, and in their office they had an accountant. He recalled a very short meeting but the management company and the accountant basically took care of all of his affairs. At that time that was a company called One Ten Sports and later he was with LBM Sports and Entertainment Accountants, an accountancy firm based in Ireland, with whom he got involved through a new agent around 2010/2011, and he was with them for a few years. They took care of tax returns and all of his financial dealings. He recalled a meeting with some other clients and it was another situation where "we just leave them to it because it was way, way over our…heads"

(2) He did not recall that the benefit of him investing was that in the year he made the investment he would get a large or a substantial tax credit or the other financial/economic effects of the scheme. He agreed that he was relying on the fact that the relevant accountant was competent and made rational decisions on his behalf. He said they acted for a number of top sportsmen and he absolutely at the time trusted them to look after his affairs. They charged a reasonable percentage of his income on and off the golf course, so he put trust in them for a good number of years.

(3) He confirmed that (a) he had absolutely nothing to do with the running and management of the LLP and could not really recall much about it at all, (b) a lot of his mail would have gone straight to the management company on that type of thing and he did not remember anything such as an annual income statement coming to him, and (c) he did not know that an enquiry was opened into the LLP returns when they claimed the trading loss. He believed but could not say for certain that LBM would look to SA for the information to answer HMRC's enquiries into his tax position and maybe would look to SA for advice. He did not think he was copied into correspondence between them. He thought he did not hear anything from SA or his advisers as regards the investment in the years before 2011.

(4) He said he did not recall receiving the February letter and initially that he did not know if he had seen it at all and when pressed that he did not recall seeing it. He could vaguely recall a proposal for the sale of his Capital Account. He thought there was a call but actually did not remember – along the lines of an opportunity to basically get out of this. He did not know if he would have seen the March letter or if he had a call with his advisers. He spoke to them fairly regularly when required but did not recall if he spoke to them about a revised proposal. He did not know exactly what was said on the call he referred to.

(5) It was put to him that in his witness statement he referred to severing his ties with the LLP and he was having the kind of conversation that would enable him to put this thing behind him. He said that could well have been the case but he could not remember for sure; it might well have been along those lines. When it was put to him that he would have given his advisers instructions to pursue this opportunity on his behalf, he said that he sought their advice but did not think he would have given instructions. He said he did not know, when asked, if they would make decisions on his behalf. It was put to him

that he was now saying that he did not receive the February letter and he did not remember ever reading it. He replied that he did not recall seeing it.

(6) When asked if he knew what he was referring to in his statement as an "Acceleration Event" and if his comment that he viewed the first sale of his capital account "as a self-contained opportunity to repay the bank loan" meant anything to him, he said "not really no".

(7) It was put to him that he said in his witness statement that he was informed by SA of the sale of the Capital Accounts but he was now saying that he did not get the letters directly but just passed everything on to his accountants. He said he was not sure. When it was put to him that he referred in his statement to receiving documentation, he said he thought that the documentation would probably all have gone to his accountants but he could not say for sure. When it was put to him that he does not remember the events, he said "I can remember conversations on you know, around it obviously because it's a very confusing issue for someone like myself, but I remember around that…obviously around that time that there was a possibility to sever ties, if you like, to take it out of the whole thing". He agreed in effect that "we have to infer that you told the accountants that they should act on the proposal on your behalf or they were used to just making decisions for you". He said they had his trust.

(8) He was asked if he was really saying that everything just went to his financial advisers. He said: "Probably, but I couldn't say for certain". When asked what he meant by his statement that his advisers were unable to guide him but he thought he should follow the majority view he said "I assume…I don't want to guess on anything here, so I can only assume that advice or going with a consensus was what I was doing there". He said he thought he knew there were two steps in order to sever his ties. He was asked whether he meant he was following the majority view in relation to step 1 or step 2 or both. He said he did not know and could not remember.

(9) As regards the preparation of his witness statement:

(a) He confirmed that somebody helped him to write his witness statement but said that of course he contributed to it: "I was advised with my current accountant, as we did the statement and we talked through all of the things, and obviously a lot of the dates were – we had to look through maybe some paperwork, but I was helped on – I was advised on my statement, yes". He seemed to agree that his accountants had shown him the two documents he had been questioned about. When it was put to him that in 2018 he had a look with his accountants at those two papers and then sort of worked out what to say in the witness statement, he said "I believe so. I couldn't say 100%. I can't remember exactly what we looked at…I don't remember what documentation we had, but, yes, we…did the statement together". He confirmed that he had assistance from The Wood Consultancy, his current accountant, but they were not the ones he talked to in terms of putting the witness statement together.

(b) He was taken to a letter dated 8 December 2016 which stated:

> "As you are aware I only represented Mr Forsyth since May of this year…Mr Forsyth is a professional golfer and former European tour player…knows very little about tax and has been guided by the promoters of the Downing Film Partnership…Mr Forsyth received £2 for the sale of his interest in the partnership, which he had been led to believe had run its course. He doesn't envisage receiving or enjoying any future profits or gains from this venture. His interest in the partnership has terminated."

(c) He assumed he had discussed this with his adviser in 2016. He agreed essentially that this was consistent with his comment that what was presented to him by the Ireland accountants when they first contacted him was an opportunity to get out of the partnership and sever ties and that is what was offered to him and then he did what he was told to do to make sure it happened.

(10) In re-examination it was put to him that it is clear that his memory and recollection of things is a bit vague. He confirmed he did not recall a meeting to decide who to choose as the buyer of his interest in the partnership. When it was put to him that no one asked him for his views on who to choose as there were several candidates he said: "No idea, no. I don't recall that at all, no." When asked if he remembered an occasion when he sold his capital account, he said "No, not as precise as that, no". When asked if he could recollect anything about what happened, he said:

> "Yes, mostly really that I can vaguely – if I'm correct and again I don't want to say anything I'm not 100% certain on…so…*I was of the belief that on my tax returns I was paying tax on something to do with the film partnership I believe and this was an opportunity that that was no longer going to be the case. I thought that sounded positive*."

We take the highlighted wording to reflect Mr Forsyth's limited recollection and overall understanding of the transactions and the exit arrangements.

Part B Discussion and decision

Approach to construction

105. As HMRC submitted it is established that in construing tax legislation a purposive approach must be adopted as set out in cases such as *UBS AG v HMRC* [2016] UKSC 13 and *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 where, at [32], Lord Nicholls said this:

> "The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straightjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found …"

106. Lord Nicholls continued, at [36], quoting Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

107. In that context, the parties also referred to *Craven v White* [1989] AC 389 ("*Craven v White*") and *Trustees of the Morrison 2000 Maintenance Trust and others v HMRC* [2019] STC 400 ("*Morrison*").

