Neutral Citation Number: [2019] EWHC 1719 (Ch)

Case No: HC-2016-001362

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

Rolls Building, Royal Courts of Justice
Fetter Lane, EC4A 1NL

Date: 4 July 2019

Before :

MR JUSTICE NUGEE

- -

Between :

VINCENT JAMES WALSH	**Claimant**
- and -	
GREYSTONE FINANCIAL SERVICES LIMITED	**Defendant**

- -
- -

Mr Tony Beswetherick and **Mr Sam Goodman** (instructed by **Coyle White Devine**) for the **Claimant**
Mr Matthew Hardwick QC and **Mr Christopher Burdin** (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 25, 26, 27, 28 and 29 March, 1, 2 and 8 April 2019

- -

Approved Judgment

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

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MR JUSTICE NUGEE

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Mr Justice Nugee:

Introduction

1. The Claimant in this action ("**Mr Walsh**") was formerly a successful and very highly paid equities trader employed in the City of London, latterly by a company in the Royal Bank of Scotland group. It is not generally necessary to distinguish between his employer and the wider Royal Bank of Scotland group and I will use **"RBS"** for both.

2. The Defendant (**"Greystone"**) is an authorised and regulated provider of regulated financial advisory services. From 2003 onwards Mr Walsh took financial advice from Mr Neil Williams-Denton, a director and employee of Greystone. That advice led to Mr Walsh putting over £1m between 2004 and 2008 into a succession of so-called film partnership schemes under which the participants became members of a limited liability partnership or LLP and which were designed to enable them, among other things, to claim relief against losses which could be used to reduce their income tax liability. The film schemes in question were promoted by Mr Terence Potter and were recommended to Mr Walsh by Mr Williams-Denton. Mr Potter was a chartered accountant and chartered tax adviser who was formerly a partner in Ernst & Young, and who ran a specialist tax consultancy under the name Sefton Potter.

3. The film schemes initially seemed to work well for Mr Walsh, and starting in 2004 he received a number of substantial payments from HM Revenue and Customs (**"HMRC"**) by way of repayment of income tax. But in the end they have proved nothing short of catastrophic for him. HMRC opened enquiries into his tax returns, and asked increasingly difficult questions, not least into how Mr Walsh and the other members of the LLP could demonstrate that they had, as required for the final scheme, personally spent an average of 10 hours per week on partnership business. Those enquiries appeared to be still ongoing when, in February 2012, Mr Walsh was arrested without warning on suspicion of conspiring to cheat the revenue, the basis for this being that he and the other members had submitted detailed records of the time they had spent on partnership business in the form of daily diaries which were entirely fictitious. Mr Walsh's position is that he knew nothing about his fictitious diary, which was created for him by Mr Potter and submitted for him by Greystone.

4. Then in June 2012 RBS terminated Mr Walsh's employment for gross misconduct. The ground of dismissal was in effect that he had been running a business on RBS premises without permission, and had brought RBS into disrepute. Mr Walsh's case is that the real reason was the adverse publicity caused by his arrest and a simultaneous raid by HMRC officers on RBS premises. He has until recently not worked again, and although now back in employment, his income is very much less than it was.

5. In 2013 he was charged; and from April to July 2015 stood trial at Southwark Crown Court on a charge of conspiring to cheat the revenue, along with Mr Potter, Mr Williams-Denton and some of the other members of the final scheme. The jury were unable to reach a verdict on them, and Mr Walsh was tried again at Southwark at a second trial between October and December 2015. This time Mr Potter pleaded guilty (having been convicted of another offence in an earlier, related trial) and the jury convicted Mr Williams-Denton, but they acquitted Mr Walsh and the other

members. Although acquitted, he incurred very heavy defence costs.

6. More recently HMRC have decided that he was not entitled to the relief he had originally claimed and have demanded that he pay back the tax repayment he received in 2004 together with substantial penalties and interest. Further demands are likely to follow.

7. In this action he seeks to recover all his losses from Greystone. That includes the monies originally paid into the film schemes; the penalties, surcharges and interest payable to HMRC (and an indemnity against similar future sums); his criminal defence costs; and his loss of earnings. (There was also pleaded a claim for loss of the income that would have been generated from alternative investment of the sums in fact paid into the film schemes, but Mr Beswetherick, who appeared with Mr Goodman for Mr Walsh, confirmed on Day 2 that that claim was not being pursued, albeit that there is a claim for interest under s. 35A of the Senior Courts Act 1981). The total claim runs to nearly £6m to date and continuing.

8. Mr Walsh brings his claims in negligence and deceit. (Claims were also pleaded for breach of fiduciary duty and conspiracy but have not been pursued and I need say no more about them). Mr Walsh's case is that Mr Williams-Denton was negligent and/or deceitful in his initial recommendation of the schemes, and in various aspects of the handling of the HMRC enquiries, and that Greystone is vicariously liable. Greystone, as well as taking issue with the underlying claims, relies on all the claims being statute-barred, the claim form having been issued on 5 May 2016. Mr Walsh relies in answer on the provisions of s. 32 of the Limitation Act 1980 (**"LA 1980"**) under which time can be extended in the case of fraud or deliberate concealment.

Background

9. I will set out here the facts in more detail, without at this stage seeking to resolve any of the more contentious issues.

10. Mr Walsh has spent his career in the world of stock markets and equities trading. He was born in November 1961, which means that he was aged 50 when he was dismissed by RBS in 2012, and 57 at the trial of the present action. After finishing school in 1980, he started out as a back-office clerk to a 'stock jobber' on the London Stock Exchange, working for the firm of Bisgood Bishop & Co Ltd. He made rapid progress, becoming first an authorised trader and then by 1985 or 1986 a member of the Stock Exchange. He subsequently worked for Merrill Lynch, Morgan Stanley, Lehman Brothers and Hoare Govett, which he joined in April 1996 as a senior trader. Hoare Govett became ABN AMRO Equities (UK) Ltd (**"ABN"**) in 1998, with Mr Walsh being promoted to Head of Global Trading, Cash Equities, Global Banking & Markets in around 2000. RBS bought ABN in October 2007, and the company Mr Walsh was working in became RBS Equities (UK) Limited. He was transferred to Head of European Trading, Cash Equities, Global Banking & Markets in 2007. He remained at RBS, where he was given the additional title of Corporate MD, until his dismissal in June 2012.

11. Mr Walsh was in the relevant period a busy professional and an extremely high earner. The figures in evidence show that his income from employment (which fluctuated up and down with bonuses) was by the tax year 2000/01 (that is, for the

year ending on 5 April 2001) about £745,000, and for subsequent years as follows (to the nearest £5,000):

2001/02	c £845,000
2002/03	c £425,000
2003/04	c £550,000
2004/05	c £1,110,000
2005/06	c £850,000
2006/07	c £1,005,000
2007/08	c £1,480,000
2008/09	c £840,000
2009/10	c £590,000

12. Mr Walsh had no large outgoings apart from mortgage interest, and spending on holidays, and so had surplus cash to invest. He had had a financial adviser called Mr Peter Livett, who was a childhood friend of his, since about 1987. Mr Livett was one of several witnesses for Mr Walsh who gave evidence by witness statement and was not required for cross-examination, so I accept his evidence as unchallenged. This was to the effect that he was a tied advisor offering mainstream financial products such as life assurance policies, pensions and savings plans, and had provided such products for Mr Walsh. From about the mid to late 1990s however, as Mr Walsh's career and remuneration took off, he would from time to time mention to Mr Livett that his colleagues at work were discussing and investing in various schemes, and would ask Mr Livett what he knew of them. But Mr Livett did not deal in those sort of schemes and did not feel able to give an opinion on them. Mr Walsh already had the full set of products that Mr Livett's advice covered so Mr Livett was not surprised that Mr Walsh came into contact with an adviser to some of his colleagues who could provide a wider range of products.

13. That adviser was Mr Williams-Denton. He was recommended to Mr Walsh by his friend and colleague Mr Sean Foley (later one of the other film scheme participants), and another friend Mr Mark Shiels. Mr Williams-Denton, who graduated in 1994, joined Greystone in 1999. Although Greystone was based in Altrincham near Manchester, Mr Williams-Denton had many London-based clients: his PA, Ms Elspeth Mundy, who gave evidence for Greystone, said that when she became his PA in early 2006, he came into the office in Altrincham very infrequently, and used to spend about 4 days a week in London, his clients being primarily bankers and traders there. Mr Walsh met him for the first time at ABN's offices in Bishopsgate on 26 June 2003.

Tax year 2003/04: Zodiac 1 and Zodiac 2

14. At this first meeting Mr Williams-Denton filled out, or got Mr Walsh to fill out, a form headed "Confidential Financial Summary" giving details of Mr Walsh's finances. This included, under the heading "Financial Objectives" a number of objectives which have been ticked, including "Reduce Income Tax"; and under the heading "Investment Temperament" a tick against "Realistic" (the middle option of three, the others being "Cautious" and "Speculated" (sic)). Mr Williams-Denton also introduced Mr Walsh to the idea of participating in film schemes. I will have to look in due course at the detailed evidence as to what he may have said about them. What is not in dispute is that he followed up the meeting with an invitation to Mr Walsh and

Mr Foley to a film partnership presentation on 2 July 2003, which Mr Walsh could not in the event attend, and a letter to Mr Walsh dated 4 July 2003 recommending that he enter into a film partnership scheme called the Zodiac Film Partnership. This is an example of what were known as 'reasons why' letters; they set out the reasons why Mr Williams-Denton was recommending a particular investment, and I will refer to this one as **"the Zodiac 'reasons why' letter"**.

15. In his letter Mr Williams-Denton explained that in order to 'shelter' (that is, to avoid paying income tax on) income of £1m, a partner had to invest £300,000. A further £700,000 is borrowed by the partnership. That generates tax relief of 40% of £1m or £400,000. (There is no detailed explanation of how this was intended to work, but in essence the idea was that the whole of the £1m would be spent by the partnership in the first year of trading; that the partnership would therefore incur a trading loss of £1m; that this would be attributable to the relevant partner; that he could set it off by way of what is called 'sideways loss relief' against £1m of his other income; and that if that income had been taxed at 40%, it would therefore lead to a reduction in taxable income of £1m, and a repayment of £400,000). Mr Williams-Denton recommended that Mr Walsh invest the sum of £326,228, a figure precisely calculated to shelter a total of £1,087,428, being the sum of that part of Mr Walsh's income that had been taxable at 40% for 2000/01 (£698,104), and a further amount of £389,324 for 2002/03.

16. In April 2004 Mr Walsh duly invested the sum of £326,228, split into two payments, one of £209,431 into a partnership called The Zodiac Film Company (No. 1) LLP (**"Zodiac 1"**), and one of £116,797 into a partnership called The Zodiac Film Company (No. 2) LLP (**"Zodiac 2"**). The split into two separate partnerships was so that one could be used for each tax year which was to be sheltered.

17. Mr Walsh's tax return for 2003/04 dated 12 August 2004 duly reported his share of partnership losses for the year in each of Zodiac 1 (£709,766.94) and Zodiac 2 (£389,090.36), and by letters dated 13 August 2004 he made claims for the losses to be carried back and set against his income for 2000/01 (Zodiac 1) and 2002/03 (Zodiac 2) respectively. The claims for relief were processed quickly and on 27 September 2004 a Ms Sasha Sherlock of GBP Services, his then accountants, was able to tell him that credits of £281,807.46 and £153,794.48 had been given and that she would ask for these amounts to be repaid as soon as possible. Those two sums together come to slightly over £435,000 and had evidently been repaid by HMRC by 18 November 2004 when Mr Walsh met Mr Williams-Denton (again at ABN's offices) as the latter's note of the meeting recorded that Mr Walsh was:

> "very happy with Zodiac refund of £435,000".

Tax year 2004/05: Aquarius 4 and 5

18. A similar exercise was carried out in each of the next two tax years. Again I will have to consider the detailed evidence below, but the outline is as follows. For 2004/05 Mr Williams-Denton recommended in November 2004 that Mr Walsh invest a net sum of £249,400 (equivalent to a gross investment of £1,247,000) to shelter income falling within Mr Walsh's 40% tax bracket of £797,000 for 2001/02 and £450,000 for 2003/04. Mr Walsh duly invested the sum of £249,400 in March 2005, again split into two payments, one of £159,400 into The Aquarius Film Company (No 4) LLP

(**"Aquarius 4"**), and the other of £90,000 into The Aquarius Film Company (No 5) LLP (**"Aquarius 5"**).

19. His 2004/05 tax return duly reported his share of partnership losses for the year in each of Aquarius 4 (£751,143.46) and Aquarius 5 (£424,088.11), and by letters dated 1 June 2005 he made claims for these losses to be carried back and set against his income for 2001/02 (Aquarius 4) and 2003/04 (Aquarius 5) respectively. (There were also rather smaller 'second year losses' for Zodiac 1 and Zodiac 2 for 2004/05, which were reported and claimed). The evidence does not so far as I can see disclose precise details of the relevant repayment, but on 24 August 2005 Mr Walsh's accountants were telling him that HMRC hoped to have the repayment to him by the end of the next week, and on 27 September 2005, when Mr Walsh met Mr Williams-Denton, Mr Williams-Denton recorded that Mr Walsh had received film losses of "around £500,000".

Tax year 2005/06: Aquarius 10, 11 and 12

20. For the tax year 2005/06, Mr Williams-Denton recommended in September 2005 that Mr Walsh invest a net sum of £280,000 (equivalent to a gross investment of £1,400,000) to shelter income falling within Mr Walsh's 40% tax bracket of £900,000 for 2004/05 and £500,000 for 2005/06. Mr Walsh duly invested the sum of £280,000 in November 2005, this time split into three payments, two of £100,000 each into The Aquarius Film Company (No 10) LLP (**"Aquarius 10"**) and The Aquarius Film Company (No 11) LLP (**"Aquarius 11"**), and the third of £80,000 into The Aquarius Film Company (No 12) LLP (**"Aquarius 12"**).

21. His 2005/06 tax return duly reported his share of partnership losses for the year in each of Aquarius 10 (£476,376.14), Aquarius 11 (£476,376.51) and Aquarius 12 (£378,703.11). His tax return claimed to offset the loss in Aquarius 11 against other income for 2005/06; and by letters dated 12 July 2006 he made claims for the Aquarius 10 and Aquarius 12 losses to be carried back and set against his income for 2004/05. (There were again smaller losses for the earlier schemes, Zodiac 1 and 2 and Aquarius 4 and 5, which were reported and claimed). Mr Walsh received a repayment of £304,395.15 in respect of 2005/06 in September 2006. The evidence before me does not disclose whether he received a repayment in respect of the claim for 2004/05.

22. The payments made by Mr Walsh referred to above can be summarised as follows:

Date	Partnership	Cash invested
April 2004	Zodiac 1	£209,431
April 2004	Zodiac 2	£116,797
March 2005	Aquarius 4	£159,400
March 2005	Aquarius 5	£90,000
Nov 2005	Aquarius 10	£100,000
Nov 2005	Aquarius 11	£100,000
Nov 2005	Aquarius 12	£80,000
	Total	£855,628

I will refer to these as the **"Zodiac and Aquarius schemes"**.

Tax year 2006/07: Edinburgh & Walsh LLP

23. For the tax year 2006/07, there was a significant change. Although Mr Williams-Denton had first raised with Mr Walsh as early as May 2006 the possibility of using a new film scheme as part of his tax planning for 2006/07, nothing had actually been done in relation to this by March 2007. The result of that was that if Mr Walsh wanted to use a film scheme to access substantial sideways loss relief, he would need to take an active part in the activities of the partnership. This was not disputed before me, although I was not taken in detail through the relevant changes in the law. I have nevertheless sought to understand them and the position appears to have been as follows:

    (1) At the relevant time sideways loss relief was available to a partner sustaining a loss in a trade under ss. 380 and 381 of the Income and Corporation Taxes Act 1988 (**"ICTA 1988"**).

    (2) The Finance Act 2004 (**"FA 2004"**) had however introduced restrictions on the availability of sideways loss relief under ss. 380 and 381 ICTA 1988 for 'non-active partners': see s. 124 FA 2004 inserting new ss. 118ZE to 118ZK ICTA 1988. The effect of these provisions was broadly that a partner who did not "devote a significant amount of time to the trade" could not claim sideways loss relief in an amount greater than his contribution to the trade: see s. 118ZE(3)(b).

    (3) By s. 118ZH(1) a partner was treated as having devoted a significant amount of time to the trade if for the whole of the relevant period he spent:

        > "an average of at least ten hours a week personally engaged in activities carried on for the purposes of the trade."

        I will refer to this requirement as **"the 10-hour requirement"**. There were other provisions explaining what the relevant period was in any particular case which it is not necessary to set out.

    (4) Those partners who did not meet the 10-hour requirement were referred to in the headings (eg to s. 118ZH ICTA 1988), although not in the text of the sections themselves, as **"non-active partners"**, and this is a convenient shorthand; the phrase was in fact later used in s. 103B of the Income Tax Act 2007 (**"ITA 2007"**), which replaced ICTA 1988 for the tax years 2007/08 onwards.

    (5) On 2 March 2007 it was announced that the Government proposed to introduce two changes to the amount of sideways loss relief that a non-active partner could claim. One was to impose an annual cap of £25,000 per tax year (for all partnerships in which the taxpayer was a non-active partner). The other was to exclude contributions in calculating the amount contributed by a taxpayer if the main purpose, or one of the main purposes, of making the contribution was to obtain a reduction in tax liability by means of sideways relief. These new restrictions were to apply from the date of the announcement: see Revenue and Customs Brief 18/07 dated 2 March 2007.

(6) These restrictions were in due course given effect to by the Finance Act 2007 (**"FA 2007"**) inserting new provisions into ITA 2007, namely s. 103C providing for the £25,000 cap and s. 113A providing for the exclusion of contributions whose main purpose was to reduce tax. Other provisions carried the effect of these sections back to 2 March 2007.

(7) There was a carve-out for certain film-related losses: see Revenue and Customs Brief 19/07 dated 7 March 2007 and ss. 103C(6) and 113A(4) ITA 2007. It was never however suggested (either at the time or before me) that this carve-out might have been of any assistance to Mr Walsh or the other members, and I will therefore assume that it was not.

24. In practical terms therefore, from 2 March 2007 Mr Walsh and the other members could only access sideways loss relief of more than £25,000 if they satisfied the 10-hour requirement. For example Mr Potter, who had sent Mr Williams-Denton the outline of a new film scheme (then called the Aquarius Film Development Scheme) in February 2007, followed it up with a Business Plan for the scheme dated 22 March 2007 which included a section to the effect that each Member of the Partnership would be required to undertake to manage the affairs of the Partnership, with the time devoted to the Partnership's affairs by each Member amounting to an average of at least 10 hours per week.

25. Mr Williams-Denton introduced this scheme to Mr Walsh at the end of March 2007. He also introduced it to Mr Jason Edinburgh, a friend and colleague of Mr Walsh's. I will again have to look in more detail at what took place, but the upshot was that Mr Walsh and Mr Edinburgh agreed to participate in the scheme. It was initially intended that they would be the only two participants and a partnership called Edinburgh & Walsh LLP (**"E&W"**) was incorporated (although there is a question whether Mr Walsh was told this at the time). It was envisaged that Mr Walsh would contribute a total (net) of £180,000, of which the first £90,000 was to be contributed by the end of March 2007 (and hence in the tax year 2006/07), with further contributions in future tax years. Contributions were to be split 60/40 between Mr Walsh and Mr Edinburgh and Mr Edinburgh was therefore due to pay £60,000. I shall refer to these arrangements as **"E&W (1)".**

26. Mr Walsh duly paid the first £90,000 on 30 March 2007. His tax return for 2006/07 reported his share of partnership losses in E&W for the year as £22,034 and asked for it to be carried back and set off against his income for 2003/04.

Tax year 2007/08: the other members join Edinburgh & Walsh LLP

27. As referred to above, it had been envisaged that Mr Walsh's total contribution to E&W (1) would be £180,000 and hence that he would contribute a further £90,000 (and that Mr Edinburgh would contribute a further £60,000). In the event they did, although Mr Walsh did not in fact pay his second £90,000 until 9 April 2008.

28. Meanwhile however Mr Potter had produced a business plan for a film scheme which called for a minimum aggregate subscription of £2.5m gross, or £500,000 net. Three more of Mr Walsh's colleagues were willing to participate, along with Mr Edinburgh and Mr Walsh himself, each subscribing £100,000 net. These were Mr Foley, Mr Assad Amin and Mr Rodney Sherrington. Mr Foley however then decided that he

only wanted to subscribe £50,000 and a sixth participant was found, Mr Michael Elsom, to take up the other £50,000. Although it had initially been envisaged that there should be a new partnership, in the event it was decided to use the existing E&W. I will call these arrangements **"E&W (2)"** although it is to be noted that they did not involve a separate partnership: they took the form of the admission of new partners to the existing LLP.

29. Mr Walsh contributed his £100,000 to E&W (2) on 11 March 2008. He therefore contributed the following amounts in total to E&W:

Date	Partnership	Cash invested
March 2007	E&W (1)	£90,000
March 2008	E&W (2)	£100,000
April 2008	E&W (1)	£90,000
	Total	£280,000

With the Zodiac and Aquarius schemes, that made the total of his cash contributions to film partnerships as follows:

Zodiac and Aquarius	£855,628
E&W	£280,000
Total	£1,135,628

30. In his 2007/08 tax return Mr Walsh reported his share of partnership losses in E&W as £931,283. He received a tax repayment from HMRC on or about 10 April 2009 in the sum of some £396,000, most of which was attributable to the claimed E&W losses.

The other members

31. It is convenient to say something here about the other members of E&W. None of them gave evidence before me (Greystone in fact issued a witness summons for Mr Edinburgh, but in the event did not require him to give evidence) so what follows is taken from Mr Walsh's evidence, and I do not know whether each of the other members would or would not accept it in all its details.

32. I should record that two of the other members, Mr Edinburgh and Mr Elsom, have each started their own proceedings against Greystone, Mr Elsom in 2017 and Mr Edinburgh in 2018. At an interlocutory stage Greystone applied for an order that all 3 sets of proceedings should be heard together, but this was opposed by Mr Walsh and by Order dated 18 December 2018 Master Bowles (sitting in retirement as a Deputy Master) refused the application, although he did make provision for each claim to be heard successively by the same judge. He also made provision designed to enable the parties to identify common issues of law which could be determined in all 3 claims at this trial, but I was not in fact asked to determine any such common issues. Indeed although the statements of case in each of those actions were in the trial bundles before me, I was not referred to any of them and I have not studied them. I have therefore not been concerned with either the facts of, or the law applicable to, Mr Edinburgh's and Mr Elsom's claims, neither Mr Edinburgh nor Mr Elsom have taken any part in or been represented at this trial, and although I am currently due to

be the trial judge, I will of course decide those claims on the evidence adduced and arguments submitted in those actions, and nothing I say in this judgment is intended to prejudge any of them.

33. With that introduction I can refer briefly to what the evidence in this trial was as to each of the other members.

34. **Mr Jason Edinburgh:** Mr Edinburgh and Mr Walsh had a close and long-standing professional and personal relationship. They first met in the late 1980s as colleagues at Morgan Stanley, where they worked together (with Mr Walsh in the more senior role) for approximately 5 or 6 years. The two ceased to work together in 1994, when Mr Walsh left Morgan Stanley for Lehman Brothers. In 2003, at ABN, Mr Walsh helped Mr Edinburgh to secure a senior role in proprietary trading on the Pan-European equities desk at ABN and he then became Mr Edinburgh's line manager. Mr Walsh declined the offer of his own office at ABN (later RBS) so that he could sit closely with colleagues on the trading floor. In fact Mr Edinburgh's desk (along with those of Mr Foley and Mr Sherrington) was in the next row of desks from Mr Walsh, and they sat literally back-to-back. Mr Walsh therefore regularly interacted with Mr Edinburgh during working hours. On the personal side, Mr Walsh confirmed that he and Mr Edinburgh are very close and indeed best friends, that their families know one another, and that he is godfather to Mr Edinburgh's daughter.

35. **Mr Sean Foley:** I have already referred to Mr Foley as one of those who introduced Mr Walsh to Mr Williams-Denton. Mr Walsh had met Mr Foley in the late 1980s at Morgan Stanley. He was, like Mr Edinburgh, a colleague and subordinate of Mr Walsh at RBS. Mr Walsh confirmed that Mr Foley was also a very good friend of his. His desk was next to Mr Edinburgh's.

36. **Mr Assad Amin:** Mr Amin joined ABN in 2003/2004 and subsequently became Mr Walsh's line manager and friend. His desk was in the same trading floor as Mr Walsh's but rather further away than the others, about 20 feet from Mr Walsh.

37. **Mr Rodney Sherrington:** Mr Sherrington was recruited into the Pan-European Equities team at ABN/RBS by Mr Walsh. He subsequently became Mr Walsh's colleague and subordinate. His desk was next to Mr Edinburgh's and hence again in close proximity to Mr Walsh's. Unlike the others, Mr Sherrington had a background as an accountant. Mr Walsh confirmed that he became a friend, albeit not a close friend.

38. **Mr Michael Elsom:** Mr Elsom was the only one of the 6 members of E&W that was not working in the same office at the relevant time. Mr Walsh had met him at Hoare Govett in the mid-1990s. By the time of the E&W partnership, he was working as a trader at a firm called Marex Spectron, approximately five minutes' walk away from the Bishopsgate offices of ABN/RBS. Mr Walsh confirmed that he was also a close friend of his.

HMRC enquiries

39. Although HMRC processed Mr Walsh's claims for repayment, that did not preclude them from opening enquiries into the returns under their powers in the Taxes Management Act 1970. In principle they could do so both at the partnership level

(that is by opening an enquiry into the partnership return) in which the main question would be whether the partnership had in fact sustained the trading losses it claimed to have sustained, and at the member level (by opening an enquiry into an individual member's return) which would be concerned with whether sideways loss relief was available as claimed. HMRC could open an enquiry into each return for each relevant tax year.

40. HMRC proceeded to open a number of enquiries. The earliest in evidence is dealt with in a letter dated 4 November 2005 from an Inspector of Taxes in Edinburgh, a Mr Stuart Condie, to Mr Walsh. He told Mr Walsh that he intended to make enquiries into the partnership return for Zodiac 1 for the tax year 2003/04, and explained that as his personal return might need to be amended depending on the outcome of the partnership enquiry, his personal return for the year would be treated as also under enquiry until the enquiries were completed. He sent a copy to Mr Walsh's then accountants (GBP Services) and told them he would pursue his enquiry with "the partnership agent, Sefton Potter", a reference to Mr Potter's firm.

41. Numerous other enquiries were subsequently opened. For example in January 2006 Mr Condie wrote to Mr Walsh and his accountants telling them that he intended to open enquiries into his claim for losses arising from Zodiac 2 for 2003/04; he opened further enquiries in January 2007 into the partnership returns for Zodiac 1 and 2, and Mr Walsh's claims for losses arising from Aquarius 4 and 5, for 2004/05; in August 2007 into the partnership returns for Zodiac 1 and 2 and Aquarius 4 and 5 for 2005/06; and in January 2008 into the partnership returns for Aquarius 10, 11 and 12 for 2005/06. It is not necessary to give further details. Mr Walsh did not respond to the letters himself: they were copied to his accountants (initially GBP Services, subsequently Shaw & Co), and indeed on 17 January 2007 Ms Whitehouse of Shaw & Co advised him that he need not then take any action and that she would keep him informed of progress.

42. No enquiries were opened into the E&W losses until the latter half of 2009. Indeed, as already referred to, Mr Walsh in April 2009 received a tax repayment of nearly £400,000 for 2007/08, most of which was due to the claim in respect of E&W losses. But Mr Edinburgh did not receive his corresponding repayment, and in May 2009 was told by his tax office that E&W would be under enquiry; in July Mr Amin was told by an officer at *his* tax office that she had been instructed from a colleague at what was called 'the Film Team' that no repayments should be made on E&W at that time. Shortly afterwards Ms Susan Sibbald, an HMRC Officer in Edinburgh, told Mr Amin that she was opening an enquiry into his claim for loss relief in respect of E&W for 2007/08, and on 19 August 2009 wrote a series of letters to Mr Walsh and the other members of E&W to the effect that she was opening enquiries both into the partnership return for E&W and into their own personal returns for 2007/08, and specifically the claims for loss relief in respect of the E&W losses.

43. This started the process of HMRC seeking information about E&W from the members, including in particular information as to their activities as members of the partnership. A considerable amount of correspondence followed, not least because enquiries were being pursued into each of the partnerships and each of the partners. So far as directly relevant to Mr Walsh it can be summarised as follows:

    (1) In her letter of 19 August 2009 in relation to his own tax return, Ms Sibbald

asked Mr Walsh to supply certain information in relation to E&W by 29 September 2009, including the following:

> "Please supply a full description of your activities as a member of the partnership, and supply whatever documentary record exists of the time spent by you on these activities. If you have kept any notes or any form of diary or time record, please let me see these."

Letters in similar terms were sent to the other members of E&W.

(2) On 21 September 2009 Mr Walsh replied confirming receipt of the letter of 19 August 2009 and saying:

> "I am in the process of collating the information that you require but due to other commitments, it is unlikely that I can get this information to you before 31 October 2009."

This letter (like all the letters that he sent) was drafted for him by Mr Potter and letters in similar terms were sent by each of the other members. Mr Sherrington was by then living in Australia, having moved there at the end of June 2009.

(3) The next round of letters was from 5 of the members (all except Mr Foley) to Ms Sibbald. They had again been drafted by Mr Potter and replied to Ms Sibbald's request for information in her letters of 19 September 2009. They included the following:

> "I enclose schedules which detail my activity as a member of the partnership."

The schedules enclosed were the diaries prepared for each member. They are not all in evidence but Mr Edinburgh's and Mr Walsh's are, and the others were no doubt in similar form. Taking Mr Walsh's as an example, the diary runs from Monday 26 February 2007 to Tuesday 30 June 2009, with (usually) a week to a page, amounting to some 130 pages in all. Each day either has "No recorded activity" or an entry referring to the activity with the time taken in hours and minutes. The timings are precise. Thus to take the first week, there are no recorded activities for Monday to Wednesday and Friday, but the other days record "Discussion about storyline" (Thursday) with a time of 1:46, and "Research into historical background" (Saturday and Sunday) with timings of 2:56 and 3:07 respectively.

(4) The diaries themselves were prepared by Mr Potter and circulated on 5 November 2009 by Ms Kimberley Murphy (Mr Potter's PA) who e-mailed each of the members a draft of the letter together with his diary. They were sent on various dates: Mr Edinburgh's, Mr Elsom's and Mr Sherrington's between November 2009 and January 2010, Mr Walsh's and Mr Amin's on 4 March 2010. Mr Foley never sent a letter enclosing his diary at all.

(5) The next round of letters from HMRC came from Mr Condie rather than Ms Sibbald, and asked for more details. That to Mr Walsh was dated 16 March 2010 and included the following:

> "I am obliged for the printouts designed to show the activities you have carried out on behalf of the partnership. These appear to have been produced in a single run. Who prepared these schedules? Please let me see the underlying or prime records from which these records were prepared. Who was responsible for compiling the underlying records?"

(6) Mr Walsh's reply dated 24 March 2010 (again drafted by Mr Potter) included the following:

> "I recorded my activity in a format provided to me by the designated members of the LLP."

Similar letters were sent by the others.

(7) Mr Condie reverted to Mr Walsh on 7 May 2010 asking again to see the underlying records, and also asking for the manual or instructions issued with the software by the designated members, or, if the system was manual, how the records came to be in the form sent to him.

(8) No immediate reply to this request was sent by Mr Walsh, but on 10 June 2010 Mr Sherrington sent a response to a similar letter in which he pointed out that he worked in the same building as his fellow members of the LLP and many meetings and discussions took place on an informal and impromptu basis; that he did make notes on pieces of paper of the time he devoted to the LLP's trade but they were not retained after the information had been entered into the computer; and that the records were maintained on Microsoft Word, and he did not need a manual.

(9) That led to Mr Condie in July and August 2010 asking for a copy of the diaries in electronic format. The letter to Mr Walsh was dated 26 August 2010 and like those to the others said that it would be easiest if it could be supplied on disc.

(10) No reply was sent and in November 2010 Mr Condie issued Mr Walsh with a formal notice requiring information, as he had done with some of the others. Mr Walsh's was dated 17 November 2010. It was issued under paragraph 1 of schedule 1 of the Finance Act 2008, and required him to produce documents and provide information within 35 days or face penalties. Among other things it required him to produce:

> "All records and supporting material supporting the printed record of activity previously supplied.
>
> A copy of the log in electronic format."

(11) Mr Walsh's next letter to Mr Condie was dated 14 December 2010. It did not however respond to Mr Condie's formal notice of 17 November 2010, but replied to Mr Condie's letter of 7 May 2010 in similar terms to the reply Mr Sherrington had sent on 10 June (sub-paragraph (8) above). It ended with a request that Mr Condie bring his enquiries to a conclusion as soon as practicable, and suggested a meeting with a representative of the LLP, something that had already been suggested in letters from Mr Edinburgh and

Mr Sherrington in November and that thereafter was regularly repeated in the responses drafted by Mr Potter.

(12) Mr Condie was sending similar requests for the electronic diary to the other members. Eventually a CD of the diaries was sent under cover of a letter from Mr Edinburgh dated 21 March 2011. It did not contain any diary for Mr Foley (who had declined to send the paper version of his diary) or for Mr Amin (who had sent the paper version of his diary but was adamant that the electronic version of it should not be sent).

44. So far as Mr Walsh was concerned, there was little further correspondence of direct relevance. A meeting between Mr Condie and Mr Potter was, after many months of requests, finally arranged for 7 November 2011 in Edinburgh. Mr Potter's note of the meeting referred to HMRC's hands being temporarily tied in negotiating any settlement as they were taking an unrelated case involving similar issues to Counsel and then possibly to the Tribunal; and he reported to Mr Edinburgh (copied among others to Mr Walsh) in reasonably optimistic terms. Mr Potter had another meeting with Mr Condie on 12 January 2012. Again he reported in reasonably optimistic terms saying that he anticipated another meeting in the next few weeks to formulate proposals for the conclusion of the enquiries.

Mr Walsh's arrest and criminal trials

45. Before any such further meeting took place, Mr Walsh was arrested at his home early in the morning of 8 February 2012 on suspicion of cheating the public revenue and associated money laundering activities. He was taken to Plumstead police station where he was interviewed and, on advice from his solicitor, gave a no comment interview. Searches were made both of his home and of the RBS offices. Messrs Edinburgh, Elsom and Foley were arrested on the same day, and Mr Amin the next day.

