DRN-4061991

The complaint

1) Mr C complains that a Mr S of Wykeham Independent Consultants Limited (WIC) mis-sold a film partnership to him in December 2002. I will call that film partnership FP1.

2) Mr C has made a second complaint, about the 2003 sale of a film partnership that I will call FP2. This final decision relates solely to his complaint about FP1; I have issued a second final decision on his complaint about FP2. However, there are similarities between the two complaints, and so I hope the parties will understand why there are also similarities in the way I have chosen to express my findings.)

What happened

3) I understand that the following facts are agreed between all parties:

   a) In 2001, Mr C became a client of WIC. His adviser at WIC was a Mr S. At first, Mr S only recommended regulated products to him. Mr C makes no complaint about those regulated products.

   b) Around 26 November 2001 WIC completed a fact find for Mr C, with the intention of determining his aims, objectives, and circumstances. (I don't have a copy of this fact find. I have asked Mr C if he retained a copy, but the only fact find he could provide was signed by Mr S on 31 March 2005, and includes investments that Mr C made considerably later than November 2001. WIC is now in liquidation, and I understand that neither the liquidator nor WIC's PI Insurer has any additional fact finds for Mr C.)

   c) On 13 February 2002, Mr S wrote to Mr C to give further information about film partnerships, referring to an earlier meeting about which he said: "*we have discussed the tax benefits to you for investing in UK Film Partnerships & how you can reclaim your income tax back from the Inland Revenue*". The letter went on to say that film partnerships that operated as a trading partnership were to be regarded as "*a 'gift' from the inland revenue*". Mr S explained the potential tax benefits of film partnerships and said he was "*100% happy to recommend them to both my best friends & best clients such as you*". He further said *"the way that the UK film partnership is drafted seems to comply with both the letter & spirit of the law. We are 99.99% confident that the scheme will qualify for tax relief & that you will receive your 40% tax relief … Please also note that we are recommending that you make this investment on the assumption that you will get your tax relief only, by December 2002 at the latest. We are assuming that the films will not make £1 of income & that still a good investment for you to make.*"

   d) On 9 October 2002, WIC wrote to Mr C offering him "*a 25% after tax investment return in the next 12 months*", and invited him to a seminar to receive more information about the investment.

e) On 12 December 2002, Mr C completed an application form for his investment in FP1. I have not had sight of that form.

f) On the same date, Mr C signed a "Certificate of Sophisticated Investor Status" form to confirm:

- "*I accept that the content of promotions and other material that I receive may not have been approved by a person who has been authorised… and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I further accept that the schemes to which the promotion will relate are not authorised or recognised for the purposes of the Act*."

- (When I issued my provisional decision I had not seen that certificate, but Mr C has since provided it to me. He acknowledges that he signed the certificate, but he says "I don't think this should absolve the IFA of responsibility for sound investment advice, nor should it turn an unsuitable recommendation into [a] suitable one … It was WIC's responsibility – not mine – to assess whether these film schemes were suitable for me.")

g) On 12 December 2002, Mr C invested £100,000 of his own money into FP1, together with a further £233,333 borrowed from a bank. His total investment was therefore £333,333. The bank loan was later repaid, as intended, by West LB bank.

h) In October 2003 Mr C received a tax refund of just under £125,000 with respect to FP1. His position is that "*it was NOT explained to me either by WIC or [anyone else] that I might ever have to give this money back to [the] Inland Revenue*".

i) In March 2007 Mr C received cash calls in respect of both FP1 and FP2. He believes those cash calls were for partnership expenses, necessitated in part by the original "sponsor" of the film partnerships resigning and being replaced. He paid £1,500 in respect of FP1 and £2,325 in respect of FP2.

j) In September 2012 Mr C received a circular from a third party offering to review his film partnership investments for him. The third party told him that in its view, "*the rights you are afforded for protection in the event of product or scheme being mis-sold or misrepresented come to an end on the 5th October this year*".

k) Shortly after receiving the circular, he complained to WIC about both film partnerships. He later explained that his complaint is "*very specific*" and that Mr S failed to advise him of the risks associated with FP1 – that is, of the risk of losing his invested capital and the risk of HMRC intervening and clawing back the tax benefits of FP1 together with interest and penalties. In particular, he now says:

i) "The [film partnerships] were wrongly described by WIC as "a gift from the government".

ii) [The film partnerships] Tax Relief were wrongly described by WIC as "guaranteed".

iii) [The film partnerships] were wrongly described by WIC as "safe".

iv) I was offered a "50% tax free guaranteed investment return within the next 12 months".

v) *[The film partnerships] were wrongly described by WIC as "low risk".*

vi) *[The film partnerships were] described by WIC as "safe, proven to work, and will give you a 50% investment return within 12 months".*

vii) *The "worst possible outcome" was quoted by WIC as: that the 70% HBOS bank loan would be repaid by West LB Bank from Germany.*

viii) *No mention of any future taxation nor that income tax would be due on the West LB bank repayment was to be made in April 2008 for [FP1] and again in April 2009 for [FP2].*

ix) *I was told by WIC in writing that "Unlike some schemes that are only a "low interest loan" from the Revenue… This investment is different and really is a "gift" from the government and it is 100% legal and legitimate. We can guarantee that it works as well".*

x) *I was told in writing that this investment is backed up by big names such as Halifax Bank of Scotland (HBOS), Barclays, Royal Bank of Scotland and West LB (a state-owned German bank).*

xi) *I was told in writing "this investment is therefore as safe as these banks are".*

xii) *On 9th October 2002, I had a letter from WIC offering me "a 25% after tax investment return in the next 12 months".*

xiii) *I was told in writing that "this is equal to a 40% gross investment return in the next twelve months".*

xiv) *I was told that the DCMS has approved the films making the scheme qualify for the tax relief.*

xv) *I was told "The Inland Revenue has approved the accounts in the same way that they do for all trading companies in the UK. Regardless of them being a Limited Company, a PLC, a Partnerships or a Self Employed or PAYE individual's"."*

l) Mr C made further payments to the organisation managing FP1 and FP2 in October 2013, March 2017, January 2018 and June 2018. His understanding is that all of those payments were for tax tribunal appeals.

m) HMRC ultimately reclaimed all the tax relief Mr C had received for both FP1 and FP2.

n) In late 2018, Mr C agreed to pay HMRC just under £221,500 in respect of both FP1 and FP2. That sum included interest, penalties, and the unpaid tax.

