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Update

Mission creep contained: the Court of Appeal's decision in *Mehjoo v Harben Barker*

In a judgment handed down last week, the Court of Appeal has confirmed that the extent of a professional's duty will depend upon the terms and limits of his retainer and any duty of care to be implied must be related to what he is instructed to do.

In the first instance decision of *Hossein Mehjoo v (1) Harben Barker (A Firm) (2) Harben Barker Ltd* (2013) Mr Justice Silber found that based on evidence of their communications over a long period, there was "a clear and mutually accepted understanding" between Mr Mehjoo and Mr Purnell of Harben Barker accountants that Mr Purnell was always required to consider Mr Mehjoo's best tax position and to provide appropriate advice, even where such advice had not been specifically asked for by Mr Mehjoo. This included providing advice that would have led to Mr Mehjoo entering into a tax avoidance scheme.

Whilst the case is, to a certain extent, fact specific, it appeared to many commentators and practitioners to be at odds with the reality of everyday general practice and even to suggest that accountants, in particular, are under some form of obligation to steer their clients towards tax avoidance schemes. The Court of Appeal has now unanimously overturned this decision and drawn a clear distinction between general and specialist advice so as to make plain that a general duty to advise does not give rise to a duty to give specialist advice.

The facts

Mr Mehjoo was a former Iranian refugee who built up a successful business over some years. From 1980 until 2003 when Harben Barker was incorporated, Mr Purnell was engaged to provide accounting services to Mr Mehjoo and to advise generally in relation to his tax and other financial and business affairs. The only engagement letter signed during this period was dated 22 July 1999. During this time, Mr Purnell pro-actively offered Mr Mehjoo advice on his business and personal affairs. In Mr Purnell's words, "*If we knew there were circumstances where he was paying tax or liable to pay tax, then we would look to help him.*"

In April 2005, Mr Mehjoo's business, Bank Fashion Limited ("BFL") was sold for GBP 22 million of which Mr Mehjoo's share was GBP 8,508,586.50. Mr Mehjoo had discussions prior to the completion of the sale with Mr Purnell, notably in October 2004, as to whether he could minimise his Capital Gains Tax ("CGT") liabilities. He also discussed matters with at least two firms of tax advisers. In August 2005, he ultimately invested in a Capital Redemption Plan ("CRP") promoted by one of the other firms.

The CRP failed and Mr Mehjoo brought a claim against Harben Barker, for over GBP 1.4 million in tax, penalties and interest, for failing to direct him to the appropriate non-domicile tax specialist before the sale. Mr Mehjoo considered that a specialist would have advised him to enter into an alternative tax avoidance scheme known as Bearer Warrant Planning, which was, at that time, a successful scheme.

Harben Barker in turn contended that they were not obliged to give tax-planning advice unless specifically asked to do so. They denied that they were under any duty to advise Mr Mehjoo that he was in all probability a non-domiciled individual ("non-dom") and should thus seek specialist tax advice in relation to that status. They also raised various causation defences.

First instance findings

Mr Mehjoo succeeded at first instance. The High Court held that Harben Barker had been negligent, essentially on the basis that the various occasions when Mr Purnell took the initiative in giving advice to Mr Mehjoo founded a course of conduct from which the Court should infer a change in the terms of the retainer. As a result, Harben Barker were required to give Mr Mehjoo advice as to how he could reduce any relevant tax liability even when not requested to do so. The Court also found that Harben Barker had a separate duty to advise Mr Mehjoo that he was or might be a non-dom, that being a non-dom carried with it significant tax advantages and that he should therefore take tax advice from a firm which specialised in individuals who had non-dom status.

The Court awarded Mr Mehjoo damages of GBP 763,658 for the CGT he became obliged to pay on the sale of his shares in BFL, GBP 180,000 for the balance of the cost of entry to the CRP and the amount of interest payable on the CGT. Both the findings on liability and causation were challenged on appeal.

