Neutral Citation Number: [2024] EWHC 849 (Comm)

Case No: CL-2020-000347

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 26 April 2024

Before :

MR JUSTICE BRIGHT

- -

Between :

Christopher Bernard Upham and others

Claimants

- and -

HSBC UK Bank plc

Defendants

- -
- -

Philip Coppel KC and Zachary Kell (instructed by Edwin Coe LLP) for the Claimants
Andrew Green KC, Simon Pritchard and Dominic Howells (instructed by Norton Rose Fulbright LLP) for the Defendants

Hearing dates: 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29 February 2024, 4, 5, 18, 19, 20, 21, 25 March 2024

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Approved Judgment

This judgment was handed down remotely at 9:15am on 26/04/24 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

I: Introduction

> "Nobody knows anything."
> William Goldman, 'Adventures in the Screen Trade' (1982)
>
> "… nothing can be said to be certain, except death and taxes."
> Benjamin Franklin, letter to Jean-Baptiste Le Roy (1789)

1. William Goldman's acidic summary of the movie business, and the exception to it required by Benjamin Franklin's ageless quip, are at the heart of this litigation.

2. More directly, this case concerns what was known as 'Eclipse' – a scheme intended to enable individual UK taxpayers to defer their tax liabilities for several years, by investing in LLPs associated with the film industry. The scheme was successfully challenged by HMRC, resulting in litigation in which HMRC prevailed at every level, from the First-tier Tribunal ("FTT"), then the Upper Tribunal ("UT"), then in the Court of Appeal (together, "the HMRC Proceedings"). The result was that the investors did not succeed in deferring their tax liabilities. They claim to have suffered losses because of this, which they seek to recover from HSBC.

3. Their claims are put in a number of different ways, but the core is as follows:

   (1) They invested in reliance on representations to the effect that the structure of the Eclipse scheme had been approved by a tax QC.

   (2) These representations were false, in that the structure of the scheme as implemented was materially different from the structure that was the basis of the QC's advice.

   (3) These false representations were made dishonestly and/or deceitfully.

   (4) HSBC knew, intended and was actively involved in all this, in the person of its employee, Mr Neil Bowman.

II: The main entities and individuals

II(i): HSBC

4. The Eclipse scheme was originally devised in 2005, chiefly by Mr Neil Bowman. Mr Bowman was a chartered accountant. He joined the firm that later became Ernst & Young in 1965 and became a tax partner in 1975. He continued in that role until 2003. He then joined HSBC Private Bank (UK) Limited – now the Defendant ("HSBC").

5. During his time at Ernst & Young, Mr Bowman acquired a reputation for his expertise in relation to personal tax relief, in particular via structured tax products intended to benefit from tax breaks introduced by the UK Government with a view to encouraging investment in the British film industry. Several witnesses referred to Mr Bowman's standing in this field. When he moved to HSBC, Mr Bowman was tasked with creating

and originating tax-advantaged structures for high net-worth individuals or corporates, and with approaching independent film and other promoters who might wish to bring these structures to market. Mr Bowman would also go on to have a role in marketing the Eclipse scheme, to some investors and to some Independent Financial Advisers ("IFAs"). He invested in the scheme, contributing investments of his own personal capital ("Personal Contributions") that totalled £75,199.

6. Mr Bowman's title at HSBC was 'Director'. Members of the team working under his direction at HSBC included Mr Guy Surtees (Assistant Director, who joined in April 2004), Mr Mark Williams (Manager, who joined in July 2006) and Ms Olivia Emmerton (a financial modeller, who joined in April 2005). The team was disbanded in September 2009, when all these individuals were made redundant. These team members all gave evidence, although Mr Bowman provided a witness statement but did not attend for cross examination.

7. Other relevant persons within HSBC include Mr Christopher Spooner, who was Group Head of Tax; and Ms Carol Boneham, who worked within the Group Tax team, reporting to Mr Spooner, and whose role at the relevant time included reviewing structured finance transactions. They both gave evidence. Also relevant were Mr Brian Bass and Ms Karina Challons, neither of whom gave evidence.

8. HSBC was represented by Mr Andrew Green KC, Mr Simon Pritchard and Mr Dominic Howells, instructed by Norton Rose Fulbright LLP.

II(ii): Future Films

9. Future Films Limited ("Future Films") was established in 2000. Until 2018, its co-owners were Mr Tim Levy and Mr Stephen Margolis. Formally, Mr Levy's position was CEO and Mr Margolis was Chairman, but in practice they ran the business as equals. Both of them had previous experience in the film business and, specifically, in tax-advantaged film investment transactions.

10. Other relevant persons within Future Films included Mr Leon Clarance, a specialist in tax advice, and Mr Simon Norris, whose responsibilities related to sales and administration. Also relevant is Mr David Molner of Screen Capital International Corporation ("SCI"), a consultant to Future Films and, in effect, its representative in Hollywood; and Mr Ivar Combrinck, a junior employee of SCI.

11. After they left HSBC, Mr Surtees and Ms Emmerton were employed by Future Films. Mr Surtees continued to work with Mr Margolis until about 2022.

12. Mr Margolis, Mr Surtees and Ms Emmerton all gave evidence, but there was no other evidence from anyone associated with Future Films – in particular, not from Mr Levy or Mr Molner.

13. Mr Levy, Mr Margolis and Mr Clarance all invested in the scheme. Mr Levy's Personal Contributions totalled £2,359,879. Mr Clarance's Personal Contributions totalled £142,916. Mr Margolis's Personal Contributions are addressed in the context of his evidence; they totalled £840,283.

II(iii): Professional advisers to Future Films/Eclipse

14. A number of professionals gave advice to Future Films and/or to the Eclipse LLPs.

15. DLA Piper Rudnick Gray Cary UK LLP ("DLA") were retained as tax solicitors on behalf of Future Films. The partner at DLA was Mr Simon Gough.

16. Advice was obtained from specialist tax counsel, Mr Jonathan Peacock QC. Mr Peacock QC was instructed by DLA, so in formal terms his advice was given to Future Films. However, Mr Peacock QC was selected largely on the recommendation of Mr Bowman, and HSBC attended many of the consultations at which Mr Peacock QC gave his advice. Furthermore, it was always intended that Mr Peacock QC's advice would be referred to and relied on in the information provided to potential investors, and Mr Peacock QC was aware of this.

17. The accountants appointed by Future Films were KPMG LLP ("KPMG"). Later on, Mazars LLP ("Mazars") were used.

II(iv): The Claimants

18. The Claimants are among the individuals who invested in Eclipse. They were represented by Mr Philip Coppel KC and Mr Zachary Kell, instructed by Edwin Coe LLP ("Edwin Coe"). They were referred to during the hearing as "the Edwin Coe Claimants". There were previously a further 177 Claimants in a separate action, being tried together with this action, which settled during the course of the hearing. They were separately represented, by different counsel and by Stewarts Law LLP, and they were referred to during the hearing as the "Stewarts Law Claimants".

19. Sample witnesses were selected to give evidence ("the Claimants' Sample Witnesses"): 9 for the Edwin Coe Claimants and 5 for the Stewarts Law Claimants. The settlement of the claims of the Stewarts Law Claimants means that it is not necessary for this judgment to address the merits as between the Stewarts Law Claimants and HSBC. Nevertheless, the evidence of the 5 Stewarts Law Claimants who testified before me remained admissible and relevant as between the Edwin Coe Claimants and HSBC.

III: The Eclipse structure

III(i): The essence of the Eclipse scheme

20. Many of the film transactions Mr Bowman and Future Films had been involved in before 2005 (whether with each other or separately) were sale and leaseback finance leases, often involving partnerships. After about 2004, changes in legislation and commercial pressures meant that the sale and leaseback model was no longer attractive. During 2005, Mr Bowman began to devise the Eclipse model.

21. The essence of the scheme was that investors would borrow to fund capital contributions to an LLP, and would then be entitled to set off the interest on those borrowings against their other income, for tax purposes ("Loan Interest Relief"). For the investors to be entitled to Loan Interest Relief, it was essential that the LLP be engaged in trading.

III(ii): Eclipse Tranches 1 to 5

22. Over time, there were five tranches of the Eclipse scheme. Each tranche involved one or more individual Eclipse transactions, and one or more limited liability partnerships, each named Eclipse Film Partners No. [X][1] LLP (referred to below as "Eclipse [X][1]"):

    (1) Tranche 1 closed on 4 and 5 April 2006 and was comprised of Eclipse 1 – 12;

    (2) Tranche 2 closed on 20 July 2006 and was comprised of Eclipse 16, 17 and 20 – 26;

    (3) Tranche 3 closed on 19 and 20 March 2007 and was comprised of Eclipse 31 – 34, and 36 – 39;

    (4) Tranche 4 closed on 3 April 2007 and was comprised of Eclipse 35 (only);

    (5) Tranche 5 closed on 30 April 2008 and was comprised of Eclipse 40 (only).

III(iii): The roles of Future Films and of the Members

23. Each Eclipse LLP entered into a consultancy agreement (the "Partnership Consultancy Agreement") with Future Films pursuant to which Future Films was appointed to provide certain services to the Eclipse LLP. The reality was that Future Films was in charge of all decision-making for every LLP.

24. The members of each Eclipse LLP comprised a number of individual members (the number ranging from 289 in the case of Eclipse 35, to 1 in the case of Eclipse 10) and two designated corporate members (which were companies associated with Future Films) (collectively "the Members"). Each individual who invested was liable to pay UK income tax.

25. Each Eclipse LLP was financed by capital contributed to the LLP by its individual Members. Once each LLP was established, Future Films made regular reports to the Members.

III(iv): The Eclipse Loans and the Lending Bank

26. Only a very small proportion of each Member's capital contributions were self-financed (i.e., Personal Contributions). The vast majority of the capital contributions came from loans, arranged by Future Films and taken out by individual Members from a lending bank (the "Eclipse Loans" and the "Lending Bank").

27. In the case of tranches 1 and 2, the Lending Bank was N.I.I.B. Group Limited ("NIIB"), a subsidiary of the Bank of Ireland ("BoI"). In the case of tranches 3 - 5, the Lending Bank was Eagle Financial and Leasing Services (UK) Limited ("Eagle"), a subsidiary of Barclays Bank Plc ("Barclays"). The sums lent to Members by the Lending Bank were borrowed by the Lending Bank from its corporate parent (i.e., BoI or Barclays, respectively).

[1] [X] being a number between 1 and 40 corresponding to the relevant Eclipse transaction.

28. The percentage of Members' capital contributions which were borrowed from a Lending Bank varied but fell between 94% (Eclipse 35) and 99% (Eclipse 40) – in general, around 97%.

29. The terms of the Eclipse Loans arranged by Future with the Lending Bank required Members to pre-pay a proportion of the interest on their loans (with the level of the pre-payment varying across tranches and across LLPs within the same tranche: e.g., Members of Eclipse 35 were required to pre-pay 10 years' interest on a 20-year loan, and Members of LLPs in Eclipse Tranche 1 were required to pre-pay between approximately 2 years' interest and 11 months' interest).

III(v): The Disney films

30. Each Eclipse LLP entered into contracts with companies in the Walt Disney group ("Disney") for the following films, including a Licensing Agreement and a Distribution Agreement, and an agreement with a Marketing Services Provider:

    (1) The LLPs in Eclipse Tranche 1 were granted a licence of rights in relation to Pirates of the Caribbean: Dead Man's Chest ("Pirates 2"), for a term of between 12 and 21 years;

    (2) The LLPs in Eclipse Tranche 2 were granted licences in relation to Pirates of the Caribbean: At World's End ("Pirates 3"), for a term of between 11 and 13 years;

    (3) The LLPs in Eclipse Tranche 3 were granted licences in relation to National Treasure: Book of Secrets, for a term of between 16 and 17 years;

    (4) Eclipse 35 was granted a licence in relation to both Enchanted and Underdog, for a term of 20 years; and

    (5) Eclipse 40 was granted a licence in relation to Confessions of a Shopaholic, for a term of 8 years.

III(vi): The Licensing Agreement

31. In each case, the Licensing Agreement was entered into with the Disney studio corporation, Walt Disney Pictures and Television ("WDPT"), pursuant to which the LLP was granted a licence of certain specified rights to exploit and distribute film(s) produced by Disney, "*but only pursuant to or as permitted by the Distribution Agreement"*. As consideration for the licence, each LLP paid WDPT (a) a 'licence fee' (the "Licence Fee") sourced from the Eclipse Loans, which was (nominally) divided into annual instalments but which each LLP paid in full on the closing date by way of (again nominally) an advance against its obligation to pay the annual instalments, and (b) further sums ("Variable Royalties") which would depend on the gross revenues.

32. In relation to each LLP in each tranche of the Eclipse scheme, the Licence Fee was equal to the balance of the Members' capital contribution after deduction of the pre-paid interest payable to the Lending Bank, and after deduction of the fee payable to Future pursuant to the Partnership Consultancy Agreement.

III(vii): Further Disney agreements: the Distributor and the MSP

33. Each LLP also entered into a Distribution Agreement with a Disney distribution company, WDPT Distribution [X][2] LLC (the "Distributor"). Pursuant to the Distribution Agreement, each Eclipse LLP sub-licensed the self-same rights which it had licensed from WDPT (and for an identical term) to the Distributor.

34. With a view to meeting the need for the Eclipse LLPs to be carrying on a trade, each Eclipse LLP entered into an agreement named a Marketing Services Agency Agreement (the "Marketing Services Agreement") with a marketing services provider (the "MSP"), which was a special purpose company owned and controlled by Disney, and incorporated in England and Wales. The MSP in turn entered into an agreement (the "Services Agreement") with Disney (or a Disney affiliate) whereby Disney made staff available to the MSP in order to provide services under the Marketing Services Agreement. The services provided by the MSP under the Marketing Services Agreement related to a marketing and release campaign for each film licensed to the LLP. In this regard, a plan for each film ("the Marketing and Release Plan") was to be prepared by or on behalf of the MSP.

III(viii): The media analysts

35. Future Films received advice as to the value of the licensing rights in the relevant films from media analysts, Kagan Media Appraisals ("Kagan") and Salter Group LLC ("Salter Group").

IV: The effect of the Eclipse structure

IV(i): The overall effect

36. The overall effect of this structure, under the terms of the various agreements that it comprised, was as follows.

37. As consideration for the rights sub-licensed under the Distribution Agreement, the Distributor was obliged to pay each Eclipse LLP specified sums over the term of the sub-license referred to as "Annual Ordinary Distributions", together with sums which depended upon the gross revenues of the film(s) ("Variable Distributions"). If the licensed rights were sufficiently profitable, and as calculated by reference to a lengthy formula, the Distributor would also have to pay a share in the profits ("Contingent Receipts", sometimes referred to as "Net Proceeds").

38. The Annual Ordinary Distributions payable by the Distributor to each Eclipse LLP were calculated so as to be precisely sufficient to satisfy Members' obligations under the Eclipse Loans (i.e., to pay the proportion of interest which had not been pre-paid, together with the principal). They escalated over the term of the LLP, resulting in a balloon payment in the final year which was sufficient to allow each individual Member to repay the entire balance of that Member's Eclipse Loan.

39. The Distributor's obligation to pay the Annual Ordinary Distributions was satisfied by the Distributor obtaining the issue of a letter of credit (the "Letter of Credit") issued by

[2] [X] being a roman numeral between VI and VIII.

the corporate parent of the Lending Bank, i.e., BoI (Eclipse tranches 1 and 2) or Barclays (Eclipse tranches 3 – 5) (the "Defeasance Bank").

40. In order to obtain the issue of the Letter of Credit, the Distributor was obliged to deposit a sum with the Defeasance Bank. The sum deposited by the Distributor was sourced from the Licence Fees pre-paid by the Eclipse LLPs to Disney.

41. The sum deposited was slightly lower than the Licence Fees. The difference was retained by Disney for its own account and represented the only benefit that Disney derived from its involvement in the transaction (the "Studio Benefit").

42. The Variable Distributions were precisely equal to the Variable Royalties. Thus, the right to receive Variable Distributions was of no net value to the LLP, because whatever might be receivable by way of Variable Distributions would be owed to Disney as Variable Royalties.

IV(ii): The effect in terms of money-flow

43. In terms of money-flow, this means that there was an essentially circular movement of funds, all of which took place at the very outset of each Eclipse transaction, upon the financial close of each LLP. This circular money-flow was wholly pre-determined by the agreements that established the Eclipse structure, and was as follows.

44. The Defeasance Bank paid the Lending Bank the sum which the Lending Bank would be lending to Members pursuant to their Eclipse Loans;

45. The Lending Bank paid Members the sums borrowed under their Eclipse Loans (into an account in their name held with Lending Bank);

46. Members (instantly and compulsorily) paid their capital contributions (which in each case comprised their Eclipse Loan plus their Personal Contribution) into an account in the name of the Eclipse LLP held with the Lending Bank;

47. The Eclipse LLP (instantly and compulsorily) paid: (a) the total amount of Members' pre-paid interest back to the Lending Bank; (b) the sums due to Future pursuant to the Partnership Consultancy Agreement; and (c) the remainder to an account in Disney's name with the Lending Bank as the sum due on account of the Licence Fees under the License Agreement.

48. The vast majority of the sum in (c) above was then paid (instantly and compulsorily) into an account in the Distributor's name with the Defeasance Bank to secure the issue of the Letter of Credit, with the balance (i.e., the Studio Benefit) being at the free disposal of Disney.

49. The relevant rights were licensed by WDPT to the LLP and immediately sub-licensed by the LLP to the Distributor. The result was that the LLP was left with no meaningful interest in any film assets and retained only the right to share in Contingent Receipts.

50. The money-flow on Financial Close was, therefore, circular with the majority of the money moving pursuant to compulsory and pre-determined steps from the Defeasance Bank to the Lending Bank and back to the Defeasance Bank. The only non-circular elements of the day-one flow of money were that (a) Future retained the sum paid to it

pursuant to the Partnership Consultancy Agreement, and (b) Disney retained the Studio Benefit. None of the other sums ever left the control of the Lending and Defeasance Banks (which were part of the same banking group, as already noted).

IV(iii): Profit at the level of each LLP

51. Pursuant to accounting advice obtained from KPMG and then from Mazars, each Eclipse LLP would produce its accounts by bringing into account as turnover the amounts to which it was entitled under the Distribution Agreement for that year (being the Annual Ordinary Distribution for that year, any Variable Distributions for that year, and any Contingent Receipts for that year), and including as costs of sales for that year the amount due under the Licensing Agreement for that year (or nominally due, since all of the licence fees had been prepaid on financial close), any Variable Royalties for that year, and administrative expenses for that year.

52. The effect of accounting for the transaction in this way was that each Eclipse LLP realised a profit in each year of operation. That profit was derived from the fact that the Annual Ordinary Distributions for that year exceeded the Licence Fee for that year and did so by an amount equal to the interest on Members' Eclipse Loans (which interest was not an expense of the LLP). Broadly speaking, each Eclipse LLP would make a small profit in all years other than the final year of the term, and a large profit in the final year of the term (reflecting the fact that the Annual Ordinary Distribution in the final year of the term was structured so as to be equal to the total principal of the Members' Eclipse Loans).

IV(iv): Loan Interest Relief for each individual Member

53. Disregarding the effects of taxation, the result of the transaction was that each individual Member of an Eclipse LLP paid his or her Personal Contribution and received in exchange the right to share in any Contingent Receipts earned by the LLP (although none were ever earned by any Eclipse LLP). The interest on Members' Eclipse Loans was not an 'out-of-pocket' cost to the Members. It was satisfied by transfers from the deposit account at the Defeasance Bank to the Lending Bank.

54. Taking into account the effects of taxation, and on the hypothesis that the Eclipse LLPs were trading, each individual Member would be entitled to Loan Interest Relief in relation to the interest (including pre-paid interest) on their Eclipse Loans.

    (1) This would amount to significant tax relief in the tax year in which financial close took place and subsequent years, except for the final year of each LLP's term. This arose from Loan Interest Relief on the interest paid in those tax years, including pre-paid interest in the first year, which could be set-off against Members' other income.

    (2) In the final year, each individual Member would have a significant tax bill, arising from the large profit generated by the LLP in that year.

55. Accordingly, on the hypothesis that the Eclipse LLPs were trading, the Eclipse scheme would allow the individual Members to defer tax for a number of years.

IV(v): The cost to individual Members and the rationale

56. The cost of achieving this result comprised the upfront payment of the Personal Contribution. As long as the Letter of Credit issued by the Defeasance Bank were honoured, the net loss of each individual Member would be precisely equal to that investor's Personal Contribution and was guaranteed to be no greater. On the other hand, the only way that the Member could do any better than this – i.e., could recover any of the Personal Contribution – would be if Contingent Receipts were received.

57. The rationale for incurring this cost was that, by deferring his tax liabilities, each Member could in the meantime invest and earn profits on the sums that would otherwise have been paid to HMRC. As long as the profits from these investments exceeded the Personal Contribution by the end of the LLP term, the Member would end up ahead.

V: The Information Memorandum and Addenda

V(i): Marketing to IFAs and to individual investors

58. The Eclipse scheme was marketed principally to IFAs, whose involvement was necessary for regulatory reasons. However, some marketing was also carried out directly to individual investors. The marketing efforts involved a few key documents and presentations. There was a subscription pack (which contained documents all investors had to complete, in order to participate). Beyond that, by far the most important marketing document was an Information Memorandum, dated 6 January 2006. This was provided to most investors, and (I infer) to all IFAs. The same Information Memorandum was used for all the Eclipse tranches, with an Addendum specific to the relevant tranche.

V(ii): Parties named in the Information Memorandum

59. The Information Memorandum was issued by a placing agent, Chiltern Corporate Finance Limited ("Chiltern"), on behalf of Future Films. It named Future Films as the promoter and Partnership Consultant, and Future Films' name, address and contact details also appeared prominently on the back cover. It said that the Eclipse partnership was a collective investment scheme that had not been approved by the Financial Services Authority and accordingly was an unregulated scheme and could not be marketed to the general public.

60. As well as Future Films, the Information Memorandum also identified various other parties as having significant involvement:

    (1) SCI was identified as the film industry consultant to Future Films.

    (2) Kagan and Salter Group were identified as media analysts advising Future Films.

    (3) Mr Peacock QC and DLA were identified as tax counsel and advisers to Future Films.

    (4) KPMG were identified as accounting advisers to Future Films.

    (5) Richards Butler were advised as media solicitors to the Eclipse LLPs.

61. There was no mention anywhere of HSBC.

V(iii): The Information Memorandum and trade/trading

62. The Information Memorandum contained numerous references to the trade that the Eclipse LLPs would be engaged in.

63. In its very first paragraph, the Information Memorandum described Eclipse as "engaging in the trade of film exploitation." Other passages were to the same effect, including the following.

64. In a section headed "Key Highlights", it said that Eclipse was:

> "An opportunity to participate in the exploitation of new Hollywood feature franchise films produced, owned or controlled by a US Major, through an exclusive joint venturing arrangement."

65. In a section headed "SUMMARY", under the heading "The Proposal", it described the LLPs as:

> "… partnerships that will exploit feature films. These Partnerships will have an anticipated trading life of between 11 and 22 years.""

66. In a section headed "THE BUSINESS OF THE PARTNERSHIP", and under the sub-heading "Strategy and Business Model", it said:

> "The Partnerships will trade in the development, production, acquisition, licensing, financing and exploitation of feature films. Initially focusing on the licensing and exploitation of film Rights to franchise films from US Majors or their affiliates, the Partnerships will structure the exploitation so that the downside risk of the films' performance is minimised whilst maintaining the ability to benefit in the potential success of the film."

67. Under a further sub-heading in that section, it said:

> "The Partnerships' initial business proposition is the exploitation of film Rights licenced from a US Major but the overall plan is to be involved in all aspects of the film business and intends to review other film business opportunities in consultation with Members (ranging from development to financing) as part of its strategy.
> The Partnership intends to contract under the Marketing Services Agency Agreement with the MSP as its agent:
> • to prepare an Initial Marketing Plan; and
> • to make certain arrangements for the physical exploitation of the Designated Film Rights;
> • and on terms requiring that at all relevant times the services will be provided on behalf of the MSP as agent for the LLP by individuals with the necessary experience in the film exploitation business."

V(iv): The Information Memorandum and legal advice

68. The Information Memorandum contained several passages relating to the advice of Mr Peacock QC and DLA as to the tax-effectiveness of the scheme, including the following.

69. In the section headed "THE BUSINESS OF THE PARTNERSHIP" and under the sub-heading "Advice taken regarding the Partnerships' tax and legal treatment" the Information Memorandum said:

> "Each Partnership's Business has been structured on the basis of tax advice from English solicitors (DLA Piper Gray Cary UK LLP) and from leading English tax counsel (Mr Jonathan Peacock QC) to the Partnership Consultant and the Promoter.
> The Partnership Consultant and the Promoter have followed that advice and therefore expect the investment to work in the manner outlined.
> While DLA Piper Gray Cary LLP and Mr Jonathan Peacock QC believe their analyses of the applicable tax law and practice to be sound, their advice is not a guarantee as to the tax treatment of any aspect of the proposal.
> A copy of the settled advice note provided by Mr Jonathan Peacock QC is available to the Investment Advisers of intending Subscribers on request, from the Promoter, but neither that advice nor the advice of DLA Piper Gray Cary LLP has been or will be given to or for the benefit of Members or Subscribers."

70. In the section headed "TAX", under the sub-heading "Income and Capital Gains Tax Position of Individual Members", the Information Memorandum said:

> "The exploitation of Films should constitute a trade for tax purposes and, therefore, the profits and losses of the Partnership should be trading profits and losses available to the Members. It is anticipated that the Partnerships will make a profit in each year of assessment, and this is allocable to individual Partners for tax purposes in accordance with their profit sharing arrangements."

V(v): The Information Memorandum and Contingent Receipts

71. As regards Contingent Receipts (referred to in the Information Memorandum as "Net Proceeds"), Appendix 5 to the Information Memorandum contained a series of financial illustrations, setting out the planned cashflows and showing the results to the investor on the basis of an investment of £1,000,000. This was done on several different permutations, including "Base Case" (i.e., no Contingent Receipts/Net Proceeds), "10% Net Proceeds" and "30% Net Proceeds". The prospect of Contingent Receipts/Net Proceeds was explained as follows.

72. In a prominent section near the front headed "SUMMARY", under the sub-heading "Financial Returns", the Information Memorandum said that investment in films was generally considered to be risky, and referred to the "RISK WARNINGS" section, then explained the fixed returns (i.e., the Annual Ordinary Distributions). It then said:

> "Additionally, the Partnership Consultant will obtain advice and valuations from the Media Analyst, based upon which the

> Promoter believes that the Films licenced could generate Net Proceeds."

73. In a section headed "THE BUSINESS OF THE PARTNERSHIP" and under the sub-heading "Net Proceeds", the Information Memorandum said (in the same terms as the draft provided to Mr Peacock QC for the consultation of 22 December 2005):

> "At the date hereof, it is not possible for the Partnership Consultant to draw a sensible conclusion with respect to the probability of any Partnership receiving a Net Proceeds distribution in any year of any particular amount, as no films have been selected yet. This situation arises further because it is impossible to accurately predict box office and other revenue streams because they depend upon the viewing public. This is mitigated by the choice of major US Studio franchise films, as the track record is a good indicator (but not a guarantee) of subsequent success.
> Prospective subscribers should not subscribe on the expectation that Net Proceeds (if any) would constitute a material sum."

V(vi): The Addenda

74. The fact that Addenda would be provided was anticipated by the Information Memorandum: on its very first page, it stated that Future would produce an Addendum "once all the terms have been finalised." The implication was that this Addendum would be available before investors had to commit.

75. The Addendum for Tranche 1 was dated 5 April 2006, i.e., the date when Tranche 1 closed. It therefore cannot have been made available to investors before they decided to invest. However, the evidence of Mr McIntyre suggests that it was provided to Tranche 1 investors soon after they invested, and that they were required to acknowledge having read and accepted it, or they would be removed from the scheme.

76. The other Addenda were issued on dates reasonably in advance of the closure of the respective Tranches. Like the Information Memorandum, the Addenda were provided to most investors, and (I infer) to all IFAs.

77. With a few immaterial variations, the Addendum for each tranche dealt with the advice of Mr Peacock QC and DLA as to the tax-effectiveness of the scheme under the heading "Advice of Tax Counsel", as follows:

> "It should be noted that owing to the need to negotiate and conclude documentation with the Studio Parties within a tight timescale it has not been possible[3] for the Partnership Consultant to have the Transaction Documents reviewed by Tax Counsel, although they have been reviewed by DLA Piper Rudnick Gray Cary LLP as tax advisers to the Partnership Consultant. It is the Partnership Consultant's view that this is not unusual in transactions of this nature, where Counsel is not usually available at short notice and does not therefore always comment on the contractual documentation.[4] Accordingly, while the Partnership Consultant believes that the transactions have been

[3] In some of the later Addenda, "possible" was replaced by "practical".
[4] The explanation of a tight timescale was not given in one version of the Addendum for Tranche 5. However, there was still a reference to a review by DLA, and the final sentence of this quotation still appeared.

> implemented materially in accordance with the principles of the structure settled by Tax Counsel, this has not been expressly confirmed by Tax Counsel"

78. In a section headed "ADDITIONAL RISK WARNINGS AND DISCLOSURES", under the sub-heading "LLP's Trade", each Addendum referred to Future's view, having taken independent advice, that:

> "… there is a real prospect the LLP Contingent Receipts Share will be payable to the LLP if the Designated Film achieves a sufficient level of success."

79. Each Addendum referred to certain language that Disney required to be included in the Distribution Agreement and in the Waiver Letters, to the effect that Disney had made no representation as to the proceeds and that the Distributor had no obligation to distribute any film or to maximise receipts. Each Addendum then said:

> "The Partnership Consultant's view is unaffected by these statements as it believes that such protective language is a standard requirement of all US Majors (who are typically particularly concerned about the potential for litigation arising from contingent participants in their films) and bears no relationship to the actual, expected or potential performance of films in the portfolio. However, it is possible that the existence of these statements could call into question the reasonableness of the Partnership Consultant's view. If such an argument could be successfully asserted, it could be subsequently possible to argue that the LLP is not trading with a view to profit which is the basis upon which the tax advice provided to the Partnership Consultant from its professional advisers has been obtained. Ultimately, there is a possibility that HMRC may successfully argue that the tax treatment for the Members should be different to that which they expect, including as to the availability and utilisation of any trading loss and/ or the deductibility of any interest on Members' Loans."

80. The Addenda also referred to the Marketing Services Agreement with the MSP:

> "Each LLP has entered into a Marketing Services Agency Agreement under which the Marketing Services Provider develops individual Marketing and Release Plans for the certain territorial and/or media-specific rights to be exploited by that LLP. The Marketing Services Provider is obliged to ensure that each Marketing and Release Plan is substantially followed by the Distributor subject to the Distributor's ability to deviate from, amend and/or modify the Marketing and Release Plans pursuant to the Distribution Agreements or as otherwise approved by the Marketing Services Provider in its sole and absolute discretion from time to time, although the LLPs have had to acknowledge that the Distributor is not obliged to distribute the Designated Film in any particular territory or media."

VI: Consultations with Mr Peacock QC

VI(i): Summary

81. From the outset, it was vital to HSBC and Future Films, alike, that legal advice be taken from tax specialists regarding the scheme, and that in due course this advice could be

referred to when marketing to investors. This process began in September 2005, long before the Information Memorandum. As already noted, the tax specialists engaged were DLA and Mr Peacock QC.

82. Mr Peacock QC advised in consultations on 8 September 2005, 20 October 2005, 22 December 2005, 23 March 2006 and 29 March 2006. The information that he was given for each consultation, and the advice that he provided, altered somewhat over time, as the structure of the scheme gradually assumed its final form. However, taken overall, the explanations that he was given as to the intended structure were essentially consistent with the outline in Section III above.

83. It is not necessary to set out or even to summarise every aspect of these consultations. For the purposes of this judgment, the relevant features include the following.

VI(ii): The consultation of 8 September 2005

84. At the time of the first consultation, on 8 September 2005, the scheme under consideration was significantly different from the final scheme; not least in that the proposal was that further tax-advantaged transactions be entered into by existing partnerships that were already involved in sale and leaseback transactions. It therefore was not yet envisaged that there would be new Eclipse LLPs. However, it was envisaged (consistently with what would become the Eclipse scheme) that these partnerships would buy the licensed rights to various films, and would in return be entitled to fixed returns and, potentially to Contingent Receipts.

85. This consultation was attended by Mr Levy, Mr Clarance and Mr Norris of Future Films, by KPMG, by Mr Bowman and Mr Surtees of HSBC and by Mr Gough and Mr Michael McCormack of DLA.

86. The note of this consultation records that Mr Levy explained the role of the MSP and said that strategic decisions in relation to the proposed distribution plan (i.e., what was later referred to as the Marketing and Release Plan) would be taken by the LLP, which would be responsible for producing the distribution plan which would then be implemented by the Distributor. I infer from the note that Mr Levy said that this work would be carried out for the LLP by the MSP. Mr Peacock QC then said that he was firmly of the view that the MSP must be the agent of the LLP; and that this was important because agents act on behalf of their principals.

VI(iii): The consultation of 20 October 2005

87. The consultation on 20 October 2005 was the first that related to a scheme recognisable as Eclipse. The attendees were the same as for the consultation of 8 September 2005, save that KPMG did not attend. Mr Bowman was not identified as having attended on the note that was later produced for this consultation, but it was put to Mr Surtees in evidence, and Mr Surtees accepted, that Mr Bowman was, nevertheless, probably present.

88. For this consultation, Mr Peacock QC was given fresh written instructions which explained that it was now proposed that the relevant transactions would be entered into by new LLPs (i.e., the Eclipse LLPs).

89. The instructions stated that each LLP would acquire rights in film(s), which would be valued by an advisor (named as Kagan) and, based on this valuation, the LLP not only would make a profit based on fixed payments but would also have a reasonable possibility of earning Net Proceeds (i.e., what was later referred to as Contingent Receipts).

90. The instructions expressly stated that the MSP would be the agent of each LLP. The MSP would be controlled by or affiliated to the studio and the studio would provide to it the services of executives, probably based in the USA, and would prepare a marketing plan (i.e., what was later referred to as the Marketing and Release Plan). The plan would then be reviewed by an employee or consultant of the MSP in the UK, who would report to the MSP's board. A decision on the plan would then be made by the MSP's board, in the UK. The MSP would make arrangements for the exploitation of the film after the plan had been approved and would then contract with the Distribution Company.

91. Mr Peacock QC was also provided with a spreadsheet, which set out the planned cashflows. It showed that the LLP would make an overall profit, but each individual investor would make an overall loss, assuming that his Personal Contribution was largely funded by a loan and taking into account loan interest. The spreadsheet indicated a loss to the investor of £82,050, on the basis of a total investment of £1,000,000.

92. At the consultation, Mr Peacock QC said that this might prompt HMRC to question the economics of the transaction. He was told (it is not clear by whom) that the loss of £82,050 represented the worst-case position, that it was genuinely anticipated that even after financing costs were factored in the overall return would be profitable and that, if the model was amended to include Net Proceeds (i.e., Contingent Receipts), then the effect of including "these anticipated additional amounts" would be to show a cumulative profit. He was also told that it would be possible to base such models on various scenarios using historic data from previously-released franchised films. Mr Peacock QC recommended that such models should be developed, but emphasised that the data had to be "plausible".

93. Mr Peacock QC said that there had to be careful selection of the film(s) to be acquired and sensible forecasting of anticipated returns (and these activities should be accurately and contemporaneously documented). He then said that, on the basis that there was a genuine expectation that the transaction would show a profit for the LLP (i.e., without taking account of interest on the loans of individual investors), each LLP should be considered to be carrying on a trade. Importantly, he gave this view without yet having received any plausible models to show a profit even if financing costs were factored in, per his recommendation. The effect of this part of his advice therefore appears to me to have been that, even if it could not be shown that there was a good chance of Contingent Receipts resulting in a profit for an individual investor who took out a loan, he still considered that the LLPs should be considered to be carrying on a trade.

94. Mr Peacock QC also said that it was vital that each LLP should be able to demonstrate that it was carrying out a trade through its agent, i.e. the MSP. He stressed the significance of instituting and retaining proper documentary evidence.

VI(iv): The consultation of 22 December 2005

95. The attendees on 22 December 2005 were different from that of 20 October 2005, in that KPMG attended, but there was no attendance from HSBC. Mr Peacock QC was given two sets of instructions: general instructions in relation to Eclipse, and further instructions focussing on a recent pre-budget speech. The general Eclipse instructions included a structure diagram that corresponded to the structure described in Section III above. This diagram, headed "Library Proposal Diagram", is Appendix 1 to this judgment.

96. The general instructions referred to the fact that individual investors would have the opportunity to borrow up to 97% of their capital contribution, but then said:

> "The loan offering does not form part of the proposal documentation and is only available to investors who request. It is expected that there will be investors that will invest without the loan facility. Investors may decide how much of their contribution is funded by loan finance themselves. A copy of the latest draft wording of the proposal document included as an Appendix."

97. I should say that I find it extremely unlikely that anyone involved in preparing these instructions in fact expected that any investors would invest without using the loan facility. The attraction of the scheme was tax deferral. This could only be achieved by dint of the accounting losses that individual investors would incur by taking out loans. Without a loan and the liability to pay interest on that loan, an investor would not be able to defer any tax. That would have made participation pointless. In fact, every investor took the maximum loan available. I do not believe that this can have surprised anyone.

98. Furthermore, I suspect that Mr Peacock QC may have taken this particular part of his instructions with a pinch of salt. When advising, he said (correctly) that borrowing was optional and not an integral feature of the decision whether to undertake the trade; and (again, correctly) that it was not intended that all finance would be provided by borrowing. He did not allude to the statement in his instructions that it was expected that some investors would not borrow at all. That statement does not appear to me to have affected his advice and it is striking that it was not included in the final record of his advice, discussed below in Section VII. It must have been obvious that Future Films was seeking the advice of a leading tax QC because the fundamental purpose of the scheme was tax-related – ergo, on the basis that investors would borrow.

99. I am conscious that, in saying this, I am departing from the view expressed by the FTT that the financial illustrations provided to investors presented an attractive internal rate of return even if an investor did not wish to borrow: *Eclipse Film Partners (No. 35) LLP v HMRC* [2012] UKFTT 270 (TC), per the FTT at [112] and [402]. This is because I have received evidence relevant to this, which the FTT did not.

(1) The illustrations included in the Addendum for Eclipse 35 indicated an internal rate of return of 1.32% over 20 years without Contingent Receipts, and 6.14% assuming full Contingent Receipts.

(2) It must be borne in mind that investors were considering this before the 2008 financial crash, following which rates plummeted. In the pre-crash world, rates of

1.32% and even 6.14% were not attractive. In the HMRC Proceedings (all conducted post-crash, in an environment of extremely low rates) there was no evidence from investors as to the rate of return that they expected from investments. By contrast, I did receive such evidence, from several Claimants' Sample Witnesses. They wanted no less than 7% and ideally something close to 10%.

(3) I therefore do not accept that investing in Eclipse would have been attractive to anyone who had no interest in tax deferral; especially if (as they were advised in the Information Memorandum) they had not participated in the expectation that Contingent Receipts would, in fact, make any material contribution to the return on their investment. The only real attraction of the scheme was tax deferral, not investment.

(4) This means that taking out a loan was practically essential, even though it was optional in formal terms.

100. The passage from the instructions that I have quoted above stated that the current draft of the proposal document was attached as an appendix. This was a reference to the Information Memorandum, discussed below in Section V. It seems safe to assume that the Information Memorandum was duly provided to Mr Peacock QC, if only because he otherwise would surely have noticed that this appendix was missing from his instructions and would have asked for it. Furthermore, Mr Surtees emailed Mr Clarance on 20 December 2005 at Mr Bowman's request, specifically to check that the Information Memorandum was going to be run past Mr Peacock QC; and was told that Mr Peacock QC would review it.

101. It also seems reasonable to assume that, having received it, Mr Peacock QC will have read the Information Memorandum. It was an obviously crucial document which he must have anticipated was likely to be relevant to his advice (which it was). Indeed, he knew that Future Films wanted to use his name as tax counsel, when marketing the scheme, and was being asked to confirm that he was happy with this. He therefore knew that the Information Memorandum would refer to him, and I am sure he will have been curious to know what it said about him.

102. In relation to Net Proceeds (i.e., Contingent Receipts), the draft in circulation at that time contained precisely the same direct warning against investing in the expectation of Contingent Receipts as was included in the final text (see paragraph 73 above).

103. The instructions to Mr Peacock QC for the consultation of 22 December 2005 did not draw attention to this. They did, however, refer to a schedule headed "Financial illustration", attached to this judgment as Appendix 2. This was functionally similar to the spreadsheet that had accompanied the instructions for the consultation of 20 October 2005, but had a number of differences in terms of both format and substance, in particular as follows:

(1) It did not assume that every investor would take out the maximum loan. It illustrated the position on the basis of no loan, a 50% loan and the maximum loan.

(2) It illustrated the position both without Net Proceeds (i.e., Contingent Receipts) and with them.

(3) Whereas the spreadsheet had shown a worst-case outcome on an investment of £1,000,000 with the maximum loan to be a loss of £82,050, this illustration showed that such an investor would make a loss of £35,453 without Net Proceeds (i.e., Contingent Receipts), and a profit of £64,457 with Net Proceeds.

104. At the previous consultation of 20 October 2005, Mr Peacock QC had recommended the production of further models, but said that they must be "plausible". Given that he had been told that the models could use historic data from actual films, it seems likely that he regarded such real-world data as one necessary element of plausibility. The "Financial illustration" schedule does not say that it was based on such data, and none of the evidence I have seen suggests that it was. It appears to have been prepared on an entirely hypothetical basis. It therefore did not comply with Mr Peacock QC's requirement that any models should be "plausible". Furthermore, any suggestion that the "with Net Proceeds" figures were plausible would have been very difficult to square with the warnings in respect of Net Proceeds that were included in the draft Information Memorandum.

