The adviser's duty to alert his client to a tax savings opportunity

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In an unusually thorough judgment, the High Court has held that accountants had a duty to advise a client that he may have been a non-dom so that he could then have consulted an appropriate tax specialist to consider what considerable tax avoidance opportunities might be legitimately available to him. In that event, the court held that the client may then have saved the CGT on the sale of his business. Silber J so held against the firm of Harben Barker (HB), which faced a claim from former client, Hossein Mehjoo (*Hossein Mehjoo v Harben Barker (A Firm) & Harben Barker Ltd* [2013]).

The judge found that Mr Mehjoo was likely to have been a non-UK domiciliary and his accountants should reasonably have advised him to take the advice of a specialist when he was about to dispose of his profitable business. The sale took place in 2005, at which time the bearer warrant scheme (BWS) was available. This allowed UK shares owned by non-doms to be 'swapped' for bearer warrants which would be taken offshore and placed in trust before sale, so that they were non-UK situs assets at the point of disposal, avoiding a charge to capital gains tax (CGT). Because of his accountant's failure to advise, Mr Mehjoo was not given the opportunity to learn about the scheme and save tax.

The judge ruled that HB was under a contractual or a tortious duty to help its client to avoid CGT. He rejected the argument that because Mr Mehjoo had been advised that he could claim business asset taper relief, there was no need to advise him of other tax planning possibilities.

The judge also grappled with the tax legislation behind the BWS and the alternative, unsuccessful planning which Mr Mehjoo did undertake, a capital redemption plan (CRP). In doing so, he dipped into Part 7 ITEPA and concluded it did not apply to the BWS.

Having found that HB was in breach of its duty, he ruled that the firm should cover Mr Mehjoo's CGT bill (minus the costs he would have incurred with the BWS) and the fees incurred by Mr Mehjoo in entering into the failed CRP.

The judge was very critical of the way the defendants' team handled the defence and also of significant aspects of the expert evidence given by Mike Warburton of Grant Thornton, while praising the evidence of David Kilshaw of KPMG. Defendant firms involved in similar litigation could do well to involve counsel with extensive experience of professional indemnity litigation, as well as tax counsel.

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Two aspects of this decision call for special comment. First, the judgment applies in principle to other tax professionals, including solicitors. Where does this leave the witch hunt by the Solicitors Regulation Authority against mainly smaller firms of solicitors who have dutifully carried out their clients' wishes to be advised on tax avoidance opportunities that are similar in degree to the BWS, but involve SDLT? This campaign has created a conflict of interest for solicitors who wish to advise their clients on tax savings, and indeed have a contractual and tortious duty to do so, but who are terrified of what the SRA might do if they try. The decision confirms that the professional duty is to the client.

Second, tax professionals who are squeamish about offering tax avoidance schemes to clients may be able to take some practical comfort from the soon to be introduced GAAR, in that sense that the wooliness of the double-reasonableness test under the GAAR may provide some cover to justify them in not advising on certain schemes or perhaps, just as importantly, being able to argue after the event that the scheme if used may not have succeeded. Tellingly, in the *Mehjoo* case, the court found that there was no evidence that HMRC had ever challenged the BWS scheme.

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