Hossein Mehjoo v Harben Barker (A Firm), Harben Barker Limited


No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
25 March 2014

Case No: A2/2013/1863

Court of Appeal (Civil Division)

[2014] EWCA Civ 358, 2014 WL 1097016

Before: Lord Justice Patten Lord Justice Lewison and Lady Justice Sharp

Date: Tuesday 25th March 2014

On Appeal from the High Court of Justice Queen's Bench Division

Silber J.

HQ10X02724

Hearing dates: 4th and 5th February 2014

Representation

Roger Stewart QC and Jonathan Bremner (instructed by Eversheds LLP) for the Appellant.
Mark Simpson QC and Isabel Barter (instructed by Wragge & Co LLP) for the Respondent.

Judgment

Lord Justice Patten:

Introduction

1. The appellant, Harben Barker Limited ("HB"), is a firm of chartered accountants with offices in the West Midlands. Until 2003 it operated as an unincorporated practice under the name of Harben Barker but the practice was then taken over by HB and I shall use those initials to describe them both. Both before and after this change it acted for the respondent, Mr Hossein Mehjoo, and provided him with accountancy services and general tax advice. Mr Mehjoo's point of contact in HB was Mr Alan Purnell who had acted as his accountant from about 1980 when he practised on his own account as Purnell & Co. This was taken over by HB in 1991 and Mr Purnell continued to act for Mr Mehjoo after the merger as a partner in HB.

2. Mr Mehjoo was born in Iran on 15 October 1959 of Iranian parents. He lived there until 1971 when he was sent to school in England. He has been resident in the UK since that time. After school he became a squash professional for about 9 years during which time he met Mr Purnell. In 1981 he was forced to contest an attempt by the Home Office to remove him back to Iran but he claimed asylum and in 1981 he was granted indefinite leave to remain. Since 1996 he has been a British citizen.

3. He retired from playing squash competitively in about 1989 and then built up an extremely successful retail fashion business. All of his business interests were in the UK where he has continued to live with his partner and two children. His first shop was established in 1983 through a private company called Hossein Sports Limited ("HSL"). In 1998 the company moved to larger retail premises in Birmingham and in 1995 HSL changed its name to Hoss Ventures Limited ("HVL"). In 2003 Mr Mehjoo merged his business with that of Mr Andrew Scott ("Mr Scott") and they became shareholders in a new company called Bank Fashion Limited ("BFL"). In April 2005 BFL was sold for £22m of which Mr Mehjoo's share was £8,508,586.50.

4. The litigation between Mr Mehjoo and HB centres on his attempts to avoid the payment of capital gains tax ("CGT") on the disposal of the shares. At the heart of the claim is the allegation that Mr Mehjoo retained his Iranian domicile of origin for UK tax purposes and could, by entering into what is described as a Bearer Warrant Scheme (" BWS "), have avoided CGT entirely on the disposal of his shares in BFL. It is not alleged that HB were a firm of accountants which specialised in giving tax advice of this kind; that they were ever asked to give such advice; or that they ought to have known of the existence of the BWS or any other specialised scheme designed to reduce or eliminate CGT on a disposal of shares in a UK registered company by a non-dom like Mr Mehjoo. It is accepted that they were generalist accountants. But what is claimed is that HB, through Mr Purnell, had, as a reasonably competent chartered accountant, the obligation to advise Mr Mehjoo that he had or very probably might have non-dom status which carried with it significant tax advantages and that he should therefore seek and obtain tax advice from a firm of tax advisers or accountants which specialised in advising non-doms on their tax affairs. Mr Mehjoo's case was that, armed with this advice, he would have gone to such a specialist; been advised to enter into a BWS ; and implemented that advice before the scheme was blocked by primary legislation introduced by s.34, Schedule 4, part 1, para 4(1) (4) of the Finance (No.2) Act 2005 with effect from 16 March 2005.

5. CGT is chargeable on chargeable gains accruing to a person in any year of assessment during any part of which he is resident in the UK: see Taxation of Chargeable Gains Act 1992 ("TCGA"); s.2(1) . A chargeable gain arises on the disposal of an asset wherever situate: see TCGA s.1 . But s.12 TCGA provides that individuals who are resident, but not domiciled, in the UK shall not be charged in respect of disposals of assets situated outside the UK except insofar as the proceeds of sale are remitted to the UK.

6. Non-doms therefore receive favourable tax treatment on gains on foreign assets just as they do in respect of foreign income. In both cases they are taxed on a remittance basis. But s.275(e) TCGA (which defines the location of assets for CGT purposes) provides that registered shares are situated where they are registered. The shares in BFL (an English registered company) were therefore UK assets in respect of which Mr Mehjoo was liable to pay CGT on any disposal.

7. The BWS , which seems to have been marketed mainly by Grant Thornton and KPMG, aimed to change the situs of the shares prior to their disposal in order to take advantage of s.12 TCGA . To achieve this, the shares were converted from registered shares to bearer shares which would have required both a special resolution and a change in the company's articles of association. The share certificates would then be cancelled and the company would issue bearer warrants in their place. These would then be taken offshore (normally to Jersey) where an offshore trust would be set up. The shareholder would then gift the bearer warrants into trust. The trustees (who would also be non-resident) would then convert the warrants into registered shares and dispose of them to a third party free of CGT as foreign assets.

