Case No: A2/2013/0042

Neutral Citation Number: [2014] EWCA Civ 117
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
HHJ SEYMOUR QC
[2012] EWHC 3626 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE AIKENS
and
LORD JUSTICE DAVIS

- -

Between :

Allison & Anr	**Appellant**
- and -	
Horner	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Richard Colbey (instructed **through the Bar Direct Access Scheme**) for the **Appellant**
Miles Croally (instructed by **Hierons**) for the **Respondent**

Hearing date: 09/12/2013

- -

Judgment

Lord Justice Aikens :

Synopsis

1. The issue on this appeal from the judgment of HHJ Seymour QC dated 17 December 2012 is whether the appellant, Ms Trisha Anastasia Allison, ("Ms Allison") can rely on a defence of limitation to defeat a claim brought against her by the respondent Mr Dennis Karl Horner, ("Mr Horner") for damages incurred as a result of fraudulent representations by Ms Allison made in January 2003 in relation to a tax reduction scheme concerning films.

2. In his reserved judgment given after an 18 day trial, HHJ Seymour QC (who sat as a judge of the High Court) found that Ms Allison had made a number of specific fraudulent representations to Mr Horner on 13 January 2003 which had induced him to enter into the tax scheme being run by her and her associate, Mr Adrian Ross, ("Mr Ross") who was the second defendant in the proceedings. Those findings have to be accepted, because permission to appeal the issues of whether they were made and whether they induced Mr Horner to enter into the scheme was refused. However, as the fraudulent representations were made in January 2003, the limitation period for an action in deceit based on them would normally expire in January 2009. The action for the claim was only begun on 19 July 2010. The sole issue on appeal is whether the judge was correct to conclude that Mr Horner, as claimant, could rely on ***section 32(1)*** of the ***Limitation Act 1980*** (as amended) to extend the limitation period[1]. The judge found that Mr Horner did not have the requisite knowledge of the fraud of Ms Allison, and that he could not, with reasonable diligence, have discovered the fraud until 25 August 2004. Therefore, the six year limitation period ran from then so that the claim was brought in time. The challenge on the appeal is therefore made to the judge's findings of fact on this limitation issue.

3. The judge dismissed Mr Horner's claim against Mr Ross. The judge held that Mr Ross did not act dishonestly in his dealings with Mr Horner and so he was not liable for fraudulent misrepresentation. That conclusion is not challenged on appeal.

4. On 9 December 2013 we heard oral argument on the appeal. At the conclusion of the argument we announced that the appeal would be dismissed and that we would give our reasons for doing so in writing at a later date. These are my reasons.

The Facts

5. Pursuant to the terms of ***section 42*** of the ***Finance (No 2) Act 1997*** as amended by ***section 48(1)*** of the ***Finance Act 1997,*** a taxpayer who participated in a trade or business which consisted of or included the exploitation of British films could deduct from his tax liability the amount of any investment of a revenue nature that he had made in the acquisition of a qualifying film. The effect of this provision was, therefore, that the investor's liability to income tax would be reduced by the amount of the income tax that he would otherwise have paid on the sum he invested in the film.

---

[1] The parties had agreed before the hearing that if the appeal was allowed on the section 32(1) issue, the further issue raised in the Respondent's notice on section 21 of the Limitation Act 1980 should be remitted to Judge Seymour.

6. Mr Horner was, in January 2003, a chartered accountant who did not practise as such but was, at the time, a management consultant. He held a position as one of a number of managing directors of ATOS KPMG Consulting Limited ("ATOS"). He was on high earnings and in the tax years 2000/1 and 2001/2 he paid tax totalling £192,099.29.

7. Ms Allison and Mr Ross had formed and ran an entity called Taipan Creative LLP ("Taipan"), which was, as its name implies, a limited liability partnership. In January 2003 a colleague in ATOS suggested to Mr Horner that he attend a presentation to be given by Ms Allison and Mr Ross. The presentation took place on 13 January 2003 in central London and about 15-20 people attended. The presentation was formal and lasted 1 to 2 hours. Ms Allison and Mr Ross distributed a document entitled "A Unique Low Risk High Return Investment Proposition" and Ms Allison spoke at some length to the audience, using a Power Point presentation.