Trade issue

108. In summary, (1) in the appellants' view chapter 5 is simply not in point because the LLPs did not in fact carry on a trade as that term is usually interpreted for the purposes of s 797; it was established in cases such as *Samarkand* that an activity of the kind they carried on is not such a trade, whereas (2) HMRC submitted that it suffices for these provisions to apply that the LLPs and the appellants acted on the basis that the LLPs were trading at the relevant time and successfully claimed that the LLPs had made a trading loss and claimed the appellants' reliefs for those losses.

Submissions

109. In HMRC's view:

(1) The "trade" referenced in s 797 and elsewhere in chapter 5 is the activity which, as a matter of fact, founded the successful loss relief claim. This is the natural meaning in the context of anti-avoidance provisions intended to counteract historic claims for relief. The focus is not on the historic validity of a factually successful claim and whether it could now be shown to have been excessive or unwarranted because it was based on a mistake of fact or law. If that were the focus, chapter 5 would confer on HMRC power to override procedural bars on re-opening enquiries or raising discovery assessments. Looking at the detail of s 797, the mischief targeted is the occurrence of a relevant exit event <u>after</u> an historic claim to loss relief.

(2) In context, the essential feature of the historic claim is that it has been successful; not that it is or was valid. That is reinforced by s 797(2)(b) and s 800(2) and (3) which focus on the "claimed" film-related losses, and the fact of the "calculation" of the profit being one which resulted from chapter 9 of Part 2 ITTOIA. It would be irrational for an anti-avoidance provision to exclude from its ambit a taxpayer who turns out to have enjoyed the loss relief on a false or mistaken basis especially where, as here, the judge made law has developed. That would undermine its counteraction purpose, not further it. Whether or not the successful loss claim is founded on an activity which would be classed as a trade under the law as it stands at the time of the counteraction is not one of the threshold tests for the counteraction. That would be self-defeating and absurd.

(3) *Project Blue Limited v HMRC* [2018] STC 1355, *Redmount v HMRC* [2022] UKFTT 38 (TC) at [126-127] (FTT) and *HMRC v Inverclyde Property Renovation LLP* [2020] UKUT 161 are recent examples of a self-assessed liability being sufficient to trigger the operation of a provision and fulfil an intended statutory purpose notwithstanding that it later emerges the liability is wrongly identified or self-assessed. These cases illustrate that there is a whole range of purposes for which legislation might refer to the concept of liability or to whether or not there is a trade. Each and every time it is not asking for there to be a full enquiry to find the definitive answer on the current law before one is obligated to do something under the relevant legislation. This is an example of a case where one is not being asked to revisit and make a decision on whether or not the LLPs were trading in 2006-2007.

(4) Accordingly, the condition in s 797(1)(a) is satisfied because the appellants made claims for "film-related losses" as defined in s 800, under ss 380 and 381 ICTA, s 72 Finance Act 1991 or on the basis that there were losses resulting from a calculation made in accordance with chapter 9 of Part 2 ITTOIA (film relief). The claims were made in relation to an activity which was claimed or self-assessed as a trade of exploiting films. HMRC opened enquiries and ultimately accepted that there were trading losses which were film related in the amounts given in the closure notices. The appellants did not appeal the decisions.

110. For the reasons set out in full below, there was a relevant disposal for the purposes of s 797(1)(b) on the basis that (a) the sale of the Capital Accounts constitutes the giving up or loss of "a right which arises from the trade to income (or any part of any income)" or (b) a disposal of "an interest in a firm that carries on the trade".

111. Mr Thornhill said that HMRC's position is wholly untenable position and is plainly contrary to the express wording of s 797:

(1) `It is entirely clear that for the provisions of s 797 to apply, the loss must relate to *a trade* <u>and</u> there must be a disposal of a right to profits arising from the trade <u>and</u> there must be an exit event. The reference to "trade" is present at 797(1)(a) as well as at s 797(1)(b). The clear purpose of s 797 is to impose a charge to income tax in relation to a

trade. Even if HMRC's stretched interpretation of the legislation were possible, at its highest, it only provides a potential answer to s 797(1)(a) and is no answer at all to s 797(1)(b). That is made abundantly clear if one has regard to s 799: Events A-D each expressly refer to "*the* trade". There is nothing in the legislation to support HMRC's position that the intended trigger for the tax charge was the claiming of sideways loss relief. The clear and unambiguous meaning of the relevant legislation is that, in the absence of a trade, there is no charge to income tax under s 796.

(2) Whilst both HMRC and the appellants believed that the LLPs were carrying on trades at the relevant time, it has become apparent in the light of subsequent cases that the activities they undertook did not amount to trading but only investing. Therefore, these provisions simply do not apply. The appellants rely on *Eclipse Film Partners (No 35) LLP v HMRC* [2015] STC 1429 and *Samarkand* and the relevant leasing agreements. HMRC has confirmed that no argument founded in estoppel is insisted upon.

(3) The decision in *R (AA Sudan) v Secretary of State for the Home Department* [2017] 1 WLR 2894 ("*Sudan*") demonstrates that the tribunal must not strain language of the provision in question. That case involved the interpretation of provisions in schedule 2 to the Immigration Act 1971 (as amended by section 5 of the Immigration Act 2014) regarding the right of the Secretary of State for the Home Department to detain, pending potential removal, unaccompanied children seeking to enter or remain in the UK. The essential question was whether such detention is lawful where a detainee is on reasonable grounds assessed at the time of detention to be an adult over the age of 18 but when it later transpires that in point of fact the detainee was a child under the age of 18. Lord Justice Davies held at [35] that the provision could not be interpreted in an way which involved writing in words or indeed rewriting the relevant legislation. He said that the definition of "unaccompanied child" cannot properly be written so as to add in the words "for whom there are reasonable grounds of suspecting" before the words "is under the age of 18". The opening wording of paragraph 18(b)(i) also cannot be properly rewritten in such a way or so as to in effect to say "where a person detained under paragraph 16(2) is being detained as an unaccompanied child". He summarised the position as follows at [46]:

> "I do not propose to say more than the wording of the relevant provisions of schedule 2 to the 71 Act as amended by the 2014 Act is, in my view, unambiguous, since that unambiguous wording gives rise to a conclusion which cannot be said to be devoid of sense or purpose the words must on conventional principles of statutory interpretation be given their ordinary meaning. It was difficult at times not to gain the impression that much of the argument on behalf of the Secretary of State in essence was to put forward the presumed intention of Parliament as being founded on an endorsement of a decision of the Supreme Court in AA [Afghanistan case] and then to mould the language of the amended statutory provisions to meet that presumed intention, but it is elementary that the intention of Parliament is ultimately to be derived from the statutory language which it actually has used. If the result which I reach in this case is unwelcome to the present covenant its remedy is to amend the statutory provisions. It is not, however, a proper exercise of judicial function to achieve such amendment by distorting the statutory language under the guise of a purported process of statutory interpretation."