8. The claimant accepted in evidence that he would not have gone ahead with a BWS if he had been advised that there was a substantial risk of it being successfully challenged by HMRC. One potential risk considered at the trial was that the bearer warrants would not fall to be treated as located in Jersey unless they were also marketable in that jurisdiction. This point is based on a decision of Nicholls J in *Young v Phillips [1984] STC 520* which concerned renounceable letters of allotment. He said:

> "For an instrument to be treated as analogous to a chattel for situs purposes more is required of it than mere transferability of title by delivery. What is required is that in practice the value of the instrument can be realised by sale of the instrument for money in the country where the instrument is found"..

9. In Chandrasekaran v Deloitte & Touche Wealth Management Ltd [2004] EWHC 1378 (Ch) I expressed the view that:

> "… it is not necessary for me to determine whether the decision in Young v Phillips applies equally to share warrants issued in accordance with s.188 of the Companies Act , and in the absence of full argument I prefer not to do so. What, however, is clear is that there are obvious parallels between renounceable letters of allotment and share warrants issued to bearer, and that the application of Nicholls J's reasoning would obviously cause the prudent tax adviser to be cautious about recommending the Bearer Warrant Scheme where no obvious market in the securities existed in the foreign situs at the date of transfer"..

10. The claimant's expert witness, Mr Kilshaw, who was also an expert witness in the Chandrasekaran case, gave evidence to Silber J that HMRC had not in fact challenged the effectiveness of the BWS on these grounds and that they were, in the end, dealt with by primary legislation but it remains an issue on the appeal whether the competent specialist tax adviser would have told the claimant in 2004 that there was a risk of challenge.

11. In the event, Mr Mehjoo did not enter into a BWS or indeed any tax saving scheme prior to the sale of the shares. He had discussions prior to the completion of the sale with Mr Purnell and at least two firms of tax advisers, Ford Campbell and MTM (Midlands) Ltd, neither of which suggested using a BWS . But on 16 February 2005 he wrote to Mr Purnell saying that:

> "Obviously until we are 100% sure that the deal will go through I think it is dangerous that I commit myself to any scheme and then there is the consideration of what is the total tax on the deal – has to be worth it!"..

12. The sale of the shares was completed on 19 April 2005 by which time the blocking legislation in relation to a BWS had taken effect. Mr Mehjoo then took tax advice from MTM who recommended that he entered into a tax scheme known as a Capital Redemption Plan ("CRP") which was implemented in August 2005. The CRP was an artificial tax scheme designed to create a capital loss which could be set off against the relevant liability to CGT which it was sought to avoid. Mr Mehjoo paid a fee of £200,000 to MTM for the scheme which was designed to produce a capital loss of £10.5m for the tax year 2005/2006.

13. HMRC challenged the loss and the effectiveness of the CRP and, after negotiations, an agreement was reached between Mr Mehjoo and HMRC on 23 May 2012 under which the loss was disallowed and the claimant agreed to pay penalties and interest. As part of his claim in these proceedings, Mr Mehjoo sought to recover the fee and the interest he had paid but not the penalties.

14. HB denied any liability in negligence. They contended that they were not obliged to give tax-planning advice unless specifically asked to do so. This included advising Mr Mehjoo that he was in all probability a non-dom and should seek specialist tax advice in relation to that status. They also said that even had Mr Mehjoo consulted a non-dom expert and been told about the BWS , he would not have entered into it because any competent specialist adviser would or should have told him that there were risks attaching to the scheme. HB also say that it would not have been implemented in time to avoid the cut-off date of 16 March 2005; and that he would have been worse off financially by implementing the scheme than if he had paid the CGT at the concessionary rate of 10 per cent.

15. Silber J held that HB had been negligent and awarded Mr Mehjoo damages of £763,658 for the CGT he became obliged to pay on the sale of his shares in BFL; £180,000 for the balance of the cost of entry to the CRP; and the amount of interest payable on the CGT.

16. The judge's findings on liability and causation are both challenged on this appeal. On liability, HB contend that:

(1) the judge was wrong to find that their retainer extended to advising and assisting the claimant generally in relation to his tax affairs including in relation to CGT planning on the sale of the BFL shares even when they had not been requested to do so. This includes advising him that he should obtain tax advice from a non-dom specialist;
(2) no such duty arose separately from a meeting held on 2 October 2004 and that, to the extent that there was any duty on HB to advise on the availability of a specialist tax scheme or specialist advice, it was discharged by the discussions at that meeting;
(3) the judge's conclusion that HB 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 situs of UK shares to an offshore jurisdiction without triggering a substantial charge to CGT in the process; and
(4) there was no admissible evidence before the judge (whether expert or otherwise) that a non-dom specialist existed as a recognisable class of adviser which the reasonably competent accountant should have been aware of and should have advised Mr Mehjoo to consult.

17. On causation and remoteness, HB challenge the judge's findings that a competent specialist would have advised the claimant to implement a BWS and that Mr Mehjoo would have paid the £83,800 up-front fees involved and gone ahead with the scheme in time to avoid the effect of the change in legislation which took place on 6th March 2005. HB contends that no competent specialist could have advised that a BWS would be risk-free or certainly effective to change the situs for CGT purposes of the BFL shares in advance of their sale. Faced with an accurate assessment of the risks involved, Mr Mehjoo would not have gone ahead.

