Generalist tax advice, farming and the importance of Mehjoo

The case of *Mehjoo v Harben Barker (a firm) and another* [2014] EWCA Civ 358 has very important implications for the scope of the duty of care owed to clients when giving advice. The success in the Court of Appeal is a positive for farm advisers but there are lessons to be learnt from this important case.

The anticipated outcome of *Mehjoo* has been on the 'radar' of all farm advisers including those who only 'dabble' with farming clients. The judgement was given on 25 March 2014. The case brings into question the role and responsibility of the generalist adviser in the complex world of the taxation of farms.

Farm tax is complicated

There are a number of reasons why *Mehjoo* impacts on advice given to farming and landownership clients, not in the least the fact that the agricultural tax rules are so complicated. There is a great need for specialist advice in the farming industry. With the value of land having increased so dramatically over the last decade together with development values returning the quantum of risk has increased. This is against a background of farming clients who do not want to pay for specialist advice.

The High Court had previously ruled that Hossein Mehjoo's accountants, Harben Barker (HB), a firm with offices in the West Midlands, had been negligent. The Court found that since Mehjoo was very likely to be non-UK domiciled, this fact should have been considered to have a bearing on the CGT liability Mehjoo was faced with. It was presented that HB should therefore have advised him to seek advice from a non-dom tax specialist. The judge indicated that he was not a tax expert and that the case should have been heard by a tax judge. However, he concluded that had Mehjoo sought specialist advice, he would have learned about the Bearer Warrant Scheme (BWS) and he would have been able to avoid the CGT on the sale of his company. HB had failed to refer the specialist and were therefore found to be liable in the first case.

The focus of the appeal would appear to be on the need for general practitioners to refer specialist advice where appropriate. Another key point is the need to have the correct engagement letter in place that clearly defines scope in order to protect the adviser and provide clarity to the client. The decision of the High Court was overturned and there is good guidance to be utilised by all practitioners moving forward. In the Court of Appeal, Lord Justice Patten found that Mehjoo had accepted in evidence that he would not have gone ahead with the BWS if he had been advised that there was a substantial risk of it being challenged by HMRC. The judge focused on the terms of HB's engagement letter with Mehjoo, since an adviser's duty of care depended on what they had been instructed to do. Based on the terms of its engagement letter, the firm's obligations to provide tax planning advice were limited. This raises the question, have all engagement letters been checked recently?

Reasonably competent accountant

The judge disagreed with the earlier High Court judgement. Applying the test of the hypothetical 'reasonably competent accountant', he found that Mehjoo's non-dom status could not influence the CGT on the sale of his UK shares unless the accountant knew how it was (potentially) possible to change the situs of the UK registered shares into overseas assets. Lord Justice Patten said: "As this was something which HB neither knew nor 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." He then went on to conclude that, in advising Mehjoo about the tax consequences of selling his UK shares, the 'reasonably competent accountant' would not have been under any obligation to discuss Mehjoo's domicile status unless it was relevant to the CGT liability on the contemplated disposal. Therefore, HB was not under any duty to advise Mehjoo'...about significant tax advantages which, to their reasonable knowledge, did not exist.' However, the judge made it clear that the duty to refer to a specialist when it is relevant to do so does exist.

"Expected to know"

The consideration for any farm adviser is what are they 'expected to know'? Here are examples of what could be considered everyday tax considerations for farmers:

1. negligible value claims for milk quota;
2. ensuring grassland keep qualifies as agriculture and a trade;
3. protecting Agricultural Property Relief (APR) for Inheritance Tax (IHT) on the farmhouse;
4. protecting IHT reliefs for the elderly farmer;
5. maximising farm loss claims under the hobby farming rules; and
6. herds basis calculation and application.

Most farm advisers would be expected to know.

Duty to refer a specialist

The above list might be deemed to be specialist knowledge of farming but problems can happen in every day farm accounts which could jeopardise these reliefs, for example:

1. The need to make the negligible value claim re quota could be overlooked and it ceases to have value on 31 March 2015.
2. The land agent could put a grass letting in for the elderly farmer which did not ensure the farmer still grows the crop of grass and the accountant not notice in the accounts and this jeopardises APR on the farmhouse.
3. The farmer could move to a nursing home and nothing could be said by the accountant to protect IHT relief.
4. The elderly farmer could lose capacity and no warnings of legal problems are made to the family and those with the registered LPA.
5. The fiscal basis of the 6th year loss could be overlooked with non-fiscal year ends, eg 30 September, and loss relief could be denied by HMRC.
6. Herds basis – a new farming operation could fail to elect within the required time when starting up the business and then be 'out of time' to make the claim.

These could be examples of when a general adviser has a duty to refer a specialist. The question must then be asked, what are the terms of the engagement letter? What had the adviser been instructed to do?

The right engagement letter

The *Mehjoo* case reminds farm advisers to ensure that all instructions are in writing and of the importance of having the right engagement letter in place. The need to clearly state what the firm undertakes to provide in terms of professional services is essential. When new advisory work is undertaken a new engagement letter should be produced. If there are serious changes such as declining health of the farmer, a specialist should be advised if necessary.

The Court of Appeal's decision would indicate a reluctance to impose duties on advisers that go beyond what they are specifically requested, or agree, to do. The decision hopefully provides support for the ability to rely on the scope of a written retainer. The case makes it clear that a generalist firm is not obliged to refer clients to specialist advisers unless there is a good and apparent reason to do so. For example, in the *Mehjoo* case being aware that non-dom status opened up additional routes for CGT mitigation or that a particular situation was complex and needed specialist advice.

What is the scope of the farm adviser?

How can a 'good and apparent reason' to refer to a specialist be defined in farming? It will be argued by the farming community that (1) to (6) above are considered to be everyday farming concerns that the accountant should be able to deal with the tax considerations of without the use of a specialist.

In the *Mehjoo* case, HB did stray from the terms of their written engagement and in doing so assumed additional duties of which they may not have been fully conscious. While the Court of Appeal was finally satisfied that they hadn't progressed so far as to impose a duty that caused a liability, this was a question of degree. When a firm holds itself out as having farm tax planning expertise, for example, the Court may be more willing to conclude that the farm adviser would be liable.

Generalist advisers

Generalist advisers will be motivated by the fact that the Court of Appeal confirmed that a duty does exist to refer clients to specialists where there is a good reason to do so. Failing to refer a client in such circumstances risks a claim that a referral should have been made, eg a generalist adviser with a few farm clients not referring a specialist in difficult circumstances. There is also the possibility of the general adviser straying into an unfamiliar area of, for example, estate planning for farmers and inadvertently providing inaccurate advice surrounding the complex area of farm tax.

Many would ask what is a good reason to refer to a farming specialist. It is hoped that the list provided gives examples. There are arguments to say that the reasons of quantum created by increased values of farmland and constantly being asked about succession planning are the reasons. For the farming advisers, how are they held out to clients? Most farming accountants promote themselves as specialists in some way, particularly when winning new clients.

Fee reluctance

A large number of farmers are resistant to pay high fees for specialist advice or for a general estate planning report. The fact that the farmer/landowner refuses to pay high fees or to accept the referral to a specialist and the evidence of the fee must be recorded by the generalist adviser.

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