105. The instructions included various specific questions that are not relevant to this judgment, and then asked Mr Peacock QC to confirm that he was happy for his name to be included on the Information Memorandum, and to settle a fully detailed note conforming the previous advice provided, together with the revised details set out in the instructions and the draft Information Memorandum.

106. No note was made specific to the consultation of 22 December 2005. Instead, as requested, a consolidated note was produced, dated 18 January 2006, discussed in Section V below. It combined Mr Peacock QC's general advice on the Eclipse structure with the advice on the recent pre-budget speech. However, by comparing the note of the consultation of 20 October 2005 with the subsequent consolidated note, it is possible to work out what new advice was given on 22 December 2005 in relation to the structure in general.

107. It is not obvious that the "Financial illustration" document was discussed in detail or relied on by Mr Peacock QC. If it was, it does not seem to have made any difference to his advice. Previously, Mr Peacock QC had referred to the loss of £82,050 indicated by the spreadsheet at the consultation of 20 October 2005. That reference was removed from the consolidated note, but not replaced with anything that drew on the figures in the new "Financial illustration". Indeed, the consolidated note made no reference to the "Financial illustration". Rather, the consolidated note continued to recommend, in terms that had not altered from the advice given on 20 October 2005, that models should be developed, but the data used had to be plausible.

108. Accordingly, there is nothing in the consolidated note that indicates that Mr Peacock QC advised on the basis that he had received models in respect of Contingent Receipts that were based on plausible data or that the "Financial illustration" constituted such modelling. On the contrary, the text implies to the reader – as was in fact the case – that his advice was given on the basis that no such models, based on plausible data, had yet been produced.

109. Furthermore, the consolidated note again stated, in the same terms as before, that, on the basis that there was a genuine expectation that the transaction would show a profit for the LLP (i.e., without taking account of interest on the loans of individual investors),

each LLP should be considered to be carrying on a trade. This part of his advice, too, seems not to have been affected by the "Financial illustration". Just like the note of the consultation of 20 October 2005, it proceeded on the basis that it should not matter if, when interest payments were taken into account, an individual investor might expect to make a loss.

110. In short, the instructions for the consultation of 22 December 2005 contained important new material, including the following: (a) a clear statement that it was expected that some investors would not use the loan facility, and (b) the "Financial illustration" which considered the position on the basis of Contingent Receipts (as well as on the basis of there being no Contingent Receipts). However, neither of these seems to have had any effect on Mr Peacock QC's advice.

VI(v): Subsequent consultations

111. There were further consultations with Mr Peacock QC on 23 March 2006 and 29 March 2006; and yet more consultations on various occasions after the closure of Tranche 1 on 5 April 2006. It is not necessary to record the details, because at none of these later consultations were any of the points discussed directly relevant to the issues before me.

112. However, it is relevant to note that, both before 5 April 2006 and thereafter, there were several opportunities to put transaction documents before Mr Peacock QC, and to ask him to say whether they were consistent with the structure on which he had previously advised and whether they required any alteration to his previous advice. This did not happen.

VII: The Consolidated Peacock Note of 18 January 2006

113. As noted above, the Information Memorandum stated that "the settled advice note provided by Mr Jonathan Peacock QC" was available to IFAs. In fact, not only IFAs but also several individual investors were provided with a copy of the consolidated version of Mr Peacock QC's note, dated 18 January 2006 ("the Consolidated Peacock Note"). This was divided into 18 numbered sections.

VII(i): Section 1 – Summary of the instructions to counsel

114. The first part of the Consolidated Peacock Note summarised the instructions given to Mr Peacock QC. Among other things, in paragraphs 1.1.7 to 1.10 it set out what Mr Peacock QC had been told about the intended role of the MSP. This was all explained in terms that were consistent with the instructions for the consultation with Mr Peacock QC of 20 October 2005, set out in paragraph 90 above. This part of the Note did not record that Mr Peacock QC had been told expressly that the MSP would be the Eclipse LLP's agent (see Section VI(iii) above, in relation to the instructions for the consultation of 20 October 2005). However, that was reflected later on, in paragraphs 3.10 and 3.11.

115. Section 1 also set out information given to Mr Peacock QC as to the sums payable to WDPT and receivable from the Distributor. In relation to Contingent Receipts, it was recorded in paragraph 1.4 that there would be a "reasonable possibility of earning Net

Proceeds…" This part of the Consolidated Peacock Note must be read together with paragraph 3.3 (which I consider below).

VII(ii): Section 2 – Specific questions

116. Section 2 set out the specific questions on which Mr Peacock QC had been asked to advise. These included, first and foremost, whether he agreed with DLA's views as to the taxation implications of the Eclipse scheme – i.e., that it would be effective at achieving tax deferral.

117. Mr Peacock QC was also asked whether his name could be used for promotion of the scheme.

VII(iii): Section 3 – Trade

118. Section 3 was, in general, the part that set out Mr Peacock QC's views on the tax effectiveness of the scheme. It began by stating that the first issue was whether the Eclipse LLPs would be conducting a trade. In paragraph 3.2 Mr Peacock QC noted that it was genuinely expected that the Eclipse LLPs would show an overall profit. This should be sufficient to allay HMRC's concerns about the LLP's trading status.

VII(iv): Paragraph 3.3 – Questioning the entire transaction

119. Paragraph 3.3 began by recording Mr Peacock QC's observation that HMRC might question the economics of the entire transaction. This observation had been made during the consultation of 20 October 2005 and had been prompted by the spreadsheet provided for that consultation, which showed a loss to each individual investor, assuming that his Personal Contribution was largely funded by a loan which incurred interest. However, the Consolidated Peacock Note did not refer to the spreadsheet or directly acknowledge how HMRC might question the economics of the entire transaction.

120. In any event, paragraph 3.3 then continued:

> "Counsel considered that the important point was that it is intended that each New Partnership, at the partnership level, would make a profit. Counsel was firmly of the view that the Optional Borrowings were not an integral feature of the decision as to whether or not to undertake the trade and that the partnership activities could be carried on regardless of whether the Optional Borrowing existed. In support of this view Counsel pointed out that it was not intended that all the finance should be provided by way of Optional Borrowing."

121. Neither here nor in Section 1 did the Consolidated Peacock Note record or refer to the fact that Mr Peacock QC had been told in his instructions for the consultation of 22 December 2005 that it was expected that there would be investors who invested without the loan facility. No-one reading the Consolidated Peacock Note would have known that Mr Peacock QC had been told this. To anyone without that knowledge, the reference to the fact that it was not intended that all the finance should be provided by optional borrowing meant, merely, that the maximum loan would be about 97%, with about 3% of the finance coming not from the Eclipse Loans but from the investors' Personal Contributions. I cannot be sure that this is what Mr Peacock QC had in mind,

although I consider that to be likely. Be that as it may, in my view it is what that particular sentence will have conveyed to any careful reader.

VII(v): Paragraph 3.3 – Information about Contingent Receipts

122. In the remainder of paragraph 3.3, the Consolidated Peacock Note then veered away from setting out Mr Peacock QC's conclusions and instead set out information given to him during the consultations, and his response.

123. First, it said:

> "It was explained to Counsel that the existing model was a base case scenario. It represented the worst case position and it was genuinely anticipated that even after financing costs were factored into the model the overall return would be profitable. It was also explained to Counsel that the existing model did not incorporate any amounts in respect of Net Proceeds Distribution. It was confirmed to Counsel that if the model was amended to include these anticipated additional amounts then, even after the financing costs had been included, the overall result would show a cumulative profit. It was explained to Counsel that it would be possible to demonstrate this by running a number of different models incorporating a number of different scenarios including historical data from previously released franchised films."

124. This is all set out as if it was said in the course of a consultation, rather than reflecting instructions given beforehand. It is obvious that it refers to an "existing model", which self-evidently had been provided to Mr Peacock QC before the relevant consultation.

125. It is clear from the evidence before me that this all happened at the consultation of 20 October 2005; following which further models were provided at the consultation of 22 December 2005. However, whereas the note made after the consultation of 20 October 2005 had made reference to the figures that emerged from the first model (i.e., a loss to an investor of £82,050 on the basis of an investment of £1,000,000), the Consolidated Peacock Note made no other reference to either model, nor to the figures in them.

126. Paragraph 3.3 then continued:

> "Counsel emphasised the importance of ensuring that HM: Revenue and Customs did not have an opportunity to question the economics of the entire transaction and he suggested that the various alternative models should be developed. However Counsel emphasised that the data used in this modelling exercise had to be plausible, had to be able to withstand scrutiny from HM: Revenue and Customs and should include allowances for the time value of money and tax flows."

127. This reflected more or less verbatim what Mr Peacock QC was recorded as having said at the consultation of 20 October 2005, and in the note that followed that consultation. However, it did not acknowledge that, following those remarks in October 2005, further models had in fact been provided for the consultation of 22 December 2005. As I have already noted, the implication of the fact that Mr Peacock QC's recommendations remained extant in the Consolidated Peacock Note is that Mr Peacock QC did not regard

those further models as meeting his requirements – i.e., plausible and based on historic data.

128. None of this will have been apparent to a reader of the Consolidated Peacock Note who did not have access to the evidence that I have seen. What will have been apparent to any reader, however, is that Mr Peacock QC was told that there was a "reasonable possibility" of Contingent Receipts and that it was "genuinely anticipated" that they would result in a profitable outcome for investors who took out loans; but this was all said on the basis of models that did not yet exist. Mr Peacock QC did not rely on these statements. Instead, he recommended that models showing this should be developed, using plausible historical data.

129. I highlight this because anyone who read the Consolidated Peacock Note after January 2006, and who was interested in Contingent Receipts, might have noted Mr Peacock QC's recommendation and might have asked whether these models had, in fact, ever been developed. I have seen no evidence that any investor pursued this point. Certainly, none of the Claimants' Sample Witnesses appears to have done so.

VII(vi): Paragraphs 3.6 to 3.10 – Conclusion on "trade"

130. In the remainder of Section 3, Mr Peacock QC explained the basis on which he concluded that the scheme was effective.

131. In paragraphs 3.6 and 3.7, he said that there had to be careful selection of films and sensible forecasting of returns. It was important that these activities be documented, in order to demonstrate the activities being carried on.

132. The main foundation of Mr Peacock QC's conclusion on the "trade" issue was set out in paragraph 3.8:

> "Counsel agreed that on the premise that there is a genuine expectation that the Proposed Transaction will show an overall profit, (even though a profit is arrived at due to the fact that interest on partner's loans is not an expense of the New Partnership), each New Partnership should be considered to be carrying on a trade on a commercial basis with a view to profit. Counsel agreed that in order to substantiate the evidence of trading it is important that each New Partnership monitors the income flow from the licensing and exploitation of the Studio Film and actively considers the suitability of other acquisitions. Counsel agreed that, provided the above criteria are satisfied, each New Partnership's activities will be sufficient to lead to the conclusion that it is trading."

133. This passage makes it clear that Mr Peacock QC was not relying on the information recorded in the second part of paragraph 3.3 as to the anticipated effect of Contingent Receipts. He came to his conclusion on trading expressly on the basis that, although the LLP would make a profit, an investor who took out a loan would not (as well as the other criteria referred to in this passage). In other words: on the basis that Contingent Receipts were ignored.

134. Paragraph 3.10 records Mr Peacock QC addressing the risk that HMRC would seek to characterise the scheme as a passive investment business. He was confident that Eclipse did not consist only of "licensing in" and "licensing out" (i.e., mere circular trading)

because this was much more complex. In particular, each LLP, acting through the MSP as its agent, would devise and implement the Marketing and Release Plan. This would involve making key decisions, documented in a detailed marketing strategy. Similarly, in paragraph 3.11, he said:

> "Counsel considered it vital that each New Partnership is able to demonstrate that any trade that is being conducted is being carried on by each New Partnership through its agents (i.e. the MSP)."

135. Accordingly, while section 1 of the Consolidated Peacock Note did not reflect the fact that the instructions given to Mr Peacock QC said that the MSP would be the agent of the Eclipse LLPs, it was nevertheless clear that his conclusion was based on this premise (among others), which he described as "vital". This is consistent with the note of the consultation of 8 September 2005, where Mr Peacock QC had said that the MSP must be an agent of the LLP.

136. In paragraph 3.12, Mr Peacock QC is again recorded emphasising the importance of instituting and retaining proper documentary evidence, to ensure that the MSP would be able to demonstrate that it actually undertook the role assigned to it.

VII(vii): Paragraph 11.4 – Circular money-flow

137. The other questions considered in the remaining sections of the Consolidated Peacock Note are not directly relevant to this judgment. However, it is relevant that, in paragraph 11.4, it was recorded that the sums borrowed from the Lending Bank would be paid to Disney, then the Distributor (also a Disney company) would simultaneously place on deposit a very similar amount, to facilitate the issue of the Letter of Credit. In short, this part of the Consolidated Peacock Note was clear that there would be a circular money-flow, which would occur as soon as each Eclipse transaction closed.

138. I accept that only an unusually astute investor would be likely to pick this up from paragraph 11.4. However, this should not have been beyond the wit of the IFAs who advised most of the investors and whose job it was to consider in detail all the documents provided. The circular money-flow was in fact picked up at the time from paragraph 11.4 by one of the Claimants' Sample Witnesses – Mr Lenthall, who in many respects is a good proxy for a competent IFA.

VIII: The DLA Summary

139. Many investors and IFAs received a copy of a letter sent by Mr Gough of DLA to Future Films dated 26 January 2006, which summarised the principal tax implications of the Eclipse scheme and the advice given by Mr Peacock QC ("the DLA Summary"). I assume that DLA sent it to Future Films with the intention that Future Films would use it when promoting the Eclipse scheme. Some investors received the DLA Summary instead of the Consolidated Peacock Note; some received both. It seems likely that IFAs generally received both.

140. The parts of the DLA summary of relevance to the issues before me were the following:

> "I can advise that:
> • on the premise that there is a genuine expectation that the New Partnership will

show an overall profit on the Proposed Transaction and that appropriate procedures are implemented by the New Partnership to monitor the income and outgoings of the Proposed Transaction and that active consideration is given by the New Partnership to the suitability of other film acquisitions then the New Partnership should be considered to be carrying on a trade on a commercial basis with a view to profit.

- provided the New Partnership, acting through the MSP as its agent is responsible for the key decisions on the marketing of the film then HM Revenue and Customs will not be able to recharacterise the activities that the New Partnership is carrying on as a passive investment business."

IX: Other information from Future Films for investors/IFAs

141. Many investors received some additional standard documents. Given that in many cases they received these materials from IFAs, I infer that all IFAs are likely to have received these materials. The evidence of Mr Lenthall confirmed this likelihood.

IX(i): The Eclipse Key Features document

142. Some investors received a document headed "Eclipse Film Partners LLPs Key Features" ("the Key Features document"). This was a one-page summary of the scheme. It explained various aspects of the scheme extremely briefly – no more than a few sentences under any given heading. It stated that it must be read subject to the full terms and conditions of the Information Memorandum, in particular the section headed "Risk Warning".

143. The Key Features document stated that the Eclipse LLPs' exploitation of franchise films should constitute a trade for tax purposes. It identified Mr Peacock QC and DLA as tax counsel and tax advisers to Future Films, but did not offer any summary of the advice obtained.

IX(ii): The Eclipse PowerPoint Presentation

144. Several investors saw and/or received copies of the slides from a PowerPoint presentation, entitled "Eclipse Film Partnerships – Exploiting the potential of Blockbuster Films" ("the Eclipse PowerPoint Presentation", also referred to on occasion as "the Blockbuster Films Presentation"). It said on slide 2 that it was only for use by IFAs, with regard to the Information Memorandum. I suspect that it was made available to all IFAs, as several IFAs appear to have used it when explaining the scheme to their clients.

145. The Eclipse PowerPoint Presentation included slides that were very similar to Appendices 1 and 2 to this judgment.

IX(iii): The KPMG Accounting Review

146. Several investors received a copy of a document created by KPMG, entitled "Review of Proposed Accounting Transactions of Eclipse Film Partnerships No. 1 LLP" ("the KPMG Accounting Review"). It was dated 5 December 2005 and noted that the legal contracts between the Eclipse LLPs, the Studio and the Distributor had not yet been finalised.

147. It attached as appendix 1 a structure diagram that was very similar to Appendix 1 to this judgment, save that it indicated that the amount of the deposit paid by the Distributor to the Defeasance Bank would be 80% of the investors' total investment (whereas in Appendix 1, no figure is given – only "XX"). Given that the deposit was to be paid out of the Licence Fee paid to the studio (i.e., Disney), and given that the Licence Fee would itself be less than 100% of the investment (because of the fees payable to Future Films), this diagram made it clear that nearly all the Licence Fee would be deposited with the Defeasance Bank, and only a relatively limited sum would be available to Disney to spend on the production and exploitation of films (i.e., the Studio Fee). This version of the diagram is Appendix 1A to this judgment.

148. Appendix 2 to the KPMG Accounting Review was a summary of the principal transaction documents. The MSP was described as "the Studio Affiliate marketing agent" and was referred to throughout as "MSA" – the letter "A" standing for agent. The summary stated that the "MSA" (i.e., the MSP) would be exclusively appointed by the Eclipse LLP to select film projects and marketing plans for approval by the LLP. This summary, with its emphasis on the MSP's status as an agent of the Eclipse LLP, was consistent with the information given to Mr Peacock QC.

149. Overall, the implication was that the Marketing and Release Plan would be prepared by the MSP for the Eclipse LLP, as its agent; and, following approval, it would then be implemented by the Distributor.

IX(iv): Individual financial illustrations

150. Most investors appear to have received financial illustrations in a standard format per the example attached as Appendix 3 to this judgment. They were tailored to each individual so as to reflect the specific years over which that investor would be participating, and (usually) so as to reflect the particular sum which that investor proposed to contribute. Unlike the example in Appendix 3, they generally referred to the individual investor by name.

151. These individual financial illustrations were cash-flow models that, in essence, provided the same information as the financial illustrations given to Mr Peacock QC for the consultation of 22 December 2005 – i.e., Appendix 2 to this judgment. These individual financial illustrations were prepared on several permutations, including no loan, a 50% loan, or the maximum loan; and both without and with a "Net profit share" (i.e., Contingent Receipts).

152. The evidence of Ms Emmerton suggests that these individual financial illustrations were all prepared by her. She did this, in each case, on the instructions of Future Films, who had devised the format and told her what details to input for each individual. It is not clear whether Mr Bowman knew that Ms Emmerton was undertaking this task for Future Films, or that individual investor illustrations in this format were being provided to investors.

X: Mr Bowman's role in marketing

X(i): Mr Bowman's Note

153. As well as his role in devising the Eclipse scheme, Mr Bowman also had a role in marketing it. Indeed, Mr Bowman produced his own summary of the scheme, which he provided as a note and amplified when presenting Eclipse to investors ("Mr Bowman's Note").

154. Mr Bowman's Note gave prominent attention to the fact that positive tax advice had been received from Mr Peacock QC, which it introduced and then summarised as follows:

> "Detailed tax advice on the structure has been obtained from Jonathan Peacock QC and has been supported by DLA Piper Rudnick Gray Cary. Additionally Future Films have received both an accounting and tax opinion from KPMG.
> …
> Counsels opinion concluded that the Eclipse Partnerships will deliver the stated objectives and that he is confident that the structure has the merit of simplicity and will not be one which is seen as overly aggressive by the Inland Revenue."

X(ii): Mr Bowman's presentation to E&Y partners

155. Mr Bowman marketed the Eclipse scheme directly to some investors. In particular, his Note was provided to potential investors among his former colleagues at Ernst & Young, and he gave a presentation to various Ernst & Young partners who expressed an interest, at Ernst & Young's London office, on 2 March 2006. Those who attended included two of the Claimants' Sample Witnesses, Mr McIntyre and Mr Pickard.

156. The Ernst & Young partners at this meeting were told by Mr Bowman that, if they were interested, they should ask Cavanagh, an IFA, for further information, which would include the Information Memorandum. Several Ernst & Young partners (including two of the Claimants' Sample Witnesses, Mr McIntyre and Mr Pickard), duly followed this up with Cavanagh. In Mr McIntyre's case, there was also a second meeting with Mr Bowman, this time one-on-one.

X(iii): Information to IFAs

157. In addition, it was common ground before me that Mr Bowman provided information directly to several other IFAs, including Andersen Charnley, Grant Thornton, Omni Executive Group LLP ("Omni"), Pantheon Financial Management Limited ("Pantheon") and ProAct Financial Planning Limited ("ProAct"). All of these IFAs acted or provided information in relation to some of the Claimants' Sample Witnesses.

158. Save for Mr Lenthall no IFA appears to have been approached by either side for their evidence. None of the witnesses who appeared was from an IFA, and no IFA was asked to provide documents, so I received no direct evidence as to the information Mr Bowman provided to any IFAs. However, it is known that, at about the time that marketing efforts commenced, Mr Bowman requested 100 copies of the Information Memorandum. It is reasonable to assume that he wanted them in order to send them to IFAs such as those identified in the preceding paragraph, as well as to Cavanagh.

XI: Significant agreements

XI(i): Negotiation of the agreements

159. The structure of the Eclipse scheme, as summarised in Section III above and set out in Appendix 1, was devised in late 2005. It had effectively been worked out before the consultations with Mr Peacock QC of 20 October and 2 December 2005. However, the commercial agreements that made up this structure did not yet exist.

160. Everyone involved – including not only Future Films and SCI, but also Mr Bowman – appreciated in advance that it would be difficult to persuade a studio to accept terms that were consistent with the intended structure. Negotiations with various Hollywood studios began in earnest in November 2005. Most studios were unreceptive. Mr Bowman participated in these negotiations, going to meetings in Hollywood with Warner and Disney on 12 and 13 December 2005, along with Mr Levy of Future Films and Mr Molner of SCI.

161. The negotiations with Warner did not go any further, because Warner was not prepared to accept the involvement of the MSP; Mr Molner reported to Mr Levy in an email of 14 December 2005 that Warner "consider the MSP issue a deal-breaker". After these meetings, Disney was the only real remaining possibility. Mr Bowman returned to London, with the future of the project very much in the balance. He was aware that the main difficulty was whether and to what extent Disney or any studio would cede control over marketing. In an email of 14 December 2005, he referred to the procedures followed in a previous deal he had done with a different studio, but noted:

> "… it still does not get around the point of whether it is credible that a studio would ever allow a third party to materially limit or vary their marketing plans."

162. On 15 December 2005, through the continuing efforts of Mr Molner in Hollywood, Future Films (via SCI) had agreed the main commercial terms with Disney, set out in a non-binding document headed "Subject to contract" which was signed on 22 December 2005. However, these main commercial terms were all fairly high-level and did not impact on the points that have subsequently emerged as important.

163. The substantive commercial agreements went through extensive negotiations, involving Olswang as Disney's English lawyers and Richards Butler as the English lawyers for the Eclipse LLPs. The negotiations for the detailed terms all occurred in early 2006, much of them in February 2006.

164. The commercial agreements for Tranche 1 were finally concluded by about the end of March 2006. The commercial agreements for the subsequent Tranches were modelled on them and did not differ materially.

165. There is no doubt that these commercial agreements achieved the structure set out in Section III above and they conformed to the diagram in Appendix 1. However, as finally concluded, some of them had features that are important to the issues before me.

XI(ii): The Licensing Agreement

166. Each Licensing Agreement was on similar terms. The operative provision was clause 2. By clause 2(a), Disney granted rights over specified films, subject to Disney's "Prior Agreements" and subject to various excluded rights set out in clause 2(b). The Prior Agreements were the existing licence agreements between Disney and Buena Vista Pictures Distribution, Inc. and various association entities ("Buena Vista"), all within the Disney group. While Future Films and SCI did not appreciate this at the time, it later emerged that the Prior Agreements conferred substantial distribution rights on Buena Vista, which materially reduced the rights granted to the Eclipse LLPs.[5]

167. Clause 2(f) had the effect that the Eclipse LLPs could only sub-license the film rights pursuant to the Distribution Agreement with the Distributor. This means that the Licensing Agreement must be considered in conjunction with the Distribution Agreement:

> "(f) **Sub-Distributors and Licensees**. Without limitation to the provisions of Section 2(a) above, the Rights licensed to LLP pursuant to this Section 2 include the right to permit, authorise and license others to exercise and sub-license all or any of LLP's rights hereunder and to exploit the Rights but only pursuant to or as permitted by the Distribution Agreement. Studio hereby acknowledges and agrees with LLP and LLP hereby undertakes that, concurrently herewith, it shall enter into the Distribution Agreement with the Distributor and, pursuant thereto, Distributor shall be granted an exclusive licence of the Rights on the terms, and subject to the conditions, set forth in the Distribution Agreement. LLP further hereby agrees and undertakes with Studio that, notwithstanding anything to the contrary in this Agreement, it shall not permit, authorise or license any party other than Distributor pursuant to and in accordance with the Distribution Agreement to exercise and sub-license all or any of LLP's rights hereunder including without limitation the Rights."

168. Also relevant are clause 20(a) and (b). By clause 20(a), the Eclipse LLP acknowledged the Distribution Agreement. By clause 20(b), it acknowledged that Disney had a free hand to enter into agreements and other arrangements with Disney-related parties:

> "**20. Acknowledgement of LLP**
>
> (a) The parties acknowledge the provisions of Section 20 of the Distribution Agreement.
>
> (b) LLP acknowledges that Studio, MSP, Subdistributors, Prior Licensees and their Affiliates are part of a large, diversified international group of affiliated companies engaged in a variety of business activities and that Studio has informed LLP that it, MSP, Subdistributors, Prior Licensees and their Affiliates frequently enter into business transactions with other Affiliates and related parties, and LLP acknowledges and agrees that MSP, Studio, Subdistributors, Prior Licensees and their Affiliates are entitled (but are not obligated) to, an may, in their sole discretion, enter into agreements or

[5] As explained by Sales J in the UT, *Eclipse Film Partners (No. 35) LLP v HMRC* [2013] UKUT 639 (TCC), at [101]-[105].

> other arrangements with Affiliates and related parties in connection with any or all rights relating to the Designated Film, including, without limitation, all exploitation rights and all subsidiary, ancillary or other rights relating thereto including, without limitation, the Rights (subject to the licence of Rights in this Agreement) (the "Exploitation Rights"). LLP hereby acknowledges and agrees that MSP, Studio, Subdistributors, Prior Licensees and their Affiliates are under no obligation, express or implied, to offer the Exploitation Rights or any part thereof to unaffiliated or unrelated third parties, whether in lieu of or in addition to offering such rights to Affiliates and related parties, or to otherwise seek or secure any business arrangements with any unaffiliated or unrelated third parties with respect thereto. LLP hereby waives any right to make any claim or seek any relief, whether at law or in equity (specifically including injunctive relief), asserting the existence and/or breach of any such express or implied obligation."

XI(iii): The Marketing Services Agreement

169. The Marketing Services Agreement was the agreement between the Eclipse LLP and the MSP. The terms were largely settled by about the end of February 2006. The Marketing Services Agreement for Eclipse 1 was concluded on 2 March 2006. It set the template for the similar agreements concluded by the other Eclipse LLPs.

170. Although I have chosen to refer to it as "the Marketing Services Agreement", it was entitled, and was referred to by everyone involved at the time, as "the Marketing Services Agency Agreement". The word "agent" was used liberally and conspicuously, throughout its text. In particular, clause 1.1 provides:

> "LLP hereby irrevocably appoints MSP to be its exclusive agent to provide the Services and MSP accepts its appointment as LLP's exclusive agent to provide the Services on the terms and subject to the conditions set out in this Agreement."

171. The manner in which the MSP's services were to be performed was specified in clause 2.1.3. This mostly consists of a single extremely long sentence, which begins by providing that the MSP shall:

> "perform the Services with due care and diligence in a manner consistent with Distributor's and Studio's then prevailing and commercially reasonable practices…"

172. Later in this sentence appears the following:

> "… provided always that LLP acknowledges and agrees that Distributor shall be exploiting the Designated Film by all means and in all media throughout the world in perpetuity and that the Marketing and Release Plan prepared by or on behalf of MSP pursuant hereto shall be consistent with Distributor's or Studio's overall strategy for the exploitation of the Designated Film and such other motion pictures as are or may be distributed by Distributor or Studio or any Affiliate thereof and provided further that LLP acknowledges that MSP,

> Distributor, Studio and their Affiliates are part of a large, diversified international group of affiliated companies engaged in a variety of business activities and that MSP has informed LLP that it, Studio, Distributor and their Affiliates frequently enter into business transactions with other Affiliates and related parties, and LLP acknowledges and agrees that MSP, Studio, Distributor and their Affiliates are entitled (but are not obligated) to, and may, in their sole discretion, enter into agreements or other arrangements with Affiliates and related parties in connection with any or all rights relating to the Designated Film, including, without limitation, all exploitation rights and all subsidiary, ancillary or other rights relating thereto including, without limitation, the Rights (the "Exploitation Rights"). LLP hereby acknowledges and agrees that MSP, Studio, Distributor and their Affiliates are under no obligation, express or implied, to offer the Exploitation Rights or any part thereof to unaffiliated or unrelated third parties, whether in lieu of or in addition to offering such rights to Affiliates and related parties, or to otherwise seek or secure any business arrangements with any unaffiliated or unrelated third parties with respect thereto. LLP hereby waives any right to make any claim or seek any relief, whether at law or in equity (specifically including injunctive relief), asserting the existence and/or breach of any such express or implied obligation"

173. Also relevant is clause 5.1, by which the Eclipse LLP acknowledged that:

> "… MSP is an Affiliate of Studio and its Affiliates (including, without limitation, Distributor) and, as such, MSP will and may have certain obligations and duties (including, without limitation, fiduciary duties) to Studio and/or its Affiliates… which will or may compete and/or conflict with MSP's obligations and duties to LLP hereunder and in the event of any such competing interests or conflicts LLP hereby acknowledges and agrees that MSP can and will act in the best interests of Studio and its Affiliates which may not be in the best interests of LLP..."

174. Clause 5.1 also provided that the sole standard of care to which the MSP was subject was (with some irrelevant qualifications) that set out in clause 2.1.3.

175. The acknowledgment that the MSP owed duties to Disney, including fiduciary duties, and the stipulation that it could perform its services according to Disney's practices and strategy, were inconsistent with the MSP owing fiduciary duties to the Eclipse LLP. It follows that, despite its title, the Marketing Services Agreement was not an agency agreement, and the MSP was not the Eclipse LLP's agent.

XI(iv): Waiver Letters

176. During the negotiations in relation to the substantive commercial agreements, in about mid-February 2006, Disney introduced the requirement for every investor to sign a letter waiving various rights, in particular against Disney, the MSP and the Distributor ("Waiver Letter"). Ultimately, the subscription pack provided to every investor included such a Waiver Letter. They were on more or less standard terms, which were settled by about the end of February 2006.

177. Each Waiver Letter comprehensively waived the investor's rights against Disney, the MSP and the Distributor; and the investors thereby acknowledged that Disney, the MSP and the Distributor owed no fiduciary duty, duty of care or other duty of any kind, except for the duty owed by the MSP to the Eclipse LLP, which was set out as a duty of care in similar terms to clauses 2.1.3 and 5.1 of the Marketing Services Agreement. They also expressly confirmed that they were not acting in reliance on the likelihood of any Contingent Receipts.

178. Similar Waiver Letters were provided by each Eclipse LLP and by Future Films.

XI(v): The Distribution Agreement

179. The terms of the Distribution Agreement do not seem to have received much attention until after substantive agreement had been reached on the Marketing Services Agreement and on the Waiver Letters – i.e., in March 2006. They seem to have been largely settled by about the end of March 2006. The Distribution Agreement for Eclipse 1 was concluded on 5 April 2006. It set the template for the similar agreements for the other Eclipse LLPs.

180. The recitals to the Distribution Agreement referred to the fact that the MSP was to produce a Marketing and Release Plan and provide it to the Distributor. Clause 4 set out the Distributor's obligations in relation to this plan, as follows:

> "4. Marketing and Release Plan.
> (a) **Implementation of Marketing and Release Plan**. Distributor shall undertake the detailed implementation of the Marketing and Release Plan under the oversight of the MSP substantially in accordance with the parameters set out in the Marketing and Release Plan, as the same may be amended or modified from time to time. Notwithstanding anything to the contrary in any Transaction Document, LLP hereby acknowledges and agrees that Distributor shall be entitled to deviate from, amend and/or modify the Marketing and Release Plan to allow Distributor to exploit the Rights and the Designated Film in the manner set out in and otherwise in accordance with Section 20 of this Agreement and Clauses 3.2 and 3.3 of Appendix A to Schedules 1 and 2 of Exhibit C or as otherwise approved from time to time by MSP in its sole and absolute discretion.
> (b) **Affiliate Relationship with MSP**. Notwithstanding the obligations of the MSP under the MSA Agreement, and the affiliate relationship between the MSP and Distributor, Distributor shall be free to conduct itself, and its performance of its obligations under this Agreement, without regard to the interests of LLP, subject only to the express terms of this Agreement."

181. Clause 20 of the Distribution Agreement and clauses 3.2 and 3.3 of Appendix A to Schedules 1 and 2 of Exhibit C contained the Eclipse LLP's acknowledgement that the Distributor would act consistently with its and Disney's practices and strategy (etc.) in terms similar to those of clause 2.1.3 and 5.1 of the Marketing Services Agreement, as well as stipulating that the Distributor had no obligation to distribute the film, or to maximise receipts.

XI(vi): The Future-HSBC Agreement

182. One additional commercial agreement is also relevant, even though it strictly fell outside the Eclipse structure as considered by Mr Peacock QC and DLA and explained in the Information Memorandum (etc.). This is the agreement that governed the relationship between HSBC and Future Films ("the Future-HSBC Agreement"). Its terms were not finalised until 30 March 2006, but it was always envisaged that some such agreement would cover the services done by HSBC and its remuneration. I understood it to be common ground between the parties before me that the Future-HSBC Agreement therefore applied in relation to all the services provided by HSBC within the terms of this contract, whether before or after 30 March 2006.

183. The most important operative terms were as follows:

> "**3. Obligations of HSBC**
> 3.1 HSBC will supply the Services to Future Films and perform its other obligations under this Agreement in accordance with the terms of this Agreement.
> 3.2 HSBC shall not alter any aspect of the Services without the prior written agreement of Future Films.
> 3.3 Future Films acknowledges that it will be responsible for making its own decisions in relation to any advice, financial structure or other information provided pursuant to this Agreement and acknowledge that neither HSBC nor any HSBC Associate Company make any representation, warranty or undertaking, express or implied, as to the accuracy, reliability or completeness of such advice, financial structure or other information. HSBC and its Associate Companies will be under no duty to provide access to any additional information or to update or correct (if required) any advice, financial structure or other information provided pursuant to this Agreement. However, HSBC acknowledges that Future Films will use and rely on advice and information provided by HSBC in connection with the provision of the Services.
>
> **4. Covenants, undertakings and acknowledgments**
> 4.1 HSBC hereby covenants with and undertakes to Future Films that, without prejudice to any of its specific obligations under this Agreement, it will:
> (1) act with all due skill, care and diligence in the provision of the Services provided pursuant to this Agreement;
> (2) keep in force all licences, approvals, authorisations and consents which may be necessary in connection with the performance of the Services; and
> (3) in performing its obligations under this Agreement, comply with all applicable legal or regulatory requirements.
> 4.2 Future Films hereby covenants with and undertakes to HSBC that, without prejudice to any of its specific obligations under this Agreement, it will:
> (1) act with all due skill, care and diligence in distribution, promotion, marketing, selling and all other activities in relation to the Partnerships;
> (2) keep in force all licences, approvals, authorisations and consents which

may be necessary in connection with activities envisaged in (1) above; and

(3) comply with all applicable legal or regulatory requirements in connection with activities envisaged in (1) above."

184. Clause 14 provided as follows:

> "**14 Partnership**
> Nothing in this Agreement shall create or be deemed to create a partnership or joint venture between Future Films, HSBC or any Associate Company."

185. The services to which the Future-HSBC agreement related were set out in schedule 1, and were largely (although not exclusively) advisory in character, including the following:

> "• Advice relating to taxation, accounting and banking in respect of the formation, financing, structure and operation of the Partnerships
> • Assistance with negotiations with studios and/or producers to secure appropriate rights for each Partnership
> • Liaison with accounting and legal advisers to Future Films in relation to the Partnership"

186. HSBC's fees were to be calculated as set out in schedule 2, which forms Appendix 4 to this judgment. In summary, HSBC was to be paid 50% of the amount by which all revenues derived by or payable to Future Films in connection with the Eclipse LLPs exceeded all independent net third party fees paid or payable. Such independent net third party fees were to be deducted at a multiple of 1.25 before first close and 1.08 thereafter. In the event, the total fees earned by HSBC in relation to Eclipse came to nearly £15 million.

XII: Review of the Eclipse agreements by advising lawyers

XII(i): The reference in the Addenda to a review by DLA

187. The statement in the Information Memorandum that "Each Partnership's Business has been structured on the basis of tax advice from English solicitors (DLA Piper Gray Cary UK LLP) and from leading English tax counsel (Mr Jonathan Peacock QC)" might be said to imply that the agreement comprising the Eclipse structure existed, as at the date of the statement (6 January 2006). However, the relevant transaction documents were still being negotiated at that time. None of them had been agreed as at 6 January 2006, and they were not all settled until about the end of March 2006.

188. The Claimants criticised everyone involved on this account, including Mr Bowman (who reviewed the Information Memorandum in draft). However, this criticism was not at the heart of their case, in part because the terms of the most important transaction documents had been settled by the time the scheme started to be marketed in earnest, and in part because the Addenda to the Information Memorandum put matters differently. The Addenda stated that the commercial agreements had not been reviewed by Mr Peacock QC, but "…they have been reviewed by DLA Piper Rudnick Gray Cary LLP as tax advisers to [Future Films]".

189. In most versions of the Addenda, the explanation given for there not having been a review by Mr Peacock QC was said to be "owing to the need to negotiate and conclude documentation with the Studio Parties within a tight timescale". The terms of the Marketing Services Agreement and of the standard Waiver Letter had been agreed by about the end of February 2006. The terms of the Licensing Agreement and of the Distribution Agreement were not agreed until about the end of March 2006. There were consultations with Mr Peacock QC 23 March 2006 and 29 March 2006, and yet more consultations after the closure of Tranche 1. It should have been possible to have at least the Marketing Services Agreement and standard Waiver Letter reviewed by Mr Peacock QC before the closing of Tranche 1; and it was certainly possible for all the transaction documents to be reviewed by him before the closing of the subsequent Tranches.

190. The Claimants again naturally criticised all those involved, including Mr Bowman. Once again, however, this criticism was not at the heart of their case; in part because the reason given for Mr Peacock QC not having reviewed the documentation was not important in itself, and in part because, as more time passed, it should have been obvious to anyone that there had been time to obtain further input from Mr Peacock QC.

XII(ii): Was there a review by DLA?

191. The crucial element was the statement that the documentation had been reviewed by DLA. This was certainly true in relation to the standard Member's Waiver Letter, which mirrored the language in clauses 2.1.3 and 5.1 of the Marketing Services Agreement and was specifically reviewed by DLA and Richards Butler. On 27 February 2006, in an email sent to Future Films and copied to Richards Butler, Mr Gough of DLA commented:

> "I am happy that the waiver letters do not take away the agency of the MSP, albeit they limit its fiduciary duty. As such, whilst not ideal from a tax perspective, I think they do not unduly damage the tax optics."

192. There is no record of an email by which DLA gave advice specific to the Marketing Services Agreement. However, the email record certainly shows that Future Films asked for such advice, and strongly suggests that it was given orally.

(1) DLA undoubtedly received a revised draft of the Marketing Services Agreement on 23 February 2006 and a draft rider, under cover of an email from Mr Clarance of Future Films. It is not clear precisely what these attachments consisted of, but rider clauses featuring language similar to the final text of clause 2.1.3 of the Marketing Services Agreement had been in circulation since 21 February 2006 (at the latest).

(2) In any event, revised rider clauses containing the whole substance of the eventual text of clause 2.1.3 were sent to DLA, among others, on 27 February 2006.

(3) In his email of 23 February 2006, Mr Clarance specifically asked DLA if the restriction of the duty of care affected the agency relationship, saying that this and the issue of documenting the preparation of marketing reports were "points to discuss".

(4) Mr Clarance does not seem ever to have repeated this request for a discussion in relation to the Marketing Services Agreement, which suggests that he did not have to – because the discussion took place fairly soon after he had requested it.

(5) If so, it is practically inevitable that, in that discussion, he received oral advice from DLA that was in similar terms to the advice given in Mr Gough's email of 27 February 2006 in respect of the similar language in the Waiver Letter.

193. DLA saw the Distribution Agreement in draft, in particular on 20 March 2006. There is no record that they commented on it, but there was nothing in its terms that made any significant difference to the position already achieved by the Marketing Services Agreement and the Waiver Letters – on which (as I have found) DLA did comment.

194. Finally, both DLA and Richards Butler saw the Information Memorandum and Addendum for Tranche 1 in draft, before they were finalised. They both had an opportunity to comment and must be taken to have been content with the final text. The fact that DLA thereby approved the statement in the draft Addendum that they had reviewed the documentation strongly suggests that they must, in fact, have done so.

195. Accordingly, the statement in the Addenda that the documentation had been reviewed by DLA was true.

196. DLA must also be taken to have approved the following further statements, which featured in all the Addenda:

(1) The statement that "[Future Films] believes that the transactions have been implemented materially in accordance with the principles of the structure settled by Tax Counsel" (see paragraph 77 above). DLA must have known that the only possible ground for any such belief was the advice of DLA.