(4) The comments made by Davies LJ in the decision in *Sudan* apply equally here. When this section was originally introduced it made perfect sense to refer to a trade but when the approach to film leasing altered these provisions clearly needed changing. If these rules were enacted now they would simply miss the mark. No doubt the legislature would not have wanted to produce such a result had they considered the interaction of the two sets of rules in this particular scenario but the words cannot be twisted to give a result they manifestly do not achieve.

(5) In the alternative, if the LLP's activities did amount to trading in 2006/07 and 2007/08, any trade ceased shortly thereafter. Therefore, in the years 2012/13, 2013/14 and following, there are no "profits arising from a trade" and no disposal of such profits can occur within the meaning of sections 797 and 799.

(6) On the authority of *Carvill v Inland Revenue Commissioners (No 2)* [2002] STC 1167 ("*Carvill*"), even if it was decided that the appellants were carrying on a trade in the earlier year it does not stop them saying they were not and that decision was wrong (and in any event, as noted any trade should be regarded as having ceased trading before the relevant tax years). *Carvill* makes it clear that an issue which has arisen in year 1 can be revisited for the purposes of charging tax in year 2, 3, 4, 5 even if there was a decision of the court governing year 1. It establishes that it is perfectly possible for different tribunals to take differing views of precisely the same transaction certainly if it relates to different years (and the principle may go further and establish that the only thing a tax case decides is how much tax is paid). He referred to [18]:

> "I recognise that there is something very odd about the fact that although directed at different years of assessment the two decisions were concerned with the identical issue in relation to the same transaction. However, the oddity is no more than a reflection of the well-established rule that the doctrine of res judicata does not apply to the decision of commissioners in relation to the amount of tax due in respect of one year of assessment so as to preclude either the taxpayer or the Revenue from contesting the self-same issue of fact or law on an appeal in relation to a different year of assessment (see the review of authorities, Mr Justice Jacob in King v Walden, in particular the decision of Mr Justice Lightman in Barnett v Brabyn and the decision of the Privy Council in Capital v Income Tax Commissioner of Columbia, approved by Lord Hope with whom Lord Hoffmann agreed in Levin v Westburn."

HMRC are almost introducing a principle of estoppel which does not exist by saying that if the taxpayer has self-assessed on the basis that there was a trade, the taxpayer is stuck with that. The whole point of the *Carvill* principle, which is supported by many other decisions, is that any matter or assumption decided in the earlier year can be revisited for the purposes of a later year.

112. Ms Wilson submitted that the decision in *Carvill* is not in point. That was about revisiting whether there is a liability for successive and different tax years. That is a completely different statutory context.

Conclusion on trade issue

113. We cannot see a basis for interpreting the term trade when used in these provisions as anything other than an activity which constitutes a trade as a matter of fact and law. Essentially the legislation applies where (1) an individual makes a loss in a trade, which results from a computation of profits/loss made under any of the provisions in chapter 9 of Part 2 ITTOIA, for which he claims certain reliefs. We note that the provisions in chapter 9 apply to provide film-relief only where the relevant person/persons is/are carrying on a trade, (b) the individual makes a disposal of a right of the individual to profits arising out of "the trade", meaning the trade which gave rise to the relevant loss, and (c) there is an "exit event". The term trade has had a well-known meaning for income tax purposes for many years. As Sir Terence Etherton explained, at [112], in the decision in the *Eclipse* case to which the parties referred, the Income Tax Acts have never defined trade or trading further than to provide, in the words of s 832(1) ICTA, that trade includes "every trade, manufacture, adventure or concern in the nature of trade" and:

> "As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Its meaning in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the

evaluation of the activity by the tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. *Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles.* To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the a fact-finding tribunal." (Emphasis added.)

114. Essentially, the underlying problem here is that (1) as HMRC appear to accept, on the authority of *Samarkand*, the LLPs were not carrying on a trade, as a matter of fact and law, and so are not entitled to the film tax reliefs which they claimed resulted in a trading loss for which the appellants have claimed the appellants' reliefs, and (2) HMRC are out of time to deny the film tax reliefs/loss and appellants' reliefs claimed for that loss under the detailed set of rules under which HMRC may take such action. If these provisions are interpreted, as HMRC argue for, on the basis that it suffices for them to operate that the LLPs/appellants made successful claims for the loss/appellants' reliefs, then in effect the benefit of that loss can be clawed back (assuming all the relevant conditions for these provisions to apply are satisfied). However, in our view:

(1) To interpret the provisions, as HMRC argue for, would involve a contortion of their meaning and we can see no proper basis for doing so on a purposive interpretation of the provisions notwithstanding the unfortunate overall result that gives in the particular circumstances of this case. The specific reference to a loss "in trade", as a term with an established meaning, as viewed in the context of the overall provisions of chapter 5 and the relevant provisions in ITTOIA, indicates that the legislature intended these provisions to apply only where an individual makes a loss in the course of carrying on activities which constitute a trade, in accordance with the usual meaning of that term, as a matter of fact and law.

(2) That the legislature intended these provisions to operate only where an individual has made a relevant valid loss in the course of an actual trade is rational and in accordance with a cohesive tax system: (a) plainly no counter-action measure is needed if there is no relevant loss in the first place, and (b) we do not accept that the fact that the legislature did not provide for HMRC to be able to override procedural bars on re-opening enquiries or raising discovery assessments indicates the legislature intended these provisions to operate where a successful but invalid loss claim has been made. The more natural, reasonable assumption is that the legislature legislates with an awareness of the overall legislative system within which the provisions in question will operate, on the basis that that system will operate as intended and that those enforcing the law will apply the law correctly. The tax regime provides a detailed set of rules for when and how HMRC can seek to deny/challenge the validity of self-assessed losses such as those claimed by the LLPs and the reliefs claimed by the appellants for those losses. We can see no indication that the legislature (i) intended to implement these provisions on an assumed basis or, in anticipation, that HMRC may allow losses/reliefs on a mistaken basis and may not avail themselves of the extensive powers they have to ensure the law is applied correctly, and/or (ii) would wish to provide for HMRC to have additional powers in case their view of whether persons are trading proves to be incorrect at a time when they are no longer able to challenge the position.

(3) We have not found the cases HMRC referred to of assistance in deciding upon the correct interpretation of these provisions given the different context and nature of the issues under consideration in those cases.

Was there a relevant disposal? – submissions

115. Our conclusion on the trade issue means that in our view chapter 5 is not in point but, in case we are found to be wrong in that conclusion on any appeal, we have set out the parties' submissions on the issues which arise if chapter 5 is in point and our conclusions on those issues.