8. The judge found[2] that in the course of her presentation Ms Allison made the following representations on which she intended those present to rely: first, that she was a specialist in film tax investment schemes. Secondly, that investors in the scheme she proposed had a guaranteed return on their investment. The judge found that Mr Horner relied on those statements. Thirdly, that the tax refunds that investors would receive were to be invested in the development or acquisition of films that qualified for relief under the relevant statutory provisions. The judge found that if this statement had not been made by Ms Allison, Mr Horner would not have signed documents authorising her to act on his behalf in procuring a tax refund from HMRC on the basis of his tax returns and also authorising the payment of the refund into a bank account of Taipan. Fourthly, that Ms Allison effectively conveyed the impression (and intended to do so) that the scheme she was promoting had been approved by HMRC and that Mr Horner relied on this fact in entering the scheme.

9. The judge also found that Mr Ross stated that the scheme had a "proven track record of success" and that, from his perspective, that was true. However, the judge found that he was applying the wrong criteria in evaluating "success". The judge found that Ms Allison knew (and indeed admitted in evidence) that the policy of HMRC was to pay out a tax refund in respect of this type of film finance scheme upon receipt of the tax return and then to investigate later: a policy known as "pay now, check later". The judge found that Ms Allison therefore knew that Mr Ross' representation was not true.[3]

10. The judge also found that the representations I have listed were untrue and that Ms Allison had either made them herself or permitted Mr Ross to make them knowing that they were false and that she did not make any corrections. [4] The judge found that she made them or prompted Mr Ross to make them "intending the hearers, including Mr Horner, to rely upon the representations" and he found that Mr Horner did so.[5] Consequently the judge found that Ms Allison was liable to Mr Horner in deceit, subject to the limitation defence.

---

[2] At [121] to 128] of the judgment.
[3] [129]
[4] [130]
[5] [132].

11. The judge considered at some length precisely what happened at the time of the representations and thereafter. For the purposes of this appeal I need only consider the judge's findings of fact on limitation. For the curious, however, I note that, as a result of the representations, Mr Horner signed copies of documents which enabled an application to be made on his behalf by Taipan, to HMRC to obtain a refund of income tax paid by Mr Horner for 2001/2 and 2002/3. This resulted in a payment of £168,756.30 from HMRC into the Taipan current account. On 4 June 2003 Mr Horner then received 20% of that amount (the so-called guaranteed return) amounting to £33,750, leaving £135,006,33 in the Taipan current account.

12. HMRC announced that it would be making enquiries into Mr Horner's claim for tax relief on the scheme on 19 January 2004, but it only began serious investigation of the scheme and another related scheme later in 2004. The investigation concluded that Mr Horner had not been entitled to any tax refund because he had not, at the relevant time, actually invested any sum in a British film in accordance with the statutory provisions. Mr Horner therefore had to repay to HMRC the whole of the tax refund, together with interest and penalties, which totalled £207,000. He paid that sum in three instalments in 2006. Mr Horner's claim against Ms Allison and Mr Ross was for the amount that he had to repay to HMRC, less the part of the tax refund which was paid to him from the Taipan current account and less some other amounts. That net sum claimed was £185,832.25 and the judge awarded him judgment in that sum plus interest of £47,076.22.

Limitation: the statutory provisions and the judge's findings

13. ***Section 32(1)*** of the ***Limitation Act 1980,*** as amended, provides as follows:

> "Subject to subsections (3) and (4A) below[6] 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."

14. Three points on the construction of that provision that are relevant to the present appeal have been made in the cases. First, in ***Barnstaple Boat Co Ltd v Jones[7],***

[6] Neither is material.

Waller LJ (with whom Moore-Bick and Moses LJJ agreed) held that the phrase "the plaintiff has discovered the fraud" in ***section 32(1)*** refers to knowledge of the precise deceit which the claimant alleges had been perpetrated on him.[8] It follows that knowledge of a fraud in a more general sense is not enough to start the limitation period running under ***section 32(1).***

15. Secondly, in ***Peco Arts Inc v Hazlitt Gallery Ltd***[9] Webster J held that the acts or omissions of an agent of the claimant were not to be attributed to the claimant for the purposes of ***section 32(1).***[10] Thus knowledge of the deceit alleged on the part of a claimant's agent will be insufficient to start the limitation period running under ***section 32(1).*** Similarly, the fact that the claimant's agent could with reasonable diligence have discovered the alleged deceit does not start the limitation period running. I would accept this construction of ***section 32(1)*** for the reasons that Webster J gives at page 202G-H of the report. It follows that the knowledge of agents of Mr Horner concerning the fraudulent representations is not to be attributed to him.

