QBE European Operations

Professional practices

A Field Too Far? A cautionary tale of the burden on advisers to identify the need for specialist

QBE

A Field Too Far? A cautionary tale of the burden on advisers to identify the need for specialist input

Tax planning, and in particular the use of 'aggressive' tax avoidance schemes, has been the subject of a great deal of attention, not least by HM Revenue & Customs ('HMRC'), in recent times. In the recent decision in *Hossein Mehjoo v (1) Harben Barker (A Firm) (2) Harben Barker Ltd* (2013) the Court considered the scope of the defendant accountants' obligation to a client in relation to tax planning.

The decision will be of interest to all professionals, as it deals with the obligation to identify the need for specialist advice that the individual or firm is unable to provide, and the danger of so-called 'mission creep' by assuming responsibility to give advice which has not been specifically sought. It has also reportedly sparked particular interest from accountants and others who give tax advice, who must strike a sometimes difficult balance between giving advice which is in their clients' best interests, managing their own professional liability exposure and complying with their professional obligations (such as the duties under the ICAEW Code of Ethics to act in the public interest and uphold the reputation of the profession). In the *Mehjoo* case, the Court found Harben Barker liable for damages in negligence and for breach of contract, on the grounds that they failed to give appropriate advice in relation to avoiding capital gains tax ('CGT'), even when not specifically asked to do so. While at first blush that might seem to provide judicial support for advising clients to enter into tax avoidance schemes, in fact the decision, properly analysed, has not altered the position in relation to accountants' obligations.

The facts

Mr Mehjoo, a former Iranian refugee, and successful businessman, attempted to avoid a £850,000 CGT bill on the sale of his shares in his co-owned business, Bank Fashion Limited (BFL) in April 2005, by placing over £200,000 into a capital redemption plan (CRP) which subsequently failed to eliminate the CGT.

Mr Mehjoo brought a claim against his accountants, Harben Barker, for over £1.4 million in tax, penalties and interest, for failing to direct him to the appropriate non-domicile tax specialist who he considered would have advised him to enter into an alternative tax avoidance scheme known as Bearer Warrant Planning (BWP) which was, at that time, a successful scheme.

Harben Barker contended that they were not obliged to give Mr Mehjoo tax-planning advice unless they were expressly asked to do so, nor were they obliged to advise Mr Mehjoo to obtain tax-planning advice from a non-domicile tax specialist. Further, it was Harben Barker's position that even if non-domicile tax planning advice had been provided to Mr Mehjoo he would not have invested in BWP.

The Court was required to determine whether Harben Barker's retainer extended to advising Mr Mehjoo generally in relation to his personal and financial tax affairs, including on CGT tax-planning, even when Mr Mehjoo had made no specific request for such advice. In addition the Court considered whether Harben Barker had a duty to advise Mr Mehjoo that he had non-domicile status and should take advice from a 'non-dom' specialist, whether such advice would have been sought at the material time, what advice such a specialist would have given Mr Mehjoo, whether he would have followed that advice, and what damages, if any, Mr Mehjoo should be entitled to recover.

The decision

Harben Barker was found liable for damages in negligence and for breach of contract for failing to provide Mr Mehjoo (who was most likely not domiciled in the UK) with the appropriate advice surrounding tax planning to those with non-domicile status.

Based on evidence of their communications over a long period, the Court found that by the relevant time there was 'a clear and mutually accepted understanding' between Mr Mehjoo and Mr Purnell of Harben Barker 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 Mehjoo. Mr Purnell and Mr Mehjoo had known each other for over twenty years and during this time the role of Harben Barker had developed from completing annual returns to providing advice on all aspects of Mr Mehjoo's business and personal financial affairs including tax. The Court found that the understanding between Mr Mehjoo and Mr Purnell constituted a variation from the terms of a retainer letter dating from 1999.

On that basis, the Court found that Mr Purnell owed Mr Mehjoo a general duty to provide advice on tax planning even if not requested, which applied to Mr Mehjoo's prospective sale of his BFL shares. Even if a general duty to volunteer unrequested tax advice did not exist, when advice was given by Harben Barker at a meeting with Mr Mehjoo in October 2004 in relation to reducing Mr Mehjoo's CGT liability on the sale of the BFL shares, Harben Barker assumed an obligation to exercise reasonable skill and care in providing such advice. The Court found that the fact that Mr Mehjoo had engaged other advisers in the run-up to the sale of BFL in 2005 did not relieve Harben Barker from their general duty to give advice during that time or from their specific duty to give proper advice at the meeting in October 2004.