46. I have little evidence as to the course of the criminal proceedings. Mr Walsh was released from the police station and able to go home on the day he was arrested. On 1 March 2013 he was interviewed again: he signed a prepared written statement but otherwise again made no comment. In January 2014 he was charged, along with others. I have seen a summons dated 9 January 2014 which was issued to Ms Mundy to appear at the City of London Magistrates Court. There were two counts scheduled to the summons, each count charging a conspiracy to cheat the public revenue, of which Count 1 related to E&W and Count 2 to another LLP called Jenkins Hyde and Maclellan LLP (**"JHM"**), which was another scheme promoted by Mr Potter and recommended by Mr Williams-Denton but in which Mr Walsh and the other members of E&W were not involved. The particulars of Count 1 scheduled to the summons addressed to Ms Mundy were as follows:

> "**Elspeth Mundy, Kimberley Murphy, Terence Sefton Potter, Neil Williams-Denton, Vincent James Walsh, Jason Edinburgh, Rodney Alan Sherrington, Assad Amin, Michael Elsom and Kimberley Murphy** between the 1st January 2007 and 8th February 2012 with intent to defraud, and to the prejudice of Her Majesty the Queen and her Commissioners of Revenue and Customs (The Commissioners), conspired together and with Sean Foley and other persons to cheat Her Majesty the Queen and The Commissioners of public revenue, namely monies, by falsely claiming as due to the Members of Edinburgh and Walsh LLP in

> consequence of their being active partners in that entity and so entitled to make such claim, uncapped sideways loss relief upon losses sustained or purportedly sustained by the partnership, such cheat being pursued by means of the Members own personal tax returns and thereafter in representations to HMRC made by the Members and on behalf of the Members."

It can be seen that Mr Foley was not included – Mr Walsh's understanding was that this was because he had suffered a breakdown. Count 2 was similar save that it related to JHM rather than E&W and charged three individuals by the name of Jenkins, Hyde and Maclellan (evidently the members of JHM) as well as Messrs Potter and Williams-Denton, Ms Mundy and Ms Murphy.

47. On 28 November 2014 Mr Walsh signed a Defence Statement denying that he conspired to cheat the Revenue.

48. Mr Walsh was tried at Southwark Crown Court before HHJ Beddoe and a jury. The trial (**"the first E&W trial"**) took place between April and July/August 2015. I do not have evidence of the precise dates but the prosecution's Opening Note is dated 18 April 2015, and I was told that the trial lasted between 14 and 16 weeks. It was only concerned with what had been Count 1 on the summons, that is the charge relating to E&W. Mr Sherrington (who was in Australia) was not in the event proceeded against so the defendants were Messrs Potter and Williams-Denton, Messrs Walsh, Edinburgh, Amin and Elsom, Ms Mundy and Ms Murphy. The jury acquitted Ms Mundy and Ms Murphy, but could not reach a verdict on any of the other defendants. HHJ Beddoe directed a retrial.

49. Before the retrial could take place there was a trial on the JHM count (**"the JHM trial"**), again before HHJ Beddoe at Southwark. I have almost no evidence about the JHM trial, which is not directly relevant, but it took place over the summer. Mr Potter and Mr Williams-Denton were convicted and sentence on them was deferred until after the conclusion of the re-trial on the E&W count (**"the second E&W trial"**). It is common ground that the three investors (Messrs Jenkins, Hyde and Maclellan) were also convicted.

50. Prior to the second E&W trial Mr Potter pleaded guilty to the conspiracy to cheat charge, and to another conspiracy charge, the essence of which was that he had purported to show that E&W had accrued trading losses of in excess of £4m whereas the genuine losses were lower, and that he had misrepresented the position in E&W's business records, financial statements and tax returns.

51. The second E&W trial took place between October and December 2015, again before HHJ Beddoe. Again I do not have precise dates but I was told the trial lasted 10 weeks. On 15 December 2015 Mr Williams-Denton was convicted by the jury; Mr Walsh and the other defendants (Messrs Edinburgh, Elsom and Amin) were acquitted. Mr Potter and Mr Williams-Denton were sentenced on 18 December 2015 to terms of imprisonment of 8 years and 6 years respectively.

52. The total costs Mr Walsh claims to have incurred in defending the criminal proceedings are £812,248.46.

Mr Walsh's dismissal

53. Reverting to 2012, it will be recalled that Mr Walsh was arrested on 8 February 2012, and the offices of RBS searched. By letter dated 10 February, he was placed on paid leave pending an investigation into his involvement in the activities of E&W and told not to attend RBS premises, or contact RBS personnel or customers. Allen & Overy LLP (**"A&O"**) were engaged by RBS to conduct the investigation and invited Mr Walsh to an investigatory meeting on 24 February.

54. By then there had been considerable press coverage. There is an example in evidence in the form of a report in the Telegraph dated 16 February 2012 under the headline "Senior bankers caught up in film investment tax probe" which referred to the arrest of Mr Walsh "until recently a director of Royal Bank of Scotland's UK equities business", and of Mr Edinburgh "a senior equities trader at RBS" and included a reference to the search as follows:

> "HMRC officials last week searched RBS's London offices as part of the investigation, though the allegations of criminal behaviour are not linked in any way to the men's work for the taxpayer-backed bank."

The Telegraph report was picked up the next day by a financial news service called Wealth Manager and reported under the headline "Three senior bankers swept up in tax probe." These are the only examples in evidence but A&O's report (below) indicates that there was "extensive press coverage", referring to other examples in the national and local press as well as international coverage and a number of articles in the financial services press, mostly on 12 and 13 February 2012, but with the Telegraph continuing to run the story until 20 February.

55. A&O reported to RBS in a detailed report dated 7 March 2012. They considered that there was a case to answer in respect of each of the employees concerned in disciplinary proceedings. Mr Walsh was required to attend a disciplinary hearing on 15 March 2012, which he did. He was allowed to have a work colleague with him but not his solicitor. The meeting was reconvened on 30 April 2012. By letter dated 26 June 2012 Mr William Fall, a Disciplinary Manager, informed Mr Walsh that he found that his actions constituted gross misconduct and that his employment would be terminated with immediate effect.

56. Mr Walsh exercised a right of internal appeal, and the disciplinary appeal hearing took place on 11 September 2012. By letter dated 29 October 2012, Ms Anna Langford, Head of Communications and Marketing, upheld the decision to dismiss him.

57. Mr Walsh and Mr Edinburgh had already by then brought complaints of unfair dismissal to the Employment Tribunal (dated 25 September 2012). The claims were heard together in November 2013 by Employment Judge Baty sitting alone. In a reserved judgment dated 30 January 2014 he dismissed the claims. Mr Walsh says in his witness statement that he appealed that decision to the Employment Appeal Tribunal but I have no documents or other evidence in relation to such an appeal, and Mr Walsh could not assist in relation to it. I therefore do not know whether there was a substantive appeal or only an application for permission to appeal, but on any view it was evidently unsuccessful.

58. Until very recently Mr Walsh has not worked again. Mr Walsh's evidence was that he spoke to some contacts in the market who told him it was not going to happen; in any event he was fully occupied with first the Employment Tribunal and then the criminal trials. He has recently obtained employment as an equity broker at a salary of £100,000 per year, but this is a probationary contract and is subject to obtaining approval from the FCA. I have no firm evidence as to when this started (his witness statement, dated 21 December 2018, simply says that he had managed to secure a job "in recent weeks"), or when FCA approval might be granted or refused.

HMRC demands

59. Mr Walsh is now facing significant demands from HMRC. The background to this is that, as set out above, he had claimed sideways loss relief in relation to Zodiac 1 and 2. He invested in the tax year 2003/04 (paragraph 16 above) and claimed sideways loss relief for his share of the partnership losses sustained by Zodiac 1 and 2 in that year in the amounts of £709,766.94 (Zodiac 1) and £389,090.36 (Zodiac 2), which led to him receiving repayment of just over £435,000 (paragraph 17 above). The repayment was very nearly 40% of his reported share of the partnership losses – it is not necessary to consider why it was not exactly 40%. Mr Walsh later claimed further sideways loss relief by reference to his share of second year losses sustained by Zodiac 1 and 2 in 2004/05 although the sums were much smaller (paragraph 19 above) and the pattern was repeated in the next 2 years.

60. On 5 October 2009 Mrs Swinton, an HMRC officer in the Film Team in Edinburgh, sent a letter to Mr Walsh in relation to Zodiac 1. It is a letter on which Greystone place considerable reliance in relation to the limitation defence, and it is quite short, fitting onto a single page, and I will therefore cite it in full:

> "Dear Sir
>
> **Section 28B(4) Taxes Management Act 1970**
>
> I am writing to let you know that I have now completed my enquiries into The Zodiac Film Company (No 1) LLP return for the four years ended 5 April 2007. As a result of my enquiries I amended the partnership returns and I will be amending your own returns/claims to reflect this.
>
> **The amendments**
>
> Your returns/claims will be amended as follows:

	2004	2005	2006	2007
Share of loss before enquiry	£709576	£36474	£34725	£23733
My amendment results in a decrease of loss	£701388	£1088	£1083	£273
Amended share of partnership loss is	£8188	£35386	£33642	£23460

> Yours faithfully [etc]"

61. In a further letter to Mr Walsh also dated 5 October 2009 Mrs Swinton dealt with Zodiac 2. It was in materially identical terms save that the figures were different. In

this case they were as follows:

	2004	2005	2006	2007
Share of loss before enquiry	£389017	£19894	£19013	£12319
My amendment results in a decrease of loss	£387006	£593	£593	£148
Amended share of partnership loss is	£2011	£19301	£18420	£12171

These letters are examples of what are known as 'closure notices' which are issued by HMRC when they have completed an enquiry into a tax return or claim. I have no evidence as to why the figures for the share of loss before enquiry for 2003/04 are very slightly different from those claimed by Mr Walsh, but nothing turns on the precise figure.

62. The letters issued to Mr Walsh in relation to his loss relief claims indicated that HMRC had also amended the partnership returns. Letters dated 9 October 2009 to Mr Walsh from Aquarius Film Management Ltd informed him that HMRC had issued closure notices to Zodiac 1 and 2 in relation to their tax returns for 2003/04, that each had been put into liquidation in July, that HMRC's closure notices had been prompted by the liquidation and that the liquidator was appealing. The closure notices issued to the liquidator are not in evidence but by letter dated 21 October 2010 HMRC offered the liquidator (Mr Kevin Brown of Marriotts Recovery LLP) the option of a statutory review of closure notices for a number of partnerships in liquidation, including Zodiac 1 and 2, from which it is apparent that by closure notices dated 22 September 2009 HMRC had amended their partnership returns for 2003/04 by reducing the claimed trading losses for Zodiac 1 from £8,178,932 to £94,382, and for Zodiac 2 from £1,933,095 to £9,993. These figures (disallowing 98.8% and 99.5% of the claimed trading losses respectively) are precisely consistent with the figures given in the closure notices issued to Mr Walsh for his amended share of the partnership losses.

63. The liquidator accepted the offer of a review. It was conducted by another inspector, Mr Gareth Hills, who by letter dated 11 March 2011 upheld HMRC's decisions. The next relevant document in evidence is a letter dated 5 October 2018 from HMRC (another inspector, Mr P Barden) from which it appears that the liquidator appealed to the First-tier Tribunal, but subsequently reached an agreement with HMRC which included withdrawing the appeals. The result of that was to finalise the position at partnership level, so that Mr Barden was able to settle the tax affairs for each member and amend Mr Walsh's self-assessments accordingly.

64. It is not necessary to detail all the adjustments made which are intricate and not easy to summarise, but for 2003/04 Mr Barden took out all the partnership losses (£709,766 for Zodiac 1 and £389,090 for Zodiac 2) and cancelled the free standing credits of £281,807.46 and £153,794.98 which Mr Walsh had claimed and received in 2004, and various other credits for Zodiac 1 and 2 for later years. Together with interest up to 5 October 2018 and penalties the total sum shown outstanding to HMRC on the statement enclosed was £753,146.72. Interest continues to run.

65. That demand only relates to Zodiac 1 and 2. As set out above Mr Walsh also received substantial refunds in relation to the Aquarius partnerships (paragraphs 19 and 21 above) and nearly £400,000 in relation to E&W (paragraph 30 above). There must

be a substantial likelihood that HMRC will in due course pursue Mr Walsh for repayment of them with interest as well.

66. I was told that Mr Walsh is unable to pay even the Zodiac demand, let alone any others, and that HMRC have recently written threatening to make him bankrupt (although I have not seen this letter).

The witnesses

67. The narrative I have set out above is largely taken from the documents, but it forms little more than a framework for the disputed issues. I must now say something about the witness evidence.

68. As well as giving evidence himself Mr Walsh served witness statements from a number of other witnesses. None of them was able to give evidence directly bearing on the central issues in the case, and none was in the event required for cross-examination. I can summarise the effect of their evidence quite briefly. I have already referred to Mr Livett who was Mr Walsh's financial adviser (paragraph 12 above). In addition Mr Walsh served statements from the following:

Mrs Janice Walsh: Mrs Walsh is Mr Walsh's wife. They have been married since 1988. She gave evidence of Mr Walsh's lack of organisational skills, for example not opening his post for a couple of months at a time; of his not questioning anything that was said to him by someone he trusted; and of Mr Williams-Denton (whom she met) describing how useless her husband was with paperwork and communication. She also described his arrest and its aftermath and the impact on her and the family. She knew nothing about the detail of his investments though.

Mr Lee Johnson: Mr Johnson is a friend and former colleague of Mr Walsh's who first met him in about 1997 at Hoare Govett and who worked as one of his senior equity traders until February 2012 when he was made redundant from RBS. He too gave evidence that Mr Walsh was very disorganised, for example being terrible at replying to e-mails. Otherwise his evidence was largely as to Mr Walsh's character, describing him as hardworking and liked and respected as a boss. He also described him as honest and trustworthy and as having put his complete faith in Mr Williams-Denton but he does not claim to have any detailed knowledge of Mr Walsh's investments and I do not think he can himself have had any direct knowledge of Mr Walsh's relations with Mr Williams-Denton.

Mr Robert Sherwood: Mr Sherwood is a racehorse trainer who is a friend of Mr Walsh's and has trained horses that he owned. His evidence was that Mr Walsh was very trusting as a racehorse owner, allowing Mr Sherwood to operate his racing account without question; and he too referred to Mr Walsh as very disorganised with paperwork and his personal affairs.

69. Some of this evidence is in effect evidence of good character, and Mr Hardwick QC, who appeared with Mr Burdin for Greystone, took the point that good character evidence is not admissible in civil trials: see *Phipson on Evidence* (19th edn, 2018) §18-23. That does seem to be the law, although I heard no oral argument on it. Subject to that, in the absence of any cross-examination or suggestion that any of this evidence should be rejected, I accept the general thrust of these witnesses' evidence.

The precise dividing line between good character evidence (for example that Mr Walsh was honest and trustworthy) and factual evidence (for example that Mr Walsh trusted others) may not be entirely easy to determine and was not explored at all in submissions, but I do not think it matters. I accept for example that Mr Walsh was disorganised, and trusting of his advisors, and have borne these points in mind. But the witnesses were not involved in the particular matters with which the trial is concerned and could give no direct evidence of them, and although helpful as confirming certain general points, I have found their evidence of little assistance in resolving the detailed issues which arise.

70. I will have to consider the quality of Mr Walsh's own evidence at greater length, which I do below. It is convenient next however to refer to Greystone's witnesses. Greystone called two witnesses who gave oral evidence:

Mr Neil Peden: Mr Peden is a director of Greystone and has been since 1992. He was its Compliance Officer between 1992 and about 1999, but not at the time of the events concerned. He did not have any involvement with E&W, and his evidence largely consisted of an account of what he knew about Mr Potter and Mr Williams-Denton, an explanation of typical due diligence processes carried out by Greystone with answers to some specific pleaded criticisms, and some evidence as to the arrests and their aftermath. This included an account of the discovery (as a result of matters coming to light in the first E&W trial) that Mr Williams-Denton had personally received undisclosed payments from Mr Potter, something which led to him being dismissed by Greystone on 2 September 2015.

Ms Elspeth Mundy: Ms Mundy, as already referred to, was Mr Williams-Denton's PA. She joined Greystone in July 2005 and became Mr Williams-Denton's PA in early 2006. She was closely involved in the e-mails between the members of E&W, Mr Williams-Denton, Mr Potter and Mr Potter's PA Ms Murphy.

Both these witnesses were entirely straightforward and I am satisfied that they were each seeking to assist the court to the best of their recollection.

71. Before coming to an assessment of Mr Walsh's evidence, it is noticeable that there was a considerable amount of potential evidence that was *not* before the Court, as follows:

(1) None of the other members of E&W gave evidence (as already referred to, Greystone in fact took out a witness summons for Mr Edinburgh and he duly attended under the summons, but in the event he was not called). The evidence of the other members might have been very interesting, and shed considerable light on Mr Walsh's account. Having more than one participant give evidence of the same events tends to give a more rounded picture than having only one account.

(2) Many of the matters which I am asked to consider must also have featured in the two E&W criminal trials. Certainly some, if not all, of the members who stood trial gave evidence. I was shown very small parts of the transcripts of those trials for certain particular points, but neither side made any attempt to put before me in any detail what was said in evidence at the trials. There may have been good practical reasons for that, but I found it slightly surprising. To

take an example, on 17 February 2011 there was a meeting between Mr Potter and the members of E&W at the time that HMRC were pressing for an electronic copy of the diaries. There is no doubt that the meeting took place, and there is evidence that all the members attended (Mr Sherrington by telephone), but apart from the documents the only evidence I have of it is Mr Walsh's evidence in this action. I do not have any account that he, or any of the other members, or indeed Mr Potter, may have given of the meeting at either criminal trial – indeed I do not even know if any such evidence was given, although since it is a meeting of some potential significance, I would be surprised if it did not feature in those trials at all. If it did, the accounts of it given at those trials might have been interesting as either tending to confirm or contradict Mr Walsh's account in this trial. But I have not been given any indication of what, if anything, might have been said about it. Counsel made it clear to me in closing that they were not proposing that I should myself trawl through such transcripts as I have – which are in any event only a small selection of the criminal trials as a whole – to hunt for material that might be relevant, and that they could not expect me to take any account of evidence given at those trials that was not specifically drawn to my attention. But I cannot help thinking that there is likely to have been more material that might have been relevant, both for what it did and for what it did not say.

(3) Another notable absentee was Mr Williams-Denton himself. I was told that he had recently been released from prison (no doubt after serving half his sentence of 6 years) and that Greystone's solicitors had written to him both in prison before, and at his home address after, his release, without Mr Williams-Denton responding at all. But privilege has not been waived in those letters, and in those circumstances I know nothing about the terms in which he was invited to give evidence, or even if he was.

(4) Perhaps unsurprisingly, I did not hear from Mr Potter either.

72. I was not asked by either side to draw any adverse inferences from the fact that witnesses were not called, and I therefore do not do so. I am conscious that there may well have been practical or forensic reasons why it would have been difficult or ill-advised to do so. I am obliged to decide the case on the evidence that the parties have chosen to put before me and do not seek to speculate on what other evidence might have been called but was not, or why it was not. But this inevitably means that the evidence I have of the central events with which the trial is concerned is limited, and that apart from the documents on many matters I only have Mr Walsh's evidence.

Mr Walsh's evidence

73. That makes it essential to evaluate Mr Walsh's evidence carefully. Indeed the degree of confidence that I can have in his evidence is probably the single most important issue in the trial. It is not therefore surprising that his cross-examination over a number of days formed the bulk of the trial.

74. In assessing his evidence, there are various factors to be considered. First, Mr Walsh is giving evidence about events that took place a long time ago. The first meeting that he had with Mr Williams-Denton was in June 2003, over 15 years before trial; and the other key events took place between then and 2011, some 8 years before trial. It is

unrealistic to expect a person to be able to give accurate accounts of meetings and conversations that took place at that distance in time. But his claims as to the advice he received or did not receive from Mr Williams-Denton turn to quite a degree on matters that are not documented, and depend on the extent to which he can give, or has given, reliable evidence of what was said at such meetings.

75. Second, this is very far from being the first time he has thought about, or given evidence of, the matters concerned, in particular in relation to the E&W scheme. He has had to give some account of them in the RBS disciplinary proceedings and internal appeal in 2012; in his prepared statement for the criminal investigation in March 2013; in the Employment Tribunal in November 2013; in his Defence Statement in 2014 and the two criminal trials in the spring and autumn of 2015; and of course in the statements of case (and further information) in this action. By the time he came to give his lengthy witness statement for these proceedings, he had therefore been over the same material again and again.

76. Third, as I have already referred to, this case is critical to Mr Walsh's financial survival. I was not taken to details of his current financial position, but an account was given by Mr Simon Terry of Coyle White Devine (his solicitors) in November 2018 when opposing Greystone's application for this trial to be heard together with Mr Edinburgh's and Mr Elsom's claims. This was to the effect that as well as the Zodiac demand of c. £750,000 Mr Walsh was expecting to receive further demands in relation to the Aquarius schemes which, together with the Zodiac demand, could amount to more than £1.5m; that he is reliant on the outcome of this trial to settle this liability; and that otherwise he faces bankruptcy, the loss of his current employment and the loss of his home.

77. I was referred by Mr Hardwick to some comments I recently made about oral evidence in *Glenn v Watson* [2018] EWHC 2016 (Ch) at [58] as follows:

> "Despite the primacy which our trial system has long given to oral evidence, it is by now a commonplace that the memory even of witnesses who are doing their honest best is often unreliable (see *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC (Comm) at [15]-[23] per Leggatt J); and in cases of fraud when the credibility of witnesses is in issue, it has long been recognised to be essential to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities (*The Ocean Frost* [1985] 1 Ll Rep 1, 57 per Robert Goff LJ)."

As is apparent, I was not there claiming to say anything new.

78. It is however I think worth adding a little on the fallibility of human memory. The entire passage in the judgment of Leggatt J (as he then was) in the *Gestmin* case referred to repays careful study. It explains how the model we tend to have of human memory as a record of an event that fades over time (but can be retrieved) is fallacious. Memory is fluid and malleable, rewritten every time it is retrieved, and vulnerable to many influences including external information and suggestions, the fact that the person concerned has a stake in the outcome or wants to please the listener, and the process of repeatedly going over the same events.

79. These considerations mean that the best chance of a person giving an accurate account

of an event from memory is if they are asked to state what they recall without having previously been asked to do so, or having gone over it in their mind (and hence preferably as soon after the event as possible); if they have not been exposed to any other information about the event, or had any suggestions made to them by anyone else; and if they have no personal interest in giving any particular account, or any particular understanding of what their listener wants to hear. But as Leggatt J refers to, the processes of civil litigation usually mean that oral evidence given at trial is given under the very antithesis of these conditions.

80. In Mr Walsh's case the difficulties are acute. Not only was he being asked about events a long time ago, and has the strongest possible interest in the outcome, but he has been exposed to so much information and gone over the same events so many times that it is difficult now to have confidence in the accuracy of his recollection. As Leggatt J said in *Gestmin* at [22]:

> "the best approach for a judge to adopt … is … to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."

Given the conditions under which Mr Walsh's evidence was given, that commends itself to me as the correct approach to adopt in relation to Mr Walsh's evidence.

81. These are general points. But there are some specific matters that have caused me to be particularly cautious about Mr Walsh's evidence. In particular, there are a number of instances where Mr Walsh's evidence appears to have firmed up compared to earlier accounts. I give some examples here although these are not exhaustive:

(1) Part of Mr Walsh's case is that he did not read any of the letters from HMRC, or any of the letters to HMRC that he signed. In his witness statement he said of various letters from HMRC that he did not read them beyond noting that they were from HMRC; and in oral evidence said that he did not read any of these letters beyond noticing that they were headed Edinburgh & Walsh, and repeatedly said that he had signed the letters drafted for him without reading them. But in his first written account (his prepared statement of 1 March 2013) he had been much less absolutist, saying that he was not reviewing in detail the letters coming in, and that he only briefly looked at the contents of letters he was signing.

(2) Mr Walsh was asked at trial about the first letter from HMRC opening enquiries (that of 19 August 2009 from Ms Sibbald: see paragraph 43(1) above), and it was suggested to him that it contained straightforward requests to which he could have supplied straightforward honest answers without having any specialist advice, to which he answered "Had I read the letter, yes" and said he was not aware of the detail of the letter; he was also clear in his oral evidence that Mr Williams-Denton had called him and told him not to worry, initially saying that he was in Lanzarote and then that he thought he had come home. But in his prepared statement of March 2013 he had said that he was "naturally concerned" about the letter and "contacted Neil immediately". In cross-examination he found it difficult to recognise, let alone explain, the inconsistency.

(3) He was much more definite in his witness statement and oral evidence in this action as to the representations made by Mr Williams-Denton (on which he based his claims for negligent misrepresentation and deceit) than he had been earlier.

82. It is worth expanding on this last point as Mr Hardwick placed some emphasis on it in closing. In his Particulars of Claim in this action (dated 2 September 2016 and, unusually, never amended), Mr Walsh pleaded that Mr Williams-Denton made representations to him in relation to the Zodiac and Aquarius schemes in the following terms:

> "9. Mr Williams-Denton further informed the Claimant of one such partnership (The Zodiac Film Company (No. 1) LLP) which he said had been vetted by the Defendant had and had *"passed"* the Defendant's *"robust compliance checks"* and into which he advised the Claimant to invest. He further advised and represented to the Claimant that an investment into the said scheme would be an effective and low-risk tax mitigation strategy and/or investment.
>
> 10. Further, at various times thereafter, Mr Williams-Denton advised and recommended that the Claimant should invest in further film schemes on the basis set out above and advised and represented to the Claimant that an investment into such schemes would be an effective and low-risk tax mitigation strategy and/or investment."

Given the way these paragraphs are pleaded, with some words quoted in italics and others not, the natural reading is that the allegations that Mr Williams-Denton advised and represented that the investments would be effective and low-risk were not intended as actual quotations of what Mr Williams-Denton said.

83. Greystone asked for further information. One of the requests under paragraph 10 was the gist of the words used, to which Mr Walsh's answer (given on 13 November 2017) was that his case was adequately pleaded. The net effect was that no specific words said to have been used by Mr Williams-Denton in relation to the low risk advice were ever pleaded. I do not find that surprising – the meetings in question took place between 2003 and 2005, over a decade before.

84. In his witness statement for trial however (dated 21 December 2018), Mr Walsh's evidence was that at each of the relevant meetings (in June 2003 for Zodiac 1 and 2, November 2004 for Aquarius 4 and 5 and September 2005 for Aquarius 10, 11 and 12) Mr Williams-Denton had used the phrase *"win, win"* to sell the idea of the schemes. Mr Hardwick told me without contradiction that this was the first time that Mr Walsh had referred to this (quite distinctive) phrase having been used. It certainly does not feature in Mr Walsh's further information. Moreover he was able to show me a transcript from the first E&W criminal trial where on 29 May 2015 *Mr Edinburgh* (not Mr Walsh) was asked in chief by his counsel:

> *"Q. People have spoken about win, win.*
>
> *A. Yes.*
>
> *Q. So, the possibility of profit down stream and of offsetting the cost.*
>
> *A. That is how it was sold to me. Win, win"*

Mr Edinburgh gave a similar answer in cross-examination:

> *"A. …all the schemes were sold to me as a win/win situation."*

I was not shown any evidence that Mr Walsh himself used the phrase at either criminal trial.

85. It is quite unclear from these brief extracts from the transcript what Mr Edinburgh's counsel is referring to by saying that "people" had spoken about win, win. Nor is it clear whether Mr Edinburgh meant that Mr Williams-Denton himself used the phrase, or it was Mr Edinburgh's own (or someone else's) summary of the advice that a film scheme could both make an investor money if it made profits, and in any event enabled an investor to claim tax relief if it did not. But whatever Mr Edinburgh meant, I accept Mr Hardwick's submission that there is a very real risk of Mr Walsh's evidence having been contaminated by sitting through the criminal trials and hearing Mr Edinburgh's evidence. As Leggatt J explains in *Gestmin*, we can come to believe that we have a memory of an event which in fact happened to someone else, and memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time: see at [17]-[18].

86. The matters I have referred to above are illustrative of the point that when dealing with distant events even apparently authentic memories, and evidence confidently given by seemingly honest witnesses, are not reliable guides to the truth (see *Gestmin* at [21]-[22]). But in the case of Mr Walsh, my confidence in his evidence is further undermined by some explanations that he gave that I found distinctly unconvincing.

87. I mention two here which I found telling, although again this is not exhaustive. The first concerns Mr Walsh's evidence that he did not read letters from HMRC. The point is an intricate one but is as follows:

(1) On 7 May 2010 Mr Condie sent a letter to Mr Walsh with some queries on the diaries (paragraph 43(7) above). This was in relation to the enquiry into his personal claim for sideways loss relief.

(2) On 6 July 2010 Mr Condie wrote to Mr Walsh as the person who had delivered the 2008 partnership return chasing up queries outstanding from August 2009. This was in relation to the enquiry into the partnership return.

(3) Mr Walsh's reply to the letter of 6 July 2010 (drafted for him, like the other letters to HMRC which he signed), dated 12 August 2010, referred back to letters he had sent in March and April 2010 and asked Mr Condie to confirm he had now received all the information he required. The letters in March and April however were not in fact answers to the queries on the partnership return but further letters in relation to the queries on Mr Walsh's activities for the sideways loss claim.

(4) On 3 November 2010 Mr Condie replied to the letter of 12 August 2010 explaining that Mr Walsh was the nominated partner for the partnership return and had never replied to the queries outstanding from August 2009.

(5) On 17 November 2010 Mr Condie sent Mr Walsh the formal notice requiring information in relation to his activities (paragraph 43(10) above), referring back to his letter of 7 May 2010.

(6) Mr Walsh's evidence on the letter of 17 November 2010 in his witness statement was that he passed it to Mr Williams-Denton without reading it. In cross-examination he confirmed that he did not read it sufficiently to notice the information requests in it; he just registered that it was to do with E&W and was for Mr Williams-Denton.

(7) Mr Walsh's evidence was that the way in which he sent letters like this to Mr Williams-Denton was to take them into the office where they would be scanned by Mrs Tracy Panrucker, a "desk assistant" who provided secretarial services (not exclusively to him), so that they could be e-mailed to Mr Williams-Denton or Ms Mundy. In the case of the letter of 17 November 2010, this was scanned and e-mailed to Ms Mundy on 6 December. Mr Walsh's covering e-mail said:

> "Things ever more bizarre by the day as this refers to a letter sent before the one they were chasing up two weeks ago.
>
> HELP"

As Mr Walsh accepted, this e-mail evidently refers to the letters of 17 and 3 November 2010; the comment is no doubt because the later letter of 17 November 2010 refers back to HMRC's letter of 7 May 2010, whereas that of 3 November 2010 was following up on his letter of 12 August 2010.

(8) It is difficult to see how Mr Walsh could have written this e-mail without having read the two letters of 3 and 17 November 2010, at least to the extent of seeing that they referred to the letters of 12 August and 7 May 2010 respectively. When asked about this, Mr Walsh continued to maintain that he had not read the letters and said that Mrs Panrucker had noticed the anomaly and told him about it.

(9) I found this evidence very unconvincing. By his own account Mrs Panrucker, who did not work exclusively for Mr Walsh, was not responsible for answering these letters – the answers were drafted by Mr Potter. Nor did Mr Walsh ask her to keep a file of correspondence. All that she was responsible for was scanning them to his e-mail so they could be forwarded. It seems to me very improbable that she would have paid such close attention to their contents to have picked up the apparent anomaly; or that if she had done, that she would have told Mr Walsh without showing him the letters for him to read. Mr Walsh's evidence gave me every impression of having been made up on the spur of the moment. I find that he did read the letters of 3 and 17 November 2010, at least to the extent I have indicated.

88. The other example concerns Mr Walsh's knowledge of the diaries and what they contained. This is an issue that I will have to consider at greater length as Greystone's case is that despite his acquittal in the criminal proceedings, the likelihood on the balance of probabilities is that Mr Walsh did know that the diaries

submitted to HMRC in his name were not genuine.

89. For present purposes the relevant evidence concerns what he said about the diaries in the course of the disciplinary process at RBS, as follows:

(1) On 15 March 2012 he had his initial disciplinary hearing. There are detailed notes of the hearing, taken by a professional transcriber, which Mr Walsh was given an opportunity to correct (and which he corrected in some details). Subject to such corrections, I proceed on the basis that they are an accurate record of the hearing.

(2) Mr Walsh was asked about the diaries. He said he had to be careful answering questions about them, and was told that if he did not want to answer that was fine. Nevertheless he did go on to answer some questions about them.

(3) According to the evidence he gave in the current action, the first time he saw the diaries was at his initial police interview on 8 February 2012, and he immediately knew that they were entirely fictitious. Apart from anything else they purported to record his activities from March 2007 whereas in these proceedings his evidence was that he was not even told about the 10-hour requirement until February 2008.

(4) However in his disciplinary hearing he never said anything about the diaries being obviously fictitious. On the contrary he said that although they were "not necessarily contemporaneous" he had told the administrator what they had done. He was asked about the specific timings, for example that a meeting lasted 1 hour 46 minutes. His answer was:

> "VW did not think that he had been that specific. The administrator might have been on the call. He could not remember the specifics of what happened in 2007. Someone from the partnership could easily have been on the call and noted the times. He could not recall whether it had been a conference call or not."

He was also asked about a comparison between Mr Foley's diary and his own which had different times for the meetings; and inconsistencies between the diaries and the paper trail. His answer was:

> "VW agreed that there had been clerical inconsistencies, but within a six-man partnership, clerical inconsistencies were not in any way conflicting or reputational damage. They were just inconsistencies in a close partnership."

(5) These answers speak for themselves. They are clearly intended to give the impression that, give or take a few clerical errors, the diaries are reflective of work that the members actually carried out. They cannot be reconciled with Mr Walsh's account in these proceedings that he knew when he first saw them in February 2012 that they were utterly bogus. He was unable to give any coherent explanation in cross-examination why he did not either say so in clear terms in March 2012, or refuse to answer any questions at all.

(6) I found Mr Walsh's evidence on these points very unimpressive. I make allowance for the fact that the hearing came some 6 weeks after his world had

been turned upside down by his arrest. But that does not explain how he came to give such misleading answers, and it is impossible to think of an innocent explanation.

(7) Mr Walsh's disciplinary appeal hearing was on 11 September 2012. Again a note was taken and he was given the opportunity to correct it, and subject to such corrections I proceed on the basis that it is an accurate record. It includes the following:

> "VW referred to the diaries, and said they were subject to some conjecture. He thought that 'diaries' was perhaps an inappropriate word as they had just been recollections of their actions four years after the event."