(2) The statements in relation to the Distribution Agreement and Waiver Letters, set out in paragraph 79 above.

(3) The statements in relation to the Marketing Services Agreement, set out in paragraph 80 above.

XIII: The implementation of the Eclipse scheme

197. For each Tranche, and in respect of the transactions relevant to each Eclipse LLP within that Tranche, the contractual documentation concluded was as summarised in Section XI above. This resulted in a series of transactions whose structure and effect was as summarised in Sections III and IV above.

XIII(i): The movement of funds for each Eclipse LLP

198. On the closing day for each Tranche:

(1) The individual Members made capital contributions, comprised as to about 3% by Personal Contribution and as to about 97% by Eclipse Loans. The funds for the Eclipse Loans originated from the Defeasance Bank, which paid them to the Lending Bank, which lent them to the individual Members.

(2) Future Films took the fee provided for in the Partnership Consultancy Agreement that it entered into with each Eclipse LLP. Under clause 7 of each Partnership Consultancy Agreement, this was a percentage of the total capital contributions – e.g., 2.6% for Eclipse 1, 5.5% for Eclipse 35. It covered the fees due to the MSP and its consultant, the fee of the Defeasance Bank, the fees of the various professional advisers (notably the lawyers and KPMG). After these deductions, the balance would then be divided between Future Films and HSBC, under the Future-HSBC Agreement.

(3) Disney ended up with the Studio Benefit. This was typically less than 1% of the total capital contributions.

(4) The totality of the interest that would be due from the individual Members in respect of the Eclipse Loans over their full term was pre-paid to the Lending Bank. The amount involved reflected the rate of interest and the loan period; it was a considerably smaller percentage of the overall sums involved for Eclipse 1 (with a term of 11 years) than for Eclipse 35 (with a term of 20 years)

(5) The balance was paid to the Defeasance Bank, which then issued the Letter of Credit.

199. After the closing, through the period of the scheme applicable to each Eclipse LLP, fixed payments were made by the Distributor to the Eclipse LLP in the form of the Annual Ordinary Distributions.

200. The Distributor also paid Variable Distributions, but these passed straight to Disney, as Variable Royalties.

201. None of the Eclipse LLPs ever received any Contingent Receipts. For some years it seemed likely that Contingent Receipts might become due in relation to Tranche 1, because of the commercial success of Pirates 2. Ultimately, however, this was not the case.

202. Accordingly, the sums received over time by each Eclipse LLP were precisely equivalent to the interest pre-paid by the individual Members. Because this interest was not a liability of the LLP, but only of the individual Members, this meant that each LLP could show an accounting profit in nearly every year of its operations. However, for the individual Members, there was a net accounting loss in every year (because their liability to pay interest was greater their share of the LLP's annual profit), apart from the final year, when they received a large balloon payment.

203. Ultimately, each individual Member received back monies precisely equivalent to the total amount of interest under that Member's Eclipse Loan, i.e., there was no loss in respect of the Eclipse Loans. However, none of them received back any monies equivalent to their Personal Contributions.

XIII(ii): The activities of the MSP

204. The evidence I received regarding the activities of the MSP was limited and (at best) second-hand.

205. The documents available to me included some of the evidence received in the course of the litigation over the Eclipse scheme that developed with HMRC. In particular, I was able to review the statements made by witnesses who gave evidence, as well as transcripts of their oral evidence. These witnesses included Mr Levy and Mr Molner, but also Mr Stuart Salter[6] who was the consultant engaged by the MSP in England.

206. Mr Salter's evidence focussed on Eclipse 35, that being the specific focus of the HMRC Proceedings. However, it seems reasonable to assume that the position was similar in relation to other Eclipse LLPs and other Tranches.

207. Mr Salter stated that detailed Marketing and Release Plans were prepared, and he produced reports on them that were presented to the MSP at its board meetings. He described the Marketing and Release Plans as being proposed by Disney, and in general he referred in his evidence to the marketing activities of Disney, not to any activity on the part of the MSP. He said that he consulted with Disney executives so as to keep abreast of the decisions being made, gathering information, mostly through informal channels. He did not participate in making decisions in relation to marketing and distribution, nor did he influence the way in which those activities were carried out by or on behalf of Disney. Instead, he monitored Disney's activities and advised the MSP – meaning, as I understand his evidence, the board of the MSP in England.

208. Mr Molner gave evidence that his understanding was that the individuals and Disney subsidiaries that performed the underlying work in respect of marketing and distribution (including the decision-making) did so on behalf of the agent of the MSP, which was in turn the agent of the Eclipse LLP. He said that his basis for this understanding was the fact that the Marketing Services Agreement required this of the MSP. In oral evidence, he explained that he understood this arrangement to involve individuals being seconded by Disney (or its subsidiaries) to the MSP. However, when asked, he was unable to say whether any secondment agreements were in fact ever entered into; although he recalled discussing whether separate service agreements were necessary and ultimately thinking that they were not.

209. Mr Molner further gave evidence that the Marketing and Release Plans were put together by Mr Salter (with assistance from Mr Combrinck of SCI); and that the MSP hired highly-qualified management to supervise and oversee those acting for it. But this evidence was inconsistent with the evidence summarised above from Mr Salter, from which it was clear that he did not put together the Marketing and Release Plans (or even influence their content) and that the MSP did not hire any staff at all.

XIII(iii): The activities of Future Films

210. Following the closure of each Tranche, Future Films had had a role in the administration of the Eclipse LLPs involved in it, including providing the Members with reports and accounts.

211. It is not obvious that Future Films had any real involvement in the marketing or distribution of the films licensed by the LLPs, even by way of oversight. I received no evidence that directly bears on this, but various email exchanges between Mr Clarance of Future Films and Mr Molner of SCI in May 2006 suggest that, as at that period, Mr

[6] There is no connection between Mr Stuart Salter and the Salter Group

Clarance had been expecting the MSP to have been playing an active role and that this would be reflected by the contemporaneous documentary record; and that he was surprised and perturbed to learn that this might not be the case.

(1) On 6 May 2006, Mr Clarance said:

> "I am very surprised to have not received ANYTHING other than a short two page summary of the trailer. This is pretty dire given the trailer is now out - ideally the LLPs would have been sent considerable info on print advertising I press releases etc. This is pretty damaging to the notion of our trade. The film is out in a month and nothing has come to us. I assume and pray stuff has gone from MSP to distributor and we have simply not been [privy] to it. Ultimately we will need copies of all stuff that has gone out on our behalf.
> …MaryAnn needs to be aware how critical this is to everything. Currently I would consider the MSP to be in breach of its duties to us, assuming no work has been done"

(2) "MaryAnn" was a reference to Ms Mary Ann Hughes, a Disney Vice President. Mr Molner responded that this was "… a super sensitive topic" that should be addressed by telephone.

(3) On 14 May 2006, Mr Clarance said:

> "I also assume the MSP is directly liaising with the designee providers on the plans, and instructing them accordingly. We will need to ensure appropriate records are retained to reflect this, [and] I suggest that in addition to what is already going on, we should receive copies of all work performed by the Agent on our behalf, and we should be forwarded any correspondence received by the MSP from the designees."

(4) Mr Molner replied:

> "I am not sure how Disney operates internally and we certainly didn't spell out the need for this going into the transaction."

(5) Mr Clarance replied:

> "Either they do this or the LLPs need to forward the marketing plan otherwise there is no point this activity being done. There needs to be a paper trail from the LLP's agent to the distribution entities."

(6) The transcript of Mr Molner's evidence to the FTT shows that he was taken to this exchange and said that maybe there were instances where things did not function correctly, but more where everything went right. That evidence is difficult to reconcile with his email of 14 May 2006. Disney/Buena Vista did no more and no less than they were required, bearing in mind the limited negotiations with them "going into the transaction" and the minimal obligations that these imposed on Disney entities (i.e., under the Marketing Services Agreement and the Distribution Agreement), and the fact that neither the MSP nor Future Films had no real power or influence over Disney/Buena Vista.

212. These exchanges suggest that Mr Clarance appears to have expected up until May 2006 that the MSP would be liaising with and instructing Disney/Buena Vista about Marketing and Release plans, and that a documentary record would exist to this effect and would be available to Future Films. Furthermore, he thought that, if the MSP was not doing all this, then it was in breach of its contractual obligations to the LLP. However, he was then made aware that this was not the case.

213. My impression is that the Distributor seems to have marketed and distributed the films in a manner that was consistent with the Marketing and Release Plans, or at least there is no reason to suppose otherwise. However, the reason for this was not that, following the approval of the Marketing and Release Plans by the board of the MSP in England, the MSP or Future Films then contacted the Distributor, sent it the Marketing and Release Plans and monitored its progression in implementing those plans. On the contrary, board approval by the MSP in England seems to have been mere window-dressing. The minutes for the board minutes were drafted in advance by Olswang, Disney's solicitors, and then adopted by the board with no changes, which suggests that the board meetings were mere formalities.

214. The Distributor appears to have acted with no real input or scrutiny at all from either the MSP or Future Films. It looked only to Disney/Buena Vista. The involvement of the MSP and the creation of the Marketing and Release Plans that were approved by the board of the MSP made no real difference to what the Distributor did. Indeed, it is not clear that if the Distributor ever received the Marketing and Release Plans, or, if so, when or from whom or with what effect; let alone that the MSP played any active role in ensuring that the Marketing and Release Plans were being followed by the Distributor (as opposed to, at most, passively monitoring, from a distance, what the Distributor chose to do).

215. At all events, the paper trail that Mr Clarance said needed to exist was not created.

216. That said, it is noteworthy that, until these email exchanges in May 2006, Mr Clarance appears to have believed that the MSP was actively engaged on Future Films' behalf, by work being done in its name by Disney/Buena Vista secondees; and that a documentary record of this would exist. After this date, however, he must have known differently. On the face of things, this knowledge from May 2006 onwards is attributable to his employer, Future Films.

XIV: Restructuring and Ceasing Member arrangements

XIV(i): Tax deferral and tax avoidance

217. In itself, the intended effect of the Eclipse scheme was not tax avoidance, but tax deferral. The individual Members who invested understood that it would not ultimately result in their paying any less tax. It would simply mean that they would pay the same amount of tax later on, all in the final year, when the Eclipse LLP would receive a very significant sum from the Distributor and so would make a very significant accounting profit – which would be passed onto all Members.

218. From the outset, Mr Bowman and those involved at Future Films recognised that there might well be appetite among some investors to seek to avoid, or at least reduce, the tax liability that would otherwise accrue in the final year. Mr Bowman came up with

the idea that, at some point before the final year, the management and control of the LLPs would be relocated outside the UK – probably to the Netherlands. The expectation was that this would result in Members being relieved of their liabilities to repay the Eclipse Loans, without accruing any tax liabilities in respect of the profits that would otherwise show up in their accounts for the final year.

219. This was not an integral part of the Eclipse proposal and was not mentioned in the Information Memorandum or any of the associated literature. Although some of the Claimants' Sample Witnesses asked about such a tax-avoidance solution and/or were told it might be possible in the future after they decided to invest in Eclipse, it was only really marketed separately and subsequently.

XIV(ii): Restructuring and Ceasing Member Arrangements

220. This first happened in 2008, when investors were told about arrangements they could participate in if they wished, involving a Dutch SPV owned by SocGen. These 2008 arrangements in the event were open to approximately one third of the Eclipse LLPs. Similar arrangements, involving a Future Films subsidiary (rather than a subsidiary of SocGen), were offered in 2010.

221. Then in 2012, 2013 and 2014, further arrangements were offered, the effect of which was said to be that investors would cease to be Members of the relevant Eclipse LLP.

222. Most of those involved referred to the 2008 and 2010 arrangements as "Restructuring Arrangements" and to the 2012 and later arrangements as "Ceasing Member Arrangements". The use of nomenclature was not always consistent, but the general understanding at the time appears to have been that the 2008 and 2010 arrangements would shelter the Members' tax liability for the large payment that they were to receive in the final year, whereas the 2012 and later arrangements would enable them to exit Eclipse and close-off their tax liabilities in relation to it.

223. None of these arrangements was ultimately treated by HMRC as in fact having the effect of avoiding liability for tax or even as meaning that the individual investor's membership of the LLP had ceased.

224. Taking part in Restructuring Arrangements or Ceasing Member Arrangements required the payment of a further substantial fee to Future Films. I was shown evidence suggesting that HSBC received a share of the fees paid by Members in relation to the 2008 Restructuring Arrangements, but not in respect of any of later arrangements.

XV: The timeline of the HMRC challenge to Eclipse 35

XV(i): The HMRC decision re Eclipse 35

225. HMRC challenged the Eclipse scheme, on the basis that the Eclipse LLPs were not trading and/or were not doing so with a view to profit, and so should be closed. The initial focus of its challenge was Eclipse 35, in relation to which HMRC opened an enquiry into the LLP's partnership tax return for the year ended 5 April 2007. Following the direction of a special commissioner (*Eclipse Film Partners No 35 LLP v Revenue and Customs Comrs* [2009] STC (SCD) 293), a closure notice was issued on

15 May 2009. HMRC's decision was that Eclipse 35 was not carrying on a trade; or, if it was, it was not doing so with a view to profit.

226. The second limb of this conclusion ultimately fell away. The first limb – HMRC's decision that Eclipse 35 was not carrying on a trade – was what mattered, both to HMRC and to the individual Members LLP. If Eclipse 35 was not carrying on a trade, then the sums borrowed by the individual Members – i.e., the Eclipse Loans – were not loans for the purposes of a trade. This in turn would mean that the interest on the Eclipse Loans would not qualify for Loan Interest Relief. In other words: Eclipse would have failed to achieve its intended purpose, which was to allow the individual Members to defer their tax liabilities.

XV(ii): The chronology of the HMRC Proceedings

227. In the HMRC Proceedings, Eclipse 35 appealed HMRC's decision to the FTT, then to the UT, then to the Court of Appeal. At every level, HMRC's view was confirmed, i.e., that Eclipse 35 had not been trading.

228. In form, the proceedings against the HMRC were conducted by Eclipse 35. However, the outcome of HMRC Proceedings was of very direct significance for the individual Members, and thus for all the Claimants in the proceedings before me.

229. Eclipse 35's notice of appeal was issued on 9 June 2009. The hearing before the FTT commenced on 13 July 2011. The FTT's decision was given on 20 April 2012: *Eclipse Film Partners (No. 35) LLP v HMRC* [2012] UKFTT 270 (TC).

230. The hearing of Eclipse 35's appeal to the UT commenced on 22 November 2013. The decision was given on 20 December 2013: *Eclipse Film Partners (No. 35) LLP v HMRC* [2013] UKUT 639 (TCC).

231. The hearing of Eclipse 35's appeal to the Court of Appeal commenced on 13 January 2015. The decision was given on 17 February 2015: *Eclipse Film Partners (No. 35) LLP v HMRC* [2015] EWCA Civ 95.

232. Eclipse 35 sought permission to appeal to the Supreme Court, but permission was refused on 13 April 2016.

XV(iii): The relevance of this chronology

233. The relevance of these dates is that part of Future Films' role as Partnership Consultant to the Eclipse LLPs was to report to the individual Members in respect of significant matters such as the Eclipse 35 closure notice and the subsequent HMRC Proceedings. All the Claimants' Sample Witnesses gave evidence that they received such reports from Future Films. The reports naturally did no more than summarise the latest developments, but it follows that all the Eclipse investors knew about the HMRC Proceedings – not only those investors who were Members of Eclipse 35. Furthermore, they gained this knowledge more or less in real time.

XVI: The consequences of the HMRC Proceedings

234. The HMRC Proceedings had a number of consequences.

XVI(i): Effect on tax deferral for Eclipse 35

235. I was told by Mr Kell for the Claimants that the very first effect felt was that investors in Eclipse 35 were not able to claim tax deferral in relation to that particular part of the scheme (i.e., Tranche 4). I was not provided with evidence that demonstrates the position clearly either way.

236. I note that, of the Claimants' Sample Witnesses, there is only one who invested only in Eclipse 35 – Mr Nielsen – and he does not appear to have been required by HMRC to pay interest on account of paying tax late. I assume that this may have been because he, at least, did not defer any tax payment by reference to Eclipse 35. On the other hand, at least one of the Claimants' Sample Witnesses (Mr Best) appears to have been charged late payment interest by HMRC in relation to Eclipse 35, which suggests that he did defer tax by reference to Eclipse 35.

XVI(ii): HMRC Follower Notices re other Eclipse LLPs

237. In about February or March 2017, HMRC issued Follower Notices and Accelerated Payment Notices to the investors in all Eclipse LLPs (not merely Eclipse 35) who had not already voluntarily settled their tax liabilities. These Notices required payment of the income tax said to be due and payable as a result of their investments in the Eclipse LLPs, on the basis that the decision in respect of Eclipse 35 was final and applied equally to each of the other Eclipse LLPs.

XVI(iii): Late payment interest

238. Since then, HMRC has maintained the position that none of the individual Members of any of the LLPs were entitled to Loan Interest Relief in respect of the Eclipse Loans, and so had not been entitled to defer tax as they had previously done. Members who had claimed to be entitled to defer tax therefore have been treated as having failed to pay tax when it was due, and have been called on to pay late payment interest.

XVI(iv): Dry Tax

239. Until 2021, HMRC in addition maintained that, whilst the Eclipse LLPs were not carrying on a trade so that the investors were not entitled to Loan Interest Relief, the investors were nonetheless liable to pay tax on the guaranteed income which was used to repay the Eclipse Loans. HMRC took this stance even though the investors had never had the benefit of that income in any real sense: they were being required to pay tax on income not received ("Dry Tax"). In circumstances where sums borrowed under the Eclipse Loans borrowings comprised about 97% of each investors' capital contributions, this Dry Tax threatened to bankrupt many of them.

240. Most of the Claimants' Sample Witnesses eventually managed to settle with HMRC, on terms that resulted in their agreeing to pay late payment interest, but HMRC accepting that no Dry Tax was payable. For one of the Claimants' Sample Witnesses, the possibility of settling came too late; he was already bankrupt.

XVI(v): Ceasing Member Arrangements

241. One further consequence of the HMRC Proceedings is that they appear to have played a significant part in the decisions made by some investors to take part in Ceasing Member Arrangements, from 2012 onwards. A good example is Mr Beveridge, who was the first of the Claimants' Sample Witnesses to give evidence. His evidence on this point was as follows.

(1) Mr Beveridge decided not to participate in the 2008 Restructuring Arrangements, because he thought they looked like aggressive tax-avoidance and he therefore considered them too risky.

(2) He also decided not to participate in the 2010 Arrangements. They were offered after the HMRC closure notice in respect of Eclipse 35 and when it was known that HMRC was challenging the Eclipse scheme more generally, including Mr Beveridge's own claims for tax relief (this is apparent from correspondence Mr Beveridge received at the time from his IFA). However, Future Films were very positive that the HMRC challenge would not succeed. Mr Beveridge found the proposed arrangements difficult to understand. Against this background, he decided not to participate.

(3) After the FTT decision in relation to Eclipse 35, a summary of the decision was posted on Future Films' website. Mr Beveridge attended a meeting of Eclipse 33 in June 2012 to discuss the consequences of the FTT decision. A number of Members raised the possibility of exiting Eclipse, as a way of (as he put it) "mitigating against the possible financial consequences of HMRC challenge to the Eclipse structure fully succeeding." Mr Levy raised the possibility of Ceasing Member Arrangements.

(4) Mr Beveridge sought advice from his IFA (Grant Thornton). Grant Thornton recommended accepting the proposed Ceasing Member Arrangements, in part because to do so might go some way to alleviating the consequences if HMRC were to succeed in the HMRC Proceedings.

(5) Mr Beveridge noted that Grant Thornton regarded the outcome of the litigation as uncertain and took the view that the risks of doing nothing or staying in the LLP were too great. He therefore took part in Ceasing Member Arrangements, his understanding being that this meant that he exited Eclipse with effect from April 2012.

XVII: Action groups

XVII(i): The Newport action group

242. In the light of the HMRC Proceedings, many investors consulted their IFAs, accountants and others for advice, as well as exchanging ideas within their own community. A number of action groups emerged. One of the earliest and largest of these coalesced around Mr Nick Wood of Newport Tax Management LLP ("Newport"), with Fieldfisher LLP being instructed to advise the members of the Newport action group. Eclipse Members began to join Newport from about January 2014. This was very shortly after the decision of the UT – given on 20 December 2013.

243. Initially, Newport was principally concerned with the investors' liability to HMRC (notably, Dry Tax), with whether or not to take part in Ceasing Member Arrangements and with potential exit scenarios and their legal and tax implications. In about July 2015, Newport began to consider the possibility of redress from third parties. This was broached in a letter to Newport action group members dated 31 July 2015, as follows:

> "To date the Action Group has existed to deal with members' exposure to HMRC and other third parties. We have not considered the exposure of third parties to Action Group members. However, tactically it may now be that pursuing third parties is the best form of defence against HMRC's claims against members.
>
> We need to consider potential liability on the part of (i) the Banks, (ii) the lawyers representing the Designated Member and (iii) the Auditors who signed off the accounts of the LLPs. If, on further exploration, those potential liabilities exist, then there may be some scope to bring claims to recover your losses from those responsible for the structure you invested in. For the time being this is all very preliminary – the question is whether these are options worth exploring further and whether the group has an appetite to explore them."

244. I should say that the reference in this letter to "the Banks" almost certainly means the Lending and Defeasance Banks, not HSBC. However, I infer that the members of the Newport action group responded positively to the idea of exploring the possibility of claims to recover their losses "from those responsible for the structure you invested in", and that the investigation of such claims began at about this time.

XVII(ii): The ARC action group

245. There were other professionals involved in advising Eclipse Members, and other action groups, notably the ARC action group. My understanding is that all the Edwin Coe Claimants are now associated with Newport, albeit some only since 2019. Some of the Stewarts Law Claimants also joined Newport on various dates in 2014, including Mr Blight, Mr Cooper and Mr Nielsen. Later (from 2016 onwards), the Stewarts Law Claimants joined the ARC action group. None of the Claimants waived legal advice privilege, in so far as that applied to their dealings with Newport, ARC or the solicitors acting for them (initially Fieldfisher, subsequently Edwin Coe and Stewarts Law).

XVIII: Why Eclipse 35 lost in the HMRC Proceedings

XVIII(i): Summary

246. The full course of the HMRC Proceedings is apparent from the various decisions. It is not necessary in this judgment to set out every detail, not least because matters ultimately crystallised in the decision of the Court of Appeal. However, it is appropriate to summarise the general outline of the proceedings as a whole and, in particular, the factors that led to the conclusion that Eclipse 35 was not trading.

247. There were two broad aspects to HMRC's position on the question of whether or not Eclipse 35 was trading.

(1) First, HMRC argued that the real nature of the Eclipse 35 transaction, if the documents comprising it were taken together, was that Eclipse 35 did not acquire

any meaningful rights in the films. Such rights as Eclipse 35 acquired were immediately returned to the Disney group; and this was reflected by the essentially circular money-flow.

(2) Second, HMRC argued that trading involves a speculative element, and the provision of goods and services to a customer, and these features were not present.

248. Eclipse 35 took issue with both aspects of HMRC's case, both as a matter of law and on the facts. Eclipse 35 also contended that the acquisition of rights and then sub-licensing them for consideration and with a view to profit inherently constituted the carrying on of trade and must be so regarded as a matter of law.

249. HMRC's case that Eclipse 35 should not be taken to have acquired any meaningful rights in the films was rejected by the FTT. It was noted that the rights acquired by Eclipse 35 were severely limited by the combination of the Licensing Agreement (esp. clauses 2(f) and 20(b)), the Distribution Agreement (esp. clauses 4(a), 4(b) and 20(c)), the Marketing Services Agreement (esp. clause 2.1.3) and the Prior Agreements. It was also noted that the flow of money in respect of these rights was essentially circular. Nevertheless, the agreements were not shams, and the rights acquired, including the right to Contingent Receipts, were real. See per the FTT at [289] and [320].

250. There was no attempt by HMRC to overturn this conclusion before the UT or the Court of Appeal. It culminated in the FTT's factual finding at [320] that:

> "… at the time the transaction was entered into a payment of contingent receipts, although speculative, was reasonably anticipated to be possible in the course of the 20-year term of the licence."

251. However, at all levels, HMRC's arguments on the legal criteria for trading, for tax purposes, essentially succeeded. In particular, the Court of Appeal held that speculation is an indication of trade (albeit not essential); and that trading normally requires that the trader offer goods and services (including rights in choses in action) to a customer (or some kind of counterparty). See per the Court of Appeal at [116], [143], [145] and [146].

252. At all levels, Eclipse 35's case that it was carrying on a trade, with regard to these legal criteria, was held to fail on the facts. Its argument that its business inherently constituted the carrying on of trade therefore failed.

XVIII(ii): The conclusion that Eclipse 35 was not trading

253. For the purposes of the proceedings before me, it was the findings of the FTT on the key factual issues relevant to trading, and the treatment of those findings by the UT and the Court of Appeal, that were critical to the respective cases of the Claimants and of HSBC.

254. A number of different factors were taken into account. They essentially fall under the four sub-headings that follow.

XVIII(iii) Whether the MSP was the LLP's agent

255. In particular before the FTT, Eclipse 35 argued that the MSP was its agent and acted as its agent for all purposes related to the marketing and distribution of the films, under the Marketing and Services Agreement. Everything done in relation to marketing and distribution in Hollywood, by the MSP, was done on behalf of the Eclipse LLP.

256. This point was treated as turning on the meaning and effect of the Marketing and Services Agreement. Really, therefore, it depended on a point of contractual construction.

257. I have already noted above that the Marketing and Services Agreement makes liberal and conspicuous use of the word "agent"; however, its terms were inconsistent with the MSP being the Eclipse LLP's agent. This was the conclusion of the FTT, at [343]-[344]. This conclusion was challenged on the appeal to the UT, but only faintly and without success: per the UT at [74]-[75]. This issue does not appear to have troubled the Court of Appeal.

XVIII(iv): Whether the MSP/LLP contributed to marketing/distribution

258. The FTT noted that its conclusion on agency was not fatal to Eclipse 35's overall case, because the MSP could provide services for Eclipse 35's benefit without doing so as agent.

259. Eclipse 35's case was that this happened in that Disney/Buena Vista staff were made available to the MSP and undertook marketing and distribution activities on its behalf: per the FTT at [347], where such individuals are referred to as "the designees". However, the FTT received no evidence to support this case: per the FTT at [348]-[349], saying that what was needed was evidence (ideally, from one of the individuals in question) that the designees "stepped out of" their position as employees of Buena Vista and performed their duties for the MSP instead. The evidence that they did receive, notably from Mr Salter, did not establish that Eclipse 35, even on a collaborative basis, was engaged in directing and supervising marketing and distribution, including the preparation of Marketing and Release Plans. Rather, Eclipse 35 (via the MSP/Mr Salter) was merely monitoring what Disney and Buena Vista were already going to do in any event: per the FTT at [351], [356], [358].

260. In saying this, I acknowledge that, at [351], the FTT expressed its assessment of the evidence using the words "We do not know whether… the designees were simply doing, in a different format, what they would in any event do…" My assessment of the same evidence would have been more forthright. The evidence that I have summarised in Section XII above pointed strongly to the conclusion that the designees were simply doing what they would have done in any event, i.e. they did not "step out of" their position as employees of Buena Vista.

261. These findings were criticised by Eclipse 35 at the UT hearing, but Sales J went through the FTT's analysis step by step, commending their "painstaking care": per the UT at [58]-[70]. The Court of Appeal's conclusion was similar: per the Court of Appeal at [135]-[139], in particular the following:

> "[138] … After analysing the mass of written and oral evidence adduced over

> some three weeks the FTT concluded on the facts, and was perfectly justified in concluding, that, reducing the transactions to their core and notwithstanding some contribution by SCI and Mr Salter, the substantial reality was that Disney produced the Films; let the rights in them to Eclipse 35, and immediately took them back again; Disney personnel created marketing plans and implemented them; and they reported back to Eclipse 35 what Disney was doing.
>
> [139] Against that background the FTT's conclusion that Eclipse 35 was not in reality carrying on a trade was justified and indeed correct. Eclipse 35 did not discharge the evidential burden of showing that it was engaged in trade in any realistic or meaningful way. The possibility of obtaining a share of Contingent Receipts did not give the business of Eclipse 35, looking at it as a whole, a trading character: having regard to the business as a whole, the right to Contingent Receipts was no more than a potential additional return on a fixed term investment."

XVIII(v): Whether the licence/sub-licence involved speculation

262. The FTT found it necessary to set out the structure of the transaction in some detail, and then to explain its net effects, including the fact that profits produced for the LLP by the sub-licence to the Distributor were essentially pre-determined by the Letter of Credit; which was itself funded by the circular money-flow: see per the FTT at [183]-[241]. There was, therefore, no risk, save the risk that the Letter of Credit might not be honoured – which the FTT said could not be treated as speculative in any meaningful sense: see per the FTT at [401].

263. Sales J in the UT adopted what he described as the FTT's "careful analysis of the transactions entered into and… of their commercial substance": UT at [80]. In relation to the Annual Ordinary Distributions, the LLP purchased a known income stream; the credit risk in relation to it was assumed by the Defeasance Bank. The Variable Distributions/Royalties operated back-to-back.

264. The approach of the Court of Appeal was that, in this respect, the Eclipse scheme involved the payment of a lumpsum to Disney, which was repaid with interest over a fixed term and would produce a profit unrelated to the exploitation of the film rights. It was essentially an investment, and Eclipse 35 did not argue otherwise: per the Court of Appeal at [123].

XVIII(vi): Whether Contingent Receipts were too remote

265. The only truly speculative part of the scheme concerned the possibility of Contingent Receipts. However, at all levels, this was considered so highly speculative that it could not really be regarded as a feature of the Eclipse scheme at all:

(1) Per the FTT at [402]:

> "The prospect of Eclipse 35 receiving anything from contingent receipts was clearly at all times considered by everyone involved as a 'bonus' rather than as a profit to be reasonably expected from entering into the acquisition and sub-licence transactions."

(2) Per the UT at [81]:

> "It was… a peripheral feature which was remote from the true commercial basis of the arrangements."

(3) Per the Court of Appeal at [139]:

> "The possibility of obtaining a share of Contingent Receipts did not give the business of Eclipse 35, looking at it as a whole, a trading character: having regard to the business as a whole, the right to Contingent Receipts was no more than a potential additional return on a fixed term investment."

266. It is important to note the factual evidence that was the foundation for this conclusion. The FTT referred at [310] and [311] to evidence that, at the time, those involved regarded the payment of Contingent Receipts as possible, and I have already noted the FTT's factual finding at [320] that this was reasonably anticipated as a possibility. However, the FTT also referred to evidence from Mr Molner that no-one would be advised to invest by reference to Contingent Receipts: see at [318]. This appears to have been a reference to a contemporaneous email in which Mr Molner had said he would not advise an investor to rely primarily on Contingent Receipts, as he accepted in cross-examination.

267. Sales J in the UT referred at [54] to a number of items of evidence to similar effect. The first was the same evidence from Mr Molner as had been cited by the FTT. Next was evidence from Mr Levy, who said:

> "Our approach was… investors should not invest expecting contingent proceeds, and it was important for us not to make misleading statements as far as contingent proceeds potential was concerned"

And:

> "They should assuming in calculating the outcome of their investment that they do not receive contingent proceeds, and contingent proceeds is a positive and welcome development."

268. Sales J also referred to evidence from Mr Sills, but the evidence referred to (i.e., as set out in the FTT decision at [65] and [67]) did not in fact relate to the likelihood of Contingent Receipts. Finally, he referred to statements in the Information Memorandum and Addendum, in particular the warning, set out in paragraph 73 above, not to invest on the expectation of Net Proceeds (Contingent Receipts) being a material sum.

269. The Court of Appeal again referred to the evidence from Mr Molner that had been cited by the FTT: per the Court of Appeal at [129]. They also referred to the fact that the contractual documents contained provisions that added acute legal conditions to the prospect of Contingent Receipts: these were the provisions that I have already highlighted, i.e. clauses 2(f) and 20(b) of the Licensing Agreement, clauses 4 and 20(c) of the Distribution Agreement and clause 2.1.3 of the Marketing Services Agreement, as well as the Prior Agreements: per the Court of Appeal at [130] to [134].

270. The Court of Appeal therefore rejected the argument of Eclipse 35 that there was an inconsistency or "disconnect" between (a) the FTT's findings at [320] that Contingent

Receipts were reasonably anticipated to be possible (the Court of Appeal summarised this at [126] as a "real possibility") and (b) the FTT's conclusion at [314] and [402] that Contingent Receipts were too remote to qualify as a basis or justification for entering upon a trading venture. The existence of this real possibility did not make Contingent Receipts more than a potential additional return on a fixed term investment: per the Court of Appeal [139], where the Court of Appeal tied up the thread that began at [125].

271. At no level was the possibility of Contingent Receipts expressed in terms of a percentage chance. However, the reasoning at every level indicates that this possibility was higher than negligible (hence, a real possibility), but not high enough to be more than a peripheral feature or "bonus".

272. There was one further matter that was relied on at all levels: that the financial illustrations given to investors when marketing Eclipse disregarded the prospect of Contingent Receipts. See per the FTT at [402], per the UT at [54(iv(c)] and per the Court of Appeal at [129]. This is puzzling, because the evidence before me was that all the Claimants' Sample Witnesses received financial illustration that did have regard to the possibility of Contingent Receipts – like the example at Appendix 3 to this judgment, given to Mr Beveridge. On the other hand, these financial illustrations gave no indication as to how likely it was the Contingent Receipts would be received. They merely illustrated what their effect would be, on the basis of various assumptions as to the figures involved.

XIX: Divergence from the basis of Mr Peacock QC's advice

273. The actual structure of the Eclipse scheme diverged from the basis on which Mr Peacock QC had advised in a number of respects, albeit all were related to the first.

XIX(i): The MSP was not the LLP's agent

274. The principal point relied on by Mr Coppel KC, on behalf of the Claimants, was that Mr Peacock QC had been instructed that the MSP would be the agent of the LLP, and had advised on this basis; but the terms of the Marketing Services Agreement were not consistent with an agency relationship. HSBC accepted that this was so.

275. Mr Howells (who dealt with this aspect of the case for HSBC) argued that this was not of great significance, pointing to the view to this effect in the HMRC Proceedings: per the FTT at [345] and per the UT at [72]. Despite the attractive way that Mr Howells developed this argument, I cannot accept it, for two reasons.

276. The first is that the exercise in the HMRC Proceedings was different from the exercise that I have to perform. In the HMRC Proceedings, the question to be answered was whether the Eclipse LLP had in fact had a role in relation to marketing and distribution; so that it was necessary to consider what had actually happened, and to assess the relevance of the terms of the Marketing Services Agreement in the context of real-world events. Here, by contrast, I have to consider what would have happened if the Marketing Services Agreement had been differently worded and so had given rise to an agency relationship. My task, therefore, involves a counterfactual examination.

277. The reason why the Marketing Services Agreement did not give rise to an agency relationship is that Disney was adamantly opposed to this and therefore re-wrote the

drafts suggested by Future Films in terms that negated the possibility of the MSP being the LLP's agent or owing it any fiduciary duties. I have to assume that Disney took this course because, if the MSP had been a true agent of the LLP and owed it fiduciary duties, it would have been obliged to discharge those obligations. It would have favoured the interests of the LLP and would have exerted itself on the LLP's behalf. This would have meant (among other things) ensuring not only that individuals from Buena Vista were seconded to the MSP, but also that they then acted in the interests of the LLP and "stepped out of" their normal positions within Buena Vista. Furthermore, the existence of an agent/principal relationship would necessarily have led to heightened transparency and access to information, from the LLP's point of view.

278. The second reason why I cannot accept Mr Howells's submissions on this point is more straightforward. It was Mr Peacock QC himself who originally insisted that the MSP must be the LLP's agent, at the consultation of 8 September 2005. If he had not been assured that this would be the case, in the instructions for the subsequent consultations, he would not have approved the scheme, and it would not have gone ahead.

XIX(ii): No involvement of the MSP/LLP in marketing/distribution

279. I am not bound by the findings made in the HMRC Proceedings in this regard, but I have set out in Section XII above the reasons that have led me to the same conclusion in any event.

280. The evidence available to me (and, for that matter, the evidence in the HMRC Proceedings) bore no resemblance to the activities that Mr Peacock QC was told the MSP would undertake. As already noted, I regard this as related to the fact that the Marketing Services Agreement did not create an agency relationship. If the MSP had owed fiduciary duties to the LLP in respect of marketing and distribution, it would have had to do more. In particular, the MSP would have had to ensure that the individuals carrying out the day-to-day activities in respect of marketing and distribution at Disney and Buena Vista really were seconded to it, and thus (as secondees to the agent to the LLP) carried out those activities while in a capacity which mean that they, too, owed fiduciary duties to the LLP.

XIX(iii): No documentary record of the MSP's activities

281. In paragraph 3.13 of the Consolidated Peacock Note, Mr Peacock QC emphasised the importance of the MSP being able to demonstrate that it had undertaken the role assigned to it, and stressed the significance of instituting and retaining proper documentary evidence. This does not appear to have happened, as reflected by the email exchange quoted in Section XIII(iii) above between Mr Clarance of Future Films and Mr Molner of SCI, in which Mr Clarance emphasised the need for transparency and for records to be kept, or there was no point to any activity, and Mr Molner said that Disney had not been told this when they went into the transaction.

282. If the MSP had actually conducted the activities that Mr Peacock QC was led to expect, and if records had been created, Eclipse 35 would not have faced the problem it did in the HMRC Proceedings of its dearth of evidence. Furthermore, if the MSP had been the LLP's agent, the LLP would have had a legal right to access any documents created or records kept by the MSP while acting on its behalf; and this right would have

extended to documents created and records kept by the individuals seconded to the MSP by Disney/Buena Vista.

XIX(iv): Burden of proof

283. The fact that a true agency relationship would have given rise to a different and fuller documentary record is important, because Mr Green KC's case on behalf of HSBC was that the findings in the HMRC Proceedings regarding the activities of the MSP turned on the burden of proof. In those proceedings, the burden was on Eclipse 35. In the present proceeding the burden is on the Claimants. Therefore, he said, the outcome in the present proceedings must be different.

284. I accept that the judgments in the HMRC Proceedings referred to the fact that the burden in those proceedings fell on Eclipse 35, and this naturally featured in the reasoning. Nevertheless, I am not convinced that the relevant findings in the HMRC Proceedings reflected nothing more than the incidence of the burden of proof. In any case, my own view of the evidence before me is that it points in the same direction. I am satisfied that the Claimants have satisfied their burden, on the balance of probabilities.

285. Be that as it may, this point would not have been open to Mr Green KC if the Marketing Services Agreement had created an agency relationship and if the MSP had been required, as agent, not only to conduct activities in respect of marketing and distribution, but to create and keep documents and records in respect of such activities. Documents created and records kept by the MSP in its role as the LLP's agent would have been available to the LLP as of right; including documents created and records kept by secondees from Disney/Buena Vista.

XX: Non-divergence from the basis of Mr Peacock QC's advice

286. It is convenient also to highlight various respects in which, contrary to the submissions made at various times by the Claimants, the scheme as implemented does not seem to me to have diverged materially from the basis on which Mr Peacock QC had advised.

XX(i): The prospect of Contingent Receipts

287. A matter that featured prominently in the Claimants' pleaded case, and in some of the submissions on their behalf, was there was never a realistic likelihood that they would receive Contingent Receipts. I have already set out the generic documents provided to investors and what these documents said about Contingent Receipts. I will come on later to the evidence of the Claimants' Sample Witnesses. However, it is also important to consider what Mr Peacock QC was told, and what effect it had on him.

288. The Consolidated Peacock Note recorded at paragraph 1.4 the instruction given to Mr Peacock QC that Contingent Receipts were a "reasonable possibility". This was not materially different from the FTT's finding that Contingent Receipts were "reasonably anticipated as a possibility" (FTT at [320]) and the Court of Appeal's characterisation of Contingent Receipts as "a real possibility" (Court of Appeal at [126]).

289. At paragraph 3.3 the Consolidated Peacock Note recorded Mr Peacock QC being told something that went further than this: he was recorded as having been told that it was "genuinely anticipated" that there would be Contingent Receipts (and that they would

make the scheme profitable not only at the LLP level, but even for an individual investor, even taking into account financing costs).

290. We know that this information was given to Mr Peacock QC at the consultation on 20 October 2005. However, as discussed in Sections V and VI above, this information had no effect on Mr Peacock QC's conclusions on trade, as recorded in the Consolidated Peacock Note (in particular, at paragraph 3.8). It was not the basis of his advice.

291. Furthermore, the instructions for the consultation of 22 December 2005 appended a draft of the Information Memorandum which contained the warning, set out in paragraph 73 above, not to invest on the expectation of Net Proceeds (Contingent Receipts) being a material sum. I have to assume that Mr Peacock QC read and considered this part of the Information Memorandum, even though it is not referred to in the Consolidated Peacock Note. If so, he was in possession of information making it clear to him that Eclipse would be marketed on the basis that no-one would be advised to invest by reference to Contingent Receipts.

292. In the HMRC Proceedings, this was probably the single most important factor contributing to the decision, at every level, that Eclipse 35 was not engaged in trade, for tax purposes. I do not know what Mr Peacock QC made of this part of the Information Memorandum. Given that he was advising in 2005/2006, whereas I am considering matters with the benefit of hindsight and informed by the judgments in the HMRC Proceedings, it would be entirely understandable if it did not have the effect on his thinking that I am certain it would have now. Nevertheless, it cannot be said by the Claimants that Mr Peacock QC was not given this crucial piece of the jigsaw.

XX(ii): The circular movement of funds

293. Another point that featured prominently in the Claimant's case was the circular movement of funds, which I have set out in Sections IV(ii) and XIII(i) above.