16. Thirdly, in ***Paragon Finance PLC v Thakerar & Co***[11] Millett LJ (with whom Pill and May LJJ agreed on this point) held that ***section 32(1)*** was concerned with whether the claimant *could* (rather than *should*) with reasonable diligence have discovered the relevant deceit at any particular time. This meant that the burden of proof was on a claimant to establish that he *could not* have discovered the fraud without taking exceptional measures which he could not reasonably have been expected to take. In the business context, this meant "how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency".[12] This point was taken up in the judgment of Neuberger LJ in ***Law Society v Sephton & Co***[13]**.** He concurred with the view of the trial judge in that case (Michael Briggs QC sitting as a deputy High Court Judge) that it followed from Millett LJ's construction of ***section 32(1)*** that there must be an assumption that the claimant desires to discover whether or not there had been a fraud committed on him. Not to make such an assumption would rob the word "could" in the section of much of its significance. Moreover, the concept of "reasonable diligence" carried with it the notion of a desire to know and, indeed, to investigate.[14]

17. In his pleadings, Mr Horner had alleged six specific fraudulent representations by the defendants, Ms Allison and Mr Ross. These were: (i) the scheme had been approved by HMRC; (ii) the scheme had been approved by the accountancy firm BDO Stoy Hayward; (iii) the scheme had a "proven record of success"; (iv) if the investor

---

[7] ***[2008] 1 All ER 1124; [2008] EWCA Civ 727.***
[8] See [34] of that judgment.
[9] ***[1983] 3 All ER 193.***
[10] See page 202F of the report.
[11] ***[1999] 1 All ER 400***
[12] Page 418C-D of the report. See, to the like effect, the statement of Webster J in the ***Peco Arts Inc*** case at 199G.
[13] ***[2005] QB 1013.*** Maurice Kay LJ agreed with him on this point. Carnwath LJ did not comment on it. On the appeal overall Neuberger LJ was in the minority.
[14] [116] in the judgment of Neuberger LJ. This paragraph appears under the heading "The Second issue…", and Maurice Kay LJ said he agreed with both the reasons and conclusions of Neuberger LJ on that issue: see [133]. Carnwath LJ said that he only disagreed with the judge on one issue, which was when the cause of action in negligence arose. He did not specifically comment further on the ***section 32(1)*** issue. On the overall decision, Neuberger LJ was in the minority.

chose a particular option of investment in the scheme he was guaranteed a return on his investment; (v) Ms Allison was a specialist in film tax investment schemes; and (vi) the tax refunds received would be invested in the development/acquisition of films in a way that would qualify for tax relief in accordance with the statutory provisions. Mr Horner had pleaded that the earliest date on which he knew that the pleaded representations were fraudulent was 25 August 2004. It was Ms Allison's case at the trial that Mr Horner was aware of the fraud which he alleged by 7 May 2004. The judge therefore had to make findings on whether Mr Horner had discovered or could have, with reasonable diligence, discovered the pleaded fraudulent misrepresentations at any time between 13 January 2003 when the representations were made and 19 July 2004, that is six years prior to the date of issue of the claim form by him.

18. Judge Seymour dealt with the limitation issue before he made his findings on what, if any, fraudulent representations had been made by the defendants. He recorded[15] that Mr Horner had received, as one of the "partners" in Taipan, a letter dated 19 January 2004 from Mr SA Condie, HM Inspector of Taxes, announcing that he intended to make "enquiries" into the 2002-3 partnership return of Taipan "of which you [ie. Mr Horner] are a member". Going to the end of the story, the judge recorded that on 25 August 2004 there was a meeting between Mr Colin Gardner (an accountant who had been appointed by one of Mr Horner's fellow investors), Mr Ross and three Inspectors of Taxes at the Institute of Directors, to discuss the validity of the Taipan scheme and whether Mr Horner and his fellow investors were entitled to the tax relief they had claimed and obtained. At [56] the judge concluded that, following this meeting, it was "obvious" that Mr Horner had entered into the scheme in reliance on the representations that (on his case) had been made to him on 13 January 2003 and which (on his case) had been fraudulent. But, the judge said, the important question was whether that fact was, or "should" have been, "obvious" to Mr Horner earlier.

19. Mr Richard Colbey, who appeared for Ms Allison on the appeal, but who did not appear below, criticised the judge's characterisation of the statutory test as stated by the judge in [56]. I agree that the first part of the test under ***section 32(1)*** is not whether the fact that the fraud was "obvious", but whether or not the claimant had, in fact, discovered it. I further agree that, following the ***Paragon Finance*** case, the second part of the test is not whether the claimant "should have known" of the fraud, but whether he "could have known" of it and the burden is on the claimant to show that he could not have known of it except by taking exceptional measures which it was not reasonable in the circumstances to expect him to take. However, in practice the question is whether the judge erred in his conclusion of fact that Mr Horner did not have knowledge of the fraud (as pleaded) nor could he reasonably have known of it if he had exercised reasonable diligence before 19 July 2004.