(8) It is not obvious what Mr Walsh meant by referring to the diaries as subject to some conjecture, but he was unable in his oral evidence to explain it. And to describe them as just recollections of their actions is again entirely inconsistent with his present case, and the obvious inference is that this was designed to mislead. Again I found his evidence unimpressive and unconvincing.

90. These matters have necessarily caused me to reassess the extent to which I can trust Mr Walsh's evidence on other matters. For the reasons I have sought to give, I have very significant reservations as to the confidence I can have in his evidence, and have been wary of accepting it save where consistent with the documents and the inherent probabilities.

Claims in relation to Zodiac and Aquarius

91. I can now consider the various claims put forward by Mr Walsh. They can be divided into the claims in relation to the Zodiac and Aquarius schemes and the claims in relation to E&W. In relation to both sets of claims Mr Walsh's pleaded case originally relied on four causes of action, namely deceit, negligence, breach of fiduciary duty and unlawful means conspiracy, but, as already referred to, the claims in breach of fiduciary duty and unlawful means conspiracy have not been pursued and I am only concerned with claims in deceit and negligence.

92. So far as the Zodiac and Aquarius schemes are concerned, the scope of those claims has also been narrowed. The deceit claims originally pleaded were in effect two-fold. The first was that contrary to implied representations, the schemes were not *bona fide* film partnership schemes at all. The basis for this case was an allegation pleaded in Paragraph 13.ii. of the Particulars of Claim in the following terms:

> "The schemes promoted and operated by Mr Potter were not *bona fide* film partnership schemes. In the case of each of the schemes referred to above, at the time of the Claimant's investment, the film or films for which the funding was apparently required had already been produced and the monies invested were not in fact used (or intended to be used) to produce such films. The monies were instead misappropriated by and/or with the concurrence of Mr Potter (who, together with various associates, has been convicted of offences of attempting to defraud Her Majesty's Revenue and Customs)."

On the basis of that it was pleaded (in Paragraph 80.i. of the Particulars of Claim) that

(i) the schemes were not *bona fide* film partnership schemes and/or it was not intended to produce films using the members' investment and (ii) that the members would not be eligible for uncapped sideways loss relief because there was no genuine intention to produce the films.

93. These allegations are not persisted in. The allegation that the monies were misappropriated was abandoned as unnecessary in Mr Walsh's further information served on 13 November 2017. The allegation that the schemes were not *bona fide* was abandoned on 3 April 2019 (after the evidence had closed on Day 7 (2 April) but before closing submissions on Day 8 (8 April)).

94. That means that the deceit claim is limited to the second of the two pleaded claims. This is that contrary to the representations pleaded at Paragraphs 9 and 10 of the Particulars of Claim (the terms of which I have set out at paragraph 82 above), the schemes did not constitute a low-risk tax mitigation strategy or investment.

95. So far as the negligence claims in relation to the Zodiac and Aquarius schemes are concerned, the same matters (that Mr Williams-Denton advised Mr Walsh that investment in the schemes was an effective and low-risk tax mitigation strategy or investment when it was not) are relied on as breaches of the duty of care. It is not disputed that Greystone did owe Mr Walsh a duty of care in relation to any advice and recommendations given to him in respect of his financial affairs.

96. Those are the only claims now relied on in relation to the Zodiac and Aquarius schemes. Each depends on the advice given by Mr Williams-Denton, and I consider that below.

Lack of due diligence

97. Before doing so, there is another issue that I should address. This is that during the course of the trial I heard argument on whether another claim in relation to the Zodiac scheme was open to Mr Walsh on his pleadings, and if not, whether permission to amend should be given. I ruled against Mr Walsh on both points for reasons that I gave in a brief oral judgment on Day 6 (1 April), but I indicated then that I would set out my reasoning in more detail in the judgment after trial, and it is convenient to do so at this point.

98. Mr Walsh's Particulars of Claim pleaded a further head of negligence in Paragraph 88.iii. as follows:

> "…the Defendant (by Mr Williams-Denton acting within the course and scope of his authority on behalf of the Defendant) breached the duties that it owed to the Claimant:
>
> …
>
> iii. by failing to carry out appropriate "due diligence" investigations into the Original Schemes (as to which paragraph 13(ii) above is repeated herein) and/or the E&W LLP and/or by advising the Claimant that robust due diligence checks had been carried out."

As can be seen, that plea encompasses both the Original Schemes (that is the Zodiac

and Aquarius schemes) and the E&W scheme, but the current point in fact only affects the Zodiac scheme.

99. I have already set out Paragraph 13.ii. of the Particulars of Claim (paragraph 92 above) from which it can be seen that it was concerned, and only concerned, with the allegation that the schemes were not *bona fide* because the films had already been produced and the monies invested were not used or intended to be used for their production but were misappropriated. Greystone, as I refer to below, had until trial assumed that the allegation of lack of due diligence was limited to an allegation that it had failed to carry out such investigations as would have uncovered these matters.

100. However it became clear from Mr Beswetherick's written opening submissions (dated and exchanged on 18 March 2019, that is one week before trial started on 25 March) that he was advancing a series of rather different due diligence claims in relation to the Zodiac scheme. This was based on the Zodiac 'reasons why' letter of 4 July 2003 which contained a number of assertions which it was suggested could only have come from Mr Potter. They were that (i) the Inland Revenue was "happy with the scheme"; (ii) that the scheme "maximises tax rebate more than other schemes"; (iii) that Aquarius did not adopt any "aggressive techniques" and the schemes were "about as mainstream as film schemes can be"; and (iv) that in the previous two years Aquarius had financed and produced more than 12 full feature films with budgets averaging $5m each. It was suggested that even the most cursory consideration of each of these four claims would have revealed serious concerns. On the basis of that, a claim was advanced which was formulated as follows:

> "Greystone's evidence demonstrates that it did not take any steps to investigate or verify the accuracy of the information it received from Mr Potter relating to the Zodiac schemes" [para 89]
>
> "Greystone breached its duty of care by failing to take any steps to enquire into or verify the information that it received about the Zodiac schemes from Mr Potter." [para 96].

I will refer to this as the "failure to verify" allegation.

101. Greystone's position is that the failure to verify allegation was a new allegation that had not been pleaded. Both Mr Beswetherick and Mr Hardwick made submissions on the point in opening on Day 1 (25 March), although I did not hear Mr Beswetherick in reply until Day 6 (1 April) after Mr Walsh's cross-examination had finished. At the same time Mr Beswetherick made an application to amend as a fall-back in case I held that an amendment were necessary, and I heard submissions from him and Mr Burdin on that application.

102. The first question then is whether the claim that Greystone failed to verify the claims in the 'reasons why' letter is within the scope of the unamended pleading. Mr Beswetherick submitted that it was: the allegation in Paragraph 13.ii is not an allegation of breach of duty; the allegation of breach is in Paragraph 88.iii and is a general allegation of a failure to carry out due diligence. That, he says, enables him to advance the particular case that the bare minimum of due diligence would have been to check what Mr Potter was telling Mr Williams-Denton, and that had they done that, they would have discovered that what he was telling them was either simply wrong or

very questionable at best, which would have raised 'red flags' or warning signs.

103. Mr Beswetherick referred me to *McPhilemy v Times Newspapers Ltd* [1999] EMLR 751, decided shortly after the Woolf reforms that introduced the CPR, where Lord Woolf MR himself said at 776:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

I of course accept the general guidance given in the first part of this passage, and it is everyday experience that the long and frequently burdensome requests for particulars that were a regular feature of litigation under the RSC are no longer looked on with such favour under the CPR where the practice is only to order further information when really necessary. But none of this detracts from the points also made by Lord Woolf that pleadings are not superfluous, and that they remain critical to identify the issues. As I read this passage the central point made by Lord Woolf was that what is important is to ensure that the other side is not taken by surprise: if disclosure and the exchange of witness statements provide the detail that is not in the pleadings, that may be enough and particulars may be quite unnecessary. Mr Beswetherick also referred me to an observation by Lord Woolf, a bit lower down on 776, that:

> "[Excessive particulars] can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of historic interest only."

As I have already indicated I have no difficulty with the suggestion that particulars may be unnecessary if the details of the party's case are apparent from the witness statements. I do have more difficulty with the suggestion that pleadings can become of historic interest only: in my experience it is essential for a trial judge when considering serious allegations (and in this I include not only deceit but also professional negligence) to be quite strict about confining the inquiry to the allegations which are actually pleaded, out of fairness to the defendant, but I need not say any more about this aspect of what Lord Woolf said as Mr Beswetherick does not suggest in the present case that he can advance his failure to verify claim unless it has either already been pleaded, or he can amend to plead it.

104. There is however nothing in the witness statements served by Mr Walsh that puts Greystone on notice that one of the issues at trial would be whether Greystone failed to verify the statements in the Zodiac 'reasons why' letter: I give the details below. So this is not a case of the type that Lord Woolf was referring to where a lack of detail in the pleading is unimportant because the case sought to be made is clear from the witness statements. Indeed Mr Hardwick said that the first time he understood that the failure to verify allegation was being pursued was when he saw Mr Beswetherick's opening submissions for trial.

105. Mr Hardwick took me through some of the procedural history. It is apparent from that, and I accept, that Greystone did indeed understand the due diligence claim that was pleaded against it to be bound up with the allegation that the schemes were not *bona fide*. One can find that articulated, for example, in the skeleton argument prepared by Mr Hardwick for the first costs and case management conference before Master Bowles on 14 November 2017. One of the issues was whether expert evidence was required, it having been suggested on behalf of Mr Walsh that an expert was required for the due diligence claim. Mr Hardwick's skeleton set out the way the claim was pleaded in Paragraph 88.iii of the Particulars of Claim with its reference back to Paragraph 13.ii and then said:

> "26. Accordingly the allegations which underpin the alleged due diligence breach are whether in the case of the (or any of the) various film schemes identified:
>
> 26.1 the "*…film or films…*" had "*…already been produced…*"
>
> 26.2 the monies invested were "*…not in fact used (or intended to be used) to produce such films…*"; and
>
> 26.3 the monies were "*…misappropriated with the concurrence of Mr Potter…*" "

He then said that it was only if these underlying facts could be substantiated that the due diligence claim pleaded in Paragraph 88.iii arose. Master Bowles must have been unpersuaded that expert evidence would inevitably be required as he did not make any immediate order for it, providing instead that any application for expert evidence should be made by 31 July 2018, that is some 6 weeks after exchange of factual witness statements which was fixed for 15 June 2018. It seems a reasonable inference that Master Bowles thought that the need for expert evidence would be clearer once witness statements had been exchanged.

106. In the event witness statements were not exchanged until considerably later, and no application for expert evidence was ever made. The witness statements are all dated on various dates in December 2018, the latest for Mr Walsh being his own dated 21 December, and that for Greystone being Mr Peden's on 19 December. Mr Walsh's statement does refer to the statements in the Zodiac 'reasons why' letter but says nothing about those statements being easily verifiable or about Greystone's failure to check them. There is nothing surprising in that, as the proper function of a witness statement (although all too frequently ignored) is to give the Court the benefit of the witness's own recollection of events, not to argue the case or give a commentary on the documents, and Mr Walsh could scarcely be thought to have any evidence, let alone recollection, as to what checks Greystone did or did not carry out, or should have carried out, or what they would have discovered if they had. But Mr Walsh's statement did refer to the schemes not being *bona fide*. His witness statement contained a section headed "Evidence that the partnerships were not bona fide schemes", which takes up some 3½ pages, largely by cross-referring to a witness statement that Mr Condie made in October 2015 for the second E&W criminal trial. Then at the end of his statement, in a section headed "Conclusion" he reverted to the point, asserting that Greystone "failed to ensure that the film schemes were genuine before they were sold" and that Mr Williams-Denton and others "would have been aware that the schemes were being sold without having carried out any checks into

whether they were genuine." Thus although Mr Walsh's evidence complained of a lack of due diligence, there was nothing to alert the reader that what was being said in that connection went beyond the complaint that Greystone had failed to check the genuineness of the film schemes, and in particular nothing to suggest that a case would be run of failure to verify the statements in the Zodiac 'reasons why' letter.

107. For its part, Greystone's understanding of what it understood the allegation of lack of due diligence to be concerned with can be found in Mr Peden's witness statement. Mr Peden made it clear that he was not himself involved in any review of the film schemes promoted by Mr Potter, but he set out his recollection of the typical processes undertaken by Greystone and what could be seen from the documentary record. He then said that there was nothing concerning about Mr Potter's background, saying that he understood him to be an experienced tax specialist with a professional background in accountancy from the well-respected firm Ernst & Young, with an existing track record of successful schemes, and nothing to suggest he was involved in dishonesty or any criminal activity. He then turned to the allegation that the schemes were not *bona fide*. He said that he was told that one of the allegations in the action was that the film or films the subject of the Zodiac and Aquarius partnerships had already been produced and:

> "I understand that it is alleged that Greystone should have carried out investigations which would have made us aware of this and, as a result, we would have concluded that these were not 'bona fide' film schemes but were some form of fraudulent schemes perpetrated by Terry Potter."

In essence his answer to the allegation was that Greystone had no reason to be suspicious the schemes were shams, that he did not know what action the compliance team could have taken to check, and that there was evidence that Mr Walsh's investments were in fact made before the release dates of the films concerned.

108. I have set this out at some length because it does to my mind confirm what Mr Hardwick told me, namely that so far as Greystone was concerned, the lack of due diligence allegation was all bound up with the allegation that the schemes were not *bona fide*, and that there was nothing in the material Greystone had seen (whether by way of formal pleading, witness statements, correspondence or otherwise) to suggest that it also included an allegation that Greystone failed to verify the information in the Zodiac 'reasons why' letter.

109. I can now come back to whether this failure to verify claim is within the scope of the existing pleading. It is worth repeating the relevant part of Paragraph 88.iii, which is an allegation that Greystone failed:

> "…to carry out appropriate "due diligence" investigations into the Original Schemes (as to which paragraph 13(ii) above is repeated herein)…"

Taken by itself, this is I think ambiguous. The question is what the reference back to Paragraph 13.ii (the not *bona fide* allegation) is intended to do. Is this intended just as an illustration of what due diligence might have been concerned with? Or is it intended as an explanation of what the pleader means by "appropriate" investigations – that is, investigations into whether the schemes were genuine or not? Purely as a matter of semantics, I can see that both are possible views. But whatever might have

been the position had Greystone not made it clear how it understood the pleading, I do not think I can ignore the fact that Greystone did make it clear at an early stage that it understood this allegation to be confined to a failure to investigate the genuineness of the film schemes. I have accepted that that is how Greystone's legal team in fact understood the allegation; in my judgment, in the context of the pleading as a whole, which made a specific allegation that the schemes were not *bona fide*, and which specifically repeated that allegation in the context of the lack of due diligence, that was a reasonable way to read the pleading; and Mr Hardwick clearly articulated Greystone's understanding of the allegation in his skeleton argument as long ago as November 2017. So far as I am aware (and I was not shown anything to the contrary), nothing was ever said by Mr Walsh's legal team to suggest that the scope of the pleading was intended to be any wider than that until the opening submissions for trial were served, and as I have set out, nothing in Mr Walsh's witness statement foreshadowed the failure to verify claim, even though it did address the failure to check that the schemes were genuine. In those circumstances I concluded that it was not open to Mr Walsh to advance the failure to verify claim under the pleading as it stands. The overall purpose of pleading, as referred to above, is to set the parameters of the case so that the other side is not taken by surprise. Where the claimant makes an allegation in unclear terms, the defendant sets out its understanding of what is in issue, that understanding is a reasonable one given the pleading as a whole, the defendant's position is clearly articulated at a case management conference at an early stage, and that understanding is never contradicted by the claimant, it is in my judgment too late for the claimant to put forward a wider interpretation for the first time without any warning in opening submissions for trial, at any rate, as is the case here, where the wider interpretation would require at the very least a factual investigation that has never been done, and quite possibly expert evidence after all. Mr Beswetherick suggested that one could deal with the failure to verify claim simply on the basis of the Zodiac 'reasons why' letter and some questions for Mr Peden. But I am not convinced that that is so. Questions such as whether the Zodiac scheme maximised tax rebates more than other schemes, or whether the scheme adopted aggressive techniques seem to me to be questions on which Greystone might well have wanted to consider anew the question of expert evidence. One of the main purposes of the Woolf reforms was to avoid trial by ambush and to ensure that by the time a case was ready for trial both sides knew what the issues were. To permit a party to advance a claim for the first time at such a late stage under the guise of an ambiguous pleading is not in my judgment in accordance with the overriding objective of ensuring that cases are dealt with justly and fairly. It was for these reasons that I ruled on Day 6 that it was not open to Mr Walsh to advance the failure to verify claim under the unamended pleading.

110. The next question is whether permission to amend should be given. A number of arguments were put forward by Mr Burdin as to why permission to amend should be refused, and among them was the argument that it would require pleading a new cause of action after the expiry of the limitation period, and that it was precluded by CPR r 17.4. By r 17.4(1) the rule applies where a party applies to amend his statement of case in one of the ways mentioned in the rule and a period of limitation has expired under the LA 1980. By r 17.4(2):

> "The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already

claimed in the proceedings."

CPR r 17.4 gives effect to the provisions of s. 35(3) LA 1980, which, so far as relevant, provides:

> "Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection 1(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim…"

A "new claim" is defined by s. 35(2) to include the addition or substitution of a new cause of action. If the amendment proposed here does constitute such a new claim it is within s. 35(1)(b) and so subject to s. 35(3).

111. The application of r 17.4 therefore gives rise to the following three questions (see *Ballinger v Mercer Ltd* [2014] EWCA Civ 996 (***"Ballinger"***) at [15] per Tomlinson LJ): (i) is it reasonably arguable that the opposed amendment is outside the applicable limitation period? (ii) if so, does it seek to add or substitute a new cause of action? (iii) if so, does the new cause of action arise out of the same or substantially the same facts as are already in issue on the existing claim? If those three questions are answered adversely to the claimant, the Court has no power to permit the amendment; if they are not, then the Court has a discretion and other considerations arise.

112. As to (i), Mr Beswetherick accepted that if the proposed amendment raises a new cause of action it is either now statute-barred, or at least arguably so. It is established that if an amendment does involve the addition of a new cause of action, permission should be refused if there is a reasonable argument that it is statute-barred (unless it can be brought under r 17.4 even if statute-barred): see *Civil Procedure (The White Book) 2019* note 17.4.2.

113. As to (ii), the law as I understand it is that, speaking generally, in the case of a claim pleaded in negligence, the addition of a new allegation of breach of duty does usually constitute a new cause of action, whereas the addition of a new head of loss does not. There are in fact a large number of cases on this question, and they are not all easy to reconcile with each other, but I was referred by Mr Burdin to the convenient summary by Mr Stephen Morris QC (as he then was) in *Diamandis v Wills* [2015] EWHC 312 (Ch) where in his summary of the principles he said (at [48(2)]):

> "Where it is the same duty and same breach, new or different loss will not be [a] new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action."

I proceed on the basis that that is an accurate summary of the law.

114. Mr Beswetherick's submission was that all that was involved here was a change to the case on causation, and the draft amendment he put before me was indeed primarily in the form of a new Paragraph 89.Ai. to the effect that had it not been for Greystone's breaches of duty, Greystone would have concluded that information provided by Mr Potter about the Zodiac scheme was untrue (detailing the information found in the Zodiac 'reasons why' letter), and hence would have concluded that there was reason to doubt the integrity of Mr Potter. But the proposed amendment also sought to delete

the words "(as to which paragraph 13(ii) is repeated herein)" from Paragraph 88.iii. If I am right that the effect of those words was to limit the original pleading to an allegation that Greystone failed to carry out investigations which would have revealed the fact that the schemes were not genuine, then logically it must follow that deleting these words expands the scope of the due diligence allegation. There is in this respect a pertinent comment in *The White Book (2019)* at note 17.4.4 which Mr Burdin relied on as follows:

> "In a professional negligence claim, although an amendment raising a new cause of allegation of breach of duty may amount to raising a new cause of action, an amendment which merely raises a new head of loss or damage can never amount to that. However, once the limitation period has expired, the court should be astute not to permit claimants to raise new heads of loss or damage as a stepping stone from which to allege new breaches of duty."

115. When one examines in detail the case that is now sought to be advanced, I do not think it can be characterised as one where the only change is one of causation (which for these purposes I assume would have the same effect as introducing a new head of loss). It is implicit in the allegations that are now being put forward that what is really being said is that Greystone should have verified the factual information given to them by Mr Potter, and that Mr Williams-Denton should have done certain things, such as to identify inconsistencies between what Mr Potter was saying as recorded in the Zodiac 'reasons why' letter and what was said in the Business Plan Mr Potter produced and the like. Indeed in Mr Beswetherick's opening submissions, this part of the claim was all dealt with under the heading of breach, and under a sub-heading "The steps that Greystone ought to have taken in 2003"; and (as set out in paragraph 100 above), the complaint was that it did not seek to verify any of the facts asserted by Mr Potter, and that it "breached its duty of care" by failing to do so. That seems to me a new allegation of breach, not just a new allegation of causation flowing from a breach already pleaded; and in accordance with my understanding of the law, to amount to the addition or substitution of a new cause of action and hence a new claim within the meaning of s. 35 LA 1980 and CPR r 17.4(2).

116. Question (iii) is whether the new claim arises out of the same or substantially the same facts as are already in issue on the existing claim. Mr Burdin referred me to *Ballinger* at [34]-[38] where Tomlinson LJ summarised the effect of the most relevant authorities. I need not set out the whole passage, but in essence Tomlinson LJ approved as helpful guidance a statement that the purpose of the rules is to avoid placing a defendant in a position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts he could reasonably be assumed to have investigated for the purposes of the unamended claims. He also referred to statements that although the question has been said to be substantially a matter of impression, it has also been said to be one which must in some cases be a question of analysis; and pointed out that "the same or substantially the same" does not mean "similar".

117. My analysis is that the facts involved in the proposed amended claim are not the same as, or substantially the same as, those that arise on the unamended claim. An allegation that Greystone should have discovered the allegedly non-*bona fide* nature of the film schemes on the basis that the money was not really intended to be used for

film production gives rise to a different factual enquiry from the factual enquiry necessary to deal with an allegation that Greystone should have verified the information that Mr Potter was providing about the matters referred to in the Zodiac 'reasons why' letter, or what it would have discovered if it had.

118. In those circumstances, no discretion arises and I am obliged to refuse permission to amend. Even if I had concluded that I did have a discretion to permit amendment, it would in my judgment be too late to run any new case that required anything in the nature of expert evidence. The parties were given liberty by Master Bowles to apply for expert evidence and did not do so. Given the way in which Greystone understood the case, and the way in which it proposed to meet it, that was understandable. But if the amendment is permitted, Greystone says that there are a number of matters which it would wish to consider exploring with an expert in relation to the duties of IFAs in 2003 to scrutinise or verify information claims made by ostensibly genuine promoters. That too I find credible, and I do not think I can conclude with any confidence that expert evidence would be of no assistance to the resolution of those issues.

119. I accept that there are cases in which allegations of professional negligence do not need expert evidence. Mr Burdin referred me to the decision of Norris J in *Lenderink-Woods v Zurich Assurance Ltd* [2016] EWHC 3287 (Ch) at [72]-[77] where he set out certain principles. At [76] he referred to what the Court of Appeal had said in *Sansom v Metcalfe Hambleton* [1998] PNLR 542 at 549 to the effect that a court should be slow to find a professional guilty of negligence without evidence from within the same profession; and at [77] set out some established exceptions to that, including:

> "cases in which it is not necessary to apply any professional expertise because the mistake was glaring or obvious."

Mr Beswetherick submitted that the proposed amendments fell into that category; but I do not find it possible to conclude that the allegations which were sought to be made are so glaring or obvious that no expert evidence is necessary, or could assist in the resolution of those issues. In those circumstances I would in any event have concluded that it would not be fair or just to allow the amendments at trial and would have refused permission to amend even if I had concluded that the case was not barred by s. 35 LA 1980 and CPR r 17.4.

120. Those were the reasons why I refused permission to amend on Day 6 of the trial. I add two footnotes:

(1) In the short oral judgment I then delivered I said that in case I was wrong to disallow the amendment I would permit Mr Beswetherick to cross-examine Mr Peden on the issues which he said were already in play, and would make such factual findings on them as appeared to me to be appropriate. In fact, I received few submissions in closing on these issues, but I will address those that have been specifically raised.

(2) Mr Beswetherick in his closing submissions said he understood that the time for any appeal in relation to the amendment would not start to run until after the handing down of this judgment. Whatever the technical position, I see the good sense of that, and I will therefore indicate now that I will be prepared to extend time for appealing my decision on the amendment to match whatever

the time for appealing the substantive parts of this judgment may be, which will itself no doubt be addressed on the handing down of this judgment.

The low risk advice – Zodiac

121. As a result of that decision, the only claim advanced in closing submissions in relation to the Zodiac and Aquarius schemes was the claim that Mr Williams-Denton advised Mr Walsh that an investment into the relevant schemes constituted a low-risk tax mitigation strategy or investment, this being said to give rise to claims in negligence or deceit.

122. The issues that arise are (i) what advice did Mr Williams-Denton give to Mr Walsh? (ii) was that advice deceitful? (iii) was that advice negligent? (iv) did Mr Walsh rely on it? (v) what loss did Mr Walsh thereby suffer? and (vi) is any such claim statute-barred?

What advice did Mr Williams-Denton give?

123. I have already explained why I can place little reliance by itself on Mr Walsh's recollection of events over 15 years ago. The resolution of this issue must turn primarily on what can be shown by reference to the documents and the inherent probabilities.

124. The documents reveal the following:

(1) Mr Walsh's first meeting with Mr Williams-Denton was on 26 June 2003 at which between them they filled out the Confidential Financial Summary (paragraph 14 above).

(2) On 27 June 2003 Mr Williams-Denton wrote "to confirm that the partnership meeting" was scheduled for 2 July, and asking him to bring among other things income details for the last four tax years as well as an estimate for the current (2003/04) tax year. This letter indicates (and I find) that Mr Williams-Denton had raised the possibility of Mr Walsh joining a film partnership scheme when he met him on 26 June because it uses the word "confirm" and Mr Williams-Denton obviously assumed Mr Walsh would understand what "the partnership meeting" referred to.

(3) On the morning of 2 July 2003, Mr Williams-Denton sent Mr Foley and Mr Walsh details of the meeting that evening. Mr Walsh replied that afternoon saying he could not make the meeting but "will get a full debrief from Sean tomorrow".

(4) On 3 July 2003 Mr Williams-Denton said he needed to see Mr Walsh that morning with a copy of his business plan, and to collect bank statements and income details and the RBS loan application. (As explained in the Zodiac 'reasons why' letter of 4 July 2003 RBS were willing to lend monies to participants in the scheme to fund their contributions). It is probable (and I find) that Mr Williams-Denton did meet Mr Walsh on 3 July as the 'reasons why' letter refers to Mr Walsh as having received a copy of the Business Plan, and to the partnership and RBS loan applications as having been completed.

The statements in this letter are not wholly reliable as some of them (such as a statement that Mr Walsh had attended the presentation on 2 July) can be shown to be incorrect, but these ones seem to me to be likely to be true; Mr Walsh could not remember receiving the Business Plan but accepted that it was probable that he had, and I find that he did.

(5) There is an example of the Zodiac Business Plan in the papers, although it is one specifically prepared for another investor, not for Mr Walsh. It has a foreword dated 25 June 2003, although this particular version has a footer indicating that it was printed on 14 July 2003. It is a lengthy document running to 45 pages.

(6) On 4 July 2003 Mr Williams-Denton sent Mr Walsh the Zodiac 'reasons why' letter recommending the Zodiac scheme to mitigate his income tax liability.

(7) On 7 July 2003 Mr Walsh signed a Confidentiality Agreement addressed to Zodiac Film Finance Ltd. It was headed "Please sign and return this copy." It was probably either left with Mr Walsh on 3 July or sent to him with the 'reasons why' letter, although nothing turns on this.

(8) Records at Companies House show that Mr Walsh became a member of Zodiac 1 on 11 December 2003. There is no documentation in the disclosure relating to this (such as Mr Walsh's application to join the partnership or anything forwarding the application).

(9) Mr Walsh paid his contributions to Zodiac 1 and Zodiac 2 in April 2004 (paragraph 16 above). Again there are no documents relating to this, although the fact of payment is common ground.

125. It is Mr Walsh's case that Mr Williams-Denton gave him the low-risk advice at the first meeting on 26 June 2003. In his witness statement, he said that Mr Williams-Denton said there was minimal risk, that the films would eventually be distributed and begin to make money, that there would be significant tax benefits, and that Mr Williams-Denton sold it to him as a "win-win"; Mr Williams-Denton also referred to Mr Potter as an Oscar-nominated film producer, whose CV was priceless, assured him that the films would be successful, and described the investment as watertight. In oral evidence he accepted more than once that he could not give an exact quote of what Mr Williams-Denton said: he was unable for example to specify whether Mr Williams-Denton had used the phrase "low risk" or "minimal risk" (and in any event did not see any difference between them), and could not remember if he used the word "watertight". He did claim to remember the phrase "win-win" but I have already given reasons for doubting that. Although he has now, with the benefit of the documents, pinpointed the occasion on which Mr Williams-Denton said these things as the meeting on 26 June 2003, his further information given in 2017 was unable to specify whether they were given at a meeting or in a telephone conversation.

126. I find that Mr Walsh's recollection of this meeting is nowhere near as detailed as he suggested it was. I do not think any firm finding can now be made on the basis of his evidence other than that he told Mr Williams-Denton that he was interested, among other things, in reducing his income tax bill (as appears from the Confidential Financial Summary), and that Mr Williams-Denton recommended film schemes for

that purpose. What cannot now be determined with any confidence is anything specifically said by Mr Williams-Denton at the meeting.

127. The best guide in my judgment to what Mr Williams-Denton is likely to have said is to be found in the Zodiac 'reasons why' letter of 4 July, as on the face of it this reflects Mr Williams-Denton's understanding, and it is inherently unlikely that he would have said one thing to Mr Walsh at the meeting on 26 June and followed it up with a letter saying something quite different.

128. One thing that emerges clearly from the letter is that it does not seek to sell the investment primarily as an investment in the underlying film or films, and gives no assurances that any film will be a commercial success. Mr Walsh's pleaded case, both in deceit and negligence, is based on Mr Williams-Denton having advised that an investment into the Zodiac scheme would be an effective and low-risk "tax mitigation strategy *and/or investment*"; this runs together the idea of Zodiac as a low-risk tax mitigation strategy and as a low-risk investment (as did quite a bit of the oral evidence). The two are however quite different and I think it is helpful to keep them distinct.

129. The Zodiac 'reasons why' letter says very little about the investment as an investment. On the contrary it makes it clear that Zodiac is being recommended as a way of mitigating tax. Thus on page 1 it says:

> "I have recommended a Film Partnership Scheme as you wish to mitigate your personal Income Tax liability and you have confirmed that you have had significant earnings and paid significant tax in the past 3 tax years."

It then compares the tax benefits with those available from pension contributions and continues:

> "A Film Partnership will provide personal Income tax mitigation more than any other investment."

Consistently with this, the bulk of the letter is taken up with how the tax mitigation works, rather than the investment in the film itself. What references there are to the latter give very little comfort, and no assurances at all. There is a reference to Aquarius Film Company and its track record, although even then the focus is primarily on the tax rebates that investors generally achieve; it does say that investors will participate in revenues after five years but gives no indication what such revenues might be. It also says that Aquarius is actively looking for film projects which:

> "are likely to be international co-productions with very good commercial prospects."

This however is self-evidently not based on an assessment of the actual prospects of any particular film and is I think no more than a puff. Under the heading of "Financial Benefits to Members", the letter refers first to the potential for making claims for tax relief and only adds secondly:

> "Potential benefit from film revenues and other associated income streams."

The key word here of course is "potential". Finally at the end of the letter, under a quite prominent heading of "Standard Risk Warning and Disclosure Statement", there

is the following:

> "I must also point out that investing within the film industry is considered a highly speculative investment. It cannot be guaranteed that a film financed by the partnership will generate any gross or net receipts (in excess of pre-sale commitments and other guarantees) and any investment in it must therefore be seen as speculative."

The pre-sale commitments would be needed to repay the loans taken out by the partnership and so would not produce any actual cash for the partners. There is also a footnote in much smaller type, under the heading Standard Risk Warning, which refers to the film industry as "inherently risky". These warnings are rather more strongly worded than standard warnings of the "investments can go up and down" type; and even without them one would have thought that it was relatively common knowledge that film-making is a very uncertain way of making money and it is very difficult to predict if any particular film will cover its costs, let alone make a profit.

130. In the light of this I find that it is highly improbable that Mr Williams-Denton gave any assurances at all to Mr Walsh about the likelihood of investment in the films being successful as an investment in itself. He may well have referred to Mr Potter's track record and CV, to his having been Oscar-nominated and the like; he may well have given the impression of having confidence in Mr Potter's ability to make successful films. But that is very different from assuring Mr Walsh that they would be successful, or would make money or would be profitable, or that the investment was watertight, or was a low-risk investment. Not only do I find that it has not been proved that Mr Williams-Denton described the investment as a low-risk investment but I find on the balance of probabilities that he did not.

131. So far as the opportunity for tax mitigation is concerned, the 'reasons why' letter says rather more. I have already referred to the fact that it recommends film partnership schemes as a means of mitigating income tax. It then explains why Mr Williams-Denton is recommending the particular scheme (Zodiac). This contains the statements that "The Inland Revenue are happy with the scheme as the partnership is actually producing films" and that Aquarius "does and never will adopt any aggressive techniques and aims to work well within the spirit as well as the letter of the law and are about as genuine and mainstream as you can get". It then, under the heading "Film Partnerships", explains the tax relief available for finance for films, introduced in order to encourage investment in the UK film production industry, and says:

> "The usual way for an individual to benefit from this tax concession is participating in a film partnership."

Under the heading "Partnership Summary & Benefits" it explains the mechanics of the investment. To shelter £1m, each partner invests 30% (£300,000) which can be borrowed from RBS adding:

> "Note that the RBS will not lend on any scheme that is not Revenue approved."

The partnership borrows the additional 70%, which is secured with film pre-sale commitments. It continues:

> "Tax relief of 40% i.e. £400,000 is obtained under S48 of the ICTA which is the Revenues own rules in June 2004."

Under the heading "Summary of Income in the last 3 tax years and Recommended Investment" it then sets out Mr Walsh's income taxed at 40% for 2000/01 and 2002/03 with the concomitant tax saving, the investment required being £326,228, the tax saving £434,971 (133.33% of the investment) and the surplus therefore £108,744.