294. This was well understood by Mr Peacock QC, as is apparent from paragraph 11.4 of the Consolidated Peacock Note. It was apparent from their evidence that it was not well understood by many of the Claimants' Sample Witnesses, even though some of them had read the Consolidated Peacock Note. Nevertheless, Mr Peacock QC advised on the basis that nearly all the money paid to Disney would be placed on deposit with the Defeasance Bank, to procure the issue of the Letter of Credit.

XXI: The core complaint

XXI(i): Outline of the core complaint

295. I gave the outline of the Claimants' core complaint in Section I above, but repeat it for convenience:

(1) They invested in reliance on representations to the effect that the structure of the Eclipse scheme had been approved by a tax QC.

(2) These representations were false, in that the structure of the scheme as implemented was materially different from the structure that was the basis of the QC's advice.

(3) These false representations were made dishonestly and/or deceitfully.

(4) HSBC knew, intended and was actively involved in all this, in the person of its employee, Mr Neil Bowman.

XXI(ii): The representation in the Information Memorandum

296. The key representation, which is fundamental to this complaint, must be the following passage in the Information Memorandum, set out in paragraph 69 above:

> "Each Partnership's Business has been structured on the basis of tax advice from English solicitors (DLA Piper Gray Cary UK LLP) and from leading English tax counsel (Mr Jonathan Peacock QC) to the Partnership Consultant and the Promoter.
> The Partnership Consultant and the Promoter have followed that advice and therefore expect the investment to work in the manner outlined."

297. It necessary to parse this text and to put it in its context; and then to analyse its legal significance, for the purposes of a claim in deceit.

298. The references to the "Partnership Consultant" and to the "Promoter" both meant Future Films. It therefore was an express statement that Future Films had received advice from DLA and from Mr Peacock QC as to the how the business should be structures in order to work.

299. The words "…has been structured…" in the past tense, indicated that structuring the business was something that had been completed. This was a representation of fact.

300. The words "…on the basis of…" indicated an understanding of the advice received and its basis, and also indicated that the basis on which the business had been structured was the same on which the advice had been given. Comparing these two things – the actual structure of the Eclipse scheme and the structure that had been the basis of the legal advice – involved a series of value judgments, notably as to the true legal effect of the various contracts that made up the structure of the scheme.

301. What those value judgments consisted of may not have been readily apparent to anyone reading the Information Memorandum, particularly without access to the Consolidated Peacock Note or any of the relevant contracts. At a minimum, they involved analysing whether the Marketing Services Agreement created an agency relationship, such that fiduciary duties were owed to the LLP, as Mr Peacock QC had insisted was vital.

302. Accordingly, while the representation that the Eclipse structure was consistent with the structure that had been the basis of the legal advice might at first sight appear to be a representation of fact, it was in reality a representation of opinion. Furthermore, it was one in relation to which Future Films (to which the legal advice had been given, which had comprehensive knowledge of the details of the structure actually put in place and the terms of the relevant contracts) was in a far stronger position than any investor, or even an IFA. It therefore implied that Future Films had reasonable grounds for believing that the structure was consistent with the basis of the advice: *Brown v Raphael* [1958] Ch 636.

303. The statement that Future Films expected the investment to work, coupled with the word "therefore", expressly linked (a) Future Films' expectation that the investment would work to (b) the advice received and the assertion that the structure had the same basis as that advice. In itself, it was a representation of fact – that Future Films held this expectation. Once again, however, it implied that Future Films had reasonable grounds for having this expectation.

304. In context and/or impliedly, the reference to the investment working meant that it would be treated as an investment in a business that was trading for tax purposes.

XXI(iii): The Addenda

305. The text in each Addendum that was crucial for present purposes is set out in paragraph 77 above. I have already addressed the reference to a tight timescale. More important were the following.

306. First, each Addendum stated that the relevant documents, i.e., the contracts that made up the Eclipse structure, had been reviewed by DLA. This was a representation of fact. In context, it implied a further factual representation, namely that DLA's review led it to confirm to Future Films that the structure thus created was consistent with the basis of Mr Peacock QC's advice.

307. Second, each Addendum expressly stated that Future Films believed that the structure was materially in accordance with that considered by Mr Peacock QC. This too was a representation of fact – i.e., that this was what Future Films actually believed. It further represented that the ground for this belief was the review said to have been carried out by DLA and (by implication) DLA's confirmation that the structure was consistent with the basis of DLA's advice.

XXI(iv): Mr Bowman's Note

308. I have set out the relevant text in Mr Bowman's Note in Section X(i) above. It said that Mr Peacock QC had given detailed tax advice "on the structure", and summarised the conclusions. It implied that the structure on which Mr Peacock QC had advised was the same as the actual structure adopted.

309. This throws up similar points as arise in the context of the Information Memorandum as to the distinction between a representation of fact and one of opinion, and as to Mr Bowman being in a stronger position than any investor of IFA in relation to any such opinion.

XXI(v): The legal significance of this analysis

310. It is both valuable and necessary to examine each statement relied on, and analyse precisely what representations were made, because the significant legal differences between statements of fact and statements of opinion/expectation carry through to the issues that come next: whether each representation is true or false, and whether the knowledge and state of mind of the representor/defendant means that the claim can succeed on the basis of deceit/dishonesty.

311. It is not startlingly innovative to subject a case of misrepresentation or deceit to this kind of analysis. On the contrary, it is or should be the norm. It is certainly the method that I would commend to any junior practitioner who may read this judgment (or even, merely, this paragraph).

312. What it reveals is that, to succeed in deceit, the Claimants must establish that Future Films (and, by extension, Mr Bowman) did not have reasonable grounds for believing the actual structure of Eclipse to be the same as the structure that had been the basis of Mr Peacock QC's advice. Further, in so far as the Addenda made it clear that Future Films' belief was grounded on DLA's review, the Claimants must establish that no such review took place, or that it did not lead DLA to confirm that the actual structure was consistent with the basis on which Mr Peacock QC had advised, or that Future Films knew or should have known that DLA were wrong.

XXI(vi): The relevant dates

313. The date of the Information Memorandum was 6 January 2006. However, no representation was made to any of the Claimants' Sample Witnesses on that date.

314. The earliest date on which any of the Claimants' Sample Witnesses heard anything at all about the scheme was 16 February 2006, when Mr Pickard received an introductory email, which did not name the scheme and gave no details except that Mr Bowman had been heavily involved; in particular, it said nothing about legal advice (although it did mention accounting advice from KPMG).

315. Mr Pickard – and, I suspect some other Ernst & Young partners – received a copy of Mr Bowman's Note on 1 March 2006, ahead of the presentation that Mr Bowman gave to the Ernst & Young partners (including both Mr Pickard and Mr McIntyre) on the following day. This was the first time that anything was said about legal advice received from Mr Peacock QC.

316. Mr Pickard then received more substantial documentation in the subscription pack, including the Information Memorandum, on 18 March 2006. This was after he had signed a confidentiality agreement.

317. The other Claimants' Sample Witnesses who invested in Tranche 1 all first received information on later dates in March, mostly towards the end of the month.

318. Reliance occurred when each Claimant became committed to investing. It was not generally apparent to me precisely what date this was for all the individual Claimants, but I take it that it will have been a date between the first receipt of significant information (having signed a confidentiality agreement) and the closing date. For Tranche 1, this almost certainly means toward the end of March 2006, possibly the first few days of April 2006.

XXII: The Claimants' case on the core complaint

XXII(i): The alleged Advice Representation

319. The Claimants advanced a case in respect of four separate alleged representations. The one that corresponded to what I have described as the core complaint was labelled by

the Claimants as the "Advice Representation". As pleaded by the Claimants from the outset in their Particulars of Claim, it was alleged that a representation was made in the following terms:

> "The business of the Eclipse Partnerships had been structured on terms, and would be conducted, pursuant to advice provided by leading tax counsel, Jonathan Peacock QC, and law firm DLA… and accountants KPMG, also both tax specialists…"

320. As the case went on (in particular, in the written and oral submissions to me), the references to advice from DLA and KPMG dropped out. The alleged Advice Representation therefore related solely to the advice from Mr Peacock QC.

321. In support of the allegation that this representation was made, the Claimants relied on the passages that I have considered in Section XXI above, as well as some additional passages in the Information Memorandum.

322. The words actually used in the Information Memorandum (and in Mr Bowman's Note, etc.) approximate to the alleged Advice Representation, but are not identical to it. At no stage prior to oral opening submissions, when I asked Mr Coppel KC about this, does any consideration appear to have been given to analysing the words actually used, in particular to working through whether those words constituted representations of fact or of opinion; and, if the latter, precisely what factual representations could be said to have been implied – i.e., as to the grounds for the opinion.

XXII(ii): Falsity

323. The pleaded case that the alleged Advice Representation was false was simply that the terms on which the Eclipse scheme was implemented were not consistent with the information and assumptions given to Mr Peacock QC and did not comply with his advice. This remained the case set out in the Claimants' opening submissions, with some emphasis on the fact that the scheme could not be said to have been structured at all, as at the date of the Information Memorandum (6 January 2006).

324. By the time of closing submissions, the Claimants accepted that the relevant date to assess falsity was the date when each Claimant invested. Accordingly the question was whether what was said in the Information Memorandum remained false as at that date (i.e., about late March 2006, for each Claimant who invested in Tranche 1). The case as to falsity was effectively narrowed to the fact that the MSP was not the LLP's agent.

XXII(iii): Knowledge/dishonesty

325. Mr Bowman received copies of all of the notes of consultations with Mr Peacock QC, and indeed saw and had the chance to comment on the Consolidated Peacock Note in draft. He therefore knew that Mr Peacock QC considered it vital for the MSP to be an agent.

326. The Claimants said that everyone knew that it would be difficult to achieve this, and noted that, in his email of 14 December 2005, Mr Bowman had queried whether it was credible that a studio would ever agree to this.

327. They said that it was clear from terms of the relevant contracts that the MSP was not the agent of the LLP. They also said that neither Future Films nor HSBC ever sought

or obtained the views of any lawyer as to whether the structure as implemented was consistent with the basis on which Mr Peacock QC had advised. They said that it was part of HSBC's role under its agreement with Future Films to check that the structure as implemented was suitable, and that this meant that HSBC should itself have asked DLA to review the transaction documents. They alleged that Future Films and HSBC hid their eyes to the truth – meaning either that they had blind-eye knowledge, or were were reckless (and, therefore, dishonest).

328. They further said that, as an investor himself who invested in Tranche 1, Mr Bowman will have received and signed Waiver Letters, and it must have been obvious from the terms of such Waiver Letters that the MSP was not the LLP's agent. They relied on this as proof of actual knowledge.

329. Finally, they relied on an email exchange between Mr Bowman and Mr Surtees of HSBC of 7 February 2008, relating to another project named "7 Arts", which they said confirmed that HSBC had deliberately shut its eyes to the truth, in the context of Eclipse.

XXII(iv): Joint tortfeasance/conspiracy

330. In relation to those Claimants to whom Mr Bowman marketed the scheme directly, the Claimants said that the alleged Advice Representation was made directly (along with the other representations alleged by the Claimants, considered in Section XXIV below).

331. Beyond this, they said that the collaborative relationship between HSBC and Future Films, and the continuing role that Mr Bowman played in it, showed that Mr Bowman (and, through him, HSBC) knew and intended that HSBC would make deliberate or reckless misrepresentations to investors including the Claimants, and participated alongside Future Films and/or helped to bring this about.

332. They said that this meant that Future Films and HSBC should be regarded as joint tortfeasors, such that HSBC was liable for misrepresentations actually made to the Claimants by Future Films. Alternatively, the circumstances satisfied the requirements for HSBC to be liable in unlawful means conspiracy.

XXII(v): Dishonest assistance

333. Alternatively, Future Films received funds from investors as a trustee or fiduciary, under the terms of the Partnership Deed that governed the relationship between each Eclipse LLP and its Members, and was bound to use the monies only for the trade of the LLP. Instead, they were not applied towards an active and genuine trade, but were disbursed in the circular manner set out in Section IV(ii) and Section XIII(i) above – with the dishonest assistance of HSBC.

XXII(vi): Partnership

334. Alternatively, on a proper understanding of the relationship between HSBC and Future Films, they were partners within the meaning of the Partnership Act 1890. Accordingly, HSBC is liable as Future Films' partner.

XXII(vii): FSMA

335. In relation to some Claimants, claims were also asserted under the Financial Services and Markets Act 2000 ("FSMA"), for breach of statutory duty.

XXIII: HSBC's case on the core complaint

336. HSBC noted that the Claimants did not advance a conventional case for misrepresentation, i.e. that something actually said in the Information Memorandum (or elsewhere) was false. HSBC said that what had actually been said did not amount to the Advice Representation alleged by the Claimants. HSBC said that it instead amounted to the following:

(1) Future Films had obtained advice from Mr Peacock QC and from DLA.

(2) Future Films had sought to follow and implement that advice.

(3) Future Films believed that the scheme as implemented was materially in accordance with that advice.

337. HSBC said that this was all true, and in any event there was no culpable misrepresentation by Future Films, let alone by HSBC – i.e. no negligence, recklessness or fraud.

338. HSBC said that the Claimants' case as to knowledge and/or dishonesty was hopeless, and that accordingly there could be no claim against HSBC as a joint tortfeasor or in conspiracy.

339. None of the elements of dishonest assistance could be made out, and the relationship between Future Films and HSBC was not a partnership.

340. HSBC said that there had been no breach of any duty owed under FSMA.

341. HSBC further said that the claims were all time-barred under the Limitation Act 1980.

XXIV: The Claimants' case as to other representations

XXIV(i): The alleged Trade Representation

342. The first of the other representations alleged by the Claimants was the "Trade Representation", it being alleged that a representation was made in the following terms:

> "The Eclipse Partnerships would be carrying on an active and genuine trade in the licensing and exploitation of rights to the commercial distribution of new Hollywood feature films"

343. It is certainly the case that the Information Memorandum and various other documents highlighted the necessity of the Eclipse LLPs being engaged in trade: see Section V(iii) above. However, these passages in the Information Memorandum need to be read in conjunction with the very closely related passages set out in Section (iv) above, concerned with the legal advice received.

344. The word "trade" in this context obviously meant trade for the purposes of income tax and, specifically, for the ability to claim Loan Interest Relief against income tax. Whether an entity is engaged in trade in that highly technical sense is obviously a question for a tax specialist. It therefore is inescapable that every statement capable of amounting to the alleged Trade Representation was in reality a statement of opinion; and the grounds given for holding the opinion that the Eclipse LLPs would be engaged in trade for the purposes of income tax was, ultimately, the advice received from Mr Peacock QC.

345. The alleged Trade Representation therefore really added nothing to the alleged Advice Representation. If the Eclipse structure, as implemented, was consistent with the basis on which Mr Peacock QC had advised, or if Future Films or HSBC had reasonable grounds for believing this to be the case, then they could not be at fault for holding the opinion that the Eclipse LLPs would be engaged in trade, or for making the Trade Representation.

XXIV(ii): The alleged Contribution Representation

346. The Claimants' case as to the alleged Contribution Representation was that a representation was made in the following terms:

> "The capital contributions of each member (both self-funded and borrowed) would be invested by the Eclipse Partnerships in pursuit of the Trade."

347. If the Eclipse scheme had been implemented consistently with the basis on which Mr Peacock QC had advised, Future Films and HSBC would have had reasonable grounds to believe that the manner in which the Members' capital contributions would be used would, indeed, amount to investment in trade, for income tax purposes. This is so despite the fact that the Studio Fee represented only a very small proportion of the capital contributions, and despite the essentially circular money-flow, because Mr Peacock QC had taken account of these features in his advice.

348. It follows that the case as to the alleged Contribution Representation also added nothing to the alleged Advice Representation.

XXIV(iii): The alleged Profit Representation

349. The Claimants' case as to the alleged Profit Representation was that a representation was made in the following terms:

> "There was a reasonable basis to expect that each Eclipse Partnership would generate profit on their Trade, which would be distributed to members to repay the loans or capital incurred to fund capital contributions. There was also a reasonable possibility of profit exceeding liabilities to repay the capital contributions. The level of profit would depend on the commercial success of the Hollywood feature film in question."

350. It became apparent during the trial that the Claimants did not contend that the first sentence was incorrect. Their submissions focussed more on the second sentence.

However, there was no pleaded case that this was false, i.e. that there was not a reasonable possibility of profit exceeding liabilities to repay the capital contributions.

351. In any event, the case as to a Profit Representation faces the fundamental difficulty that all the Claimants were expressly told in the Information Memorandum that they "…should not subscribe on the expectation that Net Proceeds (if any) would constitute a material sum." This must mean either that there was no Profit Representation, or that (unlike the rest of the Information Memorandum) any such representation was not intended to be relied on and the Claimants were told that they should not rely on it. As I will go on to find in Section XXV(iv) below, none of the Claimants' Sample Witnesses did in fact rely on the alleged Profit Representation.

352. Finally, the expert evidence, which I consider in Section XXVII below, provided no real support for the unpleaded case that the Claimants wished to advance at trial as to falsity. My conclusion is that, in relation to every Tranche, Contingent Receipts were at least possible (albeit unlikely).

XXV: The Claimants' Sample Witnesses

XXV(i): Limited recollection

353. The Edwin Coe Claimants called 9 sample witnesses. The Stewarts Law Claimants called a further 5 sample witnesses. I summarise the significant evidence given by each of them in Appendix 5 to this judgment.

354. For most of the Claimants' Sample Witnesses, not only did the decision to join Eclipse happen about 20 years ago, it related to something that was a peripheral part of their normal activities. Their recollections were, therefore, naturally vague.

355. Most of the Claimants' Sample Witnesses were frank about their limited ability to remember. Some said that they had clear memories of various aspects, but I did not find this kind of evidence compelling, at least on points where there were no contemporaneous documents or where the contemporaneous documents suggested something different.

356. However, even where I was not persuaded by the Claimants' Sample Witnesses' evidence, my impression was that they were doing their best to remember accurately and to assist the court, albeit unsuccessfully. They all tried to tell the truth, albeit some went about this exercise more carefully than others.

XXV(ii): Eclipse was a tax deferral scheme

357. All the Claimants' Sample Witnesses understood that the main advantage of Eclipse was tax deferral, which would be achieved by borrowing nearly all of the contribution, then paying interest on this borrowing. The interest on the loan would generate a loss for tax purposes – on the basis that it was a loss in respect of trading. Consistently with this, they all took out loans to the maximum available extent, so that in every case their Personal Contribution was approximately 3% and the loan from the Lending Bank was approximately 97%.

XXV(iii): Reliance on the support of a tax QC

358. Nearly all the Claimants' Sample Witnesses gave evidence to the effect that they relied on the fact that the tax-effectiveness of the Eclipse scheme was said to be supported by the opinion of a QC and this was critical to their decision to participate. Many of them noted this themselves, whether from the Information Memorandum or an Addendum or (in some cases) directly from Future Films or Mr Bowman. These witnesses all said that they would not have invested if they had understood that Eclipse, as implemented, was not consistent with the basis on which Mr Peacock QC had advised.

359. Some of the Claimants' Sample Witnesses (e.g., Mr Blight and Mr Ghella) relied on advice from their IFA, rather than scrutinising the documentation for themselves. However, it is reasonable to assume that the IFAs had scrutinised the Information Memorandum (etc.) and relied on the information set out there when making recommendations to their clients – including the existence of expert legal advice.

360. Thus, all the Claimants' Sample Witnesses were affected by and relied on the representations concerning the advice given by Mr Peacock QC and by DLA. For most of them, these representations had a direct effect on their decision to invest. For the others, these representations had an indirect effect, via the advice of IFAs.

XXV(iv): Investment in films and Contingent Receipts

361. All the Claimants' Sample Witnesses said that they regarded Eclipse as a genuine opportunity to invest in the film industry. They believed that their investment would contribute to the production and exploitation of films, especially in respect of marketing and distribution.

362. They understood that there might be additional payments, depending on how successfully the films performed. Most of them regarded this as a real possibility, which was related to the trading activities that they understood the Eclipse LLPs would be carrying out: there was a prospect of returns if the films were (or had been) carefully selected by Future Films on behalf of the scheme, and if the Eclipse LLPs were then successful at marketing and distributing the films. However, not many of them invested on the strength of this possibility. While most of them received financial illustrations including cashflow models in the format of Appendix 3 to this judgment (i.e., making provision for Contingent Receipts), this does not seem to have led any of them to anticipate Contingent Receipts. In general, their attitude was that, if Contingent Receipts were to eventuate, this would be a bonus. Several used this word, mirroring the view of the FTT (in its decision at [402]).

363. A few sample witnesses said that the possibility of Contingent Receipts was an important part of their thinking. In general, I do not accept that it was so important that it had any real impact on their decision to invest. One exception to this was Mr Upham. In his case, I accept that he treated the prospect of Contingent Receipts as a significant factor in his decision. However, I do not accept that he came to this position because of anything said or done by or on behalf of Future Films or HSBC (or, indeed, by his IFA). It was his own instinctive conclusion.

XXV(v): Circular money-flow

364. Several Claimants' Sample Witnesses said that they would not have become involved if they had understood that the "investment" and the "returns" were just the same money moving around in a circle. Those who gave specific evidence to this effect included Mr Beveridge, Mr McIntyre, Mr Upham and Mr Cooper.

365. I do not doubt the sincerity of this evidence, but it has to be considered with some care, given the information that each of them acknowledged as having received before deciding to invest. If they had thought about the position carefully, they (and/or their IFAs) could and should have appreciated that most of the money was moving around in a circle, and that the net amount of money that was contributed to Disney and/or to Future, for investment in films, was bound to be relatively small. This became apparent during the evidence of several witnesses, in particular Mr McIntyre, Mr Lenthall and Mr Cooper.

XXV(vi): Awareness of the HMRC challenge to Eclipse 35

366. In each case, their personal tax position in relation to Eclipse was questioned by HMRC from about late 2008. They were all aware of the HMRC challenge in relation to Eclipse 35, at least from shortly after the date of the FTT judgment on 20 April 2012. However, they all said that they were reassured by Future Films' expressions of confidence, both before and after the FTT judgment, that HMRC's challenge to Eclipse 35 would not succeed, and that it would not necessarily set a precedent for the other Eclipse LLPs.

XXV(vii): Restructuring and Ceasing Member Arrangements

367. From 2008, some of the Claimants' Sample Witnesses took part in Restructuring Arrangements and/or Ceasing Member Arrangements, for which they made further capital contributions. Several of those who took part in Ceasing Member Arrangements from 2012 onwards said that they did so to mitigate the risks associated with Eclipse – some using the word "mitigate", others giving evidence consistent with it (notably, Mr Beveridge, Mr Upham, Mr Southwell, Mr McIntyre and Mr Nielsen). They believed at the time that these arrangements would close-off their tax liabilities in relation to Eclipse.

XXV(viii): Concern about Dry Tax

368. They all became more concerned in about mid-2014, in part because of the outcome before the UT (on 20 December 2013), in part because HMRC then informed them that it considered that the judgments in relation to Eclipse 35 were relevant to the other Eclipse LLPs, and in part because it became clear that HMRC took issue with Ceasing Member Arrangements. Above all, HMRC now started asserting that it was entitled to Dry Tax. Liability for Dry Tax was not a risk that had been highlighted in the Information Memorandum or any associated literature, and it had not been contemplated by any of the Claimants' Sample Witnesses before they decided to participate in Eclipse.

XXV(ix): Action groups

369. Many of the Claimants' Sample Witnesses joined the Newport action group, most of them during 2014 or 2015. My understanding is that all the Edwin Coe Claimants are now associated with Newport, albeit some only since 2019. Many of the Stewarts Law Claimants were previously members of the Newport action group (including Mr Blight, Mr Cooper and Mr Nielsen, who joined in 2019) but they are all now associated with the ARC action group, and have been since 2016 onwards. Unlike the others, Mr Burke not only joined Newport (in February 2014) but also instructed solicitors and issued proceedings, which were pursued to settlement against an IFA (but were not pursued against any other defendants).

XXV(x): Knowledge/ignorance of the role of HSBC

370. It is striking that those Claimants' Sample Witnesses who had no direct contact with Mr Bowman (e.g., Mr Southwell and Mr Upham) said that they did not know until fairly late that Mr Bowman or HSBC had been involved in Eclipse. They said that they were told this for the first time by Newport/Edwin Coe (i.e., not until 2017, or even 2019). The Claimants' Sample Witnesses were all individuals who are or were members of the Newport action group. Given that Mr Bowman's involvement had been well-known from the outset to a number of other Newport members who had joined in 2014 (e.g. Mr Lenthall, Mr Best, Mr Pickard, Mr Burke and Mr Margolis), I infer that none of the Claimants' Sample Witnesses was interviewed by Newport or the solicitors until long after the action group was set up. One of the Claimants' Sample Witnesses – Mr Cooper – was asked about this and confirmed that he was not interviewed in 2014.

371. I find the failure to conduct any interviews surprising – especially in the case of Mr Margolis, given that he had been the Chairman of Future Films throughout the relevant period and was an obvious source of useful information. If Mr Margolis had been interviewed (even in the most cursory way) when he joined Newport in March 2014, or even in 2015, Mr Bowman's involvement would have been known to Newport. This knowledge therefore would have been available to all Newport members. Furthermore, it is highly likely that, if Mr Margolis had been interviewed, it would then have emerged that it very likely would also be possible to interview Mr Surtees, who had left HSBC and was now working for Mr Margolis. Similarly, interviewing Mr Pickard in 2014 would have revealed not only the presentation given to Ernst & Young partners by Mr Bowman, but also Mr Bowman's Note, which stated in its opening paragraph that HSBC had been advising Future Films in relation to Eclipse.

372. It is also striking that those of the Claimants' Sample Witnesses who were recruited by or via an IFA all said that they had not questioned their IFAs. I took this also to mean that their respective action groups and solicitors had not questioned their IFAs on their behalf. This is despite (or possibly because of) the fact that many of them continued to use the same IFA for many years, and therefore remained in contact with them, often on friendly terms. This is important because, as already noted (and as the evidence of the individual Claimants' Sample Witnesses confirmed) a number of these IFAs were among those that have received information directly from Mr Bowman.

XXV(xi): Evidence of losses

373. Each of the Claimants' Sample Witnesses devoted a section of their respective witness statements to the quantum of their losses, setting out the various elements of their claim in tabular form.

374. All of them claimed in respect of their Personal Contributions.

375. Those who ultimately had to pay interest to HMRC on tax payments which they had deferred, and which HMRC therefore said had been paid late, claimed the total amount of interest payable. However, most of them provided no information as to how this interest was calculated or at what rate. Furthermore, such information as was provided in this regard (e.g. in relation to Mr Best) was disclosed extremely late – only after the close of the Claimants' factual evidence, and then only because I queried whether there was any evidence as to how HMRC had assessed interest for late payment.

376. All the Claimants' Sample Witnesses claimed (as appropriate to each of them) in respect of fees paid to Future Films, the cost of Restructuring and Ceasing Members Arrangement and fees to other advisers (e.g. the action groups).

377. The Claimants' Sample Witnesses gave no or only very limited evidence about the return they had received on the sums they had withheld from HMRC, generally for several years. This was surprising, because the Claimants' pleaded case expressly stated at paragraph 101 of the Re-Re-Re-Amended Particulars of Claim:

> "101. So far as necessary the Claimants will give credit for any sums received by or credited to them as a result of, or otherwise related to, their investment in the Eclipse Partnerships."

378. Some of the Claimants' Sample Witnesses gave evidence about the return that they generally expected on investments, or which their IFAs regarded as likely. They seem to have anticipated a return of at least 7%, ideally not much less than 10%.

379. Few of the Claimants' Sample Witnesses gave any evidence as to what they would have done if they had not invested in Eclipse. Such evidence as was given on this point was sketchy.

XXV(xii): Tax deferral/aggressive tax avoidance

380. Many of the Claimants' Sample Witnesses wanted to make it clear in their evidence that they positively wished not to be involved in aggressive tax avoidance. They said that they were only involved in Eclipse because they understood it not to involve aggressive tax avoidance – merely tax deferral.

381. This was not strictly relevant to my decision. It could and would make no difference to the outcome of this case even if they had intended to engage in aggressive tax avoidance, because this case is not directly concerned with the propriety of the Eclipse scheme. Trying to reduce one's tax burden is not illegal in itself.

382. Moreover, within limits (e.g., legality and acceptability to HMRC), tax avoidance (as opposed to evasion) cannot properly be characterised as immoral. A lot of people

would prefer to pay less tax and, given the choice and as long as the method is legal and appropriate, will take steps to do so.

383. However, in fairness to the Claimants' Sample Witnesses, I wish to make it clear that I accept their evidence that they understood that the Eclipse scheme, in itself, would not assist them to avoid paying a single penny in tax. The effect of Eclipse was explained to them as being merely that they would pay the same amount of tax at a somewhat later date. The Claimants' Sample Witnesses understood that Eclipse, in itself, would not reduce their ultimate tax liability.

384. On the other hand, the 2008 and 2010 Restructuring Arrangements were unquestionably intended as tax avoidance, and could fairly be described as tax avoidance of a fairly aggressive kind. Most but not all of the Claimants' Sample Witnesses took part in the 2008 and/or 2010 Restructuring Arrangements. Those who did not were Mr Goodwin, Mr Margolis and Mr Beveridge.

385. The later Ceasing Member Arrangements I regard differently, because those who took part did so in whole or in part in order to mitigate the risks of the Eclipse scheme failing (in light of HMRC's challenge), rather than for purposes of pure tax avoidance.

XXVI: HSBC's factual witnesses

XXVI(i): Mr Bowman

386. For obvious reasons, Mr Bowman is the key individual in this litigation. HSBC tendered a witness statement signed by Mr Bowman dated 24 December 2020; albeit it was not completely CPR-compliant, in that it gave his address only as a post-box in Italy.

387. It seems that, at some point thereafter, Mr Bowman withdrew co-operation from HSBC and disengaged from the case. He remains in Italy and declined to come to England to give evidence, saying (via solicitors) that he could not do so owing to his advanced age, the state of his health and the fact that he no longer remembers very much about the relevant events.

388. Steps were taken by HSBC (with Claimants' consent) to oblige him to give his evidence in Italy, with the assistance of the Italian courts. He was ordered to attend court in Italy, but did not do so. The Judge in Italy therefore kindly visited him at his home. A series of questions were put to him, the answer to the first being, "I received advice from my doctor not to go to the Court of Imperia", and the answer to nearly all the others being the same formulaic phrase: "I do not remember the details due to the time elapsed."

389. It is of course true that a long time has elapsed since 2005. I have received no real evidence regarding Mr Bowman's health, but I have been told that he is now aged 82 and it is entirely possible that he is not robust. On the other hand, even in December 2020 it was already the case that a long time had elapsed since 2005. I have no reason to suppose that Mr Bowman's memory is any better or worse now than it was in December 2020. Furthermore, no matter whether his reasons for being reluctant to allow his evidence to be tested in the conventional manner are good reasons or bad, the simple fact is that it remains untested.

390. I therefore do not feel able to place any reliance on Mr Bowman's witness statement.

XXVI(ii): Mr Surtees

391. The Claimants' pleaded their case and their written opening submissions left me in no doubt that a case of dishonesty was advanced against Mr Bowman. It was not clear to me either way whether such a case was advanced against Mr Surtees, who was effectively Mr Bowman's right-hand man at HSBC. I asked Mr Coppel KC to clarify this, and after some days was told that it was asserted that Mr Surtees had sufficient knowledge such that he was dishonest, in that he knew that the information given to potential investors was incorrect.

392. I had asked for this clarification because I considered that Mr Surtees was entitled to know in advance whether dishonesty would be put to him. He duly gave his evidence, in general fairly. Inevitably, he frequently said that he could not recall matters clearly. There were also some points on which he appeared cautious to the point of being defensive, but that was not surprising given that he had been told that he would be accused of having been dishonest.

393. In the event, however, it was not put to Mr Surtees that he was dishonest. I raised this with Mr Coppel KC at the end of Mr Surtees's evidence, making the point that it would not be possible for the Claimants to invite me to make a finding of dishonesty against Mr Surtees in circumstances where the charge of dishonesty had not been put to him so as to enable him to answer it. Mr Coppel KC accepted this but confirmed that he had put all the questions he wished.

XXVI(iii): Other HSBC witnesses

394. HSBC's other witnesses included Mr Williams and Ms Emmerton from within Mr Bowman's team, and Ms Boneham and Mr Spooner from the Group Tax team. They answered honestly and gave such help as they could, but their evidence was of limited value. This was not because of any fault of theirs, but was in part because their memories had faded, and in part because none of them was ever at the heart of the matters that this case concerns. Mr Williams did not join the team until July 2006. Ms Emmerton was only involved in financial modelling. Ms Boneham and Mr Spooner were only peripherally involved.

395. None of these witnesses attended any of the consultations with Mr Peacock QC or had any real knowledge either of the basis on which he advised or of the transaction documents by which the Eclipse structure was implemented.

XXVII: Expert evidence

XXVII(i): Mr Sills and Mr Fier

396. Each side called evidence from experts in the film industry on the prospect of Contingent Receipts.

397. The Claimants' expert witness was Mr Steven Sills, who had also given evidence before the FTT in the HMRC Proceedings (albeit not on this point). Mr Sills is an accountant

and has worked for many years in the film industry, generally auditing production and distribution accounts and valuing film and television properties.

398. HSBC's expert witness was Mr Philip Fier. Mr Fier's background was in film finance, initially within a bank operating in Los Angeles, then as CFO within several major studios, and now running a financial and management consulting firm specialising in media and entertainment.

399. While their professional backgrounds are slightly different, both expert witnesses were highly qualified and demonstrated the depth of their experience in their evidence. Both gave their evidence fairly and sensibly. However, I am bound to confess that, while listening to them, I had the words of William Goldman always in mind. Mr Sills and Mr Fier both had good reasons for holding the opinions that each of them did; but they were, only, opinions. Neither expert could be said actually to know, with certainty, what the likely Contingent Receipts of any film might be; because nobody does.

XXVII(ii): Relevance

400. The primary reason for permission having been granted for this expert evidence arose from the Profit Representation alleged by the Claimants (and a similar case that had been alleged by the Stewarts Law Claimants). On examination, however, this case fails irrespective of the expert evidence, for the reasons given in Section XXIV(iii) above.

401. The secondary reason for this expert evidence was that the Claimants contended that Mr Peacock QC had also received incorrect representations as to the likelihood of Contingent Receipts, which had affected his advice. This case also fails, for the reasons given in Section XX(i) above.

402. It follows that the expert evidence does not have the significance that it was thought it might, when permission was given. Nevertheless, in deference to the dedication of the two experts and to the careful way in which I was taken through their evidence by counsel (Mr Wraith on behalf of the Stewarts Law Claimants, Mr Kell on behalf of the Edwin Coe Claimants and Mr Howells on behalf of HSBC), I will briefly summarise my conclusions.

XXVII(iii): Whether there was a real prospect of Contingent Receipts

403. I have noted above that, in the HMRC Proceedings, the FTT expressed its views in terms of whether it was reasonable to anticipate Contingent Receipts as a possibility, whereas the Court of Appeal used the phrase "a real possibility". These are, arguably, different tests. Nevertheless, it is clear that both tribunals had in mind that it was possible that Contingent Receipts might be payable, rather than impossible; but the prospect was so unlikely that investors were told not to invest on the strength of Contingent Receipts.

404. The highest basis on which Contingent Receipts were represented to potential Members was in the Addenda, where the phrase used was "a real prospect". I take this to mean something similar to "a real possibility". In any event, demonstrating that Contingent Receipts were not a real prospect must require the Claimants to show that there was no practical possibility of their ever being payable – i.e., in percentage terms, a probability that was at, or only negligibly above, 0%.

405. Having exchanged reports, Mr Sills and Mr Fier prepared a Joint Memorandum, in which their respective assessments were as follows:

		Probability of Contingent Receipts	
Tranche	Film(s)	Sills (Cs)	Fier (HSBC)
1	Pirates 2	11%	33%
2	Pirates 3	0%	50%
3	National Treasure 2	19%	42%
4 (i.e. No 35 LLP)	Enchanted and Underdog	6%	42%
5 (i.e. No 40 LLP)	Confessions	8%	18%

406. On the basis of these figures, the only Tranche where Mr Sills's evidence suggested that there was less than a real prospect was Tranche 2.

407. In his Supplementary Report, Mr Sills took account of points made by Mr Fier to the effect that his figures were based on comparable historic films that included older titles and that there was insufficient adjustment for inflation. This led to revised figures for Tranche 1 of 0% and for Tranche 3 of 28%, but no material changes for the other Tranches. On this basis, Mr Sills's evidence supported a case that there was less than a real prospect of Contingent Receipts for Tranche 1 and for Tranche 2. (In this report, he also expressed views as to the probability of films paying Contingent Receipts equal to 10% of the investment, some of which he then revised in his Second Supplementary Report, although this seemed to me less relevant to the Claimants' alleged Profit Representation).

408. In their written Closing Submissions, the Claimants set out further figures from Mr Sills, which reflected the effect of adjustments if various criticisms made by Mr Fier were to be accepted. Their effect was as follows:

Tranche	Film(s)	Sills Adjusted probability
1	Pirates 2	16.67%
2	Pirates 3	37.5%%
3	National Treasure 2	30.91%
4 (i.e. No 35 LLP)	Enchanted and Underdog	26.42%
5 (i.e. No 40 LLP)	Confessions	11.11%

XXVII(iv): Analysis

409. It is striking that two experts, both experienced, competent and honest, could come to such different views; and, indeed, that Mr Sills's views on Tranches 1 and 3 could be changed so dramatically by adjusting various parameters. It is also striking that Mr Sills ultimately came to the view that the prospect in relation to Tranche 1 was 0% (for Pirates 2), unless Mr Fier's criticisms were taken into account, when this was in fact the project that came closest to producing Contingent Receipts and arguably should have done so: see the FTT judgment at [94] and [286].

410. Both experts accepted that the process is not wholly scientific, that it requires the exercise of judgment rather than mere statistical analysis and that equally skilled professionals could hold a range of differing views. The reasons for the differences between them largely related to their choices of comparable historic films. Other factors included the use of weighted averages for revenue and expense ratios or simple averages; whether forecasts for the second revenue cycle (i.e., after the cycle of theatrical revenue) should reflect a shift over time from television to home video; and whether the figures for costs in relation to Pirates 2 and 3 should be based on contemporaneous estimates rather than actual figures.

411. There is no clear right or wrong answer on these points (save the last: it seems to me that the contemporaneous estimates should be used, per Mr Fier's report). They demonstrate that it is unarguable that a range of views is possible in principle. This in turn makes it difficult for the Claimants to show that it was not reasonable for Future Films or HSBC to have held the opinion that there was a real prospect of Contingent Receipts.

412. The fact that Mr Sills ultimately came to the view that there was a 0% chance of Contingent Receipts in relation to Tranche 1 (Pirates 2), when the actual experience in relation to that film seems to have been that it at least came very close to paying Contingent Receipts and for several years seemed likely to do so, suggests to me that his approach is, in general unduly cautious.

XXVII(v): Conclusion

413. Mr Howells suggested, and I agree, that it is not necessary for me to land on a specific percentage probability for each Tranche, or for each LLP. It is enough to say that, on Mr Sills's evidence, the case that there was no real prospect of Contingent Receipts cannot succeed on Tranches 3, 4 and 5; and that I am not persuaded that the probability in relation to either of Tranches 1 and 2 was 0% or close to it. In every case, there was at least a real prospect of Contingent Receipts, even if that prospect reflected a low percentage chance.

XXVIII: Representations regarding Mr Peacock QC's advice

XXVIII(i): The relevant representations

414. In Section XXI above, I have considered the representations relevant to Mr Peacock QC's advice and how they fall to be analysed. I accept that representations regarding Mr Peacock QC's advice were made both by Future Films and by Mr Bowman (on

behalf of HSBC). However, I do not accept that the relevant representations were precisely the same as the Advice Representation alleged by the Claimants.

XXVIII(ii): Representations by Future Films

415. I have no doubt that the crucial passage in the Information Memorandum not only stated that Future Films expected the investment to work in the manner outlined in Mr Peacock QC's advice, but also impliedly represented that Future Films had reasonable grounds for this.

416. The Information Memorandum was provided to and considered by most investors, including most of the Claimants' Sample Witnesses. I infer that it was provided to all IFAs, who then based their advice largely on its contents (this being the purpose of providing it to IFAs). Whether directly or indirectly, therefore, the representations in the Information Memorandum were made by Future Films to the Claimants.

XXVIII(iii) Representations by HSBC

417. I also have no doubt that Mr Bowman's Note impliedly represented that the structure on which Mr Peacock QC had advised was the same as the actual structure adopted. Mr Bowman's Note was provided to Mr McIntyre and Mr Pickard, who also received an oral presentation based on it. While neither Mr Best nor Mr Burke could recall the details of their meetings with Mr Bowman, it seems reasonable to assume that the presentations given by Mr Bowman to them were based on the same material, Mr Bowman having developed his Note for exactly this purpose.

418. Like the representations made by Future Films, whether the structure adopted was the same as that on which Mr Peacock QC had advised ultimately depended on whether the Marketing Services Agreement (and related transaction documents) meant that the MSP owed fiduciary duties to the LLP, as its agent. This was a matter of opinion, in relation to which Mr Bowman was undoubtedly in a much stronger position than any of the Claimants to whom he provided this Note or made presentations similar to it (i.e., the Ernst & Young partners, Mr McIntyre and Mr Pickard, as well as Mr Best and Mr Burke). Accordingly, he thereby both (a) represented that this was in fact his opinion and (b) also represented that he had reasonable grounds for holding this opinion.

419. In so doing, Mr Bowman was acting in his capacity of Director of HSBC. HSBC therefore is vicariously responsible for the representations made by Mr Bowman.