20. The judge did not consider any particular dates for possible knowledge of the fraud prior to 30 April 2004. In his submissions to us, Mr Colbey invited us to take account of earlier correspondence so as to put the documents from 30 April 2004 into their context. I will consider those in the next section of this judgment.

---

[15] At [50]

21. The judge referred to a letter dated 30 April 2004 which was sent to Ms Allison by Ms Judith Edwards, a Senior Tax Planning Consultant in the accountancy firm of Alliotts, who had been appointed to safeguard the interests of Mr Horner and other investors who were taking part in Ms Allison's film tax schemes. We were told that Ms Edwards had qualified as a barrister. This letter was much relied on by Ms Allison at the trial. It concerned two other film tax schemes partnerships called Angel Enterprise LLP and Angel Enterprise II LLP (respectively "Angel" and "Angel II"). Mr Horner was not a member of either of those partnerships although he is named as one of the "clients" in the heading of the letter. I will call this letter "the 30 April letter".

22. The 30 April letter alleged that Ms Allison had represented to those taking part in the Angel and Angel II partnerships that: (1) their financial liability would not be open ended; (2) the "vehicle" to invest their tax rebates was "tried and tested and with no risk to them" and (3) that she was a "tax expert" and that in her experience as such "it was legitimate [for the partners in the scheme] to obtain the guaranteed payment as an Inland Revenue rebate and would not involve any contention from the Inland Revenue". The letter then said that the partners in Angel and Angel II had subsequently discovered that: (1) they had been called upon to make further financial commitments; (2) they had not received any documentation about the partnerships in which they had been apparently participating; (3) both partnerships were under investigation by the Inland Revenue; and (4) there were inconsistencies between the dates in documentation that they had signed and what they believed as to the period during which they were to be actively engaged in the partnerships. The letter concluded:

> "Our clients consider that they have at all times endeavoured to have the utmost good faith in all their dealings with you. However, the numerous misrepresentations that they have since discovered that were made by you has lead them to the conclusion that had accurate representations been made by you in the first place they would not have signed any documentation to take part in either [Angel or Angel II] nor taken any other steps to become involved in these enterprises. Accordingly, they view their so-called membership of [Angel and Angel II] as void and therefore unenforceable in law".

23. The judge decided, at [58], that this letter was couched in "hesitant terms" and its main focus of complaint was on the demands made by Ms Allison for further financial contributions from the "members" of Angel and Angel II. He noted that the letter indicated that the Inland Revenue had begun investigations. The judge continued, in [58]:

> "…Ms Edwards did not specifically identify any alleged misrepresentation or contend that any misrepresentation had been made deliberately, rather than carelessly. The last sentence of the whole letter rather indicated that what Ms Edwards was seeking to do was to provoke a response from Ms Allison. If Ms Edwards or her clients were confident that the indicated position, that membership of Angel or Angel II by

any of her clients was unenforceable was a strong one, no reaction from M Allison was required."

24. The next letter the judge considered was one sent to Mr Horner by Mr CA Murphy, Inspector of Taxes who worked in the "Special Compliance Office" of the Inland Revenue, which was also dated 30 April 2003. This letter referred to the Taipan scheme to which Mr Horner was a subscriber. The letter stated that Mr Murphy had now taken over the inquiry, which would be conducted under the Inland Revenue's "Code of Practice B" and he enclosed a copy of the Code. The letter drew Mr Horner's attention to various parts of the Code, in particular the part which explained that the office did not conduct investigations under Code of Practice B with a criminal prosecution in mind "but towards a financial recovery of any tax, interest and penalties you owe". The letter went on to warn, however, that a different approach would be adopted if the investigation suspected or found evidence of "serious fraud". Mr Murphy called for a meeting with Mr Horner at his convenience.

25. The judge's comment on this letter, at [57], was that this letter ought to have indicated to Mr Horner that "there was a serious risk that his claim for a tax refund might not be accepted" precisely because the letter had come from the Special Compliance Office whose job was to enquire into cases where tax refunds had been inappropriately claimed and made. Nonetheless, as the judge commented, the letter extended an invitation to a meeting "in friendly terms". Things only begun to look "seriously difficult" when Mr Murphy wrote a letter to Mr Horner on 24 July 2004 in which he sought repayment of the tax refund that had been made to Mr Horner.

