



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 50

CA60/17

OPINION OF LORD DOHERTY

in the cause

HUGH McMAHON

Pursuer

against

GRANT THORNTON UK LLP

Defender

**Pursuer: MacColl QC, E Campbell; MacRoberts LLP  
Defender: Ferguson QC, Welsh; Clyde & Co (Scotland) LLP**

26 May 2020

**Introduction**

[1] Until 4 July 2012 the pursuer was the sole shareholder in Lomond Motors Limited (“the company”). The company had two wholly owned subsidiaries, Lomond Motors (East) Limited and Lomond TPS Limited (“the subsidiaries”). The company and the subsidiaries formed the Lomond Group (“Lomond”). On 4 July 2012 the pursuer sold his entire shareholding of 100,000 shares in the company to Lookers Motor Group Limited (“Lookers”). He made a large capital gain on the disposal and he incurred a substantial liability to capital gains tax (“CGT”).

[2] The defender is one of the leading firms of chartered accountants in the United Kingdom. Between 2005 and 2014 the pursuer engaged the defender in connection with his personal tax affairs. In this commercial action the pursuer avers that he has suffered loss and damage caused by the defender's breach of contract *et separatim* negligence. He maintains that the defender ought to have informed him that if he transferred some of his shares in the company to his wife, Mrs Eileen ("Abby") McMahon, she could have become eligible for entrepreneurs' relief when she disposed of them to Lookers; that the defender did not so inform him; and that the total CGT which would have been due by the pursuer and Mrs McMahon in respect of their disposals to Lookers would have been less than the CGT which was in fact due on the disposal which the pursuer made. The pursuer seeks damages to compensate him for the CGT that could have been saved. The matter came before me for a proof before answer.

[3] The witnesses for the pursuer were the pursuer; Mrs McMahon; Paul Eunson (who at the material time was Lomond's financial controller); Alan Kelly (a solicitor specialising in corporate finance who is a partner in MacRoberts LLP); Andrew Bruce (who at the material time was Lookers' chief operating officer); and John Cairns (a chartered accountant who is a partner in French Duncan, who was instructed by the pursuer as an expert witness, and who prepared a report dated 26 November 2018 and supplementary reports dated 1 April 2019 and 26 September 2019).

[4] The defender's personnel structure includes (in order of seniority) partners, directors, associate directors, managers, and assistant managers. The witnesses for the defender were Chris Ferguson (an associate director in the defender's corporate tax team at their Glasgow office); Paula Fraser (a director in the defender's private client tax team in the Glasgow office); Robert Hannah (a partner of the defender and at the material times the

client partner for the pursuer); Neil McInnes (who at the material times was a director with the defender and the head of the corporate finance department at the Glasgow office); and Barbara McQuillan (a chartered accountant and a partner at Henderson Loggie, who was instructed by the defender as an expert witness, and who prepared a report dated 13 March 2019 and a supplementary report dated 28 June 2019).

[5] Both Mr Cairns and Mrs McQuillan specialise in tax work. Both have many years' experience in that field. Neither Mr Ferguson nor Ms Fraser is a chartered accountant. Mr Ferguson is a member of the Association of Tax Technicians. He has worked in the defender's corporate tax team since 2006. For about 10 years before that he worked for Ernst and Young, at first in the personal tax team and then in the corporate tax team. Ms Fraser is chartered tax adviser. She has been a director in the personal tax team at the defender's Glasgow office since 2010. Before that she had about 15 years' experience as a tax specialist with other accountancy firms.

[6] Each of the witnesses to fact prepared witness statements which made up the larger part of their evidence-in-chief. The parties entered into a Joint Minute of Agreement (no 48 of process).

[7] I am satisfied that each of the witnesses did their best to assist the court. I was not persuaded that I ought to treat any aspect of a witness's evidence as being incredible. However, as will be apparent from my findings, there were some aspects of witnesses' evidence which I have concluded are unreliable.

### **The business**

[8] The pursuer has spent all of his working life in the motor trade. In about 1998 he was offered the opportunity to acquire an Audi franchise. He formed the company. He and

his wife invested £100,000 of their savings in the new venture, and the company obtained a substantial long term loan from the Volkswagen Group. From the outset, the pursuer was the company's sole shareholder. The business grew to include the subsidiaries. Lomond traded in Glasgow, Edinburgh, Ayr and Stirling. The pursuer was a director of the company and of each of the subsidiaries. Mrs McMahon was an employee of the company, and she was the company secretary of the company and of each of the subsidiaries.

### **Engagement of the defender**

[9] In 2005 the defender was engaged to provide tax and accountancy services for Lomond. It was also engaged to provide personal tax services for the pursuer and for Mrs McMahon. There were separate letters of engagement setting out the services under each of the three retainers. On occasions other more specific letters of engagement between the defender and Lomond were entered into to deal with additional services which it was agreed that the defender should provide.

### **The retainer relating to the pursuer's personal tax**

[10] The pursuer's letter of engagement of the defender was dated 10 March 2005. On 21 April 2005 the pursuer signed the letter, thereby acknowledging and agreeing the terms of the engagement. It is common ground that at all material times the letter of engagement was the defender's retainer. While an Addendum was prepared on 29 June 2012, it was not executed by the pursuer until 20 September 2012 and it related to tax services which the defender was to provide after the share sale to Lookers.

[11] The retainer provided:

“ ...

1.1 The purpose of this document is to set out the basis on which Grant Thornton UK LLP will act as your advisers on tax matters. Work on matters other than those mentioned in the appendix 1 to this letter...will not be our responsibility unless a specific engagement is entered into, and we would therefore ask you to check the appendices carefully.

..."

In Appendix 1 to the letter, under the heading "PERSONAL TAX", the services described were preparation of the pursuer's tax return; computing his self-assessment by completing the tax calculation working sheets; submitting the return and self-assessment to the Inland Revenue (part of HMRC since 18 April 2005); dealing with any further amendments to the return during the following 12 months; dealing with any enquiries raised by the Inland Revenue on the return and self-assessment; and negotiating on any question of taxation, interest and penalties arising from those enquiries. The following section stated:

**"AD HOC ADVISORY SERVICES**

For the avoidance of doubt, whilst we will always seek to inform you of tax planning ideas of which we become aware that may be of assistance to you, we cannot accept a duty to monitor and unilaterally suggest tax planning advice on specific matters. Advice on the tax implications of such specific matters will be given once you have referred it to us. On receipt of the referral we will contact you by letter setting out the scope of our work and the fee quote..."

**Entrepreneurs' relief**

[12] Prior to 6 April 2008 taper relief and the indexation of acquisition costs could significantly reduce the amount of a capital gain which was chargeable to CGT. The maximum business assets taper relief was available if a relevant business asset had been held for 2 years. In those circumstances the effective rate of tax was 10% and there was no limit on the gain to which the relief could be applied. However, on 9 October 2007 the Chancellor of the Exchequer's Pre-Budget Report PBRN 17 announced CGT reforms to be introduced in the Finance Bill 2008. Among the reforms, indexation and taper relief were to

be withdrawn and CGT was to be charged at a single flat rate of 18%. The proposed changes caused considerable concern among business owners. Representations were made on their behalf to the Government, and on 24 January 2008 the Chancellor announced that a new relief - entrepreneurs' relief - would be introduced on 6 April 2008. A qualifying taxpayer disposing of business assets would pay CGT at the rate of 10% on gains up to a lifetime limit of £1,000,000. To qualify the person making the disposal had to be an officer or employee of the company who had owned at least 5% of the ordinary share capital and had at least 5% of the voting rights for at least a year. From 6 April 2010 to 22 June 2010 the lifetime limit was £2,000,000. From 23 June 2010 to 5 April 2011 it was £5,000,000. From 6 April 2011 it became £10,000,000.

[13] In the tax year 2012-2013 the annual exempt amount for CGT was £10,600. The rate of CGT for any part of a person's chargeable gain which, when added to a person's chargeable income, was below £34,370, was 18%. The rate of CGT for any part of a person's chargeable gain which, when added to a person's chargeable income, was above £34,370, was 28%.

### **The film schemes**

[14] In December 2010 and December 2011 Lomond made substantial investments in tax avoidance schemes which were marketed and managed by Future Capital Partners ("FCP"). The schemes involved investment in film partnerships (Dean Street Productions No 5 LLP and Dean Street Productions No 12 LLP) which were designed to provide investor companies with substantial losses which they could set against profits to reduce their liability to corporation tax. The cash investments in the schemes represented only 14% of the losses which investors could set off against corporation tax. Details of the schemes were

disclosed to HMRC under the Disclosure of Tax Avoidance Scheme ("DOTAS") requirements.

[15] In 2010 the investing companies were the company and Lomond Motors (East) Limited. The defender introduced the investments to Lomond. A special letter of engagement relating to those services was entered into between Lomond and the defender. The defender recommended the investments. However, there was a degree of controversy as to precisely what a corporate tax partner of the defender, George McCracken, said to the pursuer in that regard. The pursuer's evidence was that Mr McCracken strongly recommended the investments - so much so that the pursuer was left with the impression that he was being told that making them was a "no brainer". On the other hand, Mr Ferguson did not think that matters were put as high as that. He was clear that the risk factors had all been properly pointed out. He accepted, however, that the recommendation had been in fairly positive terms.

[16] The investments in 2011 were made by each of the Lomond companies. However, the defender did not act as Lomond's agent in relation to those investments. While there was preliminary discussion with the defender at the year-end meeting in December 2011 about the possibility of making the investments, Lomond did not take the matter further with the defender. Instead, Brian Murphy, the pursuer's wealth adviser, introduced Lomond to the investments, and he obtained the agent's commission for the introduction. The pursuer and Mr Murphy agreed that Mr Murphy would share his commission with Lomond.

### **The approach by Lookers and the defender's terms of engagement for services in relation to the proposed sale**

[17] Early in 2012 the pursuer was approached by Lookers to discuss the possible purchase of his shares. The approach came out of the blue. After some negotiation about price, draft heads of terms were prepared. Towards the end of March 2012 the pursuer contacted the defender to obtain its assistance in relation to the proposed sale. On 25 April 2012 the pursuer and the defender signed a letter setting out the defender's terms of engagement for that work. The services related to sale preparatory work, project management, the completion of the sale. They did not include any tax services

### **The Sale and Purchase Agreement**

[18] In terms of the Sale and Purchase Agreement ("the SPA") the price comprised an initial consideration of £14,750,000 and retained consideration of £250,000, with a mechanism to adjust the price should the net asset value of Lomond on 30 June 2012 turn out to be less than a target net asset value of £4,800,000. In fact, the net asset value was less than £4,800,000, and the total price was reduced to £14,738,320.

[19] During negotiations Lookers was concerned that HMRC might challenge the film schemes. As a result, a tax covenant and warranties and indemnities by the pursuer to Lookers in relation to the schemes ("the warranties") were included in the SPA. In the event of HMRC demanding payment of further tax from Lomond in respect of years in which film scheme losses had been claimed as allowable losses, the pursuer required to indemnify Lookers in respect of the demand(s). However, if, after an indemnity payment was made by the pursuer to Lookers HMRC repaid Lomond, Lookers was required to pass on the repayment to the pursuer ("the repayment obligation").



### **The challenge to the schemes**

[20] HMRC challenged the film schemes. In 2015 it made an offer to Lomond to settle the dispute for £650,386.92. Lookers asked the pursuer whether he wished it to accept the offer (whereupon he would be liable to indemnify Lookers). The pursuer discussed the offer with Dominic Ryder of FCP, and he obtained advice from Ainsley Maclaren (a tax partner at MacRoberts) and from the defender. However, he advised Lookers that he did not wish it to accept the offer.

[21] On 28 October 2016, 29 October 2016, and 1 November 2016 HMRC served Partner Payment Notices (in terms of s 228, and para 3(5)(b) of sched 32, of the Finance Act 2014) (“the PPNs”) on the Lomond companies requiring payment of the corporation tax which they had saved by setting off the film scheme losses as allowable losses. The total payment required from Lomond in terms of the notices was £629,308.92. In terms of the warranties the pursuer was obliged to pay Lookers that sum. He did so on 23 January 2017. He did not at that stage make a claim under s 49 of the Taxation of Capital Gains Act 1992 (“TCGA 1992”) to amend his 2012-2013 tax return to adjust the net consideration for his shares and the capital gain resulting from their disposal.