132. There is nothing in the letter which specifically draws Mr Walsh's attention to the risk that the tax savings there set out might not ultimately be achieved. The closest that it comes to it is a brief reference to the business plan "which contains all the necessary information the participant needs to make a judgment on entering the partnership", but this does not highlight that among that information is a section on Taxation which draws attention to certain risks. The 'reasons why' letter also indicates that the partnership and RBS loan applications will only be submitted once legal advice had been taken with regards to the "Partnership Structure, Council Opinion and Partnership Deed", which suggests that there had not yet been any legal sign-off on the scheme. There is also reference to an appendix being enclosed (as to which see below). Other than that, the letter gives every impression that the tax reliefs referred to are expected to be forthcoming.

133. I think it is a fair summary of the letter that it presents film partnership schemes in general as a recognised method of mitigating income tax that is squarely within the purpose of the tax relief introduced by Government, namely to aid in the financing of British films, and the Zodiac scheme in particular as a scheme that is available for that purpose.

134. The inherent probability is that Mr Williams-Denton said much the same orally to Mr Walsh. I therefore find it likely that at the meeting on 26 June 2003 he recommended film partnership schemes, and in particular those promoted by Mr Potter, to Mr Walsh as a means to mitigate income tax. And although I find that it cannot now be proved that Mr Williams-Denton used the specific phrase "win-win", it seems inherently likely, and I find, that he did say something to the effect that one of the reasons for investing in a film scheme was because if the film made money you shared in the profits but even if it did not you got the tax saving. Again this is similar to the way the scheme is presented in the 'reasons why' letter.

135. I do not think it is now possible to go much beyond that. It is not possible for example to know what explanation Mr Williams-Denton did or did not give as to how the scheme worked: but in any event Mr Walsh by his own account was not interested in the details or specifics, and was content to follow Mr Williams-Denton's recommendation. There is ample evidence, which I accept, to the effect that Mr Walsh tended to trust those he employed to advise him and I accept that once Mr Williams-Denton recommended something, Mr Walsh was happy to go along with it without bothering himself with the precise way in which it worked. Nor do I think that it is now possible to reconstruct any particular words used: Mr Walsh himself said more than once that he was not going to give a quote of exactly what he said. I rather doubt (and do not find proved) that Mr Williams-Denton specifically described the scheme as a "low risk" or "minimal risk" tax mitigation strategy. Indeed I do not think it can now be established quite what Mr Williams-Denton may have said, if anything, about the risks of the tax planning failing. I very much doubt (and it is not

Mr Walsh's case) that Mr Williams-Denton gave anything in the nature of a guarantee or assurance that the tax planning would work; at most I think he would have left Mr Walsh with the same impression that is given in the 'reasons why' letter, namely that this is a recognised form of tax planning that utilises a relief in the way intended by Government and there is no particular reason to think it would not work. I consider it quite likely that he did not say anything specific about the risk of it not working at all. The overall thrust of Mr Walsh's evidence was that although he could not say what words Mr Williams-Denton had used, he was left with the impression that the risk parameters were at the lower end of the spectrum – what he called the left-hand side of the gauge. That I do not find surprising: in circumstances where I have found that Mr Williams-Denton recommended the Zodiac scheme as a means of mitigating income tax, and there is no evidence that he specifically drew attention to the risks involved, it is understandable that Mr Walsh was left with the idea that he could expect to receive the tax relief and I so find.

136. I find therefore that all that can now be concluded as to the meeting on 26 June 2003 is that Mr Williams-Denton recommended film partnership schemes, and in particular Mr Potter's schemes, to Mr Walsh as a means of mitigating his tax liability; that he probably sold the idea as one where you shared in profits if the film was a success but still had the benefit of the tax planning if it was not; and that any explanation that he gave was likely to have been along the same lines as the 'reasons why' letter. I find that he did give Mr Walsh the advice that a film partnership scheme could be used to mitigate tax, that it is not now possible to make any findings as to what he may or may not have said, if anything, about the risks involved, but that Mr Walsh was left with the impression that he should receive the tax relief.

Was what Mr Williams-Denton said deceitful?

137. Although Mr Beswetherick in fact addressed the negligence claim in his submissions first, logically it makes sense to consider the more serious allegation of deceit first.

138. Mr Hardwick in his closing submissions put forward an argument in relation to the use sought to be made in support of the deceit claims of Mr Williams-Denton's convictions and the sentencing remarks made by HHJ Beddoe. As appears above (paragraphs 49 and 51), Mr Williams-Denton was convicted of two counts of conspiracy, one at the JHM trial and one at the second E&W trial, and in his sentencing remarks on 18 December 2015 HHJ Beddoe described Mr Williams-Denton and Mr Potter (who were sentenced together) as both *"deeply dishonest individuals"*. But as I understood his closing submissions, Mr Beswetherick did not seek to rely on these matters in relation to the Zodiac and Aquarius schemes but only in relation to the E&W scheme, and I will defer consideration of the question what use can properly be made of the conviction and sentencing remarks until I deal with the claims in relation to that scheme.

139. Mr Beswetherick submitted that if Mr Williams-Denton advised Mr Walsh that the Zodiac scheme was a low-risk tax mitigation strategy, then that was false; and that Mr Williams-Denton either read the Business Plan (in which case he knew it was false) or did not (in which case he was reckless as to the truth, in that he was describing the products as low risk without even reading the material he had been provided about those products).

140. I have not found the specific allegation that Mr Williams-Denton described the Zodiac scheme as low-risk, or indeed that he said anything about the risks, proved. Strictly speaking that may be said to be the end of the matter, as the advice that I have found Mr Williams-Denton to have given (that he recommended film planning schemes as a means of mitigating income tax) is not itself pleaded as a deceitful representation. I have already said that in cases of deceit I think it is important to be quite strict about confining the case to what is pleaded. But the impression given by the 'reasons why' letter (that the Zodiac scheme is squarely within the tax relief and can be used for tax planning), and the impression that I have found Mr Walsh was left with, that he could expect to receive the tax relief, are not in truth very different from describing the scheme as a low-risk tax mitigation strategy, and I should explain why I am in any event wholly unpersuaded that Mr Williams-Denton was acting deceitfully at all.

141. The essence of deceit is a deliberate lie. Most lies are false statements of fact that are actually known by the person making them to be false. It is also possible to lie by asserting something to be true when one does not care whether it is true or not – this is why deceit encompasses not only false statements that are known to be untrue but false statements where the person making them is "reckless" as to whether they are true or not, in the sense that he has no belief in their truth. But a person making a statement is not reckless in this sense if he believes what he is saying, however careless that belief might have been. All this is I think trite law.

142. When Mr Williams-Denton recommended to Mr Walsh that he use a film planning scheme as a means of mitigating income tax, he no doubt made an implied (if not express) representation that his understanding was that such a scheme would be effective to mitigate Mr Walsh's income tax, or in other words that the tax planning would work. But (as I have already said) it is not suggested, and could not realistically have been, that Mr Williams-Denton was giving a guarantee that the scheme would work, which means that what he was in effect saying was that he believed or understood or expected it would work. That is a statement of fact in the sense that what Mr Williams-Denton believed or understood or expected is a fact (the state of a man's mind notoriously being as much a fact as the state of his digestion), but it is only untrue if Mr Williams-Denton did not in fact believe or understand or expect that the scheme would work.

143. In the case of the Zodiac scheme, I have seen nothing to suggest that Mr Williams-Denton did not in fact believe in the effectiveness of the planning he was recommending. As well as the 'reasons why' letter, which is written as if the tax planning is straightforward and should be forthcoming, there is evidence which establishes that Mr Williams-Denton himself invested £45,000 into Zodiac 1 on or before 2 April 2004 (that is at the same time as Mr Walsh's investment). It is, as Mr Hardwick submitted, difficult to envisage why he might do that unless he believed that the scheme would work. It is not as if there is any evidence that he brandished the fact of his own investment as a selling point in order to persuade his clients to invest – there is nothing to suggest that he told Mr Walsh about it at all.

144. Mr Walsh's real complaint (now that he has dropped the allegation that the Zodiac scheme, to Mr Williams-Denton's knowledge, was not *bona fide*) is not that Mr Williams-Denton lied to him about whether the scheme would work or not, but that he gave him the impression that the tax planning would be straightforward without alerting him sufficiently to the risks. That looks much more likely to be the

basis of a complaint in negligence than a complaint in deceit. Moreover there is a real difficulty with the idea that Mr Williams-Denton was deliberately misrepresenting the risks involved in the scheme. The theory behind Mr Walsh's claim is that the Business Plan set out the risks at some length, that Mr Williams-Denton read the Business Plan and must have appreciated the risks, and that he then described it as low-risk when he knew it was not; or alternatively that he described it as low-risk without any belief that that was true, having chosen not to read the Business Plan. I agree that the Business Plan does set out the taxation risks at some length. For example it says that the commissioning, acquisition and exploitation of films "should" constitute a trade for tax purposes and describes the reliefs that might thereby be obtained, but then continues:

> "The availability of all these tax reliefs is dependent entirely on the Inland Revenue accepting that the tax position of the Partnerships and Members is as set out in this Business Plan. If a tax payment is deferred on the basis that a loss is understood to have arisen from the Partnerships, a Member may suffer interest/penalties if the loss proves not to be available."

Again in a section headed "Risk Warnings" it contains a number of specific warnings in relation to taxation, including:

> "All estimates in this Business Plan are drafted on the basis that the Inland Revenue treats the Partnerships as trading on a commercial basis with a view to profit… It cannot be guaranteed that the Inland Revenue will treat the activities of the Partnerships as … trading on a commercial basis with a view to profit."

145. But whatever Mr Williams-Denton said at the meeting of 26 June 2003, I have found that he provided Mr Walsh with a copy of the Business Plan on 3 July 2003. He also specifically referred to it in the 'reasons why' letter of 4 July as containing all the information needed for a participant to make a judgment on entering the partnership. It is true that as I have said he does not in the letter draw attention to the particular risk warnings. Nevertheless it seems a very curious type of deceit where the person who is said to be lying follows it up by supplying the person he has just lied to with a document setting out something different from what he said, and then sends him a letter referring him to that document. Mr Beswetherick said that Mr Walsh was not one for reading lengthy documents, and that Mr Williams-Denton knew that Mr Walsh signed the necessary papers (the applications to join the partnership and for the RBS loan) on 3 July without having read the Business Plan or having had the opportunity to take advice. But Mr Williams-Denton had only met him for the first time at the 26 June meeting, and it seems improbable that he would have concluded, if he was trying to mislead Mr Walsh, that it would be safe to hand him the material which would expose what he was saying as untrue; and even though Mr Walsh did sign the applications straightaway on 3 July, Mr Williams-Denton left the Business Plan with him and made it clear in the 'reasons why' letter that it would take a little time before the scheme was ready to go ahead. If he was deliberately lying to Mr Walsh, he could scarcely have been confident that Mr Walsh would not read, or ask someone else to look over, the Business Plan before he actually paid his money.

146. Moreover the 'reasons why' letter refers to an appendix "summarising the different types of scheme in the market place." Mr Peden's evidence was that Greystone employed a team of "paraplanners" whose role included reviewing products and in

particular material produced by the promoter of a product; the paraplanner would then draft an appendix which would summarise the key points about the product and highlight the risks. The present appendix does not however seem to have been one tailored to the Zodiac scheme but a more generic one and I think it is probably a document in evidence headed "Appendix – Film Partnership Schemes". This is not in fact placed in the chronological bundle with the Zodiac 'reasons why' letter (that is in 2003), but rather later, in 2007. I have no evidence as to its provenance but it cannot actually date from 2007 as it says that section 48 relief "is … coming to an end in July 2005". Assuming that the appendix is the one I have identified it does indeed draw attention to a number of risks, including the fact that the Inland Revenue had the right to enquire into any loss relief claim and might challenge either personal circumstances or the partnership's accounts and tax calculations. This is a further reason why I am not persuaded that Mr Williams-Denton was deliberately misrepresenting the risks involved in the Zodiac scheme.

147. In those circumstances I find that Mr Williams-Denton was not guilty of deceit in relation to the Zodiac scheme.

148. To anticipate the discussion of limitation, I also find, for similar reasons, that Mr Williams-Denton did not deliberately conceal facts from Mr Walsh, nor did he commit any deliberate breach of duty. The submission made by Mr Beswetherick that Mr Williams-Denton told Mr Walsh that the schemes were low-risk in order to land Mr Walsh as a client and get him to invest in the Zodiac scheme, knowing that in doing so he was acting in breach of his duty of care, is one that I regard as neither proved nor plausible, and I do not accept it.

Are Mr Walsh's claims statute-barred?

149. Whether Mr Williams-Denton's advice was negligent is much more open to question, but before considering it I propose next to deal with limitation.

150. It is accepted that any cause of action in negligence (or indeed deceit) was complete when Mr Walsh acted on Mr Williams-Denton's advice. That was at the latest in April 2004 when he paid his contributions to Zodiac 1 and 2. The claim form was issued on 5 May 2016, more than 12 years later. All the Zodiac claims are therefore *prima facie* statute-barred by the expiry of the primary limitation period of 6 years for claims in tort under s. 2 LA 1980. Nor is any reliance placed on the latent damage provisions in s. 14A LA 1980 (no doubt because this only gives a 3-year period from the claimant's knowledge of the relevant facts). In order to avoid the claims being statute-barred, Mr Walsh relies only on the provisions of s. 32 LA 1980.

151. This provides, so far as relevant, as follows:

> "**32. Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) Subject to subsections (3) and (4A) 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."

152. Mr Walsh relies on s. 32(1)(a) and (b). To come within s. 32(1)(a) requires that the claim is based on the fraud of the defendant, and since I have rejected Mr Walsh's claim in deceit, that has no application.

153. To come within s. 32(1)(b) requires the claimant to identify a fact that has been deliberately concealed, or (in reliance on s. 32(2)) a breach of duty deliberately committed. Mr Walsh's pleaded case, as set out in his further information, identified three facts that were said to have been deliberately concealed, but two of these relate to the allegation that the Zodiac scheme was not *bona fide* which is no longer pursued. The only remaining fact relied on as having been deliberately concealed is that the Zodiac scheme was not in fact a low-risk tax mitigation strategy or investment.

154. For reasons already given I find that it has not been proved that Mr Williams-Denton deliberately concealed the risks of the Zodiac scheme. A case can undoubtedly be made out that he should have said more about the risks, and that it was negligent to present the Zodiac scheme as if it were a straightforward way to mitigate income tax, but I find that he did not deliberately understate the risks. Equally I find that he did not deliberately commit any breach of duty. That means that the case does not come within s. 32(1)(b) LA 1980 either directly, or as a result of s. 32(2). In those circumstances I hold that the claims in negligence are statute-barred.

155. That makes it unnecessary to consider when Mr Walsh discovered, or could with reasonable diligence have discovered, the concealment. On this point extensive submissions were made to me on the law but I do not propose to consider it at any length. In the present case, the position seems to me simple enough not to require considering the authorities. On the assumption, contrary to my finding, that Mr Williams-Denton deliberately concealed the risks involved in the Zodiac scheme, the letters dated 5 October 2009 from Mrs Swinton in relation to Zodiac 1 and 2 (paragraphs 60 and 61 above) do to my mind make it plain that the tax planning had almost entirely failed. Mr Walsh says he did not read them, but in my judgment reasonable diligence requires one at least to read formal letters from HMRC.

156. Had he read them, although he might not have understood all the detailed implications for his own tax position, he would have seen that Mrs Swinton said she had completed her enquiries. That makes it plain even to a layman that HMRC had moved from the stage of enquiring into the tax return to a conclusion. He would also have found that although the enquiry was into Zodiac's tax return, it had implications for his own tax position, as the box said plainly that his own returns/claims would be amended. And even without the benefit of any advice one can see immediately from the figures in the box that at least for the first tax year (2003/04), where much the largest figures are

found, the amendments are very significant, reducing the amount of over £700,000 to about £8,000 (Zodiac 1) and of nearly £400,000 to about £2,000 (Zodiac 2). One does not need to be an accountant to understand that HMRC had disallowed the bulk of what had been claimed.

157. That seems to me to be sufficient to mean that if Mr Walsh had taken the trouble to read the letter he would have discovered that the Zodiac scheme had not worked as he had been led to believe it would, and to start time running under s. 32(1) LA 1980. Strictly speaking what s. 32(1) requires him to have discovered, or to have been able with reasonable diligence to discover, is the concealment, but where his case is that Mr Williams-Denton concealed from him the real risks of the tax planning failing, it seems to me that discovery that the tax planning is not accepted by HMRC as effective is sufficient to amount to discovery that the real risks had been concealed from him. Mr Walsh said he was reassured by Mr Williams-Denton that the decisions would be appealed, and that everything would be fine, but that does not seem to me an answer to the point. Tax planning that HMRC has concluded is almost entirely ineffective seems to me to be self-evidently not properly described as low-risk even if HMRC's decision can be appealed, and even if an appeal is said to have good prospects of success. One would not expect a low-risk tax mitigation strategy to be rejected by HMRC, or need to be taken to a tribunal, at all.

158. In those circumstances I would in any event have found that the Zodiac claims were statute-barred even if, contrary to my view, there had been any deliberate concealment by Mr Williams-Denton or deliberate commission of breach of duty, or indeed deceit.

Was Mr Williams-Denton's advice negligent?

159. That conclusion makes it unnecessary to reach any conclusions on whether Mr Williams-Denton's advice was negligent. No doubt due to the limitation point, the only case of negligence in fact advanced in closing submissions by Mr Beswetherick was based on Mr Williams-Denton having given advice that it was a low-risk tax mitigation strategy. Since I have not found this advice to have been given, and since I have found that any such claim would have been statute-barred in any event, I need not consider it further.

160. Mr Walsh also pleaded that it was negligent of Mr Williams-Denton to advise him that he should participate in the Zodiac scheme. Had it not been statute-barred, that I think would have been much more arguable. Mr Peden for example readily accepted a series of criticisms of the Zodiac 'reasons why' letter, and although no specific claim is pleaded that the advice in that letter was negligent (no doubt because Mr Walsh said he did not read it and so could not have relied on it), these criticisms are illustrative of shortcomings in Mr Williams-Denton's advice. Thus Mr Peden accepted that (i) it was an inauspicious start for the letter to have referred to Mr Walsh attending the presentation on 2 July when he had not; (ii) that it was a false statement to refer to Mr Walsh having taken independent advice from a lawyer before completing the paperwork when Mr Williams-Denton knew he had not; (iii) that he would not be happy with the statement that Aquarius "never will" adopt any aggressive techniques, as you could not know; (iv) that he would have preferred that the statement that investing in the film industry was considered a highly speculative investment had gone on to say that you might not get the tax relief, and thought it needed to be a broader statement; (v) that it was a strange thing to say that RBS would

not lend on any scheme that was not Revenue approved, because you could not get Revenue pre-approval; and in summary (vi) that it was not a clear, fair and not misleading statement of the product, not a letter that he would have put his name to, and not a letter that he would want to see going out on Greystone's headed notepaper, and that there were certainly elements of the letter that were not satisfactory. I should note for completeness that one criticism that he did not accept was the suggestion that it was wrong to say that the Inland Revenue was happy with the scheme, as he did not think that implied they had given prior approval; what he thought it meant was that the Revenue were happy with schemes of that type. I think he is probably right on this particular point, but it does not detract from the criticisms of Mr Williams-Denton's advice that he accepted.

161. But I need not reach any concluded view on whether, in the light of these and other considerations, it was negligent of Mr Williams-Denton to recommend the Zodiac scheme. In the end I suspect that would have required some expert evidence as although it is now all too clear that film partnership schemes such as Zodiac do not work, it is not clear that advice that assumed that they did work was glaringly or obviously mistaken at the time. Much might depend on how such schemes were then perceived by competent IFAs. But I need not pursue these questions further.

Reliance and loss

162. Nor need I consider the remaining questions, namely whether Mr Walsh relied on Mr Williams-Denton's advice, or what his losses are. I think it fairly plain that Mr Walsh did rely on Mr Williams-Denton's advice; and that his losses are *prima facie* the amounts he contributed to the Zodiac scheme, and the penalties and interest he now has to pay, although it is at least arguable that some credit would have had to be given against the interest for the benefit of having the use of the tax repayment from 2004 which he would not otherwise have received. But I need not consider these points further.

The Aquarius schemes

163. The position in relation to the Aquarius schemes (first Aquarius 4 and 5, and then Aquarius 10, 11 and 12) is very similar. The main difference is in the evidence as to what advice Mr Williams-Denton gave, and I should trace the detail of that.

164. In relation to Aquarius 4 and 5, the documentary evidence reveals the following:

(1) Promoters of film finance schemes typically operated on an annual basis, with each year's scheme being promoted in the autumn with a view to the participants being signed up, and their contributions paid, before the end of the tax year on 5 April. Mr Potter launched his offering for the tax year 2004/05 in August 2004; he sent Mr Williams-Denton a couple of presentations in relation to Aquarius schemes on 7 August 2004, visited Greystone's Altrincham office in September 2004 to present the new scheme, and sent Mr Williams-Denton drafts of the subscription documents in which the LLPs were named as Aquarius 4, 5 and 6 on 26 October 2004.

(2) Mr Williams-Denton had a meeting with Mr Walsh at his ABN offices on 18 November 2004. This dealt with a number of matters relating to his finances.

Mr Williams-Denton's filenote of the meeting records that Mr Walsh was very happy with his Zodiac refund of £435,000 which he had evidently by then received (paragraph 17 above). It also set out, under the heading "Discussion of current tax planning opportunities – Film and VCT investments" Mr Walsh's income taxed at 40% for the last three tax years and the statement:

> "Recommended maximum Film Partnership Investment of £249,400 gross with a net investment of £150,380."

The figure of £249,400 is exactly 20% of £1,247,000, which is the sum of the figures given for Mr Walsh's income to be sheltered for 2001/02 and 2003/04, and is therefore in fact itself a net figure; the figure of £150,380 is unexplained and may just be an error, as a summary later in the filenote indicates that Mr Walsh required cash of £249,400 for film investment. The filenote ends with a list of Action Points as follows:

> "1. GB – send income details etc to Jonathan at Aquarius films to prepare Business Plan and Subscription documents.
>
> 2. TC – draft film and VCT recommendation as above.
>
> 3. Neil to sort next meeting and planning."

The reference to Jonathan was to Jonathan Steinberg, a Commercial Director at Aquarius. TC and GB were 2 Greystone employees, TC being Tracey Conway who was a senior paraplanner.

(3) On 25 November 2004 Mr Williams-Denton sent an e-mail to Mr Walsh. He said they were led to believe that there might well be an Inland Revenue announcement to address tax avoidance schemes shortly involving limited recourse loans, and that since they could not implement legislation retrospectively:

> "this may be our last chance."

He asked Mr Walsh if he could meet Jonathan that day or the next to do the draft paperwork, and recommended he invest £1,247,000 gross (£249,400 net), saying:

> "This will produce a refund of £478,848 and a surplus of £229.448.
>
> This is our last opportunity with all the risks managed/mitigated."

(4) He then sent Mr Walsh a letter dated 25 November 2004 confirming the discussions they had had at the meeting on 18 November and a subsequent telephone conversation, and providing his recommendations. That includes the recommendation to invest £249,400 net in Aquarius, together with the 'reasons why' in terms similar to the Zodiac 'reasons why' letter but at rather greater length. I will refer to it as **"the Aquarius 4/5 'reasons why' letter"**. According to the letter there were enclosed with it a Business Plan, Appendix and Risk Warning Notice. No copies of these as sent are in evidence, although there is in evidence a copy of the Business Plan, dated 31 March 2004, as sent

by Mr Potter to Mr Williams-Denton as one of the draft subscription documents on 26 October 2004, and it seems probable (and I find) that the Aquarius 4/5 'reasons why' letter did enclose a Business Plan in materially similar form.

(5) On 29 November 2004 Mr Williams-Denton met Mr Walsh again at his ABN offices "to complete the paperwork on Aquarius Film Partnerships 4, 5 and 6", although he only in fact participated in Aquarius 4 and 5.

(6) Mr Walsh duly contributed the £249,400 in March 2005 (paragraph 18 above). There are no documents relating to this, although the payment is not disputed.

165. Aquarius 10, 11 and 12 followed much the same pattern, although the process had become more streamlined. Here the documents show the course of events to be as follows:

(1) By July 2005 the Business Plan was ready and Aquarius provided Mr Williams-Denton with a link enabling him to access it.

(2) Mr Williams-Denton met Mr Walsh on 27 September 2005. Mr Williams-Denton's filenote of the meeting shows that Mr Walsh had received a tax refund for film losses of around £500,000 (that is for Aquarius 4 and 5), and that one of the items discussed was Income Tax Planning for 2004/05 and 2005/06. The note refers to a gross investment of £1.4m (£280,000 net) in Aquarius 10, 11 and 12, which would produce tax relief or a refund of £546,000 (amended in manuscript to £537,600) and records:

> "Paperwork completed and TT instruction signed, confidential letter signed, sophisticated investor letter signed and risk warning signed – GB to process."

The documents that Mr Walsh signed on 27 September 2005 are in evidence. They include an application for participation in the LLPs, deeds of adherence to each LLP, and a number of documents in relation to loans to be made to him by Barclays Bank.

(3) On 6 October 2005 Mr Williams-Denton sent a letter confirming the matters discussed at the meeting and giving his reasons for recommending Aquarius 10, 11 and 12. This letter, which I will refer to as **"the Aquarius 10/11/12 'reasons why' letter"**, was in materially similar form to the Aquarius 4/5 'reasons why' letter.

(4) Mr Walsh paid his contributions in November 2005 (paragraph 20 above).

166. Mr Walsh's evidence in relation to these events was similar to that in relation to Zodiac. So far as Aquarius 4 and 5 are concerned, he said in his witness statement that Mr Williams-Denton at the meeting of 18 November 2004 told him how great Mr Potter was, that there was another film scheme which he should invest in which was a great opportunity with low risk and that he thought he again said it was a win, win situation. He said he did not read the e-mail of 25 November 2004 or the Aquarius 4/5 'reasons why' letter, but the assurances Mr Williams-Denton gave him were in similar terms to the letter, namely that the investments were low risk and

would make a profit, Mr Potter being a very experienced and successful producer; and that he repeated the same assurances at the meeting on 29 November. So far as Aquarius 10, 11 and 12 are concerned, he said that Mr Williams-Denton told him that the new film investments were a great opportunity, the schemes were low risk and again said that it was a win, win as the schemes provided not only tax relief but the films were expected to make a profit.

167. As with the Zodiac scheme, I find that Mr Walsh's recollection is not a reliable guide to what actually took place at these meetings, and the contemporaneous documents are better indications of what Mr Williams-Denton is likely to have said.

168. In his e-mail of 25 November 2004 Mr Williams-Denton recommended the investment of £249,400 net and said "this will produce a refund". The Aquarius 4/5 'reasons why' letter of the same date again said that the investment would produce a tax saving of £478,848 and a net surplus of £229,448. It set out the main tax implications from the investment including:

> "a 100% tax deduction in respect of the qualifying expenditure in the first year (expected to be 96%), which is available for investment in British Qualifying Films"

and again:

> "Tax relief of 40% (for higher rate income) would then be granted to the member and would be based upon the minimum qualifying expenditure in the first year. It is estimated that this amount will be 96%."

This is followed by a calculation of what tax relief Mr Walsh's investment would produce and then:

> "This relief is claimed under S48 of the ICTA under Revenue rules – this is not a loophole."

There is then a description of film finance relief similar to that in the Zodiac 'reasons why' letter. In a section recommending Aquarius, Mr Williams-Denton says that the scheme "will mitigate" Mr Walsh's income tax liability and among other things says:

> "There is no mechanism for the Inland Revenue to give formal approval to the scheme but we have no reason to believe that the scheme will, in any way, be challenged by the Inland Revenue. As far as we are aware investors in previous Aquarius schemes have been receiving their tax refunds as a matter of routine and we do not know of any problems in this regard."

This wording was provided by Mr Steinberg to Ms Conway on 25 November 2004. He also in another e-mail the same day in answer to a question how Mr Potter got on with the Revenue that morning said:

> "Yes my understanding is that there is nothing in their current plans which will affect the schemes we have in existence now. They are still aiming to close down the "rogue" schemes which avoid tax altogether, but we are in the safe zone."

The Aquarius 10/11/12 'reasons why' letter was in very similar terms to the Aquarius 4/5 'reasons why' letter.

169. In these circumstances I accept that, as with Zodiac, Mr Williams-Denton did orally recommend the Aquarius schemes as a means of mitigating tax, and gave Mr Walsh advice to the effect that film partnership schemes could be used to mitigate tax. As with Zodiac however it is not now possible to reconstruct any particular words used, or make any findings as to what he may or may not have said orally, if anything, about the risks involved.

170. The analysis of the other issues that arise is similar. I find, for similar reasons as with Zodiac, that it has not been established that Mr Williams-Denton specifically referred to the scheme as low-risk, and in any event that it has not been established that he deceived Mr Walsh in relation to the risks of the scheme. Indeed the Aquarius 'reasons why' letters go rather further than the Zodiac 'reasons why' letter in drawing the Business Plan to Mr Walsh's attention. Not only do they say:

> "I recommend that you read the Business Plan in full, prior to investment, as it is the only source of information on which you should rely on making your decision to invest."

But they also, under the heading "Risks", point to the specific part of the Business Plan dealing with the risks, as follows:

> "Please read the associated Risks carefully, as described in the attached Business Plan, on pages 23 and 24 [pages 20 to 24 in the 10/11/12 letter]. It is important that you read and accept these prior to making a decision to proceed with this investment."

The Business Plans in each case do draw attention to a number of risks including taxation risks in similar terms to the Zodiac Business Plan.

171. I find that Mr Williams-Denton did not deliberately conceal facts from Mr Walsh or commit a deliberate breach of duty, and that any claim in negligence (or indeed deceit) is statute-barred. I also find that if there had been any deliberate concealment or deliberate breach of duty such as to postpone time running under s. 32 LA 1980, then Mr Walsh could have discovered the concealment with reasonable diligence by reading the letters of 5 October 2009 from Mrs Swinton. It is true that they only related to Zodiac and not the Aquarius schemes, but in circumstances where one only had to read the letters to see that HMRC had taken the view that the vast majority of the claimed Zodiac scheme losses were not allowable, it would have been an obvious question whether that meant that HMRC would be likely to take the same view of the Aquarius schemes, and it has not been suggested that there was in this respect any material difference between the schemes.

172. In the light of this I do not need to consider the question whether the advice that Mr Williams-Denton gave was negligent, nor the questions of reliance and loss.

Conclusion on Zodiac and Aquarius schemes

173. For the reasons I have given, I find that the claims based in deceit in relation to the Zodiac and Aquarius schemes have not been made out, and would in any event, if otherwise established, have been statute-barred; and that the claims in negligence are statute-barred. I will therefore dismiss all the claims in relation to those schemes.

E&W scheme claims – investment advice

174. The remaining claims all relate to the E&W scheme. They fall into two groups: (1) claims in deceit and negligence based on the advice given by Mr Williams-Denton to Mr Walsh before he invested; (2) claims (mainly in negligence but also deceit) in relation to the handling of the HMRC enquiries. I will consider them in that order.

175. The documented course of events in relation to Mr Walsh's investment is as follows. It starts with the investment in the tax year 2006/07:

(1) Mr Williams-Denton met Mr and Mrs Walsh at their home on 4 May 2006, and again on 12 July 2006. In each case Mr Williams-Denton's filenote refers to tax planning for 2006/07 as one of the discussion items, and to using "proposed new film scheme" among other things for this purpose. The use of a film scheme for tax planning was also referred to in his filenotes of meetings with Mr Walsh on 9 January and 8 February 2007 but without any specific proposals.

(2) On 17 February 2007 Mr Potter sent Mr Williams-Denton an outline of a new scheme using an LLP called Aquarius Film Developments LLP. This envisaged that the first project would be a film called "Mércédès". This was described in a preliminary flyer for the project as a romantic love story set against the backdrop of the heroic age of automobile racing in the early 20th century, an entrepreneur having created Mercedes as a marque for a new range of luxury cars and their racing counterparts, the marque being named after his daughter Mércédès, who falls in love with one of the drivers.

(3) Mr Potter sent Mr Williams-Denton a revised version of the outline on 22 March, a package of subscription documents on 23 March, and a Business Plan (titled "The Aquarius Development Film Partnership") on 24 March 2007. By this stage the restrictions on relief for non-active partners had been announced (see paragraph 23 above), and the Business Plan included specific reference to the requirement that the partners take an active part in the day-to-day management, personally devoting at least on average 10 hours per week to the activities carried on by the partnership (see paragraph 24 above).

(4) Mr Williams-Denton met Mr Edinburgh on 28 March 2007, and Mr Walsh on 29 March 2007, in each case at the ABN office. His notes of the meetings indicate that it was agreed to set up a new LLP for film development to be called Edinburgh & Walsh LLP; that Messrs Edinburgh and Walsh would be the only two investors; that they would contribute a total of £1.5m, with Mr Walsh responsible for 60% and Mr Edinburgh for 40%; and that they would be fully involved in the partnership. Illustrative figures showed Mr Walsh making an initial subscription of £90,000 before 31 March 2007 (and so in the tax year 2006/07), to be funded by an overdraft from his bankers, Coutts; the LLP making a loss in 2006/07 of which Mr Walsh's share would be £90,000; and Mr Walsh receiving tax relief of £36,000 (calculated at 40% of £90,000) in September 2007.

(5) Mr Walsh signed the subscription documents at the meeting. They included an application to participate in Edinburgh & Walsh LLP with a subscription of

£90,000, a deed of adherence, and various other documents.

(6) A new LLP was incorporated under the name Edinburgh & Walsh LLP (or E&W) on 30 March 2007 and Mr Williams-Denton sent a copy of the certificate of incorporation to Mr Potter that day.

(7) Mr Walsh paid the initial £90,000 on 30 March 2007 before the end of the tax year 2006/07. This is not documented but is referred to in a report prepared by Ms Lorraine Way, a forensic accountant employed by HMRC, for the purpose of the criminal proceedings.

(8) On 4 May 2007 Mr Williams-Denton sent a 'reasons why' letter to each of Mr Edinburgh and Mr Walsh. This was written as a recommendation to invest in "Aquarius Film Developments" but referred to the agreement to set up E&W with the two of them being the only two investors and being fully involved in the partnership. It enclosed an Appendix referring to "The Aquarius Development Film Partnership". I will refer to it as **"the E&W (1) 'reasons why' letter"**.

176. For 2007/08 the documented course of events is as follows:

(1) On 4 February 2008 Mr Potter sent to Mr Williams-Denton both a short summary, and a full set of documents including a Business Plan and subscription documents. This was for an LLP called Mercedes the Movie LLP. The Business Plan stipulated an aggregate minimum subscription from all members of £2.5m gross.