26. The next letter the judge considered was one from Ms Allison to Ms Edwards dated 7 May 2004. There was no evidence that this letter was ever shown to Mr Horner at the time. The letter of 7 May does not identify Ms Edwards' letter of 30 April specifically, but refers merely to "your letter". In it Ms Allison denied that she made the statements attributed to her, which, Ms Allison said, "seem to me to fly in the face of the legislation governing film partnerships". Ms Allison said that it was inconceivable that Mr Horner, being a "senior partner in one of the UK's largest accountancy firms", could have been induced to enter any commitment by "any statement of such a type". The judge's comment on this letter,[16] about whose provenance he appears to have been somewhat sceptical, was that it did not seem to him that "it could sensibly be said that Ms Allison's observations ought reasonably to have [been] interpreted by Ms Edwards as indicating fraud on the part of Ms Allison or to have put her [viz Ms Edwards] on a line of enquiry which, if pursued with reasonable diligence, would have led to that conclusion".

27. The next letter the judge considered was one from Ms Edwards to Mr Barry Cowing, one of the members of the Angel scheme, dated 14 June 2004. The judge concluded that a copy of this letter was forwarded to Mr Horner, but only on 11 August 2004. [17] In the letter of 14 June Ms Edwards reported on a telephone conversation that she had had with Mr Murphy of the Special Compliance Office of the Inland Revenue. She said that his views about the Angel schemes were (in summary): (1) the scheme was

[16] At [61] of the judgment

[17] However, Mr Colbey pointed out in argument to us that in paragraph 64 of Mr Horner's witness statement he had said that a copy of that letter was forwarded to him by email "on 17 June 2011" and, effectively, invited us to find that this must have been a typing error and that the letter was forwarded to Mr Horner on 17 June 2004.

not properly established so as to conform with the film partnership provisions of the tax legislation; (2) the scheme could be attacked as a "sham"; and (3) it was likely that interest and penalties (as well as a return of the tax refund) would be demanded from all those who had taken part in it. The judge noted, at [63], that this only concerned Angel and Angel II and it appeared from the letter that Mr Murphy's conclusions were provisional and subject to confirmation from a colleague at least on the question of consequences.

28. The judge then considered a letter dated 22 July 2004 from Ms Edwards to Mr Horner, which was headed "Angel Enterprise LLP Matters". The letter stated that it was "sometime" since Ms Edwards had heard from Mr Horner. It informed Mr Horner that the Inland Revenue had decided to pursue repayment of the tax refunds that had been obtained, together with interest and penalties, from all members of the Angel schemes. Ms Edwards asked Mr Horner if he wished to engage some solicitors to assist in any attempt to recover the tax refund from Ms Allison. The judge commented, at [65], that although it was clear from this letter that Mr Horner must already have given some consideration to the question of pursuing Ms Allison for any tax refund he might have to repay to the Inland Revenue, that consideration "had proceeded no further than identifying the need for solicitors to advise as to whether that was possible and if so on what basis".

29. Mr Murphy wrote to Mr Horner in relation to the Taipan scheme on 23 July 2004.[18] It referred to his letter of 30 April and to a telephone conversation with Ms Edwards on 1 June 2004. The letter said that the Taipan partnership had failed to provide the documentation and information needed to support the entries in the partnership returns and accounts so that it was Mr Murphy's view that Mr Horner's claim for "loss relief in respect of [his] share of the losses in [Taipan] is not valid". Therefore the tax refund of £168,736.30 was "not now due" to Mr Horner. Mr Murphy asked Mr Horner to make a payment on account of that amount pending the conclusion of his investigation. The judge's comment on that letter, at [53], was that it was the view of the Inland Revenue, at least until the time that the letter was written, that it was possible that information and documentation to justify the entries in the Taipan accounts might have been produced and, moreover, that the investigations were continuing. But, as the judge put it, "things were not looking good from the point of view of Mr Horner or other participants in Taipan".

30. Lastly the judge considered two documents sent on 29 July 2004. The first was Ms Edwards' letter to Mr Horner of that date. This relayed Mr Murphy's view that the Taipan scheme was a sham and did not fall within the statutory rules. On the same day, Mr Gardner, the accountant appointed by one of the other participants in the scheme, sent out an email to various people including Mr Horner. In this he commented:

> "The fact that the partnership was run fraudulently or incompetently is irrelevant to settling an individual's tax affairs. The only recourse for an individual is to sue whomever they consider is responsible for acting in a way that results in their tax liabilities being increased".

[18] The text is at [52] of the judgment.

The judge noted, at [68], that this was the first time that the word "fraudulently" or a simile had been used. Even so, the judge said, Mr Gardner was recognising fraud as one possibility and negligence was another.

31. The judge's overall conclusion, set out at [56] before he considered the detailed analysis of the correspondence, was that it was not, nor "should" it have been, "obvious" to Mr Horner before the meeting between Mr Gardner and the Inland Revenue on 25 August 2004 that the statements Ms Allison had made on 13 January 2003 had been false and dishonest.