[22] On 24 October 2017 FCP appealed to the First-tier Tribunal against closure notices which HMRC had issued in respect of the schemes. However, there was insufficient support from partner investors to fund any further procedure, and on 13 September 2018 the appeals were struck out following failures to comply with directions on the filing of papers.

[23] By letter dated 14 March 2019 the pursuer intimated a claim to HMRC in terms of s 49 of the TCGA 1992 to adjust his 2012-2013 tax return to take account of the payment of £629,308.92 made to Lookers. By letter dated 29 April 2019 HMRC indicated that the claim

was out of time because a claim to amend the return required to be made within 4 years of 5 April 2013 (Taxes Management Act 1970, s 43).

### **The pursuer's pleadings**

#### *The summons*

[24] In the summons the pursuer averred (art 7) that the defender had not provided him with any advice as to (a) the extent of the CGT liability that he would face on the sale of Lomond, or (b) any steps he could have taken to mitigate the CGT which would have been payable by him on the sale; (art 8) that the defender breached its contractual obligations to the pursuer; that a firm of chartered accountants providing the services set out in the letter of engagement would have provided the pursuer with advice as to the extent of the CGT liability on the sale of Lomond and the steps that he could take to mitigate the CGT that would be payable by him on the sale; that, in particular, such a firm would have advised him that, by transferring part of his shareholding to his wife (an appropriate time before the sale) he could have mitigated his CGT liability; and (art 9) that the pursuer owed the same duties in delict and had also breached those duties.

#### *The pleadings as adjusted and amended*

[25] The pursuer's pleadings were adjusted and amended. He now founds (art 3) on the statement in the Ad Hoc Advisory Services section of the letter of engagement that the defender "will always seek to inform you of tax planning ideas of which we become aware which may be of assistance to you". He avers that the defender was under a duty to raise the issue of the potential availability and use of entrepreneurs' relief (in relation to the

pursuer and his wife) during 2008 and that the defender did not do so. He further avers

(art 3):

“The defender did not advise the pursuer of the obvious issue of the potential capital gains tax liability that would arise on a sale of the defender’s shares in Lomond and the (equally obvious) potential for mitigating this liability by the transfer of some of those shares to other family members and the consequent application of Entrepreneurs’ Relief in respect of any capital gains tax to be paid in respect of those shareholdings.”

In art 5 the pursuer avers that after the initial sale negotiations:

“The pursuer instructed the defender to provide advice in relation to the potential sale to Lookers...The defender agreed to do so. Having failed to do so previously, the defender should have immediately raised the issue of CGT liability and potential tax reduction measures (such as the transfer of shares to family members). These are very basic tax mitigation measures. The defender, however, did not raise them with the pursuer.... At a meeting on about 14 June 2012, the defender informed the pursuer that capital gains tax ... would be payable and that entrepreneur’s relief to mitigate against the payment of CGT may be available. The defender, however, did not provide any advice as to (a) the extent of the relief available, and (b) whether any steps might be taken to further mitigate against any liability for CGT by taking steps so as to make entrepreneur’s relief available to the pursuer’s wife...”.

In art 7 he avers:

7. ...Following completion of the sale, the pursuer became aware that he had incurred a capital gains tax (“CGT”) liability as a result of the sale of £2,077,291.60. The defender had not provided him with any advice as to (a) the extent of the CGT liability that he would face on the sale..., or (b) any steps that he could have taken to mitigate the CGT that would be payable by him on the sale. Explained and averred that the meetings held on about 3 December 2008, 2 December 2009, 25 November 2010 and 12 December 2011 were annual “year end” meetings, held in advance of the audit of Lomond. The defender did not mention the possibility of transferring shares to the pursuer’s wife at these meetings. No “exit strategy” was discussed with the pursuer. The pursuer was not provided with advice as to the potential tax-inefficiency of the shareholding in Lomond in 2009, 2010 and 2011... Further explained and averred ... that the pursuer was not advised by the defender (at a meeting on 14 June 2012 or otherwise) that gifting shares to his wife and son might be used to maximise the benefit of entrepreneur’s relief. Had the pursuer been advised of such matters, he would have actively pursued them with the defender and Lookers...”

In art 8 the pursuer avers that the defender has breached its contractual obligations. He

avers that a firm of chartered accountants providing the services set out in the engagement

letter and acting to the standards reasonably to be expected of chartered accountants of ordinary competence would have provided the pursuer with advice as to the extent of the CGT liability on the sale and the steps that he could take to mitigate CGT on the sale:

“In particular, a firm of chartered accountants meeting these contractual obligations would have advised the pursuer that, by transferring part of his shareholding in Lomond to his wife (an appropriate time before the sale) he could have mitigated his CGT liability. The defender failed to comply with these contractual obligations. Reference is made to Articles 3 and 5 of Condescence.”

Art 9 sets out the pursuer’s delictual case:

“*Separatim*, the defender was also under a delictual duty, with regard to the affairs of the pursuer, to act to the standard reasonably to be expected of chartered accountants of ordinary competence. In failing to provide the pursuer with advice as to the extent of the CGT liability on the sale of Lomond and the steps that he could take to mitigate the CGT that would be payable by him on the sale, the defender also breached this delictual duty. Reference is made to the averments in article 8, which are held as repeated herein *mutatis mutandis*...”

In art 10 the pursuer avers:

“... Had the pursuer transferred shares in Lomond to his wife, the overall CGT liability would have been reduced to £1,433,688 (being £716,844 in respect of each of the pursuer and his wife). In the foregoing circumstances, as a result of the defender’s breach of contract *et separatim* fault, there was an increased CGT liability of £733,664.”

### **The year-end meetings and written communications between 2007 and 2011**

[26] Lomond’s tax year ended on 31 December. Towards the end of each year a meeting was held at which issues relevant to Lomond’s tax affairs and the pursuer’s tax affairs were discussed. Mr Ferguson and the pursuer attended each of the year-end meetings between 2007 and 2011. Mr Eunson and Mr McCracken attended the meetings between 2008 and 2011.

[27] For the year-end meetings in 2007 and 2008 the defender issued to the pursuer an agenda and accompanying pack of written materials. For the year-end meetings from 2009 there were agendas but the defender did not issue an accompanying pack.

[28] Item 7 of the agenda for the year-end meeting on 3 December 2007 was headed *Shareholder/Investor Issues*. It contained five bullet points:

- “
- Discuss plans for exit strategy
  - New rules relating to CGT – April 2008 (see section 5)
  - Optimal profit extraction
  - Equity release issues
  - CGT reliefs
- ”

Section 5 of the accompanying pack was the HMRC information sheet PBRN 17 dated 9 October 2007 and entitled Capital Gains Tax Reform. It explained that legislation would be introduced in the Finance Bill 2008 to give effect *inter alia* to a new single rate of charge to CGT at 18%, and to withdraw taper relief and indexation allowance.

[29] Following the announcement of the proposed introduction of entrepreneurs' relief the defender wrote to the pursuer by letter dated 29 February 2008 indicating that the CGT regime would be substantially changed from 6 April 2008. The letter enclosed a factsheet the defender had prepared which explained how the new relief would operate, and which asked the pursuer to get in touch if he would like to discuss how this applied to his circumstances. The factsheet set out the key elements of the relief and the qualifying conditions.

[30] The year-end meeting in 2008 took place on 3 December 2008. The defender provided the pursuer with an agenda and accompanying pack. Item 6 on the agenda contained five bullet points:

- “
- Discuss plans for exit strategy
  - Entrepreneurs’ Relief (see section 5)
  - Optimal profit extraction
  - Equity release issues
  - CGT reliefs
- “

Section 5 of the pack was a factsheet on entrepreneurs’ relief prepared by the defender (Factsheet 280 – July 2008). It explained the nature of the relief, and the circumstances in which it could be claimed by an individual. It indicated that each individual was entitled to their own lifetime limit of £1 million. The factsheet concluded:

**“Who should I contact for assistance?”**

If you would like advice on any of the points covered by this factsheet please contact the person at Grant Thornton who normally advises you, or the contact shown below...”

[31] The 2009 year-end meeting took place on 2 December 2009. The agenda for the meeting has not been found, but Mr Ferguson took two pages of manuscript notes of the meeting in his daybook. Copies of these notes were lodged. The notes included the following entries:

- “ 50% income tax rate
- Hugh thinking about bonus vs dividend
  - would like to pay a divi & leave cash in company
    - GMCC timing for cash
  - Hugh only S/H
    - ER ?
- “

[32] The 2010 year-end meeting took place on 25 November 2010. Item 6 on the agenda was “Personal Tax”. The 2011 year-end meeting took place on 12 December 2010, but the agenda for the meeting had not been found.

[33] After the share sale Mr Eunson remained as Lomond's financial controller. At the date of the proof he was employed by Lookers as franchise financial controller. In his principal witness statement he indicated that the year-end meetings were "to discuss the financial year and any financial planning which Hugh may have been interested in as he was the sole shareholder of the business". He added:

"I do not recall there having been any mention of Capital Gains Tax..., or the suggestion that Hugh could transfer shares in Lomond to his wife, at any of these meetings."

In his supplementary witness statement he reiterated that tax matters for both Lomond and the pursuer were discussed at the meetings. He continued:

"3. ... I do not ever recall it being mentioned that Hugh's shareholding was inefficient in respect of tax. I do not ever recall advice being given to Hugh to transfer shares to his wife, or to anyone else, for tax reasons or any other reasons. I also do not ever recall there being any mention of Entrepreneurs' Relief ("ER") at these annual meetings. I believe I would remember these matters if they had been raised by GT.

4. I have been asked if exit strategy was discussed at the 2008 meeting. I do not recall there being any discussion of exit strategy at this time...

5. I do recall there being discussion of dividends at one of the annual meetings ... This may have been 2009 or 2010... Again, I do not recall there being any mention of tax efficiency at this meeting in relation to Hugh holding 100% of the shares.

6. If at any of these meetings or otherwise, Hugh had been advised to transfer shares to his wife then I would have remembered this. Hugh and I had a friendly working relationship and I would have discussed this with him. We would also have had a little banter about Hugh transferring shares to his wife and no longer owning the company outright..."

In cross-examination Mr Eunson indicated that he had no recollection of the pursuer's personal tax affairs being discussed at any of the year-end meetings. He accepted that the pursuer's personal tax affairs and whether the pursuer had an exit strategy would not have been any part of his concern as Lomond's financial controller. However, his position was that there had been no such discussion at the meetings which he attended.

[34] In his principal witness statement the pursuer indicated in relation to the year-end meetings:

“16 GT had produced an agenda for a meeting on 3 December 2008 which includes “Exit Strategy” as being a point for discussion. However, this was not discussed at that meeting... CGT was not discussed at any of the other meetings I had with GT, nor was the possibility of transferring shares to mitigate tax liability.”

In his supplementary witness statement he stated that he was not told at the 2009 year-end meeting that he should consider transferring shares to optimise his CGT position. The conversation at the meeting focussed on dividends. It had not been about the transfer of shares or CGT or entrepreneurs’ relief. At one point in oral evidence the pursuer indicated that he could not remember there ever having been discussions at year-end meetings about his personal tax affairs. However, I did not understand him to adhere to that position. He stated that there had been no discussion of entrepreneurs’ relief or CGT at any of the meetings. It had not been suggested to him that being a sole shareholder was not tax efficient, or that there might be tax advantages in transferring shares to his wife. So far as discussion of an exit strategy was concerned, he conceded that this may have occurred once, but certainly not every year. An exit strategy had been of no interest to him as he had had no plans to sell. He thought that he may not have read the factsheets provided to him on CGT reform and entrepreneurs’ relief. They would have been of no interest to him at the time since he had had no intention of selling the business. For that reason he would not have taken up the invitations in the letter of February 2008 and the factsheets to seek further advice from the defender on these matters.

