



3rd July 2013

"Duty is the most sublime word in our language. Do your duty in all things. You cannot do more. You should never wish to do less." Robert E. Lee

Nelson's Eye and the *Mehjoo* Case

An analysis of the conflict between the *Mehjoo* Judgement and the SRA warning notice

- **PI Case decides that adviser's first duty is to his client**
- **A failure to inform about tax planning routes amounts to professional negligence**
- **No Regulatory concerns can override this duty**

The vast majority of solicitors and accountants I know do not recommend the use of contrived or artificial schemes to cut tax bills. But they will happily help a taxpayer to structure transactions in a tax-efficient manner. The GAAR should not change this but another important judgment - this one a little more recent – appears to threaten to turn this approach on its head. [H Mehjoo v Harben Barker \[2013\] EWHC 1500](#) found that a firm of accountants *should* have advised their client of a tax strategy and were liable for having failed to do so.

At first blush, this might seem an impossible scenario: incur the wrath of the SRA/HMRC for advising on "schemes", or pay up to the client for steering clear. (Although it may be that solicitors may have been able to discharge their perceived duty by merely telling the client that such a scheme existed, rather than actually implementing it).

All in all, who'd want to be a solicitor dealing with tax?

Some comfort can be taken from the recent SRA announcement on the 5th June 2013 where they stated:

"The SRA did express that they have no issue with firms who deal with legitimate tax planning but reminded legal firms that clients rely on solicitors to advise them as to whether a scheme is in their best interests."

But then:

"Withholding advice and information from clients on SDLT schemes could result in unwanted consequences and legal implications, and could damage public confidence in the sector."

The last paragraph brings into sharp focus the issues that arose in the *Mehjoo* case as regards SDLT mitigation (or even schemes) and the solicitors duty to the client. The court clearly restated a principle that has been trained into us all from day one – that their first duty (and some may say only duty) is to the client.

Any concerns that a solicitor may have with regards to the SRA warning notice issued on 16 February 2012 **must** therefore in light of the above now be **secondary** to the duty to inform the client of available planning routes and even schemes. It is simply **not good enough** to refuse to make enquiry about a clients affairs and inform him of any legitimate tax planning available on the basis of a fear of SRA investigation.

Where planning advice, mitigation, or indeed avoidance schemes are available the solicitor has a duty of care to consider the scheme in the light of the clients interests and advise accordingly. Turning “Nelsons Eye” to the existence of such matters is undoubtedly negligence in this context and *Mehjoo* confirms this.

So as a property solicitor:

- You have a primary duty of care to the client to advise of, at least the existence of schemes.
- To inform them about *legitimate tax planning*
- To consider all their interests when doing so.

To achieve this however you must:

- Make yourself aware of what is available in terms of planning, advice and schemes
- Make a judgement on the technical merits of each and which category they fall into and;
- Consider the impact on the clients interests and;
- Make an informed response to the clients accordingly.

And do all of this as a non tax expert!

So can you simply “opt out”?

No - but you can delegate!

Delegation is the art of acknowledging that you do not have enough expertise in an area and seeking, or asking the client to seek, specialist advice from a recognised professional in the area. Notably the judge in *Mehjoo* commented that this simple step, which Harben Barker did not take, would have absolved him from liability.

So “phone a friend” is the answer. If you are able to exclude tax advice from the terms of engagement with your clients and bring in a specialist advisor to provide that advice, who is particularly experienced and frequently advises on transactions, you will have avoided any possibility of professional negligence on your part.

Because sometimes the best advice, for the solicitor, is not to advise at all, to acknowledge lack of knowledge, and rely on those who already possess it.

But what about the SRA?

Provided you have implemented proper and honest planning advice to mitigate your clients tax liabilities then you are not at risk of any disciplinary action. Provided you do not implement a scheme then you are also similarly safe. So you need to identify the difference between schemes and mitigation or planning.

Here the SRA guidance is less than clear

What is a stamp duty land tax scheme?

A SDLT scheme is a scheme which is designed to reduce or eliminate the correct level of stamp duty payable on a property. Generally, buyers of residential property are required to pay stamp duty land tax when they spend more than £125,000 on a residential property. The tax is charged at between 1 per cent and 5 per cent of the value of the residential property. And less than helpful here:

SDLT schemes are constantly changing and are usually very complex, bearing in mind what purchasers want to achieve. [HMRC publish information on schemes which have been discredited](#);

The web link concerned takes one to a “spotlight” that was published in June 2010 (and has subsequently been amended albeit the web page does not state this). Interestingly the page does not publish any details on any schemes (whether discredited or not). Clearly however from the updated content the concerns of HMRC are surrounding schemes that use sub sale. So would it be a reasonable conclusion, if the arrangements do not involve sub sale, that they are not a scheme? From the way the spotlight is worded that would be a reasonable conclusion.

Conclusion

Taken altogether the principles in the *Mehjoo* case drive a coach and horses through the SRA assertion that a solicitor has an overriding duty to the regulator and HMRC in advising his client about SDLT planning and/or schemes, in fact it is the reverse. No amount of risk aversion generated by these warnings can remove or insulate a solicitor from his primary duty – to advise the client

To do otherwise could be very expensive for the firm



The CHARLES GROUP are proud to be associated with Cornerstone Tax Advisors who along with their principle consultant David Hannah are the leading experts on SDLT planning.