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When tax schemes go sour

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Introduction

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The retainer

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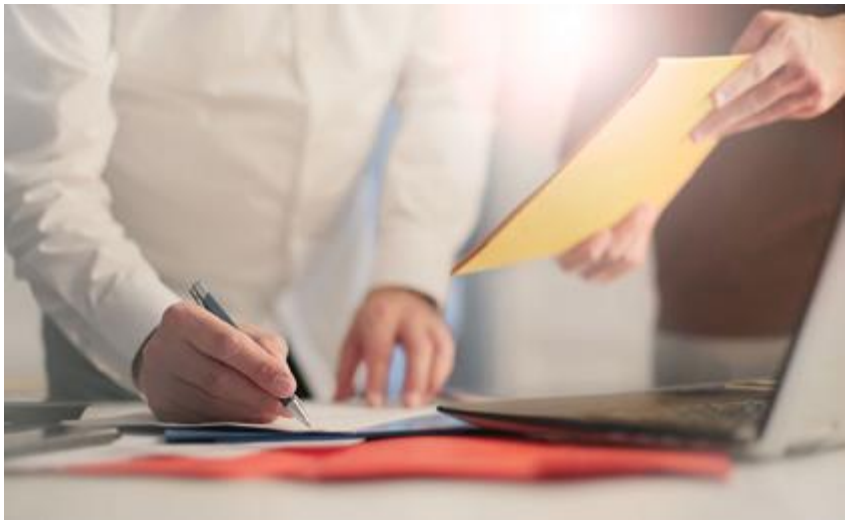
The retainer: the starting point

Dictum of Oliver J in *Midland Bank Trust Co. Ltd. v Hett, Stubbs & Kemp* (A Firm) [1979] Ch. 384:

"Mr. Harman sought to rely upon the fact that Mr. Stubbs was Geoffrey's solicitor under some sort of general retainer imposing a duty to consider all aspects of his interest generally whenever he was consulted, but that cannot be. 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."



What might broaden the extent of the retainer?

May be widened by "*reasonably incidental*" matters (*Minkin v Landsberg* [2016] 1 W.L.R. 1489):

"(i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.

(ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.

(iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.

(iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of the risks which are (or should be) apparent to the solicitor but not to the client."

A few matters which will impact on the extent, each of which may be of relevance in tax scheme cases:

1. Sophistication / vulnerability of the client (see e.g. in context of accountants *McMahon v Grant Thornton* UK LLP [2020] CSOH 50; [2020] S.L.T. 908);
2. Extent and burden of additional work required;
3. The responsibility of the client and/or any other professional involved in the transaction;
4. The amount of fees charged (but what about commission?)

Contractual limitation on scope of the retainer

Minkin (cont.):

"(v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed."

Exclusion or disclaimer relevant to both contract and tort:

- Tortious duty arises where there has been an assumption of responsibility;
- But a disclaimer may negate such an assumption.

McCullagh v Lane Fox & Partners [1996] PNLR 205, *per* Hobhouse LJ:

- A disclaimer is *"one of the facts relevant to answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement…"*
- *"The question must be answered objectively by reference to what a reasonable person in the position of [the claimant] would have understood at the time that he finally relied on the representation".*

Contractual estoppel:

- *Peekay v ANZ* [2006] EWCA Civ 386 at [57], per Moore-Bick LJ;
- *Cassa di Risparmio v Barclays Bank* [2011] 1 CLC 701 at [505(1)], per Hamblen J;
- *Thornbidge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB), per HHJ Moulder

Application to the tax schemes sphere

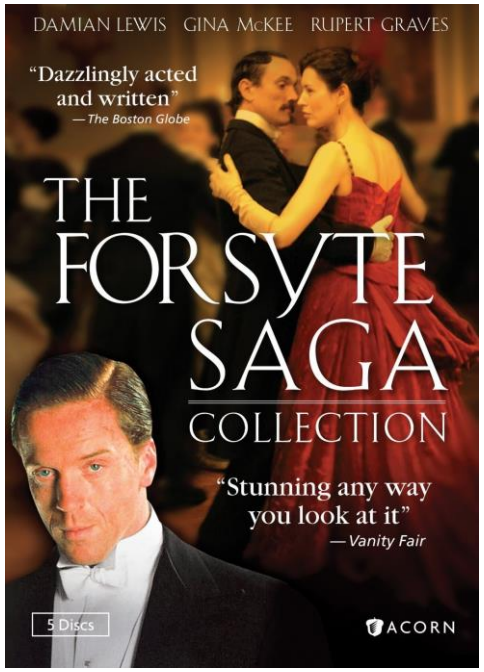
Knights v Townsend Harrison Ltd [2021] EWHC 2563 (QB)