The Court of Appeal's decision

The Court of Appeal disposed of the matter on liability alone and made a number of important comments on the nature and scope of the duties assumed and implied by the engagement letter and Harben Barker's conduct. The Court of Appeal also made some fairly pointed comments on causation, which suggest that it had little sympathy for Mr Mehjoo.

Lord Justice Patten noted that Mr Purnell's approach to Mr Mehjoo's affairs was not surprising or particularly controversial. An accountant who is retained by a client to deal with his personal affairs will inevitably have to point out the hidden consequences of a proposal. However, that is not the same as being required to direct a client towards specialist tax planning. In this regard, the Court of Appeal drew a clear distinction between general tax mitigation and specialist tax planning and noted that the Court at first instance had failed to do so. Lord Justice Patten determined that a change of the retainer to impose a duty to give specialist tax planning advice could not be inferred from a course of conduct which involved routine general tax advice (such as the availability of reliefs). He noted that Harben Barker had never held themselves out as tax planning specialists or given advice of that sort. The view that the retainer had changed over time was not sustainable on the evidence.

Lord Justice Patten went on to state that no duty to offer specialist tax planning arose separately from a meeting held on 2 October 2004 in which Mr Mehjoo and Mr Purnell had discussed the possibility of CGT arising from the sale of BFL, and that, to the extent that there was any duty on Harben Barker to advise on the availability of a specialist tax scheme or specialist advice, it was discharged by the discussions at that meeting, which must have included that various tax schemes may have been available from specialist providers. Mr Mehjoo had shown little appetite for these and had taken them no further at the time.

Lord Justice Patten noted that the judge's conclusion that Harben Barker were under a duty to advise Mr Mehjoo that he should take advice from a non-dom specialist was illogical and wrong because the tax advantages stemming from being a non-dom all related to income or gains arising from assets situated outside the UK. A reasonably competent accountant would not have been aware that there was any effective means of changing the situation of UK shares to an offshore jurisdiction without triggering a substantial charge to CGT in the process.

It was not reasonable for Harben Barker to know about the Bearer Warrant Planning scheme or other similar measures, so there was no reason for them to mention specifically Mr Mehjoo's probable non-dom status or that he should seek specialist non-dom tax advice.

Harben Barker's negligence was said to be a failure to specify what sort of advice Mr Mehjoo should seek, even though they had no reason to know that the Bearer Warrant Planning schemes existed. The Court of Appeal applied the test from *Hurlingham Estates Limited v Wilde & Partners* (1997) and noted that Mr Mehjoo knew about the tax charge and was told that schemes might exist to reduce it. Harben Barker did not know what these schemes were nor could they be expected to do so. They satisfied the *Hurlingham Estates* test and had discharged their duty.

Comment

In a sense this is an unusual, fact specific case and it is easy to see it as such. However, accountants and other practitioners can take some comfort from the Court of Appeal's decision. To the extent that there was any real doubt, pro-active practitioners will not automatically be required to steer their clients towards specialised structured tax planning schemes, unless asked to do so.

This decision shows that mission creep is not inevitable and that the Courts will have some sympathy for practitioners at the coalface. However, there is no room for complacency. At least part of Harben Barker's predicament may well have been avoided had regular engagement letters been issued and had a separate engagement letter been issued in relation to the October 2004 advice leading up to the sale of BFL. This would have made it difficult for Mr Mehjoo to argue that the retainer changed into something else over time and that Harben Barker should have offered specialist tax planning advice. Practitioners should therefore continue to ensure that the scope of engagements is clear, and that updated engagement letters are issued regularly to longstanding clients, even if there is a "trusted adviser" relationship, as was the case here. Where an accountant or other professional is able to offer or refer clients for specialist advice it should be made clear that such advice would be subject to a separate retainer. Any variation in the scope of any retainer should be properly recorded by means of an additional engagement letter or by express reference, in writing, to the engagement letter by way of addendum.

Further information

If you would like further information on any issue raised in this update please contact:

Simon Konsta
E: simon.konsta@clydeco.com

Ross Goodrich
E: ross.goodrich@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.