(2) On 6 February Mr Williams-Denton forwarded the summary to Mr Amin, who had been introduced to him by Messrs Edinburgh and Walsh. Mr Amin replied that he could put him down for £100,000. He then met Mr Williams-Denton at his office on 13 February. Mr Potter joined the meeting, as did Mr Edinburgh and Mr Foley, and they all agreed to become partners. Mr Williams-Denton's meeting note records:

> "Jason and Vinny's partnership will be opened to new members – Assad, Sean and Rodney. A maximum of 5 members will support 10 hours work per week for each member for a minimum of 6 months."

It also records that all members were to invest £100,000 each.

(3) Mr Walsh and Mr Sherrington were away that week, but Mr Williams-Denton and Mr Potter met them a week later on 20 February 2008. Mr Williams-Denton's meeting notes indicate that "everyone" was present (by which was presumably meant Messrs Edinburgh, Amin and Foley as well as Mr Walsh and Mr Sherrington) and that Mr Potter and Mr Williams-Denton presented the Business Plan and an Opinion of counsel. The notes record that it was agreed to keep the existing E&W and invest additional capital of £2.5m (£500,000 gross or £100,000 net per partner), that all members would be fully involved in the partnership, and that the capital of the partnership would be used to finance the development of the Mercedes film project. They also record that all the investors completed the paperwork: the documents signed

by Mr Walsh, dated 20 February 2008, are in evidence and include an application for participation and a deed of adherence. They were drafted to refer to Mercedes the Movie LLP, but among the other documents was one explaining that in fact the project would be carried out by E&W.

(4) Mr Foley then decided to reduce his amount to £250,000 gross (£50,000 net); by 6 March Mr Elsom had been identified as a replacement for the balance and had spoken to Mr Williams-Denton, and by 14 March he had signed up and contributed his £50,000.

(5) On 28 February 2008 Mr Williams-Denton sent each of the (then 5) investors a 'reasons why' letter, referring to the Business Plan, counsel's Opinion and an appendix (although the appendix is not in evidence). I will refer to it as **"the E&W (2) 'reasons why' letter"**.

(6) Also on 28 February 2008 Ms Mundy e-mailed Mr Walsh asking him to transfer £90,000 as a top-up payment for "the Edinburgh and Walsh LLP from last year" (ie E&W (1)) and £100,000 for "the 'new' LLP to cover the Mercedes movie" (ie E&W (2)).

(7) Mr Walsh did not do so straight away but he contributed the £100,000 on 11 March 2008 and the £90,000 on 9 April 2008 (paragraphs 27 and 29 above).

Deceit claim: representation that scheme was bona fide

177. Mr Walsh's pleaded case is that Mr Williams-Denton impliedly represented that to the best of his knowledge:

> "the scheme was a *bona fide* film partnership scheme and that it was intended to produce the Film [Mercedes the Movie] using the members' investments."

It is admitted in Greystone's defence that Mr Williams-Denton impliedly represented that to the best of his knowledge the scheme was *bona fide*. Mr Walsh's case in deceit is that Mr Williams-Denton knew that the scheme was not *bona fide* (or was reckless in the sense that he did not care whether it was *bona fide* or not).

Dishonest commission payments

178. A number of matters are relied on in support of the allegation that the scheme was not *bona fide*. They fall under two broad heads. The first is that the scheme was intended to be used as a vehicle to dishonestly extract monies from investors. This concerns the commission payments made on the investment. Mr Walsh relies both on payments made by Mr Potter to Mr Williams-Denton personally, and the payments made to Greystone by way of commission being based on grossed-up figures even though (it is said) there were no loans ever entered into.

179. The documented facts are as follows. First, in relation to E&W (1):

(1) The initial outline sent by Mr Potter to Mr Williams-Denton on 17 February 2007 envisaged investors contributing 100% of the capital of the LLP, albeit that 82% could be borrowed by the investors.

(2) But the revised version of the outline sent on 22 March 2007 no longer referred to the investors borrowing money to finance their subscriptions. And the final version of the Business Plan for The Aquarius Development Film Partnership sent by Mr Potter to Mr Williams-Denton on 24 March 2007 envisaged that an investment by a member from his personal funds would be supplemented by a loan of four times the amount of the investment from a lender to the partnership. Thus a "Funds flow chart" based on an assumed investment of £200,000 shows a loan of £800,000 from a lender to the partnership, taking the total amount provided to the partnership to £1m.

(3) Consistently with that Mr Williams-Denton's notes of the meetings of 28 March 2007 with Mr Edinburgh and of 29 March 2007 with Mr Walsh envisaged a total investment of £1.5m but the partners only contributing in cash 20% of this figure, with Mr Edinburgh contributing £120,000 over the next 3 years and Mr Walsh £180,000. In Mr Walsh's case the first payment in 2006/07 was to be £90,000. The estimated gross loss in 2006/07 however was itself only £90,000, on which he was expected to obtain tax relief at 40% of £36,000; it was anticipated that further losses would be incurred in the following tax years, with a total of £900,000 losses over the investment period, generating tax relief at 40% of £360,000.

(4) Mr Williams-Denton's notes of the meeting with Mr Walsh also stipulate that the commission payable would be:

> "2% of the gross investment (£900,000 @ 2% = £18,000)"

(5) The subscription documents signed by Mr Walsh on 29 March 2007 contained no application for a loan and no reference to a loan. This can be contrasted with the subscription documents signed by Mr Walsh on 27 September 2005 in relation to Aquarius 10, 11 and 12, which did include loan documentation (paragraph 165(2) above); those loans were to be taken out by Mr Walsh personally "to fund in whole or in part the Borrower's initial capital contribution to the Partnership" (and certain interest payments).

(6) In an internal e-mail of 3 April 2007, copied to Mr Walsh's accountant Ms Whitehouse, Mr Williams-Denton referred to Mr Walsh investing:

> "60% of the monies required by the partnership (total of £1.5 million with 80% full recourse loans)"

It again anticipated that Mr Walsh's share of losses for 2006/07 would be £90,000, but would generate losses over the investment period of £900,000.

(7) The E&W (1) 'reasons why' letter to Mr Walsh of 4 May 2007 referred to it having been agreed to set up E&W and invest £1.5m, stating:

> "Your net capital commitment is £180,000, with the balance from Partnership borrowings."

Under the heading "Financing" however it said:

> "You and Jason will be contributing the whole of the capital of the Partnership

> which will be used to finance the development of one or more film projects. Loans would be available if required from a financial institution of up to 82% of the amounts of capital subscribed. These loans would be secured solely on investors interests in the capital of AFD but would need to be on a full recourse basis."

Under the heading "Risks" it set out a bullet-point list of various risks, among which was that the loan from the Lender was a "full recourse" personal loan on which Mr Walsh would be personally liable. In the Appendix however it said this:

> "For every £1,000,000 made available to the Partnership and to pay expenses, the Member's personal cash contribution would be £200,000. Of this the balance of £800,000 may come from a Loan to the Partnership from the lender."

The Appendix itself contained a bullet-point list of risks; this was identical to that in the body of the letter save that it omitted the bullet point relating to the loan being a full recourse loan.

(8) The 'reasons why' letter also referred to Greystone receiving initial commission of 2% of the gross investment, and on 9 May 2007 Mr Williams-Denton completed an internal form headed "New Business Compliance Checklist" which referred to the investment from Mr Walsh being £90,000 net and £900,000 gross, and to commission being 2% of gross. On the same day an invoice was raised by Greystone, addressed to E&W; this also referred to an agreed fee of 2% of the total investment of £1.5m, making £30,000 (+ VAT). That was payable half immediately and half in January 2008 and the invoice was therefore for £15,000 + VAT (= £17,625).

(9) On 10 April 2008, Greystone invoiced E&W for a further £15,000 + VAT (=£17,625), being the balance of the fee payable on the investments by Mr Edinburgh and Mr Walsh in E&W (1).

180. For E&W (2) the documented facts are as follows:

(1) The Business Plan for Mercedes the Movie sent by Mr Potter to Mr Williams-Denton on 4 February 2008 again envisaged that an investment by a member from his personal funds would be supplemented by a loan of four times the amount of the investment from a lender to the partnership, with a "Funds flow chart" based on an assumed investment of £200,000 showing a loan of £800,000 from a lender to the partnership, taking the total amount provided to the partnership to £1m; it also contained a statement under the heading "Financing" that it was anticipated that a loan would be available to finance up to 80% of the Partnership's anticipated expenditure, subject to the Partnership satisfying relevant loan criteria.

(2) Mr Williams-Denton's notes of the meeting with Mr Walsh on 20 February 2008 envisaged that each of 5 partners would invest £500,000 (a total of £2.5m); that Mr Walsh would contribute a net £100,000 to E&W (2), as well as a further £90,000 for the balance of the investment in E&W (1); that commission would be payable at 1.5% of the gross investment in E&W (2)

(£500,000 at 1.5% = £7,500); and that Greystone would invoice Aquarius for £9,000 on Mr Walsh paying his £90,000 for E&W (1). As with E&W (1), the subscription documents signed by Mr Walsh that day did not include any application for a loan or reference to a loan.

(3) The E&W (2) 'reasons why' letter dated 26 February 2008 also referred to each investor contributing £500,000 gross and £100,000 net. As with the E&W (1) 'reasons why' letter, the list of risks included a reference to "the loan from the Lender" being a full recourse personal loan, but as far as I can see there is no other reference to a loan or to a Lender. The 'reasons why' letter referred to an appendix being enclosed but none is in evidence.

(4) The 'reasons why' letter also referred to Greystone receiving an initial commission of 1.5% of the gross investment, being £500,000 at 1.5% (= £7,500).

(5) On 28 February 2008 Greystone invoiced E&W for 1.5% of a total investment of £2.25m (£33,750 + VAT = £39,656.25); on 18 March 2008 Greystone invoiced E&W in respect of the final investor, Mr Elsom, for 1.5% of £0.25m (£3,750 + VAT = £4,406.25).

(6) On 29 May 2008 Mr Potter paid £12,500 to Mr Williams-Denton. This was sent to a Swiss bank account in the name of Molinar Stiftung. Mr Williams-Denton provided an invoice, addressed, I assume at Mr Potter's request, to Templar Productions Ltd, stating that it was for "consultancy advi[c]e in relation to the Mercedes project".

(7) In January 2009 Mr Walsh's accountant, Ms Whitehouse, was preparing his 2007/08 tax return. On 14 January 2009 she e-mailed Mr Williams-Denton with the subject line "Edinburgh, Walsh Hyde Amin" and asked:

> "Did Hyde, Edinburgh and Walsh and Amin have to have loans for those investments? Because I have not had any cert of interest paid."

Mr Williams-Denton replied (immediately):

> "No – therefore no loan interest."

(8) In December 2009 Mr Potter made another payment to Mr Williams-Denton, this time of £18,455, again to a Swiss bank account in the name of Molinar Stiftung. E-mails between Mr Williams-Denton and Ms Murphy dated 27 November and 2 December 2009 refer to the £18,455 as a 3% payment in relation to JHM.

Dishonest payments to Mr Williams-Denton personally

181. On these facts Mr Beswetherick submits firstly that the E&W scheme was tainted with dishonesty because sums invested in it were paid as a dishonest commission to Mr Williams-Denton. In the second E&W trial Mr Williams-Denton was asked about the payments made to him personally. His explanation of the first payment of £12,500 in May 2008 was that he had realised that the commission paid to Greystone on the E&W (2) investment was only 1.5% whereas they had charged 2% on E&W

(1); that he had pointed this out to Mr Potter who agreed to pay the extra 0.5% (which on a gross amount of £2.5m came to £12,500); that Mr Potter had suggested that he pay Mr Williams-Denton personally; that Greystone had been sold to a US firm on 1 April 2008; and that Mr Williams-Denton decided to take the payment himself. He accepted in evidence that it should have gone to Greystone. As to the payment of £18,455 in December 2009, Mr Williams-Denton's explanation was that this was a commission for raising capital for JHM. Again he accepted that he was stealing from his employer.

182. In these proceedings Greystone admit in their pleadings that the two payments were unauthorised and improper. Mr Peden explained that Greystone (that is Mr Neil Alexander, the Managing Director, and he himself) first became aware that there was a suggestion that Mr Williams-Denton had received undisclosed payments in around mid-2014. That was because Mr Alexander had read a transcript of Mr Williams-Denton's initial interview with HMRC in February 2013 after his arrest, at which it was suggested to him that he had received payments from Mr Potter personally without Greystone's knowledge. In October 2014 Mr Peden and another Greystone director, Mr Paul Heap (who had been Managing Director at the time of the film partnership investments), had a meeting with Mr Williams-Denton about this suggestion, at which the latter accepted that he had received payments from Mr Potter but said that they related to his own personal investments. But in June 2015, while the first E&W trial was ongoing, Greystone received a letter from an investigation officer of HMRC informing them that Mr Williams-Denton had been asked in the trial about the £12,500 payment, had admitted it was properly due to Greystone, and had claimed that he had notified Greystone of it. Mr Peden then made a witness statement confirming that Mr Williams-Denton had not in fact notified Greystone. On the basis of these matters Greystone also commenced disciplinary action against Mr Williams-Denton, inviting him to a formal disciplinary meeting on 31 August 2015, and when he did not turn up dismissed him with immediate effect by letter dated 2 September 2015. In oral evidence Mr Peden had no hesitation in accepting that Mr Williams-Denton had taken payments that he should not have done, lied about this to him in the October 2014 meeting, told further lies under oath in the first E&W trial, and was as far as he was concerned a "thoroughly dishonest individual."

183. It is not therefore in dispute, and I find, that the £12,500 and £18,455 payments were dishonest commission payments taken by Mr Williams-Denton personally when he knew that they belonged, if at all, to Greystone. Mr Beswetherick also relied on two other payments, in I think 2008, of £9,000 (in relation to cash calls for Zodiac or "Taffcos" (by which I think was meant the Aquarius schemes)) and £4,000 (in relation to JHM); I have seen no documentary evidence of these and have no details of them but I accept that Mr Williams-Denton appears to have accepted receiving them in his cross-examination in the second E&W trial. Apart from the £12,500 it is not suggested that any of these payments related to the E&W scheme, but I accept that they form a pattern of dishonest behaviour which can be shown to have started in May 2008.

184. Does that establish that when Mr Williams-Denton persuaded Mr Walsh to invest in the E&W scheme, first on 29 March 2007 and then on 20 February 2008, the scheme was not a *bona fide* one on the basis that it was to be used as a source of dishonest payments, or in Mr Beswetherick's words, as a vehicle to dishonestly extract monies

from investors? I have no difficulty in accepting that Mr Williams-Denton did in fact use the scheme to extract a further £12,500 dishonestly at the ultimate expense of the investors, as although the £12,500 invoice was made out to Templar Productions Ltd, Mr Williams-Denton accepted in the second E&W trial that the monies came from E&W, that is the investors, and there is nothing to suggest that the investors ever agreed to pay more commission than the 1.5% of the gross referred to in the meeting notes and the E&W (2) 'reasons why' letter. That means that Mr Williams-Denton's agreement to take a further 0.5% without informing them was a straightforward secret commission which was dishonest as against the investors (as well as against his own employer), and would doubtless have entitled the investors to require him to account for it. But that is of course not the claim that has been brought. The claim that has been brought is that he induced Mr Walsh's investments by deceitfully representing that the scheme was a *bona fide* one, and it seems to me that that claim could only be established if I found, on the balance of probabilities, that Mr Williams-Denton already intended, on 29 March 2007 and 20 February 2008 when the implied representations were made and acted on, that the scheme would be used as a source of dishonest payments.

185. There is no direct evidence to that effect, so any such finding must rest on inference. It seems to me that I do not have sufficient material on which to infer that this was already Mr Williams-Denton's intention on 20 February 2008, let alone on 29 March 2007. Needless to say, I treat the explanations given by Mr Williams-Denton in the second E&W trial with very great suspicion, given that it is common ground that he not only acted thoroughly dishonestly in the first place but then lied about it both to Greystone and to the jury in the first trial. Nevertheless there does seem to me to be an inherent plausibility in the £12,500 being calculated as the "missing" 0.5% for the second round of investment in E&W. If so, it is very unlikely to have been in Mr Williams-Denton's mind back in March 2007 when the commission charged was 2%. It is also in my view unlikely to have been in his mind in February 2008. Had he then appreciated that the commission proposed to be charged was only 1.5% rather than the 2% charged the year before, it seems to me more likely that he would simply have amended the commission terms rather than formed a plan to charge 1.5% and then claim a further secret 0.5% for himself. It is of course possible that he all along intended to siphon off 0.5% to his Swiss bank account (it was not disputed that the Molinar account was his), but I am not persuaded that I can properly find this. No pattern of dishonest behaviour has been established before May 2008, and even a thoroughly dishonest individual such as Mr Williams-Denton has to start his career of dishonesty at some point. I do not think it has been shown that it started before May 2008. I find therefore that it has not been established that Mr Williams-Denton had already decided by 29 March 2007 or by 20 February 2008 to use the E&W scheme as a means of extracting a dishonest commission payment.

Commission based on grossed-up amounts

186. The next question concerns the charging of commission payments payable to Greystone on the grossed-up amount of investments. Mr Beswetherick submitted that, as Mr Williams-Denton knew, no loans were ever obtained, relying in particular on the exchange of e-mails between him and Ms Whitehouse on 14 January 2009 where he confirmed immediately, without having to check, that no loans were obtained (paragraph 180(7) above).

187. Mr Hardwick submitted that it was not clear what the context for this e-mail exchange was and that a more plausible explanation is that Ms Whitehouse was simply asking whether the sums actually invested by Mr Walsh had come from cash or had been borrowed (as had been the case with the RBS loan for the initial Zodiac investment). I agree that the e-mail chain leaves matters somewhat obscure (Ms Whitehouse's e-mail refers to "those investments" which is clearly a reference to some previous communication, but there is none in evidence) and this may have been what Ms Whitehouse had in mind. But I think it is more likely that she was asking if Mr Walsh had had any loan, either to fund his actual net subscription (as happened with Zodiac), or to gear it up. The latter is what had happened in 2005/06 with Aquarius 10, 11 and 12 where the structure of the scheme was that Mr Walsh invested a net sum of £280,000, but his gross subscription to the partnerships was a total of £1.4m, the balance of £1.12m being borrowed by him personally from Barclays. That enabled Ms Whitehouse to claim relief in Mr Walsh's tax return for 2005/06 for some £75,000 interest paid to Barclays, the basis of the relief being that it was interest paid on a loan to "purchase an interest in a partnership" and hence on a "qualifying loan". The purpose of Ms Whitehouse's e-mail in January 2009 was to enable her to complete Mr Walsh's tax return for 2007/08, and it seems to me likely that she was asking if Mr Walsh had taken out any loans that would qualify for similar relief, whether to fund his cash subscription, or to gear it up. In any event there is no indication in the papers that Mr Walsh did take out any personal loan to gear up his subscriptions to E&W: unlike Aquarius 10, 11 and 12, the subscription documents signed by Mr Walsh on 29 March 2007 and 20 February 2008 contained no reference to a loan, and there is no other material in evidence indicating, and no reason to suppose, that he took out such a loan.

188. Mr Hardwick submitted that Ms Whitehouse appears to have been claiming tax refunds for Mr Walsh on the basis that his investments had been grossed up, and hence that Mr Beswetherick's suggested interpretation of the e-mail exchange of 14 January 2009 would make her complicit in a fraud on the revenue, something which had never been suggested and which the Court should be slow to find on so thin and ambiguous an evidential basis. I do not accept this submission. The basis for it is Mr Williams-Denton's e-mail of 3 April 2007, copied to Ms Whitehouse (paragraph 179(6) above). This does refer to Mr Walsh investing 60% of the monies required by the partnership, a total of £1.5m with 80% full recourse loans. But I do not see that that means that Ms Whitehouse was claiming tax refunds on the basis that he had invested the grossed up amount.

189. This requires a little explanation. I received very little if anything in the way of submissions as to how the E&W scheme was intended to work for tax purposes, but my understanding is as follows:

(1) The film partnership schemes all relied as a starting point on the taxpayer being a partner of a partnership that was carrying on a trade and that sustained a loss (at any rate in its first year or years). Since a partnership is transparent for tax purposes this loss is attributed to the partners in the shares in which they bear losses. *Prima facie* a partner who sustains such a loss is able to claim relief for that loss. It is to be noted that the relief is not claimed for capital investment in the partnership but for income losses sustained in the trade.

(2) For 2003/04 (Zodiac) it was not necessary for Mr Walsh to take out a personal loan. As the Zodiac 'reasons why' letter explained, to shelter £1m of income it was only necessary for the member to contribute 30% or £300,000, the balance of £700,000 being borrowed *by the partnership* (paragraph 15 above). That grossed up the amount available to the partnership to £1m, which could all be spent in the first year and hence generate a trading loss of £1m. That illustrates that the relief was for the member's share of loss sustained by the partnership (£1m), not for the member's contribution to the capital of the partnership (£300,000).

(3) For 2004/05 and 2005/06 (Aquarius) however the rules changed. The FA 2004 limited the availability of sideways loss relief for a non-active partner to the amount of his subscription (paragraph 23(2) above). The Aquarius schemes therefore adopted a different model under which the member would gear up his subscription with a loan borrowed *by the member*. Both Aquarius Business Plans illustrate this with a funds flow chart showing a loan from a lender to the member, and both Aquarius 'reasons why' letters refer to a member investing 20% from their own resources and borrowing the balance of 80%. That is why the Aquarius 10, 11 and 12 subscription documents completed by Mr Walsh included a loan application (there was probably a similar loan for Aquarius 4 and 5 but the completed subscription documents are not in evidence). In other words to shelter £1m, a member would contribute £200,000 from their own resources and borrow £800,000, enabling their contribution to the partnership to be £1m, and hence enabling them to claim up to £1m of losses.

(4) For 2006/07 the rules changed again. Relief for non-active members was now further restricted to £25,000, and even that was not available if one of the main purposes was to obtain tax relief (paragraph 23(5) above). That was why the E&W scheme provided that the members had to be active partners. But as active partners, their losses were no longer restricted to the amount of their contributions. It was therefore no longer necessary to gear up the contributions by loans to the members. Hence the business plans for E&W (1) and (2) each reverted to showing in their funds flow chart a loan to the *partnership*. For the partnership to have £1m of cash, it was now sufficient for the member to contribute £200,000, the balance of £800,000 coming from a loan direct to the partnership. This was obviously preferable for the members as they would not be under any personal liability for the loans, even theoretically. (In practice repayment of the loans was no doubt assured by various means).

(5) Thus Mr Walsh contributed a total of £280,000 to E&W (£180,000 to E&W (1) and a further £100,000 to E&W (2), but as explained above these were the same LLP). But, on the basis he was an active partner, the losses he claimed were not limited to the £280,000 he had contributed. They were in fact £22,034 for 2006/07 and £931,283 for 2007/08. These were not calculated or capped by reference to his contributions but were his (uncapped) share of the losses of the partnership. The figures were supplied by Mr Potter. There are detailed calculations in evidence which show (or purport to show) that E&W made a loss both in its first accounting period of 30 March 2007 to 30

November 2007 of £1,290,580, and in its second accounting period of 1 December 2007 to 30 November 2008 of £1,473,266, and that the figures of £22,034 and £931,361 represent Mr Walsh's share of those losses, apportioned on a daily basis to the relevant tax years, and split in accordance with his share (60% for the first accounting period, and 280/800 (35%) for the second).

(6) I do not therefore think there is any question of Ms Whitehouse having claimed relief, falsely or otherwise, on the basis of grossed-up contributions. She claimed relief (quite properly, if one assumes that Mr Walsh was an active partner and the partnership was trading) on the basis of Mr Walsh's share of trading losses.

190. On this material I find that Mr Walsh did not take out any personal loans in connection with his investments in E&W, and the fact that Ms Whitehouse claimed the relief she did provides no basis for suggesting the contrary.

191. Does that establish that when Mr Williams-Denton persuaded Mr Walsh to invest in the E&W scheme, first on 29 March 2007 and then on 20 February 2008, the scheme was not a *bona fide* one on the basis that it was to be used as a source of dishonest payments in the shape of dishonestly inflated commission payments? Here the documents undoubtedly betray a considerable degree of confusion. I do not think Mr Potter was confused. He was the one who devised the scheme. Although his initial summary of the scheme referred to the members borrowing up to 82%, his revised version (produced after it became necessary for the members to be active partners) dropped this suggestion, and both Business Plans make it clear that for every £1m made available to the partnership, the member need only provide £200,000 from his personal funds, the balance of £800,000 coming from a loan to the partnership (paragraphs 179(1) and (2) and 180(1) above). That is why the subscription documents, which he was responsible for, did not include any loan documentation (paragraphs 179(5) and 180(2) above). As explained above, it was not necessary for the members to take out loans for the purposes of claiming tax relief. They needed to be active members to access sideways loss relief of more than £25,000; and if they were active members, their relief was not limited to the amount of their contributions.

192. Nor do I think that whoever drew up the Appendix to the E&W (1) 'reasons why' letter was confused. This would have been drawn up by a paraplanner, and the evidence is that this was probably Mr Andrew Towers, who was sent a copy of the final Business Plan by Mr Williams-Denton on 25 March 2007 "to prepare the appendix". The Appendix therefore includes a statement, taken directly from the Business Plan, that for every £1m made available to the partnership the member's personal cash contribution would be £200,000, with the balance coming from a loan to the partnership; it is also no doubt why the bullet-point list of risks in the Appendix does not include any reference to the risk of a full recourse loan (paragraph 179(7) above).

193. But Mr Williams-Denton's documents do show some confusion. His meeting notes of 29 March 2007 with Mr Walsh do not refer expressly to a loan, but they do refer to an agreement to set up E&W "and invest £1.5 million"; to Mr Walsh investing 60% of the monies required and his "net investment" being £180,000; and to commission being payable on the "gross investment (£900,000)" (paragraphs 179(3) and (4) above). His e-mail of 3 April 2007 goes further and refers to "80% full recourse

loans" (paragraph 179(6) above). But when one comes to the E&W (1) 'reasons why' letter, he both says (i) under a heading referring to £900,000 that Mr Walsh's net capital commitment is £180,000 "with the balance from Partnership borrowings", and (ii) under a heading "Financing" that loans would be available of up to 82% but would need to be on a full recourse basis; his bullet-point list of risks also refers to the risks of a full recourse loan (paragraph 179(7) above). He also refers to commission being 2% of the gross investment and his invoices are based on a commission of 2% of the total figure of £1.5m (paragraphs 179(4), (8) and (9) above). For E&W (2) his meeting notes and the 'reasons why' letter refer to a gross investment of £500,000 and a net investment of £100,000 for each member, and a commission of 1.5% based on the gross investment of £500,000 (paragraphs 180(2), (3) and (4) above).

194. This rather muddled picture leaves it unclear how Mr Williams-Denton thought the scheme worked. What it does make clear is that Mr Williams-Denton considered that there would be a gross investment of 5 times the actual cash contributed by the members (£1.5m for E&W (1) and £2.5m for E&W (2)), on which he could base his commission, but it does not clearly indicate what he thought the mechanics of the grossing up would be. I am left very unsure quite what his understanding was, or indeed whether he gave any real thought to it at all. He was not responsible for devising the schemes, and appears to have been heavily reliant on Mr Potter. He does not appear to have studied the Business Plans with care, as if he had he would have found that there would be no personal full recourse loans. But the present question is not whether he took due care but whether I am satisfied on the balance of probabilities that when he put forward the schemes to Mr Walsh on 29 March 2007 and 20 February 2008, he did so knowing they were not *bona fide* but a vehicle dishonestly to extract monies from the investors. It seems to me that I can only so find if I find that he intended, at the time that he recommended the schemes to Mr Walsh, to take commission payments which he knew Greystone would not be entitled to.

195. I do not think I can make that finding. My reading of Mr Williams-Denton's documents is that he knew that in the case of E&W (1) Mr Edinburgh and Mr Walsh would only pay cash contributions of £120,000 and £180,000 respectively, and that in the case of E&W (2) the investors would only pay a cash contribution of £100,000 each; that he understood this to be equivalent to a gross contribution to the partnerships of 5 times as much; and that he intended that the commission would be based on this grossed-up amount. He made clear both in his meeting notes and in his 'reasons why' letters that the commission would be 2% or 1.5% of the grossed-up amount. In circumstances where an investor only needed to contribute £200,000 out of his own resources for the partnership to be funded to the tune of £1m (and hence be able to generate losses of £1m), I doubt Mr Williams-Denton saw it as making a significant difference whether the £800,000 was lent to the member and contributed by the member as capital (as in the Aquarius schemes) or lent to the partnership (as envisaged in the E&W schemes): in either case the practical effect would be much the same, namely that a member's cash contribution of £200,000 would lead to the partnership having available funds of £1m, and the member's share of losses available for tax relief would be likely to be about the grossed-up figure.

196. In those circumstances I am not persuaded that Mr Williams-Denton deliberately put forward the schemes to Mr Walsh knowing that the sums that Mr Walsh was putting in would not in fact be grossed up in this way and that the commission payments that

he intended to charge would be on a false and dishonest basis. No attempt was made before me to explore whether E&W did in fact take loans from a lender, and it may be that no real third-party loans were ever taken out (although Ms Way's report for the criminal proceedings suggests that a number of loans were made to E&W, amounting to nearly £1.5m, from companies associated with Mr Potter); but even assuming this to be so, I have no basis on which to find that Mr Williams-Denton knew or intended that this would be the case. The operation of E&W was entirely left by him to Mr Potter, and Mr Potter's Business Plans had indicated that for each £1m made available to the partnership, the members would only need to find a cash contribution from their own resources of £200,000, and although the mechanics were different, this was consistent with the previous schemes. Indeed, for what it is worth, which is admittedly not much, Mr Williams-Denton said in the second E&W trial that "we all thought there was debt involved" in E&W. That has not in my judgment been shown to be untrue.

197. I find therefore that at the time that Mr Williams-Denton recommended E&W to Mr Walsh on 29 March 2007 and again on 20 February 2008, he did not do so knowing or intending that dishonestly inflated commission payments would be paid to Greystone.

Eligibility for uncapped sideways loss relief

198. The other broad head under which it is said that the scheme was not a *bona fide* scheme is that it was never intended that the requirements for the members to be eligible for uncapped sideways loss relief would be met. As already explained (paragraph 23(3) above), from 2 March 2007 uncapped sideways loss relief was only available for partners who met the 10-hour requirement of having spent:

> "an average of at least ten hours a week personally engaged in activities carried on for the purposes of the trade."

(ss. 118ZH(1) ICTA 1988, re-enacted with effect from 6 April 2007 in s. 103B(2) ITA 2007). By s. 61(1) FA 2008, s. 103B(2) ITA 2007 was amended in relation to relevant periods ending on or after 12 March 2008. As so amended the 10-hour requirement was that the partner spent:

> "an average of at least ten hours a week personally engaged in activities of the trade and those activities are carried on
>
> (a) on a commercial basis, and
>
> (b) with a view to the realisation of profits as a result of the activities."

199. Mr Beswetherick relied on a number of matters under this head. First, he said that the Mercedes film that E&W was purportedly intended to produce was never intended to be produced; it was never produced nor could it have been. For this he relied on the fact that the Business Plan for E&W (2) indicated that a minimum subscription of £2.5m would be required, but that the contributions from the members only ever reached £800,000 and no loans were ever taken out, with the consequence that E&W did not have the necessary funding to produce the film it was supposed to be producing.

200. I accept that the contributions from the members totalled £800,000: Mr Edinburgh and Mr Walsh contributed £120,000 and £180,000 respectively to E&W (1) and £100,000 each to E&W (2); Mr Sherrington and Mr Amin £100,000 each; and Mr Foley and Mr Elsom £50,000 each. I also accept, as stated above, that no loans were taken out by the members. But Mr Potter's Business Plans, as set out above, had never envisaged that they would be. What they had envisaged is that the balance of funds required for E&W would come from lending to the partnership. As also stated above, no attempt was made before me to examine what loans E&W did or did not take out to finance its activities. I do not think the mere fact that no loans were taken out by the members shows that it was never intended to produce a film at all.

201. Mr Beswetherick next relied on the monies extracted to pay commissions to Greystone, calculated on the grossed up amounts. But these amounted (excluding VAT which could presumably be reclaimed) to £30,000 for E&W (1) and £37,500 for E&W (2) (or £50,000 if one includes the £12,500 to Molinar), and although not nothing, it seems unlikely that sums of this order would make the difference between the viability or not of a project estimated to require £2.5m.

202. Mr Beswetherick next relied on the fact that Mr Potter pleaded guilty, prior to the second E&W trial, not only to the conspiracy to cheat charge on which Mr Williams-Denton and the members were tried at the second trial, but to another charge of conspiracy (paragraph 50 above). This is pleaded by Mr Walsh, and admitted by Greystone, as having been a charge of conspiring with his associates, Christopher Walsh-Akins and Christine Slater (who I was told were the film director and an assistant), between 1 January 2007 and 8 February 2012 with intent to defraud HMRC:

> "by purporting to show that E&W LLP had accrued losses in its trading life of £4,005,043, whereas the genuine losses were lower and such cheat was facilitated by the movement of monies between bank accounts and the preparation of business records and financial statements and tax returns for the entity which misrepresented the position and in consequence of the entity being fiscally transparent it made those losses available for the Members of the LLP to claim as their own losses and to set against their income tax liabilities."

But although the guilty plea itself is not disputed, I have not been shown any of the material on which it was based or had any explanation in evidence as to quite what Mr Potter accepted doing.

203. In his written closing submissions Mr Beswetherick relied on the report by Ms Way, but I was not taken to it and no attempt was made to analyse or explain what it did or did not show. What it appears to show is that a combination of contributions from the members, loans from Templar Productions Ltd and Ursa Major Media Finance, and a series of VAT repayments from HMRC produced total inflows to E&W over the period covered by the report of £2,496,358. It also reveals that Mr Potter was a director or beneficial owner of Templar Productions Ltd and Ursa Major Media Finance, that much of the money was transferred out to other companies associated with Mr Potter, and that most of it found its way back through a series of transactions to Ursa. It also records (para 4.57) that E&W's financial records indicate very little income but major expenditure. This is however what one would expect during the production phase of a film: as Ms Way herself says (para 4.35):

> "The financial statements and tax returns report substantial losses which are consistent with heavy expenditure involved in film production where the income is not expected until some time in the future."

