Tax Schemes and Tax Counsel: Can the Investor Sue in Relation to the Opinion?

Simon Howarth KC

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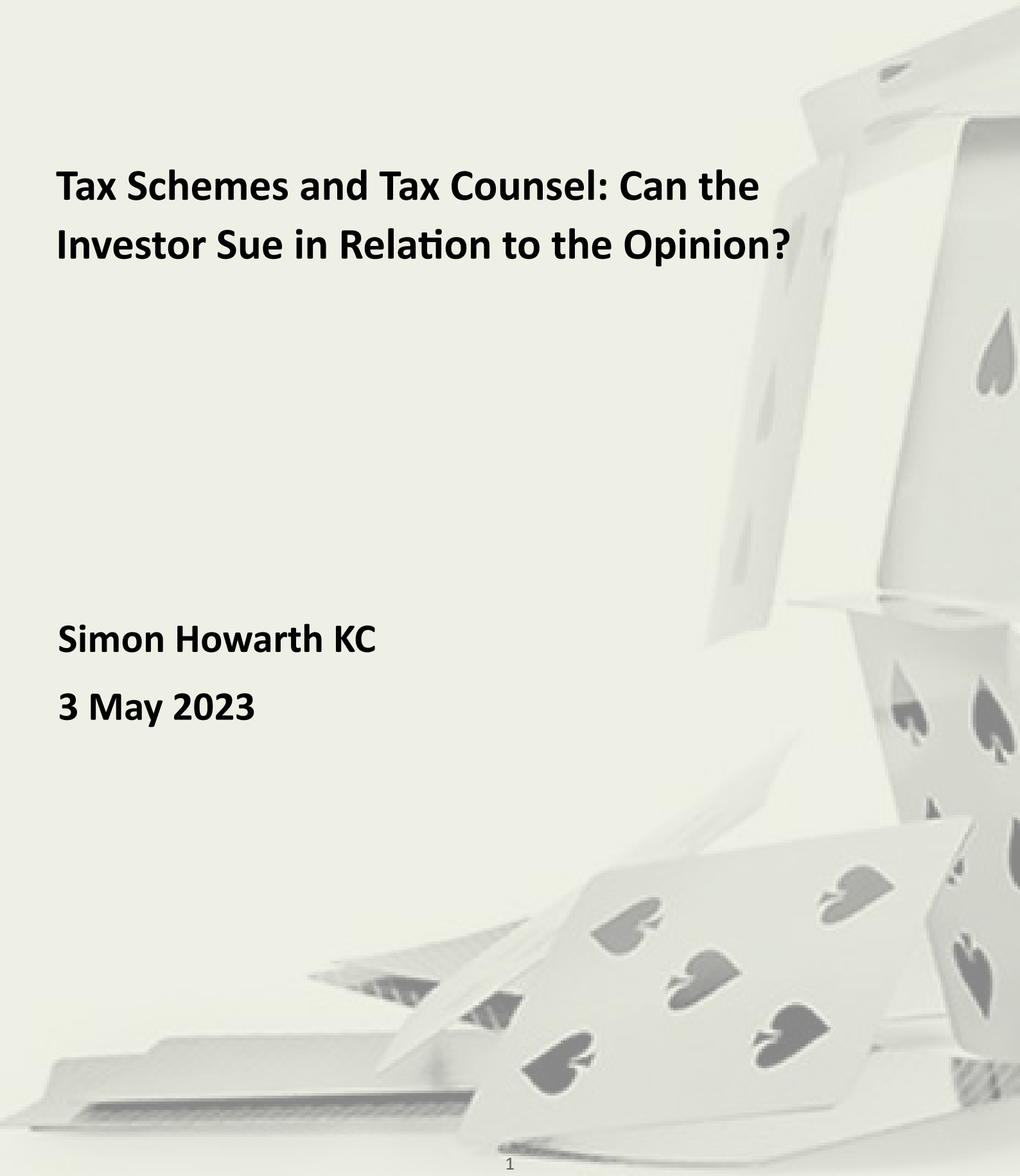

1. Film schemes and other tax efficient investments remain controversial, politically and legally. Such schemes are almost invariably marketed on the basis that their efficacy is supported by an eminent member of the bar, and that endorsement often plays an important role in tempting investors to participate. Often, HMRC takes a different view from that expressed by counsel. The Court of Appeal has handed down an important judgment which clarifies whether tax counsel can be sued by a disappointed investor.

