

Mehjoo v Harben Barker: Duty of an accountant confined to the terms and limits of its retainer

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This judgment of the English Court of Appeal considered whether an accountant who had been retained to provide general accounting services was under a duty to advise its client about possible tax saving schemes or of the need to take specialist tax advice.

Facts

The background is briefly summarised as follows. The claimant, Mr Hossein Mehjoo (**Mr Mehjoo**), was born in Iran to Iranian parents. He moved to the UK in 1971 and, having claimed asylum in 1981, was granted indefinite leave to remain in the UK. In 1996 Mr Mehjoo became a British citizen.

Harben Barker (an unincorporated practice) which subsequently became Harben Barker Limited (**Harben Barker**) is a firm of chartered accountants which acted for Mr Mehjoo and provided him with accountancy services and general tax advice. Mr Purnell a partner at Harben Barker acted for Mr Mehjoo from 1980 onwards (prior to the merger of his own firm with Harben Barker and from 1991 onwards as a partner of Harben Barker). In 1999 Mr Mehjoo signed an engagement letter with Harben Barker in respect of the general accounting services being provided, such as the preparation of annual tax returns (the **Retainer**). However, on various occasions Mr Purnell gave Mr Mehjoo tax planning advice outside the parameters of the Retainer without being asked to do so.

The litigation between Mr Mehjoo and Harben Barker centred on Mr Mehjoo's attempts to avoid UK capital gains tax on the disposal of shares in Mr Mehjoo's successful retail fashion business. Mr Mehjoo claimed that Harben Barker, through Mr Purnell, had the obligation to advise Mr Mehjoo that on the disposal of shares in a UK registered company his non dom (or probable non dom) status carried with it significant capital gains tax advantages and that they should have advised him of the existence of tax saving schemes, such as the bearer warrant scheme, and also they should have advised him to take advice from tax advisors or accountants who specialise in advising

non doms on their tax affairs. Mr Mehjoo alleged that, if he had been advised at the time by Harben Barker to take specialist advice, he would have done so.

It was accepted by the parties that Harben Barker are general accountants. It was not alleged that Harben Barker specialised in giving tax advice to non doms, nor that they were asked to give such advice or to give tax planning advice on ways to minimise or eliminated capital gains tax on the disposal of the shares. However, the Court at first instance found that Harben Barker had been negligent and that the Retainer and the duty of Harben Barker extended to advising Mr Mehjoo on potential methods to minimise his tax liabilities, including capital gains tax planning on the sale of the shares in his business, even if not requested to do so.

The general principle

The Court of Appeal observed that there is no such thing as a general retainer and the terms and limits of the retainer and any consequent duty of care therefore depend on what the professional is instructed to do.

The Court of Appeal judgment

The Court of Appeal thought it clear from the terms of the Retainer and the context of the relationship between Harben Barker and Mr Mehjoo, that Harben Barker were acting as general accountants to Mr Mehjoo and that the Retainer imposed no obligation on Harben Barker to advise Mr Mehjoo as to how he might minimise his tax liabilities unless they were specifically requested to do so.

The Court considered whether the occasions on which tax planning advice was volunteered by Mr Purnell to Mr Mehjoo founded a course of conduct from which the Court should infer a change of terms of the Retainer and extended the duty upon Harben Barker to include advising Mr Mehjoo on the reduction of his tax liabilities. On the evidence given, the Court concluded that Mr Purnell did consider that he owed a duty to his client to avoid unnecessary (and perhaps unforeseen) adverse tax consequences when it was possible to do so. However, the Court did not think this surprising or particularly controversial. An accountant who is retained by a client to deal with his personal financial affairs will inevitably have to point out what might be the hidden tax consequences of any particular proposal. This may well arise in the context of carrying out general accounting services such as preparing tax returns or more general discussions about the client's business plans.

Instead, the Court of Appeal differentiated between routine tax advice of the kind given by Mr Purnell, and the more sophisticated form of tax planning exemplified by tax saving schemes, such as the bearer warrant scheme, which often involves a re-formulation of the transaction in order to bring about particular tax consequences rather than a mitigation of the tax liability which the transaction will otherwise produce. The Court of Appeal considered that as Harben Barker were not, and had never held themselves out to be specialist tax planners, and had never given Mr

Mehjoo advice of that sort, they should not be taken to have assumed a positive duty to give advice of that kind.

The Court of Appeal considered the argument that the duty to refer a client to a specialist for advice cannot be limited by the level of knowledge or skill attributable to the generalist who is first consulted. The Court set out that the test is whether, having regard to the terms of the retainer in all the circumstances which were known or should reasonably have been known by the professional, the professional should reasonably have appreciated that the client needed his advice and guidance in respect of the tax liabilities to which entry into the transaction would expose it. The circumstances include the relevant business experience of the client, and the ready availability to the client and likely recourse by the client to other advice. However, as in the present case, Harben Barker alerted Mr Mehjoo to the fact that various tax saving schemes might be available in relation to his impending capital gain but Mr Mehjoo chose not to follow this up; the Court of Appeal considered therefore, that Harben Barker had discharged their duty.

The Court of Appeal concluded that Harben Barker were not in breach of duty to Mr Mehjoo and that the limited occasions upon which Mr Purnell gave advice beyond the strict limits of the Retainer did not imply a variation of the Retainer and did not have the effect of imposing an open-ended duty upon Harben Barker.

The Court of Appeal referred in particular to the judgment in *Midland Bank Trust Co Ltd v Hett Stubbs & Kent* [1979] Ch 384 which provides a useful overview as to the decision reached:

"There is no such thing as a general retainer in that sense. The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.

Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors - or upon professional men in other spheres - duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and [cases] demonstrate that the duty is directly related to the confines of the retainer."

Comment

This is an interesting judgment which highlights that the duty of a professional, whether an

accountant or solicitor, is generally limited to the terms of his engagement and to what he is instructed to do, and that, as a result, it is important that the terms of any retainer set out any specialised services that the client requires such professionals to provide.

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