204. I find it very difficult to draw any firm conclusions from this material as to whether E&W was ever in a position to make a film or not, or indeed whether there was any genuine expenditure on a film. On the one hand the loans from entities connected with Mr Potter have all the hallmark of money being moved around in circular transactions without any real intention to spend it on film-making, the VAT repayments are entirely unexplained, and Mr Potter's plea shows that he accepted at the very least that the genuine losses were less than claimed. On the other hand, the total inflows very nearly reached the £2.5m mentioned in the Business Plan and Ms Way's report refers to such matters as a commissioning agreement between E&W and a company called Halidom Productions Ltd, and nearly £1m being spent on such matters as a Creative Producer, Derbyshire Shoot, Executive Producer fee and Monaco shoot. I have no idea whether it is suggested that these were fictitious invoices, or whether money was actually spent on shooting scenes in Monaco and Derbyshire. What does appear from the evidence is that a 122-page script was produced in February 2008 and circulated to the members in May 2008, which gives all the appearance of being a serious and genuine attempt to produce a script for a real film; and that Mr Potter told the members in July 2008 that a number of things had been done over recent months (including such matters as reviewing approximately 30 hours of film from the Monaco shoot, and research on potential directors) such as one would expect if there were a genuine attempt to produce a film.

205. In these circumstances I find myself unable to conclude that it was never intended to make a film. All that can safely be drawn from Mr Potter's guilty plea, even read with Ms Way's report, is that Mr Potter artificially manipulated the books to make E&W's losses appear greater than they actually were. That does not mean he never set out to make the film; nor that he did not genuinely embark on the process; indeed it does not even establish that he planned to exaggerate the losses from the outset.

206. In any event the question is not what Mr Potter's intentions were, but whether Mr Williams-Denton knew what his intentions were. I will come back to this shortly but should first refer to one other matter relied on by Mr Beswetherick, at any rate in his written closing submissions, which is the submission that Mr Potter and Mr Williams-Denton knew from the outset that the members of E&W would not qualify for uncapped sideways loss relief because they would not do the necessary activities to satisfy the 10-hour requirement. Mr Hardwick submitted that this was a new allegation that was not pleaded. I accept this submission. What is pleaded (at Paragraph 80.i.2) of the Particulars of Claim) is as follows:

> "The members of … the E&W LLP would not be eligible for uncapped sideways loss relief in respect of amounts that they invested because (a) there was no genuine intention to produce the films using such funds, and (b) the relevant partnership would not therefore be engaged in activities for which the tax relief was intended."

That is not wide enough to encompass an allegation that it was always known that the members would not fulfil the 10-hour requirement, which is a quite different point. Not only is this not pleaded, but it did not feature in Mr Beswetherick's written (or I believe oral) opening, so it cannot be said that Mr Hardwick was aware that it would

be said before conducting his cross-examination. In those circumstances I agree with Mr Hardwick that it is too late to raise it for the first time in closing submissions, and it is not open to Mr Beswetherick to rely on it. It is only fair to add that as I understood it Mr Beswetherick in oral closing submissions did not rely on this point but confined his argument to the submission that this was not a *bona fide* scheme because there was never any intention to produce a film, and on that he took his stand on the absence of loans.

HHJ Beddoe's sentencing remarks

207. I come back to the question whether Mr Williams-Denton knew that the scheme was not *bona fide*. In his written submissions Mr Beswetherick relied on Mr Williams-Denton's conviction at the second E&W trial, and the sentencing remarks of HHJ Beddoe. I did not understand Mr Beswetherick to press this point in oral closing submissions, but I should explain why I agree he was right not to, especially as the sentencing remarks had featured quite prominently in Mr Walsh's case as opened.

208. HHJ Beddoe had presided over both E&W trials and the JHM trial. He sentenced both Mr Potter and Mr Williams-Denton on 18 December 2015 after the conclusion of the second E&W trial. It is apparent from the transcript that he was dealing with four counts; that Mr Potter had either been found guilty or pleaded to all four; and that Mr Williams-Denton had been found guilty of Counts 3 and 4. I have not seen any copy of the indictment, which makes identifying the counts less easy than it might be, but piecing together the clues in the transcript with the other evidence the position would appear to be as follows:

(1) Count 3 was the conspiracy charge in relation to E&W, which Mr Potter pleaded to at the outset of the second E&W trial, and which Mr Williams-Denton was convicted of at that trial.

(2) The terms of that count are pleaded by Mr Walsh, and admitted by Greystone, as follows:

> "between 1 January 2007 and 8 February 2012 with intent to defraud and to the prejudice of Her Majesty the Queen and her Commissioners of Revenue and Customs (The Commissioners), conspired together with Terence Sefton Potter, Rodney Alan Sherrington and Sean Foley to cheat Her Majesty the Queen and The Commissioners of public revenue, namely monies, by falsely claiming as due to the Members of Edinburgh and Walsh LLP in consequence of their being active partners in that entity and so entitled to make such claim, uncapped sideways loss relief upon losses sustained or purportedly sustained by the partnership, such cheat being pursued by means of the Members own personal tax returns and thereafter in representations to HMRC made by the Members and on behalf of the Members."

This is in materially identical terms to the E&W count in the summons issued to Ms Mundy in January 2014 (paragraph 46 above).

(3) Count 4 was the conspiracy charge in relation to JHM, which Mr Potter and Mr Williams-Denton were each convicted of at the JHM trial.

(4) The terms of the JHM conspiracy charge are not pleaded, and I have no direct

evidence as to the terms of the indictment. But if the indictment was in the same terms as the summons issued to Ms Mundy, it provided as follows:

> "between the 1st January 2007 and 8th February 2012 with intent to defraud, and to the prejudice of Her Majesty the Queen and her Commissioners of Revenue and Customs (The Commissioners), conspired together and with other persons to cheat Her Majesty the Queen and The Commissioners of public revenue, namely monies, falsely claimed as due to the Members of Jenkins and Hyde and Maclellan LLP in consequence of their being active partners in that entity and so entitled to claim uncapped sideways loss relief upon losses sustained or purportedly sustained by the partnership, such cheat being pursued by means of the members own personal tax returns and thereafter in representations to HMRC made by the Members and on behalf of the Members."

(5) That leaves Counts 1 and 2, to which Mr Potter pleaded guilty. I do not know precisely what these were, but one of them was no doubt the conspiracy charge in relation to inflated losses in E&W, the terms of which, as admitted on the pleadings, I have already set out (paragraph 202 above). It seems likely that the other one was a similar count, possibly in relation to JHM, as HHJ Beddoe treats the two together, referring, by reference to both counts, to Mr Potter conspiring in the creation of sets of accounts and the underlying support for the figures in them:

> "by a carefully orchestrated, contrived, and fictitious merry-go-round of money and false accounting."

Mr Williams-Denton was not charged with either count.

209. HHJ Beddoe's remarks are addressed to both of them. The parts particularly referred to in Mr Beswetherick's written closings were as follows:

> "I'm **quite sure that by early 2007 the Crown is right in asserting that a dishonest relationship existed between the two of you, with you, Mr Potter, on the one hand, creating schemes for you on the other, Mr Williams-Denton, to sell to your high net worth clients, so that you could each benefit financially in the ways identified by the Crown, and those investors essentially could get sideways loss tax relief, to which you two both, at least, knew that they would not be entitled**. Whatever those clients may have initially thought or believed they were getting into, and whether or not they did or did not believe that they would be entitled to such relief, **I have no doubt that neither of you envisaged that they would do anything which would properly qualify them for such relief. It was never the intention by you, Mr Potter, properly to involve them, in any meaningful sense, in your film projects, as you, I conclude, Mr Williams-Denton, knew well**. A rather obvious endorsement of this point, it seems to me, is that for the period 2007 to 2008, the first year of the existence of the Edinburgh Walsh LLP, there was not one project to which that LLP was even superficially attached. So how you could be the ignorant conduit of figures for losses upon which Mr Edinburgh and Mr Walsh made claims for tax rebates, for that period up to the of the financial year March 2008, and for the preceding year, defeats me.
>
> …
>
> In dealing with you, it's important that I make clear that I put aside the suggestion

> that between you you misled investors as to the interpretation of what the new active partner requirements were in both 2007 and in 2008… It is enough to say that **I am sure you both knew that those requirements would not be met by those to whom you sold the product**, and that you did not envisage that, at any time, they would make any practical contribution to the film projects [with] which you, Mr Potter, were otherwise concerned."

210. HHJ Beddoe goes on to deal with the submission of the false diaries. What he says is this:

> "The suggestion, moreover, by Mr Henley [counsel for Mr Williams-Denton], in his submissions that I should only conclude that you became dishonestly involved when the diaries had been produced, after formal inquiries by HMRC had begun in 2009, sits ill not only of course with your own case, as I queried, but with the first of the dishonest payments, just by way of example, that passed between you and Mr Potter in 2008. As I've said, by 2007, in fact, I'm sure that both of you were engaged dishonestly, and both of you had every reason to expect tha[t] any LLP Mr Potter created for you, Mr Williams-Denton, to sell, and upon which your investors might claim tax relief, [would be the] subject of inquiry, as all of Potter's schemes had been, to date. And together, the two of you were readily prepared, if necessary, to feed your investors the material which might be required to mislead HMRC into accepting that their individual claims to active contribution were genuine.
>
> And so it happened. When the hint of a problem arose, you were asking Mr Potter what he could do to help…
>
> In due course the diaries were created. They were a complete fiction, intended by you both – and you were very much a party to their creation, Mr Williams-Denton, being sent indeed the first iterations of them, no doubt for your consideration and approval… They were intended by you both to deceive HMRC, whether those through whom they were submitted to HMRC were aware of their true nature or not…
>
> …
>
> So, in concert the two of you fostered and encouraged the advancement of lies to HMRC, not only through the tax returns of investors, which each of you knew they would submit, but also in the raft of false material which from 2009 through to 2012 you, Mr Potter, were creating and which you, Mr Williams-Denton, were encouraging those investors to submit, whatever they specifically knew about it…
>
> Mr Williams-Denton, you are not charged on Counts 1 and 2, and [I] obviously do not take any of the evidence in relation to Mr Potter's involvement with those particular counts into account when I come to consider sentencing your case. But I make it clear that I do not accept, for the reasons I've already given, that you did not know, however they were actually created, that those figures were a nonsense as far as the entitlement of the investors to make claims based upon [them] were concerned, whatever the investors' own state of knowledge might have been.
>
> The more I have seen of you both over these last months, the more I have become convinced that you are both deeply dishonest individuals…
>
> …
>
> Mr Williams-Denton, your culpability is high, but I accept that it does not rank as

> high as that of Mr Potter. Somewhat below it. But it is obviously well above that of any of those investors found to have been complicit in what was going on. You were the seller of the product, and a knowing seller of a false product. And once an inquiry began you were, as the Crown rightly say, the dishonest hub for the continuance of the claims for tax relief, and for the submission of false responses, co-ordinating them, with the assistance of Mr Potter, who decided what responses individual investors should be asked to make to HMRC."

211. I have set this out at some length because it helps to understand the context in which HHJ Beddoe made the various remarks that he did. What I take from this is as follows:

(1) Mr Williams-Denton's counsel accepted that the verdict of the jury inevitably meant that they had found that Mr Williams-Denton had become dishonestly involved when the diaries had been produced, but submitted that HHJ Beddoe should conclude that he had only become so involved in 2009.

(2) HHJ Beddoe rejected that submission, concluding that he knew all along that the members would not do anything which would properly qualify them for tax relief, and that the active partner requirements would not be met by those to whom he sold the product. That justified his conclusion that Mr Williams-Denton was acting dishonestly as early as 2007, and was a "knowing seller of a false product".

(3) On the other hand Mr Williams-Denton was not charged with Counts 1 and 2, which concerned the "fictitious merry-go-round of money and false accounting", and HHJ Beddoe therefore left out of account, for the purposes of sentencing Mr Williams-Denton, the evidence in relation to Mr Potter's involvement in those counts.

(4) He did say that he did not accept that Mr Williams-Denton did not know that they were a nonsense so far as the investors' entitlement to make claims based upon them were concerned, but this was "for the reasons I've already given". As far as I can see, that can only be a reference to his conclusion that Mr Williams-Denton knew that the investors would not comply with the active partner requirements and hence that they would not be entitled to claim sideways loss relief (a question that I have decided is not open to Mr Walsh in this action on the pleadings).

212. The question for me is what assistance, if any, I can properly derive from these remarks. At common law the fact that a person had been convicted of an offence at a criminal trial was not even admissible in subsequent civil proceedings. This is the well-known rule in *Hollington v Hewthorn*: see *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. Subject to statutory developments, this remains good law: see the thorough examination of the point by Leggatt J in *Rogers v Hoyle* [2013] EWHC 1409 (QB) at [79]-[90], endorsed by Christopher Clarke LJ in the Court of Appeal [2014] EWCA Civ 257 at [32]-[40].

213. The actual decision in *Hollington v Hewthorn* has been reversed by statute, namely s. 11 of the Civil Evidence Act 1968. This provides, so far as relevant, as follows:

> "(1) In any civil proceedings the fact that a person has been convicted of an offence

> by or before any court in the United Kingdom or of a service offence (anywhere) shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or of a service offence–
>
> (a) he shall be taken to have committed that offence unless the contrary is proved; and
>
> (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose."

214. The effect of s. 11(1) is that evidence of Mr Williams-Denton's conviction is admissible. The effect of s. 11(2)(a) is that he is to be taken as having committed the offence of which he was convicted unless the contrary is proved. That creates a rebuttable presumption that he did commit the offence. I am not satisfied that the presumption has been rebutted. Mr Hardwick did suggest somewhat faintly in oral closing submissions that the contemporaneous material was sufficient to rebut the presumption, but he did not press the point and I consider that the relevant material amply supports the case that Mr Williams-Denton was knowingly involved in the provision of the fictitious diaries to HMRC, which is sufficient to support the conviction. I am entirely unpersuaded that Greystone has proved, or indeed come anywhere close to proving, that he was wrongly convicted. I proceed therefore on the basis that it has been established for the purposes of these proceedings that Mr Williams-Denton was guilty of a conspiracy to cheat the revenue.

215. The effect of s. 11(2)(b) is that evidence is admissible for the purpose of identifying the facts on which the conviction was based. Although the Act specifically refers to any document admissible as evidence of the conviction (such as a certificate of conviction or a criminal record), and to the contents of the indictment as being admissible for this purpose, these are without prejudice to "any other admissible evidence". In *NT1 v Google LLC* [2018] EWHC 799 (QB) at [88] Warby J said that sentencing remarks were admissible as hearsay evidence of the facts of the case. I have no difficulty in accepting that in an appropriate case a judge's sentencing remarks will be admissible as evidence of what "the facts on which the conviction was based" are; if a defendant is convicted of murder, the sentencing remarks of the trial judge are likely to contain reference to many of the facts on which the conviction was based, such as the relationship between the defendant and the victim, the circumstances of the killing, the age and sex of the victim, the weapon used and the like.

216. Mr Hardwick however submitted that in the present case the judge's sentencing

remarks contained a mixture of material. Some of it does identify the facts on which the conviction on the relevant count (Count 3, being the conspiracy count in relation to E&W) was based, but other parts deal for example with the JHM conspiracy count (Count 4), or the counts concerning the inflated losses and accounting records (Counts 1 and 2). He submitted that the parts of the judge's sentencing remarks which identify the facts on which the conviction was based were really those that started with "So, in concert…". Mr Beswetherick, having heard those submissions, said that he accepted Mr Hardwick's characterisation of the allegations that were found against Mr Williams-Denton and the proper way that one has to interpret the judge's sentencing remarks.

217. I agree. In my judgment s. 11(1)(b) of the Act entitles me to look at HHJ Beddoe's remarks for the purpose of seeing what the facts were on which Mr Williams-Denton's conviction on Count 3 was based, but not otherwise. Since Mr Williams-Denton was convicted by a jury, and it is not possible to ask the jury what facts they found proved, all that can be done is to seek to identify what they must have been satisfied of in order to convict. In the present case they must have been satisfied, as Mr Williams-Denton's own counsel recognised, that he was at the very least knowingly involved in putting forward false material to HMRC in the shape of the fictitious diaries: this was, to judge at any rate by the prosecution's Opening Note in the first E&W trial (I do not have the opening for the second trial) the thrust of the prosecution case. The prosecution there did rely on other things such as the members' tax returns being false because they were not active partners, but the emphasis is undoubtedly on the creation and submission of diaries that were "complete fabrications" and "nothing but hundreds of pages of lies". For example, the Note said this:

> "Even if one or other of them had done 10 hours on average engaged in the activities of the trade, and that is not accepted, they had no evidence that would have satisfied HMRC. They had not done it and they all knew that and sought to cheat HMRC by passing the diaries off as proof."

218. In those circumstances I think the only "facts on which the conviction was based" are the facts in relation to the creation and submission of the false diaries. HHJ Beddoe's conclusion that Mr Williams-Denton was acting dishonestly from early 2007, and that he knew that the investors would not be entitled to sideways loss relief, cannot be characterised as identifying the facts on which the conviction was based, as there is no way of knowing if the jury was satisfied of that or not. HHJ Beddoe of course had to form his own view of the culpability of Mr Williams-Denton for the purposes of sentencing, and was no doubt fully entitled to reach the conclusion he did for that purpose, but that does not make his conclusion evidence of the facts on which the jury convicted him. They are his considered view on the evidence he heard, but save to the limited extent made admissible by s. 11 of the Civil Evidence Act 1968, they do not raise any presumptions, and in my judgment are strictly inadmissible under the rule in *Hollington v Hewthorn*: see the modern justification for the rule given by Christopher Clarke LJ in *Rogers v Hoyle* at [39]:

> "The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being

made, at least in part, on evidence other than that which the trial judge has heard…"

219. In those circumstances I agree with both counsel that the sentencing remarks do not assist in establishing whether Mr Williams-Denton knew on 29 March 2007, or 20 February 2008, that the E&W scheme was not a *bona fide* one in that there was never any intention to produce a film. On the evidence I have heard I have already said that I am unable to conclude that it has been shown that Mr Potter never intended to make a film; but even if he did, I do not find it established that Mr Williams-Denton knew that, or knew that the scheme was not *bona fide* (or was reckless in the sense of not caring whether it was *bona fide* or not). In the second E&W trial, Mr Williams-Denton said in chief that his attitude to the scheme was that it was a completely proper scheme; although I naturally view this evidence with great suspicion, the conviction by the jury does not show that they inevitably rejected that, and I do not think I have the material to reject it either.

220. I conclude that Mr Walsh's claim in deceit based on the representation that the scheme was not *bona fide* has not been made out.

Negligence claims

221. Mr Walsh's claims in negligence in relation to the original investment advice are based on the claim that as with the Zodiac and Aquarius schemes Mr Williams-Denton advised that the E&W scheme was another low risk investment.

222. This aspect of the case was dealt with very briefly in Mr Beswetherick's closing submissions, and I can be equally brief in considering it as many of the relevant considerations are similar to those that apply to the Zodiac and Aquarius schemes.

223. As with them, I accept that Mr Williams-Denton recommended the E&W scheme to Mr Walsh, and gave him advice to the effect that it could be used to mitigate tax. He presumably did not need to say very much as by then the use of film schemes as a means of mitigating tax was very familiar to Mr Walsh, and indeed he had received a number of substantial tax repayments. By 2007 it had become a routine part of Mr Williams-Denton's tax planning for his clients to find a Potter film scheme each year to shelter large amounts of income. Indeed, Mr Williams-Denton's evidence in the second E&W trial was that he was aware of the new requirement in March 2007 for the members to be active partners, that he wanted a scheme for that tax year end for both "the JHM guys" and Messrs Edinburgh and Walsh, and that it was he who asked Mr Potter to come up with a scheme which complied with the new rules. I suspect that he needed to do little more to sell the scheme to Mr Walsh in 2007 than say "this is the film scheme I recommend for this year's tax planning" or the like.

224. And when it came to 2008, the meeting on 20 February was attended not only by Mr Williams-Denton but by Mr Potter. This was the first time that Mr Walsh had met Mr Potter. Mr Potter had some slides with him about the Mercedes film on a laptop, and Mr Walsh said that the focus of the meeting was this presentation, with Mr Potter speaking passionately about the film as a low budget "blockbuster" (in his evidence in the second E&W trial Mr Walsh said that Mr Potter sold them "a huge exciting project, his baby, the best he'll ever do"), and with Mr Williams-Denton being equally enthusiastic. Mr Walsh accepted in evidence that he invested in the scheme because he thought the film would be a blockbuster. It seems unlikely in the circumstances

that Mr Williams-Denton would have needed to say anything much about the scheme to sign him up.

225. In those circumstances I find, as with the earlier schemes, that it is not now possible to reconstruct any particular words used, or make any findings as to what Mr Williams-Denton may or may not have said orally, if anything, about the risks involved, and I find that it has not been established that he specifically sold the E&W scheme, either on 29 March 2007 or on 20 February 2008, as a "low-risk investment".

226. Quite apart from this, the critical question, as with the earlier schemes, is whether any claim is barred by limitation, in circumstances where the negligence relied on took place, if at all, in 2007 and 2008, and the claim form was not issued until May 2016. In his closing submissions, Mr Beswetherick submitted that Mr Williams-Denton's breach of duty was a deliberate breach committed in circumstances where it was unlikely to be discovered for some time. I do not think such a case has been established. I suspect for reasons already given that Mr Williams-Denton did not draw attention to the risks orally, and will assume that Mr Beswetherick may be right that the evidence points squarely to his having failed to give adequate advice, at any rate face-to-face, about the risks of tax relief not being available. But that is not the same as evidence that he deliberately mis-stated the risks, which is Mr Walsh's pleaded case.

227. As with the other schemes, he followed up the meetings at which the investments were agreed by detailed 'reasons why' letters. These went out of their way to draw attention to the risks involved. Thus the E&W (1) 'reasons why' letter (i) under the heading "Risk Profile" referred to Mr Walsh being fully aware of the risks and to his "realistic" and "speculative" attitude; (ii) under the heading "Tax Relief" referred to the scheme as one that could provide members with tax relief but added that this would be "subject to the risks outlined in Part 8 of the enclosed Business Plan"; (iii) under the heading "Risks" again referred Mr Walsh to the risks described in the Business Plan and contained the bullet-point list of risks which took up almost a whole page, including specific reference to the possibility of a successful challenge by the Inland Revenue; (iv) attached the Appendix which repeated the risks; (v) attached a Risk Warning Notice which had to be signed (it is not in evidence but a similar notice in relation to E&W (2) is: it is a one-page document prominently headed "**RISK WARNING NOTICE**" and refers to the "risks associated with a Film Partnership", and the "risks involved in such schemes", which Mr Walsh signed along with the other subscription documents on 20 February 2008); and (vi) urged Mr Walsh to read all the documents carefully. The E&W (2) 'reasons why' letter is similar.

228. Mr Beswetherick said that the 'reasons why' letters came after Mr Walsh had already signed up to the investments, that Mr Walsh did not read them, and that Mr Williams-Denton knew that he had a habit of not reading documents. But this is not to my mind an answer to the point that the lengthy and repetitive risk warnings in the 'reasons why' letters tend to suggest not that Mr Williams-Denton was deliberately mis-stating the risks, but that at most he did not think it necessary to draw attention to them orally as they would all be covered in the paperwork which he would be sending in due course. That may or may not have been negligent – that depends on whether it was incumbent on him to give explanations of the risks orally as well as in the paperwork – but leaving aside that this is not Mr Walsh's pleaded case, it is not to my mind a

case of Mr Williams-Denton deliberately committing a breach of duty.

229. In those circumstances s. 32 does not apply and the claims are necessarily statute-barred. It is therefore not necessary to consider whether the advice, or lack of it, was negligent, or the other issues that would have arisen.

Conclusion on the E&W investment claims

230. I find that Mr Walsh's deceit claims in relation to the investment in E&W are not made out and that his negligence claims are statute-barred.

The HMRC enquiry claims

231. Mr Walsh's remaining claims all relate to the HMRC enquiry into E&W. As summarised in Mr Beswetherick's closing submissions they are as follows:

(1) Mr Williams-Denton (and hence Greystone) was negligent in failing to advise Mr Walsh that Mr Walsh's understanding of the 10-hour requirement was false.

(2) Mr Williams-Denton (and hence Greystone) was negligent in relation to the false diary by (i) failing to inform Mr Walsh that he knew that false diaries were being produced; (ii) participating in the creation and submission of false diaries; and (iii) failing to advise Mr Walsh as to the information that he ought properly to be providing.

(3) Mr Williams-Denton (and hence Greystone) was negligent in relation to the additional information that was provided to HMRC on Mr Walsh's behalf.

(4) Mr Williams-Denton told Mr Walsh, on 23 March 2010 and again on 25 May 2010, that there was nothing to worry about when in fact he knew that there was something to worry about; these assurances ground claims in deceit and negligence.

232. Mr Beswetherick accepts that all these claims post-date the investments made by Mr Walsh into E&W, and hence that the claims are not to recover his investments but his further losses, consisting of his criminal defence costs and his loss of earnings.

233. He also accepts that if Mr Walsh loses on what was called 'the knowledge issue', his claims for his defence costs and loss of earnings would fail. The knowledge issue was formulated by Mr Hardwick in opening as whether Mr Walsh knew about the falsity of the Walsh diary and the related HMRC correspondence, and I did not understand Mr Beswetherick to take issue with this formulation. Since it is accepted that if Greystone are right about this it is a complete defence to Mr Walsh's remaining claims, I propose to address first the question of what Mr Walsh did or did not know about the falsity of the diaries and other information provided to HMRC.

234. I will start with the documented course of events. I have given a summary above (paragraph 43) but I must now deal with it in greater detail.

The 10-hour requirement and the members' activities

235. As explained above (paragraph 24), the changes to the relief available to non-active partners were announced on 2 March 2007, with the result that the Business Plan for what became E&W (1), sent to Mr Williams-Denton by Mr Potter on 24 March 2007, included reference to all participants taking an active part in the day to day management of the partnership's business and personally devoting at least on average 10 hours per week to the activities carried on by the Partnership.

236. Mr Williams-Denton's notes of his meetings with Mr Edinburgh and Mr Walsh on 28 and 29 March 2007 therefore referred to them being "fully involved in the partnership" but said that they would employ experienced senior executives and gave no indication as to what this would actually entail for them personally. Mr Walsh's evidence was that Mr Williams-Denton gave no indication that the investment was any different to the other schemes he had previously invested in. I do not accept this. Mr Williams-Denton accepted in the second E&W trial that he was aware in 2007 of the need for the partners to be active partners; he refers to them being fully involved both in his meeting notes and in the E&W (1) 'reasons why' letter; and he told Ms Whitehouse in a telephone conversation of 9 May 2007 that he had set them up in partnership "whereby they are each working ten hours a week in a film development scheme". In those circumstances I find that he probably did tell them in March 2007 that they would be fully involved. On the other hand, I accept that there is no evidence that he explained what this meant in practical terms. I think he probably thought that as with all other matters dealing with the operation of the schemes, Mr Potter would deal with that side of things, and that it was not a matter for him. In practice, no attempt was made by Mr Potter to involve Messrs Edinburgh and Walsh in the day to day running of E&W during 2007, and no attempt appears to have been made by them, even nominally, to carry out any such activities. I find that it was not explained to them what they had to do and that in practice they did not do anything that could count towards the 10-hour requirement.

237. For E&W (2) in 2008 the Business Plan sent by Mr Potter to Mr Williams-Denton on 4 February 2008 contained a similar reference to the 10-hour requirement. Then on 12 February 2008, Mr Potter sent Mr Williams-Denton a copy of an Opinion of counsel. This was headed "Re: Formula One Productions", presumably a different but similar scheme and at paragraph 12, counsel referred to a warning in the Business Plan that a non-active member's loss claim would be limited to the amount he or she had subscribed. Mr Williams-Denton evidently read the Opinion and picked up this point as he replied to Mr Potter by e-mail the same day:

> "General Point 12 – we must make it clear and have documentary evidence that the partners must be active in the partnership. Otherwise, there relief is limited to the amount that they subscribe."

Mr Hardwick submitted that this e-mail was a reason to reject Mr Walsh's evidence that Mr Williams-Denton told the members on 20 February 2008 that they did not need to keep records. I think that is probably a mis-reading of the e-mail: Mr Williams-Denton does not seem to me to be referring to the need for the partners to have documentary evidence of what they did by way of active participation, but to the need for him to have documentary evidence of having given clear advice to them that they must be active. His notes of the meeting of 20 February duly document that

he and Mr Potter presented the Business Plan and the Opinion and record:

> "Point 12 confirms that a non-active member's loss claim for the current and preceding tax years will be limited to the amount he or she has subscribed to the partnership."

A similar statement is found in the E&W (2) 'reasons why' letters. I do not consider therefore that the e-mail of 12 February says anything about the need for the members to document their activities as members of the partnership.

238. Mr Williams-Denton and Mr Potter met Messrs Edinburgh, Foley and Amin on 13 February 2008 and presented the scheme to them; Mr Williams-Denton's note of the meeting refers to E&W being opened to new members and that a maximum of 5 members would support 10 hours work per week for each member for a minimum of 6 months (paragraph 176(2) above). On 20 February 2008, Mr Williams-Denton and Mr Potter presented again to them and to Mr Walsh and Mr Sherrington (paragraph 176(3) above). The note of the meeting, as well as referring to point 12 of counsel's Opinion, refers to all members being fully involved in the partnership "(with Terry overseeing the activities)", and contains a list of activities involved in the film development process. These are all the sort of activities that one would expect a professional film production company to undertake – acquiring a story, commissioning a screenplay, producing a shooting schedule, preparing a budget and so on. None of them are amateur activities such as watching films.

239. Mr Walsh's evidence was that he was told at this meeting of the 10-hour requirement but told that this could include watching films at home, which could lead to a suggestion of a particular actor, discussing things connected to films in the pub after work, watching a Top Gear video or reading magazines and general chatting about cars and films. Mr Hardwick submitted that I should be very careful about accepting the assertions by Mr Walsh as to what happened at this meeting. I agree, for reasons already given, that I should be cautious about relying on Mr Walsh's evidence alone, but his evidence in this respect receives considerable support from what can conveniently be referred to as the BIM episode in 2009.

240. It will be recalled that Mr Sherrington had a background in accountancy – Mr Walsh described him in his witness statement as "an analyst and an accountant" and as not coming from a trading background – and he appears from the outset to have taken a closer interest in the details of how the scheme worked than, for example, Mr Walsh. Thus on 20 February 2008 he asked Mr Williams-Denton for, and was sent, a copy of counsel's Opinion and by 10 March 2008 he was e-mailing Mr Potter to say he had finished reviewing the Business Plan. On 23 February 2009 he sent an e-mail to Mr Potter, saying that he thought they needed to meet as soon as possible as he had some major concerns to discuss with him; and on 25 February 2009 followed this up with another e-mail to Mr Potter, copied to Mr Williams-Denton, saying that the partners were requesting an urgent meeting with them both, and referring to BIM 56540. This is a reference to a section in HMRC's Business Income Manual. This is one of a number of internal manuals. They contain guidance for HMRC staff, but it has for some years been the practice of the Inland Revenue, and subsequently HMRC, to make such manuals available to the public generally; and BIM 56540 dealt specifically with "Film and audio products – avoidance – partnership loss manipulation – restriction of relief for non-active partners." Mr Sherrington quoted

the following passage from it:

> "Investors in film partnerships are generally passive partners, with no active involvement in running the partnership trade. We have heard of some schemes being promoted on the premise that partners will be able to get around these restrictions by spending 10 hours each week reviewing videos or films, or similar pastimes. This is not actively and personally carrying on the trade."

He then said that he hoped that in the meeting they would have some answers "that relieve our grave concerns and prove me wrong."

241. The natural inference from this is that Mr Sherrington's grave concerns were that what they had been doing to fulfil the 10-hour requirement was exactly what HMRC said did not count. That seems to me a powerful indication, and I find, that the members were indeed told at the 20 February meeting that they could fulfil the 10-hour requirement by watching films and videos and the like. I do not think Mr Walsh can remember quite who said it (he said in the second E&W trial that he could not specifically remember but it came across as one of the presentation points), but I think it more probable that it was Mr Potter rather than Mr Williams-Denton. Of the two, he was very much the expert on these schemes.

242. Mr Walsh's evidence is that Mr Williams-Denton also specifically said that they did not have to take notes or document what they had done. I am not persuaded that he can remember specifically being told that, but I accept that the members were not told that they needed to record or document their activities, as if they had been told, they would no doubt have done it.

243. The members did make an attempt to carry out these amateur activities, but the evidence is unclear as to quite what they consisted of. Mr Walsh's evidence in this action is that he made an effort to watch films most evenings and each weekend, and that was confirmed by Mrs Walsh (who was of course not cross-examined). He said that 10 hours was easily achievable doing that and discussing the films with the others the following week, without having to worry about meetings and discussions and the like; and he confirmed in oral evidence that watching a film every night would be 10 hours, so the 10 hours would be "in my rear view mirror quite quickly." That seems credible and I find that Mr Walsh thought that all he had to do was watch 10 hours of film a week and he would be fine, and that he had no difficulty doing that.

244. What is far less clear is how much time he spent on meetings and discussions with the others. In the E&W (2) 'reasons why' letter, there is a reference to monthly meetings, to be chaired by Mr Sherrington. In fact they seem to have started with regular Monday meetings (referred to, for example, in e-mails from Mr Sherrington on 20 and 28 March 2008). Neither of these pieces of contemporary evidence suggest anything much more frequent than that. But in 2012 Mr Walsh told A&O (at the investigatory meeting on 24 February) that he would:

> "spend around five hours per week whilst on RBS premises in relation to work for E&W and that that might have been attending ad hoc meetings during the day or meetings after the market closed."

Similarly on 15 March 2012 he told the RBS disciplinary meeting that it had probably amounted to four or five hours per week. He was asked if they had a regular set

meeting to which he said that initially they had tried to get together on a Monday at 4.30, but since the market closed at 4.30, RBS or ABN business had always taken precedence and if people were busy the meetings had been deferred. They had become more ad hoc as a consequence.

245. For the present proceedings, Mr Walsh said in his witness statement that he met regularly with the other members at the end of each day's trading at around 4.30 pm in the office to discuss the films he had watched. That gave the impression, rather different from what he told RBS, of a fixed daily meeting. In oral evidence he accepted that he left the office about 5.30 pm, and it was suggested to him that he had told A&O he was doing 5 hours per week (on RBS premises), and that the thrust of his evidence in this action was that he had an hour or so at the end of each day to do these activities. His answers were that the 5 hours was incorrect; that he was not doing that many hours of work; that the time he had for the activities at the end of the day "may have been five minutes; it may have been ten minutes"; that most traders would be out of the office before 4.50 or 5.00; and that when he said he was there at 5.30, he was purely speaking for himself. And when he was asked his best estimate of how long he spent each week, he said 2½ to 3 hours.