2. The case is **McLean v Thornhill** [2023] EWCA Civ 466. The CA dismissed an appeal against the decision of Zacaroli J ([2022] EWHC 457 (Ch)) holding that the Defendant tax silk was not liable to investors in a tax scheme, operated by entities known collectively as Scotts.

3. The leading judgment was given by Simler LJ, with whom Carr LJ agreed, adding a short judgment of her own. Flaux C agreed with both judgments. The judgment of Simler LJ is lengthy and repays careful study: what follows is not an exhaustive analysis, but a consideration of the main points of interest.

4. The essential facts can be summarised very shortly as follows:

   (1) The Claimants were all wealthy and sophisticated investors.
   (2) The Claimants all contracted with Scotts, on terms which included the giving of warranties by them to the effect that (inter alia) they were experienced investors, had the capacity to take the economic risk of the scheme, had read and understood the detailed information memorandum (IM) describing the scheme, and had "only relied on the advice of … his or her own professional advisers with regard to the tax, legal, currency and other economic considerations" attendant on the scheme. It was also warranted that "appropriate professional advice" had been taken.
   (3) As is very common, the IM contained a section relating to risks and in particular tax risks.
   (4) The Defendant was instructed by Scotts to advise on whether the tax strategy was effective.
   (5) The Defendant confirmed in robust terms that he considered the strategy was effective, both in written opinions and in letters in which he confirmed that Scotts' literature in respect of the tax risks of the scheme was a complete and accurate statement of the same.
   (6) The Defendant was aware that the materials he provided would be supplied to the Claimants as part of the documentation for them to consider when decided whether or not to enter into the schemes.

5. The Court of Appeal held that the claims failed because:

   (1) The Defendant owed no duty of care to the Claimants.
   (2) The Defendant's view of the efficacy of the scheme was one which a reasonable tax silk could have held at the material times. This Note does not consider the detail of the judgment in relation to this issue.

(3) Had a duty of care been owed, the Defendant would have been in breach. His unequivocal advice failed to discharge the **Baxendale Walker** duty[1] to point out the consequences if he were wrong in his views, and the risks that he might be wrong. But in this case, the failing had not caused the Claimants any loss, because they would have proceeded to invest in any event. Again, this point does not require particular attention in this Note because the Court accepted that the judge was entitled to reach the conclusions which he did.

6. The Court also expressed views on a number of points of detail which emerge in cases of this kind and which may be of interest in other litigation.

Duty of Care

7. The Claimants presented their case on appeal as a straightforward **Hedley Byrne v Heller**[2] claim. Thus, it was argued:
   a. The Defendant was a person possessing special skill.
   b. The Defendant voluntarily gave his advice knowing that it would be presented to the Claimants and relied on by them in weighing up the decision whether or not to enter the scheme.
   c. The Defendant recognised that the efficacy of the scheme from a tax saving perspective was a critical matter for the Claimants.
   d. The Defendant was lending his name and his advice to support the marketing efforts made by Scotts. This marketing function was sufficient to take the Defendant's conduct out of the norm in terms of the ordinary function of Counsel.
   e. The Defendant could have disclaimed responsibility to the Claimants[3] but chose not to do so.

8. The Defendant argued, amongst other points, that:

   (1) It was highly relevant that for regulatory reasons[4] the investor required the advice of an IFA before the investment could be made.
   (2) This provided context to the provision of the Defendant's advice via Scotts. It could not be relied on other than through the conduit of an IFA's involvement.
   (3) The Claimants and Scotts were commercial counterparties. The principle of caveat emptor applied.
   (4) It was made clear that the Defendant was the adviser to Scotts. The Claimants did not meet with, communicate with nor pay the Defendant.
   (5) The Defendant's role was a standard one for Counsel. He was asked to advise and did advise as to the tax implications and consequences of the scheme.