420. It is worth repeating at this juncture that Mr Bowman's Note and his oral presentations positively encouraged prospective investors to take advice from an IFA (Cavanagh, in the case of the presentation to the Ernst & Young partners) and ask them for further information. This further information would be based on the Information Memorandum, a copy of which would be provided to most prospective investors by their IFAs. Mr Bowman not only knew that Future Films was providing the Information Memorandum to IFAs for marketing purposes, it seems likely that he personally supplied 100 copies to some IFAs, presumably including Cavanagh.

421. It follows that Mr Bowman at least took a very active role in ensuring that Future Films' representations in the Information Memorandum would be received by potential investors, specifically the Ernst & Young partners (including Mr McIntyre and Mr

Pickard), Mr Best and Mr Burke. This was one of the intended purposes of what he said to potential investors.

XXIX: Reliance

XXIX(i): Intention that potential investors should rely

422. In all the circumstances, there can be no question but that Future Films and Mr Bowman intended that the representations set out in Section XXVIII above should be relied on by potential investors, including the Claimants.

XXIX(ii): Reliance by the Claimants' Sample Witnesses

423. I cannot decide as a matter of evidence whether all the Claimants relied on these representations, having only received evidence from a small sample. Nevertheless, the undoubted materiality of the representations to the decision that they had to make makes this inherently likely, and almost certainly something I would be entitled to assume.

424. In relation to the Claimants' Sample Witnesses, I was persuaded by their evidence that each of them did, in fact, rely. My reasons are set out in Section XXV(iii) above and in Appendix 5.

XXX: Falsity

XXX(i): The Claimants' pleaded case as to falsity

425. This is where a critical difference emerges between the relevant representations that I have found, and the Advice Representation alleged by the Claimants. It highlights why it matters that the Claimants did not analyse and plead out their case in a conventional manner.

426. The Claimants' case as to falsity of the Advice Representation was not really developed in the Re-Re-Re-Amended Particulars of Claim, but was explained in their Amended Reply, primarily on the following basis:

> "31. On the terms of the MSP Agreement, the MSP was not an agent for the Eclipse Partnership, nor did it otherwise provide any services for the benefit of the Eclipse Partnerships. It was not appropriately staffed by senior Disney executives with the requisite expertise and attributes. Rather than having the Trade (still less a "*large and complex*" Trade), the Eclipse Partnerships had passive investment businesses and made no decisions ("*key*" or otherwise) on the marketing and distribution of the relevant films, such decision-making remaining in-house at Disney. Further, and in any event, the transactions were operated such that the Trade (or a trade) was not being carried on through the MSP as the Eclipse Partnerships' agent or otherwise, the MSP could not actually undertake the role assigned to it, and the appropriate secondments to the MSP were not made."

427. Two other matters were also relied on – that the bulk of the funds would be invested in a trade rather than applied in a circular money-flow, and that the profits of the Eclipse LLPs would be generated by speculative profit from the exploitation of film rights. I have already explained why those matters cannot help the Claimants. What remains,

therefore, is that the relationship between the MSP and the LLP was not as outlined to Mr Peacock QC: in particular, in that it was not an agency relationship.

428. By the time of their written Closing Submissions, the Claimants' case focussed solely on the matters set out in paragraph 31 of their Reply, and specifically on the fact that the MSP was not an agent. Mr Coppel KC confirmed this to me during oral closing submissions.

429. Once it is recognised that the relevant representations related to matters of expectation and/or opinion, it is obvious that the mere fact that the MSP was not an agent is not enough.

XXX(ii): Did Future Films/Mr Bowman have the expectation/opinion?

430. Mr Coppel KC's submissions did not directly address the question whether either Future Films or Mr Bowman in fact expected the investment to work in the manner outlined in Mr Peacock QC's advice, or held the opinion that the structure adopted was the same as that on which Mr Peacock QC had advised. However, Mr Coppel KC certainly made submissions to the effect that Future Films and Mr Bowman knew or shut their eyes to the fact that what they said about Mr Peacock QC's advice was false (addressed in Sections XXXI and XXXII below). I inferred from this that the Claimants' case therefore must be that Future Films and/or Mr Bowman did not in fact have the represented expectation/opinion.

431. Because most of the submissions relevant to this point approached it from the perspective of knowledge, I will address them in the relevant Sections, below, under that heading. However, it is worth underlining that Mr Levy invested £2,359,879 of his own money in the scheme. It would be surprising if he had done so without expecting the investment to work.

432. Mr Bowman's investment was not as substantial, but it was not trifling: £75,299.

XXX(iii): Did Future Films have reasonable grounds?

433. I have noted in Section XII above the reference in the Addenda to a review by DLA, and have explained my conclusion that there was such a review by DLA, and that what DLA said was consistent with Mr Gough's email of 27 February 2006 – i.e., that the restrictions introduced by Olswang, on behalf of Disney, "do not take away the agency of the MSP, albeit they limit its fiduciary duty".

434. We know that this was DLA's advice in relation to the Waiver Letters, on 27 February 2006. It is likely that similar advice was given orally, at about the same time, in relation to the Marketing Services Agreement. Thereafter, DLA reviewed and must have approved the Addendum for Tranche 1, including its statement that DLA had reviewed the transaction documents.

435. It was common ground before me that what Mr Gough said in his email of 27 February 2006 was incorrect; and, more broadly, that it was not the case that the transaction documents were consistent with Mr Peacock QC's advice. However, Mr Gough's email was not sent only to Mr Clarance of Future Films. It was copied to several other

lawyers within DLA, and to the Richards Butler team. None of them queried what Mr Gough said. Unlike these copy recipients, Mr Clarance was not a lawyer.

436. I do not see why a lay client such as Future Films was not entitled to take the advice received from Mr Gough at face value and rely on it; especially when no dissenting view was received from any other lawyer. Accordingly, the fact that DLA certainly seems to have reviewed the Waiver Letter and the Marketing Services Agreement and regarded them as consistent with the MSP being the LLP's agent, and (as I have found) probably reviewed the transaction documents as a whole, means that Future Films had reasonable grounds for their expectation/opinion.

XXX(iv): Did Mr Bowman have reasonable grounds?

437. Mr Bowman attended the consultations with Mr Peacock QC, along with DLA. He was also copied into various exchanges regarding the instructions that preceded those consultations; and regarding the notes that emerged from them, which ultimately took the form of the Consolidated Peacock Note.

438. However, he was not copied into the exchanges regarding the negotiation and drafting of the transaction documents in February and March 2006. That is, he did not see the transaction documents in draft or even in their final form prior to the closing of Tranche 1 (or, so far as I am aware, even for some time after that); and he did not see the exchanges in which Future Films queried whether the documents were consistent with the MSP being an agent, and the lawyers gave their views on this.

439. There are three qualifications to this.

(1) Mr Bowman must have seen, read and accepted the terms of the Member's Waiver Letter, which was part of the subscription pack for his investment in Tranche 1.

(2) As an investor, Mr Bowman is likely to have received a copy of the Addendum for Tranche 1, just as Mr McIntyre did, probably shortly after Tranche 1 closed. He therefore will have seen at that time, even if no earlier, the reference to a review by DLA.

(3) He was of course aware of the terms of the Future-HSBC Agreement, between HSBC and Future Films. However, this had no bearing on whether the MSP was an agent.

440. The Claimants said that, under the terms of the Future-HSBC Agreement, HSBC had agreed to provide advice in relation to tax, and to liaise with accounting and legal advisers to Future Films. They said that it therefore was incumbent on HSBC to check that the structure as implemented was consistent with the basis of Mr Peacock QC's advice, and that Mr Bowman therefore should himself have sought advice on this from DLA. Indeed, they said that it was highly suspicious that he had not done so.

441. The definition of the services under the Future-HSBC Agreement is broad, but it does not seem to me to impose a positive obligation on HSBC to provide advice on every conceivable point that could possibly fall within the words "advice relating to taxation, accounting and banking in respect of the formation, financing, structure and operation of the Partnerships". The reality was that HSBC took the lead in devising the structure,

and Future Films took the lead in implementing it. There was considerable overlap. However, once detailed negotiations of the transaction documents were under way, Future Films was heavily involved in that process and HSBC was not. It therefore was natural for Future Films to put the relevant questions to the lawyers, not HSBC; and for HSBC to count on Future Films to get this done appropriately.

442. Neither side appears to have seen it as incumbent on HSBC to seek advice from DLA or from any other lawyer, and it is telling that at no stage did Future Films ask HSBC (whether Mr Bowman or anyone else) whether they had done so, let alone complain that this had not been done. The email record does not suggest that Mr Bowman ever sought to confirm that Future Films was undertaking this responsibility, but it seems to me likely that he assumed this. When he saw the Addendum for Tranche 1 (and the similar text in later Addenda), that assumption will have been confirmed.

443. If, as seems likely, Mr Bowman assumed that Future Films was getting DLA's views on the suitability of the transaction documents, this was itself a reasonable assumption, for the reasons given in Section XXX(iii) above – i.e., because the assumption was correct. Future Films had sought DLA's views, and DLA had confirmed that they were happy that the MSP was an agent.

444. The suggestion that HSBC should itself have consulted DLA is, therefore, peculiar, in two respects.

(1) First, Mr Bowman was not in a position to do this, because he (and others at HSBC) did not have sight of the draft transaction documents. He therefore was not able to question DLA about their suitability. That is why Future Films took the lead in this regard.

(2) Second, if he had done so, the answer received would have been the same as the answer that Mr Gough of DLA gave Future Films on 27 February 2006.

445. I therefore conclude that Mr Bowman did have reasonable grounds – namely, his reliance on Future Films and DLA. That it had been reasonable of him to rely on them was confirmed when Mr Bowman first had sight of the Addendum for Tranche 1. At this point (even if no earlier) he saw the express statement that DLA had reviewed the transaction documents, in an Addendum which had itself been approved by DLA.

XXXI: Knowledge/dishonesty of Future Films

XXXI(i): Knowledge, blind-eye knowledge, recklessness, dishonesty

446. In its simplest form, deceit involves a false representation, which the representor actually knew was false at the relevant time.

447. Deceit is not confined to cases involving actual knowledge, however. It also includes the situations where the representor has shut his eyes to the facts, or has purposely abstained from inquiring into them, or has no belief in the truth of the representation, or is reckless or careless as to its truth. Deceit is concerned with fraud; to prevent a false statement from being fraudulent, there must be an honest belief in its truth. This has been settled law for many years, at least since *Derry v Peek* (1889) 14 App Cas 337, at p. 374. I was referred to several authorities that expand on this, and provide examples

of the many different categories of knowledge that can be relevant, as well as the many different forms of dishonesty that can arise. Very few (if any) have improved on the following observation from *Derry v Peek*, in the submissions made by Sir Horace Davey (later, Lord Davey), at p. 339:

> "Fraud never has been and never will be exhaustively defined, the forms which deceit may take being so many and so various. There is a negative characteristic: it must be something which an honest man would not do; not merely what a logical or clear-headed man would not do."

448. Most of the submissions I received as to the evidence on this part of the case related to knowledge – primarily actual knowledge and blind-eye knowledge. I deal with them under a heading that refers both to knowledge and to dishonesty to emphasise that I have well in mind the full breadth of the doctrine.

XXXI(ii): The Claimant's case in relation to Future Films

449. I have summarised the Claimants' general case on knowledge/dishonesty in Section XXI(iii) above. Specifically in relation to Future Films, they said that Future Films knew even in advance of the negotiations with Disney that it was unlikely that any studio would agree to the proposed MSP agency arrangements, at least if they involved studio employees being seconded on terms that resulted in their owing fiduciary duties to the Eclipse LLP, rather than being able to favour the studio's own interests. Not only did Warner regard this as "a deal-breaker" (per Mr Molner's email to Mr Levy of 14 December 2005), a number of other studios did as well: Sony, Universal and Paramount, as recorded in the FTT judgment at [83].

450. The Claimants said that Future Films therefore went into the negotiations with Disney not even suggesting that control over strategic decisions would pass to the LLP, via the MSP. The presentation provided to Disney for the meetings in mid-December 2005 said:

> "Day-to-day activity of studio executives (Licensing & Marketing Services Agents) substantially unaffected, with additional reporting requirements."

451. Thereafter, Future Films knew full well what terms Disney actually agreed, and what Disney also required in the Waiver Letters.

452. The Claimants' case on this culminated with the submission that Future Films did not go back to Mr Peacock QC in order to ask him to approve the terms agreed with Disney; Future Films deliberately did not provide Richards Butler with a copy of the Consolidated Peacock Note; and Future Films did not ask DLA to review the transaction documents for consistency with the basis of the advice given by Mr Peacock QC in that Note.

XXXI(iii): Future Films' initial negotiations with Disney

453. I accept that Future Films, like Mr Bowman, knew in advance that it would be difficult to persuade a studio to cede control over strategic decisions over marketing and distribution. However, my impression from the exchanges on this topic is that the

individuals involved were, nevertheless, hopeful. Furthermore, they recognised that, if no studio would agree, then the scheme could not proceed, at least in the intended form.

454. When Mr Levy gave evidence in the HMRC Proceedings, he was asked about the negotiations with Disney and the end-result. He gave a lengthy answer, acknowledging that Future Films had known that the negotiations would be difficult and that they were difficult, before concluding with the following:

> "It was a very difficult issue to deal with, and we ended up where we ended up, which we believe was actually a transaction that was in the interests of the LLP and its members."

455. I did not have the benefit of receiving Mr Levy's evidence directly, but I see no sign in the FTT's judgment that they did not think that this evidence was an honest reflection of Mr Levy's understanding. I have already noted the magnitude of Mr Levy's personal investment in Eclipse.

456. As to the presentation to Disney, Mr Molner gave evidence about this to the FTT as follows:

> "A. I would say that is me doing a bit of selling. If you walk in and you say really all the things that you want and that they are actually going to have to do, which are actually pretty substantial, I am not sure you would get the second meeting.
> Q. So it's important to get the second meeting but presumably at some point you are going to have to break the news, if that's the case?
> A. Yeah, but as I say, the deal dynamic in Hollywood is one that has to be carefully nurtured, and when you get down the down far enough and you have a termsheet and you have agreed a number of cornerstone things, it's acceptable and in many ways more appropriate for some of the other requirements to evolve at that point, because people are more entrenched and more committed to the deal and the truth is it's easier to get them to say yes to those requests down the line."

457. In short, the initial presentations does not reflect limited desire on Future Films' part to get what they wanted from the negotiations. It just reflects Mr Molner's perception of the best way of achieving that goal.

458. Furthermore, it is fair to note that the presentation still used the word "agent" fairly conspicuously, which itself was a reasonable indicator that fiduciary duties were intended.

XXXI(iv): The contractual negotiations in February/March 2006

459. When more detailed discussions followed in February 2006, between Richards Butler and Olswang, the draft terms were at first consistent with a relationship of agency. It was Olswang's revisions that affected the position.

460. Those revisions, and the draft Waiver Letter associated with them, led to Mr Clarance's email of 23 February 2006, to the discussion that Mr Clarance requested (and which I infer took place) and to Mr Gough's email of 27 February 2006.

461. Accordingly, it is not the case that Future Films did not even attempt to get suitable terms from Disney. Nor is it the case that Future Films deliberately failed to get DLA to review the documents. On the contrary, Mr Clarance raised precisely the correct questions with DLA, and got reassuring answers – certainly on the Waiver Letters, but also, on my view of the evidence, on the Marketing Services Agreement.

462. It is true that Future Films does not seem to have specifically asked DLA to review the Distribution Agreement, following agreement of the terms at about the end of March 2006. It is also not clear whether Richards Butler received a copy of the Consolidated Peacock Note. However, neither of these facts is sufficient to make out blind-eye knowledge, recklessness or any kind of dishonesty. Future Films had no reason to think that DLA would have said anything different about the Distribution Agreement. In any case, DLA's evident approval of the statement in the Addenda that they had reviewed all the transaction documents confirms that DLA were, in fact, happy with the Distribution Agreement (just as with the other documents). DLA were the tax advisers to Future Films, so their blessing was sufficient.

XXXI(v): Mr Clarance's emails in May 2006

463. Finally, the email exchanges between Mr Clarance and Mr Molner of SCI on 6 and 14 May 2006 seem to confirm that, at least until that time, Mr Clarance's understanding was that the MSP was the LLP's agent, that it owed duties to the LLP and that all the work done in relation to Marketing and Release Plans (i.e., by secondees) was supposed to be documented. Mr Clarance clearly had in mind that matters that had been stressed by Mr Peacock QC as "vital". He would not have taken the stance that he did with Mr Molner, if he had known all along that the Marketing Services Agreement did not create an agency relationship and was not consistent with the basis on which Mr Peacock QC had advised. This confirms that, in February 2006, he had been reassured by what he was told by Mr Gough.

XXXI(vi): Conclusion

464. I therefore am satisfied that Future Films acted honestly, at least up to May 2006.

465. On the other hand, his exchanges with Mr Molner in May 2006 must have led Mr Clarance to understand that what was being done in the LLP's name in relation to marketing and distribution was limited, and that it was at least doubtful whether it satisfied Mr Peacock QC's requirements.

466. I do not know whether Mr Clarance reported his exchanges with Mr Molner to anyone else within Future Films. Nor do I know what consequences (if any) flowed, either within Future Films or between Future Films and anyone else – SCI, the MSP or DLA. If there is any evidence that sheds light on this, it was not brought to my attention. I would have expected Mr Clarance or others within Future Films to have pursued this. Any failure by Future Films to do so would begin to look as if, at least from this point, Future Films may have been shutting its eyes to the truth.

467. However, the Claimants did not place any reliance on the exchanges between Mr Clarance and Mr Molner in May 2006. This may be because their claim is not against Future Films but against HSBC. Establishing dishonesty against Future Films from May 2006 onwards would not assist the Claimants, unless this were relevant to HSBC.

There is no indication that anything that Mr Clarance learnt in May 2006 was ever brought to the attention of Mr Bowman or of anyone else at HSBC.

XXXII: HSBC's knowledge/dishonesty

XXXII(i): The Claimants' case in relation to Mr Bowman/HSBC

468. Much of the Claimants' case in relation to Mr Bowman/HSBC was similar to the case as to the knowledge and/or dishonesty of Future Films, summarised in Section XXXI(i) above. They said that, like Future Films and SCI, Mr Bowman knew from the outset that it was unlikely that any studio would agree to the proposed MSP agency arrangements. In this regard, they relied on Mr Bowman's email of 14 December 2005, cited in paragraph 161 above. They said that, with this knowledge, it was essential for Mr Bowman/HSBC to check that the transaction documents met Mr Peacock QC's requirements.

469. They also pointed to evidence suggesting that Mr Bowman himself had originally intended the transaction documents to be approved by Mr Peacock QC, and they noted that other witnesses from HSBC (in particular, Mr Surtees) agreed that it was important to check that the structure as implemented was consistent with Mr Peacock QC's advice. They said that, in all the circumstances, HSBC's failure to conduct any such check meant that it was shutting its eyes to the truth. It therefore is fixed with blind-eye knowledge.

470. Next, the Claimants said that Mr Bowman in any event acquired actual knowledge of the true position, from the Waiver Letters. Mr Bowman invested in three Eclipse LLPs in Tranche 1, and in each case the subscription pack will have contained a Waiver Letter, which he must have signed and returned. The Claimants said that the terms of each Waiver Letter made it obvious that no fiduciary duties were owed to the LLP, so there could not be the agency relationship that Mr Peacock QC had described as "vital".

471. Finally, the Claimants relied on the email exchange between Mr Bowman and Mr Surtees of HSBC of 7 February 2008, relating to the 7 Arts project.

XXXII(ii): Blind-eye knowledge

472. The fact that Mr Bowman knew that it would be difficult to persuade Disney (or any studio) to accept the proposed MSP agency arrangement takes matters no further in relation to him than the same point does in relation to Future Films or Mr Molner.

473. Mr Bowman attended the meeting with Disney on 12 December 2005, which seemed to go well. On 15 December 2005, when Mr Bowman was back in the UK, Mr Molner announced that heads of terms had been agreed with Disney, and they were signed a few days later (subject to contract). Mr Molner appears to have believed that he had achieved the desired objective, and that is what his reports will have conveyed both to Future Films and to Mr Bowman.

474. Mr Bowman was not involved in the drafting process that followed, in February 2006. However, it is of interest that, when the first draft of the Marketing Services Agreement was produced (on about 3 February 2006), it unequivocally provided for the MSP to be appointed as the LLP's agent and did not contain limitations that were inconsistent with

fiduciary duties or agency status. That suggests to me that, when Richards Butler were instructed to prepare it, they understood that the agreement they were to flesh out was – as its title suggested – an agency agreement. If so, that tends to confirm that, at least on the part of Future Films and SCI, this was where they thought Mr Molner had landed.

475. I do not see why it was incumbent on Mr Bowman to be more sceptical, nor why it was incumbent on him to check that the final terms were suitable. The fact that he at various occasions in 2005 expressed the view that they should be checked did not mean that it was up to him to do this. The party giving instructions to DLA and Richards Butler was Future Films. Neither firm reported on the drafting to HSBC, which was not their client; they reported to Future Films and SCI. Mr Bowman never even received copies of the drafts.

476. It therefore was entirely natural for Mr Bowman to leave it up to Future Films to check that the draft transaction documents were suitable and consistent with Mr Peacock QC's requirements. Furthermore, he was not only entitled to assume that Future Films would undertake this, he was right so to assume. Future Films did do this, by the emails from Mr Clarance to Mr Gough of 23 and 27 February 2006.

477. I therefore do not accept that Mr Bowman was shutting his eyes to the truth or purposely abstaining from inquiring into it. There is no basis for the Claimants' case that HSBC had blind-eye knowledge.

XXXII(iii): Mr Bowman's Waiver Letters

478. The argument that the Waiver Letters meant that Mr Bowman had actual knowledge that the MSP was not the LLP's agent is one that could only appeal to a lawyer. I have summarised the content and effect of the Waiver Letters in Section XI(iv) above. No ordinary lay person would read legal drafting of this kind and ask themselves whether it was consistent with the MSP being the LLP's agent.

479. This instinctive assessment is confirmed by the Claimants' evidence. Of the Claimants' Sample Witnesses, Mr Goodwin, Mr Margolis, Mr Upham, Mr Lenthall, Mr McIntyre and Mr Pickard all gave evidence that they received and read the Consolidated Peacock Note. If so, then they knew just as well as Mr Bowman did that Mr Peacock QC had said that it was "vital" that the MSP be the LLP's agent. They all signed Waiver Letters in the same terms as Mr Bowman. It evidently did not occur to any of them – not even Mr Lenthall – that the Waiver Letters were obviously inconsistent with the Mr Peacock QC's advice.

480. Mr Coppel KC suggested that Mr Bowman was not to be equiparated with the ordinary layman, because of his many years' experience as a tax partner in Ernst & Young. That experience made him knowledgeable about tax structures and, to some extent, tax law. It did not give him any special knowledge about the law of agency. Indeed, it did not put him into any different category from Mr Pickard, who also had many years' experience as a tax partner in Ernst & Young.

481. I therefore reject the submission that Mr Bowman's Waiver Letters gave him actual knowledge (or any other kind of knowledge) that the MSP was not the LLP's agent or that the representations in the Information Memorandum and in Mr Bowman's own Note were false or misleading or contained incorrect opinions.

XXXII(iv): The 7 Arts emails

482. This point relates to an email exchange that I have not dealt with when setting out the factual background of Eclipse, because it is not part of the factual background of Eclipse. The emails in question related to a different project, about which I was told very little and which I therefore assume has no direct connection to Eclipse.

483. The relevant emails were all sent on 7 February 2008, as follows:

(1) Mr Williams of HSBC sent an email to Mr Surtees about the 7 Arts project, which was copied to Mr Bowman and which included the following point:

> "2) As you know we haven't seen the detailed transaction description document that Dominic has been working on with Peter. As such I am at this stage unable to comment on how perfectly (or otherwise) the actual arrangements will reflect those which we discussed with Counsel."

(2) Mr Surtees responded:

> "As with Eclipse and Future I do not think we will ever know how closely the actual execution matches the arrangements discussed with counsel and in some respects we might agree with Neil on Monday that the less we see or know the better."

(3) Mr Bowman replied to Mr Surtees:

> "I agree your points"

484. Mr Surtees dealt with these emails in his Second Witness Statement. He said that he had no particular memory about them, because they did not stand out. His explanation, which therefore was reconstruction rather than recollection, was as follows:

> "My recollection is that, as a general matter, HSBC did not wish to be involved in the implementation or execution of any schemes or structures: this was beyond our remit. I recall at the time that there was discussion within HSBC that it was important that all parties remained aware of the remit of HSBC's role when advising on these schemes/structures and that we stayed within our agreed scope. This is the context in which I wrote the "7 Arts" email. Although I have no particular memory of writing it, I believe that what I was getting at is that because of our advisory role, which was akin to the one played in Eclipse, and which was removed from the actual implementation and operation of the scheme, we would not necessarily know how the scheme was actually implemented and it would be better to maintain a certain distance from the implementation. It was beyond our contractual remit (as far as I recall) to become involved any further than was necessary to give advice when required to do so by Future"

485. Mr Surtees's evidence that HSBC generally wanted a limited remit is consistent with other evidence, showing that others within HSBC (in particular, Mr Spooner) wanted to limit HSBC's involvement and visibility and so vetoed the idea of HSBC's name featuring in the Information Memorandum – even though that was something that Mr Bowman had wanted. This was not for sinister reasons – it has never been suggested

that Mr Spooner was dishonest. It was simply a matter of general caution. The smaller the bank's role, the smaller the risk to the bank.

486. Mr Surtees was asked about this email in cross-examination, but maintained this position in evidence. I was persuaded that his evidence on this was honest. In any event, as I have already noted, in the event Mr Coppel KC chose not to put dishonesty to Mr Surtees.

487. If (as I find) Mr Surtees's intentions when sending his email were innocent rather than dishonest, and if (as I find) they reflected HSBC's general approach to such matters, then the 7 Arts emails cannot help the Claimants to establish dishonesty as against Mr Bowman.

XXXII(v): Mr Bowman's statements to others

488. The Claimants (and the Stewarts Law Claimants) drew attention to various statements made by Mr Bowman to others, that reflected the state of his belief on the agency point.

(1) On 16 December 2005 (i.e., a day after he had been told by Mr Molner that Disney had agreed, subject to contract) Mr Bowman told Peter Chadlington, a potential investor who was not a Claimant, that:

> "We agreed a deal with disney which is remarkable as they have offered the jewels in the crown."

This was cited as an example of Mr Bowman's mendacity and dishonesty, but it seems to me to evidence, rather, Mr Bowman's genuine excitement and belief that Mr Molner had landed the deal that Future Films and HSBC, alike, wanted and needed.

(2) On 21 March 2006, Mr Bowman had a conversation with Mr David Mattu, Tax Director at Ernst & Young, in which he said:

> "The role of the agency company ... is to sort of act on behalf of the partnership, and it will have experts – both its own experts and experts from Disney – and their role is to review the marketing plan, and [either[7]] will agree with it or disagree with it and make recommendations ....the expert is actually going to be – you know, there's going to be one or two experts putting people who are specialists in reviewing marketing plans – it will be completely independent from Disney – and then there will be Disney people in there…. And you know, the role of that is – and Counsel made it very clear in his opinion that that's got to do something, it's got to actually sort of add value…"

Once again, it was suggested that this was an example of Mr Bowman's mendacity and dishonesty. Once again, it seems to me, rather, to suggest that what he said was what he believed. If he had known, when he had this conversation, that the MSP would not in fact be an agent of the LLP, I do not see why he would have gone to the trouble of talking at great length about how important it was that it would be an agent.

[7] The Transcript says "I will" but this appears to be a transcription error..

(3) On 16 and 17 May 2006, Mr Bowman sent emails to/about various IFAs, again stressing the role of the MSP and stating that HSBC would monitor its activities, at least to some degree:

> "The important issue being that the agent [i.e. the MSP] must be seen to work actively throughout the period of the exploitation arrangements and as I said we ourselves would expect to ensure, as far as we can, that this is carried out effectively"
>
> (16 May 2006 email to Andersen Charnley)
>
> "Their other key issue is to ensure that the partnerships trading status remains and I indicated to them that the MSP plays a key issue and I will keep a watching brief on the activities of this company as of course a considerable amount hangs on this part of the analysis"
>
> (17 May 2006 email to Future Films, about a recent meeting with IFAs)

489. There is no evidence that Mr Bowman or anyone else at HSBC in fact thereafter made any real effort to monitor the MSP's activities. However, these aspects of what Mr Bowman said I regard as good intentions before the event – in other words, unjustified over-enthusiasm, rather than dishonesty. However, the fact that Mr Bowman said in an email to Future Films that trading status was a key issue and that the MSP played a key part in this is distinctly interesting. If both he and Future Films knew that this was untrue, and if each knew that the other knew that it was untrue, then, while I understand (but do not accept) the Claimants' case that Mr Bowman had a reason to lie to IFAs, I do not understand, and the Claimants could not explain, why he lied in his email to Future Films.

490. I therefore do not regard these other statements of Mr Bowman as assisting the Claimants' case. Seen in their proper context, they do the opposite.

XXXII(vi): Conclusion

491. I therefore do not accept the Claimants' overall case that Mr Bowman knew (in any sense of that word) that representations made by him or by Future Films were false, or that he was dishonest.

XXXIII: Conclusion on deceit

XXXIII(i): Burden of proof

492. The parties cited a number of authorities to me relevant to the standard of proof in cases of civil fraud – notably, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, per Lord Hoffmann at [55]; and *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35; [2009] AC 11, per Baroness Hale at [70]-[72] and also per Lord Hoffmann at [13]-[15]. The civil standard is always "more likely than not"; but proving to that standard that something is inherently unlikely may require more cogent evidence (depending on the circumstances). Deceit

and dishonesty are relatively unusual, so may require more cogent evidence, unless there is some independent reason for thinking that the individuals involved may have a propensity to be dishonest.

493. There was no real disagreement between the parties as to the principles in this regard, only as to their application. In the event, I have not found it difficult to decide the Claimants' case in deceit, and my decision does not depend on the incidence or standard of the burden of proof. The burden of proof is more relevant to some other points, notably quantum and limitation, which I address later, in Sections XL and XLI, below.

XXXIII(ii): Conclusion

494. The Claimants have established that representations were made, which were related to but different from the Advice Representation that they alleged. They have also established reliance.

495. However, those representations, as analysed and found by me, were not false.

496. In any event, neither Future Films nor Mr Bowman knew that they were false, on the contrary they had reasonable grounds for the matters of expectation and opinion to which the representations related, and they were not dishonest.

497. I have considered how I would have dealt with deceit if I had accepted that the representations fell to be analysed as the Claimants alleged, and on the basis that they had persuaded me on their case as to the Advice Representation. My conclusion would have been that the Advice Representation, even if incorrect, was at most a misrepresentation made innocently, because it was based on reasonable grounds. This was the answer that Mr Green KC pressed on me, on behalf of HSBC.

498. On either analysis, the Claimants' case in deceit fails.

XXXIV: Direct representations by HSBC

499. Mr Bowman made direct representations to a number of the Claimants' Sample Witnesses, for which HSBC is responsible. As well as the presentation to Ernst & Young partners on 2 March 2006, which was attended by Mr McIntyre and Mr Pickard, Mr Bowman also had private meetings with Mr Best and Mr Burke.

500. There was also a meeting between Mr Bowman and Mr Lenthall, but the context was different and it had no effect on Mr Lenthall's decision to invest.

501. The presentation to Ernst & Young partners accompanied and expanded on Mr Bowman's Note. It is not certain precisely what Mr Bowman said to Mr Best or Mr Burke, but it seems likely that he made a representation consistent with the extract from his Note that I have set out at paragraph 154 above. At all events, he encouraged the Ernst & Young partners and Mr Best and Mr Burke to rely on what they were told about Eclipse by their IFAs, and he knew that this would largely reflect the Information Memorandum.

502. These direct representations had a material effect on the decision made by each of Mr McIntyre, Mr Pickard, Mr Best and Mr Burke to invest in Eclipse. In part, they relied on what Mr Bowman said and the impression that he made on them as the person

responsible for devising the scheme. They also were induced by what he said to rely on from the Information Memorandum, and/or the associated information that they received from their IFAs.

503. Accordingly, if I had accepted the Claimants' case in deceit, the claims of these Claimants' Sample Witnesses would have succeeded against HSBC at least as regards liability, on the basis of these direct representations. In the event, however, this does not arise.

XXXV: Joint tortfeasance and conspiracy

XXXV(i): The Claimants' case

504. The principal representations, however, were not made by Mr Bowman directly, but were made by Future Films, chiefly in the Information Memorandum and the Addenda. The Claimants' primary case that HSBC is liable for these representations by Future Films was put on the basis that Future Films and HSBC were liable together, either as joint tortfeasors or on the basis of a conspiracy to use unlawful means.

505. The Claimants' case in joint tortfeasance was put on the basis that HSBC (in the person of Mr Bowman) assisted or facilitated Future Films by combining with it to carry out the conduct that constituted the deceit. The leading authority cited by the Claimants was *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10; [2015] AC 1229, at [20]-[22]. The Claimants said that there was a common design or shared intention between Future Films and HSBC.

506. The Claimants' case in conspiracy was put on the basis that there was a combination between Future Films and HSBC to use unlawful means – deceit – to injure the Claimants, with knowledge of the unlawfulness, pursuant to which Future Films made the representations in the Information Memorandum and Addenda (and, in so far as relevant, in other documents such as the Key Features). A large number of authorities were cited, notably *Kuwait Oil Tanker Company SAK v Al Bader* [2000] EWCA Civ 160, [2000] 2 All ER (Comm) 271 at [108]-[112]. The most recent was *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm).

507. The challenge to this case from HSBC related to whether there was a combination (or common design or shared intention) between Future Films and HSBC, and (for unlawful means conspiracy, alone) whether HSBC had an intention to injure the Claimants.

508. Mr Green KC objected that the Claimants had failed to say when the combination occurred, and had also failed to explain or make out a case of intention to injure.

XXXV(ii): Analysis and conclusion

509. I had some sympathy both with Mr Green KC, who found it difficult to identify the case he had to meet, and with Mr Coppel KC, who found it difficult to be more precise. Their respective problems both arose from the fact that deceit, which was relied on by the Claimants as the basis for their arguments both in joint tortfeasance and in conspiracy, was not made out.

510. If Mr Coppel KC had been able to point to any real evidence that Future Films and Mr Bowman both knew that the crucial representations in the Information Memorandum and the Addenda were false, and furthermore that Mr Bowman knew that Future Films knew this and vice versa, he would necessarily have established fraud and dishonesty, common to both Future Films and Mr Bowman. The detailed features of this evidence would then have enabled him to spell out the Claimants' case on combination and on intention to injure. He could not in fact do so, because the evidential building-blocks did not exist.

511. If I imagine myself in an alternative world where Mr Coppel KC had been able to point to cogent evidence of shared knowledge that established fraud and dishonesty against Future Films and Mr Bowman alike, I think it highly likely that, in that situation, Mr Coppel KC would have been able to meet Mr Green KC's challenges in relation to combination and intention to injure. I cannot say how precisely he would have done this, because this is all conjecture and I do not know what this non-existent evidence would have shown. As the then Sir Horace Davey noted in *Derry v Peek*, deceit can take many and various forms; not only can it not exhaustively be defined, it also cannot comprehensively be hypothesized (cf. paragraph 447, above).

512. This is abstract and too far removed from the facts of the case to be useful. If the Claimants had made out their case in deceit, I think it very likely that they would also have made out their case in joint tortfeasance and/or in unlawful means conspiracy. Back in the real world, however, this does not arise.

XXXVI: Dishonest assistance

513. Each investor joined the scheme by becoming a Member under a Partnership Deed for the relevant Eclipse LLP. The terms required the LLP to carry on "the Business", defined to include film production, distribution, financing and exploitation. The LLP then engaged Future Films as its Partnership Consultant under the Partnership Consultancy Agreement, and Future Films provided the relevant services via its subsidiary, Future Films (Partnership Services) Ltd ("Future Partnership Services"), which was one of the corporate members of each LLP. It was Future Partnership Services that controlled the money invested by individual Members.

514. The foundation of the Claimants' case in dishonest assistance is the contention that Future Films and/or Future Partnership Services were given money to hold and apply for a particular purpose, i.e. the trade of the Eclipse LLP. It held them on trust and subject to a fiduciary duty to apply them only for that purpose. It breached them by instead applying them in the circular manner set out above, rather than in the pursuit of an active and genuine trade.

515. The claim against HSBC is said to arise from the fact that HSBC dishonestly assisted in this breach of trust.

516. There are many problems with this, but the Claimants' fundamental difficulty is that the monies controlled by Future Films/Future Partnership Services were applied for "the Business" of each LLP.

517. It is true that "the Business" did not operate in the way that most of the Claimants' Sample Witnesses had expected, and was not a "trade" for tax purposes. However, this

way of putting the Claimants' case depends on re-branding what the Claimants have elsewhere put under the headings of the Trade Representation, the Contribution Representation and their complaint about circular money-flow. I have already dealt with and rejected those ways of putting the Claimants' case, for a variety of reasons.

XXXVII: Partnership

XXXVII(i): Legal principles

518. The case that Future Films and HSBC were in a partnership within the meaning of the Partnership Act 1890 was originally alleged by the Stewarts Law Claimants. Most of the legal submissions that the Claimants relied on were set out by the Stewarts Law Claimants in their written Opening and Closing Submissions, before their settlement, rather than in the Claimants' own written submissions. My understanding from Mr Kell (who dealt with this part of the case for the Claimants) was that the Claimants adopted wholesale the Stewarts Law Claimants' submissions.

519. Happily, there was little real disagreement between the Stewarts Law Claimants and HSBC as to the relevant legal principles; and none that mattered. It was common ground that, while receiving a share of the profits of the business is one of the primary indicia (per section 2(3) of the Partnership Act 1890), other indicia that may be relevance include sharing of losses, mutual agency, common capital and the non-assignability of the partnership relation.

520. It was also common ground that a provision such as clause 14 of the Future-HSBC Agreement is not determinative.

XXXVII(ii): Analysis and conclusion

521. Schedule 2 of the Future-HSBC Agreement (Appendix 4 to this judgment) prescribed a way of calculating the fee payable to HSBC such that 50% of the amount by which all revenues derived by or payable to Future Films in connection with the Eclipse LLPs exceeded all independent net third party fees paid or payable. It cannot be said to be unvarnished profit-sharing, because the independent net third party fees that were to be taken into account would seem likely to constitute most of the business expenses, but not all of them (no account is taken of staff costs or other overheads). Also, the multiple applied to these independent third party fees – 1.25 before first close and 1.08 thereafter – favoured Future Films. Conversely, the risk that expenses might be incurred but the scheme might not come to fruition – in which case there would be no revenue – fell entirely on Future Films.

522. Accordingly, the fee arrangement approximated to profit-sharing, but was not a true or simple profit-share arrangement.

523. Conversely, there was no sharing of losses, no mutual rights or obligations characteristic of partnership (i.e., no mutual agency), no common capital and there was no prohibition on assignment.

524. Looking at the Future-HSBC Agreement in its totality, it seems to me consistent with clause 14, which in the circumstances seems an accurate reflection of the parties' intentions, as indicated in the other contract terms.

525. Accordingly, I reject the case that Future Films and HSBC were in partnership.

XXXVIII: FSMA

XXXVIII(i): FSMA and COB 2.1.3R

526. The Information Memorandum had a passage at the front headed "Important Information", which included the following:

> "The Partnership is a collective investment scheme (as defined in Section 235 FSMA). It has not been approved by the Financial Services Authority or any other regulatory authority and is accordingly an unregulated scheme for the purposes of Section 238 FSMA and cannot be marketed to the general public in the UK. Chiltern Corporate Finance Limited, which is authorised and regulated by the Financial Services Authority, has approved this Proposal only for communication to persons qualifying as investment professionals under Article 14 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 ("CIS Promotion Order"), and by them to persons falling under other exemptions to Section 238 FSMA under the CIS Promotion Order or under the rules of the Financial Services Authority, including communication by an Investment Adviser (as defined below) to those of its clients for whom the Investment Adviser considers investment in the Partnership to be suitable."

527. It was common ground between the parties that Eclipse was indeed a collective investment scheme within the meaning of FSMA, with the result that various rules made by the Financial Services Authority ("FSA") could in principle apply to HSBC, in relation to Eclipse, and breaches of those rules could in principle be actionable at the suit of such customers, subject to the usual activities HSBC actually undertook. The right to bring such an action arose under section 150 of FSMA (prior to 1 April 2013) and under section 138D of FSMA (after that date).

528. Only 3 of the sample Claimants' Sample Witnesses brought FSMA claims: Mr McIntyre, Mr Pickard and Mr Goodwin, all of whom were HSBC customers. It was fairly obvious how Mr McIntyre and Mr Pickard had at least an arguable claim under FSMA, given that they both received information directly from Mr Bowman (in particular, at the meeting of Ernst & Young partners on 2 March 2006). By contrast, Mr Goodwin had no contact with Mr Bowman or with anyone else at HSBC in relation to Eclipse; it was never obvious to me how he could have even an arguable FSMA claim, and Mr Kell (who presented this part of the case on the Claimants' behalf) very sensibly did not press Mr Goodwin's position with any vigour.

529. So far as concerned Mr McIntyre and Mr Pickard, the relevant rules were the FSA's Conduct of Business Rules 2.1 ("COB 2.1") – entitled "Clear, fair and not misleading communication." Two provisions of COB 2.1 are relevant:

(1) COB 2.1.1 concerns the application of COB 2.1:

> "This section applies to a firm when it communicates information to a customer in the course of, or in connection with, its designated investment business."

(2) The substantive rule upon which Claimants' case focused was COB 2.1.3R:

> "When a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading."