[35] Mr Ferguson stated that the engagement with the pursuer was to provide personal tax compliance services. The year-end tax meetings were held with a view to business development by the defender - to explore whether there were additional tax services which



Lomond or the pursuer might wish to take advantage of. Areas for possible tax planning advice were raised, and if the client was interested in taking up any such services a discussion about the scope of the advice and the fee would follow. The agendas at the meetings followed a template, and there was a relatively methodical approach to going through the items on the agendas. At the 2008 meeting there had been discussion of entrepreneurs' relief and the fact that there were planning opportunities - there had been a material change in the law. Transferring shares to maximise entrepreneurs' relief was a tax planning idea he had been aware of at that time, but he could not recall whether the possibility of transferring shares was mentioned at the 2008 meeting. At the 2009 meeting CGT and entrepreneurs' relief had been discussed. There had been a discussion about the pursuer being a sole shareholder and that not being the most tax efficient arrangement for income tax. While that had been the main focus of the discussion, Mr McCracken had added that it was also not tax efficient for CGT and entrepreneurs' relief and that the possibility of transferring some of the shares might be considered. The pursuer had indicated that he had no interest in selling. Mr Ferguson also recalled that the pursuer and Mr Eunson had indicated that the Volkswagen loan might prevent the transfer of shares. As a result of this discussion Mr Ferguson had written "E/R ?" as an aide memoire to check on the position again at future meetings. Mr Ferguson's recollection was that the issues of an exit strategy and whether there was a more tax efficient holding structure were broached at all of the year-end meetings, but that the pursuer's response had always been that he had no intention of selling. The pursuer had not instructed the defender to provide tax planning advice on those issues. If he had, the advice would have generated a fee. Mr Ferguson indicated that he took notes of meetings in his daybooks. His manuscript notes of the 2009 meeting were from one of his daybooks. The other daybook notes of year-end meetings had

not been produced because they did not contain relevant entries. There were no references in them to entrepreneurs' relief. In cross-examination he agreed that when providing accountancy services an accountant ought always to act to the standard required of an ordinarily competent accountant exercising ordinary care. He also agreed that that standard applied both to the provision of the services which an accountant had undertaken to provide and to things reasonably incidental to those services.

[36] The year-end meetings all took place many years ago. It would be surprising if the witnesses had a clear memory of each of them. I am not satisfied that the recollections of pursuer, Mr Eunson or Mr Ferguson in relation to the year-end meetings are wholly reliable.

[37] In my opinion the documentary evidence provides substantial support for Mr Ferguson's account that at the year-end meetings in 2008 and 2009 there was discussion of the pursuer's exit strategy and of entrepreneurs' relief. The pursuer conceded that the issue of an exit strategy may have been raised once. In my view Mr Ferguson's notes of the 2009 meeting support his recollection that the issue of the tax-inefficiency of the pursuer being the only shareholder was raised. I also accept Mr Ferguson's evidence that when these matters were raised the pursuer was not interested in instructing advice in relation to them. At the time he had no interest in selling the business.

[38] I accept that there was some reference to entrepreneurs' relief in the context of it being tax-inefficient for all of the shares to be in the pursuer's name. The reference to "E/R?" in Mr Ferguson's notes does support his recollection. However, I think that the evidence suggests that only passing reference was made to entrepreneurs' relief in this context. I think it is clear from the oral evidence and from Mr Ferguson's notes of the 2009 meeting that income tax was the main focus of the discussion about the tax-inefficiency of the pursuer being the sole shareholder. I am not satisfied that Mr McCracken went as far as discussing

the benefits of transferring shares to Mrs McMahon so that her entrepreneurs' relief could be used if the business was sold.

[39] I think that Mr Eunson's recollection on a number of matters is unreliable (eg his evidence that there was never any discussion of exit strategy, CGT, entrepreneurs' relief, or the tax inefficiency of the pursuer being the sole shareholder). That is not a criticism. These events took place many years ago, and the matters in relation to which Mr Eunson had responsibility and interest at the meetings concerned Lomond, not the pursuer.

#### **Contact between the pursuer and the defender prior to 14 June 2012**

[40] There was some dispute as to when the pursuer first contacted Mr Hannah to inform him of the proposed deal. The pursuer suggested that contact about it was made in early January 2012. However, Mr Hannah thought that contact was not until near the end of March. In my opinion nothing much turns on this, but I think it more likely than not that Mr Hannah's recollection is correct. It corresponds better with the pursuer's email correspondence with the defender about the proposed sale, which began on 30 March 2012. It also fits with the first written contact with MacRoberts in relation to the sale, which was in April. While it was suggested to Mr Kelly that there might have been earlier telephone contact, and he accepted that it was possible, he had no recollection of it if there had been. I am not satisfied that there was such earlier contact.

[41] On 25 April 2012 the pursuer entered into the letter of engagement with the defender to provide corporate finance services to him in relation to the proposed sale. Mr Ferguson first learned of the sale from colleagues at that time. He realised that the proposed price was in excess of the pursuer's lifetime entrepreneurs' relief limit of £10 million, and that the balance of up to £5 million would bear CGT at the rate of 28%. He was apprehensive that

the pursuer might be displeased when he realised how much CGT he would have to pay - particularly as he would have paid about £750,000 less had Mrs McMahon qualified for entrepreneurs' relief and the shareholding had been divided between them before the sale. He discussed the matter with others in the office including Mr McCracken, Ms Fraser, and Andrew Addie (a director in the tax department) to see if there was a solution. The only possible solution which they could think of involved transferring shares to Mrs McMahon and postponing the sale for a year. That did not seem a viable option to Mr Ferguson given the imminence of the sale. He would not have advised the pursuer to postpone the sale - because of the risks which a postponement would have involved (eg that Lookers would not wait and the transaction would not proceed; or if Lookers were prepared to postpone, the price might be reduced; or the tax regime might change to the pursuer's disadvantage during the year).

[42] Ms Fraser explained that Mr Ferguson told her at this time that the possibility of transferring shares to Mrs McMahon had been suggested to the pursuer in the past, but that he had not been interested. She confirmed that that there was some apprehension within the tax department that the pursuer might be displeased at the size of his CGT liability, and that he might rue the fact that he had not mitigated it in time by transferring shares to his wife. If the pursuer was unhappy that could prejudice the future client relationship. As far as she was concerned the purpose of the meeting was to retain the pursuer as a client and to see if he wished to avail himself of further services once the sale proceeds were received.

[43] Mr Ferguson stated that he tried to contact the pursuer by telephone during May 2012 without success. He emailed him on 8 June 2012:

“... I am conscious that we've not had an opportunity to discuss your own tax position in relation to the deal. I understand from Robert that you have a broad

understanding of your own tax position, however it may be useful to meet to discuss this in advance of the transaction...”

The pursuer replied on 11 June 2012, and a meeting was arranged for 14 June 2012.

[44] Margaret Murray, an assistant manager in the tax department, was one of the defender’s staff who dealt with the pursuer’s personal tax affairs. In advance of the meeting, at Ms Fraser request, Ms Murray prepared a schedule showing an estimate of the CGT which would be due by the pursuer on the disposal. It showed the application of entrepreneurs’ relief on the first £10 million of the gain with the remainder being taxed at the standard rate. The schedule contained three notes. The third note stated:

“Abby would also have the full Entrepreneurs Relief Lifetime Allowance of £10 million available if she held shares for at least 12 months preceding the disposal and met the qualifying conditions for ER.”

The schedule was reviewed by Mr Ferguson and Ms Fraser before the meeting. They could not recollect what, if any, changes to the draft were made as a result of that review.

### **The meeting of 14 June 2012**

[44] In advance of the meeting Ms Fraser prepared notes as an aide memoire of matters which she wished to cover. The notes included reference to the following entry:

“ Gift of Lomond Audi shares to children  
 – any rate bands available  
 – hold-over & CGT due to children who can then  
 subscribe for EIS shares  
 ... ”

[45] During the meeting Ms Fraser did not make notes. Mr Ferguson made only the following very brief notes in his daybook:

“ 14/6/12 HUGH M

Bonuses

[x]    £100k            Gross  
           £35k

GIFTS

EXIT PAYMENTS TO [X and Y] ALREADY WRITTEN IN.    “

[47]    In his principal witness statement the pursuer stated that by the time of the meeting he was aware “although I cannot recall from what source” that the lifetime limit for entrepreneurs’ relief was £10 million for the 10% tax rate and that the remainder of the gain would be taxed at 28%. During his oral evidence he said that it was possible that the source had been one of the financial advisers or accountants with whom he played golf. Going into the meeting he had expected to get an indication of the CGT which would be due and to find out when he would have to pay it. That was what he was told at the meeting. He was not given, shown, or talked through the schedule. Nothing was said at the meeting about transferring shares. There was no indication of what the position would have been had shares been transferred to his wife, nor was there any mention of the possibility of postponing the sale in order to transfer shares to her. The possibility of gifting shares to his children had not been discussed. He agreed that if he had got the schedule it would have been obvious that his wife would have qualified for entrepreneurs’ relief had she owned shares and satisfied the other conditions; and that it would have been obvious that in order to enable that to happen the sale would have to be postponed for 12 months.

[48]    Mr Ferguson’s evidence was that the purpose of the meeting was to inform the pursuer of approximately how much money he would have after allowance was made for the CGT which would be due, and to introduce him to Paula Fraser because there was a lot

of scope for further services to be provided to him after the sale. At the meeting the pursuer had been given a copy of the schedule and he had been taken through it. He had been told that if he transferred shares to his wife and she held them for at least twelve months her lifetime allowance could be used too. The possibility of making gifts of shares to his children had been raised. The pursuer had not been interested in either possibility. He had not wished to complicate the sale by introducing additional vendors. As Mr Ferguson saw things, the pursuer had entered into the sale aware of the entrepreneurs' relief lifetime limit and the qualifying conditions. He had understood what his CGT liability would be.

[49] Ms Fraser's evidence as to what took place at the meeting was much to the same effect as Mr Ferguson's evidence. The main purpose of the meeting had been to see if the pursuer was interested in post-sale services such as inheritance tax planning. The schedule was to assist in estimating the CGT which would be due and the net sum which would be available for investment. After the sale the pursuer would have a significant exposure to inheritance tax. Before the sale his investment in the business had been sheltered from inheritance tax. She was clear that the pursuer had a copy of the schedule in front of him, that he had been taken through it, and that she had raised the possibility of making gifts to the pursuer's children.

[50] Both Mr Ferguson and Ms Fraser said they had been a little surprised that there was no adverse reaction by the pursuer to the size of the CGT liability and to the fact that had Mrs McMahon qualified she too could have claimed entrepreneurs' relief. They did not suggest to the pursuer that he might consider postponing the sale, and they did not indicate the amount of tax which might be saved if the whole gain was taxed at the lower rate of 10%.

[51] In this chapter of the evidence I think that part of each witness's evidence is reliable and part is not.

[52] I am satisfied that the possibility of making gifts of shares to the pursuer's children (to allow them to make use of any available annual allowances, lower rate bands, etc) was indeed discussed at the meeting, but that the pursuer was not interested in following that course. The evidence of Mr Ferguson and Ms Fraser is to similar effect on this point, and the contemporaneous documentary evidence is consistent with their account. Mr Ferguson's meeting notes contain the heading "GIFTS". Ms Fraser's pre-meeting notes make it clear that this was a matter which she intended to raise. In addition, it seems to me that the terms of her email of 15 June 2012 to Anna McBride and the terms of the Addendum of 29 June 2012 also tend to support Ms Fraser and Mr Ferguson's evidence on this point.

