Potential farm tax negligence claims – Implied terms and marketing

Two recent cases for negligence claims against accountants have, in relation to tax work, shown the importance of the risk of 'implied terms' with clients and also the potential risk of negligence claims with regard to how a firm markets itself. Both cases were against accountants and both ultimately failed whilst offering clear indications as to how to secure future protection. A further professional negligence claim of more than £49m for audit work by Manchester Building Society from Grant Thornton is a serious concern.

Restructuring to avoid tax consequences

Altus Group (UK) Limited v Baker Tilly Tax and Advisory Services LLP (and another) [2015] EWHC 12 (Ch)

The case arose because Altus claimed damages for professional negligence, for work carried out by Baker Tilly, for failing to explain the implications of Corporation Tax Act (CTA) 2009, s1263. It was said that if Baker Tilly had provided the appropriate advice, Altus could have carried out a restructuring scheme to avoid the tax consequences of s1263. The High Court ruled that Baker Tilly should have known about the prospective legislation and brought the details thereof to the attention of its client (Altus). This was considered particularly relevant because Baker Tilly marketed itself as a 'top-end and very large firm of specialist advisers' and it was therefore reasonable for a client to expect that it had greater technical resources than a smaller firm.

The emphasis of this case shows the importance of clients being able to expect 'more than a small firm'. Also the impact of marketing needs to be considered, on what services a firm provides, and the impact on potential negligence claims.

Accepting breach of duty but no loss suffered

Baker Tilly accepted that it had been in breach of its duty, but argued that Altus had not suffered any loss because it would not have implemented the restructure. It had since appointed Ernst & Young to draw up the new structure but Altus decided against the restructuring.

The court found that if Baker Tilly had been aware of the new provision, it would have consulted PricewaterhouseCoopers, with which it had an arrangement to provide tax services as requested. It was reasonable to conclude that PwC could not have come up with a similar proposal to that of EY, given that it had not implemented a similar structure.

Marketing and what the client expects

The *Baker Tilly* case highlights the importance of the firm's marketing of a potential professional negligence claim and how the firm holds itself out to clients. Such action can be looked at in terms of the marketing of farm tax advisers. Where a firm holds itself out as having farm tax planning expertise, for example, it can be argued that the courts are more likely to conclude that the firm has breached its duty of care if the firm is unaware of a new important provision relating to farm tax planning.

Mehjoo v Harben Barker [2014] EWCA Civ 358

The *Mehjoo* case is another example of a potential negligence case with regard to tax advice that reminds farm tax advisers to ensure that all instructions are in writing, and of the importance of having the right engagement letter in place. The need for the professional adviser to clearly state what the firm undertakes to provide in terms of professional services is essential.

The Court of Appeal's decision in the *Mehjoo* case 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, but that referral should then take place.

The question must be asked, has any firm of tax advisers created implied terms of duty of care through subsequent marketing or correspondence? How can a 'good and apparent reason' to refer to a specialist be defined in farming?

There are arguments to say that the reasons of quantum created by, say, increased values of farmland and constantly being asked about succession planning are those 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 directly or through marketing at, say, agricultural shows.

The recent cases of *Ham v Ham and another* [2013] EWCA Civ 1301 and 'Cowshed Cinderella' (Davies) have shown the potential legal nightmares of farming disputes between families where emotions and farm values run high.

Examples of specialist needs:

- Potential development land, concerns on Inheritance Tax (IHT) and Capital Gains Tax (CGT) associated therewith;
- Weak grazing agreements that do not protect tax reliefs on potential development land;
- Lack of legal agreements in complex farming families which lead to dispute;
- Too much let land and properties resulting in the loss of Business Property Relief (BPR);
- Lack of capacity of one of the older generation of the farming family, and potential for dispute;
- A farming family dispute not protected by sound legal agreements.

In the *Mehjoo* case, it was considered that Harben Barker did stray from the terms of its written engagement and in doing so assumed additional duties of which it may not have been fully conscious. Have the additional duties been assumed by most farm accountants and tax advisers? Are there implied terms that all potential tax concerns will be considered?

Marketing farm tax professionals

The world of the farm accountant and tax advisers is competitive. There are many farming sons and daughters who join a firm of farm accountants to stay close to farming. Many farm accountants and tax advisers have aggressive marketing strategies. For example, exhibitions at country shows provide a very specialist image. The duty of care by farm accountants to help with all farm tax planning problems has perhaps been implied, for example:

- The associated disposal advantage for Entrepreneurs' Relief for withdrawals from the business;
- The importance of partnership property as opposed to personal property for 100% BPR;
- The necessity of a partnership agreement to tie into the above;
- Maximising IHT reliefs in a position of diminishing capacity of a partner;
- Ensuring strong accounts and tax return disclosure to maximise reliefs – for example, partnership property and grazing income not on land and property pages.

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