Be careful what you assume: professional negligence claims against tax advisors following *Mclean v Thornhill*

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The promoters of a scheme market it to investors, claiming that it will enable them to obtain certain tax advantages. The promotional materials state that the promoters have obtained the advice of an eminent tax advisor which supports these claims. The scheme is subsequently challenged by HMRC, and the investors do not receive the anticipated tax advantages. Can the investors sue the tax advisor in negligence on the basis that they relied on his or her advice?

These were the facts of *Mclean v Thornhill* [2022] EWHC 457, a seminal case which is likely to become a must-read for those practising in this area. The scheme involved the creation of three LLPs in order to acquire and exploit film distribution rights. The anticipated tax advantages were that investors would be able to set-off the trading losses of the LLPs and thereby obtain relief from income and capital gains tax. The tax advisor was the distinguished tax barrister Andrew Thornhill QC, who had advised that in his view investors would be entitled to relief under the income and capital gains tax legislation.

The scheme was promoted through an information memorandum, which set out the anticipated tax advantages and stated that *"advice has been received from Mr Andrew Thornhill QC, a senior UK Tax Counsel and head of Pump Court Tax Chambers in respect of tax".* The memorandum stated that copies of the opinions of Mr Thornhill QC were available from the promoters. Importantly, the memorandum also contained a notice that prospective investors should consult their own tax advisors. In order to subscribe to the scheme, investors were required to warrant that they had relied only on the advice of, and had only consulted with, their own advisors.

The investors subsequently claimed the tax reliefs, but these were refused by HMRC. HMRC wrote to the investors making a settlement offer, under which the investors were required to repay an amount equal to the majority of the tax advantages received by them, together with interest. The claimants were ten investors, all of whom had accepted the settlement offer. They brought claims in negligence against Mr Thornhill QC on the basis that they had relied on his advice in entering into the scheme, as a result of which they had suffered loss.

The case was heard before Mr Justice Zacaroli across 14 days in November and December 2021, and judgment handed down on 8 March 2022. The claims failed for a number of reasons. Firstly, no duty of care was owed to the investors. Secondly, even if a duty had been owed, there was no breach. Thirdly, even if there was a breach, causation had not been established. Fourthly, in any event, many of the claims were time barred by s2 of the Limitation Act 1980. Whilst all of these points are interesting, the decision on duty of care is likely have the broadest practical application and is therefore the focus of this article.

The Judge considered the decision of the Supreme Court in *NRAM Ltd v Steel* [2018] UKSC 13, which is now the leading authority on the law of negligent misrepresentation. In *NRAM*, the court identified the assumption of responsibility as being the foundation of the duty of care in these cases. However, the representor would not be held to have assumed responsibility towards the representee unless (i) it was reasonable for the representee to have relied on what the representor said and (ii) the representor should reasonably have foreseen that he would do so (*NRAM*, per Lord Wilson at [23]).

In this case, the Judge observed that there were a number of relevant factors which pointed towards a duty of care being owed to the investors. Mr Thornhill was a person with special skill. He gave his advice in the knowledge that it was to be made available to potential investors who asked for it. He knew that the information memorandum was a marketing document intended to attract investors to the scheme. He was aware that potential investors were likely to take comfort from the fact that he, as a leading expert in the field, was named as tax advisor to the promoters and that he had given positive advice on the prospects of the tax advantages being achieved. Mr Thornhill accepted that his advice assisted investors and their independent financial advisors in evaluating whether an investment should be made, and he knew that his advice was on the very point of critical importance to any potential investor, namely the likelihood of them obtaining the tax advantages which the scheme promised.

However, the Judge nevertheless concluded that there was no duty of care owed to the investors. He noted that "*critical to this conclusion*" was the fact that the information memorandum clearly advised potential investors to consult their own tax advisors on the tax aspects of the scheme, and the fact that no investor could subscribe to the scheme without warranting that he or she had relied only on the advice of or had only consulted with their own professional advisors. Under the circumstances, it was not reasonable for the investors to rely solely on Mr Thornhill's advice without making independent inquiry. The court had regard to the fact that the schemes were commercial in nature and marketed only to high-net-worth individuals. In addition, the schemes could only be marketed via independent professional advisors so that, by definition, all investors would have the benefit of an independent financial advisor to assist them. Under the circumstances Mr Thornhill could reasonably assume that independent professional advice would indeed be taken by investors, as they were advised to do (and were required to warrant that they had done) in the information memorandum and subscription agreement.

The Judge also considered whether the warranties which were given by the investors fell within s2(2) of the Unfair Contract Terms Act 1977, which prevents a person from excluding or restricting his liability for negligence except in so far as the term or notice satisfied the requirement of reasonableness. The Judge concluded that s2(2) of UCTA did not apply: since there was no duty of care there was no liability in negligence which the warranty was purporting to exclude. In any event, the warranties were fair and reasonable ones to include in all the circumstances.

The case is therefore likely to be heartening to tax advisors who are concerned about the extent to which they may have assumed a duty of care towards investors. However, advisors should also be aware of the limits of the decision. The fact that the Judge considered that it was "*critical*" that the information memorandum contained a notice advising investors to consult their own tax advisors suggests that, in the absence of this notice, a duty of care would have been owed. Furthermore, although the notice in this case was held to be sufficient to give rise to an expectation that investors would indeed consult their own advisors, it may well be that more would have to be done in the case of a scheme being marketed to less sophisticated investors, who might not necessarily have access to independent professional advice. Tax advisors should therefore adopt a cautious approach when considering whether and how to make their advice available to investors as part of the marketing of a scheme. If there are any concerns, then professional negligence advice should be obtained.

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