[53] I accept Mr Ferguson's and Ms Fraser's evidence that the pursuer was taken through the contents of the schedule. I think it likely that the pursuer does genuinely believe that he did not see the schedule and that its contents were not verbally communicated to him; but I think it more likely that his recollection on those points is incorrect than that the recollections of Mr Ferguson and Ms Fraser are both incorrect. I attach weight to the fact that the pursuer has no recollection of any discussion of gifts of shares to his children – in my opinion his recollection of the meeting is unreliable in that respect. I also attach weight to the fact that his initial pleaded position, and the basis upon which Mr Cairns was asked to advise when he prepared his reports, was that the pursuer was given no advice about his CGT liability or about entrepreneurs' relief. It seems that the pursuer's initial recollection was erroneous in those respects. Similar observations may be made about his position on whether an exit strategy was ever raised. In his pleadings and in his witness statements his position was that it had not been. In oral evidence he accepted it may have been, but not



more than once. That recollection seems to me to be unreliable too. I also think that it is unlikely that the meeting would have been conducted with only two of the three participants having sight of a schedule which appears to have been prepared with a view to communicating information to the pursuer.

[54] While I accept that the pursuer was informed of the contents of the third note, I am not satisfied that Mr Ferguson and/or Ms Fraser expanded upon those contents. In so far as they suggest that there was such expansion, I do not think that their recollections are reliable. I bear in mind that the context in which the note had been prepared was that Mr Ferguson and Ms Fraser had a degree of apprehension about how the pursuer might react to his significant CGT liability and to the realisation that he and his wife might have paid significantly less CGT had they been in a position to use Mrs McMahon's entrepreneurs' relief. Given their unease about the issue, I think it likely that a light touch was taken to the third note and that it was not elaborated upon or developed as Mr Ferguson and Ms Fraser suggest it was. Had the third note been elaborated upon to any significant extent I would have expected what was said to have been recorded in an attendance note or confirmed in a letter to the pursuer after the meeting. The fact that neither happened suggests to me that the third note represented all that was said about the subject. My impression from Ms Fraser's evidence as a whole was that while she recollected that she had raised the possibility of gifts to family members, and that the pursuer had been taken through the schedule, she had no clear recollection as to whether the contents of the third note were expanded upon.

[55] I do not overlook the fact that in April 2014 the pursuer intimated dissatisfaction to the defender and suggested that the idea had never been raised with him. I am not swayed by it. By then the pursuer had been advised of the quantum of CGT that might have been

saved had the idea been implemented and had the sale proceeded at the same price a year later. Any view he may have held at that time would have been one formed in the cool of the evening and with the benefit of hindsight. I think it likely that on 14 June 2012 the pursuer did not fully appreciate the quantum of CGT that might be saved had the sale been postponed and if everything had gone well thereafter. However, I am satisfied that he was aware - because it was obvious from the third note - that there might be an option of arranging matters differently in order to use Mrs McMahon's relief. The note flagged that up, but the pursuer did not ask the defender to advise him further. At no point during the meeting did he suggest to the defender that delaying the proposed sale was a possibility which he might wish to consider. His focus was on the transaction completing as planned and what the CGT consequences of that would be.

### **The expert evidence**

#### *Mr Cairns*

[56] Mr Cairns was first instructed in the summer of 2018. When he prepared his reports his understanding from the material provided to him was that the pursuer had not been given any information by the defender about entrepreneurs' relief. Mr Cairns had been unaware of the provision of the factsheets.

[57] While he could not give a legal opinion on the correct interpretation of the Ad Hoc Advisory Services provision in the letter of engagement, his reading of it "as an accountant" was that the defender had obliged itself to bring to the pursuer's attention relevant tax planning ideas of which it became aware.

[58] Mr Cairns recognised the difference between an engagement to provide tax compliance services and an engagement to provide tax planning advice. In paragraph 8.1 of

his principal report he described advice on how to maximise entrepreneurs' relief as a basic form of tax planning. However, in paragraph 3.1 of his supplementary report he opined:

"To have advised Mr McMahon of the £10 million limit was, in my opinion, of itself not of much assistance to him. In contrast, the very small extra step of advising him of the possibility of delaying the transaction and gifting some shares to his wife would have been of very great help to him. I do not regard this extra step as involving any particular provision of advice or that it would reasonably be thought of as "tax planning"."

On the other hand, at para 4.8.1 of the same report he observed:

"Where there is the possibility of an individual selling shares such that the £10 million limit will be breached, then the next step is to check whether a spouse, and perhaps children can qualify for the relief with very little planning."

[59] In any case, Mr Cairns was clear that the idea ought to have been raised with the pursuer in 2012 once the defender became aware of the proposed sale. By that time, given the anticipated sale price of £15 million, it would have been obvious to any reasonably competent accountant that there would be a substantial tax advantage to the pursuer if the sale could be delayed for a year and some of the shares transferred to his wife. No reasonably competent accountant would have failed to have informed the pursuer of the idea at that time. In his opinion that was the case whether or not the defender was under a contractual obligation to seek to inform the pursuer of relevant tax planning ideas of which it was aware which might assist the pursuer.

[60] On the information available to Mr Cairns the defender had breached the duty or duties which it had owed to the pursuer. It had not informed the pursuer of the idea in 2008, or at any subsequent time. Mr Cairns accepted that the entrepreneurs' relief factsheets set out the lifetime limit and the circumstances in which a taxpayer would qualify for relief, but in his view it would require something of a "slight leap" from that information for a taxpayer to realise that he or she could transfer shares to a spouse to make use of the

spouse's relief. His understanding was that the schedule had not been provided to the pursuer at the meeting on 14 June 2012. If, contrary to his understanding, it had been, he agreed that anyone reading the third note would have understood that Mrs McMahon would have a £10 million lifetime allowance available to her if she held 5% of the shares and met the relief's other requirements. It was put to him that it would have been obvious to anyone reading the note that the sale would have to be delayed if the pursuer and his wife wished to utilise her entrepreneurs' relief. Mr Cairns was reluctant to agree. He observed: "It didn't seem obvious to Mr McMahon."

*Mrs McQuillan*

[61] In her principal report, which she adopted, I understood Mrs McQuillan to say that the letter of engagement was a retainer for personal tax compliance services, and that it did not include tax planning services. Where active and positive steps, such as a transfer of shares, were required to arrange the client's affairs in order to maximise reliefs, that was tax planning. On her reading of the letter of engagement the defender had not been obliged to raise tax planning ideas with the pursuer. The conclusion of her principal report was that she did not consider that the defender had acted in a way that no reasonably competent accountant would have acted. Somewhat confusingly, in her supplementary report (which she also adopted) she was asked to consider a different question, namely what advice a reasonably competent accountant would have given if postponement of the deal was being considered in June 2012. In my view it is unnecessary to discuss that matter.

[62] In cross-examination Mrs McQuillan was asked whether a reasonably competent accountant would mention something to his client if he realised that there was a possibility of saving the client a substantial amount of tax. Mrs McQuillan answered in the affirmative.

She was asked whether by the end of 2010 a reasonably competent accountant would have drawn to a client's attention the potential mitigation strategy of transferring shares to their spouse to make use of the spouse's entrepreneurs' relief. She replied that yes, she would expect that sort of discussion, unless the accountant was engaged "very narrowly" only to do personal tax returns. However, she went on to state that by the summer of 2011 she would have expected the idea of inter-spousal transfers to have been raised with the pursuer. She would also have expected it to be raised at the time of the sale proposal, but not in isolation from the other factors which would require to be considered (by which I understood her to mean the commercial and other risks which might be associated with seeking to postpone the sale). She agreed that it ought to have been raised at the meeting of 14 June 2012, but she would have expected it to have been raised much earlier than that.

### **The scope of the defender's duties**

#### *Counsel's submissions*

[63] It was common ground that the services listed under the heading Personal Tax in the letter of engagement were typical of the services provided in an engagement to provide tax compliance services. However, the parties differed as to proper construction of the letter of engagement, and, in particular, the Ad Hoc Advisory Services section of Appendix 1.

#### *Senior counsel for the pursuer's submissions*

[64] On a proper construction of the Ad Hoc Advisory Services section the defender had bound itself to seek to inform the pursuer of tax planning ideas of which it became aware which might be of assistance to him. Transferring shares to the pursuer's wife so that use could be made of her entrepreneurs' relief on any subsequent disposal of the shares had

been such an idea. It was clear from Mr Ferguson's evidence that at all material times he had been aware of the possibility that a taxpayer might mitigate CGT by adopting such a course. Accordingly, if the court found, as it ought to, that the defender had not made the pursuer aware of the idea, then it had breached its obligation to inform him.

[65] If the court did not construe the Ad Hoc Advisory Services section as imposing an obligation, the defender had still been bound to bring the idea to the pursuer's attention.

That was because, in addition to the services specified in the retainer, the defender had been obliged to do work which was reasonably incidental to those services (*Credit Lyonnais SA v Russell Jones & Walker* [2003] PNLR 2, per Laddie J at para 28; *Minkin Bank v Landsberg* [2016] 1 WLR 1489 (CA), per Jackson LJ at para 38). Informing the pursuer of the idea would have been routine tax advice which was reasonably incidental to the services which the defender had been engaged to provide (cf. *Mehjoo v Harben Barker (A Firm) & Anor* [2014] PNLR 24).

[66] In any case, even if the defender had not been obliged as a matter of contract to inform the pursuer of the idea, it had had a delictual obligation to inform him of it from 2008 *et separatim* in the lead-up to the sale. While concurrent contractual and delictual duties were usually co-extensive (*Tai Hing Cotton Mill Ltd v Chong Hing Bank Ltd* [1986] AC 80 (PC), per Lord Scarman at p 107), sometimes a delictual obligation could be wider than a concurrent contractual obligation. The matter was fact dependent (*Holt v Payne Skillington* [1996] 2 PNLR 179 (CA), per Hirst LJ at pp 194F – 196A). If the court concluded that there had been no contractual duty to inform the pursuer of the idea, it should nonetheless hold that on the facts there had been a delictual duty to do it.

[67] The defender's duty to inform the pursuer about the idea arose when entrepreneurs' relief was introduced in 2008. In any case, the duty arose at the latest in 2012 when the defender learned of the proposed sale.

*Senior counsel for the defender's submissions*

[68] It was not disputed that the defender had known at all material times of the idea. However, the extent of the defender's obligations fell to be determined by reference to the terms and limits of the retainer (*Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, per Oliver J at pp 402G - 403C). On a proper construction of the Ad Hoc Advisory Services section the defender had not undertaken an obligation to seek to advise the pursuer of tax planning ideas which it became aware of which might assist the pursuer. Rather, correctly interpreted, the language of the section indicated that additional ad hoc advisory services would be the subject of separate engagements following a reference by the pursuer seeking such specific advice. The defender might raise the possibility of such an engagement with the pursuer where it seemed to it that it might be of interest to him, but it had not obliged itself to do so. In terms of the retainer it had not bound itself to provide any tax planning ideas or services.

[69] The defender's obligations had included an obligation to do work which was reasonably incidental to the work which had been undertaken (*Credit Lyonnais SA v Russell Jones & Walker, supra*, per Laddie J at para 28; *Minkin Bank v Landsberg, supra*, per Jackson LJ at para 38). Here the work undertaken had been tax compliance work. Suggesting the possibility of the pursuer making a share transfer to his wife so that she could benefit from entrepreneurs' relief would have been tax planning. The fact that it would not have been complex tax planning was beside the point - it had not been reasonably incidental to the personal tax compliance services which the defender had undertaken to provide to the pursuer. On the contrary, the parties had agreed that the retainer did not cover tax planning

work and that in the event that the pursuer wished to be provided with services of that kind a specific referral would be required.

[70] The pursuer's delictual cases added nothing to his contractual cases. They were based on the same facts and the same duties. The cases were concurrent and co-extensive. The delictual cases were not based on wider sets of factual circumstances than the contractual cases (cf. *Holt v Payne Skillington*, *supra*, where the case in tort was based upon an assumption of responsibility and concomitant reliance (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465), but was ultimately unsuccessful on the facts)).

### ***The scope of the defender's duties: Decision and reasons***

#### *The authorities*

[71] In general the scope of a professional's duty to his client depends upon the terms and limits of the retainer. In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*, *supra*, Oliver J stated (in relation to a solicitor's duties) at pp 402-403:

"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.

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



*W.L.R. 1424* and *Hall v. Meyrick* [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer.”

[72] In *Mehjoo v Harben Barker (A Firm)*, *supra*, the defendants’ retainer with the claimant was a letter of engagement entered into in 1999 (which was set out in para 21 of the judgment of Patten LJ). It is clear that it was a tax compliance retainer. Patten LJ observed at paras 23 and 24:

“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] P.N.L.R. 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.”