18. There were also, it is argued, external factors over which the claimant could have no control which are likely to have delayed implementation beyond the 16 March deadline even if the decision had been taken to proceed with the scheme. Mr Scott would have needed to consent to an amendment of the articles of association of BFL to allow the shares to be converted to bearer warrants. His own evidence was that the sale had been a nerve wracking experience and that he would have been cautious about consenting to anything which might delay the sale or appear to devalue the business. The need

for Mr Scott to take advice on these matters is likely to have delayed the implementation of the scheme even if his consent was ultimately forthcoming.

19. Aside from these issues of timing, HB also take a stand on the likely effectiveness of the BWS . Their case is that it would not, as a matter of law, have enabled Mr Mehjoo to avoid CGT on the disposal of his shares in BFL either because by 2005 he had acquired a UK domicile of choice and, being resident in the UK would have been liable to CGT on the disposal of his assets wherever situate or because the BWS would not have created property in the form of bearer warrants with a non-UK situs or would have resulted in a taxable remittance to the UK of the proceeds of sale.

20. There are two final points. First, it is said that the exchange of absolute legal and beneficial ownership of the shares for an interest under the offshore discretionary trust (which formed part of the BWS) meant that the value of the claimant's interest in the settled property was less than if the claimant had retained the shares and paid CGT on the proceeds of sale at the rate of 10 per cent which was applicable to the disposal. The second point is that the MTM fees are too remote to be recoverable in damages.

Breach of duty

21. The claimant's pleaded case was that from 1980 until 2003 when HB 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 and stated:

> "The purpose of this letter is to set out our understanding of the terms of our engagement as accountants and tax advisers to you."
>
> ….
>
> 1. We will assist you in fulfilling your annual obligations in respect of income tax and capital gains tax. It is, however, a legal requirement that completed returns are approved and signed by you personally.
>
> In particular we will be responsible for:
>
> (a) preparing your annual tax return for your approval and signature;
>
> (b) conducting all correspondence with the Inland Revenue on your behalf;
>
> (c) attending to assessments received from the Inland Revenue;
>
> (d) determining and agreeing with the Inland Revenue on your behalf taxation liabilities and codings;
>
> (e) advising you as to payments on account of tax and the settlement of your taxation liabilities;
>
> (f) other routine compliance matters as necessary;
>
> (g) giving you general tax-planning advice on the best use of reliefs;"
>
> …..

> In addition we would be willing to provide, if we are not already doing so, a more extensive tax and personal financial planning service taking into account all forms of taxation and personal financial planning such as:—
>
> – Inheritance tax
>
> – Capital Gains Tax
>
> – Life Assurance
>
> – Pensions School Fees planning.
>
> …..
>
> 2. As required, we will be pleased to help with any other matters such as negotiations with your Bankers, VAT returns, etc."

22. There was no change in the terms of the retainer following the incorporation of HB.

23. The judge correctly interpreted the 1999 letter as not imposing any obligation on HB to advise Mr Mehjoo as to how he might minimise his tax liabilities unless they were specifically requested to do so. It is also clear both from the terms of the letter and from the context of the relationship which preceded it that HB were acting throughout as general accountants to the claimants and his company. As such they were charged with preparing annual tax returns for Mr Mehjoo and his company and with advising them on the availability of reliefs in connection with their annual tax liabilities. Any more specialised services than that would have to be specifically requested by the claimant and it would then be a matter for HB to decide whether and, if so, how such a request would be accommodated.

24. The judge said that the 1999 retainer was not a negotiated agreement but that is largely irrelevant. It represented the terms of HB's engagement which never changed. As the judge observed in [126] of his judgment, 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: see *Regent Leisuretime Ltd & Ors v Skerrett & Anor [2006] EWCA Civ 1184; [2007] PNLR 9* . An accountant in the position of HB was not therefore under a general roving duty to have regard to and to advise on all aspects of the claimant's affairs absent a request to do so.

25. This formulation of principle has a particular relevance to the present case where it is accepted by Mr Mehjoo that Mr Purnell and HB were never asked to give him tax planning advice on possible ways of minimising or eliminating the already low rate of CGT applicable to his disposal of the BFL shares. Under the terms of their retainer letter, they were not therefore required to give such advice. It is undoubtedly correct, as the judge found, that on many occasions Mr Purnell (who was clearly on very friendly terms with Mr Mehjoo) did go out of his way to offer advice (including some tax advice) on aspects of the claimant's business and personal financial affairs. This included some advice about the implications of his merger with Mr Scott and about VAT in connection with the claimant's purchase of a boat in 2004.

26. Most of this advice seems to have been relatively routine, even if pro-active, and the judge did not find that Mr Purnell ever held himself out as a specialist in tax planning or that he would have been competent to do so. But the claimant relied on the various occasions when Mr Purnell, apparently unprompted, took the initiative in giving advice to Mr Mehjoo as founding a course of conduct from which the court should infer a change in the terms of the retainer prior to the events of 2004 and 2005 as a result of which HB were required to give the claimant advice as to how he could reduce any relevant tax liability even when not requested to do so.