Additional documentary evidence

4) In a case like this one, where a complainant alleges that an adviser has made an unsuitable recommendation, I will often rely on the documentary evidence produced at the time of the sale. But in this case, much of the evidence I would like to see is simply not available. For example:

- Mr C says Mr S completed a fact find in November 2001. At the time (and indeed still today) it was usual for advisers to complete fact finds setting out the client's circumstances and objectives before giving any advice. It was also very common for fact finds to set out the level of risk that the client wanted to take. The fact find Mr S completed is likely to have contained material evidence, but it is simply not available.

- Mr C also says that application forms were completed. I think it is very unlikely indeed that he could have become a member of FP1 without some kind of paperwork being completed, so I accept that there would have been an application form. My experience with other film partnership complaints is that the application process usually does require the applicant to confirm that they have some awareness of the associated risks. But here, I cannot assess the adequacy of any such risk warning (if it existed at all).

- Similarly, the promoters/sponsors of film partnerships usually produced an Information Memorandum, or IM. That document would set out the intended structure of the partnership and its purpose. It would also usually contain some risk warnings. It was in part a marketing document – so the risk warnings might not necessarily be expressed in a particularly stark way – but they would usually be there.

- One of Mr S's emails refers to a 33 page "*partnership deed*", which was provided to Mr C before he chose to invest. I assume that document contained some relevant information, but I have not seen it.

5) I do have some documentary evidence from the time of the sale, primarily consisting of the correspondence from Mr S to Mr C that I mentioned above. But after all of this time, I think it is very unlikely that the parties have been able to provide me with a complete record of the letters and emails exchanged in late 2002.

6) All in all, notwithstanding that some of the documentation from the point of sale is no longer available, I am satisfied that the documentation and evidence that I do have in connection with the sale is sufficient to enable me to assess this complaint fairly.

Mr C's recollections and circumstances

7) Mr C has been able to provide the Financial Ombudsman Service with his recollections of what happened. Briefly, he told us:

- Mr S recommended that he invest in FP1. In doing so, "*WIC made several misleading statements describing [FP1]. This included the following: low risk, safe, guaranteed, tax free.*"

- Mr S also told him that the investment was as safe as Bank of Scotland, Barclays, Royal Bank of Scotland, and a state owned German bank.

- At the time, he was working particularly long hours during "*an intense period of my career…I needed to rely on external advisers for financial advice*".

- Whilst WIC's insurer's records say that he told Mr S "*Providing a good level of return on my investments*" was "*very important*" to him, and that reducing his tax bill was "*essential*", he would like me to bear in mind the context – which is that he "*was being asked to fill in a computerised questionnaire … with no idea what recommendations would later be made to me*."

- His view now is that Mr S either misunderstood or deliberately misrepresented the risks associated with FP1.

8) The information I have about Mr C's finances just prior to Mr S's recommendations is limited. I believe his income was significantly in excess of £100,000 a year – I do not have exact figures, but Mr C has provided me with Mr S' handwritten notes (which were apparently made during the sales meetings for FP1 and later FP2) and suggest income of over £520,000 in the 2000/2001 tax year, and almost £650,000 in the following tax year.

9) The fact find Mr S completed in 2005 shows that a few years after Mr C invested in FP1 he had cash deposits of over £300,000, an equity portfolio (including PEPs) worth more than £600,000, a mortgage free main residence, and a second property owned subject to a mortgage. I do not know when he acquired those assets, but I think it likely he held at least some of them in 2002, and this is supported by Mr S's handwritten notes from the advice meetings.

10) Mr S's handwritten notes about Mr C's assets aren't as clear as his notes about Mr C's income, but notes he made in December 2002 say that Mr C had investment income of over £15,000 – which suggests Mr C held investments with a capital value significantly more than that.

11) Mr S's December 2002 notes also include the comment "*£10,000 EIS*", but they do not say whether that £10,000 was investment income or a capital investment. Similarly, the notes Mr S made in October 2003 include the comment "*VCT/EIS £6999.80*", but do not specify whether the sum represents the income on an investment Mr C held before investing in film partnerships, the current value of an investment, or something else. I think the notes do suggest that Mr C had some involvement in Venture Capital Trusts and/or Enterprise Investment Schemes at some point, but they do little to tell me exactly what he invested in or when he made those investments.

12) The 2005 fact find recorded Mr C's net worth as being in excess of £2 million. I do not know what his net worth was immediately before Mr S recommended FP1, but I think it is likely to have been significant.

13) Mr C described his professional background as follows: [redacted].

14) I understand that at the time of the sale, Mr C did not work in a role that required any kind of authorisation or approval from the Financial Services Authority (FSA). His name did not appear on the Financial Services Register maintained by the FSA and its successors until [redacted].

What was FP1?

15) Film partnerships were originally introduced in the late 1990s as a way to support the UK film industry. They were designed to provide tax advantages for people who were prepared to invest in the production or exploitation of films. The majority of film partnerships were either 'sale and leaseback' or 'production' partnerships, but hybrid arrangements also existed.

16) In a sale and leaseback arrangement, the partnership would buy the rights to a completed British film. The partnership would then lease the film back to the seller for a period of time, typically 15 years, in return for an annual payment. The cost of buying the rights was tax deductible as an expense – meaning that in the first year of the

partnership, the partners would suffer a substantial loss. They could offset that loss against certain other income and capital gains, providing a significant tax benefit in the first year of the partnership. However, in subsequent years the rental income from the lease would be taxable in the partners' hands.

17) Sale and leaseback arrangements were effectively tax deferral schemes. The partners would receive a tax benefit in the first year, but then have to pay higher taxes over the remaining years of the lease. Partners would benefit if they were able to invest the initial tax benefit in a way that produced a return over and above the tax due on the lease payments received in later years. But the income received from the partnership was guaranteed (subject to the seller being able to meet its obligations). The income from a sale and leaseback film partnership did not depend on the commercial success of the film.

18) Production partnerships were different. In a production partnership, the partners' money was not used to buy the rights to a completed film, but instead to finance the production of a British film. That financing was tax deductible as an expense, giving the partners an immediate tax benefit. But unlike a sale and leaseback arrangement, income in future years was not guaranteed. Future income, if any, depended on the commercial success of the film or films produced.

19) The benefits – and risks – of both types of film partnership could be amplified by gearing. It was common for partners in the schemes to fund only a small portion of their investment from their own resources, and to fund the rest by a loan. In this case, Mr C took a bank loan for £233,333. That loan was later paid back from the returns generated by FP1.

20) I don't know what type of film partnership FP1 was. I invited the parties to provide me with any further evidence they had on that point, but nobody has been able to provide me with relevant documents.

My provisional decision

21) I issued a provisional decision on this complaint in November 2022. That provisional decision is attached, and should be read together with this final decision.