The submissions of the parties on appeal

32. Mr Colbey, on behalf of Ms Allison, submitted: (1) the judge did not state the test correctly at [56] of the judgment by asking whether it should have been "obvious" to Mr Horner that there was fraud and whether he "should" have discovered it by a certain time. (2) Whatever view the judge might have taken on whether and when Mr Horner actually discovered the fraud, the judge failed to deal with the question of whether Mr Horner had proved (the burden being on him) that he could not have discovered it with the exercise of reasonable diligence. (3) On the documents, Mr Colbey accepted that the earliest date on which Mr Horner could have discovered the fraud was 30 April 2004. However, if the letter of 30 April 2004 from Mr Murphy to Mr Horner was put in the context of the earlier correspondence, including Ms Edwards' letter of that date to her clients, including Mr Horner himself, he must have appreciated then that the Taipan scheme (like the Angel schemes referred to in the letter) was not approved by the Inland Revenue, it was not risk free and that Ms Allison was not a film tax expert. Therefore it was a short step to the conclusion that Ms Allison could not have believed the statements that she had made on 13 January 2003 were true. (4) The Inland Revenue had asked in the letter of 30 April 2004 for a meeting with Mr Horner. He failed to arrange one. If he had done so he would have found out that the scheme was not Revenue approved. This was a lack of reasonable diligence on the part of Mr Horner. The judge failed to deal with the point.

33. Mr Miles Croally, on behalf of Mr Horner, submitted: (1) there was very little cross-examination of Mr Horner at the trial on the question of limitation and Mr Horner's knowledge or state of mind about the truth or otherwise of the statements Ms Allison had made. (2) It was only at the meeting on 25 August 2004 that it was clear that the specific allegations of misrepresentation which were subsequently pleaded were untrue to Ms Allison's knowledge. Nor was it clear until then precisely what Ms Allison had done, viz. taken the tax figure, grossed it up by 2.5 times and then claimed that was the sum that had been expended in financing films; which was a fraudulent manoeuvre. (3) Even though Mr Horner had not met the Inland Revenue after Mr Murphy's letter of 30 April 2004, his representatives had done so, therefore there was no lack of reasonable diligence.

Analysis and conclusion

34. On the limitation issue the two questions before the judge were: (1) whether, on or before 19 July 2004, Mr Horner had, in fact, discovered the fraud that he

subsequently pleaded in his claim, and, assuming the answer to (1) is "no", (2) whether Mr Horner had proved (the burden being on him) that he could not have discovered that fraud with the exercise of reasonable diligence, bearing in mind that Mr Horner was a qualified but non-practising accountant who was acting in his personal rather than his business capacity. In carrying out that exercise the judge had the benefit of oral evidence from Mr Horner, with whom the judge was "very impressed".[19] However, we were told by Mr Croally, and Mr Colbey did not contradict him, that Mr Horner was asked very little about the limitation issue in cross-examination. The judge does not refer to the oral evidence of any other witnesses in that part of his judgment dealing with the issue of limitation; nor did Mr Croally in the course of his submissions to us. I will therefore proceed on the basis that the judge was correct to deal with the two limitation issues I have identified above by drawing conclusions on Mr Horner's state of knowledge and whether he could have discovered the fraud from an assessment of the documentary evidence that was adduced at the trial.

35. In my view it is important when considering these issues to keep three particular matters in mind. First, the issue of whether the statements made by Ms Allison on 13 January 2003 were false would only be relevant if there were to be any claim against her. Mr Horner would only make a claim against her if he had suffered a relevant loss. That relevant loss would be the repayment of any tax rebate he had obtained, together with any penalties and interest he might have to pay as well to the Inland Revenue if it concluded that the film tax scheme was illegitimate. So, on the assumption that it was not self-evident that the statements made by Ms Allison were false, (and the judge did not so find), it would only have been reasonable for Mr Horner to take action to investigate the truth (or otherwise) of those statements if he needed to do so.

36. Secondly, whether Mr Horner knew that Ms Allison had made fraudulent misstatements depends on whether he knew, or at the least had good evidence of, the true state of affairs. It seems to me that, despite Mr Colbey's best efforts, he was not able to show us anything in the documents that the judge failed to take into account which would, if the judge had done so, have meant that he must have arrived at a conclusion that Mr Horner had discovered that the statements Ms Allison made were fraudulent or that it was possible to plead that they were. It follows that the judge was correct to conclude in [56] that Mr Horner did not know on or before 19 July 2004 that the statements made by Ms Allison on 13 January 2004 were known by her to be false.