Like the present case, *Mehjoo* involved a disposal of shares resulting in a CGT liability. The claimant’s case was that the defendants ought to have advised him (i) that he was potentially a non-domiciliary (a “non-dom”); (ii) that being a non-dom carried with it significant tax advantages; and (iii) that he should therefore take tax advice from a firm which specialised in individuals who had non-dom status. The retainer was for tax compliance work. A more extensive tax planning service was available only on request and was never requested (Patten LJ at paras 21 and 41). The claimant maintained that the

retainer had been varied because on a number of occasions the defendants had volunteered other tax advice. Patten LJ described that advice as having been “routine tax advice” (para 39-40). In his view it was very different from much more sophisticated tax planning “which often brings about 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.” By volunteering such routine advice the defendants did not agree to the contract being varied to oblige them to provide more sophisticated tax planning. The defendants had not assumed responsibility to provide such advice. Patten LJ continued:

“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...

...

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...”

Sharp and Lewison LJ agreed with Patten LJ. Lewison LJ added:

“69. ... 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 & Kemp* [1979] Ch. 384 at 402 ...

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.”

[73] In *Credit Lyonnais SA v Russell Jones & Walker, supra*, the defendants were instructed by the claimants in relation to the exercise of a break clause in a lease. The defendants served an appropriate notice on the landlord. However, in terms of the break clause in the lease payment to the landlord by the termination date of £11,500 was a condition precedent and was time critical. The claimant did not pay that sum in time and the option was lost. The claimant sued the defendants for failing to advise it that the making of the payment was a condition precedent and was time critical. The defendants maintained that their retainer had been a limited one, and that it had not included any obligation to give such advice. Initially, their instructions were to contact the landlord to enquire whether they would be prepared to extend the notice period, and if so, on what terms. Ultimately, their instruction had simply been to serve notice of termination in time and to obtain an acknowledgement from the landlord or his agent. In finding for the claimant Laddie J stated:

“28 ... A solicitor is not a general insurer against his client's legal problems, His duties are defined by the terms of the agreed retainer. This is the normal case although *White v Jones [1995] 2 A.C. 207* suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing “extra” work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions. In relation to this I was struck by the analogy drawn by Mr Seitler. If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him...”

Laddie J went on to note that the defendants had been provided with a copy of the lease and as he read their instructions they had been instructed to read the break clause. That ought to

have alerted them to the time critical condition precedent, and since they had no reason to think that the claimant had in-house legal advice on the point they ought to have warned it of the nature of the condition. In any case, on a fair reading of the instructions the defendants had been instructed to assist generally in achieving the objective of terminating the lease in accordance with the break clause, and that those instructions were wide enough to include giving advice on how to effect termination. Failure to warn of the existence of the risk was a breach of those instructions.

[74] In *Minkin v Landsberg (trading as Barnet Family Law)* [2016] 1 WLR 1489 the claimant and her husband negotiated settlement of their financial disputes following divorce. She was advised by her solicitors that the proposed terms did not seem satisfactory and that there were alternative courses available to her including negotiation, mediation and litigation. She decided to adhere to the settlement. She changed solicitors. She instructed her new solicitor, the defendant, to put the agreement into a form which the court would approve, which the solicitor duly did, and the order was approved by the court. However, she subsequently brought proceedings against the defendant seeking damages for professional negligence on the basis that the defendant had failed to warn or advise her against entering into the consent order. At first instance the court held that while it had been implicit in the defendant's retainer that she would proffer advice which was reasonably incidental to the work she was carrying out, the giving of the suggested warning or advice had not been reasonably incidental to the retainer. The decision was affirmed on appeal to the Court of Appeal. The leading judgment was delivered by Jackson LJ. He observed at para 32:

"32. The extent of a solicitor's duty to his/her client is determined by his/her retainer. The starting point in every case is to ascertain what the client engaged the solicitor to do or to advise upon."

Jackson LJ canvassed a number of the authorities (*Midland Bank Trust Co Ltd v Hett Stubbs & Kemp, supra*; *Carradine Properties Ltd v DJ Freeman & Co* [1999] Lloyd's Rep PN 483; *Hurlington Estates Ltd v Wilde & Partners* [1997] 1 Lloyd's Rep 525; *National Home Loans Corp'n plc v Griffin Crouch & Archer* [1998] 1 WLR 207; and *Credit Lyonnais SA v Russell Jones & Walker, supra*). He continued:

"38. Let me now stand back from the authorities and summarise the relevant principles:

- (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 risks which are (or should be) apparent to the solicitor but not to the client.
- (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."

He concluded (para 43) that giving the warning/advice at issue was not reasonably incidental to the work carried out under the retainer, for four reasons. First, all of the matters were obvious to the claimant. Second, the claimant was intelligent. She had qualified and practised as a chartered accountant. She was well versed in the litigation and she had a good grasp of the issues. Third, as the defendant knew, the claimant had already

taken advice from other solicitors about the proposed consent order. Fourth, the claimant had made it plain that she wished to conclude the consent order as swiftly as possible.

[75] For completeness I mention two cases decided since *Minkin*, namely *Denning v Greenhalgh Financial Services Ltd* [2017] PNLR 19 and *Lyons v Fox Williams LLP* [2019] PNLR 9. I was not referred to either case, but since the decisions and reasoning do not depart in any material way from the authorities to which I was referred I did not think it necessary to put the parties to the additional expense of inviting them to make further submissions.

[76] The facts in *Denning* were that in 2000, on the advice of his financial adviser, the claimant transferred an occupational pension to a personal pension. In 2008 he replaced his previous financial adviser with the defendants, and he instructed them to advise him on the management of his investments. In 2013 he issued proceedings against them alleging that they had been negligent in failing to advise him about the necessity to investigate the possibility of negligence by the former adviser. Green J held that the defendants had been instructed to advise solely upon the claimant's present and future requirements, and that they had not been under any duty to advise on the suitability of advice given by the former adviser. He discussed several of the authorities (*Midland Bank Trust Co Ltd v Hett Stubbs & Kemp, supra*; *Pickersgill v Reilly* [2004] UKPC 14; *JP Morgan v Springwell Navigation Corp* [2008] EWHC 1186 (Comm); and *Mehjoo*). He went on to observe:

"51 ... The case law cited above emphasises that in both contract and tort the four corners of the retainer are, at least ordinarily, likely to be dispositive.

52. As noted in [43] above reliance is placed upon the judgment in *Credit Lyonnais (ibid)*. This establishes that, in unusual cases, the surrounding circumstances might be such that the four corners of a retainer might not describe, exhaustively, the full extent of the duty owed by a professional. A number of features of the case are informative as to the circumstances in which the extension of that duty might occur. First, it was a signal feature of that case that the totality of the information required by the professional to give the advice which it was alleged was negligently omitted was before the professional concerned. That case concerned a clause in a lease which

a professional simply failed to read and draw the necessary inferences from. Second, it was also a feature of the facts that the issue overlooked was one which was patent on the face of the instruments being reviewed and it became (or should have become) evident from the performance by the solicitor of his retainer..."

After citing from para 28 of Laddie J's judgment, Green J made three observations about it:

"53. ... First, the Judge considered that the matter that should have been advised upon was something (i.e. reviewing the lease) for which the professional was being paid and would not entail "extra" work which was not being paid for. Second, the analogy of the dentist peering into the patient's mouth and noticing an adjacent tooth in need of treatment highlights that the sorts of matter that the professional should assume a responsibility to advise upon are obvious ones which are closely related to the matters the subject of the retainer. Third, the Judge was not referring to cases where the professional reads documents that he was not asked to read and, in so doing, discovers a risk to the client. These three observations highlight, to my mind, the fact that it would only be in obvious cases where an extended duty to advise arises. There must, necessarily, also be a close and strong nexus between the retainer and the matter upon which it is said the professional should have advised, but omitted to do so."

At para 55 he discussed textbook commentaries (*Clerk and Lindsell on Torts* (21<sup>st</sup> ed), para 10-134; *Charlesworth and Percy on Negligence* (13<sup>th</sup> ed), paras 9-235 and 9-236; Salzedo and Singla, *Accountants' Negligence and Liability* (2016), paras 9.97 to 9.98) before concluding:

"... The general thrust of the observations set out in commentaries is that the most important consideration governing the scope of the duty is the retainer and that the courts are loath to extend that duty far beyond the retainer, though it is accepted that in appropriate but narrow circumstances this may occur. The general tenor of academic commentary, and indeed that of the courts, is that for an extended duty and liability to arise there has to be a close factual and legal nexus between the retainer and the matter that it is alleged the adviser omitted to provide advice upon."

[77] In *Lyons* the claimant sustained serious injury in a cycling accident. He was covered by insurance which had been taken out by his employers for the benefit of its employees, consisting of cover under both Accidental Death and Dismemberment ("AD&D") policies and Long-Term Disability ("LTD") policies, but the employer's insurance broker advised that he did not qualify for a payment under either of the AD&D policies. The claimant retained the defendant to investigate causes of action against his employers for failing to

have in place adequate AD&D insurance to cover his injuries, alternatively for misrepresenting to him that they had adequate insurance. In fact the cover under the policies was wide enough to allow his claim to succeed, and ultimately he received a substantial sum under the AD&D policies. However, any right he had to claim under the LTD policies time-barred by 2010 without a claim having been made. The claimant sued the defendant for negligently failing to advise that the basis on which insurers had rejected his claim was wrong and unfounded and that he had a claim for either Total Disability or Partial Disability payments; alternatively if it was well founded, for failing to advise him to reduce his salary during the waiting period so as to preserve his claim under the policies; and in any event for failing to advise him to bring a claim or otherwise to protect his claims and to prevent them from becoming time-barred. At first instance the judge rejected the contention that it had been part of the defendant's retainer to advise the claimant about the claims under the LTD policies. That decision was affirmed on appeal. In delivering the leading judgment Patten LJ noted:

"41 ... It is, I think, worth emphasising that although cases like *Minkin* are often cited as authority in support of a legal duty to warn, they are in fact decisions about the scope of a solicitor's duty based on a particular retainer. As Laddie J explained in his judgment in *Credit Lyonnais* which was approved in *Minkin*, the solicitor's obligation to bring to the client's attention risks which become apparent to the solicitor when performing his retainer does not involve the solicitor in doing extra work or in operating outside the scope of his retainer. The risks in question are all matters which come to his attention when performing the tasks the client has instructed him to carry out and which therefore as part of his duty of care he must make the client aware of.

42. Neither *Credit Lyonnais* nor *Minkin* are authority for the proposition that the solicitor is required to carry out investigative tasks in areas he has not been asked to deal with however beneficial to the client that might in fact have turned out to be..."

#### *Construction of the letter of engagement*

[78] The pursuer's primary position is that the Ad Hoc Advisory Services section made it



an express term of the retainer that the defender would seek to advise the pursuer of tax planning ideas of which it became aware that might be of assistance to him. I am not persuaded that that is correct.

[79] In my view the letter of engagement was an engagement to provide tax compliance services. It clearly distinguished between those services (which the defender was obliged to provide under the engagement) and separate *ad hoc* tax planning and advice which, if the pursuer wished the defender to provide it, required a further arrangement to be made. In my judgement a reasonable person in the position of the parties at the time of contracting would not have understood the parties to have provided that, in addition to the Personal Tax services which it was to provide, the defender was bound to seek to inform the pursuer of any tax planning ideas of which it became aware which it thought might be of assistance to him. Rather, I think that the reasonable person would have read the section as recording that it was the defender's intention to endeavour to provide ideas of that sort to supplement the Personal Tax services, but that it was not undertaking any obligation in that regard. The section would have been understood as being no more than a statement of intention as to intended future conduct (cf Gloag, *The Law of Contract in Scotland* (2<sup>nd</sup> ed), p 464; *Royal Bank of Scotland Plc v Davidson* 2010 SLT 92, per Lord Drummond Young at para 20).