530. The meaning of "designated investment business" within the COB Rules means various activities specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). As the case developed, the specific provision of the RAO that assumed significance was Article 53, which is concerned with advising on investments:

> "(1) Advising a person is a specified kind of activity if the advice is-
>
> "(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and"
>
> (b) advice on the merits of his doing any of the following (whether as principal or agent)-
>
> (i) buying, selling, subscribing for… … relevant investment"

XXXVIII(ii): The applicability of COB 2.1

531. Article 53(1) of the RAO (and, therefore, COB 2.1) does not apply if advice is given by a person who is "appropriately authorised" (and who is not providing a personal recommendation). This was why the Information Memorandum referred to and required the involvement of IFAs. Mr Bowman was not an IFA and was not appropriately authorised. Thus, COB 2.1 applied if Mr Bowman's activities in relation to Mr McIntyre and Mr Pickard amounted to giving advice.

532. Mr Pritchard, who dealt with the FSMA issues on behalf of HSBC, highlighted the fact that Mr Bowman made it clear to the Ernst & Young partners that they would need to proceed via an IFA, Cavanagh. He also noted that Mr McIntyre had said in evidence that Mr Bowman "knew where the limits were" and was aware that he was not qualified to give advice as an IFA. Mr Pritchard also referred me to the first-instance judgment of HHJ Havelock-Allan QC in *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB), at [81]:[8]

> "The key to the giving of advice is that the information is either accompanied by a comment or value judgment on the relevance of that information to the client's investment decision, or is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient. In both these scenarios the information acquires the character of a recommendation."

533. The fact that Mr Bowman purported to respect the limits of what he was allowed to do, does not mean that he in fact did so. Elsewhere in his evidence, Mr McIntyre described Mr Bowman as making a "swaggering pitch" and telling the Ernst & Young partners:

[8] Overturned in part on appeal, but not on this point: [2012] EWCA Civ 1184

"You're going to invest in a new film partnership" . Mr Pickard said that Mr Bowman encouraged the Ernst & Young partners to invest before 5 April 2006. They were both clearly overawed by his performance, which was without question designed to encourage them. I have absolutely no doubt that it had the character of a recommendation.

534. It follows that COB 2.1 is applicable.

XXXVIII(iii) Alleged breaches of COB 2.1.3R

535. The Claimants' case as to HSBC's breach of its duties under COB 2.1.3R was twofold.

536. First and foremost, the Claimants repeated their case as to the alleged representations (i.e., the Advice Representation, but also the Trade Representation, the Contribution Representation and the Profit Representation) and said that by "directly or indirectly" making these representations or permitting them to be made or not correcting them, HSBC did not communicate in a clear, fair and not misleading way. This case therefore once again was based on the entirety of the Information Memorandum and Addenda and the other documents addressed in Section IX above, and on the argument that the Advice Representation and/or the Trade Representation, Contribution Representation and Profit Representation could be spelt out from these materials.

537. I will not repeat my concerns about whether this was an appropriate or sufficient way of analysing those materials. In the context of FSMA the Claimants faced the additional problem that, here, the focus really must be on the information communicated by HSBC itself, i.e. by Mr Bowman. There was nothing in Mr Bowman's Note, or in the account of his presentation from Mr McIntyre or Mr Pickard, that came close to amounting to the alleged Trade Representation, Contribution Representation or Profit Representation. Indeed, the fact that Mr Bowman positively exhorted the Ernst & Young partners to read the Information Memorandum (with its warning against investing in reliance on Net Proceeds) and to take advice from Cavanagh (who should have noted the significance of paragraph 11.4 of the Consolidated Peacock Note) is particularly problematic for the Claimants in relation to the alleged Contribution and Profit Representations.

538. As regards the alleged Advice Representation and COB 2.1.3R, the fundamental problems for the Claimants remains the same as set out in Section XXX(iv) and XXXII above. It seems to me clear that Mr Bowman genuinely believed that the Eclipse structure was consistent with the basis on which Mr Peacock QC had advised, and the relevant contracts had been reviewed by DLA. Furthermore, the Claimants again said that HSBC should itself have checked this – by asking DLA. If Mr Bowman or anyone else at HSBC had done this, the answer would have been on the lines of the advice given by DLA to Future Films on 27 February 2006.

539. The obligation under COB 2.1.3R is to "take reasonable steps". In this regard, Mr Bowman acted reasonably; and the alternative steps that the Claimants suggested he should have taken would have made no difference.

540. The Claimants' secondary criticisms of HSBC for the purposes of FSMA were that HSBC failed to disclose its name and contact details in the Information Memorandum and failed to disclose its interest in Eclipse. I found these points surprising, in the

context of claims that are only brought by individuals who were customers of HSBC and who were marketed to directly by Mr Bowman. While some investors might not have known of HSBC's involvement, Mr McIntyre and Mr Pickard undoubtedly did. Furthermore, it was obvious to them that Mr Bowman and HSBC had an interest in Eclipse: as Mr McIntyre said, he appreciated that Mr Bowman was not acting out of altruism.

541. I therefore do not accept the Claimants' case that HSBC was in breach of its obligations under COB 2.1.3R.

XXXIX: Causation

XXXIX(i): Appendix 6

542. My conclusions so far already mean that the Claimants cannot succeed, in deceit or under FSMA or on the various other bases asserted in the Re-Re-Re-Amended Particulars of Claim. However, in fairness to the Claimants (and, especially, the Claimants' Sample Witnesses) and their legal advisers, as well as in case of appeal, I nevertheless will deal with the remaining issues raised by the claims, including causation and quantum, as well as limitation.

543. The precise sums claimed by each of the Claimants' Sample Witnesses was ultimately set out in a series of tables, provided by the Claimants shortly in advance of closing submissions, with cross-references to the evidence relied on. I am extremely grateful for the work that went into producing these tables, which has greatly facilitated my assessment of the issues of causation and quantum. It has also enabled me to set out my detailed conclusions on these points in Appendix 6 to this judgment.

544. I have found that the Claimants' Sample Witnesses relied on the representations made to them regarding the advice given by Mr Peacock QC. The causative consequences of their reliance are reasonably plain on the evidence, but I should briefly give my reasons for the conclusions set out in Appendix 6.

XXXIX(ii): Personal Contributions, HMRC late payment interest

545. In each case, the most significant proportion of the total claim comprised the individual Claimant's Personal Contributions and the late payment interest that each Claimant was charged by HMRC.

546. The case that the investment of the Personal Contributions, and therefore their loss, was caused by reliance on the relevant representations is self-evident. Furthermore, since the purpose of these investments was tax-deferral – i.e., to set off the interest on the Eclipse Loans against other tax liabilities – it was practically inevitable that, having invested, each Claimant would seek to do this. This in turn made it inevitable that, following HMRC's successful challenge to Eclipse, the Claimants would then face demands for late payment interest.

XXXIX(iii): Restructuring Arrangement fees

547. As discussed in Sections XIV and XVI(v) above, the 2008 and 2010 Restructuring Arrangements were in my view not an integral part of the Eclipse scheme itself. Of

course, no-one would have taken part in them unless they had first invested in Eclipse. In that somewhat banal sense, they were "caused by" the decision to invest in Eclipse. However, the decision whether or not to take part in the Restructuring Arrangements nevertheless required an independent decision, with some Eclipse investors deciding to do so, and some deciding not to do so.

548. Participating in the Restructuring Arrangements therefore was not an inevitable adjunct of being an Eclipse investor. Not only were they marketed to investors separately and later, the reason why those who participated decided to do so was different in kind from their reason for participating in Eclipse – i.e., to achieve tax avoidance, rather than mere tax deferral. A number of the Claimants' Sample Witnesses were keen to stress this distinction, and that Eclipse was not about tax avoidance.

549. I consider that these witnesses were right to draw this distinction. However, their doing so has implications for my conclusions in relation to Restructuring Arrangement fees. I do not consider that they were caused by their reliance on the representations regarding Mr Peacock QC's advice, and their decision to invest on the strength of this. In legal terms, and for the purposes of the recovery of loss (if they had been entitled to recover any losses), the Restructuring Arrangement fees were caused by the relevant Claimants' subsequent decisions, in 2008 and 2010, to participate in the Restructuring Arrangements.

XXXIX(iv): Ceasing Member Arrangement fees

550. I regard Ceasing Member Arrangement fees differently. These too, if successful, would have resulted in tax avoidance; and they, too, were marketed separately from and later than Eclipse itself. However, as illustrated by the evidence of Mr Beveridge, and as is apparent both from the chronology and the contemporary record, the principal reason why Ceasing Member Arrangements were first proposed when they were (in 2014) was because of the perceived risk that HMRC might succeed in its challenge to Eclipse, and Future Films and Eclipse 35 might lose the HMRC Proceedings.

551. As I have noted in Section XXV(vii) and (xii) above, several of the Claimants' Sample Witnesses explained their decision to take part in Ceasing Member Arrangements using the word "mitigation", or other language consistent with the proper legal use of that term.

552. The reality is that their motivation for taking part in Ceasing Member Arrangements will have been mixed. Some will have done so primarily because of their concern about HMRC, whereas for others the desire to avoid tax will have played a more prominent role. It is not possible to calibrate precisely what dominated any individual's thinking, so long after the event. However, I am satisfied that, from 2012 onwards, concerns about the HMRC challenge, which were prompted by the FTT decision, played a substantial part in the various Claimants' Sample Witnesses' decisions to participate in Ceasing Member Arrangements. They did so, substantially even if not entirely, by way of mitigation. This establishes the necessary causative link.

XXXIX(v): Fees to Future Films and to other advisers, etc.

553. The claims include various fees paid to Future Films, or otherwise relating to the administration of the scheme (e.g., audit fees). There was no issue about causation in relation to these items.

554. They also include various fees paid to other advisers – notably, action groups and the solicitors which represented the action groups (i.e., all substantially before the commencement of these proceedings, and distinct from the costs of these proceedings). Here too, the Claimants' case as to causation was obvious.

555. Some of the Claimants' Sample Witnesses also claimed for the cost of loans taken out to fund their Personal Contributions or to fund Ceasing Member Arrangements. These items did not raise separate causation issues from the principal sums to which they related.

XL: Quantum

XL(i): The losses suffered by the Claimants' Sample Witnesses

556. Details of the losses asserted by each of the Claimants' Sample Witnesses, and my conclusions in relation to each, are (again) set out in Appendix 6.

557. These conclusions are subject to credit for profits made.

XL(ii): Whether credit must be given for profits made

558. I have noted in Section XXV(xi) above that the Claimants said they would give credit for any sums received as a result of their investment in Eclipse. This was in paragraph 101 of the Re-Re-Re-Amended Particulars of Claim (quoted in paragraph 377 above), which has remained the Claimants' pleaded case from the outset. However, as I also noted, none of the Claimants' Sample Witnesses (or indeed any of the other Claimants, in their individual Particulars of Claim) set out a case or offered any evidence (documentary or in a witness statement) as to what sum they had in, in fact, received as a result of their investment in Eclipse.

559. The purpose of investing in Eclipse was tax deferral. The reason that investors such as the Claimants were interested in tax deferral was so that, during the years over which the liability to make tax payments was deferred, they could invest and earn profits on the sums that would otherwise have been paid to HMRC. Indeed, it was necessary that they should take advantage of this opportunity to earn profits, because this was how the Claimants must all have been planning to emerge from Eclipse with a net gain. They must all have anticipated that their investment profits would exceed their Personal Contributions (which, as they knew, they were not going to get back in the absence of Contingent Receipts).

560. The Stewarts Law Claimants likewise provided no evidence of the sums received as investment profits as a result of their investment in Eclipse. However, shortly before the commencement of the trial, the Stewarts Law Claimants agreed with HSBC that all issues in relation to what was referred to as "Tax Benefits" would be held over, and a consent order dated 6 February 2024 was made, reflecting this agreement.

561. On 22 February 2024, I was told by Mr Coppel KC that, overnight, Edwin Coe had written to Norton Rose, seeking to align the position of the Edwin Coe Claimants with that of the Stewarts Law Claimants in this regard. This was on Day 12 of the trial, shortly after the Claimants had called their final factual witness. I heard no more about this, but assume that HSBC's agreement was not forthcoming. Given the late stage at which Edwin Coe had made this request, I am not surprised.

562. The result was that, by the time of closing submissions, the Claimants' case was that they did not have to give credit for any profits made by investing the deferred amounts of tax.

563. Similar points often occur in the context of mitigation, where the victim of a breach has made a profit from an opportunity that would not otherwise have arisen. In such cases, a distinction is drawn between (a) a course of action which arose directly out of the consequences of breach (within the classic test in *British Westinghouse Electric And Manufacturing Co. Ltd. v Underground Electric Railways Company of London Ltd.* [1912] AC 673) and (b) "an independent decision, independent of the breach, made by the buyer on his assessment of the market": *Koch Marine Inc v D'Amica Società di Navigatione, The Elena d'Amico* [1980] 1 Lloyd's Rep 75, per Robert Goff J at p. 89 lhc. Mr Coppel KC said that the Claimants were under no obligation to invest the deferred amounts of tax. In so far as they did so, this was in each case an independent decision by the individual investor. They might have done other things with the money, rather than investing it.

564. I do not accept this. The whole purpose of taking part in Eclipse was to defer tax payments, and then to invest the deferred amounts of tax. Otherwise, there was simply no point taking part. Mr Coppel KC suggested in oral submissions that some people might have done so because they needed the deferment because they could not pay their tax liabilities immediately. However, not only did none of the Claimants' Sample Witnesses give evidence to this effect (on the contrary, they all appeared to be both reasonably wealthy and solvent), the suggestion in any event misses the mark. Even the kind of hypothetical Eclipse Member posited by Mr Coppel KC would, by investing in Eclipse, have the benefit of being able to use the amounts of deferred tax for the time being.

565. This was integral to Eclipse and was the purpose of tax deferral. This seemed to me to be understood, in principle, by all the Claimants' Sample Witnesses. They all knew that they would have to pay the tax in the end (hence the insistence of some that Eclipse was not a tax avoidance scheme). They planned on benefiting from the use of the money in the meantime.

566. It follows that the Claimants must give credit for the profits made.

XL(iii): There is no evidence as to the quantum of this credit

567. Although none of the Claimants' Sample Witnesses volunteered evidence about how they had used the deferred amounts of tax, some light was shed on this in cross-examination. Mr Best used it to invest in property, and said that the profits achieved were sufficiently significant that he was unable to say that he made a net overall loss. Mr Goodwin also invested in property; it was unclear how much profit he made, but it was substantial. Mr Burke thought he had probably used the money to build a barn on

his farm; he did not put any figure on how this had enhanced the value of his estate. Others were unable to say precisely how they had invested; this does not surprise me, because the reality is that the amounts of deferred tax will have been used as part of their overall holdings, rather than handled and accounted for specifically.

568. Mr Margolis is in a slightly special category. As well as deferring his tax payments, he benefited from Eclipse in a different way. His interest in Future Films meant that he directly received 40% of all Future Films' profits, to which Eclipse will have contributed substantially. He was unable to put a figure on this, but it will have been substantial.

569. When they joined Eclipse, the Claimants will all have expected to be able to defer their tax liabilities for the intended duration of the relevant LLP – i.e., from 8 to 21 years. In the event, the HMRC challenge meant both that they had to pay the relevant amounts much earlier following HMRC's demands, and also that they had to pay interest. In effect, this means that the period that they were able to use the relevant amounts was shorter than expected, and that some of the profits made during that period will have been eroded by the late payment interest that each of them paid to HMRC.

570. However, I have already noted that several of the Claimants' Sample Witnesses gave evidence as to the general performance of their investments – in general, they expected a return of at least 7% and ideally close to 10%. That evidence was significant for this point, because I was told that the rates charged by HMRC for late payment were as follows:

From	Late payment %
22.8.2023	7.75
11.7.2023	7.50
31.5.2023	7.00
13.4.2023	6.75
21.2.2023	6.50
6.1.2023	6.00
22.11.2022	5.50
11.10.2022	4.75
23.8.2022	4.25
5.7.2022	3.75
24.5.2022	3.50
5.4.2022	3.25
21.2.2022	3.00
7.1.2022	2.75
7.4.2020	2.60

From	Late payment %
30.3.2020	2.75
21.8.2018	3.25
21.11.2017	3.00
23.8.2016	2.75
29.9.2009	3.00
24.3.2009	2.50
27.1.2009	3.50
6.1.2009	4.50
6.12.2008	5.50
6.11.2008	6.50
6.1.2008	7.50
6.8.2007	8.50
6.9.2006	7.50
6.9.2005	6.50

571. I do not know over what period(s) each of the Claimants' Sample Witnesses had the use of how much deferred tax (their evidence did not include this information). However, in general terms, it seems likely that they were able to earn more from their money than they ultimately had to pay HMRC in late payment interest.

572. This means that quantifying the precise profit made by each of them is important. Indeed, it is necessary, if any of them are to prove on the balance of probabilities that they made a net overall loss; and to quantify that net overall loss. The fact that (despite

paragraph 101 of the Re-Re-Re-Amended Particulars of Claim) the Claimants have not provided any evidence of this is, therefore, fatal to their claims.

573. There is one exception: Mr Pickard. I accept his evidence that the failure of Eclipse and the HMRC demands that ensued were responsible for his bankruptcy, in the sense that it would not otherwise have occurred. Whatever profits he may have made from investing deferred tax amounts over the period prior to HMRC's demands to be paid, they were clearly wiped out.

XL(iv): Distress

574. As well as these claims for economic losses, there are also claims for distress.

575. All the Claimants' Sample Witnesses were naturally upset and disappointed about the failure of Eclipse, and worried. For some, matters went further than this. To varying degrees and in different ways, they suffered from depression and experienced behavioural changes, drinking to excess and entertaining thoughts of suicide. Not all the Claimants' Sample Witnesses suffered in this way. Those of the Edwin Coe Claimants whose evidence impressed me in this regard were Mr Best, Mr Burke, Mr Goodwin, Mr Pickard and Mr Upham.

576. This was at its most acute in the case of Mr Pickard, whose life spiralled out of control, resulting in his bankruptcy. For the others I have identified (and also for the Stewarts Law Sample Witnesses), the main cause was crippling anxiety about Dry Tax. Dry Tax seemed to threaten them with bankruptcy as well, until HMRC backed down. By contrast, the other Edwin Coe Sample Witnesses did not give evidence about distress (Mr Lenthall, Mr Margolis and Mr Southwell) or were less concerned about Dry Tax (Mr McIntyre).

577. There were pleaded claims for distress from a more limited class still: Mr Best, Mr Burke, Mr Pickard and Mr Upham. My understanding is that, while several additional Edwin Coe Sample Witnesses wished to impress on me the effect that Eclipse had had on them, it was only individuals in this more limited group who sought compensation for distress.

578. HSBC accepted that compensation for distress could in principle be claimed in an action for deceit such as this. However, it said that everyone who chose to invest in Eclipse knew that to do so carried the risk of a challenge from HMRC, and must be taken to have read the risk warnings in the Information Memorandum.

579. If the claims of Mr Best, Mr Burke, Mr Pickard and Mr Upham had otherwise succeeded, this would have been on the basis that they were deceived into investing in Eclipse on the erroneous basis that the scheme as implemented was the same as the basis on which Mr Peacock QC had advised. The significance to them of the fact the scheme seemed to have the blessing of a tax QC was that they believed that this reduced very significantly the risk of a successful challenge by HMRC. They read the risk warnings with this reassurance in mind. Accordingly, the fact that the Claimants were warned that investing in Eclipse was risky is not enough to rule out the possibility of claims for distress.

580. My assessment of the figure attached to the distress of these particular Claimants would have been £4,000 each for Mr Best, Mr Burke and Mr Upham, but £12,500 for Mr Pickard, for whom the level and duration of the distress were considerably more significant.

581. In relation to Mr Best, Mr Burke and Mr Upham, there would still have been the problem that their claims must be reduced by the profits made by each of them.

XLI: Limitation

XLI(i) Legal principles

582. It was obvious even before the proceedings commenced that limitation would be an issue. Each Claimant acquired a cause of action, and so time ordinarily began to run for limitation purposes, when he/she made the investment – i.e. on various dates from late March 2006 to late April 2008. The claims were all tortious, such that the limitation period was 6 years, pursuant to section 2 of the Limitation Act 1980.

583. The Claimants relied on section 32(1) and (2) of Limitation Act 1980, which they said postponed the date when time began to run for the purposes of section 2. The claim form was issued on 5 June 2020. The Claimants therefore needed section 32 to result in a postponement until 6 June 2014, or later.

584. Section 32 (1) and (2) of the Limitation Act 1980 provide as follows:

> "**32 Postponement of limitation period in case of fraud, concealment or mistake**.
> (1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
> (a) the action is based upon the fraud of the defendant; or
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> (c) the action is for relief from the consequences of a mistake;
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

585. Nearly all the causes of action alleged by the Claimants were based upon fraud, and so fell within section 32(1)(a). The exceptions were the FSMA claims, for which the Claimants relied on section 32(1)(b) – i.e., deliberate concealment, as explained in section 32(2).

586. Although both sides had a lot to say about limitation, the relevant legal principles for this case are both simple and well-established:

(1) The burden of proof in establishing their case under section 32 was on the Claimants: *Paragon Finance plc v D B Thakerar & Co.* [1998] EWCA Civ 1249; [1999] 1 All ER 400, per Millett LJ at p. 418b-d. This is a passage cited as "authoritative" by the majority in the Supreme Court in *Test Claimants in FII Group Litigation v HMRC* [2020] UKSC 47, at [203] per Lord Reed PSC and Lord Hodge DPSC; see also [209(2)], [213(16)].

(2) Discovery of the fraud, for the purposes of section 32(1), means knowing that there is a worthwhile claim, i.e., having sufficient confidence in the facts it is necessary to allege to justify embarking on the preliminaries to issuing proceedings: *Gemalto Holdings BV v Infineon Technologies AG* [2022] EWCA Civ 782, per Sir Geoffrey Vos MR, in particular at [45] and [53], applying in the context of fraud the reasoning in *Test Claimants in FII Group Litigation v HMRC* (above) at [192]-[193], [196] and [213(14)].

(3) The requirement of "reasonable diligence" for the purposes of section 32(1) means that the Claimants (the burden being on them) must show that they could not have discovered the fraud (in the sense just explained) without "exceptional measures which they could not reasonably have been expected to take": see again the "authoritative" passage from the judgment of Millett LJ in *Paragon Finance plc v D B Thakerar & Co*.

(4) Although not necessary, it can be useful to consider whether, and if so when, something happened to put the Claimants on notice of a need to investigate: *OT Computers v Infineon Technologies* [2021] EWCA Civ 501, per Males LJ at [47]. This is sometimes referred to as the "trigger" for investigations, and in many cases can be identified when it is objectively apparent that something has gone wrong, which ought to prompt the Claimants to ask "why?" and investigate accordingly: *Granville Technology Group Ltd v Infineon Technologies AG* [2020] EWHC 415 (Comm), per Foxton J at [48].[9]

XLI(ii): The Claimants' case

587. The Claimants' case shifted during the course of the trial. By the time of oral closing submissions, it was clarified as being that the Claimants did not know that they had a worthwhile claim against HSBC in deceit/fraud until (at the earliest) late 2018. Each of the Claimants' Sample Witnesses said that they were first aware of this when they were informed by the solicitors retained by their action group (i.e., Newport/Edwin Coe, for the Edwin Coe Claimants; the position was slightly different for the Stewarts Law Claimants).

588. It is relevant to have in mind that most (although not all) of the Claimants had been members of the Newport action group for some years prior to 2018; many of them since 2014. These Claimants said that their knowledge of the possibility that they had been misled at all came only when they were informed of this by Newport in late 2015; and that HSBC was identified as possibly responsible only later still:

[9] This is the first-instance decision, upheld on appeal under the name *OT Computers v Infineon Technologies* [2021] EWCA Civ 501.

(1) First, there was the letter from Newport of 31 July 2015, set out in paragraph 243 above.

(2) An email from Newport of 8 September 2015 proposed litigation against appropriate third parties, to seek recovery of economic losses. It did not identify HSBC as one of the possible targets of such litigation.

(3) An email from Newport of 20 October 2015 again referred to the possibility of economic redress, on the basis of material and meaningful differences between the structure described in the Information Memorandum and the actual structure.

(4) A letter from Edwin Coe of 26 October 2016 expressed the view that there was a strong prima facie case that the promoter of Eclipse and the banks that provided the loans misrepresented certain fundamental aspects.

(5) On 24 November 2016, documents from Newport described Eclipse as having "originated from a structure developed by HSBC in 2003" and that Future "acquired the structure for a significant fee, and negotiated lending facilities for investors". The Claimants said that this suggested to them that HSBC had sold Eclipse to Future, then had no further involvement such as to justify a claim against it.

(6) On 16 July 2018, Newport provided further documents stating that the action group was now in possession of a "huge amount of data", regarding Eclipse and that it seemed that HSBC had a pivotal role and would be a defendant. The documents were still being interrogated.

589. I understood the Claimants' final position on limitation to be as follows:

(1) The "trigger" for investigations did not occur until Newport's messages of 8 September and 20 October 2015; alternatively, not until some time shortly after the decision of the Court of Appeal in the HMRC Proceedings, given on 17 February 2015.

(2) The alleged deceit was not "discovered" (within the meaning of section 32(1) of the Limitation Act 1980) until late 2018, because sufficient confidence in a case involving dishonesty was only acquired when they got hold of the cache of documents previously held by Future Films – this being the "huge amount of data" referred to in Newport's update of 16 July 2018.

XLI(iii): When did the Claimants know something had gone wrong?

590. As regards the "trigger", I cannot accept that it was only after the decision of the Court of Appeal that the Claimants knew that something had gone wrong, which merited investigation. This was in fact objectively obvious in the light of the FTT decision, given on 20 April 2012. At the very latest, it was obvious – and was actually recognised by many Eclipse Members – immediately after the UT decision, given on on 20 December 2013.

591. This was not merely because Eclipse 35 lost – which in itself highlighted the risk (i) that Eclipse 35 might lose again, at higher levels, and (ii) the position might be the same for the other Eclipse LLPs (because there was no difference between Eclipse 35 and the

other LLPs that was material to the FTT's reasoning). It was also because the factors that led the FTT to its conclusion were essentially factual (i.e., difficult to reverse on appeal) and, above all, because of the FTT's conclusion that the MSP had not been Eclipse 35's agent, which Mr Peacock QC had described as "vital" in the Consolidated Peacock Note.

592. I acknowledge that the defeat at the FTT was reported by Future Films in terms that were nevertheless positive, as the Claimants' Sample Witnesses all said (see Section XXV(vii) above). Specifically, Future Films said that Eclipse 35 had won on nearly all the facts, and that there were good grounds to be optimistic about the prospects on appeal to the UT.

593. However, I would expect anyone who had read the Consolidated Peacock Note as many of the Claimants' Sample Witnesses said that they had in 2006 (notably, Mr Goodwin, Mr Margolis, Mr Upham, Mr Lenthall, Mr McIntyre and Mr Pickard) to have read the FTT judgment just as carefully, and to have compared it to the Consolidated Peacock Note on which they say they had set so much store. I would also expect them and all the other Claimants' Sample Witnesses to have asked their IFAs to explain the position to them (rather than merely accepting what Future Films said uncritically), and I would expect the IFAs also to have read the FTT judgment and compared it to the Consolidated Peacock Note.

594. If anyone had done this, they would have known that, while Eclipse 35 had succeeded on many factual issues, it had lost on the ones that mattered – hence the outcome. They would also have seen that the Eclipse scheme evidently had not been structured on the basis on which Mr Peacock QC had advised.

595. It may be that a lifetime's experience in litigation has taught me, in a way that is not familiar to lay people, that it is never sensible to be sanguine about winning on appeal a case that was lost the first time around. Conscious of this, I have therefore given active consideration to the possibility that my assessment is affected by my own background; and, of course, by hindsight.

596. However, I am extremely impressed by the evidence that I have already referred to from Mr Beveridge, as to why he decided not to take part in the 2008 and 2010 Ceasing Member Arrangements, but did take part in the 2012 Restructuring Arrangements. It was because he and other investors were concerned about the FTT judgment. This led to a meeting in June 2012 to discuss the consequences of the FTT decision, where several Members raised the possibility of exiting Eclipse, because of the risks of the HMRC Proceedings. Mr Levy responded by raising the possibility of Ceasing Member Arrangements. Mr Beveridge consulted his IFA, who recommended that he should participate, in part because of the risk of losing again. Mr Beveridge agreed and acted accordingly. See my summary of this evidence in Sections XVI(v) and XXV(vii) above, and my conclusion in Section XXXIX(iv) that participating in the Ceasing Member Arrangements (from 2012 onwards) should be regarded as mitigation.

597. I am also impressed by the fact that, in 2014, Mr Burke in fact instructed solicitors and issued proceedings against various defendants, originally including Future Films.

598. I therefore am confident that it is not unrealistic to expect ordinary investors to have worked out from the FTT decision that "something had gone wrong". It is clear that Mr Beveridge and others knew that something had gone wrong.

599. That something had gone wrong was all the more apparent after the UT decision. This must have indicated even to those with no experience of litigation that Future Films' optimism about the prospects on appeal had been misplaced and could no longer be relied on. It in fact was the spur for many Eclipse Members to join action groups – notably Newport, which several Claimants' Sample Witnesses joined in January 2014 and shortly thereafter.

600. I also have in mind the Claimants' comments that Newport at first was not aware of HSBC's involvement, then thought that this involvement had ceased in 2005; and that it was only from the time of its letter of 16 July 2018 that Newport appreciated that HSBC had a pivotal role. I found this part of the Claimants' case impossible to credit, given the knowledge of Mr Margolis, the Ernst & Young partners, Mr Best and Mr Burke.

XLI(iv): When could fraud have been discovered?

601. As regards the time required to discover the deceit/fraud, if reasonable diligence had been exercised, I accept that the Claimants could not be confident that HSBC could properly be accused of dishonesty, without access to the documents held by Future Films. Certainly, without these documents, the Claimants did not have a sufficient basis to allege to justify embarking on the preliminaries to issuing proceedings alleging fraud.

602. My one reservation about this is whether the Claimants had a sufficient basis to justify doing so, even when they had received and reviewed all those documents. My earlier conclusions indicate not. However, proceeding for the time being on the counterfactual basis that those earlier conclusions might be wrong, I have considered how I would view matters if I felt that that the Claimants did have a good claim against HSBC in deceit. I do not see how that claim could have been assessed as potentially pleadable, without the information received in June/July 2018 (as referred to in Newport's update of 16 July 2018). This comprised the entirety of Future Films' documentary records. It included most if not all of the materials relied on by Mr Coppel KC in relation to dishonesty: for example, Mr Bowman's email of 14 December 2005, and the email exchange between Mr Bowman and Mr Surtees of HSBC of 7 February 2008, relating to the 7 Arts project.

603. Nevertheless, I do not understand why these documents could not have been obtained long before June or July 2018. If investigations into what had gone wrong had been started much earlier (and then undertaken with reasonable diligence) – i.e., after the FTT decision (or even after the UT decision) – then, on the face of things, it is logical to suppose that the documents would have been obtained much earlier.

604. The only evidence about the time required to gain access to these documents came from a few paragraphs of a witness statement made by Mr David Michael Greene, a senior partner of Edwin Coe, on 19 May 2023. That witness statement was made in support of an application for disclosure being made by the Claimants against HSBC – i.e., not for the purpose of supporting the Claimants' case on section 32(1) of the Limitation Act 1980. In other words, the availability of this evidence to the Claimants at trial was

somewhat adventitious. This explains its fragmentary, second-hand and (through no fault of Mr Greene's) unsatisfactory nature.

605. What this witness statement revealed is that, by 2018, the documents were in the possession of Mr Levy's new company (in effect, the successor to Future Films) Towerstone Partners Limited ("Towerstone"). Negotiations for access to these documents in fact took place between Mr Wood of Newport and Levy from early January 2018. Terms were agreed in principle on 9 February 2018. For reasons that Mr Coppel KC was unable to shed any light on, the agreement between Newport and Towerstone was not signed until 6 June 2018. I assume that access to the documents was given to Newport shortly after this. Then, in April 2019, they were transferred by Newport to Edwin Coe.

606. Thus, the process of getting the materials that the Claimants said were critical to their having sufficient confidence seems to have taken 5 months; and Newport's update of 16 July 2018 followed just over 1 month later – i.e., about 6½ months in total. However, there was no evidence to explain the delay from February 2018 to June 2018. This leaves me obliged to conclude that, with reasonable diligence, this all could have been done more quickly – probably in no more than 2 or 3 months.

607. In the course of oral closing submissions, I asked Mr Coppel KC if there was any reason to suppose that the process of obtaining documents might have taken longer, if it had commenced earlier. Once again, he was unable to direct me to any evidence.

608. I raised this because, in the Claimants' written closing submissions, it had been submitted (without reference to evidence) that Newport got access to the Future Films documents only by way of a trade-off in exchange for supporting Eclipse 35's attempt to take its appeal to the Supreme Court. If this submission had been correct, the leverage it indicated would not have been available to Newport in 2012 or 2013.

609. However, in answer to my question, Mr Coppel KC said that the Claimants did not rely on what had been said in the written submissions. I am sure that he was correct to make this concession, because permission to appeal to the Supreme Court must have been sought in 2015, and was refused by the Supreme Court in April 2016. This was all long before the negotiations between Mr Wood of Newport and Mr Levy in 2018. Indeed, when making oral closing submissions in reply, Mr Coppel KC accepted that, in principle, the agreement for access to the Future Films documents could have happened at any stage.

610. Because of the "reasonable diligence" requirement in section 32(1) of the Limitation Act 1980, it is commonplace for Claimants who rely on section 32(1) not only to work out a case as to when they first "discovered" the fraud, but also to adduce documentary and witness evidence to explain the steps that they took to discover it, and why these steps took so long. Providing this evidence often makes it necessary to waive privilege over some communications; if so, that is regarded as the necessary price for success on section 32(1). This is all done in order to demonstrate that the fraud could not reasonably have been discovered any faster.

611. In this case – unusually, in my experience – the Claimants produced no such evidence. On the contrary, the Claimants' Sample Witnesses all had very little to say on limitation, indeed their witness statements expressly asserted privilege over their exchanges with

Newport in respect of all legal advice (with limited exceptions). Furthermore, there was no evidence at all from Newport itself, despite the fact that Mr Wood remains involved. The only truly relevant evidence was that in the solicitor's statement of Mr Greene.

612. The result is that I was told almost nothing about (i) why no steps were taken to investigate what had gone wrong until about July 2015 (per the Newport letter of 31 July 2015) or (ii) why they then took so long. This was despite the Claimants' acknowledgment that the burden of proof under section 32 was on them.

XLI(v): Conclusion on section 32(1)(a)

613. The Claimants knew or should have known that something had gone wrong, which needed to be investigated, from mid-2012; and certainly after the UT decision in December 2013 (which I infer led to the founding of the Newport action group).

614. If investigations of any kind had commenced in mid-2012, or even in January 2014 (when Newport was founded), it should have been possible to discover very rapidly the importance of the role played by Mr Bowman and HSBC, not only in devising the Eclipse structure, but in marketing the scheme to some investors and to IFAs.

615. Furthermore, it should have been obvious from the FTT decision that the structure actually implemented was not the same as the basis on which Mr Peacock QC had advised. This ought to have led to efforts to find out how this had come about. Those efforts required access to Future Films' documents, and some kind of review.

616. On the basis of the admittedly nugatory evidence that was presented to me, this should all have been possible to accomplish in no more than 2-3 months. That is not a conclusion about which I am confident, but it is the best I can do given the dearth of evidence and keeping in mind that the burden of proof is on the Claimants.

617. I therefore do not accept that, pursuant to section 32(1)(a) of the Limitation Act 1980, the period of limitation under section 2 did not begin to run until 6 June 2014. In the light of my earlier conclusions, section 32(1)(a) is not applicable at all. However, even if section 32(1)(a) had applied, the period of limitation would have begun to run at the end of September 2012; alternatively, and at the very latest, at the end of April 2014.

XLI(vi): Limitation and the FSMA claims

618. In the context of the FSMA claims, the Claimants relied on section 32(1)(b), i.e., deliberate concealment, including deliberate commission of a breach of duty in circumstances in which it was unlikely to be discovered for some time.

619. My earlier conclusion in relation to the Claimants' case as to deceit, in particular my findings in Section XXXII above as to the knowledge/dishonesty of HSBC, mean that I cannot accept the case that there was deliberate concealment by HSBC, or the deliberate commission of a breach of duty.

620. However, even if I had accepted that Mr Bowman/HSBC deliberately concealed or deliberately acted in breach of duty, the Claimants would face the same problems set

out above in relation to when these matters could have been discovered with reasonable diligence.

XLII: Conclusion

621. The claims of all the Claimants fail, essentially for the following reasons:

(1) The Claimants have failed to analyse properly the legal significance of the statements made to them before they invested in Eclipse.

(2) Properly analysed, the statements that related to the advice of Mr Peacock QC did not constitute misrepresentations. Future Films and Mr Bowman had reasonable grounds for believing that the scheme as implemented was consistent with the basis on which Mr Peacock QC had advised.

(3) Neither Future Films nor Mr Bowman was dishonest.

(4) The Claimants' Sample Witnesses have failed to prove the quantum of their loss (with the exception of Mr Pickard).

(5) Their claims are time-barred.

XLIII: End-note

622. I have great sympathy for the Claimants. Their losses are significant, their suffering has been real (even for those who did not claim for distress) and they have every right to feel aggrieved. When all is said and done, they were badly let down.

623. However, this is not enough for them to have a good claim against HSBC. I also have some sympathy for HSBC and, specifically, for Mr Bowman, who should not have had to deal with proceedings or the allegations of dishonesty that were central to them.

624. It is important, both for those in the position of the Claimants and for those in HSBC's/Mr Bowman's position, that proceedings alleging dishonesty are not launched unless there are proper grounds. This obviously matters to prospective defendants, who are entitled not to have their reputations unfairly traduced. However, it also matters to the prospective claimants, who should not be given false hope.

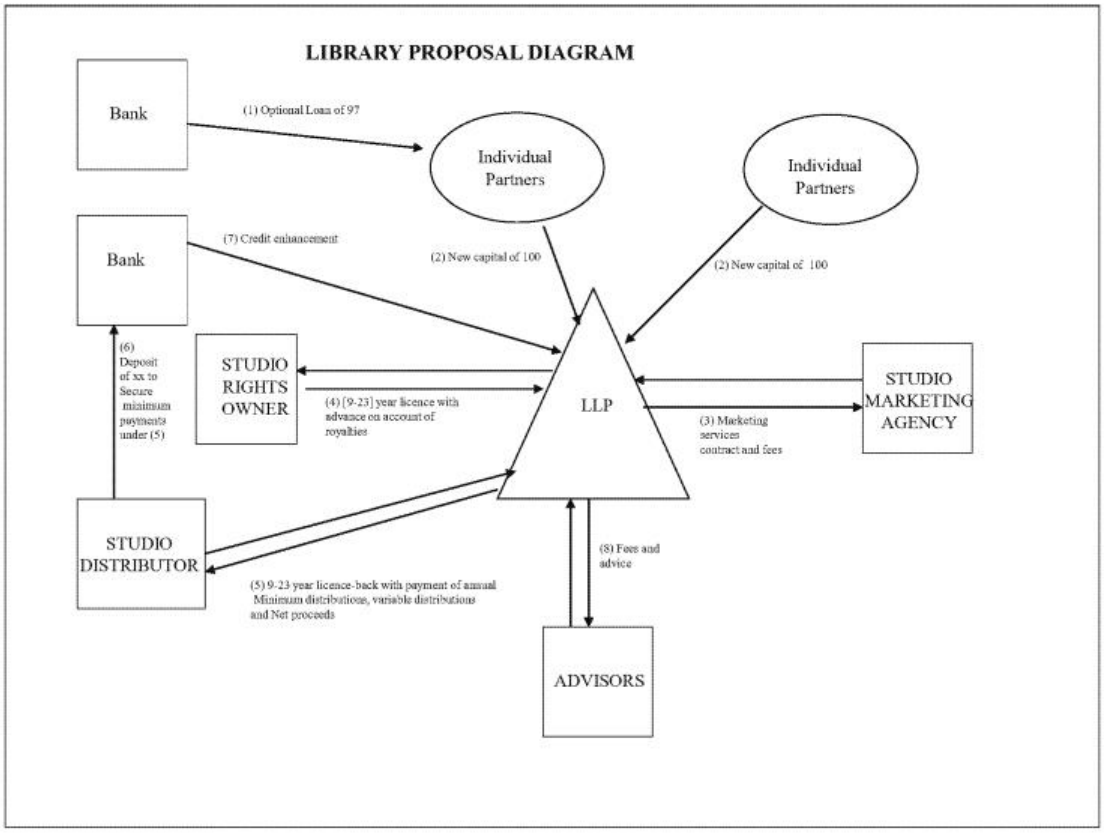
625. Having made those comments, it is all the more important that I emphasise how impressed and grateful I have been throughout the trial for the manner in which it was conducted by everyone involved – counsel, solicitors and witnesses. They all acted with exemplary professionalism, courtesy and good humour, in their dealings with me and with each other.