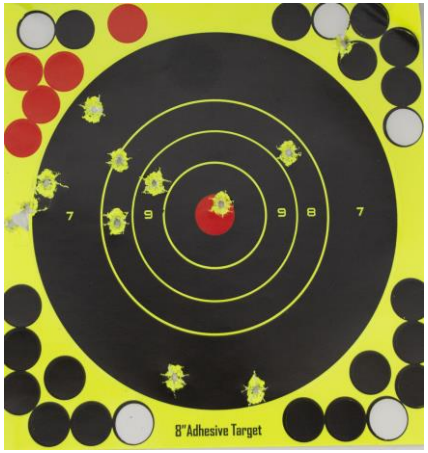
Acting as introducer. No duty of care to provide advice:

- Retainer and TOB made clear that D would not recommend a particular investment;
- Limitation of liability letters;
- Receipt of advice from scheme promoters/architects;
- While the last LOL was unsigned, the nature of the relationship was well established by then;
- Email acknowledging that not "*your position to give advice*";
- C's evidence that D said could not "*officially advise*";
- Delay in complaint/challenge/claim.

Contractual estoppel did not arise: *"I do not consider that a contractual estoppel would in any event arise in circumstances where the existence of the Limitation of Liability letters would not have negatived the existence of a duty of care in any event."* And an accountant is not in the same position as a bank.

But potential for claims in the future





Possible further claims against accountants/introducers expressly recognised in *Knights*:

[252]: *"....it may be that, on appropriate facts, a relationship of reliance exists even though the accountant does not in fact provide affirmative advice so as to give rise to that relationship – provided that that relationship of reliance is not negatived by other considerations such as appropriately worded Limitation of Liability letters..."*

[253]: *"...there may be circumstances in which an accountant, in introducing a client to a tax scheme in the context of an ongoing professional relationship may owe a duty not to introduce an unsuitable client to an unsuitable tax scheme...."*

[254]: *"...there may, as I see it, be circumstances in which the nature of the relationship was such that it was incumbent upon the accountant to proffer advice in relation to the tax scheme, and the implications of entry into the same. However, this would all be dependent upon showing that the circumstances were such that the accountant had assumed responsibility for such matters, which would in turn depend upon whether the accountant reasonably foresaw that the client would rely upon him in respect of these matters, and whether the client did, in fact, reasonably rely on the accountant in relation thereto."*

Possibility of claims against <u>other targets</u>: adviser/ promoter/ solicitors/ counsel. Will depend on *inter alia* the facts of their involvement, the terms of their retainer and/or any disclaimers.

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Appropriate knowledge and advice

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Zeroing in on the nature of the duty

- No "general" retainer: *Mehjoo v Harben Barker* [2014] EWCA Civ 358, [2014] PNLR 24
- But there is assumption of responsibility: *Hurlingham Estates v Wilde & Partners* [1997] 1 Lloyds Rep 525
- But there are broad retainers with necessary implications: *Midland Packaging v HW Accountants Limited* [2011] PNLR 1
- And situations where the facts demand advice regardless of the retainer: *Altus Group (UK) Ltd v Baker Tilly* [2015] EWHC 12 (Ch)

Making sure the advice is understood

- The key is that the client *understands* the steps he is taking: *Dhillon v Siddiqui* [2008] EWHC 2020 (Ch)
- All relevant advice must be included: *Little v George Little Sebire* [2001] EWCA Civ 894…
- And difficult matters must be explained in an accurate précis: *Citibank v Nicholson* (1997) 70 SASR 206

Drawing the threads together

- The nature of the transaction proposed discloses the parameters of the professional's research
- The parameters can be altered by the terms of the retainer
- The professional's explanation must be correct in substance and expressed in a form that the client truly understands

MBS v GT applied to tax schemes

Ben Smiley

MBS v Grant Thornton [

The facts

- MBS v GT: negligent advice re "hedge accounting".
- Khan v Meadows: failure to spot autism.

What are the impacts?

1. Introduction of a 6-stage roadmap;
2. Formulation of the scope of duty test which is (arguably) new;
3. Disposal of the advice vs information distinction;
4. Attack on (certain) counterfactuals.

Application to the tax scheme sphere

Roadmap:

- Will apply – see *Knights* at [273]. But unlikely to make any difference.

Scope of duty test:

- At [4] and [13]: *"the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given"*
- At [17]: *"…in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk."*
- Will apply – see *Knights* at [274]-[275]. Will likely turn on the terms and purpose of the retainer.

Disposal of information v advice distinction

- It was already dead!
- Confusion by the claimants in *Knights* – information not introduction. Does not impact on question of whether a duty has arisen in the first place – see [248].

Attack on (certain) counterfactuals

- *SAAMCo* style cap will be difficult to apply in this context.

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