[80] Mrs McQuillan characterised the idea as tax planning, albeit of a basic type. At times Mr Cairns described it as a tax planning idea. At other times he suggested that in his view the point was such an obvious and straightforward one that it ought not reasonably be characterised as tax planning.

[81] I agree with Mrs McQuillan that the idea did involve tax planning, albeit of a fairly rudimentary kind. Raising the idea would not merely have been advising the pursuer as to the reliefs which were available to him. It would have involved suggesting that the pursuer

reorganise his affairs by gifting some of the shares to his wife in order that they could both be sellers, and could both claim entrepreneurs' relief. If the idea was implemented, a subsequent sale would not have been a sale in which the pursuer was the sole seller. It seems to me to be even clearer that raising the idea in the lead-up to the sale would have been tax planning. If the pursuer had taken up the idea it would have resulted in him seeking to enter into a different transaction from the one which was proposed (cf. *Mehjoo v Harben Barker (A Firm)*, *supra*, Patten LJ at para 40). Rather than he being the sole vendor, the sellers would be pursuer and his wife. Other terms of the contract might also have been altered.

[82] However, I do not think it necessarily follows from the fact that the idea would have involved simple tax planning that it did not fall within the scope of the retainer. I do not read the Ad Hoc Advisory Services section as cutting down the scope of the Personal Tax section. If on a proper reading of the contract as a whole raising the idea fell within the scope of the Personal Tax section, or if it was reasonably incidental to the work included within that section's scope, then in my opinion the Ad Hoc Advisory Services section would not operate so as to exclude it from the ambit of the retainer. The Ad Hoc Advisory Services section concerned the possible provision of services additional to those encompassed by the retainer.

[83] That deals with the submission that the Ad Hoc Advisory Services section obliged the defender to seek to advise the pursuer of tax planning ideas it became aware of which it thought might be of assistance to the pursuer.

[84] I did not understand Mr Cairns or Mrs McQuillan to maintain that raising the idea fell within the scope of any of the express terms of the retainer, and in my opinion it does not. They agreed, however, that the scope of the retainer certainly included advising the

pursuer as to the reliefs which might be available in calculating his tax liability, and that entrepreneurs' relief was such a relief. In my view that is plainly right.

[85] Of course, the contract included a number of implied terms. Only two need be mentioned. The first was that the defender would proffer advice which was reasonably incidental to the work that it had undertaken to carry out in terms of the letter of engagement (*Minkin v Landsberg (trading as Barnet Family Law)*, *supra*, per Jackson LJ at para 38). The second was that in carrying out all of its obligations under the retainer (whether those obligations were express or implied) the defender would comply with the standard of a reasonably competent accountant.

*Was informing the pursuer of the idea reasonably incidental to the terms of the retainer?*

[86] Other than in exceptional circumstances, the scope of the retainer ought to be determinative of the scope of a professional person's obligations under an engagement to provide services. The services which the defender expressly undertook to provide under the retainer were preparation of the pursuer's tax return; computing his self-assessment by completing the tax calculation working sheets; submitting the return and self-assessment to HMRC; dealing with any further amendments to the return during the following 12 months; dealing with any enquiries raised by HMRC on the return and self-assessment; and negotiating on any question of taxation, interest and penalties arising from those enquiries.

[87] Here the services specified in the retainer were tax compliance services. Preparing the pursuer's tax returns and the work associated with that involved, for the most part, taking the relevant information which the client provided, making the appropriate entries on the return, calculating the tax liability, and dealing with HMRC in relation to matters

arising from the return. It involved checking that the pursuer claimed relevant reliefs to which he may be entitled so that he did not pay more tax than he needed to.

[88] The pursuer maintains that it was reasonably incidental to the provision of those services that (i) the defender should have advised the pursuer to consider transferring part of his shareholding to his wife from the time when entrepreneurs' relief was introduced; and (ii) that, in any case, it ought to have made that suggestion once the sale was proposed.

Before I examine those propositions I think it useful to make some further observations about the evidence of Mr Cairns and Mrs McQuillan.

[89] Both witnesses expressed their own understandings of the letter of engagement, but they recognised - correctly - that its interpretation was a question of law for the court. While this part of their evidence was inadmissible for the purpose of interpreting the contract, in my opinion it was admissible for the more limited purpose of explaining the legal assumptions which each of them made in arriving at their conclusions.

[90] Much of Mr Cairns' evidence was founded upon his understanding that the Ad Hoc Advisory Services section obliged the defender to seek to inform the pursuer of tax planning ideas of which it became aware which might assist him. As already discussed, in my opinion that understanding is erroneous. In so far as Mr Cairns' opinion evidence was founded upon that error it falls to be rejected.

[91] Mrs McQuillan did not fall prey to the same error. She proceeded, correctly, on the basis that the Ad Hoc Advisory Services section did not impose an obligation upon the defender to seek to raise tax planning ideas of which it became aware.

[92] Mr Cairns was asked whether, even if the defender was not contractually obliged by the Ad Hoc Advisory Services section to raise the idea, a reasonably competent accountant in the circumstances would have done so. He answered in the affirmative. He thought it

was an obvious and straightforward idea which should have been raised. Even if his construction of the contract was erroneous, he would still have been of the view that there had been an obligation to raise the idea between 2008 and 2011, and also in the lead-up to the sale.

[93] Mrs McQuillan's principal report and her oral evidence-in-chief were clear. There had been no contractual obligation to raise the idea. The engagement had been to carry out personal tax compliance work. Raising the idea had not been within the scope of the engagement.

[94] The difficulty is, what is the court to make of the evidence which Mrs McQuillan gave during cross-examination and re-examination? In my view some of her answers have to be treated with care. For example, she was asked whether a reasonably competent accountant would mention something to his client if he realised that there was a possibility of saving the client a substantial amount of tax. It was, in my opinion, an extremely vague, general, and hypothetical inquiry. It was not directed to the identification of any specific practice or standard. I do not find Mrs McQuillan's affirmative answer to be of any real value or assistance in resolving the issues which I have to determine. In addition, parts of her evidence appeared to be self-contradictory (eg making concessions which appeared to be inconsistent with her avowed adherence to the conclusions of her principal report). Nevertheless, I think it may fairly be concluded that her ultimate position reflected an acceptance by her that she would have expected a reasonably competent accountant to have raised the idea with the defender both during the period after the introduction of the relief in 2008 and in the lead-up to the sale.

[95] In order to determine whether raising the idea was reasonably incidental to carrying out the work which the defender had undertaken to perform it is necessary to have regard to

all of the circumstances of the case, including the character and experience of the pursuer (*Minkin*, per Jackson LJ at para 38). It is convenient to begin with the circumstances which were common to the scenario more than a year before the sale and to the scenario once the sale was proposed.

[96] So far as the pursuer's character and experience are concerned, he is undoubtedly an able and determined person. Starting from nothing - he left school at 16 and obtained his first job in the motor trade as a technician - he built up a very successful business. He is an intelligent and astute businessman with a lifetime's experience in the motor trade. On the other hand, he has no legal, accountancy or other professional training, and I did not understand it to be suggested that he was particularly knowledgeable about tax matters. He looked to the defender to attend to his tax affairs.

[97] Throughout the engagement the defender knew that the pursuer was the sole shareholder in Lomond. It knew that Lomond was a substantial business, of significant value, which the pursuer had established and built up over many years. From 2008 it knew that if the pursuer disposed of his shareholding there was likely to be a substantial capital gain which would be liable to CGT, but that the pursuer ought to be eligible for entrepreneurs' relief.

[98] It is also clear, and it is in my opinion of some significance, that the defender was aware of the idea at all material times. This was not a case where it would have required to carry out investigations or other work in order to learn of, or raise, the idea.

[99] Neither Mr Cairns nor Mrs McQuillan was asked in terms to opine whether raising the idea was reasonably incidental to the services which the defender had undertaken to provide under the retainer. Matters were not canvassed in that way with either witness, perhaps because ultimately that question is one for the court. However, both witnesses

confirmed that the idea was a very simple and obvious matter which they expected a reasonably competent accountant to have raised in the circumstances. In my opinion that is a pointer in favour of the conclusion that raising the idea was reasonably incidental to the retainer.

[100] However, until the sale was unexpectedly proposed the pursuer had made it very clear to the defender over a number of years that he had no interest in discussing an exit strategy, and that he had no intention of selling his shares in the business. In addition, in my view it is not clear that it ought to have been obvious to the defender in the period between 23 June 2010 (when the lifetime limit increased from £2 million to £5 million) and its learning of the proposed sale (by which time the limit had increased (on 6 April 2011) to £10 million) that the pursuer's net capital gain should he dispose of his shares would exceed his lifetime limit for entrepreneurs' relief. In the whole circumstances I am not satisfied that raising the idea before the end of April 2012 was reasonably incidental to the retainer.

[101] By contrast, in my opinion once the defender was informed of the proposed sale the circumstances changed materially. An exit was on the cards - the sale was imminent. Moreover, the defender became aware that the proposed sale price was very substantially in excess of the pursuer's lifetime limit for entrepreneurs' relief. Within the defender's tax department that caused alarm bells to ring. The issue was discussed internally to see if there was a solution. The defender was aware that it was at least possible that CGT might be mitigated, but only if the sale could be postponed to allow the idea to be implemented. These were matters which it became very much alive to in the course of carrying out the retainer.

[102] The defender suggested meeting with the pursuer in advance of the sale to discuss his tax position. At the meeting it provided him with an indication of his likely tax liability,

and it raised certain ways in which it might be possible to mitigate that liability to a limited extent. In my opinion by that that stage, in the whole circumstances (which I think were rather special and unusual) raising the idea was reasonably incidental to the retainer.

[103] In my judgement the circumstances justifying that conclusion are very different from the circumstances in *Minkin* and *Mehjoo*. In *Minkin* the scope of the retainer was extremely limited. The claimant was a chartered accountant who was fully aware of exactly what she was agreeing to, and of the risk that it did not represent her full entitlement. She had been advised as much by her previous solicitors. Those were not propitious circumstances for holding that the advice which she claimed the defendant solicitor ought to have given her was reasonably incidental to the retainer. In *Mehjoo* the advice in question related to sophisticated tax planning. It was very far removed from the sort of routine tax advice which the accountants had given the claimant under the retainer (and, on occasions, beyond the retainer). Here, on the basis of Mr Cairns' and Mrs McQuillan's evidence, for a tax practitioner the idea was of a fairly routine and obvious sort. It was perhaps not very different in nature from the sort of routine advice which had been given in Ms Murray's email to the pursuer and his wife on 29 March 2011 (when she reminded them of opportunities to reduce their tax liability for the year, including reminders that each individual had a CGT allowance of £10,100 and that transfers between spouses were exempt).

[104] So much for the defender's contractual duties. What of its delictual duties? It was not suggested that the delictual cases were based on wider sets of factual circumstances than the contractual cases (cf. *Holt v Payne Skillington*, *supra*). Nor was it contended that the delictual cases were founded upon an assumption of responsibility and concomitant reliance (*Hedley Byrne & Co Ltd v Heller & Partners Ltd*, *supra*). In my view the position here is the



normal one of contractual and delictual duties being concurrent and co-extensive (*Tai Hing Cotton Mill Ltd v Chong Hing Bank Ltd, supra*, per Lord Scarman at p 107). It follows that in my opinion the defender did not have a delictual duty to raise the idea before the sale was proposed; but that it did have a delictual duty to raise the idea in the lead-up to the sale.

### **Breach of duty?**

[105] If, contrary to my opinion, on a proper construction of the Ad Hoc Advisory Services section the defender was obliged to seek to inform the pursuer of tax planning ideas of which it was aware which might be of assistance to him, then in my view the defender would have been in breach of that duty from very soon after the introduction of entrepreneurs' relief. However, there would not have been a further breach in the lead-up to the sale because, as discussed below, in my opinion the pursuer was sufficiently informed of the idea at the meeting on 14 June 2012.

[106] If, contrary to my view, it was reasonably incidental to the retainer that the defender raise the idea between 2008 and 2011, then the defender breached that duty. While I accept that the tax-inefficiency of the pursuer being a single shareholder was raised at the year-end meeting in 2009, and that in that context there was passing reference to entrepreneurs' relief, I do not think that that would have sufficed to discharge the defender's obligation.