626. Giving judgment inevitably involves expressing disagreement with the submissions made by some or other of the protagonists; sometimes, repeatedly. This never implies criticism of any individual involved in advancing such submissions. The outcome in this case means that Mr Coppel KC has borne the brunt on this particular occasion, so it is only right to single him out for the skill, clarity, charm and good judgment with which he advanced even the less attractive elements of the Claimants' case. He found himself having to do so, no doubt, not because of his own spontaneous decisions while on his feet, but because of a host of earlier strategic and tactical decisions. What those

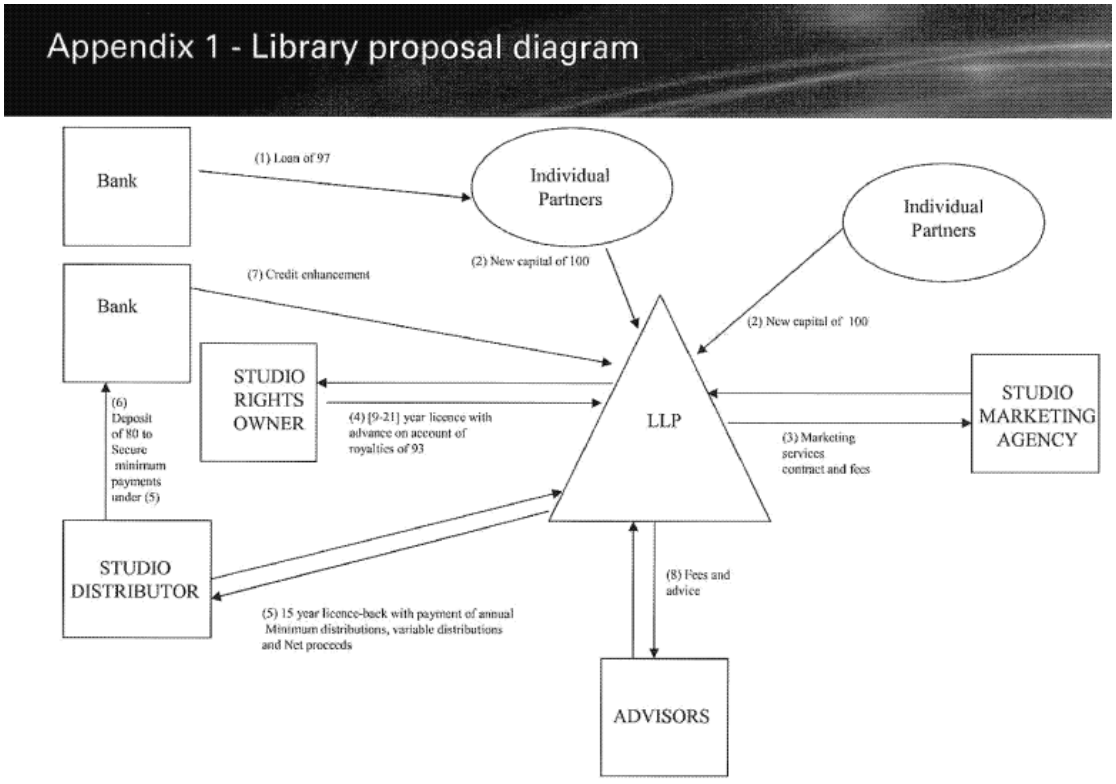
decisions were, and when, by whom and in what circumstances they were made, is all beyond my ken. However, I have noticed that Mr Coppel KC's name does not appear on the Claimants' pleadings, from which I infer that he is a relative newcomer to the case.

627. I should also note my delight that all the leading counsel involved delegated significant portions of the oral advocacy to their respective juniors. Those junior counsel rose to the challenge with flair. It was a real source of joy to see the pleasure with which they went about their allotted tasks, and to note that this pleasure appeared undimmed even when each of them, in turn, had to fend off a series of chest-high bouncers hurled down from the bench. They returned to the pavilion bruised but exhilarated, and with the scorecard in each case reading "Not Out". They may or may not be grateful to me for the experience, but I know that it will have made all of them even better advocates than they were before the trial commenced.

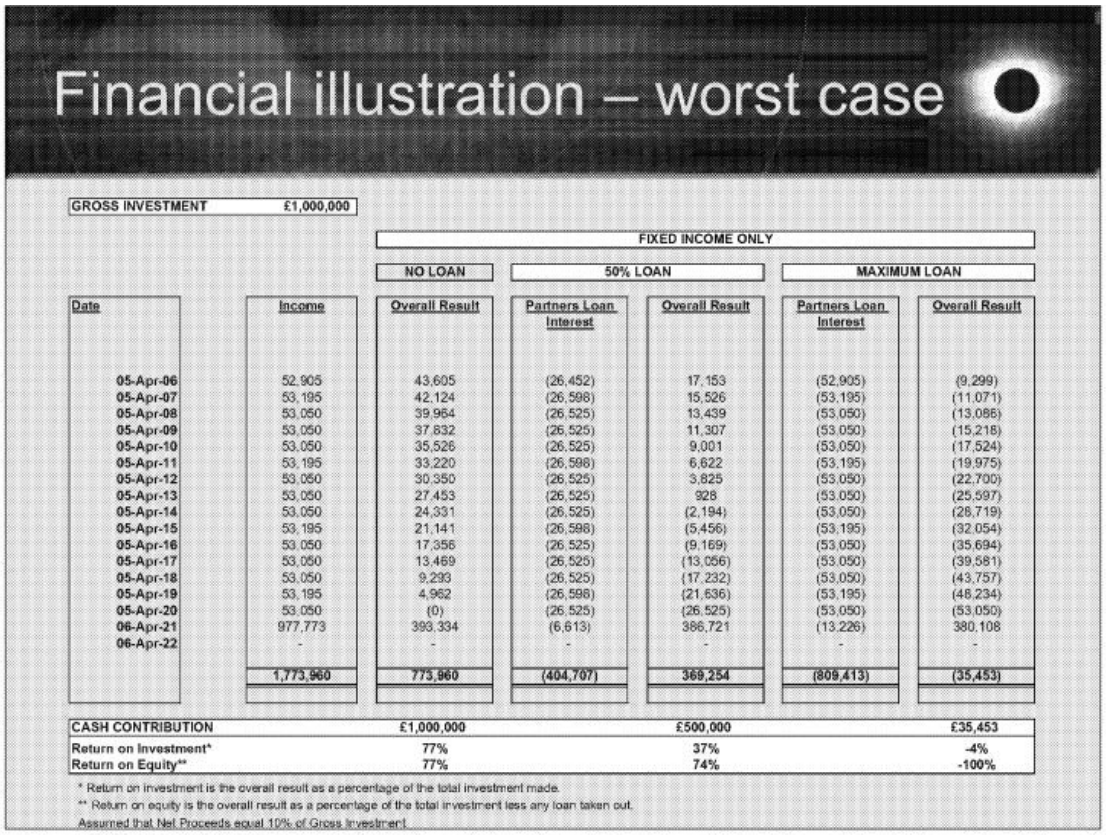
Appendix 1: Structure Diagram provided to Mr Peacock QC



Appendix 1A: Structure diagram attached to KPMG Accounting Review



Appendix 2: Financial illustration provided to JPQC



Financial illustration – worst case

GROSS INVESTMENT £1,000,000

		FIXED INCOME ONLY				
		NO LOAN	50% LOAN		MAXIMUM LOAN	
Date	Income	Overall Result	Partners Loan Interest	Overall Result	Partners Loan Interest	Overall Result
05-Apr-06	52,905	43,605	(26,452)	17,153	(52,905)	(9,299)
05-Apr-07	53,195	42,124	(26,598)	15,526	(53,195)	(11,071)
05-Apr-08	53,050	39,964	(26,525)	13,439	(53,050)	(13,086)
05-Apr-09	53,050	37,832	(26,525)	11,307	(53,050)	(15,218)
05-Apr-10	53,050	35,526	(26,525)	9,001	(53,050)	(17,524)
05-Apr-11	53,195	33,220	(26,598)	6,622	(53,195)	(19,975)
05-Apr-12	53,050	30,350	(26,525)	3,825	(53,050)	(22,700)
05-Apr-13	53,050	27,453	(26,525)	928	(53,050)	(25,597)
05-Apr-14	53,050	24,331	(26,525)	(2,194)	(53,050)	(28,719)
05-Apr-15	53,195	21,141	(26,598)	(5,456)	(53,195)	(32,054)
05-Apr-16	53,050	17,356	(26,525)	(9,169)	(53,050)	(35,694)
05-Apr-17	53,050	13,469	(26,525)	(13,056)	(53,050)	(39,581)
05-Apr-18	53,050	9,293	(26,525)	(17,232)	(53,050)	(43,757)
05-Apr-19	53,195	4,962	(26,598)	(21,636)	(53,195)	(48,234)
05-Apr-20	53,050	(0)	(26,525)	(26,525)	(53,050)	(53,050)
06-Apr-21	977,773	393,334	(6,613)	386,721	(13,226)	380,108
06-Apr-22	-	-	-	-	-	-
	1,773,960	773,960	(404,707)	369,254	(809,413)	(35,453)

CASH CONTRIBUTION	£1,000,000	£500,000	£35,453
Return on Investment*	77%	37%	-4%
Return on Equity**	77%	74%	-100%

* Return on investment is the overall result as a percentage of the total investment made.

** Return on equity is the overall result as a percentage of the total investment less any loan taken out.

Assumed that Net Proceeds equal 10% of Gross Investment

Appendix 3: Financial illustration provided to Mr Beveridge

INVESTOR ILLUSTRATION
ECLIPSE FILM PARTNERS
INVESTMENT SCENARIOS

[Insert Investor Name]

Term 12 Years		FIXED INCOME ONLY						FIXED INCOME PLUS NET PROFIT SHARE			
		NO LOAN	50% LOAN		MAXIMUM LOAN			NO LOAN	50% LOAN		MAXIMUM LOAN
	Income	Pre Tax Profit / (Loss)	Partners Loan Interest	Pre Tax Profit / (Loss)	Partners Loan Interest	Pre Tax Profit / (Loss)	Share of Net Profits	Pre Tax Profit / (Loss)	Pre Tax Profit / (Loss)	Pre Tax Profit / (Loss)
05-Apr-07	-	-	(32,030)	(32,030)	(62,211)	(62,211)	-	-	(32,030)	(62,211)
05-Apr-08	84,384	37,109	(43,446)	(6,338)	(84,384)	(47,275)	4,333	41,442	(2,905)	(42,942)
05-Apr-09	141,421	86,642	(72,812)	13,830	(141,421)	(54,779)	5,148	91,791	18,978	(49,631)
05-Apr-10	141,421	78,610	(72,812)	5,797	(141,421)	(62,811)	5,986	84,596	11,783	(56,825)
05-Apr-11	141,421	65,887	(72,812)	(2,526)	(141,421)	(71,534)	6,896	76,783	3,970	(64,639)
05-Apr-12	141,809	60,892	(73,012)	(12,119)	(141,809)	(80,916)	7,873	68,765	(4,247)	(73,043)
05-Apr-13	141,421	50,170	(72,812)	(22,642)	(141,421)	(91,251)	8,952	59,123	(13,690)	(82,298)
05-Apr-14	141,421	39,062	(72,812)	(33,750)	(141,421)	(102,359)	10,111	49,173	(23,639)	(92,248)
05-Apr-15	141,421	27,041	(72,812)	(45,771)	(141,421)	(114,380)	11,365	38,406	(34,406)	(103,015)
05-Apr-16	141,809	14,451	(73,012)	(58,561)	(141,809)	(127,358)	12,717	27,168	(45,844)	(114,641)
05-Apr-17	141,421	-	(72,812)	(72,812)	(141,421)	(141,421)	14,186	14,186	(58,627)	(127,236)
05-Apr-18	2,813,669	908,964	(18,153)	890,811	(35,258)	873,706	198,533	1,107,497	1,089,344	1,072,239
	4,171,617	1,372,829	(749,341)	623,488	(1,455,416)	(82,590)	286,100	1,658,929	909,588	203,510
GROSS INVESTMENT	£2,861,000	[illegible]								
CASH CONTRIBUTION		£2,861,000		£1,430,500		£82,590		£2,861,000	£1,430,500	£82,590
Return on Investment*		47.98%		21.79%		(2.89%)		57.98%	31.79%	7.11%
Return on Equity**		47.98%		43.59%		(100.00%)		57.98%	63.59%	246.41%

205,510 - £2.86m
7.11%

* Return on investment is the overall result as a percentage of the total investment made.

** Return on equity is the overall result as a percentage of the total investment less any loan taken out.

Net Profit Assumption

Film generates net profits of 10% of your total investment

Disclaimer:

i) This Document is for the use of Investment Professionals (under Article 14 of FSMA)

ii) This Document refers to the Information Memorandum dated January 2006. Special notice should be taken of the risk warnings on pages 23 - 25 as well as the Financial Assumptions on page 50 of the Information Memorandum.

iii) This document is for illustration purposes only. Although considerable effort has been applied in ensuring the information and analysis is accurate and complete, Future Film Group Holdings Limited and its subsidiary or associate companies ('Future Films') do not guarantee the accuracy of the information contained herein; as a result, the following must not be taken to constitute tax, financial, legal or investment advice and is provided as an indicative guide only.

iv) That that the opportunity described in the Information Memorandum may not be suitable for all recipients, thus potential members are advised to take appropriate independent professional advice, including advice from an investment advisor who is authorised under FSMA 2000 and a specialist taxation advisor

v) No reliance should be placed in whole or in part on the details provided for the purposes of making a tax return, standalone claim for repayment or to estimate tax liabilities and Future Films cannot be held responsible for any loss arising from the use of information contained herein.

Appendix 4: Schedule 2 to Future-HSBC Agreement

Schedule 2

Fees

1) Calculation

(i) The fees due to HSBC at any time after the commencement of the Agreement are to be calculated according to the formula:

$$\frac{A-B}{2}$$

Where A are all revenues derived by or payable to Future Films or any Associated Company in connection with the Partnerships (including but not limited to amounts received for acting as the Partnership Consultant and Promoter to those Partnerships and any shares of Net Profits) and any other revenues derived by Future Films in connection with any other use of any part of the Deliverables, but excluding any payments by HSBC to Future Films representing a share of profits due to Future Films in respect of using the Deliverables where Future Films did not act as promoter of such Partnerships;

and B are all independent net third party fees paid (exclusive of recoverable taxes) and payable in connection with the Partnerships including but not limited to:-

- IFA fees
- Bank fees
- **Legal fees**
- **Bank legal fees**
- **KPMG Accounting and tax advice**
- **DLA tax advice**
- **Tax Counsel**
- **Other legal opinions**
- **US legal advice**
- **Marketing, Printing and Promotional costs**
- **Operator and Placing Agent Fees**
- Audit Fees
- Fees to Screen Capital.

(ii) Amounts are only to be included in the calculation of B if

a) HSBC have specifically agreed in writing to the third party supplying the services in question to the Partnerships, (the services of Richards Butler, DLA, KPMG, MRI Moores Rowland, Clifford Chance (on behalf of Bank of Ireland), Jonathan Peacock QC, Strook and Strook, Kugel [printing] and Chiltern Corporate Finance, Screen Capital at 15% of the net margin, all being pre approved) and

b) An invoice has been raised or is to be raised in respect of the amount for the services agreed by HSBC and the amount charged (without any reversal, directly or indirectly) to the profit and loss account of Future Films and the amount paid within 3 months of the calculation date, or

c) (in respect of Audit Fees only), HSBC have been provided with a copy of the contract under which the amounts are payable and the amount has been charged (without any reversal, directly or indirectly) to the profit and loss account of Future Films.

iii) Amounts included within the calculation of B highlighted in bold in (i) above are to be increased by a factor of 1.25 provided they are incurred before the financial closing in respect of the first Partnership and were payable whether or not such financial closing took place. Additionally, amounts of expenditure relating to the listed items above incurred subsequent to the first close, shall be due for

payment in priority from subsequent closings and shall be increased by a factor of 1.08. Operator fees provided by Future Films to the Partnerships in respect of accounting, support and taxation, and compliance services may be included within B to the extent pre-agreed by HSBC. The schedule of agreed administrative costs, which will depend on the number and duration of Partnerships, is attached as Schedule 4.
(iv) For the avoidance of doubt if Operator and Audit services are not received no amount shall be included in the B calculation. For the avoidance of doubt, all fees shall be paid in advance to Future.

2) Frequency of Calculation and Payment

(i) Calculations of the fees due to HSBC as at 30 April 2006 and 3 monthly intervals from that date are to be prepared by Future Films, and sent to HSBC within one month of the relevant calculation date. It is agreed that this will include costs incurred on a reasonably estimated basis by Future, including provision for subsequent work required post closing. Alterations and adjustments shall be reflected in subsequent statements.

(ii) Upon receipt of each calculation, HSBC may invoice Future Films for the total amount due, but after deducting amounts previously invoiced.

(iii) In the event of Future Films failing to send HSBC any calculation, the fee due is assumed to be £1,000,000 plus £250,000 per month from the date of the last agreed calculation, or 30 April 2006 if none have been agreed.

(iv) If HSBC disagree with any calculation they may refer it, at their cost, to the auditors at Future Films, whose decision will be final.

3) Pro-forma Calculation and Illustrations

A pro forma of the calculations to be prepared is attached as Appendix 1, with illustrations of the expected fee due at various levels of capital raised for the Partnerships.

Appendix 5: Individual Claimants' Sample Witnesses

1. The general features outlined in Section XXV were common to all the Claimants' Sample Witnesses. I therefore do not repeat them here, when summarising the evidence of each of the individual Claimants' Sample Witnesses. However, those general features are at the heart of the claims of each of the Claimants' Sample Witnesses and were crucial to their evidence. They were a prominent part of all the Claimants' Sample Witnesses' witness statements and of the answers that each of them gave in cross-examination.

I: Mr Anthony Best

2. Mr Best worked for many years at JP Morgan, where he held various senior roles before retiring in 2010. In 2006 he had considerable experience in dealing with investment products, both in his career as a banker and in respect of his personal investments. He regarded it as essential to understand the mechanics of any investment and would only commit if he considered it legally and reputationally appropriate.

3. Mr Best was introduced to Eclipse by an IFA, Mr James Kaberry of Pantheon, who worked with a colleague, Mr Michael Strutt. While Mr Best considered Pantheon's advice, he was better equipped than most investors to form his own independent evaluation of the underlying materials. I therefore have no doubt that he relied on his own analysis, as well as on Pantheon's recommendations. However, it is relevant that Pantheon is one of the IFAs which received information in relation to Eclipse from Mr Bowman.

4. Mr Best did not recall precisely when or how this introduction first came about, but thought it must have been shortly before 28 February 2006, when he received a letter from Pantheon which referred to a recent meeting and confirmed Mr Kaberry's recommendation to invest in Eclipse. This letter attached the Information

Memorandum, which Mr Best scrutinised. He also received the DLA Summary and the KPMG Accounting Review. Mr Best appreciated that the major purpose was the deferral of payment of tax, and relied very much on the DLA Summary and on what it said about the advice received from Counsel.

5. At some point, Mr Best also had a meeting with Mr Levy at Future Films' offices, presumably because he was a particularly significant investor. He found Mr Levy professional and impressive, but did not recall any significant details of what Mr Levy said.

6. At some time in February or early March 2007, Mr Best had his regular annual investment review with Pantheon and was told about a further opportunity to invest in a Future Films project, Eclipse 35. The size of the investment was particularly large, and Eclipse 35 was different from the other Eclipse LLPs (in that all the interest payable over time on the investors' personal loans would be recovered in the first year), so Mr Best wanted reassurance. Mr Kaberry and Mr Strutt arranged for him to meet Mr Bowman, who they said was an adviser on Eclipse 35 and could answer any questions.

7. Mr Best had a limited recollection of this meeting and did not seem to know the date (although he remembered the location). He recalled that Mr Bowman told him that he worked at HSBC. Mr Best also recalled being told (probably by Pantheon) that Mr Bowman was the person who had developed the Eclipse partnerships, knew all the details and was a tax expert. He remembered Mr Bowman's enthusiasm and encouragement. He also remembered Mr Bowman saying that HSBC was encouraging its own clients to invest, and that he was pleased about the quality and earnings of the films they had managed to secure. Overall, he was impressed by Mr Bowman and the reputation and backing of HSBC was important to Mr Best.

8. Mr Best recalled that Mr Bowman brought various documents, which were similar to ones he had seen before, but did not recall what they were and was not sure if he took them away and re-read them before committing. It therefore was not clear to me whether Mr Best ever saw or received a copy of an Addendum, although it would be surprising if the Addendum for Eclipse 35 was not made available to him at about this time. His decision to invest in Eclipse 35 was made very soon after this meeting.

9. Mr Best invested in Eclipse 1, 3 and 7, which closed in early April 2006 and formed part of Tranche 1, and in Eclipse 35, which closed on 3 April 2007 and constituted Tranche 4. His Personal Contributions totalled £1,571,090.

10. Like the other Claimants' Sample Witnesses, Mr Best said that, if he had known that the Eclipse LLPs were not trading as suggested in the Information Memorandum, or that the money invested was not in fact being used for the trade of the partnerships, or that the operation of the partnerships differed in any way from the advice given, he would not have proceeded.

11. Mr Best took part in Ceasing Member Arrangements in 2010.

12. Mr Best joined the Newport action group in January 2014.

13. Mr Best's claim includes his Personal Contributions as well as elements in respect of his Ceasing Member Arrangements and late interest paid/payable to HMRC.

14. Mr Best said that, if he had not invested in Eclipse, he would have invested elsewhere. In his witness statement, he said that it was difficult to say where, but he would have expected such investments to have delivered returns "no less than investments on the London Stock Exchange or on other world exchanges"; he did not put any value on these hypothetical alternative returns.

15. In cross-examination, he said that some of the money saved by tax deferral had been invested in various homes he had lived in over the years. It was not possible to identify how much or to be precise about what money had been used for any specific investment, or what the outcome had been. However, he said that he did not consider that he was down, overall, by reason of having invested in Eclipse (save that he had not taken his Ceasing Member fees into account, when arriving at this estimation). I should say that I found this evidence surprising, given that Mr Best's Personal Contribution to Eclipse 35 was £784,020, for which he got no return. However, I was not given any other evidence on this point.

16. My impression was that, like most if not all of the Claimants' Sample Witnesses, Mr Best originally was involved in these legal proceedings when there was a real concern that HMRC would pursue the Eclipse investors for Dry Tax. Mr Best's evidence suggests that, after that risk was resolved, he did not think that he had suffered any net financial loss and did not expect to recover damages. He remained as a claimant in part simply because he had already committed himself to the litigation, in part because he believes that fraudsters should be held to account, and in part out of solidarity with the other claimants.

II: Mr Christopher Burke

17. Mr Burke has had a career in industry, specifically in telecommunications and information technology. He is an intelligent businessman, but not particularly expert in investment or tax matters.

18. Mr Burke was introduced to Eclipse by an IFA, Mr Andrew Lockington of Johnson Fleming (one of the IFAs which received information in relation to Eclipse from Mr Bowman). He was invited to a presentation at HSBC's offices, given by Mr Bowman on 5 June 2006. He said that Mr Bowman mainly focused on the tax shelter benefit, although there was also reference to the possibility of super profits. Mr Bowman was convincing and knew the Eclipse scheme inside and out.

19. After this, he was sent the Eclipse 'Blockbuster Films' PowerPoint Presentation and the DLA Summary. At some point around this time, he also received the Information Memorandum. Mr Burke said that he will have sat down and considered all these documents, but Eclipse was not the kind of product he was used to assessing. He recalled the references to Mr Peacock QC and DLA and the advice given by them. He said he might have been sent one of the Consolidated Peacock Notes, but he could not be sure; if so, he had not retained it, unlike the other documents he referred to.

20. Mr Lockington then visited him at his home on 27 June 2006 when the size of his investment in Eclipse 16 was finalised and he signed the relevant documents.

21. Mr Burke invested in Eclipse 16, which closed on 20 July 2006 and formed part of Tranche 2, and Eclipse 40, which closed on 30 April 2008 and comprised Tranche 5. His Personal Contributions totalled £139,773.

22. In 2008, Mr Burke took part in Restructuring Arrangements in relation to Eclipse 16.

23. Shortly after this, Mr Burke was contacted by another IFA, Mr Dan Williams of Absolute Wealth Management Limited, and invested in Eclipse 40.

24. Mr Burke took part in Restructuring Arrangements in 2010.

25. Mr Burke followed the Eclipse 35 litigation, albeit he did no more than scan the judgments. After the UTT decision in January 2014, he was starting to panic. He joined the Newport action group in January 2014.

26. Slightly later in 2014, he instructed his own solicitors, Osborne Clarke. A claim form was issued against various IFAs and others including Future Films, DLA and Mr Peacock QC. However, it seems that it was never served. At any rate, all the defendants were deleted by amendment, except for one IFA, who settled on terms that resulted in Mr Burke receiving a net payment of £29,481.75.

27. Mr Burke said that, despite receiving a presentation from Mr Bowman at HSBC's offices, he did not appreciate until much later that Mr Bowman was anything more than an adviser to Future Films. Be that as it may (and leaving aside whatever Mr Lockington might have told him about Mr Bowman's role, had he asked), the Eclipse scheme was effectively sold to him by Mr Bowman, and Mr Bowman impressed him with his in-depth knowledge. Mr Burke was well aware of Mr Bowman's importance to the Eclipse scheme, even if he did not know precisely how Mr Bowman fitted in.

28. Mr Burke's claim includes his Personal Contributions as well as elements in respect of his Ceasing Member Arrangements, late interest paid/payable to HMRC and fees to various advisers.

29. Mr Burke was sure that if he had not received representations to the effect that Eclipse was structured in accordance with the legal advice, and representations in relation to trading, he would not have invested in Eclipse but would have pursued other options. Ideally, these would have been alternative investment options, which would have created similar benefits (i.e., tax deferral).

30. Mr Burke was unable to say how he used the sums that represented the tax liabilities that were deferred on account of his investment in Eclipse – possibly in investments, possibly in a barn on his farm. He said he would give credit for the net sum received under the settlement with the IFA.

III: Mr Anthony Goodwin

31. Mr Goodwin qualified as a chartered accountant but then moved into financial recruitment. In 1993 he founded his own recruitment company. Since then, he has been the CEO and owner of that company.

32. Mr Goodwin was introduced to Eclipse when his accountant (Mr Joel Harding) put him in touch with Deven Yagnic, an IFA at Genius Partners. Mr Yagnic contacted him by

telephone in February 2008 and arranged a meeting which took place on 31 March 2008. The meeting was attended one side by Mr Goodwin, Mr Harding and Mr Yagnic, and on the other by Mr Brad Lee of Future Films.

33. It seems clear that, at that meeting, Mr Goodwin was given the Information Memorandum and the Consolidated Peacock Note of 18 January 2006; because he retained those documents, and there is no other occasion when he is likely to have received them. However, Mr Goodwin did not seem to me to remember anything at all about the meeting, except that he understood that the object was tax deferral and that he was attracted by the idea of paying tax later than he would otherwise have to.

34. Mr Goodwin said in evidence that he recalled reference to Mr Peacock QC and that he also thought there had been mention of Mr Bowman. I did not find Mr Goodwin's evidence as to his recollections convincing or helpful in any way. My doubts on this score were amplified by the fact that the surprisingly detailed recollection that he claimed in his witness statement on certain isolated but legally significant points (e.g., the reference to Mr Peacock QC) was surpassed by his oral evidence, when, for the first time, he said he also remembered Mr Bowman's name being aired.

35. However, irrespective of what Mr Goodwin can now recall (or could recall at the time of his witness statement), it seems to me inherently likely that the references in the Information Memorandum to legal advice will have had some effect on Mr Goodwin's decision to invest (and, indeed, on the advice of Mr Yagnic and Mr Harding that he should do so), whether directly or indirectly via what was said at the meeting.

36. It seems likely that, at some point (possibly after the meeting with Mr Lee of Future Films), Mr Goodwin received the Addendum for Eclipse 40, as well as the Key Features document.

37. Mr Goodwin then made his investment. In his witness statement, he said that this was "perhaps" after further discussions with Mr Harding and with Mr Yagnic. Despite the vagueness of this evidence, it seems to me extremely likely that Mr Goodwin will have had such discussions, at least with Mr Harding, as it is practically inconceivable that he would have decided how much to invest without input from his accountant.

38. Mr Goodwin invested in Eclipse 40, which closed on 30 April 2008 and constituted Tranche 5. His Personal Contribution was £53,624.

39. Mr Goodwin did not take part in Restructuring or Ceasing Member Arrangements.

40. Mr Goodwin joined the Newport action group in July 2014.

41. Mr Goodwin's claim includes his Personal Contribution, late interest paid/payable to HMRC and fees to various advisers.

42. Mr Goodwin's evidence was that the tax payments that the Eclipse scheme had been intended to defer had been invested in property, on which he had made substantial profits. He did not say what he would have done, if he had not invested in Eclipse.

IV: Mr Gavin Lenthall

43. Mr Lenthall qualified as a chartered accountant and worked in accountancy as a tax adviser, specialising in advising high-net-worth individuals and private trusts. In 2007, he was Tax Director at the practice where he worked, responsible for the operation and management of the Private Client Tax team. He also provided training and technical support for tax and financial advisers on tax structure. As such, he was probably the most expert of all the Claimants' Sample Witnesses in relation to a scheme such as Eclipse. In due course (in about 2010), Mr Lenthall qualified as an IFA.

44. Mr Lenthall was introduced to Eclipse by Vivek Sharma, who was known to him from a previous film scheme and who had moved to Future Films. Mr Lenthall was attractive to Future Films not only for his own investment, but because of the possibility (which duly came to pass) that he would recommend Eclipse to the tax and financial advisers with whom he worked, and to his own clients. One of the documents provided to Mr Lenthall was a standard-form letter to IFAs, which I take it was given to him precisely for this reason. I therefore found Mr Lenthall's evidence doubly useful. Not only was he a sample investor, but also his evidence shed light on the kind of information likely to have been provided to IFAs.

45. On 1 February 2007, Mr Sharma gave Mr Lenthall an explanation of the scheme, and then sent him literature including the Addendum relevant to Eclipse 38. On 6 February 2007, Mr Sharma had a meeting with Mr Levy and Mr Astaire of Future Films. Much of the presentation at that meeting was given by Mr Astaire, who illustrated the structure and intended transactions diagrammatically. Mr Lenthall copied the diagram, and confirmed in evidence that he understood the money-flows and appreciated that 97% of the money paid to Disney would go to the Guarantee Bank, to fund the Letter of Credit. He noted this down at the time, and in due course would give explanations to this effect to his colleagues and to some of his own clients.

46. Following this meeting, he received further documents, including the Information Memorandum, the DLA Summary and the Consolidated Peacock Notes of 28 October 2005 and 18 January 2006; but not, he thought, the KPMG Accounting Review. He read all these materials with great care. He was satisfied that the Eclipse scheme appeared to work, and so were his colleagues. The attraction to him was tax deferral, not investment income; he did not put much stock in the possibility of Contingent Receipts. He said that it was critical to him that the scheme had been approved by lawyers, and it was also significant that Mr Peacock QC allowed his name to be used on the Information Memorandum. I accept this evidence, and that Mr Lenthall would not have decided to invest (or recommended Eclipse to any of his colleagues or clients) if he had been told that the structure of the scheme was in fact significantly different from the basis on which Mr Peacock QC had advised.

47. He confirmed in evidence that, in the course of his reading, he noted paragraph 11.4 of the Consolidated Peacock Note and appreciated that it meant that the Letter of Credit was to be secured by the deposit of (as he knew from Mr Astaire's diagram) 97% of the money that the Eclipse LLP had paid to Disney.

48. On 14 February 2007, Mr Lenthall contacted Mr Bowman. He was interested in exploring the possibility of HSBC providing bridging loans for investors, and Mr Bowman's name and contact details were given to him for this purpose by Mr Astaire.

The call was also to discuss the possibility of restructuring in due course. Mr Lenthall said, and I accept, that he did not know at this time that Mr Bowman was the person who had originally devised the Eclipse scheme.

49. Mr Lenthall did not take out a bridging loan from HSBC, but he did take a loan from NatWest.

50. In September 2007 he was contacted by Future Films again, in relation to Eclipse 40. He was given further information, including the Addendum for Tranche 5, all of which he read. He understood Eclipse 40 to be similar to Eclipse 38.

51. Mr Lenthall invested in Eclipse 38, which closed in March 2007 and formed part of Tranche 3, and Eclipse 40, which closed on 30 April 2008 and constituted Tranche 5. Mr Lenthall's Personal Contributions totalled £35,063.

52. Mr Lenthall took part in Restructuring Arrangements in 2010, for which he paid £53,242.

53. Mr Lenthall joined the Newport action group in January 2014.

54. Mr Lenthall's claim includes his Personal Contributions as well as elements in respect of his Ceasing Member Arrangements, other fees paid to Future Films, late interest to HMRC and fees to various advisers.

55. Mr Lenthall said he did not do anything specific with the sums that represented the tax liabilities that were deferred on account of his investment in Eclipse. He had general investments, but he did not say what sort of returns they made. Nor did he say what he would have done if he had not invested in Eclipse.

V: Mr Stephen Margolis

56. Mr Margolis was unusual among the Claimants' Sample Witnesses. From 2000 to 2008, he was in business with Mr Levy as co-founder, co-owner and Chairman of Future Films. On 5 April 2008, he resigned from the board of Future Films and sold his shareholding to Mr Levy. Until the end of 2006, he and Mr Levy worked in the same room, their desks opposite each other. Even after 5 April 2008, Mr Margolis continued to work from the same premises as Mr Levy (albeit on a different floor). Mr Margolis carried on working in film finance until about 2012.

57. Mr Margolis emphasised that his work within Future Films was separate from Mr Levy's. I accept that he was not involved in the day-to-day work on the Eclipse scheme, including the detailed drafting of the transaction documents or the scheme's implementation. However, it is evident that he spoke to Mr Levy frequently. Furthermore, he was a copy addressee, and sometimes the direct addressee, on many emails relating to Eclipse; although I appreciate that he will not always have paid as much attention to these emails as he would have to his own projects.

58. It is clear that he first learnt about Eclipse in late 2005 – no later than about the end of November. He said that Mr Levy told him that he had been discussing a new project with Mr Bowman. Mr Margolis knew Mr Bowman as the doyen of tax-based investment in the film industry, and that he was now at HSBC. Later on, it became

clear to him that HSBC would be receiving a share of the fees. He described the relationship as a partnership, but made it clear that he used this term colloquially.

59. He received a draft of the Information Memorandum, for comments, on 18 December 2005 (he did not provide any comments). He then received the final version on 5 January 2006. His evidence was that he probably did not read the final Information Memorandum closely, having already seen it in draft. However, he would have looked, in particular, at the "Key Highlights" section; and he also noted the references to Mr Peacock QC and to DLA.

60. A few days later, he received further documentation, including the Eclipse 'Blockbuster Films' PowerPoint Presentation, the Key Features document and the DLA Summary. He thought that he also received one or more of the Consolidated Peacock Notes. He said that he would have reviewed all these documents.

61. He said that he thought he later also received an Addendum, in the context of Eclipse 35. He said that he would have glanced at it, but probably trusted his existing understanding.

62. Mr Margolis thought that it looked like a tax shelter deal that could work well. He did not expect to make an overall profit and did not consider the possibility of Contingent Receipts.

63. Mr Margolis invested in Eclipse 1, 7, 11, 12, all of which closed by 4 and 5 April 2006 and formed part of Tranche 1, and Eclipse 35, which closed on 3 April 2007 and constituted Tranche 4. His Personal Contributions totalled £840,283.

64. Mr Margolis was aware that HMRC issued closure notices in May 2009, but was not alarmed at that stage. He was certainly aware of the HMRC challenge in respect of Eclipse 35.

65. Mr Margolis joined the Newport action group in March 2014.

66. Mr Margolis's claim includes his Personal Contribution as well as elements in respect of late interest paid/payable to HMRC and fees to various advisers.

67. Mr Margolis accepted that Future Films' profits during 2006 to 2007 were about £21.5 million, of which he took 40%. He also accepted that some of this was attributable to Eclipse, but he could not say how much.

68. Mr Margolis did not say how he used the sums that represented the tax liabilities that were deferred on account of his investment in Eclipse. Nor did he say what he would have done if he had not invested in Eclipse. However, it should be noted that he got no return at all from his Personal Contribution to Eclipse 35, which was £516,660.

VI: Mr Andrew McIntyre

69. Mr McIntyre qualified as a chartered accountant and worked as an accountant, mostly at the firm that became Ernst & Young. He became a partner at Ernst & Young in 1988 and remained there until his retirement in 2016.

70. Mr McIntyre first met Mr Bowman in 1987, through their work as accountants. He got to know him better from 1989, after which they were both at Ernst & Young.

71. Along with various other partners at Ernst & Young, Mr McIntyre was introduced to Eclipse by Mr Bowman. This happened principally when Mr McIntyre and various other Ernst & Young partners attended at Ernst & Young's London office on 2 March 2006. Mr Bowman gave a presentation, and handed out his own Note. Mr McIntyre said that, in the course of the presentation, Mr Bowman presented himself as the driving force behind the scheme. Given that Mr McIntyre knew Mr Bowman as a tax specialist who had devised various film-related tax schemes while still at Ernst & Young, this was not a surprise. He remembered Mr Bowman striding into the room and making "a swaggering pitch", telling the Ernst & Young partners "you're going to invest in a new film partnership, and it's going to make money by investing in box office successes". He described this as "typical Neil".

72. After this presentation Mr McIntyre then had a follow-up meeting with Mr Bowman on 7 March 2006, which cemented his impression regarding Mr Bowman's importance to the scheme.

73. Mr McIntyre said that it was evident that Mr Bowman was very focused on Eclipse being successful. He knew that HSBC would be remunerated for leading the scheme and would not be involving itself simply for altruistic reasons.

74. As well as Mr Bowman's own Note, Mr McIntyre was also provided with materials including the Information Memorandum, the Consolidated Peacock Note of 18 January 2006, the DLA Summary, and the KPMG Accounting Review, as well as the necessary subscription pack.

75. He provided these materials to another partner at Ernst & Young, who specialised in tax, and he received Ernst & Young's own commentary on the Eclipse scheme ("the E&Y Commentary"). The E&Y Commentary stated that it was based solely on these documents. It broadly accepted and agreed with the advice of Mr Peacock QC (there was one immaterial disagreement).

76. Mr McIntyre also sought and received advice from an IFA, Cavanagh Financial Management Ltd ("Cavanagh"). Cavanagh's report to Mr McIntyre appears to have been based on the Information Memorandum. It concerned the investment aspects, not the taxation perspective (on the basis that tax had been covered by the E&Y Commentary).

77. Mr McIntyre's evidence was that he read all these documents with care before making his decision. Mr McIntyre said that he relied on the opinion of Mr Peacock QC as set out in the Consolidated Peacock Note of 18 January 2006, and that it was unthinkable to him that the scheme would not have been implemented as set out in the documents that he had been given, including the Consolidated Peacock Note. Mr McIntyre struck me as a careful person, and I accept this evidence.

78. Mr McIntyre invested in Eclipse 3 and Eclipse 8, which closed in early April 2006 and formed part of Tranche 1. His Personal Contribution was £213,698. He funded this Personal Contribution by a loan from HSBC, Mr Bowman having put him in touch with Brian Bass at HSBC for this purpose.

79. Shortly after this, Mr McIntyre was provided with the Addendum dated 5 April 2006. He said he was asked to sign an acknowledgment, or he would be removed from partnerships. He said that he read the Addendum carefully before signing it and thought that it did not substantially change the basis of the investment, therefore it was something he could go along with.

80. Mr McIntyre took part in Restructuring Arrangement for Eclipse 8 in 2008, and he took part in Restructuring/Ceasing Member Arrangements for Eclipse 3 in 2010 and again in 2014, for which he paid £155,227. Like Mr Beveridge, Mr McIntyre described this as mitigation.

81. Mr McIntyre's claim includes his Personal Contribution as well as elements in respect of his Restructuring and Ceasing Member Arrangements, late interest paid/payable to HMRC and fees to various advisers. He also sought to recover the cost of the loan from HSBC for his Personal Contribution, in the sum of £32,734.39.

82. At one point of his evidence, Mr McIntyre said that, as an experienced auditor, he was well aware an enterprise such as a leasing business might have large figures on both sides of the balance sheet, but they would net off to something quite small. He explained that he made this comment with his own investment and the distributions that would be received over time.

83. However, if he had thought about the position as between the Eclipse partnerships and Disney, I think it would have been obvious to him that, in that context as well, the figures on each side would net off to something quite small. This small net balance would be the ultimate upside to Disney. Furthermore, having read the Consolidated Peacock Note, he could have worked out from paragraph 11.4 that monies received by Disney under the Licensing Agreement (apart from the ex hypothesi small net balance that Disney retained) would fund the sum required for the deposit with the Guarantee Bank. This is what the Distributor would use to procure the Letter of Credit.

84. Mr McIntyre was one of the Claimants' Sample Witnesses who said that he had not appreciated that the money had "gone round in a circle and not having touched anything" until 2019, when he first instructed Edwin Coe and learnt this from them. He said that this was "a lightbulb moment", which made him think that HSBC might be liable, because his experience as an auditor was that a circular money-flow was not compatible with genuine trading.

85. I accept that this was truthful evidence by Mr McIntyre as to his actual state of mind. Furthermore, I do not criticise him for not appreciating the circular money-flow earlier than this. I am sure that many others might also have failed to spot the significance of paragraph 11.4 of the Consolidated Peacock Note of 11 January 2006. Nevertheless, the fact that the money (or most of it) would go round in a circle was, strictly, apparent from the Consolidated Peacock Note.

86. Mr McIntyre did not say how he used the sums that represented the tax liabilities that were deferred on account of his investment in Eclipse. Nor did he say what he would have done if he had not invested in Eclipse.

87. Mr McIntyre seems to have been less concerned than most of the Claimants' Sample Witnesses about Dry Tax. His view was that this was just a negotiating posture on the part of HMRC.

VII: Mr Nigel Pickard

88. Mr Pickard qualified as a chartered accountant. Before he retired in 2002, he worked for many years in the tax department of Ernst & Young, becoming a partner in about 1974. As a retired tax partner in a major accounting firm, he was comfortable giving and taking tax advice, including in relation to the tax element of investment proposals. He would always give such advice on the basis of the proposal as set out, and would expect to be told if the proposal changed. Once finalised, he would expect the proposal to be carried out in the manner previously indicated.