27. The judge set out the issue he was faced with in these terms:

> "128. In the present case, in order to establish the obligation of the Defendants to give tax advice even when not requested to do so, the Claimant relies on a course of dealing in which Mr. Simpson says that it was agreed and understood between him and Mr. Purnell that the Defendants would advise him on ways of saving tax without being expressly asked to do so. The Claimant's case is that the retainer letter did not reflect the true relationship between the parties. He explained that if during his regular meetings with Mr. Purnell, he told Mr. Purnell that he was thinking of doing something, Mr. Purnell would immediately consider and explain the financial and tax implications of it, without being requested to do so.
>
> 129. It is settled law that that it is clear that a term may be implied where the parties have consistently on previous occasions adopted a similar course of dealing (see, for example, *Chitty on Contracts* (31st Edition) (Vol. 1) Para 13-023). In this case, Mr. Simpson contends that the duty of the Defendants to give the Claimant tax-planning advice arose as a result of the acceptance by the Defendants over a long period of their duty to give tax-planning advice to the Claimant even when not requested to do so. This duty or understanding, he says, became part of the Defendants' duty to use skill and care. As I will explain, it is also said that even if there was not that duty on the Defendants, a duty to give advice arose at the meeting on 2 October 2004 because first Mr. Purnell was giving advice to the Claimant at that meeting on reducing his CGT liability without a specific request to do so and second he was then obliged to consider all ways in which the Claimant could reduce his tax liabilities."

28. The obvious starting place for a consideration of this alleged course of conduct must be July 1999. Whatever may have gone before, HB confirmed the terms of their retainer in the letter I have quoted from and the claimant was content to instruct them on that basis. The judge, however, gives a number of examples of occasions after that date when Mr Purnell gave advice on what the judge describes as tax planning. The judge defined this as:

> "considering whether the incidence of tax can be mitigated by embarking upon one or more different transactions which might have the similar economic effect to what the tax payer is already doing but attracts a lower rate of tax"..

29. Mr Stewart QC for HB made various criticisms of this as a useful or accurate definition but the important question is whether a duty to give tax planning advice in the relatively narrow and specialised sense adopted by the judge for the

purposes of this claim can be spelt out from the type of advice which Mr Purnell had given to Mr Mehjoo on the occasions relied on to found the extended duty.

30. The first instance referred to in the judgment is an occasion in September 2001 when Mr Purnell actually asked to join the claimant's business. Mr Purnell wrote to the claimant saying that he had:

> "gradually become less of a processing accountant and more of a business and tax adviser using the resources of my firm. This is a role that I enjoy and I feel is better suited to my talents"..

But nothing came of the proposal and I do not see how it can be relevant to what contractual duties were owed to Mr Mehjoo by HB.

31. The two examples given to the judge by Mr Simpson QC of occasions when Mr Purnell became involved in tax planning matters on behalf of the claimant without first being requested to do so occurred in October 2002 and February 2004. The first occasion arose at the time of the merger of Mr Mehjoo's business with that of Mr Scott. There is a note of a conversation between Mr Purnell and Mr Mehjoo in which Mr Purnell had:

> "explained to Hoss that I needed to speak to him as his business ideas appeared to introduce a substantial tax liability if cash or profits are taken out of the business. On the other hand if a share for share transaction was carried out for the whole of the business, tax should only be paid on dividends and bonuses as and when they were provided"..

32. In cross-examination, Mr Purnell explained that he saw one of the merger proposals as creating an unnecessary and avoidable tax liability for Mr Mehjoo which he felt it was his duty to warn Mr Mehjoo about. The second occasion was when Mr Purnell (again of his own volition) asked Berry Birch & Noble for advice on the potential CGT consequences of the merger for Mr Mehjoo. In the event, the merger proposals were amended in a way which meant that the potential tax liability did not arise. The judge concluded:

> "137. This evidence of the Claimant showed that on many occasions, Mr. Purnell of his own volition and without being asked to do so took it upon himself to advise the Claimant on the tax implications of what the Claimant was proposing to do including considering ways in which the Claimant could reduce or avoid a substantial tax liability. Mr. Purnell indeed gave such advice relating to the tax treatment of the Claimant's first boat.
>
> 138. So in the absence of any contrary evidence, I am satisfied that prior to the merger of the Claimant's business with that of Mr. Scott on 28 February 2003, there was a clear and mutually accepted understanding between the Claimant, on the one hand, and Mr. Purnell, on the other hand, that Mr. Purnell was always required to consider the Claimant's best tax position and to give appropriate advice including on how to reduce his tax liability, even when such advice had not been expressly requested. This was a result of their long-standing close personal and business relationship and it constituted a variation from the terms of the 1999 Retainer Letter. This was the position even

> though the Claimant had on occasions sought tax-planning advice from others such as Wragges in 2001."

33. In relation to the period after its incorporation, HB ceased to act as accountants for the claimant's company and business but remained his personal accountants. Mr Purnell was, however, kept informed of the claimant's business plans and in 2004 of the proposal to dispose of BFL. It was during this time that he gave Mr Mehjoo advice about the tax treatment of his boat. But the claimant and Mr Scott sought advice about the sale of BFL from Ford Campbell, another firm of accountants and corporate financial advisers. There were meetings between the claimant and Mr Purnell in September 2004 at which time, on the judge's findings, Mr Purnell must have become aware that the claimant was to dispose of his shares for a substantial sum. But there were no other specific occasions (prior to the events with which the proceedings are concerned) which are relied on as creating a more extensive duty than that set out in the 1999 retainer letter.

34. The judge refused a late application by HB for permission to re-amend their defence so as to plead that HB, through Mr Purnell, believed that Mr Mehjoo was receiving specialist tax advice on the sale from Ford Campbell and others and was not therefore looking to HB for advice on his personal tax position. So it was not the appellant's case at trial that the existence of other tax advisers absolved them from any duty which they otherwise owed. But that still left the judge to decide whether, on the basis of the occasions I have described, the scope and conduct of HB's duty had become considerably extended from what the judge found it to be on the proper construction of the retainer letter.