[107] In my opinion communication to the pursuer of the third note in the schedule was sufficient to satisfy the defender's obligation to raise the idea in the lead-up to the sale. It reminded the pursuer of the possibility that Mrs McMahon would have a £10 million lifetime allowance if she owned 5% of the shares and if she satisfied the other requirements for relief. In my judgement it should have been obvious to the pursuer from the terms of the note that if he wished to take advantage of Mrs McMahon's relief shares would have to be

transferred to her and the sale would have to be delayed for a year. The pursuer accepted that if he had seen the note those things would have been obvious to him. I think that that was a concession which was correctly made. While Mr Cairns was reluctant to make a similar concession, I am not persuaded that his reluctance was justified in the circumstances. In my view those consequences would have been obvious to a reasonable person in the position of the pursuer at the meeting on 14 June 2012. It follows that in my opinion the defender did not breach its duty to raise the idea in the lead-up to the sale. In the whole circumstances I am not satisfied that the skill and care exercised by the defender in the lead-up to the sale fell below the requisite standard of care (*Hunter v Hanley* 1955 SC 200, per Lord President Clyde at p 205).

## **Causation and damages**

### *Causation*

[108] Even if, contrary to my view, the defender breached an obligation to raise the idea at latest a year before the sale, I would not have been persuaded that any such breach caused the pursuer to suffer loss. I am not satisfied that the pursuer would have been interested in the idea had it been raised at that time. He had no interest then in an exit strategy or in contemplating a sale of the business. I do not think that he would have pursued the idea had it been raised.

[109] That conclusion is consistent with the fact that the pursuer is the sole shareholder of Leven Cars Group Limited, notwithstanding that his son also works in the business and that the pursuer has now exhausted his lifetime allowance for entrepreneurs' relief. I think it significant that the pursuer indicated that he saw no reason at present for another family member to become a shareholder because he had no intention of selling the business.

Although he added that since the business was a young business he did not think there would be a significant capital gain if it was disposed of in the near future, that observation struck me as being very much an afterthought. Moreover, since the pursuer has no remaining entrepreneurs' relief, any gain on a disposal - large or otherwise - would be likely to be liable to CGT at the standard rate.

[110] If, contrary to my view, the defender breached his duty to raise the idea in the lead-up to the sale, I would not have been satisfied that the breach caused the pursuer any loss. I am not persuaded that he would have given up the certainty which the agreed sale represented for the risks and uncertainties of seeking to postpone the sale for a year. If he went ahead with the sale he would be sure of obtaining the agreed consideration in early course, and of having the benefit of that capital to use and invest. The risks and uncertainties which he would have had to consider would have included (i) that Lookers might not agree to postpone the sale for a year; (ii) that if it did agree, it may have insisted upon a downward adjustment in the price; (iii) that if a postponed sale to Lookers at the same or a reduced price did not go ahead a replacement buyer at the same price might not be found a year after the proposed sale (or at all); (iv) that he might incur at least some increased transaction costs as a result of the postponement because extra work by professional advisers would have been required; (v) that the CGT regime may have changed before a postponed sale took place. I accept that Lookers was keen to acquire a UK Audi dealership and that Lomond fitted the bill. However, Lomond was not the only fish in the sea. There were also at least three further factors which the pursuer would have been aware may have put at risk the prospect of obtaining a delayed sale at the same price. First, Lomond's trading in the first half of 2012 had been poorer than anticipated. Had that continued, the net asset value in mid-2013 may have been less than at the time of the sale in

2012. Second, on 31 May 2013 the new Block Exemption Regulations (EU Commission Regulations 330/2010 of 20 April 2010 and 461/2010 of 27 May 2010) were to take effect. The regulations which they would replace had allowed dealers who already owned a franchise within the EU to purchase further franchises with the same manufacturer without the need to obtain the manufacturer's consent. Lookers benefited from that exemption because it had an Audi franchise in Dublin. Under the new regulations manufacturers were to have a veto in every case. The impending change led to an active and buoyant market, as buyers and sellers sought to complete transactions before the change took effect. In mid-2012 there was a widespread perception that after the change the market for dealerships would not be quite as buoyant. While in fact after the change Volkswagen and Audi continued much as before and did not insist on a right to approve sales where the purchaser was already a franchisee, that was not what those involved in the motor trade had expected would happen. Third, postponing the sale would have been likely to cause some increase in Lookers' own costs for the transaction and in the costs which it incurred to advisers, and Lookers might well not have been prepared to be out of pocket in relation to them. I think that the pursuer's present confidence that he would have delayed the sale is a view which is conditioned by hindsight. I am not persuaded that as matters stood at the time of the lead-up to the sale, when the risks would have been existing and prospective risks, that he would have taken those risks and delayed the sale.

### *Loss of a chance*

[111] Had I been satisfied that the defender had breached his duty to raise the idea in the lead-up to the sale, his loss would have been the loss of a chance of making a tax saving of £733,664. The value of that lost chance would have fallen to be assessed on the basis of the

well-known principles discussed in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, and recently confirmed by the Supreme Court in *Perry v Raleys Solicitors* [2019] 2 WLR 636, per Lord Briggs JSC at para 34. The pursuer would have required to establish on the balance of probabilities that he would have sought to implement the idea by transferring shares to his wife and by postponing the sale. Counsel for both parties proceeded on the basis that Mrs McMahon was so closely connected with the pursuer, and that their interests were so closely aligned, that it would be wrong to treat her as if she was an independent third party for the purposes of the application of the *Allied Maples* principles (*Assetco PLC v Grant Thornton UK LLP* [2019] EWHC 150 (Comm), per Bryan J at paras 450-455). I do not demur from that approach on the facts here. The evidence indicates that the interests of the pursuer and Mrs McMahon would have coincided. I am satisfied on the balance of probabilities that Mrs McMahon would have trusted and followed the pursuer's judgement. So far as the actions of other third parties were concerned, the pursuer would have to have shown that there was a real and substantial, rather than merely negligible, chance that they would have acted in a way which would have enabled him to sell the shares a year later for the same price; or at least for a price which, once the tax saving and any extra expenses associated with the postponement are taken into account, would have left he and his wife better off.

[112] As I have explained already, I am not persuaded that the pursuer would have run the risk of delaying the sale in order to implement the idea. Had I been persuaded that he would have delayed it, I would have accepted that there was a real and substantial, as opposed to a mere negligible, prospect that he would have succeeded in securing a sale a year later at the same price. However, in my view there would also have been very real and substantial risks (i) that Lookers would not have agreed to postpone the sale for a year;

(ii) that if Lookers was prepared to postpone it may have obtained a downward adjustment in the price; (iii) that if a postponed sale to Lookers at the same or a reduced price did not go ahead that a replacement buyer at the same price would not have been found a year after the proposed sale; (iv) that the pursuer would sustain at least some increased transaction costs as a result of the postponement because extra work by professional advisers would have been required and those advisers would have charged him for that work.

[113] Mr Bruce was the representative of Lookers who was most involved in the discussions with the pursuer about the sale. His evidence was that he thought that Lookers would have been willing to wait, and that it would probably have been prepared to stick to the agreed price. Lookers was keen to add an Audi dealership in the UK to its existing businesses.

[114] Of course, Mr Bruce was speaking with the benefit of hindsight about a hypothetical scenario. Moreover, decisions whether to agree to a postponement, and if so on what terms, would not have been for him alone. Ultimately such decisions would have required the approval of Lookers' board of directors.

[115] I have already discussed (in the context of whether the pursuer would have delayed a sale) the sort of factors which I think would have caused Lookers to think carefully about (i) whether they would have wished to proceed with a delayed sale; and (ii) whether, if they were prepared to countenance a delay, the price should be reduced. It is unnecessary to repeat those factors. I also think it likely that had the sale been postponed the pursuer would have been charged additional fees by professional advisers. There would have been some duplicated work and some extra work. Mr Kelly's evidence was that he thought that if the sale had been postponed a couple of weeks before the completion date then MacRoberts' additional charges for completing the transaction a year later would have been fairly

modest, perhaps not more than £10,000. He thought it possible that the firm might even have decided to abate its fee for the aborted transaction by an equivalent amount for the sake of maintaining a good client relationship. He accepted that there would have been additional accountancy costs, bank costs, and share transfer costs - but the latter two would have been fairly minor. There was also unchallenged evidence from Mr McInnes that the defender's corporate finance department's fees for its work in connection with the sale were time-based and that there would have been significant additional fees had there been a late postponement of the sale for a year. The fees paid by the pursuer to the defender in respect of the sale work were £95,720.

[116] In my opinion this is a case where a broad overall assessment of the value of the lost chance would have been appropriate. In the whole circumstances I would have assessed that value as being 50% of £733,664.

*Failure to mitigate loss?*

[117] Since in my view there was no breach in the lead-up to the sale and the pursuer suffered no loss, the question whether the pursuer failed to mitigate his loss does not arise. However, I had the advantage of counsel's submissions on this point and I think it right to indicate what my conclusions would have been had the pursuer established (i) a breach in the lead-up to the sale; and (ii) that as a result he had lost the chance of making a tax saving of £733,644.

[118] In return for the sale price the pursuer sold his shares and granted the film scheme warranties. At the time of the sale the effect of the warranties was that the pursuer had future and contingent obligations to indemnify Lookers. At that stage no sum in respect of those contingent obligations represented allowable expenditure which could be set off

against the sale price in calculating the pursuer's capital gain. However, that position changed when the PPNs were served on Lomond. At that point the contingent obligations became enforceable. The pursuer became liable to indemnify Lookers in the sum of £629,308.92. When he made that payment to Lookers, the pursuer became entitled to seek relief by way of discharge, repayment or other adjustment in respect of his CGT liability for the gain made on the sale (TCGA 1992, s 49). Had he claimed in time, the payment of £629,308.92 ought to have been treated as allowable expenditure for the purposes of re-calculating the pursuer's gain on the sale. When Lookers received the payment from the pursuer its repayment obligation was a mere contingent obligation. Repayment would only become due in the event that FCP's appeal against the closure notices was successful and the sum of £629,308.92 was repaid to Lomond by HMRC. If that happened, and if Lookers repaid the pursuer that sum, there would be further CGT consequences for the pursuer. However, unless and until the contingency was purified the repayment obligation was subject to suspensive conditions. It did not prevent the pursuer from obtaining s 49 relief.

[119] It is a basic principle of both contract and delict that the law expects the injured party to take all reasonable steps to minimise the loss consequent on the defender's wrong, and that he cannot recover damages for any such loss which he failed to avoid through unreasonable action or inaction (*McGregor on Damages* (20<sup>th</sup> ed.), paras 9-004, 9-014; *Chitty on Contracts* (33<sup>rd</sup> ed.), para 26-087; *Stair Memorial Encyclopaedia of the Laws of Scotland*, vol 15, Obligations, para 925). A pursuer's loss will be assessed as if he had acted reasonably in the circumstances even if he has not. It is, however, assumed that actual loss incurred by a pursuer was reasonable, until the defender proves otherwise (*McBryde, The Law of Contract in Scotland* (3<sup>rd</sup> ed.), para 22-38). In *British Westinghouse-Electric & Manufacturing Co v*



*Underground Electric Railway Co of London* [1912] AC 673 Viscount Haldane LC observed at p 689:

“...[T]here are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever*, ‘The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.’

As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.”

As has been often noted (see eg McBryde, *supra*, at para 22-37 and the authorities there discussed; MacQueen and Thomson, *Contract Law in Scotland* (4<sup>th</sup> ed.), para 6.41; *Chitty on Contracts*, *supra*, para 26-089; *McGregor on Damages*, *supra*, para 9-018), strictly speaking it is inaccurate to say that there is a “duty” to mitigate loss. A pursuer may do what he pleases, but his loss will be assessed on the basis of what someone acting reasonably would have done. Subject to that qualification, the passage from Viscount Haldane’s speech is, as McBryde states, the *locus classicus* of the principle of mitigation of loss.