116. HMRC submitted that there was a relevant disposal for the purposes of s 797(1)(b). HMRC noted the following general points on the interpretation of the relevant provisions:

(1) Section 797 is an anti-avoidance provision designed to ensure that film reliefs operate as intended. It is deliberately open and adaptive: (i) The condition in s 797(1) is satisfied if there is a relevant disposal and an exit event in any order and in any timescale, (ii) a relevant disposal (however small) preceding (or succeeded by) any reimbursement (however large) triggers a chargeable event by reference to the full amount of the reimbursement: s 797(2)(b), and (iii) the concept of profits "arising from" an activity is also wide (see for example *Shop Direct Group v HMRC* [2016] UKSC 7 at [21]), (iv) The definition of a "relevant disposal" in s 799 is not exhaustive. Section 799 covers part disposals (which would include the grant of new rights out of existing rights), legal and de facto disposals (such as an assignment, a release, a waiver or other loss or destruction), and a disposal in stages or by arrangement.

(2) Event A is broadly framed to cover a disposal, giving up or loss of "a right which arises from the trade to income (or any part of any income)". It does not require a disposal of the right to carry on the trade or to interfere in the management of the trade or any disposal of the partnership share itself. It does not matter if the right is disposed of, given up or lost as part of a larger disposal, giving up or loss.

The appellants did not appear to dispute the points set out in (1) and (2).

(3) Event B covers a disposal of "an interest in a firm that carries on the trade…". It looks at the interest from which the right to the profit arises, whether that is the right to carry on the trade oneself or to have it carried on one's behalf or otherwise.

(4) The fact that after the event in question, members remain liable to income tax on all or some of the partnership profits does not of itself prevent that event being a "disposal". As a matter of basic tax law, liability to income tax on profits will not always follow the assignment of rights to profits. Under s 8 ITTOIA the person liable for income tax on trading profits is the person receiving or entitled to the profits. A person may be entitled in a number of different capacities: such as trustee or beneficiary or as sole owner of the asset producing the income (see *Maureen Hepburn v HMRC* (TC02837) [2013] UKFTT 445 (TC); *Reid's Trustees v CIR* 14 TC 512). A person can be liable as a person in receipt, whether or not he is entitled to receive the income. Where issues of double taxation arise on the income as it accrues, it is for the parties to determine the incidence of the tax as between themselves. Where an exit event precedes a relevant disposal within Event B, the assignor will necessarily remain liable for income in the interim period. Basically, so long as the profits continue to arise from a UK source or to a UK resident, someone must be liable for UK income tax. If that someone is the individual, the onus is on him to negotiate a lien or indemnity from the person entitled in receipt.

(5) The particular mischief (a) as regards s 797(2)(a) is that the individual whose capital contribution is brought into account in a partnership's tax computation of trading losses has been able to set his share of those losses sideways against his other income and capital gains (relieving him from tax), yet when he finally makes money, he receives it free of income tax (paying income tax – if he does – only as and when (or if) the income profits accrue over the life of the trade), and (b) as regards s 797(2)(b) is that the individual incurs a loss (for which he successfully claimed sideways or capital gains tax

relief) in the amount of his capital contribution funded by debt yet has no liability to make good that debt; he has had something for nothing.

117. HMRC submitted that in this case there was a relevant disposal for the following reasons:

(1) In January 2013 the appellants sold the benefit of all their rights to profits in the LLPs for money to Birdcrest. That was an effective assignment of all their future rights, because they received full consideration. It was clearly intended and was binding on the LLPs and on third parties. It had to be because the second stage was to sell their partnership interests stripped of those rights. In effect, having had the full benefit of loss relief and of tax relief for interest due on the loans up to 2013, the appellants rid themselves of the whole of their partnership interests for a sum of money which they were able to use to repay the loans which had enabled them to obtain such a large upfront cash flow benefit. On their view, they walked away from the scheme before its end point, when the Government would have had most of the cash flow advantage back. Plainly these provisions are intended to be effective in counter-acting such transactions.

(2) On selling their Capital Accounts, the appellants each disposed of a right to profits arising from an LLP's trade within the meaning of Event A. Under the CAA, each appellant assigned to Birdcrest all his interest in net profits available for distribution in respect of his Capital Account. This was not a disposal of the whole of the appellants' interests in the LLP because they retained some (in reality, nominal) right to income above an agreed amount and could not, without the other members' consent, assign their rights to interfere in the management of the LLP. However, it is an assignment of capital and income profits which was permitted by the LLP Agreement and the Limited Liability Membership Act (which recognises that, by default, a member of an LLP can assign part of the financial interest that makes up their "share" in an LLP (s 7(1)(d) of that Act)). The requirement in the amended LLP Agreements to notify the LLP of the assignment evidences the intention that the LLP was to be bound by the assignment. The quantum of the consideration further reflects an arrangement intended to bind third parties (and creditors in a bankruptcy) as does the fact that the SA strategy expressly contemplated the sale of the residual interest to a third party (most likely outside the jurisdiction). Clause 3.1 of the CAA assumed and implied that Birdcrest had rights of 'recoupment' (reflecting its status as holder of enforceable rights as against the LLP). The LLP gave security over the LLP's assets to Birdcrest as "beneficial" owner of rights to profits arising from the trade.

(3) Alternatively, the appellants disposed of beneficial interests in the LLPs within Event B, which is the disposal, giving up or loss of the individual's interest in a firm that carries on the trade, including the dissolution of the firm. The appellants disposed of the right to profit from their management of the trade carried on through the relevant LLP; in other words they disposed of part of their financial interest that makes up their "share" in the LLP. It is notable that the LLP Agreements were amended to allow the members to assign a "part" of their interests in the LLP.

(4) Further and alternatively, for the reasons given above, the appellants made relevant disposals within the scope of s 797(1)(b), whether or not they fulfil the specific terms of any event within s 799. "Dispose" can be defined variously as "to get rid of; to transfer or give away as by gift or sale; to sell an asset, property, or part of a business". Section 797 provides for "a disposal of *a* right of the individual to profits" rather than, say, *the* right. The legislation, therefore, captures the "transfer… to the Purchaser" of the Seller's "beneficial interest in and to the Capital Account, which… shall include (without limitation) [the] Seller's right to receive drawings from the Partnership" where the Purchaser "shall…be entitled to recoup" its investment from "the Seller's entitlement to drawings from the Partnership".

118. HMRC submitted that there was an "exit event" (1) within s 797(1)(c) in 2012/13 on the basis that the appellants received the purchase price "for" the sale of the Capital Accounts, as the disposal of a right to profits arising from the LLP's trade (as represented by his "Capital Account"). This is "non-taxable consideration" because it was not charged to income tax and it was "for" the relevant disposal, or (2) within s 797(2)(b), on the basis that the purchase price was an amount of capital reimbursed to the member by another person in accordance with s 801(6)(c). In paying the purchase price, Birdcrest defrayed the costs to the individual of his capital contribution in that, pursuant to the CAA and related documents, the money could only ever go to repay the loan which financed that contribution. In that case, the charge equals the amount by which each appellant's original loss claim exceeds his capital contribution, as adjusted by the later reimbursement (s 797(5)(b) and s 801(6)(c)). On that basis the chargeable event occurred in 2012/13.