22) Briefly, I said I was unable to make any findings as to whether Mr S's recommendations were suitable for Mr C, but I could make the following provisional findings:

- It is unlikely that WIC fully complied with the promotion rules.
- Mr S made misleading statements about the risks associated with FP1.
- Nevertheless, Mr C already knew there was a risk that the tax authorities might investigate the FP1 tax arrangement and claw back any benefits taken. As a result, Mr C did not rely on Mr S's misleading statements when he decided to purchase FP1. Further, it is likely Mr C would still have gone ahead with the investment even if Mr S had not made any misleading statements. That means Mr S's misleading statements and rule breach did not cause Mr C's loss, and it would not be fair and reasonable for me to uphold this complaint.

23) Mr C and his representative did not accept my provisional decision. Briefly, his representative said:

a) They do accept my finding that Mr S cannot have had a reasonable basis on which to make the statement that he was "*99.9% confident that loss relief would be applied*". They also accept my opinion that "*Mr S's comments about FP1 were… wildly misleading – they weren't just overoptimistic – they were outright wrong*". But they do not accept the remainder of my findings.

b) Mr C was at all times a consumer, and the responsibility for retaining records of the advice given rests with the regulated adviser. Nevertheless, Mr C has been able to provide a considerable amount of documentation – arguably more than the average reasonable consumer would have retained. Where there is any doubt about what happened, that doubt should be resolved in Mr C's favour. He should not be disadvantaged by the absence of documentation made available by the adviser or its liquidator, nor by the very long delays in resolving his complaint.

c) This is a simple case of unsuitable advice provided to a retail client by a regulated adviser who either misunderstood or misstated the risks associated with the film partnerships.

d) Given that my provisional decision found that the adviser made wildly misleading comments and seriously understated the risks associated with FP1, it must follow that I accept the advice was unsuitable. The default position must be that the advice was unsuitable unless proven otherwise. In the circumstances of this case, it is not open to an ombudsman to say that the advice 'may' have been suitable or that other evidence 'may' point towards Mr C having accepted risks.

e) The case of *McLean and others v Thornhill [2022] EWHC 457 (Ch)* is highly relevant to Mr C's case, in that the there are similarities in the period of time covered and in the issues of suitability of advice.

f) They consider that I have used the wrong test for reliance. They say the correct test is whether Mr C in fact relied on the advice, and whether it was reasonable for him to do so. Here it is clear that reliance was placed, because substantial sums were invested.

g) The relevant test is what Mr C could reasonably have known at the time of the negligent advice. There is no reasonable basis for me to conclude that it was "*obvious*" that there was a risk of tax relief being refused.

h) Mr C did invest in another film partnership in 2005, but this was after he'd received tax relief for FP1 and FP2 – and before he'd realised there was any problem with that tax relief. His later investment implies that he had no idea that his existing investments were at risk from loss of tax relief.

i) They do not accept that the adviser's letter of 23 February 2004 referred to DOTAS, and they do not accept that Mr C would have believed that it did.

j) They also consider that I misunderstood the tax consequences of Mr C employing an agent rather than personally carrying on a trade.

k) [redacted] qualifications are unlikely to have covered future tax avoidance schemes at all, and certainly not in sufficient detail to enable Mr C to be able to fully understand schemes presented to him many years later. This is evidenced from the significant involvement of specialist tax counsel.

l) Mr S was a professional adviser, carrying numerous permissions from the regulator to advise retail clients and consumers. WIC itself was regulated for a period of some twenty years. It is likely the various regulators would have carried out routine compliance checks over that period. Given that the regulators allowed WIC to continue to trade and to advise retail customers for 8 to 9 years before it gave advice to Mr C, it was reasonable for Mr C to rely on the advice – including the written advice – that he received from Mr S of WIC.

m) Overall, if Mr C had understood the real risks involved in FP1, he clearly would not have invested in any film partnerships at all.

24) No other party provided any comments on the contents of my provisional decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

25) Having done so, I've come to the same conclusions as I did in my provisional decision, for broadly the same reasons as before. I remain satisfied that:

- It is unlikely that WIC fully complied with the promotion rules.
- Mr S made misleading statements about the risks associated with FP1.
- Nevertheless, Mr C already knew there was a risk that the tax authorities might investigate FP1's tax arrangements and claw back any benefits taken. Mr C did not rely on Mr S's misleading statements when he decided to purchase FP1. Further, it is likely Mr C would still have gone ahead with the investment even if Mr S had not made any misleading statements. That means Mr S's misleading statements and rule breach did not cause Mr C's loss.
- Overall, it would not be fair and reasonable for me to uphold this complaint.

26) I now confirm those provisional conclusions as final. I also give further explanation below and address the further points made by Mr C.

The promotion rules

27) I set out the promotion rules in some detail in my provisional decision. I do not repeat those rules here, because there is no dispute about them. But I will say, in brief, that Mr S could only lawfully have promoted FP1 to Mr C if one of the exemptions in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (the 'PCIS Order') applied.

28) Given the existence of the signed "*Certificate of Sophisticated Investor Status*" form, I think it is apparent that Mr S intended to rely on the exemption relating to sophisticated investors. Amongst other things, that exemption required a prospective investor to make a statement containing specified terms. The certificate Mr C signed contained wording that was close to the required wording, but it was not the same – and it did not cover the same points.

29) I have not seen any evidence to suggest that any other steps were taken in an attempt to comply with any of the exemptions available under the PCIS Order, and therefore I consider it is extremely unlikely that WIC complied with the promotion rules.

30) However, as I explained in my provisional decision, a finding that the promotion rules were not complied with does not automatically lead to a finding that a complaint should be upheld. I must also consider the consequences of any rule breach, and, in particular, what would have happened if that breach had not occurred.

Mr S's misleading statements

31) None of the parties have raised any objection to my provisional conclusion that Mr S's statements about FP1 were both wildly misleading and wrong.

32) Everyone accepts that Mr S told Mr C that the FP1 amounted to "*a gift from the government*", and "*the Best Low/No Risk opportunity that we have been able to offer in 17 years*".

33) So far as the associated loan was concerned, Mr S said "*your only 'risk' for any of the [loans] is if the AA rated bank 'goes bust' … & if an AA rated bank goes 'bust' – the consequences for the economies [all over the world] would then be pretty disastrous & whatever investments we have all used would also have collapsed*".

34) As I said in my provisional decision, I think Mr S seriously understated the risks. Whilst I don't have full details of FP1 – and I don't know if it was a production partnership or a sale and leaseback scheme – I don't think it has ever been reasonable for an adviser to describe an investment into any type of film partnership as low to no risk.