35. In terms of timing, a critical date was 2 October 2004 when a meeting was arranged between the claimant and Mr Purnell to discuss the tax implications of the sale. The judge concluded that by the 2 October meeting HB had come to share the claimant's expectation that Mr Purnell would give tax planning advice to the claimant even when not requested to do so. This was based partly on the earlier occasions when Mr Purnell had taken steps, as he put it, "to consider Mr Mehjoo's best tax position" and also it seems on the events which immediately preceded the 2 October meeting with the claimant.

36. On 30 September Mr Purnell met Mr Stanford, the tax partner in HB, to discuss the points which needed to be covered at the 2 October meeting. By then the claimant had been told by Wragges, his solicitors, that completion was likely to take place by the end of February 2005. Mr Purnell (and, through him, Mr Stanford at HB) were therefore aware when preparing for the meeting that the claimant would dispose of his shares in BFL and would receive a large cash payment in return. The tax consequences of the sale and, in particular, the claimant's capital gain were therefore obvious matters for discussion at the meeting.

37. The judge placed particular reliance on two passages from Mr Purnell's oral evidence. The first was part of his cross-examination:

> "Q. So you accept that in October of 2004, moving forward, that it was your responsibility to give Mr. Mehjoo tax planning advice?
>
> A. October 2004 going forward—
>
> MR SIMPSON: I'm moving forward. I'm trying to cut to the chase, as it were, and do think carefully because to explain our case—

MR JUSTICE SILBER: Can you just answer the question? October 2004: can we just take up the position at that stage?

A. I was always required to consider Mr. Mehjoo's best tax position. So October 2002, 2004 I was still required to consider his best tax position.

MR SIMPSON: That does mean that I can probably cut a considerable amount of what I'm doing with you because I'm asking lots of questions about the merger to set up questions about October 2004 but if you accept that in October 2004 you would have been under the obligation to give Mr. Mehjoo tax-planning advice, I can cut all that.

A. Okay. We were his personal accountants and we did deal with his tax, so if he'd asked to us deal with tax planning we would have helped him.

Q. The big bit of contention that I've had with you in the last hour or two is even if he didn't you'd look round corners for him?

A. If we knew there were circumstances where he was paying or liable to pay tax then we would look to help him.

MR SIMPSON: I understand"

38. The judge then asked:

"If you knew there were circumstances where he would have to pay tax?

A. Yeah, we would look to help him assess the situation and give advice if we thought it was appropriate.

MR JUSTICE SILBER: Yes.

MR SIMPSON: I'm jumping forward here to see what I can miss out. That's why, for instance, you met Mr. Stanford when you found out about the disposal?

A. Yes."

39. It is clear from this evidence and the various occasions when Mr Purnell did proffer unprompted advice to Mr Mehjoo about the tax consequences of particular financial and other transactions 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. None of this is 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. Similarly, in handling the client's tax affairs the client can expect his accountant to advise on any available tax reliefs under the relevant fiscal charge which may be available to him to reduce his tax liabilities.

40. But routine tax advice of this kind, though an important part of an accountant's ordinary duties, is not what this case is about. And Mr Stewart is, I think, right in his submission that much of the difficulty with the judge's analysis of the scope of HB's retainer and duty of care stems from a failure to differentiate between the tax advice of the kind which Mr Purnell gave to Mr Mehjoo on the occasions referred to by the judge and the much more sophisticated form of tax planning exemplified by the BWS 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.

41. No distinctions of this kind appear in the passage of cross-examination I have referred to and there are obvious dangers in using the term "tax planning" without making it clear what one is referring to. HB were not specialist tax planners of the kind I have mentioned and never offered to give the claimant such advice. Their retainer letter listed entirely conventional forms of tax advice including what they described as tax planning advice on the best use of reliefs. A more extensive tax planning service was available only on request and was never requested. On the occasions the judge refers to, Mr Purnell gave Mr Mehjoo tax advice in a pro-active way but none of it was of this latter more specialised kind. It either involved alerting Mr Mehjoo to potential tax liabilities if a particular course of action was pursued or advising him on the most tax effective way of purchasing his second boat.

42. The judge recognised that, to establish the scope of duty contended for by the claimant in advance of the 2 October meeting, it was necessary to imply a term in the contract of retainer based on the conduct of the relationship up to that date. But it is unusual to imply a term which contradicts the express terms of a contract and what the judge was really deciding was whether the course of conduct he described supported a significant variation of its terms.

43. The judge relied on Mr Purnell's evidence as establishing that HB had accepted that they were under a duty to give the claimant advice on tax matters including tax planning in the sense that the judge had defined that term. This duty, he held, was not dependent upon a prior request for such advice. But I am not satisfied that such a fundamental variation in the terms of the retainer can be spelt out of any of the evidence which the judge refers to. It is common ground that there was never any express agreement between the parties to alter the existing terms of the retainer and the question therefore is whether, looked at objectively, such a change in the contract can be inferred from the events which were relied on by the claimant.

44. As I have already explained, the giving of general tax advice (such as the availability of reliefs) was undoubtedly part of the existing retainer but it is difficult to see why a positive duty to advise on such matters should be extended in this case (by October 2004) to include a duty to give specialist tax planning advice as understood by the judge. HB were not and had never held themselves out to be specialist tax planners; and had never given Mr Mehjoo advice of that sort. It is therefore surprising to say the least that from a course of conduct which did not involve tax planning, they should be taken to have assumed a positive duty to give advice of that kind. The judge's conclusion that such a duty had arisen by the time of the 2 October meeting is not, in my view, sustainable.