119. HMRC submitted that further and alternatively, as the appellants accept, there was a relevant disposal in 2013/14 when the appellants sold their residual interests for €2. In HMRC's view, in that case, the purchase price each member received in 2012/13 is an amount of capital reimbursed to him by another person in accordance with s 801(6)(c). That is an exit event in 2012/13. The chargeable event occurs in 2013/14, as is the later of: the relevant claims, the relevant disposal, and the exit event (s797(4)(b)). The charge equals the amount by which the member's original loss claim exceeds his capital contribution, as adjusted by the later reimbursement (s 797(5)(b) and s 801(6)(c)). As already noted, it does not matter that the exit event and relevant disposal occur in different tax years, and nor does it matter whether they are connected.

120. Finally HMRC submitted that further and alternatively, on a purposive construction of chapter 5 and viewing the facts realistically, there was a staged arrangement to dispose of all rights to profits in consideration of (a) the purchase price for the Capital Accounts, and (b) €2 paid for the sale and purchase of the residual interests, which falls into charge in 2013/14 at the latest. Such an arrangement falls firmly within the scope and purpose of the charging provision. It cannot matter that it straddles two different years of assessment or that the sale and purchase of the residual interests was deliberately delayed as an 'anti-Ramsay' device. The second stage would never have happened without the first, and the intention and desire was that the second stage would come to fruition, as indeed it did: see *Morrison* at [49]-[53], and *RFC 2012 plc (in liq) v A-G for Scotland* [2017] UKSC 45, [2017] STC 1556, particularly at [12]-[16]. There was no real commercial reason why they had to be split in that way. They could have been contemporaneous. They could have been quite clearly upfront, linked and connected, and attempts were made in a sort of anti-*Ramsay* way to avoid that argument. In other words, looking at the nature or the shape of this rather weird set of transactions, the disposal of the residual interests in April 2013, was the necessary consequence of carving out the first sale of the Capital Account and that was only carved out in order that the members could make the second sale without a tax charge. Even if the sales were in some way at risk of not occurring in any particular order or at all, the fact they did occur is enough to say that for the purposes of Part 13, assuming it is a rational piece of legislation intended to catch exit strategies and that this would be caught if it had been done all on the same day, then what was given for that disposal of the partnership interest was everything that a member got in order to finally rid himself of a tax liability under Part 13, including the money from Birdcrest. The facts which HMRC rely on in support of their position are included in our conclusions below.

121. The appellants submitted that the sale of the Capital Accounts does not constitute a "relevant disposal" within the meaning of ss 797 and 799 for the following reasons:

(1) There was no Event A or event within the general description in s 797(1)(b) as the sale of the Capital Accounts did not diminish the seller's right to profits. A member disposed of the bundle of rights associated with him in the LLP with his Capital Account

but that did not include the sale of a right to the income; the member kept the right to the income and was still taxed on it. The members simply gave up rights they had as Capital Account holders to have net profits credited each year to their capital account and to have payments made to the bank which resulted in them becoming a debtor of the LLP, which ultimately meant that all their bank debt was paid off:

(a) HMRC misunderstand the nature of the Capital Accounts. It must be borne in mind that all the capital introduced by members disappeared by the end of the LLPs' term. All lease payments (whether profits or not) were returned to members as drawings and used to repay the loans that in large measure funded the capital. As can be seen from the LLPs' accounts, the drawings were repayments of capital. While as a general rule capital remains in an LLP or partnership, there is no invariable rule. In the accounts for each year, (i) the Capital Account is shown as being increased by being credited with the accounting profit and the member is treated as withdrawing both that profit and a further sum, which in total matches the sum needed to meet payments due under the loan, and (ii) that further sum is shown in the LLPs' balance sheet as an amount owed by the member to the relevant LLP. The intention was that at the end of the 15 year term of the transaction, once all the lease rentals had been paid, there would be a set-off; by that stage the sums shown as owned by the member would equal all the capital repaid. Whilst the LLP owed the member his capital, the member owed a similar amount back, so the two would just be set off.

(b) It is highly relevant that following the sale of the Capital Accounts, members remained liable to tax on their share of the LLP's profits because they were still members. A member sold a beneficial interest in the Capital Account but remained a member and, as such, remained liable for tax on his profits and, due to the loan repayment, lost interest relief. So members did not dispose of a right to profits of the trade because they were still taxable on them. As a matter of impression, "surely one would say, the last thing you've done is disposed of a right to profits of the trade because you're still taxable on them". Moreover, the whole point of this legislation is to stop those who have claimed sideways loss relief from stepping out of the arrangement and receiving a capital sum instead. But if the person is still taxable on the profits he is still in the arrangement. The effect of these film leasing arrangements is that (i) the member obtains a very large loss gain in year one and gradually over the years pays tax on the lease rentals and thereby pays that gain back, and (ii) he has to achieve something with the tax saving because otherwise he would end up paying more tax than the tax saved on day one. So the key to staying in the arrangement is staying in and paying tax on the profits which is precisely what happened.

(2) There was no event B. Each appellant's Capital Account formed part, but not the whole, of his interest in the LLP. Event B is referring to the whole interest. If part only was meant, Event B would cover a partial loss of profits. But that is already comprehended in Event A. Event A would become superfluous on HMRC's interpretation and Parliament must be assumed not to legislate in vain. If event B covered giving up any interest in the firm, it would not be necessary to have Event A or D. The reference in Event B to dissolution, as a complete coming to the end of the LLP and so all interests in it, reinforces the notion that loss of the whole interest is meant.

(3) The conditions for there to be a relevant disposal are not met on a *Ramsay* approach:

(a) The *Morrison* case built on an observation of Lord Jauncey in *Craven v White* [1989] AC 39 that if the final step in a transaction is a sale of an asset at auction and there is a high probability that someone will buy it, that would be caught by the preordained principle. The Court of Appeal in *Morrison* went further than that. They said, in effect, that if the case concerns shares which can be sold on the stock exchange and the plan is to sell those shares, the fact that one does not know who is going to buy them is irrelevant. So the nature of the final disposal and the nature of the asset being disposed of becomes relevant.