35) I remain satisfied that Mr S made misleading statements about the risks associated with FP1. But that doesn't automatically mean that Mr C was in fact misled – I explain this further below.

***Was WIC's advice suitable for Mr C*?**

36) I set out some of the rules in relation to suitability in my provisional decision. Again, I do not repeat the body of the rules here because there is no dispute about them. WIC was required to take reasonable care to ensure that it did not recommend FP1 to Mr C unless that recommendation was suitable for him.

37) Mr C's representative has referred me to past decisions of the Financial Ombudsman Service and explained why he believes those decisions show that Mr C's complaint should be upheld. This is a point that he has made again in his more recent letter of 4 April 2023.

38) Although I have read and had regard to each of the decisions to which he has referred, I want to stress to Mr C that we consider each case on its own merits. Mr C's complaint, and the circumstances that led to it, are unique to him. Mr C's complaint may have similarities with other complaints – and in particular to any complaints that might be

made about the same product sold by the same adviser – but it is my view that the facts leading to his complaint differ from other complaints in some material ways. For instance, Mr C's professional background and investment history are his own, and will not be the same as any other complainant. This and the other distinctions I have drawn between Mr C's complaint and the decisions to which he refers are highlighted in my provisional decision.

39) I also acknowledge that Mr C's representative believes that, since I provisionally found that the adviser failed to provide reasonable risk warnings, it must logically follow that I believe the advice was 'unsuitable'. On this point, I feel I should explain that my finding that I had insufficient information to determine the issue of 'suitability' was made in the context of the requirements of the FSA's rule on 'suitability' as contained in COB 5.3.5R. At the same time, I acknowledge that a 'suitability' analysis more generally, can be broader than that. I'll explain my stance below.

40) As I set out in my provisional decision, and as Mr C's representative agrees, the two FSA Handbook rules on advising and selling that were most relevant to the complaint Mr C has made in connection with WIC's advice were COB5.3.5R (the requirement that personal recommendations must be suitable for the customer) and COB5.4.3R (the requirement that a firm must not make a personal recommendation unless it has taken reasonable steps to ensure that the customer understands the nature of the risks involved). I am also aware that principle 7 of the FSA's principles for businesses provided that, in communications with clients, a firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.

41) To be clear, I agree with Mr C that each of the regulator's rules do not operate in a vacuum when assessing the adequacy and quality of the advising and selling that has taken place. All the features of the sale should be considered in the round. And I agree that the absence of adequate risk warnings might render investment advice 'unsuitable' in a broad sense.

42) On this, I note that Mr C's representatives indicate they have seen FCA guidance that says, in the absence of evidence proving that the sale of a UCIS is suitable, 'the default position is that it is deemed to be unsuitable advice'. I have asked them to give further information about the source of this comment, and they confirmed they were referring to the following documents:

- The FSA's Unregulated Collective Investment Schemes: Project Findings
- The FSA's Unregulated Collective Investment Schemes: Good and poor practice report
- The FSA's Consultation Paper CP12/19 (Restrictions on the retail distribution of unregulated collective investment schemes and close substitutes)
- The FCA's Policy Statement PS13/3 (Restrictions on the retail distribution of unregulated collective investment schemes and close substitutes)

43) Mr C's representatives have also said that they believe I have already made the finding "the FCA considers that advice must be deemed unsuitable absent evidence to the contrary". However, I have not made that finding – and I do not believe that statement to be true for UCIS advice. I will explain why.

44) I do accept that the FCA and its predecessors have consistently said that unregulated collective investments like film partnerships "*are generally unsuitable for ordinary retail investors*". In this context, an "*ordinary retail investor*" is defined as a retail client who is neither a sophisticated investor nor a high net-worth individual – in other words, as set out in the glossary to CP12/19, "*investors of ordinary means and experience who make up the vast majority of the retail market in the UK*". For example, in CP12/19, the FSA said:

> "*With their ability to invest in a potentially limitless range of assets and projects, risks will vary from fund to fund but are generally higher than those presented by regulated CIS, which are subject to more stringent rules on how they can operate. UCIS products are generally unsuitable for ordinary retail investors*."

45) However, a statement that UCIS are generally unsuitable for ordinary retail investors is not the same as a statement that a particular UCIS will be unsuitable for a particular investor unless proven otherwise.

46) In any event, I don't think Mr C could fairly be described as "*an investor of ordinary means and experience*". Investors could potentially be classified as a "certified high net-worth individual" under PCIS if they had held net assets of at least £250,000 for at least a year. The evidence suggests Mr C's assets comfortably exceeded that figure. WIC does not appear to have made any attempt to certify Mr C as a high net-worth individual – to do so properly, it would been required to involve either Mr C's employer or his accountant – but nevertheless it is clear that he was a wealthy individual with access to significant resources. Similarly, whilst Mr C was not a properly certified sophisticated investor, he had many years of experience in financial matters. I discuss his experience in more detail below (under the heading "*is it fair to uphold this complaint?*"), but in brief I consider that he had more than ordinary experience.

47) In its July 2010 "*Project Findings*" report, the FSA recognised that "Where firms are unable to demonstrate the suitability of their advice, their customers are at risk of receiving unsuitable advice". But this again is not the same as saying that sales to ordinary retail investors will be deemed unsuitable unless and until proven otherwise. I consider that if the FSA had meant to include such a default position, it would have said so.

48) All in all, the FCA statements on the suitability of UCIS sales do not, as Mr C's representatives suggest, comprise a default provision on suitability. Nonetheless I do recognise that those statements do amplify the risks of UCIS and suggest that in most cases, they will be unsuitable for ordinary retail investors. I agree with this. But, as I have indicated, for a person in Mr C's position who was seeking tax benefits, who was likely to have had an appetite to take risk, and who could afford to absorb the losses that might come about, a UCIS might have been a suitable option, but I cannot say conclusively that it was suitable or unsuitable as I do not have enough information to make a determination about that.

49) I have therefore given careful regard to all the references to FSA guidance that have been made by Mr C's representative in his letter of 4 April 2023. I have also had regard to further guidance issued by the FSA and subsequently the FCA on the suitability of UCIS recommendations made by advisers. For instance, I note that Mr C's representatives refer to the July 2010 report released by the FSA and titled '*Unregulated Collective Investment Schemes: Good and poor practice'*, which gave examples of poor practice as follows:

- The firm did not tell the customer that the recommended scheme is unregulated.

- The firm did not highlight all relevant risks of an unregulated scheme (e.g., UCIS frequently invest in assets that are less/not liquid, some UCIS are geared, customers may not have cancellation rights, customers may not be covered by the FOS should they have a complaint about the fund or the FSCS should they need to seek compensation).