[1] **Barker v Baxendale Walker** [2018] PNLR 16 (CA).
[2] [1964] AC 465 (HL).
[3] As, of course, the Bank did in **Hedley Byrne** itself, thereby avoiding liability.
[4] The curious will find a full explanation at [34], [35] and [96], but the essential point is that the unregulated nature of the scheme meant that it could only be marketed through the offices of an IFA.

(6) The Claimants were persons of sufficient sophistication and wealth to understand the risk warnings given in the scheme documentation and to be able to employ specialist tax or accountancy advisers to consider the position.

9. The Court placed emphasis on the explanation of the duty of care concept given by the Supreme Court in **Steel v NRAM** [2018] 1 WLR 1190 ("**NRAM**"). It followed the approach in **NRAM** to the effect that there were 2 separate (albeit closely connected) enquiries to be made:
   (1) Did the representee reasonably rely on the representation; and
   (2) Ought the representor reasonably to have foreseen that the representee would so rely.

   See [87-89].

10. The starting point, where a claimant seeks to sue a professional person instructed by the opposite party in the transaction, is that the claimant's alleged reliance in that situation is "presumptively inappropriate" [89].

11. Where there was an opportunity (a fortiori an invitation) to make an independent check or enquiry, and this opportunity was not taken, this is likely to be fatal to the claim:

    "*While paragraph 19 of **NRAM** sets out the test, paragraph 23, in particular, makes it clear that the question whether it was reasonable for the representee to act without making an independent check or enquiry is highly relevant and in many cases likely to be determinative. There may be a parallel to be drawn with product liability cases where the likelihood that there will be an intermediate inspection or check negatives the existence of a duty of care.*"

    See [89], following the analysis of Lord Oliver in **Caparo v Dickman** [1990] 2 AC 605 at 638D.

12. The Court accepted the arguments summarised at paragraph 8 above, and held (i) that it was objectively unreasonable for the Claimants to rely on the Defendant's advice without making independent enquiry as to the likelihood of the scheme's succeeding in delivering the tax benefits, and (ii) the Defendant ought not reasonably to have foreseen that they would do so [117].

13. The failure to issue a disclaimer was a relevant factor tending the other way, but "was neither a trump factor nor fatal especially given that the advice and opinions were only given to investors through the gateway of the IM with all its caveats." [116].

14. What is clear is that making a statement voluntarily and directly to the representee is not a sufficient condition to impose a duty of care on the representor: see [94] and the reliance placed on **Peach Publishing v Slater & Co** [1998] PNLR 364 (CA).

    Failure to identify risk factors

15. The first point to note is that whilst the judgment on this issue was an evaluative one based on the facts found, the Court held that the question whether there was a breach "is a hard

edged question of law, and the judge was either right or wrong in determining it" [159]. This is an interesting aside for those seeking to disturb an evaluative conclusion, at least where the facts on which it is founded do not need to be challenged in order to run the argument.

16. The Court held [167] that:

"*Non negligent advice would, at least, have acknowledged that no two cases are factually the same, and accordingly no existing authority could be said to cover the circumstances… exactly; and that the three statutory tests each engaged a risk of challenge by HMRC… I consider that reasonably competent tax advice should have identified the risks*."

17. The Court did not find it necessary to consider the detail of the **Baxendale Walker** case: indeed, that authority (whilst plainly in the mind of the court) was not expressly referred to. However, practitioners may note that the argument gained traction because rather than it being based on a general admonition to err on the side of caution, it proceeded from the identification of two specific risks to which attention ought to have been drawn.

Implications and practical pointers

18. It is submitted that the result, whilst comforting for the tax bar, may not be of general application in terms of protecting defendants.

19. The critical factors are the sophistication of the Claimants, and the resources available to them, set against the documentation they signed, as well as the finding of the Court as to the Defendant's position on the opposite side of the transaction from the Claimants.

20. It is submitted that the Court's willingness to hold Claimants of this stamp to the effect of the documentation they signed, in the overall context of the transaction into which they contemplated entry, is both correct and refreshing. There is a tendency in this field to "cherry pick" the advice and/or the role of one party (sometimes the party which has the deepest pocket), whilst ignoring the importance of placing that party's acts (and responsibilities) correctly in context. See in particular [115] where the cumulative effect of the interlocking documentation is emphasised.