(b) Here the concern is with a rather odd species of property, the end of a leasing arrangement. The buyer was effectively buying liability in the form of a stream of taxable income, but with a potential upside that there might be opportunities to turn the film to account and make a bit of extra profit. That is a fairly rarified type of deal. One has to give all the details of the films, the lessees, the income streams and so forth, and may find that the purchaser does not want to be in the UK because buying the tax stream is simply buying a liability. In other words, one was selling an asset which was not of an obvious sellable kind. So there was a fairly rarified market where there would only be a few special purchasers and no guarantee that they would ever be found; the residual interests certainly could not be sold in the market like shares and without consideration of all sorts of details the purchasers would not have had the relevant information to buy.

(4) There is no artificially dissected arrangement. The sale of Capital Accounts was commercially separate from the sale of the residual interests and was not an artificially inserted step; there was no preordained scheme:

(a) The sale by the appellants of their Capital Accounts coterminous with the refinancing by the non-sellers of their borrowing was the only course of action available to them to achieve their desired ends. There was no artificiality. It achieved a distinct purpose, that of repaying the loans and freeing members' interests from the BOI charges. Until that was achieved, a sale of members' interests could not be effected for the reasons set out by Mr Dryburgh. The sale of the Capital Accounts achieved this independent purpose stated which at most enabled later sales of interests to happen if members wanted to sell and if a buyer could be found. Only some partners disposed of their Capital Accounts; others refinanced their borrowing and took no further steps.

(b) If the relevant members had stopped at selling their Capital Accounts, they would not have had any exit from the film schemes. They remained entitled to profits and liable to tax. A sale of interests was not pre-organised, was not guaranteed, was only negotiated after the first stage had, with great difficulty and delay, been accomplished and required considerable further negotiation and novel drafting. The sales were no more than a possibility. It was made quite clear that (a) if a members sold his Capital Account there could be an opportunity to dispose of his residual interest but it was all left up in the air and there was no purchaser lined up until those accounts had been sold, so that there was a separate transaction. No purchasers were looked for. These interests are not easily disposed of and it all had to be done separately as a later separate step.

(c) Accordingly the members were told they *may* be able to sell their residual interest but there was no guarantee. It is highly unlikely (if this is what HMRC allege) that there were buyers waiting in the wings to acquire these interests because, if there were, they would have been waiting far longer than anyone would have agreed to. The documents show that time and time again everything was about to happen and then difficulties emerged and it did not happen. It took from spring of 2011 to early 2013 to get these transactions through because of the difficulties; there were continual frustrations and dates were missed and on and on it all went.

Purchasers were not actually approached at all until two months after the completion of the sale of Capital Accounts. In that state of affairs the transaction here falls on the right side of the *Morrison* line.

(d) It is also demonstrates that this was not a pre-determined type of transaction that (a) Mr Alistair Gordon had to sit down and draft the documents from scratch and (b) Mr Dally's evidence is that he did not get any impression that the five people he wrote to, had already been lined up and were ready to go. It all had to start from scratch. It should also be borne in mind that this started with fears about BOI collapsing, and the same was true of other banks. The first set of transactions solved the BOI issue; they had a real, commercial purpose.

122. The appellants accepted that the appellants' disposal of their residual interest for two euros falls within Event B but considered that the only consideration was that sum. The purchase price did not give rise to a relevant disposal and is to be ignored. The purchase price was paid in consideration of the sale of a Capital Account and, as such, does not constitute capital "reimbursed" to the seller for the purposes of s 801(6)(c). To hold otherwise would attribute an entirely unnatural meaning to the word "reimbursement" for which there is no foundation.

123. Ms Wilson replied that:

(1) Mr Thornhill's view that Event B would be otiose if it covered a part disposal event would not be the case if, as he says, Event A is limited to the legal right to profits (although there is nothing which limits it as such). It must be borne in mind that this is a counteraction provision which is non-exhaustive and in listing various events it is simply giving guidance as to the types of or examples of what might be caught.

(2) The tax position is not determined by and does not depend on the accounting treatment which, in general terms, looks to economic substance (under s 863 ITTOIA and s 59A TCGA). Moreover, it is not known whether the accounting treatment is actually correct or what policy is behind the treatment adopted.

(3) There is no basis for Mr Thornhill's view that "as a matter of impression" the fact that the appellants were still liable to tax on the profits after the assignment of rights to profits suggests that actually there was no disposal of a right to profits at all.

(a) A person can be in receipt of all the value and still be liable to the tax. That is not a bar to chapter 5 applying.

(b) There is no impression test in any of the authorities on statutory interpretation The words have to be read in their statutory context, and chapter 5 is very wide, and nothing in the use of the words "rights to profits" limits them to mean the relevant provision only applies if on the disposal the person is no longer liable to tax on the relevant profits. The words used are wide enough on any normal meaning to include the benefit of all rights to profits and an investor has lost the right to profits if he is nothing more than a bare trustee of them.

(c) As chapter 5 is focussed on disposals of bundles of rights, which include rights to future profits, it would be odd to have any enquiry as to whether the disponor is still taxable on them; the test requires one to look at a disposal today and the simple question is – what is the thing disposed of – is it a right to profits?

(d) It is well known and structurally an inherent part of the income tax regime that entitlement to and receipt of income does not always go hand-in-hand. If a partnership interest, partnership share or a right to profits is sold to someone who is in the UK, that person would carry on paying the tax on the profits. That would not be case if the person is non-resident or in certain circumstances if he is non-domiciled, and the trade is emigrated. Chapter 5 is not directly concerned with that.

In fact, all the sales are offshore, and no one pays any tax after the second sale. It is important that what is happening is that this enables a distortion of the original structure whereby the tax credit would in effect have been clawed back. Hence, chapter 5 accelerates the tax charge to match the real world cash flow benefit. Any risk that the partner may not have been able to sell the residual interest or delay in getting rid of it is just of a risk of entering into structures such as this. Parliament can be taken to have known that but it cannot be taken to have created a huge loophole whereby the sale of a capital account does not count as the disposal of a right to profits, because it is a disposal only of the benefit and the disponor does not rid himself of the tax liability until he disposes of the residual interest.

Was there a relevant disposal? - conclusion

124. In our view, on the assumption that the LLPs were carrying on a trade in the relevant periods, the sale of the Capital Accounts constitutes a disposal, giving up or loss of "a right which arises from the trade to income (or any part of any income)". As set out in Part B, on the sale the appellants effectively assigned all the rights to their share of profits to Birdcrest; whilst following the sale, the profits would continue to accrue in the name of the relevant appellant, from then on they were held by him as nominee or bare trustee for Birdcrest as the beneficial owner of the Capital Account. As HMRC submitted, Event A is widely drawn and on its natural meaning encompasses the disposal of the beneficial entitlement to income arising from the trade.

125. We cannot see that the accounting position as regards the Capital Accounts, profit receipts and drawings from the LLPs has any relevance to the interpretation of this provision. We can see some force in Mr Thornhill's argument that the legislature did not intend to capture scenarios where the individual in question remains taxable on the relevant income. The purpose of this legislation appears to be to prevent those who have claimed relevant reliefs from converting a taxable income stream into a tax free capital sum. Hence, in broad terms it seems unlikely the legislature intended the provisions to apply where the individual in fact remains liable to income tax on the relevant income stream albeit he has realised the value of that income stream.