89. Mr Pickard worked with Mr Bowman for about five years, before his retirement, and invested in some of the previous schemes Mr Bowman had come up with, for which he had used a loan from HSBC. He therefore already knew of Mr Bowman's expertise in devising such schemes. Pickard had a relationship manager with HSBC, Mr Brian Bass, with whom he had annual discussions to review his financial position.

90. Mr Pickard first heard about Eclipse on 16 February 2006, when he received an email from Mr Ken Barnes, the manager of Ernst & Young's Personal Tax Services, telling him about a film investment scheme and saying that Mr Bowman had been heavily involved in its development. The name "Eclipse" was not mentioned at this point and no meaningful information was provided. However, on 1 March 2006 Mr Pickard received a copy of the Note produced by Mr Bowman, which he regarded as key. He read this Note carefully in advance of a meeting on 2 March 2006, at which Mr Bowman gave a presentation to him and various other people, most of whom were Ernst & Young partners (including Mr McIntyre).

91. At the meeting, Mr Bowman made it clear that Eclipse was his scheme. Knowing that Mr Bowman was involved and had devised Eclipse was reassuring, because Mr Pickard rated Mr Bowman highly. He felt that Mr Bowman was an expert in personal tax and knew what he was talking about. At the time of the meeting, Mr Pickard did not know that Mr Bowman had left Ernst & Young, but he learnt a few weeks later that Mr Bowman was by then at HSBC.

92. Mr Bowman gave a comprehensive rundown of how the partnership would work, how the film rights would be exploited, how it would be funded and what the return would be as far as an investor was concerned. He also said that it would be an advantage to make your investment before 5 April 2006. At the end of the meeting, Mr Bowman went around the room. He asked Mr Pickard if he was interested, and Mr Pickard said yes, although he wanted further details including counsel's opinion.

93. Mr Pickard recalled that Mr Bowman mentioned the advice of a QC, and he left the meeting thinking that the scheme would probably work, subject to his being able to verify this by looking at the QC's opinion. In due course, Mr Pickard received the Consolidated Peacock Note of 18 January 2006. He was familiar with Mr Peacock QC's name and reputation and placed a lot of reliance on his advice, reading the Note several times and doing his best to check the details carefully.

94. Mr Pickard also received a report from Cavanagh and a tax commentary from Ernst & Young. These documents were similar to the Cavanagh report and E&Y Commentary received by Mr McIntyre.

95. Mr Pickard said that he believed that he received the Information Memorandum along with the Cavanagh report. He did not recall reading it, but was sure that he would have done so and would have noted the reference to the advice from Mr Peacock QC and from DLA. It is clear from his evidence that Mr Pickard placed considerable reliance on this advice.

96. Mr Pickard said that he did not think he received the KPMG Accounting Review. However, the E&Y provided its Commentary on the terms of an engagement letter that stated that Mr Pickard had provided the KPMG Accounting Review to E&Y. This suggests that he had, in fact, received the KPMG Accounting Review; at any rate, he should have done so.

97. Mr Pickard said in evidence that he also relied on the fact that, as he understood it, an investor who borrowed the maximum amount would get a return of more than 4%. He accepted in cross-examination that this was a misunderstanding on his part, in that the information provided to him actually showed that such an investor would make an overall loss of approximately 2.5% (even though the LLP would be in profit).

98. Mr Pickard invested in Eclipse 3, which closed in early April 2006 and formed part of Tranche 1. His Personal Contribution was £88,152.

99. Mr Pickard contacted Mr Bass of HSBC, who told him he knew all about the Eclipse scheme and asked him what sum he wanted to borrow. Ultimately HSBC provided a facility of £100,000, which Mr Pickard drew on to provide the full amount of his Personal Contribution, i.e. £88,152.

100. Mr Pickard took part in Restructuring Arrangements in 2010.

101. Mr Pickard joined the Newport action group in early 2014.

102. Mr Pickard's claim includes his Personal Contribution and the cost of the HSBC loan, as well as elements in respect of the Ceasing Member Arrangements and fees paid to various advisers.

103. Mr Pickard said that, if he had not invested in Eclipse, he would have put his Personal Contribution to buying properties to let. He said that his return on such properties was about 7.1% per annum.

104. I have no reason to doubt Mr Pickard's evidence that his return on investments in properties was about 7.1% per annum. He struck me as a careful witness who was likely to know this. However, given that his Personal Contribution was not made from his own capital, but was entirely borrowed from HSBC, I was not convinced that, if he had not invested it in Eclipse, he would instead have invested it in properties.

105. When HMRC challenged Eclipse and then started demanding payment, this had a more serious effect on Mr Pickard than on any of the other Claimants' Sample Witnesses. He received multiple notices and telephone calls requesting payment within 7 days. On

one occasion, debt collectors came to the front door, leaving a letter and threatening court proceedings. By this time, Mr Pickard was over 75 years of age and was caring for his wife, who was dying with Alzheimer's and required 24-hour care. Mr Pickard became depressed and was unable to cope. He suffered from headaches, could not sleep and drank excessively. Ultimately, he entered into an IVA.

106. I must record the fact that Mr Pickard, who is not in robust health, gave his evidence with a quiet dignity that I found both impressive and moving.

VIII: Mr Robin Southwell

107. Mr Southwell's career was mostly in the aviation industry. In 2006, he was chief executive of a major aircraft manufacturer.

108. Mr Southwell was introduced to Eclipse by his long-term IFA, Mr Philip Raper of Cannacord Genuity Wealth Management ("Cannacord"). Mr Raper sent him a suitability letter dated 9 June 2006.

109. While Mr Southwell did not appreciate this at the time, this suitability letter does not appear to have been written by Mr Raper. A header states that it was written by "Mike Haines". I have been told, and I believe it to be common ground, that Mr Haines worked at another IFA – Andersen Charnley, which is one of the IFAs which received information in relation to Eclipse from Mr Bowman.

110. The letter appears to have been largely based on the Information Memorandum and Addendum and referred to both, asking Mr Southwell to read them. It also referred to the opinion of Mr Peacock QC, which registered with Mr Southwell. However, the suitability letter was not only based on the Information Memorandum or any similar source, because it contained some additional information that must have been obtained from elsewhere – possibly from Mr Bowman.

111. Consistently with this, the suitability letter says at one point: "The structure is supported by the opinion of Jonathan Peacock QC, KPMG and Neil Bowman, Director of Structured products at HSBC". There was no other reference to Mr Bowman or to HSBC. However, the letter also contained a diagram, similar to the structure diagram provided to Mr Peacock QC for the consultation of 22 December 2005 (but not included in any of the Consolidated Peacock Notes or any other documents provided to the generality of ordinary investors) and also similar to the one that Mr Astaire of Future Films drew for Mr Lenthall. It may well have been provided to Andersen Charnley by Mr Bowman. It reflects that 97% of the total investment will be paid to the Guarantee Bank, to secure the minimum payments (i.e., via the Letter of Credit).

112. None of this appears to have been appreciated at the time by Mr Southwell. Mr Raper took Mr Southwell through the scheme at a meeting, but Mr Southwell did not recall the detail of the meeting. He was shown some documents, and asked to sign documents, but did not recall scrutinising any documents and was not sure that he did so.

113. In deciding to invest in Eclipse, Mr Southwell essentially relied on the advice of Mr Raper. However, I accept that Mr Raper recommended Eclipse to Mr Southwell on the basis of the information that Cannacord had received, including the Information

Memorandum as well as the other information in the suitability letter provided to Mr Southwell.

114. Mr Southwell invested in Eclipse 20, which closed on 20 July 2006 and formed part of Tranche 2. His Personal Contribution was £118,203.

115. Mr Southwell took part in Restructuring/Ceasing Member Arrangements in 2010 and 2014. He said that he did so in 2014 following advice from his IFA about developments around the Eclipse case (which I assume means the UTT decision) and proposed changes in legislation. Mr Southwell was by now concerned that Eclipse was unravelling.

116. Mr Southwell's claim includes his Personal Contribution as well as elements in respect of his Ceasing Member Arrangements, late interest paid/payable to HMRC and fees to various advisers.

117. Mr Southwell said that, if he had not invested in Eclipse, he would have invested elsewhere. He was unable to say how, except that the relevant funds would probably have gone in with his other investments.

118. He said that he generally expected his investments to give a return of about 9.5%, just below 10% (which I understood to be an annual rate).

IX: Mr Christopher Bernard Upham

119. Mr Upham was a police officer for 24 years. After retiring from the police force in 1995, he set up a consultancy business, with some success. He was still engaged in this business in 2006.

120. Mr Upham was introduced to Eclipse by an IFA, Patrick Finnegan of ProAct. Mr Upham had been put in touch with Mr Finnegan by his long-term IFA, Mr David McGhie of Planned Futures. As I have already noted, ProAct is one of the IFAs which received information in relation to Eclipse from Mr Bowman. There is some evidence that Mr McGhie may also have been in contact with Mr Bowman. Mr Upham himself had no direct contact with Future Films or with HSBC/Mr Bowman, before his decision to invest.

121. Mr Upham said that he was first contacted by Mr Finnegan by telephone, following which Mr Finnegan sent a report in the form of a letter of 13 March 2006 headed "Film investment recommendations". In fact, that letter begins: "As promised, I am following up on our meeting(s) on 10th March…", and in the next paragraph again refers to "our meeting". Furthermore, on its fourth page, it refers to the "Information Memorandum (previously provided)…"; whereas Mr Upham's evidence was that the Information Memorandum was sent along with the report of 13 March 2006.

122. This suggests that in fact Mr Upham met Mr Finnegan in person and discussed Eclipse with him, on 10 March 2006, rather than merely having a discussion by telephone; and that the Information Memorandum was provided at or before that meeting; all of which, in turn, suggests that Mr Upham's recollection of these events is not wholly clear or reliable.

123. The ProAct report of 13 March 2006 was not very detailed, but it drew specific attention to various parts of the Information Memorandum, notably the section dealing with Risk Factors. It also had an annex dealing with taxation matters, which referred to the "lengthy consideration by leading Counsel" on the question whether the Eclipse LLPs would be carrying on a bona fide commercial trade.

124. Mr Upham read this report and the Information Memorandum, as is evident from the fact that he marked various passages in both. These include the parts of the Information Memorandum that refer to the advice from Mr Peacock QC. He said in evidence, and I accept, that he made these markings prior to making his decision to invest, and relied on the relevant passages.

125. Mr Upham said that he also received and read the Consolidated Peacock Note of 28 October 2005, but no longer had a copy (this makes it difficult to sure that it was the Consolidated Peacock Note 28 October 2005 version, rather than the Note of 18 January 2006). He also said he thought he had received the Addendum, but was not certain. In cross-examination, he said that he had seen the Addendum, but was not able to say that he saw it before investing. Unusually, Mr Upham does not appear to have received an investor illustration (cf. Appendix 3 to this judgment).

126. Mr Upham said that he carefully read all the materials provided to him, before he made his decision to invest. He then called Mr Finnegan just to say that the forms had been filled in and were in the post – i.e., there was no further discussion with Mr Finnegan, following receipt of the report of 13 March 2006, before Mr Upham was committed.

127. Mr Upham invested in Eclipse 3, which closed in early April 2006 and formed part of Tranche 1. His Personal Contribution was £13,752.

128. It was important to Mr Upham that the Eclipse LLP in which he was invited to invest would be trading. This was not only because he understood this to be essential in order to succeed in deferring his tax liabilities, but also because he saw Eclipse as a low-risk opportunity to make a profit. Indeed, he said that tax deferral was a minor consideration to him, and was less important than Eclipse making a profit.

129. Given the advice that he received from ProAct, from Mr McGhie and from his accountant (who explained the financial models that set out the intended tax benefits), I strongly suspect that, in his evidence to me, Mr Upham was understating the significance to him of deferring his tax payments. I consider it likely that this is an area where Mr Upham's memory may have let him down. Despite this, I do accept that the possibility of profit was important to Mr Upham, more than to any of the other Claimants' Sample Witnesses. However, this was not because of any representation made to him by Future Films or HSBC, or for which they are responsible.

130. It was not clear from his evidence whether Mr Upham appreciated (i) that Eclipse was certain to make a profit as long as the Letter of Credit issued by the Guarantee Bank held up, (ii) that this profit was not dependent on Contingent Receipts or (iii) that Eclipse making a profit was not the same as Mr Upham making a profit. However, Mr Upham was firm in his evidence that he read the Information Memorandum carefully, as well as the report from his IFA (ProAct). Each of these made it clear that there was a possibility of Contingent Receipts, but it was not dependable.

131. My impression was that Mr Upham decided for himself that an investment that was associated with the 'Pirates of the Caribbean' franchise was bound to be profitable. He said in evidence that Mr Finnegan told him that there was a good chance of Contingent Receipts, but this was not in his witness statement. The fact that Mr Upham did not recall meeting Mr Finnegan, which is when any such discussion must have taken place, undermines the reliability of his evidence that Mr Finnegan gave him some kind of assurance about Contingent Receipts. I do not exclude the possibility that some conversation took place to the effect that there was a good chance of Contingent Receipts, but, having seen and heard Mr Upham give his views about the certain profitability of any 'Pirates of the Caribbean' movie, I think it more likely that Mr Upham expressed this view to Mr Finnegan, rather than the other way around.

132. Mr Upham took part in Restructuring Arrangements in 2008, as well as Ceasing Member Arrangements in 2014. He said that his decision to take part in the 2014 Ceasing Member Arrangements came after the UTT decision, following which his accountant became concerned and discussed with him what would happen if Eclipse 35 lost in the Court of Appeal. Mr Upham and his wife then both then decided to become Ceasing Members. In his witness statement, he gave the date as "probably 2013", but if it post-dated the UTT decision (handed down 20 December 2013) it is more likely that this decision was made in early 2014.

133. Mr Upham joined the Newport action group in around May 2015.

134. Mr Upham's claim includes his Personal Contribution as well as elements in respect of his Ceasing Member Arrangements, late interest paid/payable to HMRC and fees to various advisers.

135. Mr Upham said the sums that represented the tax liabilities that were deferred on account of his investment in Eclipse got absorbed by general day-to-day costs and went in a number of different directions. He and his wife had a modest property portfolio, which had increased in value; but he could not say by how much. He did not say what he would have done if he had not invested in Eclipse.

X: Mr Robert Beveridge

136. Mr Beveridge qualified as a chartered accountant and spent much of his career working in industry, initially as a finance manager and then as finance director. This included various stints with significant financial responsibility for major FTSE companies. In 2007, he was the finance director of a plc. He was not a tax specialist, but his business experience made him better equipped to understand an investment proposal than the average person.

137. Mr Beveridge was introduced to Eclipse by an IFA, Grant Thornton (a firm which was also responsible for Mr Beveridge's personal tax affairs). Prior to joining Eclipse 33, Mr Beveridge had no direct contact with Future Films or with HSBC/Mr Bowman. However, Grant Thornton is one of the IFAs that received information in relation to Eclipse from Mr Bowman.

138. Mr Beveridge attended a meeting with Grant Thornton on 12 March 2007, at which the Eclipse scheme was outlined to him, and he was given the Information Memorandum and the relevant Addendum. He skimmed them, but assumed that any important

information would be highlighted by Grant Thornton. He said he was interested and was given a detailed report, which Grant Thornton prepared specifically for him. After the meeting, he read this report carefully, as well as the Information Memorandum, before making his decision to invest. At some point, he also received a spreadsheet and explanatory email from Grant Thornton, which set out the anticipated net benefits to Mr Beveridge of investing in Eclipse, and in which Grant Thornton treated it as realistic to anticipate earnings of 7% per annum on the tax payments being deferred. These anticipated net benefits related entirely to the expectation of tax deferral.

139. Both at the meeting and when reading the Grant Thornton report, Mr Beveridge appreciated that it was key that the Eclipse LLP engaged in trading. He challenged the Grant Thornton representative on this at the meeting of 12 March 2007. He also paid particular attention to this aspect when considering Grant Thornton's report and the Information Memorandum.

140. The Grant Thornton report appears to have been based on the Information Memorandum and the relevant Addendum. I did not understand any of the parties to suggest otherwise. It referred to Mr Peacock QC as tax counsel and to DLA as the tax adviser. It attached appendices including an investor illustration said to have been prepared by Future Films (but probably in fact prepared by Ms Emmerton of HSBC, on Future Films's instruction), which is the example at Appendix 3 to this judgment – i.e., a cashflow model prepared on several permutations, reflecting no loan, a 50% loan and the maximum loan; and both without and with a "Net profit share" (i.e., Contingent Receipts).

141. I accept that Mr Beveridge relied on the Grant Thornton report and on the Information Memorandum when he made his decision to invest. He was well aware that Eclipse offered the advantage of tax deferral. His evidence did not suggest that he placed reliance on the possibility of Contingent Receipts, which do not appear to have been highlighted by Grant Thronton in the meeting of 12 March 2007 or in the spreadsheet setting out the benefits of the scheme. Mr Beveridge's contemporaneous notes of that meeting suggest he may have regarded Contingent Receipts as no more than a "bonus element".

142. Mr Beveridge said he would not have invested if he had understood that the "investment" and "returns" was just the same money going around in a circle. I accept Mr Beveridge's evidence that he did not understand the essentially circular money-flow. However, it is important that Mr Beveridge placed considerable reliance on Grant Thornton, because Grant Thornton may well have understood the circular money-flow, and should have if they had read and understood paragraph 11.4 of the Consolidated Peacock Note of 18 January 2006 (as they ought to have done); or if this was explained to them in some other way, as appears to have happened in relation to some other IFAs who also received information from Mr Bowman, notably Andersen Charnley and Pantheon (see below in relation to Mr Southwell and Mr Cooper).

143. Mr Beveridge invested in Eclipse 33, which closed on 20 March 2007 and was part of Tranche 3. His Personal Contribution was £82,590.

144. On 31 March 2008, Mr Beveridge received an email from Grant Thornton, which forwarded an email from Future Films that made a passing reference to HSBC. However, he did not ask Grant Thornton about this and did not become aware of the

role of Mr Bowman/HSBC in devising the Eclipse scheme until 18 February 2015, when he read a newspaper article about this.

145. Mr Beveridge took part in Ceasing Member Arrangements in 2012, for which he paid £148,457. He described this as mitigation.

146. Mr Beveridge first took legal advice in relation to Eclipse in July 2013, but the initial focus of this advice was Grant Thornton. In May 2018 he joined the ARC action group, which was advised by Fieldfisher.

147. Mr Beveridge's claim includes his cash contribution as well as elements in respect of his Ceasing Member Arrangement costs, late interest paid/payable to HMRC and fees to various advisers.

148. Mr Beveridge did not say how he used the sums that represented the tax liabilities that were deferred on account of his investment in Eclipse. Nor did he say what he would have done if he had not invested in Eclipse.

XI: Mr Stephen Blight

149. Mr Blight was for many years a dentist in specialist practice as an orthodontist, before retiring in 2022. He is not a claimant who had training, qualifications or experience relevant to tax, finance or investment. I suspect that he will not feel slighted if I say that he is not especially experienced or sophisticated when it comes to investment decisions. He was, therefore, the kind of investor who is bound to depend on advice from an IFA.

150. Mr Blight was introduced to Eclipse by an IFA, Omni. Prior to joining Eclipse 33, Mr Blight had no direct contact with Future Films or with HSBC/Mr Bowman. However, Omni is one of the IFAs which received information from Mr Bowman in relation to Eclipse.

151. Unsurprisingly, Mr Blight essentially relied on what he was told by Omni. Omni's advice was given at a presentation on 3 March 2008. PowerPoint slides from the presentation were handed out in hard copy.

152. Mr Blight was not sure if he ever received the Information Memorandum. It may have been available at the 3 March 2008 presentation (he was not sure), but he would not have done more than flick through it. In any event, he did not keep a copy after the presentation.

153. After the presentation, Mr Blight told Omni that he was interested. He was then sent the Addendum for Eclipse 40, but not the Information Memorandum. He read it for "red flags" that might contradict anything he had been told up to that point.

154. It is worth noting that the Addendum is intended to be read in conjunction with the Information Memorandum. The fact that Mr Blight in fact read it in isolation, without asking Omni for the Information Memorandum to which it relates, suggests that his scrutiny was not searching.

155. The explanation of Eclipse in Omni's presentation is noticeably short and simple. It appears to have been based on the Information Memorandum and the Addendum, but

is brief. For example, it makes no reference to Mr Peacock QC or DLA or their legal advice.

156. Mr Blight said that, even though the text in Omni's PowerPoint slides said nothing to this effect, he recalled Omni saying at the presentation that Eclipse had been reviewed by legal counsel (or something similar). Given the many years that have passed since 3 March 2008, it is difficult to place any reliance on this evidence. Furthermore, Mr Blight does not appear to have said anything about Omni having mentioned a review by legal counsel when he instructed a claims management company (Rebus), in 2013.

157. However, it seems reasonable to infer that Omni recommended Eclipse because Omni itself was satisfied by the information provided to it – which, I infer, included the Information Memorandum and the Addendum for Eclipse 40, with their references to Mr Peacock QC and to DLA; and may well have included the Consolidated Peacock Note of 18 January 2006. Mr Blight then relied on Omni.

158. Mr Blight invested in Eclipse 40, which closed on 30 April 2008 and constituted Tranche 5. His Personal Contribution was £42,000.

159. Mr Blight took part in Restructuring Arrangements in 2010, for which he paid £67,250.

160. Mr Blight joined the Newport action group in May 2014. He first took legal advice at about this time, from the solicitor advising the Newport action group. He then joined the ARC action group in November 2016.

161. Mr Blight's claim includes his cash contribution as well as elements in respect of his Ceasing Member Arrangement costs, late interest paid/payable to HMRC and fees to Future Films and to various advisers.

162. Mr Blight did not say how he used the sums that represented the tax liabilities that were deferred on account of his investment in Eclipse. Nor did he say what he would have done if he had not invested in Eclipse.

XII: Mr Stephen Cooper

163. Mr Cooper was in 2007 an audit partner at a big-four accounting firm. Most of his clients were in the manufacturing sector (typically large FTSE250 companies). He had an understanding of corporate tax matters, but no more than a basic knowledge of personal tax. He relied on an IFA, Mr Richard Grant of Pantheon. As I have already noted, Pantheon is one of the IFAs to which Mr Bowman provided information.

164. On the advice of Mr Grant/Pantheon, Mr Cooper had previously invested in several other film finance schemes.

165. In early March 2007, Mr Grant approached Mr Cooper about Eclipse. He appreciated from the outset that the scheme was intended to achieve the deferral of tax liabilities. Mr Grant first sent Mr Cooper an email on 9 March 2007, then a formal recommendation on 14 March 2007, which was accompanied by the Information Memorandum.

166. The initial email from Mr Grant attached an investor illustration, which was a cashflow model in a similar format to Appendix 3 to this judgment – i.e., both without and with

a "Net profit share" (i.e., Contingent Receipts). It was not clear to me that he paid any regard to this investor illustration. My impression was that he paid more attention to the formal recommendation and Information Memorandum than to the initial email or the investor illustration attached to it. Overall, Mr Cooper's evidence suggested that he believed that there was a possibility of upside if the films did well, but he did not rely on it. His real interest was in tax deferral.

167. Mr Cooper said that he recalled Mr Grant telling him that the partnerships had gone through proper tax diligence and had been approved by leading tax counsel. This will also have been apparent to him from the Information Memorandum. Mr Cooper said that it was particularly important to him that a QC had approved the scheme and, without that, he would not have wanted to invest. He thought that Eclipse was a bona fide business trading scheme. I accept this evidence.

168. Mr Cooper did not recall reading or receiving the Addendum for Tranche 3 and had not kept a copy (whereas he kept copies of various other documents, including the Information Memorandum). It therefore is not clear that he ever saw it or was advised of its contents by Mr Grant. However, it seems unlikely that the Addendum was not provided to Mr Grant/Pantheon.

169. Mr Cooper also said that he would not have invested if he had known that the money invested simply moved round in a circle. However, Mr Grant's email of 9 March 2007 stated that the loan which would fund the great majority of the investment would be cash-collateralised – Mr Grant described it as "effectively ring-fenced". It was put to Mr Cooper in cross-examination that this meant that his own investment would be pledged to the lending bank, rather than being used to fund films. He said that he did not think about this at the time. Now, however, with the benefit of hindsight, he recognised the circularity involved.

170. Mr Cooper invested in Eclipse 38 and Eclipse 39, which closed in March 2007 and formed part of Tranche 3. His Personal Contributions totalled £38,235.

171. Mr Cooper took part in Restructuring Arrangements in 2008 and in 2010.

172. Mr Cooper joined the Newport action group in February 2014. He joined the ARC action group in mid-2018.

173. Mr Cooper's claim includes his Personal Contributions as well as elements in respect of his Restructuring Arrangements and late interest paid/payable to HMRC.

174. Mr Cooper was unable to say how he had used the money that would otherwise have been used to pay his tax liabilities when they fell due in each year, except that some of it had probably gone into a pension scheme, and some leaked into general expenditure.

175. Mr Cooper did not say what he would have done, if he had not invested in Eclipse. I suspect that, as with the tax payments that he deferred, some of the money would have gone into a pension scheme, and some would have gone into his general expenditure.

XIII: Mr Federico Ghella

176. In 2006, Mr Ghella was an investment manager.

177. Mr Ghella was introduced to Eclipse by an IFA, Mr Richard Taylor of ProAct, along with another investor, Mr Keith O'Callaghan, who was the CFO of his employer. Prior to joining Eclipse 12, Mr Ghella had no direct contact with Future Films or with HSBC/Mr Bowman. However, ProAct is one of the IFAs which received information in relation to Eclipse from Mr Bowman.

178. Mr Ghella attended at least two meetings with ProAct during March 2006, but did not recall the specifics of these meetings. He also communicated with Mr O'Callaghan. He and Mr O'Callaghan received from ProAct a report prepared by Mr Steve Bold of Stellar Financial Partners. Mr Ghella did not receive the Information Memorandum or any Addendum, but Mr Bold's report appears to have been based on the Information Memorandum and makes reference to the advice received from Mr Peacock QC as well as the involvement of DLA. I accept that Mr Ghella relied on this, when he decided to invest.

179. Mr Ghella said that the main aim of investing in Eclipse was tax deferral, but the fact that there was an upside (i.e., Contingent Receipts) was important as well. However, while Mr Ghella was one of the investors who received a financial illustration similar to that in Appendix 3 to this Judgment (i.e., one that included a cashflow model that made provision for Contingent Receipts), he made no reference to this in his evidence. On the contrary, the illustration that he recalled, and which he said as something that affected this thinking, was a series of cashflow models provided by Mr Taylor to illustrate the worst-case, best-case and middle-ground scenarios. In these models, the best-case scenario appears to have been prepared on a basis that does not include Contingent Receipts. I therefore do not accept that the possibility of Contingent Receipts was of any real importance to Mr Ghella's decision to invest. Indeed, Mr Ghella was one of the witnesses who described it as a "bonus".

180. Mr Ghella invested in Eclipse 12, which closed on 5 April 2006 and was part of Tranche 1. His Personal Contribution was £51,176.

181. Mr Ghella took part in Restructuring Arrangements in 2010, for which he paid £28,934.

182. Mr Ghella joined an action group in 2019.

183. Mr Ghella's claim includes his Personal Contribution as well as elements in respect of his Ceasing Member Arrangements, late interest to HMRC and fees to various advisers.

184. Mr Ghella said that the sums that represented the tax liabilities deferred on account of his investment in Eclipse were invested in a flat in London – not immediately, but in 2010. It is not clear what return he made. He did not say what he would have done if he had not invested in Eclipse.

XIV: Mr Peter Nielsen

185. Mr Nielsen is a trader in the financial markets. For 22 years he worked in this field at Citibank in London, until 2022. He is financially sophisticated but has no experience or knowledge in the field of tax.

186. Mr Nielsen was introduced to Eclipse by an IFA, Simon Woods of Frontier Financial Services Limited ("Frontier"). Mr Nielsen had no real collection of his discussions with

Mr Woods/Frontier and was frank about this. He thought that he had one or two meetings with Mr Woods but was hazy about the details. However, it is apparent from some of the email exchanges that Mr Nielsen had with Frontier at the time that the Information Memorandum had been mentioned to him; he therefore asked for a soft copy and was sent scans of the pages setting out "Risk Warnings".

187. Mr Nielsen understood that the object of the scheme was tax deferral, and that this would be allowed as long as the Eclipse LLP was (in his words) "a proper film business". He recalled that Mr Woods mentioned a top tax lawyer, although he did not seem to me to be sure whether Mr Peacock QC's name had been mentioned. The fact that Mr Woods had mentioned the opinion of tax counsel is confirmed by various email exchanges that must have been shortly after Mr Woods explained the scheme to Mr Nielsen.

188. It does not seem likely that Mr Nielsen spent much time, if any, scrutinising the documents published by Future Films in relation to Eclipse, with the possible exception of the "Risk Warnings" section of the Information Memorandum. It seems more likely that he relied on his IFA to have done this and then to give him appropriate advice, in the light of those documents.

189. Mr Nielsen invested in Eclipse 35, which closed on 3 April 2007 and constituted Tranche 4. His Personal Contribution was £142,500. This was partly funded by a bank loan from Barclays.

190. Mr Nielsen took part in Restructuring Arrangements in 2010, and Ceasing Member Arrangements in 2014. His decision to take part in the 2014 Ceasing Member Arrangements was taken in the hope that it would protect him from Dry Tax, which had first come to his attention as a risk in about May 2012, and had been causing him considerable anxiety since late 2013.

191. Mr Nielsen first considering taking action in respect of Eclipse in about August 2012, when he instructed a claims management company to make a complaint against Frontier (or its legal successor). It does not seem that anything came of this.

192. Mr Nielsen joined the Newport action group in January 2014. He then joined the ARC action group in 2016.

193. Mr Nielsen's claim includes his Personal Contribution as well as elements in respect of his Restructuring and Ceasing Member Arrangements and the fees paid to various advisers, plus the cost of the Barclays loan.

194. As someone who invested only in Eclipse 35 – to which HMRC objected almost immediately – Mr Nielsen never succeeded in deferring the payment of any of his tax liabilities. He therefore received no benefit for his investment in Eclipse.

Appendix 6 – Losses asserted by Claimants' Sample Witnesses

ANTHONY BEST			
HEAD OF LOSS	**AMOUNT**	Causation	Proof of loss
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 1	£222,756	✓	✓
Cash Payment – Eclipse 3	£418,724	✓	✓
Cash Payment – Eclipse 7	£145,590	✓	✓
Cash Payment – Eclipse 35	£784,020	✓	✓
(B) Further Payments to Future			
Restructuring Fees – Eclipse 1 (2010)	£127,020	X	✓
Restructuring Fees – Eclipse 3 (2010)	£236,363	X	✓
Restructuring Fees – Eclipse 7 (2010)	£81,918	X	✓
Restructuring Fees – Eclipse 35 (2010)	£184,269	X	✓
Audit Fees – Eclipse 1	£627.10	✓	✓
Audit Fees – Eclipse 3	£1,124.04	✓	✓
Audit Fees – Eclipse 7	£367.98	✓	✓
(C) Payments to Professional Advisors			
ARC/Fieldfisher Advisor Fees	£48,900	✓	X Undocumented, witness statement vague, oral evidence generally not indicative of accurate recall or record-keeping
(D) Payments to HMRC			
HMRC Late Payment Interest	£463,197.74	✓	✓
TOTAL CLAIMED	**£2,714,876.86**		
TOTAL ACCEPTED, subject to credit for profits made	**£2,036,406.86**		

CHRISTOPHER BURKE			
HEAD OF LOSS	**AMOUNT**	Causation	Proof of loss
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 16	£119,731	✓	✓
Cash Payment – Eclipse 40	£20,042	✓	✓
(B) Further Payments to Future			
Restructuring Fees – Eclipse 16 (2008)	£57,801	X	✓
Administration Fees (2009, 2010, 2011, 2012, 2013, 2014)	£20,187	✓	✓
Restructuring Fees – Eclipse 16 (2010)	£69,622	X	✓
Restructuring Fees – Eclipse 40 (2010)	£42,688	X	✓
Legal Fees – Eclipse 35 (2012)	£500	✓	✓
(C) Payments to Professional Advisors			
Osborne Clarke Advisor Fees	£26,576.39	✓	X Undocumented
Clarke Wilmott Advisor Fees	£3,018.30	✓	X Double recovery: Clarke Wilmott costs netted off against IFA settlement
Thomas and Young Advisor Fees	£12,400.20	X Witness statement says would have sought accountant's advice even if the representations complained of had not been made	X Undocumented, not satisfactorily explained in witness statement
Newport Tax Management Advisor Fees	£2,400	✓	✓
	£8,386.38	✓	✓
	£300	✓	✓
	£1,000	✓	✓
	£4,802.52	✓	✓
	£1,000	✓	X

			Undocumented, double counting
	£1,000	✓	✓ Undocumented, but witness statement accepted
	£600	✓	✓ Undocumented, but witness statement accepted
ARC/Fieldfisher Advisor Fees	£19,300	✓	✓ (in part) Undocumented, witness statement vague and inconsistent – only accepted as to smaller figure of £18,300
(D) Payments to HMRC			
HMRC Late Payment Interest	£98,863.75	✓	✓
TOTAL CLAIMED	**£510,218.54**		
Less credit for settlement with IFA	(£29,481.75)		
TOTAL ACCEPTED, subject to credit for profits made	**£296,112.65**		

ANTHONY GOODWIN			
HEAD OF LOSS	**AMOUNT**		
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 40	£53,624	✓	✓
(B) Further Payments to Future			
Administration Fees	£10,003 (2009)	✓	✓
	£10,003 (2010)	✓	✓
	£10,003 (2011)	✓	✓
	£9,000 (2012)	✓	✓
	£8,000 (2013)	✓	✓
	£300 (2018)	✓	✓
	£350 (2018)	✓	✓
(C) Payments to Professional Advisors			
Newport Tax Management Advisor Fees	£2,681	✓	✓ Undocumented, but witness statement accepted
	£1,000	✓	✓ Undocumented, but witness statement accepted
Hillier Hopkins Advisor Fees	£4,780	X Causation not explained in witness statement	
(D) Payments to HMRC			
HMRC Late Payment Interest	£116,770.87	✓	✓
TOTAL CLAIMED	**£226,514.87**		
TOTAL ACCEPTED, subject to credit for profits made	**£221,734.87**		

STEPHEN MARGOLIS			
HEAD OF LOSS	**AMOUNT**		
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 1	£16,111	✓	✓
Cash Payment – Eclipse 7	£187,097	✓	✓
Cash Payment – Eclipse 11	£15,046	✓	✓
Cash Payment – Eclipse 12	£105,369	✓	✓
Cash Payment – Eclipse 35	£516,660	✓	✓
(B) Further Payments to Future			
Legal Fees – Eclipse 35 (2015)	£6,494	✓	✓
(C) Payments to Professional Advisors			
Newport Tax Management Advisor Fees	£2,400	✓	✓
Double Diamond Tax Solutions Advisor Fees	£54,000	✓	✓
Atcha & Associates Ltd Advisor Fees	£23,027.02	✓	✓
Barrie Akin of Devereux Chambers Advisor Fees	£4,050	✓	✓
John Nisbet Advisor Fees	£17,000	✓	✓ Undocumented, but witness statement accepted
Haysmacintyre LLP Advisor Fees	£17,040	✓	✓ Undocumented, but witness statement accepted
(D) Payments to HMRC			
HMRC Late Payment Interest	£83,476.70	✓	✓
TOTAL CLAIMED	**£1,047,770.72**		
TOTAL ACCEPTED, subject to credit for profits made	**£1,047,770.72**		

GAVIN LENTHALL			
HEAD OF LOSS	**AMOUNT**		
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 38	£13,613	✓	✓
NatWest Bridging Loan Interest and Administrative Charges on Cash Payment – Eclipse 38	£1,835.62	✓	✓
Cash Payment – Eclipse 40	£21,450	✓	✓
NatWest Bridging Loan Interest and Administrative Charges on Cash Payment – Eclipse 40	£1,735.73	✓	✓
(B) Further Payments to Future			
Restructuring Fees – Eclipse 38 (2010)	£7,566	X	✓
NatWest Bridging Loan Interest in relation to Eclipse 38 Restructuring Fees on £6,572 (2008)	£786.77	✓	✓
Restructuring Fees – Eclipse 40 (2010)	£45,686	X	✓
Administration Fees (2009, 2010, 2011, 2012, 2013, 2014, 2015)	£23,103	✓	✓
(C) Payments to Professional Advisors			
Newport Tax Management Advisor Fees	£2,400	✓	✓
	£816.78	✓	✓
	£1,287	✓	✓
	£817	✓	✓ Undocumented, but witness statement accepted
	£1,287	✓	✓ Undocumented, but witness statement accepted
(D) Payments to HMRC			
HMRC Late Payment Interest	£42,511.58	✓	✓
TOTAL CLAIMED	**£164,895.48**		

TOTAL ACCEPTED, subject to credit for profits made	**£111,643.48**		

ANDREW MCINTYRE			
HEAD OF LOSS	**AMOUNT**		
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 3	£164,651	✓	✓
Cash Payment – Eclipse 8	£49,047	✓	✓
HSBC Bridging Loan Interest and Administrative Fees	£32,734.39	✓	✓
(B) Further Payments to Future			
Restructuring Member Fees – Eclipse 3	£92,887 (2010)	X	✓
	£31,162 (2014)	✓	✓
	£2,500 (2014)	✓	✓
Restructuring Fees – Eclipse 8 (2008)	£23,678	X	✓
Audit of Contingent Receipts – Eclipse 3 (2012)	£2,500	✓	✓
Audit of Contingent Receipts – Eclipse 8 (2012)	£2,500	✓	✓
Legal Fees – Eclipse 35 (2015)	£2,000	✓	✓
Future Consultancy Fee	£3,750 (2016)	✓	✓
	£3,750 (2017)	✓	✓
(C) Payments to Professional Advisors			
Atcha & Associates Advisor Fees	£1,422	✓	✓ Undocumented, but witness statement accepted
	£1,407.60	✓	✓
	£2,378	✓	✓ Undocumented, but witness statement accepted
Charter Tax Consulting	£4,170	✓	✓ Undocumented, but witness statement accepted
Double Diamond Tax Services Professional Advisor Fees	£3,000	✓	✓

Greewoods Professional Advisor Fees	£3,956.40	✓	✓
(D) Payments to HMRC			
HMRC Late Payment Interest	£162,565.55	✓	✓
TOTAL CLAIMED	**£590,058.94**		
TOTAL ACCEPTED, subject to credit for profits made	**£473,493.94**		

NIGEL PICKARD			
HEAD OF LOSS	**AMOUNT**		
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 3	£88,152	✓	✓
HSBC Bridging Loan Interest and Administrative Fees	£21,569	✓	✓
(B) Further Payments to Future			
Restructuring/Ceasing Member Fees – Eclipse 3	£49,761 (2010)	X	✓
	£17,821 (2014)	✓	✓
Legal Fees – Eclipse 35 (2015)	£1,000	✓	✓
(C) Payments to Professional Advisors			
Ernst & Young LLP Advisor Fees	£300	✓	✓
Newport Tax Management Advisor Fees	£8,889.10	✓	✓
Atcha & Associates Advisor Fees	£741.60	✓	✓
FRP Advisory LLP Advisor Fees	£1,000	✓	✓
Bankruptcy Registration Fee	£680	✓	✓ Undocumented, but witness statement accepted
Clarke Wilmott LLP Advisor Fees	£1,800	✓	✓
(D) Payments to HMRC			
HMRC Late Payment Interest	£0		
TOTAL CLAIMED	**£191,713.70**		
TOTAL ACCEPTED, subject to credit for profits made	**£141,952.70**		

ROBIN SOUTHWELL			
HEAD OF LOSS	**AMOUNT**		
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 20	£118,203	✓	✓
(B) Further Payments to Future			
Restructuring Fees – Eclipse 20 (2008)	£57,064	X	✓
Ceasing Member Fees – Eclipse 20	£67,374.70 (2010)	X	✓
	£29,582 (2014)	✓	✓ Partially documented, witness statement accepted
Administration Fees (2016)	£2,500	✓	✓
(C) Payments to Professional Advisors			
ARC/Fieldfisher Advisor Fees	£17,020.65	✓	✓ Undocumented, witness statement accepted
Engaging Tax Ltd Advisor Fees	£1,500	✓	✓
(D) Payments to HMRC			
HMRC Late Payment Interest	£55,160.12	✓	✓
TOTAL CLAIMED	**£348,404.47**		
TOTAL ACCEPTED, subject to credits for profits made	**£223,965.77**		

CHRISTOPHER UPHAM			
HEAD OF LOSS	**AMOUNT**		
(A) Initial Own Cash Contribution(s) to Eclipse			
Cash Payment – Eclipse 3	£13,752	✓	✓
(B) Further Payments to Future			
Restructuring Fees – Eclipse 3 (2008)	£4,919.80	X	✓
Ceasing Member Fees – Eclipse 3 (2014)	£3,455	✓	✓
Legal Fees – Eclipse 35 (2015)	£500	✓	✓
Administration Fee 2014	£1,250	✓	✓ Undocumented, but witness statement accepted
Administration Fee 2015	£500	✓	✓
Administration Fee 2016	£500	✓	✓
(C) Payments to Professional Advisors			
Newport Tax Management Advisor Fees	£1,285.73	✓	✓
	£1,650.24	✓	✓
WH Sharrock & Co Advisor Fees	£5,000	✓	✓ Undocumented, but witness statement accepted
(D) Payments to HMRC			
HMRC Late Payment Interest	£11,329.51	✓	✓
TOTAL CLAIMED	**£44,142.28**		
TOTAL ACCEPTED, subject to credit for profits made	**£39,222.48**		