37. That conclusion means that I must concentrate on the question of whether the judge erred in concluding (effectively, although the test he used was arguably inaccurate) that Mr Horner could not, with reasonable diligence, have discovered on or before 19 July 2004 that the statements were fraudulent. That leads to the third matter to be kept in mind. Mr Colbey's argument was, effectively, that Mr Horner should have been "put on enquiry" as to the fraudulent nature of Ms Allison's statements because it should have became increasingly clear to him, from 30 April 2004 at the latest, that there were grave doubts as to the legitimacy of the film tax schemes being promoted by Ms Allison. That should have led him, if he had acted with reasonable

[19] [119]

diligence, to probe further and so he would have discovered the truth before 19 July 2004.

38. This argument is difficult to sustain in the light of the evidence of the investigations of the Inland Revenue. It was only at the meeting of 25 August 2004 the Revenue stated definitively that it had concluded that the investors in the scheme had, in the Revenue's view, not been investing capital with a view to trading in relation to qualifying films. Therefore, tax relief was not due because there was no evidence of trading with a view to profit. That made the whole structure of the schemes "fundamentally flawed".[20]

39. By the time of the trial a lot more was known about the operations of the film tax schemes operated by Ms Allison and Mr Ross and the judge described this in some detail at [23] to [33] of his judgment. It emerged that the schemes treated each taxpayer investor as having "contributed" 2.5 times the actual income tax paid by the investor for a particular tax period, which in Mr Horner's case was £192,000 for the tax years 2000/1 and 2001/2. Therefore when Taipan, with the investors' authorisation, submitted a tax rebate application to the Inland Revenue it was based upon the fiction that Mr Horner, as a participant in the scheme, had actually invested the grossed up amount of £480,000 in a qualifying film (or more), thus entitling him to the tax rebate he received. The 80% of the total rebate that the Inland Revenue paid out to investors like Mr Horner was then supposed to be invested in a qualifying film, although whether this was ever done by Taipan seems uncertain. The judge described the scheme as "a fairly uncomplicated fraud on the Revenue".[21] However, the judge also accepted the evidence of Mr Ross, who was closely associated with Ms Allison in running these schemes which had been devised by Ms Allison, that he believed at the time that they were legitimate.[22]

40. Taipan had been running since at least April 2002[23] and so, presumably, Taipan had submitted investors' applications for tax rebates to the Inland Revenue since then. Nonetheless, the Inland Revenue seems only to have concluded definitively in August 2004 that the scheme was a "sham" because the investors were not actually paying in good money to invest in films but only notionally doing so. Given this fact and the fact that the judge accepted Mr Ross' evidence that he believed the scheme to be genuine, it seems to me that the initial position must be that Mr Horner could not be expected, using reasonable diligence as a private individual (even if a qualified accountant), to have engaged in his own investigations on whether the scheme was a "sham" before the Inland Revenue made their own conclusions.

41. It is against this background that I now examine the correspondence which Mr Colbey invited us to examine critically and which he said demonstrated that Mr Horner should have been on notice from January 2004 that there might be problems with the acceptability of the Taipan scheme to the Inland Revenue. In my view the only document before those of 30 April 2004 which might be significant is an email from Ms Edwards to Mr Barry Cowing, a participant in the Angel schemes, dated 1 April 2004, which Mr Cowing forwarded to Mr Horner the same day. In the email

[20] See the IR note of the meeting quoted by the judge at [55] of the judgment.
[21] [31].
[22] [32].
[23] This is clear from the judge's description of the accounts at [28]

Ms Edwards stated that she had had a conversation "on a no names basis" with Mr Graham Dean of the Inland Revenue. It is clear from the wording of the email that Mr Dean was not a part of the Special Compliance Office. He had expressed the view to Ms Edwards that a film partnership scheme which invested only a portion of the tax rebates and not any personal funds on films was "in the eyes of the Revenue 'a sham'". Mr Dean had also said that one film partnership that had allowed participants to invest in that way was being investigated "by a special office of the Revenue". Ms Edwards' advice to Mr Cowing was that if the Angel scheme was the scheme being investigated by the Inland Revenue Special Compliance Office then that would be very serious "as the Revenue would be suggesting that there had been an element of serious wilful tax avoidance or even fraud, which has serious consequences".