126. However, if that is a material consideration, on a purposive approach taking an unblinkered realistic view of the facts, in our view it suffices for there to be "disposal" of the required kind that, as we conclude having regard to all the evidence set out in Part B, (a) the sale of the Capital Accounts was part of an overall scheme undertaken with the intention and expectation that the appellants would be able to divest themselves soon afterwards of the remainder of their interest in the LLPs and so of any further income tax liability without disturbing the appellants' reliefs, (b) when the Capital Accounts were sold, there was no practical likelihood that the disposal of the residual interests would not take place, and (c) the residual interests were sold shortly after the sale of the Capital Accounts as was intended and expected, on the appellants' analysis, thereby achieving an exit from the arrangements with the desired tax result. In that context, we note in particular the following:

(1) In the February letter, SA proposed the sale of the benefit of the "Capital Account" for an amount equal to the net present value of the future income streams, and then a sale of the residual interests to another purchaser for a nominal sum or envisaged that members could make a gift of the residual interests.

(2) It was stated in the notes accompanying the relevant resolutions made in April 2011 that amendments to the LLP agreements were intended to "ensure that members who wish to refinance from the sale of their capital accounts would have confidence that they could later dispose of their remaining LLP interests should they so wish".

(3) SA identified five potential purchasers willing to be paid to purchase the residual interests prior to the sale of the Capital Accounts, all of whom were aware of the proposal in early 2011 before the February letter was produced and one of whom was the eventual purchaser.

(4) It is reasonable to infer from the evidence that Mr Dryburgh calculated a percentage fee for the whole proposal in 2011. Inherent within that fee was the cost in relation to and proportionate to the sum payable to a purchaser of the residual interests. Certainly, by the time of the sale of the Capital Accounts in January 2013, Mr Dryburgh must have had an idea of the ball-park figure for the sale of the residual interests and thus his fee.

(5) We consider it reasonable to infer from the evidence that as at the date of the sale of the Capital Accounts (a) there was a small market of potential purchasers. We note that Mr Rangeley expressly stated that he understood there was a market in such interests, (b) there was an expectation on the part of those managing the transactions, SA, that the residual interests would be capable of being sold or disposed of. Mr Dryburgh, who was directing matters also had in mind that a partner could assign the residual interest to a child or family member chargeable at a lower rate of income tax without triggering the application of chapter 5. The relevant resolutions dated 11 and 12 February 2013 accordingly made provision for a gift or sale of the partnership interest, (c) the intention and expectation was that this could all be done without any new tax charge or loss of the original tax relief. Mr Dryburgh confirmed that the intention was to structure the transaction so that chapter 5 did not apply, and (d) the members who sold their Capital Accounts shared these expectations; they sold their Capital Accounts on the basis that they would be able to sell their residual interests in order to exit from the arrangements, on SA's analysis, without any further tax charge and without disturbing the appellants' reliefs.

(6) A formal gap or hiatus between the sale of the Capital Accounts and the sale of the residual interests was inserted into the arrangements specifically with a view to avoiding the application of chapter 5. The delay in sending out the formal offers to potential purchasers had no other commercial motivation . We can see no reason why the sale of the Capital Accounts and of the residual interests could not have taken place contemporaneously. Overall, there was no practical likelihood that there would be no disposal at all of the residual interests. Had there been a genuine risk, that would have confounded the expectations of Mr Rangeley and the appellants, who were given the impression that there was a market, and that the sale option was a proposal to rid oneself of their interest in the LLPs altogether, and that any delay in the sale of the interest would simply be an acceptable cost of the opportunity or scheme.

(7) For the reasons already given in Part B, (a) the features of the scheme are not wholly explained by the factors stated by the witnesses in their witness statements such as the banking crisis and the dissolution of some of the lessee companies: The evidence does not establish that (i) there was any specific risk, known to Mr Dryburgh/SA as regards BOI/ABN Amro at any particular point in time or that concerns for the status of those banks was the driving force, the sole or main reason for the proposal for the exit arrangements, or (ii) the fact that certain lessee companies were struck off of itself had the potential for disastrous consequences for Mr Jarman and Mr Forsyth or other relevant members, (b) we do not accept that the appellants' sole or main objective in selling their Capital Accounts was to rid themselves of the loan due to the risk of BOI going into liquidation and/or that they undertook the sale of the Capital Account as what can be described as "a standalone matter". As noted, we consider that it is reasonable to infer from the evidence that they appellants chose the sale option with the intention and expectation that they would be able to sell their residual interests and thereby exit from

the structure in a tax efficient manner. We rely on all the points made in Part B but we note, in particular, that any concern with BOI's position does not fully explain the choice of the sale option. Plainly a member could remove that risk, at no cost, by taking the loan option. It would make no commercial sense for a member to choose to sell the Capital Account unless that was going to be followed by the disposal of the residual interest as he would plainly be worse off if that did not occur.

127. On that basis, we consider it is clear that (1) there was an "exit event" (1) within s 797(1)(c) in 2012/13 on the basis that the appellants received the purchase price "for" the sale of the Capital Accounts, as the disposal of a right to profits arising from the LLP's trade; and (2) this is "non-taxable consideration" because it was not charged to income tax and it was "for" the relevant disposal, and (3) the purchase price is taxable under chapter 5 in the tax year 2012/13.

Part D - Taxation of Chargeable Gains Act 1992 ("TCGA")

128. HMRC submitted that if the appellants are found to be correct that chapter 5 does not apply so that the purchase price is not subject to income tax, the purchase price is subject to capital gains tax.

129. A useful summary of the proprietary nature of a partnership share at general law is found in *Memec v IRC* [1998] STC at 764e-f , 765d-e, 765h; *IRC v Gray* [1994] STC at 377c, and this extract from *Lindley & Banks on Partnership* 20th Ed at 19-03:

> "When analysing the proprietary nature of a partnership share, it is necessary to distinguish between the internal and external perspectives, since they are very different. The distinction was clearly drawn by Lord Justice Hoffmann in I.R.C. v Gray in these terms:
>
> > "As between themselves, partners are not entitled individually to exercise proprietary rights over any of the partnership assets. This is because they have subjected their proprietary interests to the terms of the partnership deed which provides that the assets shall be employed in the partnership business, and on dissolution realised for the purposes of paying debts and distributing any surplus. As regards the outside world, however, the partnership deed is irrelevant. The partners are collectively entitled to each and every asset of the partnership, in which each of them therefore has an undivided share.
> >
> > …, the external perspective may still be of relevance in certain circumstances, e.g. when determining the manner in which a partnership share should be transferred and, perhaps, where a firm holds shares in a company subject to a right of pre-emption, if one partner were to assign his partnership share."