21. The current controversy over the role of a SIPP operator in relation to the viability of investments accepted within the SIPP provides an apposite example (the point as to the effect of the technical documentation having been left open by the Court of Appeal in **Adams v Options SIPP** [2021] Bus LR 1568). Here it should be noted that many persons who entered into SIPP arrangements lack the sophistication of the Claimants in **McLean**; and that the SIPP operator is on the same side of the transaction as the investor.

22. The importance of the fact that the Defendant in **McLean** was held clearly to be on the "other side" of a commercial transaction should be borne well in mind. This factor was sufficient to make the existence of a duty of care "presumptively inappropriate". It is submitted that this

presumption weighed with the Court in deciding that other factors, which might at first sight suggest that a duty of care would be just and reasonable, did not tip the scales. Particularly striking among those factors seem to be that (i) the defendant knew that his advice would be relied on as a matter of fact, (ii) the defendant elected nonetheless to give his advice and his approval to its being disseminated to others, (iii) the unequivocal nature of the advice and (iv) the defendant's omission to disclaim responsibility.

23. It is further submitted that it is highly relevant that the regulatory background against which the claim was set positively required the interposition of an IFA (and advice from such an IFA) between the Defendant's advice and the decision to invest.

24. The Court subjected the warning that participants should take their own advice, and the marketing documents generally, to considerable analysis.

25. First, it rejected the proposition that independent advice required the instruction of a tax silk to examine the Defendant's analysis. The submission that only the advice of another silk would do was rejected (see [91]).

26. It follows that advice from a solicitor or accountant sufficed. This conclusion appears to contemplate that such advice would be on a higher "sense check" level.

27. The Court was prepared [92] to contemplate the possibility that there might be "reasonable or partial dual reliance" by the Claimant on both the Defendant and the Claimant's own advisers, but warned that "in many cases, the fact that a party could and should have made their own independent enquiry will lead to the conclusion that reasonable partial reliance is not enough to create a duty of care."

28. This statement is not further explained or elaborated. Given that it assumes that the reliance by the representee was reasonable, it appears that the doubts as to the existence of a duty of care must be premised on the idea that the representor ought not reasonably to anticipate such reliance: although this is difficult to reconcile with the second sentence of the same paragraph "the question in such a case would be whether it is objectively reasonable for a representee to rely both on the seller's adviser and on their own advice, having made independent enquiry".

29. It is submitted that this passage may cause a difficulty in a case where the independent advisor reasonably takes the position that (s)he is not employed to reinvent the wheel but to assess whether the Defendant's advice appears reasonable in all the circumstances, necessarily undertaking that assessment at a higher level.

30. Second, the Court held that the fact that Scotts represented that "all reasonable care" had been taken as to the accuracy of the IM was a different thing from saying that the contents of the IM were correct: "rather these were representations that due diligence had been performed, together with a factual representation that advice had been taken" [108].

31. Third, the Court rejected the argument that the warning that participants should take their own tax advice was to be read as referring to advice about the tax position as applied to their own circumstances, rather than the tax position as to the efficacy of the scheme generally. See [110].

32. The Court accepted [112] that:

"*Scotts owed a duty to investors in relation to the accuracy of the information in the IM and would have been liable to investors for negligently misrepresenting the nature of [the Defendant's] advice, if that had been done. But Scotts did not misrepresent the nature of [the] advice and this was never alleged*"

33. This is useful confirmation of a proposition which is sometimes (and wrongly) disputed: viz., that the fact that statements made in an IM or similar are promotional materials designed to market a particular financial product does not dilute the obligation of a party which puts such materials into circulation to see that the statements therein are reasonably accurate and based on reasonable supporting grounds.

34. In summary, this is an important decision in the area, both in terms of the main point of principle relating to the absence of a duty of care, and the treatment of various points which are often in play in such cases. However, the case is not the last word on the subject and we can expect its effect to be debated strongly in the future.

Simon Howarth KC

Hailsham Chambers

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