As to what advice should have been given, the Court found not only that Mr Mehjoo was very probably a non-domiciled person in October 2004 and that Harben Barker were obliged to advise him of this, but also that Harben Barker should have advised Mr Mehjoo that non-domicile status carried potentially significant tax advantages and that he should therefore seek tax advice from an adviser specialising in advising individuals who had or might have 'non-dom' status. In reaching this decision, the Court had regard to the amounts of CGT involved and a provision in the Chartered Institute of Taxation's Code that a member who did not have the expertise or the staff resources available to meet his client's needs should refer the client to another professional adviser. The Court was satisfied that Mr Mehjoo would have sought specialist tax advice very speedily, if advised to do so by Harben Barker.

Finally, as to causation, the Court noted that BWP was only available to non-domiciled persons and could only be used prior to a share sale. Although it would not have been possible for Mr Mehjoo to have obtained clearance from HMRC for his non-domicile status before entering into BWP because of the timescale for the share sale, a 'non-dom' specialist adviser would not have considered that there was a substantial risk of a successful challenge being made to Mr Mehjoo's domicile status by HMRC, given that he had an Iranian domicile of origin, had not acquired a domicile of choice in the UK and members of his family remained in Tehran. Indeed, Mr Mehjoo was subsequently granted non-domicile status by HMRC in 2006, and his position had been the same in 2004. As to the characteristics of BWP as a form of tax planning, there was no evidence available to the Court that HMRC had ever challenged BWP schemes and therefore no evidence that any such scheme had failed to save CGT for its instigator. By contrast, the Court found that, on the evidence before it, CRP was an 'extremely risky device' with 'serious shortcomings'. The Court therefore accepted Mr Mehjoo's argument that any reasonably competent accountant with expertise in advising 'non-doms' would have recommended BWP to him.

The Court was satisfied that had Mr Mehjoo received the advice that BWP was better than CRP he would have implemented BWP, and would have done so before the date when entry into BWP had become blocked by legislation.

Comment

Although at first sight the decision that Harben Barker owed an ongoing duty to give tax planning advice even when it was not specifically sought may seem concerning and at odds with the general reluctance of the courts to find 'general retainers' of professionals, this appears to have been a decision made on very specific facts. What is clear in this case is that the familiarity that had developed over the twenty year relationship between Mr Mehjoo and Harben Barker, and the repeated volunteering of unrequested tax advice by the firm to Mr Mehjoo during that time, had led to a departure from (and, as the Court found, in effect a variation of) the terms of the only retainer letter in existence. The importance of providing for the scope of, and any limitations on, the work expected of a professional in documents such as the engagement letter, and thereafter of acting consistently with the agreed retainer, should not be underestimated. This case demonstrates once again the significance of conduct on the scope of a professional's retainer, notwithstanding attempts to define such matters in an engagement letter.

Further, although it has been reported that some were quick to jump on the decision as heralding an increased obligation on accountants to advise on the availability of intricate tax schemes, from the profession's point of view it seems that there is, in fact, no fundamental change in the law regarding obligations owed by accountants and tax advisers. Professional obligations must still be observed and – in the interests both of giving proper advice to the client and of managing the professional's own risk – due warnings should be given about the risks of any scheme in relation to which advice is given. Further, the decision simply emphasises once again the importance of not providing advice, or of obtaining a second opinion, where the professional lacks the relevant expertise.

It is understood that Harben Barker intend to appeal the decision so it remains to be seen how the position will ultimately be resolved.

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

Neither QBE European Operations nor Clyde & Co LLP accepts any responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority. QBE's legal and regulatory status is detailed in the small print at the bottom of this page.

Clyde & Co LLP's Professional Indemnity Team has kindly given us full permission to reproduce this document. Information is correct as at November 2013.

QBE European Operations

Plantation Place
30 Fenchurch Street
London
EC3M 3BD

tel +44 (0)20 7105 4000

www.QBEeurope.com

4649/SeekingSpecialistAdvice/Nov2013