246. Mr Walsh also said in these proceedings that they met in the pub on a Thursday night to discuss matters such as films or magazines. That had not been mentioned to A&O, or RBS. Indeed in the A&O meeting when Mr Walsh was asked about meetings which took place outside of the working day, he said that they would sometimes meet at the Starbucks opposite the office, or in each other's houses, but there was no specific place they would meet. In oral evidence before me, he said that on Thursdays most people would go out with other members of market firms and socialise, that the meetings in the pub were not confined to the 6 members of E&W, that there was no agenda, that they discussed whatever anyone wanted to discuss, and that these included other topics of conversation, not just films. In practice this sounds like a group of colleagues meeting up in the pub regularly on Thursday evenings and having a chat.

247. Three things emerge from this evidence taken together. First, Mr Walsh repeatedly said that he thought that watching films was sufficient, and that given the number of films he watched, that was more than sufficient to fulfil the 10-hour requirement. I have already said I accept this evidence. Second, I very much doubt, in the light of what Mr Walsh said in this trial, that he was really spending 5 hours per week on E&W activities while at work. That would have meant an hour a day, and although the impression given by Mr Walsh in his witness statement was of fixed regular meetings at 4.30 pm each day, his answers in cross-examination indicate that these were often brief (5 or 10 minute) informal conversations after the market closed. The overall impression I gained was that these "meetings" amounted to little more than chatting to his colleagues about the films he and they had watched. Third, in the light of the first two conclusions, it seems very odd that he should have told both A&O and RBS that he spent 5 hours a week on RBS premises on E&W activities.

248. It is worth expanding on this last point. Before the meeting with A&O, they had written to him (on 16 February 2012) with bullet-points of the matters that were to be discussed. The first of these was:

> "The nature and extent of your involvement in the activities of E&W and the fact that

> your E&W work appears to have been completed by you during the working day and on RBS premises."

The letter also said that A&O's investigation was a fact-finding one that did not constitute disciplinary action, "although it may lead to disciplinary action being commenced"; he had in fact already been placed on (paid) leave (paragraph 53 above). He therefore knew that he was going to be asked about his E&W activities on RBS premises during the working day, that this was a matter of potential concern, and that it might have serious disciplinary consequences. One would have expected him to have a very strong incentive not to overstate the extent of them, and if anything to downplay them; and certainly not to say he had been doing 5 hours a week if the true figure was about half that. Mr Walsh pointed out that the meeting with A&O was only 12 days after he had been arrested; but he said much the same to the RBS disciplinary meeting on 15 March 2012 which was almost a month later. Why did he not tell them, as he told me, that he was doing more than 10 hours a week anyway watching films at home, and that what he did at work was not needed to make up the 10 hours and was just 5 or 10 minutes chat here or there? I will come back to a possible answer to this question below.

249. Reverting to the chronology, on 30 April 2008 Mr Walsh replied to an e-mail from Ms Whitehouse in which he said:

> "Is it just bad luck that I have not got the rebate from the Walsh/Edinburgh as I know Jason received it?"

This refers to the tax refund claim for 2006/07, which was relatively small, but indicates that Mr Edinburgh had told Mr Walsh that he had his refund. There is nothing surprising in that, given their close relationship, but it is an indication of something that Mr Walsh was reluctant to admit to, which is that he and Mr Edinburgh from time to time discussed their tax affairs, at any rate in relation to E&W.

250. Otherwise there is little of relevance documented in 2008. The members did initially carry out some other E&W activities: they read articles on the internet, and bought books on the history of Mercedes; Mr Potter met them in April 2008 and promised to send them the script to review, which he did on 2 May 2008; and there was a trip to Monaco to see the Historic Grand Prix on 9 to 11 May 2008 (although Mr Walsh himself was in the event unable to go due to his mother-in-law being unwell). But after that there is very little in the record: no feedback from the members to Mr Potter on the script, or recommendations of actors they had seen (the ostensible justification for watching films), nor any other involvement in the actual process of producing the film. Mr Walsh's evidence is that Mr Foley went to the Goodwood Revival and Mr Sherrington to Ireland for the Gordon Bennett rally, and that he and the other members met after these events to discuss them and look at photographs; again there is nothing in the documents adduced in evidence showing the benefit of this research being fed back to Mr Potter.

251. Indeed after sending them the script in May 2008 there is little sign of Mr Potter involving them in any meaningful way with the progress of the film at all. He did in July suggest a meeting in September, either at Silverstone on 12 September or at Goodwood for the Goodwood Revival on 21 September "to discuss and plan the

partnership's business" but there is no evidence that either took place (apart from Mr Walsh's reference to Mr Foley going to the Goodwood Revival). He also invited Mr Edinburgh and Mr Walsh to a meeting on 16 December 2008 to discuss the partnership and sign accounts, and it appears they went as they did both sign the accounts for E&W for the year ended 30 November 2008 on 16 December 2008. But there is no evidence of what else was discussed at the meeting and there is nothing to suggest any of the other members attended; Mr Walsh does not in fact refer to it in his witness statement.

252. Mr Potter's failure to involve the members was confirmed by Mr Walsh in his own oral evidence, as follows:

> *"We were waiting. We were ready to feed up any stuff we had found from him. I do not think Mr Potter treated us very well here, because once he got us signed up, we were history, in my opinion. There were a couple of meetings since then, so Mr Potter did not really seek our input. We were ready for it, ready to give him observations about actors and actresses and other DVDs and TV programmes. We were certainly ready to feed that information up. However, Mr Potter and Mr Williams-Denton I do not think asked us once."*

253. Some time in early 2009 the members stopped doing the E&W activities. In oral evidence Mr Walsh said that he thought the original requirement was to do 10 hours a week for 6 months (which is indeed what Mr Williams-Denton's note of the meeting of 13 February 2008 had said (paragraph 176(2) above) – I was not addressed on whether this was in fact sufficient to satisfy the statutory requirements), and that it petered out after less than a year, perhaps after 10 months or maybe less. Since it started in March 2008, that would take the period to about January 2009. Again there is nothing in the documentary record that reflects a decision or recognition that it was no longer necessary, and Mr Walsh's reference to it petering out suggests a gradual falling away not a sudden stop.

The BIM meeting

254. Then on 23 February 2009 Mr Sherrington sent his e-mail to Mr Potter requesting a meeting to discuss major concerns, followed by his BIM e-mail on 25 February saying that the partners were requesting an urgent meeting, referring to grave concerns (paragraph 240 above). Mr Walsh's evidence in this action was that he did not know about the 23 February e-mail and was not party to any request for a meeting, and he said he thought Mr Sherrington deliberately avoided raising his concerns with him as he would have pulled the plug on the whole scheme. I do not accept this evidence. There is nothing in the e-mails in evidence to suggest that Mr Sherrington, or anyone else, was keeping anything from Mr Walsh. Thus for example, Mr Sherrington copied him into an e-mail of 9 March 2009 in relation to the proposed meeting with Mr Potter, as did Mr Williams-Denton on 9 March and Ms Murphy on 11 March. In any event it makes no sense. A meeting with Mr Potter was arranged for 12 March 2009, but at the last moment (late on 11 March) Ms Murphy, his PA, said that he would be unable to make it as he had to meet the crew. Mr Amin's immediate comment, copied to Mr Walsh along with the others, was:

> "this whole thing really stinks now….."

And Mr Sherrington's reaction was to e-mail Ms Murphy, again copied to Mr Walsh, saying:

> "Put yourself in our position, we have invested post tax £500,000, and have grave concerns regarding the investment and find we come second fiddle to a film crew in Swansea"

Evidently Mr Sherrington did not hold back on expressing his concerns to Mr Walsh. And in due course the meeting did go ahead (below), Mr Walsh was invited along with the others, and Mr Sherrington's concerns were raised, and there is no suggestion that Mr Walsh pulled the plug or suggested doing so. I therefore unhesitatingly reject Mr Walsh's suggestion that Mr Sherrington was deliberately avoiding raising concerns with him as he would have pulled the plug, as wholly unsupported by the contemporaneous material. The interesting thing however is why he said it: he could not explain it in cross-examination, but the obvious inference is that it was a not very subtle attempt to distance himself from the others. This is the first emergence of what became a theme of his evidence and its transparent falsity is an example of points that undermine the confidence I have in his evidence.

255. Another example is his evidence in relation to Mr Amin's e-mail saying that the "whole thing stinks". It is fairly self-evident what Mr Amin is referring to: Mr Sherrington had pressed for an urgent meeting because he had been reading the BIM which plainly indicated that watching films was not enough, and hence that the whole basis on which they had sought to justify the 10-hour requirement was wrong; Mr Potter had agreed to a meeting and had then cancelled it at the last minute. In those circumstances Mr Amin was obviously concerned that Mr Potter did not have an answer to Mr Sherrington's concerns, and that they would not receive the tax relief they had expected. But when this was put to Mr Walsh, he refused to accept the obvious, saying that he did not know what was in Mr Amin's mind.

256. The meeting (referred to as the BIM meeting) was rearranged for 18 March 2009 at the RBS offices. In preparation for the meeting Ms Murphy (on behalf of Mr Potter) sent to Mr Williams-Denton, and Mr Williams-Denton got Ms Mundy to send to the members, a 3-page list headed "Activity schedule" which detailed activities for each week from that commencing 3 December 2007 to date. These activities record such things as "Discussions about the script", "preliminary discussions about the budget for the film", "Monaco shoot – preparation/budgeting/attendance" and many others – they are the sort of activities that one would expect someone actively involved in the planning and production of a film to undertake.

257. Mr Walsh attended the meeting. His evidence for this action was that this activity list was a list of the activities that Mr Potter had been involved with and on which their investment was being spent; and that the purpose of this was for Mr Potter to demonstrate to the members of E&W that he was working behind the scenes on the Mercedes film.

258. I do not accept this. The meeting, as Mr Walsh accepted, was called because of Mr Sherrington's concerns about the BIM guidance. No-one had suggested that there was a quite different concern about Mr Potter not working on the film, or how he was spending their money (as again Mr Walsh accepted). Mr Hardwick submitted, and I agree, that the only coherent explanation for the Activity schedule was that it was

produced as a means of answering Mr Sherrington's concerns, that is as a list of activities that if necessary the members could be said to have been engaged on (as opposed to merely watching films and chatting about them which the BIM guidance indicated would not suffice). Not only was this the reason (and so far as the documents show the only reason) why the meeting was called, and why Mr Potter agreed to come up to London, but there are other indications that this is not simply a list of what Mr Potter had himself been doing.

259. The very first entry, for the week commencing 3 December 2007, is "Discussions with new Members about progress on the project to date." This is patently false: the "new Members" are presumably Messrs Foley, Sherrington, Amin and Elsom, but none of them had joined E&W in December 2007, and Mr Potter did not have discussions with them then. Nor indeed did he have discussions with Mr Edinburgh and Mr Walsh that week: Mr Walsh's own evidence is that he first met Mr Potter on 20 February 2008. That establishes beyond doubt that the Activity schedule is not a genuine list of Mr Potter's activities. It also raises the question why there should be this entry against 3 December 2007, and indeed why the Activity schedule should start that week. Although one cannot be sure, the most likely answer is to my mind as follows. Mr Potter had supplied the figures for the partners' share of losses for 2006/07 and 2007/08 on which they had based their claims for sideways loss relief. Those were based on tax calculations that he had done. These calculations were based on apportioning E&W's losses as shown in its accounts to the relevant tax years on a daily basis, and splitting the apportioned amounts among the relevant partners in accordance with their shares (paragraph 189(5) above). The relevant accounting periods for E&W were (i) 30 March 2007 to 30 November 2007, all of which was split between Mr Walsh (60%) and Mr Edinburgh (40%), and (ii) 1 December 2007 to 30 November 2008, which was split between all 6 members. That means that each of the new members had claimed losses based on an accounting period commencing on 1 December 2007. Under s. 103B ITA 2007, in order to avoid being a non-active partner, a partner had to do an average of 10 hours a week "during the relevant period". The relevant period is defined by statutory provisions of some complexity, on which I did not receive any submissions, but the upshot would appear to be, or at any rate it seems likely that Mr Potter concluded that it was, that the new partners had to have averaged the 10 hours a week from the commencement of the accounting period on 1 December 2007 (he may in fact have been wrong, but that does not affect the point). That seems to me the most plausible explanation of why he referred to the new Members in the week commencing 3 December 2007, and why the schedule starts from that date. But if that is right, it demonstrates that the schedule was not being produced to refer to what he was doing, but to assist the members in claiming the tax relief.

260. Nor does it stop there. Although Mr Walsh said in his witness statement that the Activity schedule was "entirely different to the Diaries", this is demonstrably not so. Mr Hardwick took me to the prosecution's Opening Note for the first E&W trial which contains an explanation as to how the diaries were generated, and although I had no other evidence on this, it was not suggested that that explanation was wrong. A number of ingredients were used to generate the diaries, one of which was this Activity schedule. That means that many of the activities listed on the schedule turn up verbatim in the diaries. Thus for example the entry in the Activity schedule for the week commencing 7 January 2008 was "Appointment of Anthony Waye (Executive

Producer of Bond Films) as a key executive on the team". That turns up in Mr Walsh's diary for 8 and 10 January 2008 as "Meeting to discuss the appointment of Anthony Waye (Executive Producer of Bond Films) as a key executive on the team", complete with the extra gap after the bracket. Similarly the entry on the Activity schedule for the week commencing 17 November 2008 is "Making an offer to a one of the selected potential directors", which turns up in Mr Walsh's diary for 28 November 2008 as "Meeting to discuss making an offer to a one of the selected potential directors" and for 4 December 2008 as "Discussions about making an offer to a one of the selected potential directors", in each case complete with the grammatical error.

261. It is therefore beyond doubt that the Activity schedule was in fact in due course used for the false diaries, that is to show HMRC what the members had purportedly been doing as active members. Given that the whole purpose of the meeting was to provide an answer to Mr Sherrington's concerns based on the BIM, that seems to me to support the inference that the Activity schedule was designed for the very purpose of providing a list of activities that the members could claim to have been doing.

262. One more piece of evidence points strongly in the same direction. The meeting was at 12. At 1.40 pm Mr Sherrington sent an e-mail to Mr Potter, copied to the other members (although he missed off Mr Elsom) in which he listed the key things to follow up from the meeting, of which the first two were:

> "1. Supporting paperwork
>
> 2. Provision of fund for tax consulting"

The second of these is, as Mr Hardwick submitted, likely to refer to getting together a fighting fund in case there were a challenge by HMRC. In that context, I think he is also right that the first of them refers to paperwork supporting the members' involvement in the listed activities.

263. I therefore reject the explanation given by Mr Walsh of the Activity schedule. I find it was produced to be used as the basis for the members to be able to claim, if necessary, that they had been fulfilling the 10-hour requirement without having to include time spent watching films and discussing them.

264. But this means that I also reject Mr Walsh's account of the meeting. He said that he attended the meeting, that he was only present at the start, that the purpose of the meeting was for Mr Potter to reassure the members that the money was being spent wisely, and that as soon as he heard that everything was on track, he did not see any point in staying and left. He also said that he was not aware that Mr Sherrington also had concerns about the 10-hour rule. Given my finding as to what the meeting was called for, and the purpose of the Activity schedule, it is impossible to accept this. I am unable to determine whether Mr Walsh did or did not stay for the whole of the meeting, but if, as he accepted, he was there at all, I think it inevitable that he would have realised what the purpose of the meeting was and what Mr Potter proposed to do about it. Nor can he say (as he frequently did in relation to later periods) that although the other members were anxious about receiving their expected tax refunds, he was not concerned as he had already received his: by the time of the meeting he had not received the large refund he was expecting for 2007/08, although he did

receive it shortly afterwards. I find that he did attend at least the start of the meeting, and that he not only appreciated the concerns that Mr Sherrington had expressed about watching films not being enough, but that he understood that Mr Potter was proposing that the Activity schedule be used to suggest the members had been more involved than they actually had been. It follows that his account in his witness statement is necessarily a false one; and it is not in my view one that can be explained as mere faulty recollection. I conclude that he has deliberately sought to distance himself from what he knew was a crucial meeting, crucial because it was the first time that it became apparent that Mr Potter was proposing that the solution to the BIM problem was that the members should lie about what they had actually been doing, and from which everything else in due course flowed.

The opening of the HMRC enquiry

265. By 31 March 2009 Mr Walsh had received a letter from HMRC confirming that on the basis of the figures in his tax return for 2007/08 he had overpaid tax of some £396,000, and he received payment of it on or around 10 April 2009. He had not however received a refund of some £55,000 which was calculated as overpaid for 2006/07, and when he met Mr Williams-Denton on 23 April 2009, the latter recorded one of Mr Walsh's objectives to be to get the enquiry which was holding this up completed and get the refund of £55,000.

266. Mr Edinburgh, however, who was expecting a refund for 2007/08 of some £250,000, had not received it. He knew that Mr Walsh had received his – Mr Walsh accepted in evidence that he had told Mr Edinburgh this, describing it as a "Eureka moment", and saying "I was very happy so I told the guys" – and he chased HMRC, only to be told that the partnership would be under enquiry and that this could take years to sort. He spoke to Ms Whitehouse who said that everyone had been made aware that she was expecting an enquiry and that Mr Walsh's pay out was due to human error. That made Mr Edinburgh irate, as he admitted in an e-mail; he was anxious about the refund, not least because he had earmarked it for "John's venture", this being a reference to a company owned by Mr Walsh's brother. Mr Walsh accepted that he knew that Mr Edinburgh had not got his refund and was anxious. This episode illustrates (again) that as one would expect Mr Walsh and Mr Edinburgh, close friends and the two original partners in E&W, did talk to each other about their tax refunds, or lack of them.

267. Then by letter dated 31 July 2009 HMRC wrote, in response to a letter chasing for Mr Amin's loss relief, that the Film Team had instructed that no repayments should be made in respect of E&W. That was followed on 14 August 2009 by a letter to Mr Amin opening an enquiry into his 2007/08 tax return and specifically into his claim for loss relief from E&W, and on 19 August 2009 by Ms Sibbald's letter to Mr Walsh opening an enquiry into his return for 2007/08 and specifically his loss relief claim (even though he had already received it), and similar letters to the other members. That was the start of the enquiries by HMRC which in due course led to the diaries being submitted (paragraphs 42 and 43 above).

268. I have already referred (paragraph 81(2) above) to Mr Walsh's shifting evidence about this letter. I place more weight on his admission in his prepared statement of 1 March 2013 that he was naturally concerned about the letter and contacted Mr Williams-Denton than his suggestion in these proceedings that he might not even

have read it. In any event he accepted in these proceedings that one of the other members called him, quite possibly when he was on holiday in Lanzarote, to tell him that the members of E&W had received letters from HMRC. I find that he knew that HMRC had opened an enquiry into E&W and written to the members generally, not just him, and that he did read the letter.

269. I also find that he appreciated that the position was a serious one. He maintained in these proceedings that he was not overly concerned because he had already received his refund of £396,000. But the letter makes it plain that HMRC are checking the return to ensure that it was correct, and in particular that the enquiry would cover the £931,283 loss relief claim in respect of E&W, and that HMRC "will let you know if I find something wrong". It went on to ask, in language that Mr Walsh accepted in cross-examination was not difficult to understand, for him to supply:

> "a full description of your activities as a member of the partnership"

and:

> "whatever documentary record exists of the time spent by you on these activities. If you have kept notes or any form of diary or time record, please let me see these".

It is obvious, and I find that Mr Walsh appreciated, that the reason why HMRC was asking for this information, was to check whether the members had fulfilled the 10-hour requirement. Mr Walsh knew perfectly well that the members had to fulfil this requirement to get the tax relief. I have already found that he appreciated that the purpose of the 18 March BIM meeting, demanded as a matter of urgency to address Mr Sherrington's grave and serious concerns, was to hear from Mr Potter how he proposed to deal with the point that it appeared watching films did not count. I think that he must have appreciated that if HMRC were not satisfied that the members had been carrying out sufficient activities to fulfil the 10-hour requirement then the tax relief would not be available. I cannot accept that in those circumstances he thought that he could take any real reassurance or comfort from the fact he had already received the £396,000, especially as he knew that Mr Edinburgh had not had his corresponding refund (and Ms Whitehouse had suggested to Mr Edinburgh, which I doubt Mr Edinburgh kept from him, that Mr Walsh might have been paid by mistake). I find that his admission in his prepared statement of 1 March 2013 that he was "naturally concerned" represents a truer picture than the one he gave me that he was "not concerned".

270. Indeed on 20 August 2009 Ms Whitehouse, who had received a copy of the letter of 19 August addressed to Mr Walsh, sent it to him by e-mail and said:

> "You have of course already had your refund in respect of the 2008 losses, and so their letter is effectively putting you on notice that you need to refund any tax which may be found owing at the end of the enquiry. This you will already have appreciated and I think your refund slipped through their net!
>
> HMRC will now correspond with Terry Potter to finalise matters."

Mr Walsh said in oral evidence that he was on holiday and probably did not see that. I accept that there is evidence that in general Mr Walsh was not diligent in reading his e-mails. But he certainly read some of them, and I find it difficult to believe that he

did not open and read this one, either on holiday if he had access to e-mails there, or after he returned if he did not. It was from his accountant; the subject-line was "HMRC enquiry"; he had been told by a fellow-member that HMRC had sent letters to the members of E&W; he had, I have found, read the letter and was concerned by it; and it is not difficult to pick out that this e-mail was dealing with the very issue he was concerned with. In any event, even if he did not read it, his accountant obviously thought that he already appreciated that if HMRC enquired into E&W and found that the tax relief was not properly allowable he would have to repay his refund. I find that he did appreciate that.

271. Mr Walsh did not reply to the letter himself. Despite the fact that he accepted in cross-examination that it would have been easy for him to send straightforward honest answers to the requests in the letter, to the effect that he had fulfilled the 10-hour requirement by meeting his fellow-members at 4.30 pm, going to the pub with them on Thursdays, and watching films and discussing them, that he did not have any documentary record, and had not kept notes or any form of diary or time record, I do not find it surprising that he did not try and draft his own response. It was obvious that the enquiry was a serious matter that required careful handling, and I think it was also obvious that it would make sense to co-ordinate the members' responses. This would still have been the case even if everyone's intention had been to send honest answers, and in itself I do not find it suspicious.

272. What Mr Walsh in fact did is speak to Mr Williams-Denton. Mr Walsh said that Mr Williams-Denton told him to leave it to him and Mr Potter. I accept that. It is consistent with what Mr Williams-Denton said in an e-mail of 24 August 2009 to Mr Sherrington, namely that he would work with Mr Potter and Ms Murphy. In practice, the lead on the response was, as I find everyone appreciated, to come from Mr Potter. This was what Ms Whitehouse, Mr Walsh's own accountant, had indicated in her e-mail of 20 August 2009 to Mr Walsh (paragraph 270 above); and said again on 25 August 2009 in another e-mail to Mr Walsh, copied to Mr Williams-Denton ("Neil...would you confirm that Terry Potter will respond on this please?"). It made obvious sense. He was the one who had devised the scheme; he was the accountant and former tax partner; he was the one who, according to Mr Walsh's evidence of what Mr Williams-Denton had said, had a good relationship with HMRC. It was obvious that even if Mr Williams-Denton felt an obligation to assist his clients that he had got into the E&W scheme, he would in practice be heavily reliant on Mr Potter for answers to the enquiry.

273. But in the circumstances there was another reason why everyone expected the response to come from Mr Potter. This was because of the concerns raised at the BIM meeting about whether the activities carried out by the members were such as to qualify for the 10-hour requirement. It was Mr Potter who had come to the meeting, and as I have found, suggested a way of answering those concerns through the Activity schedule. Now HMRC were probing the very issue which Mr Sherrington had been worried about. It was, I find, appreciated by the members, including Mr Walsh, that they would have to look to Mr Potter to provide the answers to deal with HMRC's enquiries. Mr Walsh was perfectly content, like the others, to allow him to get on with that. I accept that he had not studied the BIM question in the way that Mr Sherrington had: he was a trader, not an accountant or an analyst. I accept (as I have already referred to above) that he was in general content to leave matters to

professionals without second-guessing their advice. I accept that Mr Williams-Denton probably gave him the impression that Mr Potter knew what he was doing, and may well have reassured him that everything would be fine. There is evidence a bit later in the story that Mr Walsh was indeed confident that all would be well in the end (below). But I find, on the basis of the material I have already referred to, that Mr Walsh appreciated that by leaving the responses to Mr Potter, the likelihood was that Mr Potter would not tell HMRC the honest truth, that is that they had thought they could fulfil their 10-hour requirement by watching films, but would have to tell HMRC that they had been engaged in other activities that qualified. By leaving it all to Mr Potter therefore, Mr Walsh knew, as I find, that he would be attempting to mislead HMRC. He may have been confident that that would work; but if so, that was because he thought Mr Potter knew what he was doing, not because he thought Mr Potter was being frank and honest with HMRC.

274. Those conclusions are effectively enough to decide the knowledge issue against Mr Walsh. He did not need to have appreciated the precise detail of the way that Mr Potter would craft his responses. All he needed to appreciate, and on my findings he did, is that Mr Potter's responses to HMRC's enquiries would not be honest and truthful but would be an attempt to mislead by mis-stating the activities that he and the other members had been engaged in.

275. But I will continue through the narrative, to show how the remainder of the evidence is not only consistent with the conclusions I have come to, but reinforces them.

Initial response

276. HMRC's letters of 19 August 2009 had asked for responses by 29 September 2009. On 31 August 2009 Mr Williams-Denton sent an e-mail to Mr Potter chasing him saying they needed to catch up on Mercedes and the HMRC enquiries because there was a tight deadline.

277. On 4 September 2009 Mr Walsh called Ms Whitehouse to ask about his tax refund for 2006/07 which he had not received (see paragraph 265 above). She sent him an e-mail later that day, having spoken to a very helpful HMRC officer in the specialist Film Unit. Ms Whitehouse had argued that a refund could be made at any rate in relation to the non-film losses but added:

> "My concern is that the refund for 2008 which was repaid to you when it should have been withheld may be used to refuse the refund at this point."

She also said that she had asked the HMRC officer how long the enquiries were taking to finalise to which the answer was that she could not say, but that some of the early enquiries were "about 3 years (…and counting!)." I find that Mr Walsh probably read this e-mail, as having spoken to Ms Whitehouse he would have expected her to answer his queries. It illustrates not only that Mr Walsh was anxious about his 2006/07 refund, but also that he had been told by Ms Whitehouse (again) that her view was that HMRC should not have paid him the 2007/08 refund; it also makes it clear that the enquiry was not a formality but potentially a long process.

278. Mr Potter did not produce anything to send to HMRC until 16 September 2009 when Ms Murphy sent Mr Williams-Denton an e-mail saying that they were in the process

of collating information that members could use to respond but did not anticipate this being ready before 16 October 2009, and enclosing a draft holding letter for members to use. Mr Williams-Denton spoke to Mr Potter at length about this, and reported to the members in an e-mail the same day that he had categorically advised that it was precautionary and there was no downside to it. Ms Mundy then personalised the draft letter for each member by putting in their name and address, and as she put it "dispatched Neil off to London" with the letters to get them signed. Mr Walsh's letter is dated 21 September 2009. It is a very short letter of 6 lines, the substance of which is that he was in the process of collating the information that HMRC required but would be unlikely to get the information to them before 31 October 2009 (paragraph 43(2) above). It is difficult to accept that he did not read it when he signed it. He had been concerned about the letter from HMRC. He had been told that Mr Potter would be providing the response. Mr Williams-Denton had travelled down to London to get his signature on the letter. It is very short and on one page. One would have thought it the most natural thing to glance through it if only to see what Mr Potter was proposing he should say. I fully accept that busy people often sign documents without reading them through, and I have already said that I accept the evidence that Mr Walsh was in general trusting of advisers. But that is not the same as signing a very short letter without any attempt to see what it said. I think it probable that he did glance through it quickly, sufficient to understand the substance of it.

279. Mr Hardwick submitted that if he had done so, he would have appreciated that it was false as he personally was not collating any information at all. That may be strictly so, but I think that is to take too literal a view of the letter. As Mr Walsh said, it could be read as a reference to Mr Potter doing it on his behalf. But nevertheless it is instructive to consider what he thought Mr Potter was actually doing. Mr Potter had not asked him for any records of his activities, nor, if he had asked, would he have got an answer as Mr Walsh did not have any records. So what was Mr Potter supposedly collating?

280. There is an instructive exchange in cross-examination on this:

> *"Q. You knew there was no information to collate; you had no records?*
>
> *A. No, I did not … I did not know it to be contemporaneous. I could have collated information about the activities I did.*
>
> *Q. About your 200 films?*
>
> *A. Yes.*
>
> *Q. Someone was going to create a list of the films you ---*
>
> *A. There could have been, as I thought this would be, I thought the activity reports or diaries or whatever, as now the activity plan, that could have been a generic list of activities performed. I did not realise until I got to the police station that this was a ludicrous breakdown of hour and hour, minute and minute."*

281. This is revealing for a number of reasons:

(1) I do not accept that Mr Walsh ever expected there to be a list of the films he

had watched. He was never asked for such a list, he never created such a list and he would no doubt have found it difficult to do with any accuracy. In any event I find that he knew that a list of films would not suffice because he knew from the BIM meeting that watching films was not good enough. This is something that he has thought of in the witness box, not something that he has recalled.

(2) Mr Walsh says here, as he does elsewhere, that it was only when he was arrested that he saw the diaries for the first time. I will have to consider this question in due course, but for the present will assume that is true. But what is interesting is that the reason he says they are ludicrous is because they purport to record the members' activities to the nearest minute. That is indeed one of the more ludicrous falsities in the diaries.

(3) What he does not say here is that he did not think Mr Potter was drawing up a list of his activities at all. Instead what he says he expected is that there would be a "generic list of activities performed." But what did he expect to be on that list? It would not, for reasons already given, be film watching or chatting about films in the pub. I think the only plausible explanation is that he thought Mr Potter would be drawing up a list of activities that would satisfy the 10-hour requirement. That is why he was willing to leave it to Mr Potter to produce the list rather than ask him for details of what he had been doing: it was Mr Potter who knew what would satisfy the 10-hour requirement and what would not, and it was Mr Potter who had responded to Mr Sherrington's BIM concerns with the Activity schedule, and proposed, as I have found, that something along those lines be used if necessary. It had now proved necessary, and I find that Mr Walsh appreciated that the sort of generic activities that he expected Mr Potter to be producing would be along the lines of the Activity schedule. As such I find that he knew that the generic activities would be false ones.

Creation and submission of the diaries

282. The next stage was the creation of the diaries. On 6 October 2009 Ms Murphy sent Mr Edinburgh's "activity diary" in pdf form to Mr Williams-Denton, copying in Ms Mundy. On 7 October Ms Mundy sent it to Mr Edinburgh in an e-mail which said:

> "As discussed with Neil, please find attached the document which I understand you know what you are doing with!"

On 13 October, Mr Edinburgh sent it back to Mr Potter in an e-mail which read as follows:

> "As promised I have attached my working diary and activities for for the Mercedes project."

This charade was presumably intended to make it possible to suggest that it was Mr Edinburgh who had kept the diary and sent it to Mr Potter rather than Mr Potter who had created it.

283. This attempt to provide a false paper trail was not followed with the other members.

Instead on 26 October Ms Murphy simply sent Mr Williams-Denton Mr Sherrington's diary, and later the same day Mr Potter sent him the diaries for the other 5 members (including Mr Edinburgh's again).

284. Ms Mundy sent Mr Sherrington his diary on 2 November. Then on 5 November Ms Murphy sent separate e-mails to each of the members, copied to Mr Williams-Denton, attaching the relevant diary and a draft of a covering letter which it was suggested should be sent to HMRC with the diary, adding:

> "We recommend that you review your diary and check that it is accurate. If you are happy with your diary then please send it to HMRC or let us know if there are any discrepancies and we will update accordingly."

This was more window-dressing as Mr Potter knew the diaries were not accurate.

285. Mr Sherrington undoubtedly read his diary, as on 2 November he sent an e-mail to Mr Williams-Denton and Mr Potter with a number of detailed points on the diary. One of them was as follows:

> "5. In general, dates of meetings while I was on holiday (out of the UK)…….is that something they can easily prove (ie do they have access to immigration records etc)?"

It is noticeable that Mr Sherrington's concern was not whether the diary was accurate or not (it was obviously not) but whether "they" (evidently HMRC) could easily prove that it was false. Over the next few days, Mr Sherrington sent a number of other e-mails with queries on his diary: on 5 November raising again the question whether the tax-man could find out when he was out of the UK, on 7, 10 and 11 November raising the question whether the hours averaged 10 per week, and on 18 November with a list of mistakes he had found in the calculations. True to Mr Walsh's depiction of him, Mr Sherrington was obviously thorough and detailed in the way Mr Walsh was not.

286. Mr Foley also evidently read his diary as he was very uncomfortable with the proposal to submit it, as shown by an e-mail sent by him to Mr Sherrington on 6 November, which read:

> "Finally spoke to Neil … Put the question to him of what happens if I don't put diary thru and hes only concern was 'why would you do that'. Have asked him for definitive list of repurcusions/outcomes if I do/don't sign up. Said he will get back to me, but to be honest by the tone of the conversation and his standard it will be o.k I am sorely tempted to tear it all up and brewd for the next year about it…."

In fact Mr Foley never did submit his diary. His statement that Mr Williams-Denton's standard response was "it will be ok" tends to confirm something else said by Mr Walsh, namely that he reassured him everything would be fine. This e-mail is also incidentally one of the reasons (far from the only one) why I rejected Mr Hardwick's somewhat faint submission that Mr Williams-Denton was wrongly convicted (paragraph 214 above): he obviously knew the diaries were false and was here encouraging Mr Foley to submit his.

287. On 13 November Ms Mundy e-mailed the members other than Mr Sherrington

chasing them on the diaries as follows:

> "Kim sent to each of you your activity planners and other documentation over a week ago. Can I please ask you all to ensure that you check your Activity Planner asap – especially for times/dates when you were on Holiday or out of the Country on Business. Can you please advise Kim as a matter of priority where dates need to be amended as these planners need to be 100% correct and an average of 10 hours per week achieved?"

Mr Walsh was asked about this. He denied opening this e-mail or that of 5 November.

288. Mr Hardwick submitted that that denial is not credible. In the first E&W trial he had been considerably more equivocal, saying that he could not say whether he had seen an e-mail from 6 years before or not and could not remember. Moreover, he accepted that he did pass on holiday dates to Mr Williams-Denton. That I accept (see below) but it does not follow that he did so because he had read the e-mail. What does appear to be the case is that he did not respond in writing to either e-mail, and I am prepared to accept that he may not have opened them.