130. Very broadly, the capital gains regime applies to the disposal of chargeable assets. Under s 59A TCGA an LLP is treated as transparent for capital gains purposes if it carries on business with a view to profit. The effect of that is that the members of such an LLP are treated as owning a fraction or share of each of the partnership assets and not an interest in the partnership itself and where an asset is disposed of by the LLP to an outside party each of the members is treated as disposing of his fraction or share of the asset. On the other hand, an LLP which is not treated as transparent under this rule or which ceases to be treated as such (because it ceases to carry on a business with a view to profit) is treated like a company; it pays corporation tax on its profits and gains made on any disposal of its assets, and any member who disposes of his capital interest in the firm is subject to capital gains tax on that disposal.

131. HMRC submitted that, however the sale of the Capital Accounts is viewed, the appellants realised a taxable capital gain on the sale of a sum equal to the purchase price received:

(1) Their primary argument was that when the appellants sold the rights represented by the Capital Account, that did not constitute the disposal of a partnership share or partnership asset. Rather (a) as a disposal of rights which subsist as between the partners

and as between partners and the LLP, the sale constitutes a disposal as a matter of fact as between the seller and third-party purchaser, or (b) alternatively, the sale is a deemed disposal by virtue of s 22(1)(c) TCGA. In either case, the gain accruing to the appellant is computed under s 38 TCGA, subject to s 37 TCGA, which excludes from the computation of the gain, consideration which is chargeable to tax on income, and s 39 TCGA, which excludes from the computation of the gain, expenditure by reference to tax on income. On the basis that, contrary to HMRC's primary case, the purchase price is not chargeable to tax on income, it must be brought into account as consideration for CGT. The full price is taxable as there is no amount to be deducted as acquisition cost in computing the resulting gain:

(a) The rights to profits arise from the partners' purported trading activities and in that sense are created by them (see by analogy *Zim Properties Ltd v Procter (HMIT)* [1985] STC 90). The rights are not themselves a partnership asset and thus the partners did not acquire the rights with their capital contribution. Furthermore, for this purpose the LLP is transparent as regards activities (see s 59A, *Memec v IRC* at 764e-f, 765d-e, 765h).

(b) Further and alternatively, if the appellants could be said to have acquired the rights in consideration of the whole or part of the capital contribution made on investing in the relevant LLP (because akin to the acquisition of a partnership share) that sum is reduced to nil under s 39 TCGA. The appellants' capital contributions were expended by the relevant LLP (and thus by them) in purchasing film rights for the self-assessed trade and, as such, was expenditure allowable in "*computing*" the LLPs' (and thus the appellants') self-assessed income profit/loss. The result is that the appellant cannot also treat the capital contribution as deductible expenditure when computing his chargeable gains for CGT. It is entirely rational that the acquisition cost is taken away from the appellant because the capital contribution is the very money that created the trading loss and the appellant already had the benefit of that. Otherwise the appellant would have the benefit of the same sum as a deduction twice.

(2) The result would be the same even if the appellants are instead regarded as making a disposal of a share/interest in the LLP on selling the Capital Accounts. Again the full amount of the purchase price would be brought into account in the capital gains computation and would be taxable as again they would not obtain a deduction for the capital contribution for the reason set out above.

132. However, we consider that, as the appellants submitted, there can be no capital gains tax charge for the following reasons:

(1) As HMRC did not appear to dispute, the LLPs were transparent for tax purposes on the basis that they were carrying on business with a view to profit. We note that there was an overall profit to them from the film leasing due to the receipt of a series of lease rentals over 15 years carrying interest in the case of Avondale at 5.24%; the borrowing was by the individual members so the interest charge was not an expense of the LLPs' business.

(2) As the members are treated as effectively owning the assets of the LLP, they cannot also be treated as making a disposal of their capital interest in the LLP and as being liable to capital gains tax in respect of that capital interest. A partner's or member's capital account is not an asset for capital gains tax purposes. Under the Statement of Practice D12 dealing with partnerships, this is clearly assumed:

> "… the enactment of the Limited Liability Partnership Act 2000 created from April 2001 the concept of limited liability partnerships as bodies corporate in UK law. In

conjunction with this, new CGT provisions dealing with such partnerships were introduced in section 59(a). S59(a)(1) complements section 59 in treating any dealings in chargeable assets by a limited liability partnership as dealings by the individual members for CGT purposes. *Each member of a limited liability partnership to which 59(a)(1) applies has therefore to be regarded like a partner in any other non-corporate partnership as owning a fraction or share of each of the partnership assets and not an interest in the partnership itself…*

Where an asset is disposed of by a partnership to an outside party, each of the partners will be treated as disposing of his fraction or share of the asset. In computing gains or losses the processes of disposal will be allocated between the partners in the ratio of those share and asset surpluses at the time of disposal….

When this Statement of Practice was published in 1975 it did not address the situation where a partner contributes an asset to a partnership by means of a capital contribution. HMRC clarified its approach to this in Revenue and Customs brief 0308. OTS asked HMRC to include this clarification in the Statement of Practice. Where an asset is transferred to a partnership by means of a capital contribution, the partner in question has made a part disposal of the asset equal to the fraction or share that passes to the other partners. The market value rule applies if a transfer between connected persons or is other than by a bargain at arm's length. Otherwise the consideration for the part disposal will be a proportion of a total amount given by the partnership for the asset. That proportion equals a fraction or share of the asset passing to the other partner. A sum credited to the partner's capital account represents consideration for the disposal of the asset to the partnership. Although this is similar to a change in partnership sharing ratios it is not possible to calculate the disposal consideration on a capital contribution by reference to section 4 as the asset does not have a balance sheet value in the partnership accounts. In these circumstances HMRC accepts the apportionment of allowable costs on a fractional basis as provided for in section 4 rather than by reference to the statutory A over A plus B formula…

Where a partnership asset is revalued a partner will be accredited in his current or capital account with a sum equal to his fraction or share of the increase in value. An upward revaluation of chargeable assets is not in itself an occasion of charge." (Emphasis added.)

133. We also accept the appellants' argument that (1) s 39 TCGA has no application since the expenditure on acquiring the Capital Accounts as such did not of itself give rise to any income tax deduction. The capital contributed was used to acquire films in respect of which s 39 would apply but that is a distinct acquisition of a separate asset, and (2) in any event, if the members are to be regarded as having acquired an asset on contributing capital to the LLP, they would have acquired that asset for the capital contributed (and the asset acquired would not be a wasting asset).

PART D DECISION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

134. For all the reasons set out above, the appeal is allowed.

135. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HARRIET MORGAN
TRIBUNAL JUDGE