- The firm told the customer that returns are guaranteed rather than targeted. The firm did not give a balanced view on benefits and risks of investing in UCIS.

- The firm did not explain to the customer that they will not have access to their investment during a tie-in period or even after it, as exiting the scheme was only on the discretion of the fund manager.

- The firm had a strategy to put all of its customers and all of their money into one UCIS.

50) It follows that a failure to give Mr C adequate risk warnings about FP1 might, in the broader sense of the word, lead to a view that 'unsuitable' advice was given. However, I want to be clear that my view was that I did not have sufficient information to make a finding as to the suitability of the recommendation to Mr C to invest in FP1, in the sense required by COB 5.3.5R. I still consider I do not have enough evidence to do so. I don't know enough about either Mr C's objectives or about FP1 itself to be able to sensibly comment on whether Mr S's recommendation that Mr C invest in FP1 was suitable.

51) The facts available to me do tell me something about Mr C's financial position at the time FP1 was recommended to him, but they tell me very little about his objectives.

52) At the time Mr S made his recommendation, most of Mr C's income from employment fell into the higher rate tax band. That would have given Mr C significant scope for potential tax savings. I have no doubt that he could afford to take the risks associated with FP1, and I see nothing in his circumstances to suggest that he would not be able to absorb the losses should FP1 fail to produce the benefits he hoped. There is nothing in Mr C's circumstances that suggests to me that Mr S's recommendation was obviously unsuitable (in the COB 5.3.5R sense), but suitability is not just about affordability. A recommendation will only be suitable if it meets an investor's objectives and is commensurate with their attitude to risk.

53) I think it is obvious that Mr C was interested in discussing advantageous tax arrangements. His previous investments in VCTs and/or EIS suggest that he was willing to take higher risk with at least part of his portfolio, and that is consistent with comments he made in 2005 about being willing to take a "*medium*" risk with his lump sum investments.

54) As I have previously said, I do not have a fact find, and I have very little correspondence between Mr C and WIC and/or Mr S that was contemporaneous to the advice. Overall, the evidence I have about Mr C's circumstances, aims and objectives, and attitude to risk at the time of the sale is extremely sparse, and this makes it very difficult to conduct an assessment of suitability, as contemplated by COB 5.3.5R. I also know very little about FP1, and I don't know whether it was a production or a sale and leaseback partnership. Film partnerships were not all the same; there was no such thing as a 'standard' film partnership, just as there is no such thing as a 'standard' investment in a unit trust, or shares, or any other type of investment.

55) I acknowledge that Mr C's representative has said that WIC had a strategy to put all of its customers and all of their money into one single UCIS, but I don't think the evidence supports that view. Although I don't have full details of Mr C's other investments, it is apparent that he held significant wealth outside of FP1. He did not put all of his money into a single unregulated scheme.

56) I don't think it is surprising that documents have gone astray in the twenty years since the advice complained of was given. I certainly don't criticise Mr C for that, and I am satisfied that he has done his best to provide me with all the documents he can.

57) But I'm required to treat both sides fairly. In this case, I don't think it would be fair or reasonable for me to simply resolve all doubts in favour of Mr C.

58) For example, I am confident that a partnership deed for FP1 would have existed at some point. I say that partly because the correspondence I have seen refers to the deed, but mostly because I think it is exceptionally unlikely that a partnership of this sort would have come into existence without a written record of the agreement made between the partners. In addition, given my experience as an ombudsman who has dealt with multiple complaints regarding film partnership investments, I consider that it is much more likely than not that the promoters of this sort of investment opportunity would have produced an Information Memorandum, or IM – and investors were usually required to sign to confirm receipt of the IM before they were allowed to invest in the partnership. I have not been able to review any of those documents here.

59) As I said in my provisional decision, IMs are in part marketing documents aimed at promoting the opportunity being offered. But they are also often used to ensure that relevant information and risk warnings are shared with investors. In my experience, I have never seen an IM for a film partnership investment that did not include a warning that the tax authorities might disagree with the promoters about the tax treatment of the investment. And I note that in the Thornhill case itself, on which Mr C's representatives have placed much reliance, clear risk warnings were given in the IM for the film partnership in question indicating that changes in tax legislation and HMRC published practices might have retrospective effect and might adversely affect the performance of the investment.

60) However, I fully appreciate that it does not follow that Mr C must have received such a warning in the IM for FP1. As I say, I have not seen the IM for FP1 so I cannot be sure that it contained such a warning – and even if it did, I cannot be sure that Mr C ever saw the IM. I raise my experience with film partnerships, and with IMs in particular, only to help explain why in my view it would not be fair nor reasonable for me simply to assume, in the absence of the IM in question, that it did not contain any risk warnings about the treatment of the tax position by the tax authorities when there is at least a reasonable possibility, in my experience, that it did contain such warnings.

61) I therefore agree with Mr C and his representatives that he should not be unfairly disadvantaged by the lack of documentation. But equally, I do not agree that to the extent that relevant evidence is deficient or unavailable, I must find that the advice in question was unsuitable in accordance with COB 5.3.5R.

62) As I say, there is little doubt that Mr S gave inaccurate and misleading information about FP1 and I accept that this rendered the advice 'unsuitable' in the broad sense contemplated by the FSA, for instance, in its report on the quality and suitability of advice on and selling of UCIS.

63) Ultimately of course, I am required to determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case, taking into account relevant:

- law and regulations;
- regulators' rules, guidance and standards;
- codes of practice; and
- (where appropriate) what I consider to have been good industry practice at the relevant time.

64) It follows that, even if I am satisfied that the failure to give accurate information and adequate risk warnings rendered the advice 'unsuitable' in the broader sense, it does not automatically follow that it would be fair and reasonable for me to order WIC to pay compensation to Mr C. I must also consider, whether those failures actually misled Mr C and whether he relied on that aspect of WIC's advice when he decided to proceed with the FP1 investment. If Mr C would have gone ahead with the investment in any event (that is, even if WIC had given clear and adequate information and risk warnings), then it would not be fair for me to uphold the complaint. I explain this stance further below.

65) At this point I should say that I also agree with Mr C's representative's view that Mr S had assumed responsibility for the advice he gave to Mr C. If Mr S felt he did not have the requisite expertise to provide the advice in question, he ought to have told Mr C to obtain advice elsewhere. He did not, and in turn he and WIC are responsible for the advice given. I've not seen any evidence to indicate that Mr S did not have the expertise to give the advice, but in any event, I should say that Mr S's level of expertise will not of itself be determinative of whether the advice was suitable. I do not agree with Mr C's representative that advice given by an unqualified or incompetent adviser must necessarily be unsuitable. There is obviously a risk than an incompetent or unqualified adviser will make a recommendation that is unsuitable for a client, but I don't think that automatically follows.