289. But I do not think it matters. The latter e-mail was sent on Friday 13 November 2009. The same afternoon Ms Mundy sent an e-mail to Messrs Edinburgh, Walsh, Amin and Foley (that is the remaining members at RBS, Mr Sherrington having left, and Mr Elsom never having been there) asking if they were around on Tuesday 17 November for a catch-up with Mr Williams-Denton; and on that day he came to London and met Messrs Edinburgh, Foley and Walsh (as he told Mr Sherrington in an e-mail on 18 November). No evidence was adduced before me about this meeting, but the obvious item on the agenda would have been the diaries, which were now overdue (the members' holding letters having indicated that the information would be provided by the end of October). There is evidence that tends to confirm that: that afternoon Ms Mundy e-mailed Ms Nilufer Hoare, who worked with Mr Potter, to the effect that Mr Edinburgh had confirmed that his Activity Planner was ok; since there is no e-mail from him to that effect, it is a reasonable likelihood that he told Mr Williams-Denton that at the meeting, and that Mr Williams-Denton passed it on to Ms Mundy. 2 days later, on 19 November, Mr Foley sent through his holiday dates to Ms Murphy asking her to amend his diary for those dates. Again the likelihood is that Mr Williams-Denton had asked him at the meeting to provide the dates so that his diary could be finalised.

290. In those circumstances it is also a reasonable likelihood that Mr Williams-Denton asked Mr Walsh the same question. That would explain Mr Walsh's recollection that he had provided his holiday dates to Mr Williams-Denton, although there is no e-mail to this effect. He had referred to this in his prepared statement of 1 March 2013 where he said:

> "I think I passed details of my holiday dates to Neil; I always took the first two weeks in August as leave plus a few days here and there throughout the year."

In oral evidence before me he said that he may have jokingly said that he had 2 weeks in Lanzarote in the summer and a week's ski-ing, something that he described as a "flippant comment." At the end of his evidence I asked him why he described this as a flippant comment, to which he said that he did not realise the gravitas of supplying

holiday dates, and that was why he did not send an e-mail; and when asked why he thought Mr Williams-Denton was asking him, said:

> *"Because if there was going to be some sort of production about activities, there would be – even though I thought week one would say "Watch a film, watch ten films read a book and do this", there would be week four whereby my activities would say nothing."*

In the light of these exchanges, I do not think it is necessary to resolve whether Mr Walsh opened the e-mail of 13 November or not. I find on the balance of probabilities that at the meeting of 17 November Mr Williams-Denton asked him for his dates, and that he gave him his regular holiday periods – unlike Mr Foley he did not need to check anything as he always took the same periods. I also find that he knew that he was being asked for the dates so that they could be taken account of in a document that was being produced for him about his activities, what he refers to as "some sort of production about activities". Even on his own evidence he understood that this was not just going to be a list of the sort of things he had done, but specify the activities week by week (as had indeed been done on the Activity schedule produced by Mr Potter for the BIM meeting). Since he had not been asked to detail his activities, even in a generic or broad way, this supports the conclusion that I have already come to that he was leaving it to Mr Potter to compile it for him as Mr Potter thought best. I have already rejected the suggestion that he thought it would refer to watching films, and I find that he knew that Mr Potter would not be referring to his watching films and chatting with his friends about them, but would be choosing activities to go in the list which would qualify for the 10-hour requirement. That as I have already said is enough to conclude that he knew that Mr Potter would not be producing an accurate account of his activities, even week by week, but making up a misleading one. That is so whether he actually opened the e-mail attaching his diary or not.

291. There was another meeting on 10 December 2009, attended by both Mr Williams-Denton and Mr Potter, and 4 of the members (Messrs Edinburgh, Walsh, Foley and Elsom). Mr Williams-Denton's notes of the meeting show that the first purpose of the meeting was to:

> "Discuss the activity reports and enquiry letters from HMRC."

Mr Walsh suggested in his witness statement that the reference to activity reports was not to the diaries but to the activities Mr Potter had been engaging in in relation to the film, and sought to maintain this position under cross-examination. That I do not accept: there is nothing to suggest that Mr Potter was producing reports of *his* activities, and in the context of the HMRC enquiry letters the obvious inference, and I find, is that Mr Williams-Denton was indeed referring to the diaries. Mr Walsh's reluctance to accept this is another example of seeking to distance himself from matters that were potentially damaging to his case. I have no evidence as to what was discussed about the diaries, but since Mr Walsh (along with Mr Amin and Mr Foley) had not yet submitted his diary, the probability is that Mr Williams-Denton was again encouraging them to do so.

292. The next relevant development was on 4 February 2010 when Ms Sibbald sent a chasing letter to Mr Walsh pressing for a response to her letter of 19 August 2009.

On 3 March 2010 Ms Mundy sent Mr Walsh an e-mail as follows:

> "With regards to the 'chaser' letter you received from HMRC about the LLP Enquiry, I have attached a letter to this email in response. Could you please print it off, sign it and return it to me asap as I have the supporting documents here (too large to send to you) which will need to be sent with the letter."

Mr Walsh said in his witness statement that as the documents had been sent before there was no reason why they could not have been sent again and that he assumed that Ms Mundy's intention was that he should not read the attachments before they were sent. That seems to me a fanciful suggestion. First, the previous e-mail sending the diary was from Ms Murphy, not from Ms Mundy (paragraph 284 above) and there is no reason to assume that just because one could send a large attachment, the other could also do so. That would presumably depend on some technical limitation such as the capacity of their respective servers. In fact Greystone had had a problem with their e-mails not long before. Second, it is very difficult to see why Ms Mundy would want him not to read the attachments. Her previous e-mail of 13 November 2009 (paragraph 287 above) had actually asked him to do just that. Third, she sent similarly worded e-mails both to Mr Foley and to Mr Amin immediately afterwards, so on this view she was deliberately keeping back the attachments from them as well. That seems even more implausible. There is no reason not to accept Ms Mundy's e-mail at face value. The fact that Mr Walsh came up with this far-fetched suggestion, and was reluctant in oral evidence to accept he was wrong, is another example of his attempts to distance himself as much as possible from everything to do with the creation and submission of the diaries.

293. Mr Walsh printed off, or got Mrs Panrucker to print off, the attached letter and sent it back to Ms Mundy, as is apparent from the fact that Ms Mundy e-mailed Ms Murphy on the afternoon of 4 March 2010 confirming that she had signed letters from him and Mr Amin. Mr Walsh's evidence was that he did not open Ms Mundy's e-mail until she telephoned him and prompted him to, but it was apparent from his oral evidence that he had no real recollection of this and was relying on the fact that he frequently did not open e-mails and her practice of telephoning him to get him to respond. It does not matter as, whether prompted or unprompted, he must have found the e-mail and the likelihood is that he read it, in which case he would have found the reference to her having large supporting documents to send with the letter. Indeed if, as he believes, she telephoned him to prompt him to sign and return the letter, the likelihood is that she would say something along the lines of needing him to do it so that it could be sent to HMRC with his "Activity Planner" (which was how she described the diaries). Moreover the letter itself is short, and even a quick glance at the first page shows that the first bullet point is as follows:

> "I enclose schedules which detail my activity as a member of the Partnership."

Mr Walsh claimed not to have read this, but I do not accept that he can now have any recollection whether he did or not. I prefer to rely on the inherent probabilities. The inherent probability is that when asked to sign a short letter to be sent to HMRC he at least scanned it quickly to see what he was signing. I find on the balance of probabilities that he did appreciate that this letter was the covering letter for the sending to HMRC of some form of schedule of his activities which had been prepared by Mr Potter to demonstrate that he had carried out activities that qualified for the 10-

hour requirement. That of course fits with his own description of what he thought was being produced ("some sort of production about activities" – paragraph 290 above).

294. Mr Walsh's evidence was that at this stage he had not opened and looked at the diaries. Mr Hardwick invited me to reject that and find that he had. I do not think I can properly conclude that he did (however much one may harbour doubts about it). It is I think quite possible that Mr Walsh was telling me the truth when he said that he did not see the actual diaries themselves until he saw them at Plumstead police station on 8 February 2012, and that he was then shocked by the ludicrous way in which they purported to record what he had been doing every day, with timings down to the last minute. He was adamant about that aspect of his evidence, and in the end I have not been persuaded that he is completely making that up.

295. But I should make it clear that that in no way undermines the conclusions that I have come to (i) that he appreciated that what was being sent to HMRC was some form of list or schedule of his activities prepared by Mr Potter to demonstrate that he had carried out activities that qualified for the 10-hour requirement (paragraph 293 above); and (ii) that he appreciated that Mr Potter's responses to HMRC's enquiries would not be honest and truthful but would be an attempt to mislead by mis-stating the activities that he and the other members had been engaged on (paragraph 274 above).

296. Ms Mundy put Mr Walsh's letter in an envelope with his diary and the Business Plan and sent it to HMRC on 4 March 2010. That effectively marks the stage at which the attempt to mislead HMRC was carried out. I can take the remaining matters more quickly. It is not necessary to detail the steps by which the HMRC enquiry proceeded: I have set out the basic chronology already (paragraph 43 above). I will simply consider some of the other points that were dealt with in evidence and submissions.

March to July 2010

297. The next letter from Mr Walsh to HMRC (now to Mr Condie) was dated 24 March 2010 (paragraph 43(6) above). It had been drafted by Mr Potter, and sent by Ms Mundy on 23 March 2010 to Mr Walsh with a request to him to print it off, sign it and return it, which he did. It includes as the first item in a list of responses to Mr Condie's requests:

> "I recorded my activity in a format provided to me by the designated members of the LLP."

As before, I think it probable that Mr Walsh would have looked at this letter when signing it and appreciated that this is what it said. It was to his knowledge quite untrue.

298. On 9 April 2010, Mr Williams-Denton e-mailed Mr Potter saying that they needed a communication update to the partners, adding:

> "All are getting worried."

He then e-mailed him again, saying

> "we really need to chase HMRC for jason."

It is apparent that Mr Edinburgh in particular was getting frustrated at what he saw as Mr Condie's lack of response. On 19 April he told Ms Hoare (who had explained that they had been sending chasing faxes to Mr Condie but HMRC did not normally acknowledge faxes):

> "You've got to be joking.
>
> > We have no record of them receiving a fax and we are no longer calling them. Is this really the best way to go about getting my money back. The lack of urgency being displayed is mind blowing. Tell Terry from me this is unexceptable and I request we go back to calling him on a daily basis."

Mr Walsh accepted in evidence that Mr Edinburgh was not a man who hides his feelings and that he would have shared his concerns with Mr Walsh. He suggested however that he was not at all interested in Mr Edinburgh's tax affairs. I do not accept that, for two reasons. First, Mr Edinburgh had been proposing to use his refund to invest in Mr Walsh's brother's business, and one would have thought Mr Walsh would be interested in the prospects of his refund being paid for that, if no other, reason. Second, he cannot have been unaware that if Mr Edinburgh was refused the refund because it was disallowed by HMRC, there is no reason why they should not refuse relief to him equally, with the result that not only would he lose the refunds for the other tax years he had not had, but he would also be at risk of having to repay the refund he had had. I do not believe he was so ignorant as to the risks to him personally as not to have any interest in the outcome of the enquiry.

299. Mr Condie's next round of letters was sent on 6 and 7 May 2010 (paragraph 43(7) above). This asked a number of detailed and probing questions, including asking to see the underlying records and supporting material for the diaries and the format for the official recording system. Sefton Potter got Mr Condie to fax them a copy of his letter to Mr Edinburgh, which Ms Hoare e-mailed to Mr Edinburgh, copying in Mr Williams-Denton, on 10 May. Mr Williams-Denton replied to Mr Potter, saying:

> "we need to action as a mater of priority. What is the strategy?"

Mr Potter replied that they were already working on a reply.

300. There is therefore evidence, and I find, that by this stage at least some of the members were getting worried, initially at the lack of response from Mr Condie and then at the questions he asked when he did respond. It was evident that he was not going to simply accept the diaries as proof that they had complied with the 10-hour requirement, but would continue to probe. Mr Walsh himself professed to be unconcerned, and indeed on 25 May 2010 Mr Foley responded to an e-mail from Mr Sherrington asking when "the northerner" (ie Mr Williams-Denton) was coming in, as follows:

> "Came in last week, didn't speak to me tho… guess he realises he wont be getting another penny from me… nuts and bolts tho apparently Terry still convinced all is in order (he was a Cannes film festival last week) and will be sending responses off this week. Vinny having spoke to Neil is still of the opinion all will be fine!"

This indicates a number of things. First, that Mr Foley must have made clear to Mr Williams-Denton that he would not be investing through him again, no doubt because he had lost faith in his schemes. Second, that Mr Williams-Denton had given some form of reassurance to Mr Walsh, although it is likely (as Mr Walsh accepted) that all he was doing was relaying what Mr Potter had said. Third, Mr Walsh had obviously spoken to Mr Foley and told him he thought it would be fine, but Mr Foley (and I infer Mr Sherrington) appears to have been much more doubtful. Although Mr Walsh was reluctant to accept this, it would have been surprising if Mr Foley had not said something to Mr Walsh indicating that he was nothing like as optimistic as him.

301. One of the other questions raised by Mr Condie in this round of letters was whether there were really no notes of the meetings. He expressed the view that that was a highly unusual way to do business and added:

> "If you had all been in the partnership premises every day working side by side, I could have seen a more casual approach being possible, but for this partnership, with this membership, the failure to record what you discussed seems highly unusual."

Mr Sherrington, who, unlike Mr Walsh, evidently did read the HMRC letters with care, picked up on this point in an e-mail to Mr Potter and Mr Williams-Denton of 17 May 2010 in which he said:

> "Just a suggestion regarding question five, is it worth noting to the HMRC that the majority of partners did actually sit together side by side during the day (see the question), thereby negating his concerns in question five?"

This was picked up by Mr Potter in the response he drafted. He had decided that rather than everyone sending the same response at the same time, he would get Mr Sherrington to respond first, and see what Mr Condie's next move was before drafting a response for Mr Edinburgh and so on. In the response he drafted for Mr Sherrington (dated 10 June 2010, but actually sent rather later – Mr Condie received it on 29 June) he included the following:

> "1. I should point out that I worked in the same building as my fellow members of the LLP, and so many meetings, discussions and communications took place on an informal and impromptu basis…
>
> 5. I can confirm that I did work in the same premises as the other members every day, working side by side and so I assume you can now accept the approach that we all took to our involvement in the LLP's business."

As will appear, this suggestion of meetings and discussions at work later assumed considerable significance.

302. Mr Sherrington was in regular e-mail contact with Mr Foley. He was not overly impressed with the letter Mr Potter had drafted, e-mailing Mr Foley on 21 June 2010 as follows:

> "Actually just read it……it took weeks to write that? If that is the effort that Terry puts into those questions, either, 1) He is way smarter than anyone I have ever met, and it will all fall into place, or 2) We are fucked."

Mr Foley was equally unimpressed, replying:

> "As ever seems sooo lacksydaisical about the whole thing…."

Mr Walsh made the point that he had no ongoing contact with Mr Sherrington after he had moved to Australia. Mr Foley however was a very good friend of his and was still working a few feet away from him. Mr Walsh alluded to the fact that Mr Foley later had a breakdown, and suggested he was not talking to him either, but although it is not necessary to make any definite finding to this effect, I would be surprised if Mr Foley did not make his views known to Mr Walsh. He certainly does not appear to have been reticent in expressing his views in his e-mails to Mr Sherrington.

303. Mr Condie's next letter to Mr Sherrington came on 5 July 2010. This pointed out that some of the discussions (ie those recorded in the diaries) were lengthy and frequent, there being some weeks with meetings substantially in excess of an hour on all 5 working days, and asked:

> "Did you and your partners seek permission from your employer to devote your time on these days to the business of the LLP?"

This was the first time this issue had been raised.

304. Mr Potter's decision to use Mr Sherrington to respond first meant that the partners were now at different stages of the process. Mr Edinburgh decided to try and co-ordinate matters as he told Mr Sherrington in an e-mail of 14 July, adding:

> "Everyone seems to be at different stages in the process and it feels like with the wording in the HMRC letters we need to try a little harder to resolve this."

The upshot of that was a conference call with Mr Potter at 5 pm on 20 July. Mr Walsh claimed in his witness statement that e-mails setting up the call would have passed him by, and that he did not recall taking part; but in fact Ms Mundy had circulated an e-mail on 15 July suggesting the date and time and Mr Walsh had replied within the hour saying that it worked for him. There is nothing in the documentary record suggesting that he did not participate, and I conclude that it is probable that he did.

305. The only note of the call is in an e-mail from Mr Williams-Denton (who had not been on the call) to Ms Mundy relaying what Mr Edinburgh had told him that same evening. Mr Edinburgh had reported that Mr Potter was calm and spoke with his usual tone of confidence; he had asked Mr Potter what if HMRC simply thanked them for the information and refused the relief, to which Mr Potter's reply was:

> "that would be good as they would present to the commissioners with the finished product and diaries and detail that you all work together…"

That indicates not only that Mr Potter treated the possibility of HMRC rejecting the claim for relief as a real one, but also that Mr Potter again proposed relying on the diaries to establish the claim. In the light of my findings above, this would not have been news to Mr Walsh (even if he had not actually looked at his diary and thought it was done week by week rather than to the minute). But I do not think he can have really been so unconcerned as he claimed to be, when it would have been obvious that

at least Mr Edinburgh and Mr Foley were having real concerns, and when Mr Potter did not suggest that HMRC refusing the relief was out of the question; indeed he cautioned the members against speaking to HMRC:

> "especially Mr condie who although appears nice is like a member of the gustapo".

306. Moreover Mr Edinburgh's concerns cannot have been helped by an e-mail from Mr Sherrington to Mr Foley, which Mr Foley forwarded to Mr Edinburgh shortly before the call. (Mr Hardwick suggested this might have been Mr Foley's e-mail but I think it clear that it was Mr Sherrington's). Mr Sherrington could not make the call but wrote:

> "Terry needs to stop and spend some real time and effort to directly engage with HMRC and use shock / awe tactics (in terms providing them lots of relevant information – even if this means he needs to recreate documents etc). The one page answers to two page questions is pathetic, and makes the pship look mickey mouse…is a easy target for saying No to. We have to show the HMRC that we were a real film pship etc. Remember we have no funds left in the pship to fight this at tribunals etc.
>
> So far, lack of detail in his answers to HMRC will be the reason we will fail."

It is likely, and I find, that Mr Edinburgh would have passed on the gist of this during the call. I find that even if Mr Walsh was himself less anxious about the outcome, he cannot have been ignorant that most of the other members were by now very far from confident.

July to December 2010

307. Mr Potter suffered a personal tragedy on 28 July 2010 when his 9-year old daughter lost her life in a white water rafting accident in Turkey. The result was that there was a considerable delay before he could provide further responses to the HMRC letters. The members were understandably patient in the circumstances, but by October were getting frustrated, and Mr Potter agreed to meet them on 19 October. Mr Walsh attended. He claimed in his witness statement that he only attended briefly, that he was in and out of the meeting because he was busy with work and that he did not hear any discussion about the HMRC enquiry save for a comment from Mr Potter that he was speaking with Mr Condie. I do not think he can now remember whether he was in and out of the meeting or not, and since the entire purpose of the meeting was how to handle the HMRC enquiry, I do not accept that he heard very little about it. Indeed there is a list of 5 questions prepared for the meeting (quite possibly by Mr Sherrington who attended by telephone and had certainly sent some questions through), and they all concern the HMRC enquiry process, starting with:

> "Please provide a general update as to where the enquiry process is at present?"

Mr Walsh by his own account attended enough of the meeting to form the impression that Mr Potter had been hard hit by his daughter's death and was a shadow of his former self. He claimed not to be interested in the meeting, but again I do not accept this. He was interested enough to confirm his attendance in the first place and as I have already said I do not believe he was so ignorant of the risks involved in the enquiry as to have no concern about the outcome. He had in May thought that

everything would be fine (paragraph 300 above), but that had been on the basis of Mr Williams-Denton relaying what Mr Potter had said; but if he thought that Mr Potter had been badly affected by his loss, that could hardly have given him confidence about the likely outcome of the enquiry, given that the members were entirely reliant on him for their responses to HMRC's questions.

308. After the meeting Mr Potter drafted a letter for Mr Sherrington to respond to Mr Condie's of 5 July 2010 (paragraph 303 above). That had asked whether he had sought permission from his employer. The answer, in a letter signed by Mr Sherrington, was:

> "I confirm that I did seek permission from my employer to devote time to the trade of the LLP and such permission was granted. We regularly used the facilities of our employer including meeting rooms…"

The letter is undated but Mr Condie had received it at the latest by 15 November when he replied asking to see evidence of him having sought permission, and who at his employer he could contact to verify the information.

309. The tactic of using Mr Sherrington for replies and holding off with the others meant that the others were not supplying the information Mr Condie had requested. In November 2010 he therefore resorted to using formal powers and sent each of Messrs Edinburgh, Foley, Elsom and Walsh a formal notice to produce documents. Mr Walsh's was dated 17 November 2010 (paragraph 43(10) above). I have already concluded (paragraph 87(9) above) that he read this letter, at least to a certain extent, and that I do not accept his evidence to the contrary. The letter had a prominent heading in bold underneath E&W's name which read **"Notice to provide information"**. I find that Mr Walsh would have seen that and would have appreciated that this was a formal document which was taking the enquiry to a new level.

310. On 18 November 2010 Ms Whitehouse sent him an e-mail about a letter he had received from Mr Condie dated 3 November 2010 in his capacity as nominated partner. This is one e-mail that it is clear Mr Walsh did read (as he accepted), as there are two further e-mails that morning from him to Ms Mundy in the same chain. Ms Whitehouse's e-mail was hardly reassuring. She said that it would seem that the inspector was losing patience with the lack of response, and that he was threatening the issue of a formal notice (he had not yet done this in relation to the partnership enquiry, and I suspect she did not yet know that he had just done it in relation to the enquiry into Mr Walsh personally). She explained that that entitled him to levy a penalty equal to the amount of tax which he reasonably believed to be at stake ("i.e a finger in the air estimate") which the Collector would then seek to recover. She said it would be very unsettling for him to be on the receiving end of the ensuing correspondence. In the following e-mail exchanges Mr Walsh said to Ms Mundy:

> "Looks to me that he has no idea of how to end this and the worry would be that he just puts his size 12 boots on and just says NOOOOO !!!!!"

Mr Walsh says that this was just his attempt at humour and did not indicate that he was really worried; but even as an attempt at humour it shows that he appreciated that there was a real risk that Mr Condie would refuse the relief.

311. On 8 December Ms Whitehouse e-mailed Mr Walsh to say that she had spoken to Ms Mundy about the HMRC letter (who said she had passed it on to Mr Potter), and would check again at the end of the week:

> "but the only real task I can undertake on this is to nag on your behalf!"

By 14 December Ms Mundy was telling Ms Murphy that she was being chased on a daily basis for responses both for Mr Walsh in his capacity as nominated partner and personally. None of this suggests blithe unconcern on Mr Walsh's part.

312. Mr Potter produced a draft response for Mr Walsh (in his personal capacity) on 14 December 2010 and it was sent by Ms Murphy to Ms Mundy who forwarded it to him saying:

> "If you decide that the attached is acceptable to you can I suggest you sign it and pass it to Neil…"

Mr Walsh did sign it. It is a one-page letter. I think it likely that he would have read it when he signed it – he had been told that matters were getting more serious, and by his own account the last time he had seen Mr Potter he thought he had been badly affected by his loss. It would have been the obvious thing to do to see what Mr Potter had drafted for him. I find that he probably did read it, at least quickly. If he had done so he would have known that the first two answers were straightforward lies. They included the following:

> "1. …I did from time to time make hard copy notes on odd pieces of paper of the time I devoted to the LLP's trade, but I did not retain such paper once the information has been entered into the computer.
>
> 2. The records were maintained on Microsoft Word."

I find it probable that Mr Walsh signed this letter knowing it was untrue.

The query about whether the members had their employer's permission

313. Mr Potter also drafted the next response for Mr Sherrington. Mr Condie's last letter to him of 15 November 2010 had asked for evidence of the process of seeking permission (paragraph 308 above). Mr Potter's draft response had two alternatives as follows:

> "a) *[I did get permission from my employer but this was in a verbal form. If you wish to obtain confirmation of this please contact …….]
>
> b) *[I enclose a copy of a letter from my employer confirming permission.]"

It was sent by Ms Murphy to Ms Mundy on 15 December 2010, asking her to circulate it to all members for discussion.

314. That led to an extensive discussion by e-mail about how to answer this question. Mr Walsh was copied into these e-mails. They start with one from Ms Mundy to all the members on 15 December forwarding Ms Murphy's e-mail. Mr Walsh certainly opened that e-mail as he replied to it the next day – she had not only attached the draft letter for Mr Sherrington but another one for him (in his capacity as nominated

partner), and he replied that he had signed it and it was on its way. That does not establish that he opened the other attachment, but since both Ms Murphy had suggested it be circulated "for discussion" and Ms Mundy had reiterated this ("up for discussion?"), it would seem surprising if he did not, although Mr Walsh did not accept this.

315. The discussion that followed was as follows:

(1) On 20 December 2010 Mr Sherrington said he would prefer choice (a) but queried whose name they would be putting forward. He suggested Mr Amin.

(2) On 4 January 2011 he chased for an answer and said if he didn't hear he would put Mr Amin.

(3) Mr Amin replied on 5 January that his preference was not to use his name. He said he saw no reason why they needed permission to use a spare office outside of work hours and added:

> "We should be clear that not all meetings were held here, just the odd one."

(4) Mr Potter (who was copied in) asked if they could quote exactly what Mr Amin said. But Mr Sherrington pointed out that the problem with that was that the next question would be where most of the meetings took place, to which he did not think they had an answer. He added:

> "If we want the planning to be successful, we are going to have to stick to the story that our meetings were held at work, were we all (bar one of us) sit close together, on a ad hoc basis, and regularly after work hours. No permission was required as it did not interfere with our work, and we were all senior enough (ie self monitored) not to need permission for such activities."

He suggested a reply saying they held nearly all their meetings after work hours with some important but ad hoc meetings during breaks.

(5) Mr Amin came back with:

> "I think going down this route opens us to the question of running a business at work, for which there would be further questions (and we did not do)…."

(6) Mr Sherrington then suggested a telephone call, saying:

> "We are in a pship, and if the partners go in different directions with answers, we should not be surprised to see the planning fail for all partners."

(7) The call took place on 5 January 2011. Mr Sherrington followed it up with an e-mail saying he had looked back at previous answers, and quoted the undated letter he had sent after the meeting with Mr Potter (paragraph 308 above) where he had said that he did have the employer's permission. He therefore suggested that an answer be given that there was no evidence of his having sought permission:

> "as it was a verbal discussion with the now redundant ex head of equities."

(8) Mr Foley replied the same day:

> "Havnt spoken to Assad yet but Vin and Jason agree with what you say at the bottom mate, believe they have been trying to get a hold of Terry so maybe hold fire for today."

(9) Mr Potter was still on holiday and suggested they speak when he got back on 10 January. On 11 January he sent a draft: this had Mr Sherrington saying that the only person he would have needed to seek permission from was Mr Amin. But on 12 January Mr Amin said he had made it clear he did not want his name used, and would reply to that effect in his response.

(10) Mr Sherrington therefore proposed that they stick with what he had written the previous week (referring to a verbal discussion with the ex head of equities). Mr Amin was happy with that, and although Mr Potter tried to get them to use his draft, the letter eventually sent (dated 12 January 2011) read as follows:

> "Permission was given in a verbal discussion with the now redundant ex head of equities. Although, I should emphasise that in my opinion I did not need the permission of my Employer to carry on the trading activities of the LLP."

316. This exchange is revealing. It shows that Mr Sherrington was very alive to the potential dangers of different members saying different things – hence the need to "stick to the story". It strongly suggests that the "story" that the meetings were held at work was just that – a fiction. Mr Amin's comments that there was just the odd meeting held at work, and that they were not running a business there, seem more likely to be true. It shows that Mr Amin was becoming more nervous about the lies being told to HMRC. This is something that is apparent from other evidence: in an e-mail of 27 October 2010 he had asked that he see any of the responses that went back to HMRC on his behalf as he wanted to ensure they were factually accurate, and on the next day said that given the investigation he wanted to ensure that everything from his end was "properly representative".

317. Most significantly for present purposes it shows that Mr Walsh was involved in this discussion, as there is no reason to doubt Mr Foley's report on 5 January that he and Mr Edinburgh agreed with Mr Sherrington's draft, and to do that he must have at least looked at that e-mail. What is more it shows that Mr Walsh was content for Mr Sherrington to put forward the story that they had permission from the ex Head of Equities, a Mr Michael Baptista. But it is obvious that Mr Sherrington did not in fact have permission from Mr Baptista, as otherwise he would have said so right at the outset, whereas his first instinct was to suggest that he had permission from Mr Amin, and his second was to suggest that no permission was required. He came up with the idea of using Mr Baptista (although careful not to name him) to get round the twin problems that Mr Amin was adamant that his name should not be used (and threatened that if it was, he would tell HMRC) and that Mr Sherrington had already said that he did have permission. I find that it was a deliberate lie to refer to Mr Baptista having given permission. Mr Walsh, who had said nothing about this in his witness statement, maintained in oral evidence that he and the others thought that Mr Baptista, who was Mr Sherrington's closest friend, had given permission, but I cannot believe that he really did. Mr Sherrington is not in his e-mails giving the impression that he really did have permission, but that this is a convenient untruth to

tell given the other constraining factors. I find that Mr Walsh knew that Mr Sherrington was proposing to lie to HMRC about this.

318. I also consider that this exchange provides an explanation as to why Mr Walsh, contrary to what might have been thought to have been in his interests, told A&O and RBS that he had spent 5 hours a week on E&W business at the RBS premises (paragraph 248 above). I have already found – and Mr Amin's e-mail confirms – that it is unlikely that he was doing that many hours at the RBS offices, but this e-mail exchange shows that Mr Sherrington had said that the meetings did take place there. At the time of the meetings with A&O and RBS, Mr Walsh had not admitted that the diaries were false, and (as I suggest below) I think he was planning at that stage to try and defend them, or at least keep this open as an option. If he was to do that, he needed to accept that they had had regular meetings, and as Mr Sherrington said, they could not point to anywhere else much. Hence I think Mr Walsh's acceptance of the 5 hour figure. But that suggests that he was alive to the points made by Mr Sherrington in this exchange, and aware that Mr Sherrington was proposing to lie about this as well.

The electronic version of the diaries

319. For some time Mr Condie had been pressing the members for an electronic version of the diaries, and a requirement to provide it was included in the formal notices to produce documents. The question of how to deal with this was discussed (a) in a conference call with Mr Potter on 25 January 2011 and (b) at a meeting with him on 17 February 2011. Mr Walsh was present for both. For the conference call, he responded "Yes" (within 3 minutes) to the e-mail from Ms Mundy asking if he was available. That does not suggest that he was, as he claimed in his witness statement, oblivious to the need for electronic diaries. There is no evidence of what was said, but it is clear that the topic of discussion was the need for electronic diaries to be submitted. For the meeting, he had accepted in his prepared statement of 1 March 2013 that:

> "Terry brought in a memory stick which he said contained electronic copies of our activity records."

There is no record of the meeting, but Mr Walsh accepted that the other members all attended, and that it was agreed that Mr Edinburgh would be the lead, and would submit the electronic version. However there was a hitch as both Mr Foley and Mr Amin were insistent that electronic versions of their diaries not be submitted. That meant that their diaries had to be taken off, which in due course was done before the diaries were submitted (in the form of a CD) under cover of a letter from Mr Edinburgh dated 21 March 2011. Mr Walsh did not accept that Mr Foley and Mr Amin had made their position clear at the meeting – this was another meeting that he claimed to have been in and out of – but at the very least I think they must have reserved their position at the meeting as otherwise there was no reason why the memory stick could not be submitted straight away. In any event Mr Foley had never submitted his paper copy, so it was obvious that he would not have wanted to submit an electronic copy. Mr Amin was, as I have referred to, becoming much more circumspect about what was sent to HMRC in his name. I think it likely that they both made their position clear at the meeting. The whole purpose of the meeting was to discuss the electronic diaries and I do not accept that Mr Walsh paid as little

attention to what was going on as he suggested. In any event he accepted that he did appreciate that Mr Edinburgh was going to take the lead and was going to be submitting an electronic version of the activity reports, including his. In the light of my earlier conclusions, even if he had not seen the actual diary with its entries timed to the minute, he knew enough to know that those activity reports would be misleading.

320. That concludes my review of the history up to Mr Walsh's arrest on 8 February 2012.

Mr Walsh's account of the diaries in 2012

321. The only other matter to which it is helpful to refer is the way that Mr Walsh referred to the diaries in his meetings with A&O and RBS in 2012. In the A&O meeting, he declined, on advice, to answer any questions about the diaries. In the disciplinary hearing with RBS on 15 March 2012, he again said that he had to be careful and was told that if he did not want to answer that was fine. But in fact he did give some answers. I have already referred to these above (paragraph 89(1)-(6)), where I concluded that they were clearly intended to give the impression that, give or take a few clerical errors, the diaries were reflective of work that the members actually carried out. That I think can only be explained by the fact that at this stage Mr Walsh was intending to defend the diaries as broadly true, or at least keep that open as an option. That in itself speaks volumes as to his willingness to mislead.

Conclusion

322. For the reasons I have given, I resolve the knowledge issue against Mr Walsh. It is accepted that in those circumstances he has no claim for his remaining losses, being his criminal defence costs and his loss of employment earnings. It is not necessary to seek to assess what those losses would have been had I come to a different conclusion. Nor do I propose to consider whether Mr Williams-Denton was negligent, or deceitful, in the particular respects claimed by Mr Walsh, or whether Greystone would be vicariously liable if he were. To do so would lengthen this judgment still further, and in circumstances where I have come to a very clear view of the facts on the knowledge issue, I do not think it would be sufficiently useful to justify doing so.

323. It follows that none of Mr Walsh's claims succeed. I am well aware that the consequences for him will be disastrous. In a very broad sense he is right that none of the very significant losses he has suffered would have happened if he had never met Mr Williams-Denton and to that extent it is unsurprising that he blames him for everything. But I have not found Mr Williams-Denton to have been guilty of deceit or deliberate concealment; and although the question whether he was negligent or not is much more open, I have not found it necessary to resolve as all the claims in relation to the selling of the investments are barred by limitation; and the claims for his losses arising out of the enquiry are barred by what I have found to be Mr Walsh's own willingness to go along with false information being submitted to HMRC.

324. I will therefore dismiss the action. As the judgment illustrates, in order to resolve the issues it was necessary to scrutinise the facts over many years with great care, and I am grateful to counsel for all the assistance they gave me in doing so.