45. The next issue is whether what happened at the 2 October meeting made any difference. The meeting is important for three reasons. First, it is relied on in the judgment as confirmation of a pre-existing obligation on the part of HB to give advice on tax planning without being asked to do so. Second, it forms the basis of the claimant's alternative case (which the judge accepted) that, even if there was no such pre-existing duty as of 2 October, HB assumed responsibility and therefore came under a duty to give tax planning advice because of the nature of the meeting. The third reason that the meeting was significant is that this would have been an occasion on which, on the claimant's case, tax planning advice (even of a preliminary nature) should have been given.

46. Mr Mehjoo had no recollection of the 2 October meeting and could give no evidence about it. But the judge found that on 30 September Mr Purnell met with Mr Stanford, as I have mentioned, to discuss the CGT liabilities which would arise on the

sale of the BFL shares and how the claimant might reduce those liabilities. A number of topics were identified which could be raised at the 2 October meeting and on 1 October Mr Purnell produced what might be described as a check list of those points:

> "Potential Chargeable Gain when shares in Bank Fashion are disposed of
>
> 1. Chargeable gains computation required at disposal date
>
> 2. Business Taper relief should apply reducing the effective tax rate to 10%
>
> 3. Sale could consist of cash, loan notes, or shares in exchange
>
> 4. Loan notes and shares would postpone the tax
>
> 5. A cash sale will trigger a gain if HM is UK resident
>
> 6. Gain could be deferred by reinvesting in an EIS-no limit
>
> 7. If income tax relief is required 20% tax can also be reclaimed up to £200000 invested
>
> 8. There is a 3 year time scale for EIS and a max of 30% of the equity capital
>
> 9. A VCT could be purchased to give 40% relief in the year of the disposal only
>
> 10. If gain is postponed via an EIS it may be possible to go abroad after 3 years and escape the gain
>
> 11. Going abroad to escape the gain is possible? Belgium
>
> 12. Various tax saving schemes may be available subject to up front fees and uncertainty regarding Government action"..

47. Consistently with the tax position I described earlier in [5], one can see why Mr Purnell and Mr Stanford thought that there were only limited ways in which Mr Mehjoo could reduce his tax liability. Unless he were to become non-resident, which he did not wish to do, the tax liability could only be reduced by, for example, re-investing the proceeds in an Enterprise Investment Scheme or taking the consideration in shares or loan notes rather than in cash. The significant advantage that was available to the claimant was that the shares qualified for business taper relief which reduced the chargeable gain by 75 per cent resulting in an effective tax rate of 10 rather than 40 per cent. But if Mr Mehjoo wanted to explore a more radical solution which might eliminate even this level of chargeable gain then, as the checklist records at point 12, he would have to discover whether any tax schemes might be available.

48. The judge found that the checklist contained all the possible CGT tax saving ideas which Mr Purnell and Mr Stanford were able to think of and that they were discussed at the meeting He also found that the claimant was not interested in any of the ideas and did not take them forward. He said:

> "167. … I am not surprised that the Claimant was not interested in any of the ideas put forward by Mr. Purnell because in my view, he only appears to have been interested in a scheme which would prevent him paying any CGT because that would appear to be one of the reasons why he selected the Montpelier Scheme later."

49. There are, I think, some difficulties in that conclusion because it is in fact clear from later events that the claimant was extremely cautious about spending significant sums in fees on a tax scheme before he was certain that the sale was going to go ahead. But, on the basis of the judge's findings, Mr Purnell must have at least mentioned to Mr Mehjoo that more radical tax schemes might be available even though he could not say that any would necessarily be suitable or what they were.

50. As I mentioned much earlier in this judgment, it is not the claimant's case that HB ought to have included in the list some specific reference to the BWS or have known that such a scheme existed. So the duty (as the judge found it) to give tax planning advice is limited in this case to a duty to advise the claimant 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.

51. The judge attached significance to the fact that the 2 October meeting was specifically designed to discuss the minimisation of the claimant's CGT liabilities on the imminent disposal of his shares. This, he reasoned, was enough in itself to impose on Mr Purnell a duty to give tax planning advice at the meeting:

> "170. I must add that even if there had *not* been any pre-existing duty on the Defendants to give tax-planning advice to the Claimant without being requested to do so in all tax-planning matters by the time of the meeting on 2 October 2004, then in any event on the occasion of that meeting, there was such a duty imposed on the Defendants as there is no other sensible explanation for the meeting and the nature of Mr. Purnell's preparation for it other than that the Defendants had this obligation to advise the Claimant on how to eliminate or to reduce his substantial CGT liability without being requested to do so. In other words, even if previously the Defendants did not have a general duty to give unrequested tax-planning advice, when they gave advice in relation to reducing or eliminating the Claimant's CGT liability on 2 October 2004, they then assumed an obligation to use all due skill and care in giving the Claimant advice on steps open to him to reduce or to extinguish his CGT liability at that meeting.
>
> 171. I cannot discern any purpose for Mr. Purnell's attendance at that meeting or in his preparation for it other than to give advice on how the Claimant could eliminate or reduce his CGT liability. So if Mr. Goodfellow is right and Mr.Purnell only had an obligation to provide tax-planning advice when requested by the Claimant to do so, such a request must have been at least implied in relation to the meeting on 2 October 2004 as otherwise Mr. Purnell would not have gone to the lengths first of consulting Mr. Stanford; second of preparing the List of Issues on 1 October 2004; and third of having a session advising the Claimant on tax-planning matters on Saturday 2 October 2004. The duty imposed on the Defendants as to the precise nature of tax-planning advice that should have been given by Mr. Purnell raises issues as to as which I will return when considering the Referral issues.
>
> …
>
> 173. So I conclude that the Defendants' retainer prior to and subsequent to the merger extended to advising and assisting the Claimant generally in relation to his personal and financial tax affairs, including identifying and advising the Claimant of possible methods by which he could minimise his tax liability including giving the Claimant CGT tax-planning advice on the proposed sale of his share holding in BFL *even* when he had not been requested to do so. This relates to the position as at 2 October 2004 when it is said by the Claimant, the Defendants ought to have given him the advice first, that he had or very probably had (or alternatively might have had) non-dom status, second, that

> non-dom status carried with it very significant tax advantages, and third, that he should therefore take tax advice from a firm of accountants or tax advisers who, unlike the Defendants, specialised in advising individuals who had (or might have) non-dom status.
>
> 174. In any event, even if there had *not* been such a retainer at an earlier time, the Defendants' duty on 2 October 2004 was to use all proper skill and care to give tax-planning advice on that occasion for the reasons set out above (including what Mr. Purnell said in evidence as quoted at the end of paragraph 152 and in paragraph 153 and the amount of CGT potentially payable) so as to reduce or eliminate his liability to pay CGT on the sale of his BFL shares even though not requested to do so."

52. This analysis suffers, I think, from the same failure to distinguish between the tax saving measures included as items 1–11 on the list which would or should have been obvious possibilities to any competent general accountant and measures such as the BWS which no-one suggests that HB should have been aware of. I am unable to accept that one can derive from the topics included in the checklist a duty to give advice of the latter kind. It seems to me to be a completely different type of exercise. It may reasonably be said that a firm such as HB should at least have alerted Mr Mehjoo to the possibility that there might be available a more radical scheme. But that is what they in fact did and Mr Mehjoo took the matter no further. What, however, is said in the action is that, had they advised him that he was a non-dom which carried with it significant tax advantages, he would immediately have sought advice from non-dom specialists and this would have connected him up with the BWS scheme.

53. This part of the claimant's case raised a number of issues of causation, some of which form part of this appeal. But I want, for the moment, to continue with the issue of breach of duty and to consider whether the undoubted duty to give general tax advice of the kind referred to in points 1–11 of the 2 October checklist can be said to have included a duty to give advice to the claimant that he was a non-dom and that this status carried with it potentially significant tax advantages. Mr Simpson submits that on the judge's findings, those two pieces of information alone would have caused Mr Mehjoo to seek advice from a suitable specialist.

54. It was, I think, common ground before the judge as it is before us that HB were not aware of the existence of the BWS or any other tax efficient means of changing the situs of the BFL shares to foreign assets and that such knowledge would not have been possessed by a reasonably competent generalist accountant at the time. The claimant's case therefore amounts to saying that Mr Purnell should have alerted Mr Mehjoo to the fact that he was probably a non-dom and told him in terms that such status carried with it significant tax advantages even though he knew that the advantages were not available to the claimant on a sale of the shares in an English registered company.

55. Conversely it might be supposed that if Mr Purnell had a duty to mention Mr Mehjoo's tax status as a non-dom at all, it would have been incumbent on him to add in terms that the tax advantages linked to being taxed on a remittance basis did not apply to the shares. Had Mr Mehjoo been given this rather fuller account of the matter, it must be highly questionable whether he would have taken the matter further. The essence of his case and his evidence on causation was that he would have taken the reference to significant tax advantages as an indication that they had some application to him in relation to the sale of the BFL shares. We know that the neutral terms of point 12 in the 2 October checklist were not enough to persuade him to take the matter any further.

56. The reasonably competent accountant setting out to advise Mr Mehjoo of the tax consequences of the sale would not, in my view, have been under any obligation to raise for discussion the claimant's domicile unless it was relevant to the CGT liability on the disposal. The accountant would have known that it gave Mr Mehjoo no tax advantages in relation to the sale

of the BFL shares unless the situs of the shares could be changed. As this was something which HB neither knew or could have been expected to know was achievable, there was no reason to mention the matter still less a liability in negligence for not having done so. Although not in any sense conclusive, it is not insignificant that none of the other firms of specialist tax advisers whom Mr Mehjoo subsequently consulted suggested he should consult a non-dom specialist or raised the possibility of using a scheme like the BWS . None of them has been sued in negligence.

57. The judge based his conclusion that HB were under a duty to advise Mr Mehjoo that he was probably a non-dom on the fact that Mr Purnell, who had known Mr Mehjoo for a long time and was aware of his family history, must have realised that he had probably retained his Iranian domicile of origin. Referring to the subsequent formal acceptance by HMRC in 2006 that Mr Mehjoo was still domiciled in Iran, the judge said:

> "To my mind, this evidence from Mr. Purnell together with HMRC's decision to accept the Claimant as a non–dom individually and cumulatively satisfy me that the Claimant was very probably or possibly might have been a non-dom in October 2004 and that he should have been so advised by the Defendants."