66) I also agree with the FCA's comment that "*where firms are unable to demonstrate the suitability of their advice, their customers are at risk of receiving unsuitable advice*". In this case WIC cannot demonstrate the suitability of its advice. But again, the fact that there is a risk that WIC's advice was unsuitable does not in itself say anything about the actual suitability or otherwise of that advice. And, as I say above, the FSA is plainly not saying (as Mr C's representatives suggest) that in the absence of proof of suitability, the advice is 'deemed' unsuitable. In this case, as the facts are currently put before me, I simply do not have sufficient evidence to make a finding as to whether the advice was suitable or unsuitable in a COB 5.3.5R sense. Whilst I am satisfied that Mr S and WIC owed Mr C a duty to provide suitable advice, I cannot make the finding that that particular duty was breached.

The application of the Thornhill case to this complaint

67) Mr C's representatives have provided a detailed analysis of the case of *McLean and others v Thornhill [2022] EWHC 457 (Ch)*. I have read that judgment and given it careful thought.

68) Briefly, *Thornhill* involved a group of investors in film schemes in and around 2002-2004 (not FP1 or FP2). Mr Thornhill was a barrister specialising in tax, and had given advice to the promoters of the schemes in question. He consented to being named as tax adviser to the schemes, and he also consented to investors being told that there was nothing in the scheme IMs that was inconsistent with his advice.

69) In summary, the investors' claimed:

> "*Mr Thornhill negligently advised that the Schemes would achieve the Tax Benefits [expected by the investors] because the LLPs would be carrying on a trade on a commercial basis with a view to profit, which was advice that no reasonably competent tax QC could have given, and/or that he negligently failed to advise that there was a significant risk that the Scheme would be challenged by the Inland Revenue*".

70) The investors' position was that but for Mr Thornhill's advice they would never have entered into the schemes.

71) There are some significant differences between the claims brought by the Thornhill investors and the complaint Mr C makes to the Financial Ombudsman Service. Those differences include (but are not limited to):

- Mr C's complaint is against his own financial adviser, who clearly owed him a duty of care. The Thornhill investors were claiming against the barrister who advised the film scheme's promoters, and there was a dispute about whether the barrister owed a duty of care to the investors.

- In *Thornhill*, the relevant IMs were available and were closely analysed by the judge, particularly in connection with the causation issue. In Mr C's case, whilst I am satisfied that it is much more likely than not that an IM was produced, I have not been able to review it.

- The Thornhill investors alleged that "*no reasonably competent barrister could have concluded that [the film schemes in that case] were trading and/or commercially and/or with a view to profit, whether in 2002-2004 or in 2017*". Mr C's complaint is not about the advice given to the promoters of FP1, or about the way FP1 was set up. His complaint is that Mr S should not have recommended that he invest in FP1.

- Much of the judgment was concerned with limitation issues. There is no dispute between Mr C and WIC about timebars or limitation periods. WIC's liquidator has consented to my consideration of Mr C's complaint about FP1, so there is no need for me to decide when Mr C ought reasonably to have become aware that he had cause for complaint.

72) Mr C's representative says the judge in *Thornhill* emphasised the role of the financial adviser in ensuring the suitability of the advice the investors received. That is true and is, as I say, equally applicable in this case.

73) The judge in *Thornhill* was also clear that the investors' financial advisers owed a duty of care to them. I agree, but I don't think anybody has disputed that Mr S and WIC owed a duty of care to Mr C. Certainly there is no dispute that WIC owed a duty to under COB 5.3.5R to give suitable advice.

74) Overall, whilst I have carefully read the contents of the *Thornhill* judgment I consider that the circumstances of Mr C's complaint are different to the claims made in that case. I don't think *Thornhill* is entirely on point with the circumstances of Mr C's complaint. Nonetheless, I have taken it into account when forming my views of the fair and reasonable outcome of this complaint. In particular, I consider the judgment to be relevant to the issue of reliance and causation, which I expand on below.

Is it fair to uphold this complaint?

75) It is common ground that Mr S and WIC had a duty of care towards Mr C. I consider that Mr S had a general duty to act with the skill and care to be expected of a reasonably competent financial adviser. There were also a number of specific duties imposed by financial services regulation.

76) Mr C's representatives have made much of the fact that Mr C was entitled, reasonably, to rely on Mr S as an FCA authorised financial adviser. I agree that a person is ordinarily entitled to rely on the investment advice they have paid a financial expert to give them. The question is whether Mr C did in fact rely on the part of the advice he received that I have found to be deficient – that is, the failure to warn him that he might not receive the tax benefits anticipated by the promotors of the scheme.

77) Given my inability to make findings about suitability in the COB5.3.5R sense, I cannot uphold this complaint on the basis that Mr S's advice breached that particular rule. I don't know what Mr C's needs and objectives were, I don't know the key features of the investment, and so I cannot say whether the investment met Mr C's needs and objectives. That means I cannot make the finding that Mr S breached his duty under COB to provide suitable advice.

78) I have however found that there were significant deficiencies in WIC's sales process. I think the rules on promotion were breached. It is also clear that Mr S did not provide Mr C with an accurate description of the risks involved.

79) But the conclusion that the promotion or COB rules were breached is not the end of the matter. Section 228(2) of the Financial Services and Markets Act 2000 requires me to determine a complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. It is not automatically fair for me to uphold a complaint because I believe a rule has been breached. I must also consider the consequences of that breach – and in particular, what would have happened if the breach had not occurred.

80) I have carefully considered Mr C's representative's further comments. But given the particular circumstances of this complaint, I still don't think Mr S's breaches of the promotion rules and the deficiencies of his advice have caused Mr C's loss.

81) Whilst Mr C may not have been a certified sophisticated investor as defined in PCIS, he was an experienced businessman [redacted]. I consider that his professional experience means he had sufficient background knowledge to understand the risks associated with FP1. As he has said, his role was to [redacted].

82) I remain satisfied that the key issue here is whether Mr C understood the risks associated with FP1 – primarily the risk that HMRC might investigate the arrangement and claw back any benefits wrongly claimed. I think it's clear that Mr S seriously understated those risks. But I also need to consider whether – taking into account the evidence relating to Mr C's professional background, qualifications and previous investment experience - Mr C understood those risks, notwithstanding Mr S's misstatements about FP1.

