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PROFESSIONAL NEGLIGENCE:

COURT OF APPEAL COMES TO THE RESCUE IN *MEHJOO*

It is clear from the acres of press coverage devoted to people avoiding taxes by arrangements of varying complexity, that anybody who advises on such things should be cast into the outer wilderness or the fires beneath.

The case of *Mehjoo v Harben Barker* last year was therefore a surprise. Mr Mehjoo sold shares in his company and made a substantial gain, which after taper relief gave rise to capital gains tax at only 10%. Nevertheless, he sued his accountants on the grounds that he was a non-dom and should have been advised to do something to avoid the tax completely – like using bearer warrants to turn his shares into foreign property, enabling him to shelter the gain by reason of the remittance basis.

Opinions differed on whether such arrangements would be effective, but the High Court found that the accountants were negligent in failing to provide such advice or at least in failing to refer him to a specialist in this area who would do so. (This was not completely off the wall. In *Slattery v Moore Stephens* (2003), the accountants were sued successfully for not advising their client to divert part of his earnings to the Channel Islands when he came to work in the UK.) The position would seem to be even more difficult for solicitors, because the Solicitors Regulation Authority has warned that solicitors could be censured and fined if they are involved in implementing schemes to reduce their client's liability to SDLT. By heeding this warning, it seems that solicitors risked being sued for professional negligence.

However, the Court of Appeal ([2014] EWCA Civ 358, see also page 5) has come to the rescue, deciding unanimously that Harben Barker was not negligent.

Harben Barker was described as a generalist firm of accountants and it advised Mr Mehjoo about a number of ways to reduce his CGT liability. The firm had a checklist of 12 points, although this did not include anything relevant to his possible non-dom status. The Court of Appeal suggested the firm would have known that, on a sale of shares in an English registered company, no tax advantages were available to a non-dom unless the situs of the shares could be changed. As this was something which it did not know, nor could have been expected to know, was achievable, there was no reason to mention it, still less be liable in negligence for not doing so. The Court of Appeal thought that the High Court decision would impose an open ended and apparently limitless duty upon Harben Barker. The Court of Appeal explained that its decision is not inconsistent with *Hurlingham v Wilde* [1997] STC 627, where a solicitor engaged to carry out a conveyancing transaction was held to have a duty to advise on the tax implications, even though he was not asked to advise on that aspect. The tax charge was something which should have been known to the solicitor and was therefore regarded as covered by his retainer – whereas in *Harben Barker*, its retainer did not extend to matters beyond its reasonable knowledge.

I would respectfully suggest that this must be right. Otherwise, if an accountant were to be liable in negligence for failing to advise his client how to avoid the whole of the CGT liability on a sale of shares – or if he does not know how, to introduce him to somebody who does – nobody would ever pay any tax. If any tax arose, the accountant would be liable for failing to advise (directly or indirectly) how it should be avoided.

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