42. This email is not referred to by the judge in the section of his judgment dealing with limitation. Mr Horner was not, apparently, questioned on his reaction to receiving it in copy. The email relates to Angel, not Taipan. It is not a "smoking gun", meaning that it did not indicate that, on 13 January 2003, Ms Allison had made fraudulent representations of the kind subsequently alleged by Mr Horner. Nor, it seems to me, should this have put Mr Horner on enquiry that Ms Allison might have made such fraudulent representations so that he ought to have followed the matter up. In fairness to Mr Colbey, he only characterised this email as important to show that there was a degree of suspicion about the schemes by the Inland Revenue by then. So this was, he submitted, part of the circumstances against which to assess the key documents, viz. the letter of Ms Edwards to Ms Allison dated 30 April 2004, coupled with the letter of the same date from Mr Murphy of the Inland Revenue Special Compliance Office to Mr Horner announcing the investigation of Taipan.

43. The letter of 30 April certainly posed questions about Ms Allison's expertise and whether the film tax schemes were "tried and tested". It was also clear that the schemes were, by then, under investigation by the Inland Revenue. However, I accept the judge's characterisation of the letter[24] as being one that was asking questions of Ms Allison and seeking to provoke a response from her. From Mr Horner's point of view, even if it is assumed that the same points could be made about Taipan as for Angel and Angel II, the matter was in the hands of his tax consultant Ms Edwards. Mr Horner clearly relied on her, as is shown by his request for a discussion in the email he sent her on 6 May 2004 after he had received the letter of 30 April from Mr Murphy (of the Special Compliance Office) asking for a meeting.

44. If Mr Horner had received a copy of Ms Edward's letter to Mr Cowing of 14 June 2004 at the time it might seriously be argued that this should have spurred him into taking more determined action to investigate for himself the concerns that Mr Murphy of the Inland Revenue had reported to Ms Edwards. But I think we are bound to accept the judge's finding of fact that Mr Horner did not see this document until 11 August 2004. When Ms Edwards wrote to Mr Horner on 22 July 2004, pointing out that she had not heard from him for some time, she was writing about the Angel scheme and not the Taipan one. But by now it was clear that the Inland Revenue were intent on recovering the tax rebates that had been made. So the issue of whether there was a possibility of recovering from Ms Allison the amount of the tax rebate

[24] At [58].

that had to be repaid to the Inland Revenue was more important than it had been when the Inland Revenue's position was less firm. Ms Edwards recommended a particular firm who would provide "specialist assistance" in advising on this. Their advice would have to be on whether there was any cause of action against Ms Allison for recovery of any tax rebate that Mr Horner would have to repay.

45. The matter could have become more urgent following Mr Murphy's letter to Mr Horner of 23 July 2004, when a payment on account was demanded "pending the conclusion of [the] investigation". However, in her letter of 29 July 2004 to Mr Horner, Ms Edwards advised him to "resist" this demand on the ground that the investigation had not been completed. Ms Edwards also advised that Ms Allison be warned that Mr Horner was considering "further action" without specifying it.

46. Having re-examined all the correspondence that was pressed upon us by Mr Colbey, I come back to the judge's negative answer to his own question: should it have been obvious to Mr Horner prior to 19 July 2004 that Ms Allison's statements were dishonest. If that question is put in a more accurate form it is: had Mr Horner proved that he could not, with reasonable diligence, have discovered that the 13 January 2003 statements were false, or, at the least, have discovered enough so as to be able reasonably to plead that they were false. The real issue is what was required of Mr Horner by way of "reasonable diligence" during this period. It seems to me (and I think Mr Colbey accepted) that Mr Horner could not reasonably have been expected to have taken more action than he had prior to 30 April 2004. Even if Mr Horner had engaged a forensic expert around about 30 April 2004 to do an investigation into the Taipan film tax scheme and its validity, it seems most unlikely that results would have been produced before 19 July 2004 that would have enabled Mr Horner to conclude that the statements of Ms Allison on 13 January 2003 were false (or that it could reasonably be alleged). After all, the Inland Revenue only reached a firm view at the end of July 2004. But, in my view, it would have been extraordinarily percipient of Mr Horner to have concluded, as at 30 April 2004, that he needed to put such an exercise in train. It would have been well beyond the requirements of reasonable diligence on his part as a private individual investor in the circumstances that prevailed.

47. Accordingly, I conclude that Mr Horner did prove that he could not, within the bounds of reasonable diligence, discover before 19 July 2004 the fraudulent misstatements which he subsequently pleaded and were found to be the case. Accordingly, the appeal had to be dismissed.

Disposal

48. At the end of the hearing we ordered that the appeal be dismissed with Mr Horner's costs of the appeal to be paid by Ms Allison. We assessed those costs summarily at £23,000.

Lord Justice Davis:

49. I agree with the judgment of Lord Justice Aikens

Lord Justice Richards:

50. I also agree.