83) Having carefully considered the evidence available to me, including the evidence presented following my provisional decision, I still think that Mr C did understand those risks so that even if Mr S had not understated the risks, Mr C would have gone ahead with the investment anyway. To put it another way, if Mr S had taken reasonable steps

to ensure that Mr C understood the nature of the risks involved, I think it is much more likely than not that Mr S would have discovered that Mr C did in fact already understand the risks.

84) I recognise that Mr C's representatives were surprised by my provisional findings about reliance, and that they consider I have used the wrong test for reliance. But I agree with them that the correct test here is whether Mr C in fact relied on Mr S's misleading statements, and, if he did, whether it was reasonable for him to do so. I should add that even if that were not the correct test at law, I consider it to be the fair test in all the circumstances of this case. Having applied that test, the conclusions I have reached are different to the ones Mr C's representatives have reached; I do not think Mr C relied on Mr S's misleading statements when he went ahead with the investment in FP1, and even if he did, I do not think it was reasonable for him to do so.

85) As I've said, I don't have enough evidence to be able to make a finding that Mr S's advice was suitable or unsuitable in a COB 5.3.5R sense.

86) I am however satisfied that Mr S and WIC breached their COB 5.4.3R duty to take reasonable steps to ensure that Mr C understood the nature of the risks involved with Mr S's recommendation. In considering whether Mr C relied on Mr S's misleading statements I have given careful thought to everything his representatives have said on his behalf, and note:

    a) Mr S and WIC had the appropriate authorisations from the FSA to be permitted to recommend products like FP1. I agree with Mr C's representatives that an investor is ordinarily entitled to rely on the advice of his authorised financial adviser. But in the circumstances of this case, it is my view that Mr C already knew there was a risk the scheme's tax affairs might later be challenged by the Inland Revenue. In my view, he knew that Mr S's misleading statements were simply sales puff and bluster and therefore he did not rely on them when he decided to invest in FP1.

    b) I don't think Mr S merely "*adopted exaggerated sales pitches*", as Mr C's representative suggests. By way of example, I have noted that he made comments along the following lines - that the tax relief was a "*gift from the government*", that it was "*guaranteed*", and that the only risk Mr C was exposed to with respect to the investment involved the potential failure of a German bank. Given Mr C's professional qualifications and experience, I think it would have been clear to Mr C that Mr S's comments amounted to mere puff and bluster. I say that because [redacted]. I accept that Mr C was not an expert in film financing or its taxation, but I still consider that he would have understood that tax avoidance arrangements can operate in a legally grey area, and he would have understood that the tax authorities would act when a taxpayer was making loss relief claims which it believed were not permitted by the relevant legislation.

    c) I also consider that Mr C's professional experience would have put him in a better position to be aware that, whilst the tax authorities usually accept the returns submitted by a taxpayer, it is open to those authorities to open investigations. Precisely how those investigations take place has changed over time, but I am satisfied that Mr C would have known in 2002 that Inland Revenue investigations into tax returns were possible, and that those investigations might ultimately result in a taxpayer being required to repay the unpaid tax, together with interest and penalties, to the Revenue.

d) I acknowledge that Mr C's professional experience was not in film finance, and that [redacted]. But I still think his qualifications and experience meant that he would have clearly understood concepts like "*carrying on a trade*" and "*loss relief*", and that it is more likely than not that he would have understood that tax avoidance schemes come with the risk that they might be investigated by the tax authorities and that any benefits obtained might be clawed back.

e) Mr C has said that Mr S "*led me to believe that the tax relief would be automatic [in] a similar way to [how] a pension fund would get automatic tax relief*". But as I said in my provisional decision, I don't think this is credible. As Mr C's representatives admit, Mr C understood the essential features of the arrangement as follows:

- 30% of the invested sum would come from his own money;
- 70% of the investment was money borrowed from a third party by way of a loan that Mr C was never personally liable to repay;
- This would in turn entitle him to higher rate tax relief of 40%.

f) On this basis alone, I consider it extremely unlikely that Mr C understood that the tax relief would apply 'automatically' to the arrangement in a similar way to the tax relief applied to pension funds.

g) I know Mr C's representatives consider that I have misunderstood the extent to which Mr C would have been required to have "*active involvement*" in the running of the film partnership. I acknowledge that I placed some emphasis on the possibility that Mr C might have been required to be an 'active' member of the partnership in my provisional decision. I agree that it appears more likely that Mr C was an inactive member operating through an agent, and that made little difference to the tax position. In saying that, I should again stress of course that in the absence of any documentation at all pertaining to FP1, it is impossible for me to form a settled view on how this aspect of the arrangement was actually intended to work.

h) Nonetheless, even if Mr C's involvement was on an 'inactive' basis, this feature of the arrangement to my mind strengthens my belief that Mr C was more likely than not to have understood that these types of tax arrangements were not straightforward, conventional methods by which tax benefits might be derived (in the sense that an ordinary person would certainly understand the tax benefits for pension plans to apply). Again, I am simply not persuaded that a person in Mr C's position could reasonably have believed that an investment into FP1 would only carry benefits without exposing him to the very real risk that the tax relief obtained might be investigated by the tax authorities and clawed back.

i) Mr C's representatives are right to say that the government was promoting the British film industry at the time – as they say, it was doing so "*under its 'Cool Britannia' mantra*". But I see nothing in that to suggest that it was reasonable for Mr C to believe Mr S's assurances that that the government would give him a 'gift'.

j) I've considered the possibility that Mr C thought Mr S had found a loophole that legitimately allowed people to avoid income tax. But Mr C had experience as [redacted]. I've carefully considered Mr C's comments, but I am simply not persuaded that he would have accepted at face value an assurance that there was some sort of loophole that was not in any way vulnerable to being closed at a later date, and which did not carry any risks of unpaid taxes being

recovered in the future.

k) I'm also mindful that Mr C signed the sophisticated investor certificate. Despite the deficiencies in that certificate in respect of compliance with the promotion rules, I think the very fact Mr S wanted Mr C to sign the certificate would have made it obvious to Mr C that there was something unusual about FP1. Mr C had previously followed Mr S's advice to invest in regulated products, and presumably Mr S had not then requested that Mr C sign an equivalent certificate. If Mr C had genuinely believed that the scheme was simply a risk free way to get tax relief, then I think he would have questioned why he was being asked to sign a document confirming that he was a sophisticated investor who understood that he would be receiving promotions about schemes which were not authorised or recognised for the purposes of the Financial Services and Markets Act 2000.