58. The obligation to advise the claimant of his status as a non-dom seems to be based on the fact that by 2 October HB were aware that the sale of the BFL shares would generate a large cash sum possibly for future investment. But accountants are not paid to give unnecessary advice and I can see no reason, still less any obligation, on HB to have raised the claimant's non-dom status at the 2 October meeting when the only issue for discussion was the CGT payable on the disposal. The taxation of future income on a remittance basis could be the subject of discussion and advice as and when it arose. The last part of the judge's statement in the passage I have quoted is, with respect to him, a *non-sequitur* .

59. I take the same view in respect of the claim that Mr Purnell should have told Mr Mehjoo that his probable non-dom status carried with it significant tax advantages. Again, these were not advantages which were available to the claimant on the sale of UK registered shares and, in the absence of any claim that HB should have known and advised Mr Mehjoo that it would or might be possible to change the situs of the shares without triggering a charge to CGT in the process, it is difficult to understand why they were under any legal duty to bring the existence of "very significant tax advantages" to the claimant's attention. The competent accountant would not have believed that they existed.

60. The judge based his finding that there was such a duty on the fact that both Mr Purnell and Mr Stanford said in evidence that if a taxpayer was a non-dom the status carried with it certain tax advantages and that these included the use of offshore investments. All of that was, of course, true. If Mr Mehjoo had invested the proceeds of sale abroad, he would pay tax only on the remitted income. But the CGT problem created by the disposal of shares in a UK company could not be addressed in that way.

61. I am not therefore persuaded that HB were under any duty to advise the claimant of significant tax advantages which, to their reasonable knowledge, did not exist.

62. The third limb of the pleaded duty was to advise Mr Mehjoo that he should take tax advice from a non-dom specialist. There was a significant debate at the trial as to what was meant by a non-dom specialist and whether such a type or class of specialist adviser even exists. But the three parts of the alleged duty have to be considered together and there cannot have

been any duty to advise Mr Mehjoo to consult a non-dom specialist if HB were, in the circumstances of this case, under no duty to draw to his attention any significant tax advantages derived from his non-dom status which might be relevant to the sale of the shares. It is not therefore necessary to consider Mr Stewart's submission that only HB's expert (Mr Warburton) was competent to give expert evidence on the point and, that by relying on the claimant's expert (Mr Kilshaw), the judge has based his decision on inadmissible evidence.

63. One point which I do need to deal with is 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 judge said:

> "First, if Mr. Warburton was right, the less the knowledge possessed by the generalist, the lower would be the duty to advise the client to consult a non-dom expert. His test, which I suppose must apply to all professionals, would have the possibly alarming consequence that if a GP has a patient with a serious but obscure fatal illness, then he would be under no obligation to advise the patient to consult a specialist unless he knows that the specialist would be able to give some treatment which has *"at least a reasonable chance of success* ". Surely if the GP knows that there *might possibly* be types of treatment known only to specialists which might assist the patient that should trigger a duty to advise to refer irrespective of his views on the prospects of success."

64. The first point to be made is that it is often dangerous as well as unhelpful to draw analogies with other types of profession. The inability of the general practitioner to diagnose the cause of his patient's illness gives rise to a duty to refer because it is apparent that the patient is ill and requires treatment. The GP is not required to form a view about whether the condition is curable. That is a matter for further investigation by the specialist. The task of the GP is to ensure that his patient is treated.

65. In the present case, HB alerted Mr Mehjoo to the fact that various tax saving schemes might be available in relation to his impending capital gain. He chose not to follow it up. Their negligence is said to be a failure to specify what type of advice Mr Mehjoo should seek even though they had no reason to suppose that that type of tax saving scheme existed. The judge referred to the decision of Lightman J in *Hurlingham Estates Ltd v Wilde & Partners [1997] STC 627* where the issue was whether a solicitor engaged to carry out a conveyancing transaction was under a duty to advise his client of the existence of a potential tax charge which would be avoided by re-structuring the transaction. Lightman J said:

> "The test to be derived from the authorities 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 solicitor], [the solicitor] 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."

66. But in that case, unlike this, the existence of the tax charge was something which the judge held should have been known to the solicitor and which he should have warned his client about. Here the claimant knew about the tax charge and was told that schemes might exist to reduce it. HB did not know what those schemes were nor could they be expected to do so. On the Hurlingham Estates test, they had discharged their duty.

Conclusions

67. For these reasons, the judge was wrong in my view to find that HB were in breach of duty and it is therefore unnecessary to consider the various issues raised about causation and remoteness of damage. I would therefore allow the appeal and dismiss the claim.

Lady Justice Sharp:

68. I agree.

Lord Justice Lewison:

69. I agree that the appeal should be allowed for the reasons given by Lord Justice Patten. What, to my mind, went wrong was that the judge lost sight of the wise words of Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kent [1979] Ch 384* at 402:

> "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 such as *Duchess of Argyll v Beuselinck [1972] 2 Lloyd's Rep 172* ; *Griffiths v Evans [1953] 1 WLR 1424* and *Hall v Meyrick [1957] 2 Q.B. 455* demonstrate that the duty is directly related to the confines of the retainer."

70. In my judgment it was impermissible for the judge to infer from the limited occasions upon which Mr Purnell pursued a line of inquiry beyond the strict limits of his retainer that there had been a far reaching (but silent) variation of the retainer, which had the effect of imposing an open-ended and apparently limitless duty upon HB.