87) I have also noted what Mr C's representatives say about Mr C's further investment in [another film partnership]. By then Mr C would have received WIC's 23 February 2004 letter, which included an explanation of "*some recent elements which have had serious effect on the UK Film industry following a surprise & very hostile piece of new legislation issued by the Inland Revenue on the 10th February 2004…[with] potentially very serious complications for the entire British film industry … [though] the opinion we have so far is that existing investors do not need to worry*".

88) When I issued my provisional decision, I thought the "new legislation" referred to was likely to have been The Disclosure of Tax Avoidance Schemes (DOTAS) regime. I understand why Mr C's representatives say they do not believe that to be the case. But regardless of precisely what the letter was referring to, Mr C still invested in another film scheme after being told by his financial advisers of the existence of new and "hostile" legislation by the Inland Revenue.

89) In this regard, I have also given careful thought to the Inland Revenue's letter of 25th February 2004. Mr C's representatives say that this letter explains why he chose to invest in a further film partnership in 2005, despite being warned by that point by Mr S that 'hostile' legislation with serious implications for the film industry had been enacted. Mr C's representatives say:

'This clearly demonstrates that in December 2002 and December 2003, it would have been highly unlikely, if not impossible, for our clients to have known that HMRC might later dis-allow tax relief at the time they made their investments.'

90) I'm afraid I do not agree. Whilst I do agree that the letter would likely have given Mr C comfort that his later 2005 investment would provide the same tax benefits he enjoyed with FP1 and FP2, that letter does nothing to mitigate the ongoing risk that the HMRC might, at some future point, look at these arrangements in order to determine whether that tax had been lawfully avoided. The letter explains that the government's announcement of 10 February 2004 "does not affect Film Tax Reliefs in any way". But it does nothing to provide any reassurance that the Inland Revenue would agree with the promotors (or accountants) of individual film schemes about whether their existing loss relief claims were allowable. Indeed, it seems to me that the very fact that WIC had obviously written to the Inland Revenue asking for clarification (in the wake of Mr S's comments about the recent 'hostile' legislation) points very clearly to an ongoing concern on their part that the Inland Revenue might be shifting or tightening its stance on the tax breaks enjoyed by film partnerships. Mr C did in fact receive the tax benefits Mr S told him he would receive. But there was always the risk that he would lose those benefits if the tax authorities investigated the schemes and Mr C's returns. Mr C says he did not know that was the case and would not have invested if he had known. But in my

view, he did always know that was possible, despite the wild assurances provided by Mr S, and he chose to proceed with the investment nonetheless.

91) In this context, Mr C's representatives have also quoted the judge in *Thornhill* as having made it extremely clear that, even in 2009, "*no reasonable investor/person would have had reason to seek independent advice*". They say the judge made it clear that none of the investors could reasonably have known there was a problem until closure notices arrived from the HMRC in 2016. They further say that this means:

> *'There is no reasonable basis for [me] to determine that [Mr C] would have known in December 2002, and again in December 2003, that HMRC might later dis-allow tax relief at the time they made their investments.'*

92) But I consider that the point the representatives make in connection with the *Thornhill* judgment confuses two distinct analyses by the judge. The finding the judge made in relation to knowledge of a problem not arising until 2016 was made in relation to arguments about limitation, and about whether the *Thornhill* investors should have realised in 2009 that they might have cause to make a claim against Mr Thornhill. The judge went on to say "*such a [reasonable person] would have known (because the IM told them) that among the "substantial risks" were tax risks including that the availability of tax reliefs depended upon the Revenue's acceptance of the Partnership's accounts, tax computations and compliance with detailed rules, and that the Revenue had the right to enquire into loss relief or interest relief claims by any member*."

93) The judge then went on to find, on the issue of causation, that the investors did know at the time they invested that there was a risk that the Inland Revenue might change its approach at some future point. Yet, as the judge found, '*every claimant invested anyway'*.

94) It follows that two distinct tests were applied by the judge. On the limitation point, he was effectively asking at what point the claimants became aware *they had actually suffered damage* as a result of an investigation by the HMRC in connection with the tax arrangement. But on the causation point, he was asking if the claimants knew there was *a possibility that might happen* at the point they entered the scheme. As I say, he found that all claimants knew that was possible (because the risk was highlighted in the IM) and yet they proceeded anyway. He found:

> *"The claimants' statements as to what they would have done in those circumstances are necessarily to a large degree speculation. I reject the possibility that any claimant would have acted differently had there been merely "any qualifications or risk warnings" from Mr Thornhill because, as I note elsewhere, there were indeed qualifications and risk warnings in the IM (which Mr Thornhill specifically endorsed), yet every claimant invested anyway."*

95) Ultimately, of course, I am not bound by the law when I am applying my fair and reasonable remit to determine this complaint. Nonetheless, I have taken the *Thornhill* judgment into account and am satisfied that it is not at odds with the fair and reasonable outcome as I see it.

96) I am aware that there have been several high profile cases on tax relief in film schemes since 2002, which neither Mr C nor Mr S could have known about when FP1 was sold, but it was always a risk that the tax authorities might choose to review a tax relief claim, and that they (and ultimately the courts) might disagree with the taxpayer about reliefs claimed. The way in which the tax authorities carry out their investigations have changed over time, but it has always been open to them to review losses claimed –

and, as a [redacted], I am satisfied that Mr C would have known that well before Mr S told him anything about FP1.

97) Overall, I remain satisfied that in December 2002 Mr C was in a position where he could afford to make an investment in FP1 if he wished to do so. Mr C was attracted to the opportunity to reduce his tax liability, and he'd had previous experience with investments as well as recent experience working as a [redacted]. He would have understood that Mr S's explanation of the risks was implausible and in turn, I think it is unlikely he would have relied on Mr S's explanation of those risks when he decided to go ahead with the investment. And even if he did rely on Mr S's misleading statements, in light of all the circumstances I have referred to above, particularly in connection with Mr C's expertise and experience, I consider such reliance would not have been reasonable. It is very unfortunate for him that ultimately HMRC did not agree with FP1's promoters about how the tax relief might work, but I consider that he would always have known such a risk existed and chose to take it nonetheless.

98) I appreciate that Mr S's misleading statements suggest serious deficiencies in his advice. But in my view, even if Mr S had lawfully promoted FP1 to Mr C and clearly explained the risks to Mr C when he recommended Mr C should purchase FP1, I consider that it is more likely than not that Mr C would have gone ahead with this investment in any event.

99) This is my view of the fair and reasonable outcome based on the evidence and arguments before me.

My final decision

100) My final decision is that I do not uphold this complaint against Wykeham Independent Consultants Limited. I make no award.

101) Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 1 June 2023.

Laura Colman
Ombudsman