[120] In the present case had the pursuer made a timeous claim for s 49 relief his *total* tax liability in respect of the sale would have been reduced because his net gain would have been less. However, no part of the loss consequent on the defender’s breach would have been avoided. As he did not make a timeous claim his total tax liability was not reduced, but the failure to make that claim had no effect on the loss claimed to have been caused by the breach.

[121] The loss claimed by the pursuer to be “consequent on the breach”, to use Viscount Haldane’s terminology, is the loss of a chance of a tax saving of £733,664. It is that loss, and that loss alone, which is relevant when the principle of mitigation has to be considered. The loss of that chance is entirely separate from and unrelated to the loss which the pursuer suffered through his failure to make a timeous claim for s 49 relief.

[122] The position would be different if the loss claimed to have been caused by the breach was the pursuer’s *whole* tax liability arising from the disposal; or if the loss said to have been caused was not just loss of the chance of making the tax saving of £733,664, but also loss of the further tax which the pursuer could have saved had a s 49 claim been made (ie 28% of £629,038.82, viz £176,132). On either of those hypotheses the loss consequent on the breach would have included the tax which could have been saved had a s 49 claim been made, so it would have been relevant to enquire whether the pursuer had unreasonably failed to avoid that part of his loss by failing to make a s 49 claim. However, here the only loss claimed to have been caused by the breach is the loss of the chance of making a tax saving of £733,664. The pursuer’s position is that he paid CGT of £2,077,291.60, and that if the defender had duly performed its duties that tax liability would have been reduced by £733,664 to £1,433,688. He does not claim that his total tax liability of £2,077,291.60 was caused by the defender’s breach. Nor does he claim that any part of that liability other than the sum of £733,364 was caused by the breach.

[123] In my view the correct analysis is that by not making the s 49 claim the pursuer caused himself loss which was distinct from, and additional to, the loss said to have been caused by the defender’s breach. He did not fail to mitigate the loss claimed to have been caused by the breach.

[124] That is sufficient to dispose of the defender's submission that the pursuer failed to mitigate his loss. However, if, contrary to my opinion, on a correct analysis there was loss caused by breach on the part of the defender which included the loss of the CGT which would have been saved if he had made a s 49 claim, it would be necessary to consider whether a reasonable person in the circumstances would have made a s 49 claim timeously. For completeness, I shall set out my views on that matter.

[125] In mitigating his loss the victim of a wrong is only required to act reasonably, and the standard of reasonableness is not high in view of the fact that the defender is an admitted wrongdoer (*McGregor on Damages, supra*, para 9-079). While a pursuer is not required to "nurse the interests" of the wrongdoer, he must act with that person's interests as well as his own interests in mind (*McGregor on Damages, supra*, para 9-081; *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509, Roskill J at p 530; *Smaill v Hans Dessen* (1906) 94 LT 492, Channell J at p 493; *Koch Marine Inc v d'Amica Societa di Navigazione arl, The Elena d'Amico* ) [1980] 1 Lloyd's Rep 75, Robert Goff J at p 85). The victim need only do what is reasonably necessary to avoid the loss caused by the breach (*McGregor on Damages, supra*, para 9-082). The test of whether the victim took reasonable steps is whether what he did was objectively reasonable for someone in that position (*Chitty on Contracts, supra*, para 26-090; *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm), Andrew Smith J at para 159).

[126] Had the loss of the tax saving of £176,131(which could have been obtained had a s 49 claim been made) been part of a loss caused by a breach on the part of the defender, I would have held that in not submitting a timeous s 49 claim the pursuer unreasonably failed to avoid that part of his loss.

[127] In paragraph 13 of his Further Supplementary Witness Statement the pursuer explained that at the time of the settlement offer (in the summer of 2016) Mr Collins gave him two options: (i) pay the settlement and claim for CGT relief; or (ii) refuse the settlement and let FCP's appeal take its course. The pursuer decided not to pay the settlement sum. He gave the following explanation:

“As matters were ongoing to try to recover the full amount of tax, it did not seem sensible to seek repayment of the CGT element. This would have equated to me accepting that the tax was due in full to HMRC. As I wished to recover the entire amount paid under the PPNs, and understood from FCP that there was funding in place and good prospects of success in respect of the litigation, I did not wish to damage my chances of being able to claim the whole amount back. At that time I expected to claim the whole amount back.”

In my view, that evidence is problematic.

[128] First, the pursuer appears to conflate the consequences of HMRC's settlement offer and the consequences of the subsequent PPNs.

[129] Second, his explanation does not correctly reflect his legal rights and obligations at the material time. Making a s 49 claim would not have involved acceptance on his part that FCP's appeal was ill-founded. He was entitled to seek relief because his contingent obligation to indemnify Lookers had become enforceable. Claiming relief would have had no effect on his right to enforce Lookers' repayment obligation in the event that it became enforceable (which it would if FCP's appeal succeeded and if HMRC repaid Lomond).

[130] Third, by the time he paid the £629,308.92 to Lookers, in my opinion the pursuer knew or ought to have known that there was considerable doubt as to whether an appeal to the First-tier Tribunal could be funded, and that the prospects of an appeal being prosecuted to a successful conclusion were not good. I accept that in 2010 Mr McCracken had been positive about the likely effectiveness of the schemes. I also accept that Mr Ryder's communications with the pursuer (the last of which had been in May 2016) had expressed

some confidence in FCP obtaining a positive outcome on appeal. However, in my view other circumstances ought to have raised, and are likely to have raised, very significant doubts in the pursuer's mind about the effectiveness of the schemes and about the prospects of a successful appeal. HMRC had challenged the schemes, and the pursuer had learned that FCP did not have insurance to finance an appeal to the First-tier Tribunal. As at January 2015 FCP's estimated cost of an appeal to the First-tier Tribunal was £1million to £1.5 million. Funding the appeal was dependent upon a sufficient number of investor partners being prepared to provide the necessary finance. The pursuer was not prepared to contribute towards that funding. By a circular letter dated 10 December 2015 (which was sent to the pursuer at that time and was resent to him on 4 May 2016) the defender had advised investors in the film schemes of a perceived gradual change in the courts' attitude to tax avoidance, of recent adverse decisions in other film scheme cases, and "that the risks of failure might well be increased because what was previously thought of as trading in this context had now been successfully challenged by HMRC". The pursuer knew or ought to have known that Mr Ryder's view on prospects was the view of someone who had promoted the schemes, and that it was very far indeed from being an independent or objective assessment. In my opinion Ainsley Maclaren's manuscript attendance note with the pursuer of 20 April 2016 provides a better indication of the pursuer's thinking at that time. It mentions Mr Ryder's bullish views, but, more tellingly, it records the pursuer's own view as being that there was "a slight hope" that litigation could actually be successful. In my opinion, at best for the pursuer, a reasonable person in his position might have clung on to a similar slender hope of a successful outcome.

[131] Fourth, it is notable that there is no suggestion in the passage (or anywhere else in any of his witness statements) that the pursuer had sought or obtained advice as to whether

he could make a claim for s 49 relief once he had made the payment. Yet in cross-examination he suggested for the first time that Ainsley Maclaren had advised him that she doubted whether HMRC would accept a s 49 claim for relief while the underlying dispute was outstanding. Nonetheless, she was prepared to make a protective claim for relief if he wished her to. The pursuer also indicated that Mr Collins had told him that he did not think that HMRC would accept a s 49 claim for relief while FCP's appeal against the closure notices remained open. Rather confusingly, the pursuer provided these two pieces of evidence during a discussion of the considerations taken into account at the time of the offer to settle. It may be that what was being suggested was that the advice referred to was given at that time. Be that as it may, given the very late stage at which these matters were raised in evidence, their vagueness, and the absence of any contemporaneous documentation which supports them, I am not persuaded that I ought to treat this part of the pursuer's recollection as being reliable.

[132] Had it been necessary to do so, I would have concluded that in the whole circumstances the pursuer's failure to make a timeous s 49 claim was not objectively reasonable. Even if a reasonable person in the pursuer's position had entertained real doubt about his entitlement to claim relief (and I do not think that he would have), in my opinion it would not have stopped him from making a protective s 49 claim by 5 April 2017.

### *Damages and interest*

[133] Had I been awarding damages for breach by the defender of its duty to raise the idea in the lead-up to the sale I would have awarded £366,832 (ie 50% of £733,664).

[134] The pursuer sought interest on any damages award at the legal rate from the date of citation (3 July 2017) until payment. In my opinion an award of interest at 8 per cent per year

from 3 July 2017 until the date of decree would have substantially over-compensated the pursuer for the damages having been withheld during that period. In exercising my discretion as to the appropriate award of interest for that period I would have had regard to the compensatory principle and to the very low official bank base rates which prevailed (*viz* 0.25% from the date of citation until 2 November 2017; 0.5% from 2 November 2017 until 2 August 2018; 0.75% from 2 August 2018 until 11 March 2020; 0.25% from 11 March 2020 until 19 March 2020; and 0.1% from 19 March 2020 to date) (*Farstad Supply AS v Enviroco Ltd* 2013 SC 302). In the whole circumstances I would have awarded interest at the rate of 4% per year from the date of citation until the date of decree, and interest at the rate of 8% per year from the date of decree until payment.

### **Objections**

[135] During the course of the proof a number of objections to the admissibility of evidence were made. In several instances I allowed evidence to be led under reservation as to its competency and relevancy. When it came to closing submissions only two objections were insisted upon.

[136] Objection was taken by counsel for the defender to two parts of Mr Eunson's evidence. The first was his evidence that if the defender had advised the pursuer to transfer shares to his wife and to delay the sale in order to mitigate CGT he believed that the pursuer would have followed that course. The second was that he believed that if Lookers had been asked to delay the sale for a year it would have agreed to do so.

[137] Mr Eunson explained that the basis of the first belief was that the pursuer was cautious in respect of matters such as investments, bonuses and dividends; that he tended to follow the advice of advisers where the advice fell within the adviser's expertise; that he

knew that the pursuer and his wife owned a property in Spain in joint names; and that Mrs McMahon was company secretary and worked full-time in the business. He explained that the basis of the second belief was his impression in the lead-up to the sale that Lookers had been keen to acquire the business; and that that was also his impression at the date of the proof from his experience as an employee of Lookers, including his knowledge of the directors.

[138] The objection to both passages of evidence is that Mr Eunson is a witness to fact, and that his opinion evidence is irrelevant and inadmissible. In my judgement the objection is well founded.

[139] Generally, an ordinary witness must confine himself to matters of fact which are within his own direct knowledge. The general rule is that evidence of opinion is excluded. A witness must speak to facts as observed by him, and not to any inference or opinion which he may draw or form from those facts (W G Dickson, *The Law of Evidence in Scotland* (3rd ed), para 391; W J Lewis *A Manual of the Law of Evidence in Scotland*, p 46; Stair Memorial Encyclopaedia of the Laws of Scotland, *Evidence* (Reissue), paras 170-173; *Phipson on Evidence* (19<sup>th</sup> ed), paras 33-01, 33-89). While the general rule admits of exceptions, I am satisfied that here the evidence objected to falls squarely within the prohibition. While matters of fact which Mr Eunson spoke to from his own direct knowledge are admissible, any inferences or conclusions to be drawn from them and/or from any of the other evidence in the case are matters for the court, not for him.

[140] If, contrary to my view, Mr Eunson's evidence on these matters had been admissible, I would not have attached any weight to it. In my opinion the court is far better placed to judge, from a proper consideration of all of the evidence, whether the inferences which Mr Eunson draws are ones which ought to be drawn.



[141] The second objection was also taken by counsel for the defender. The evidence which was objected to was Mr Ferguson's acceptance in cross-examination that a reasonably competent accountant who was aware of a problem would draw it to the client's attention and seek to solve it. The objection was that Mr Ferguson is a witness to fact, not a skilled witness competent to give opinion evidence. Moreover, since Mr Ferguson is a tax technician rather than a chartered accountant, it was all the more inappropriate that the evidence be admitted.

[142] The evidence objected to does appear to be opinion evidence. Clearly, it is not the opinion evidence of an independent skilled witness. If it is admissible it must be on some other ground. Mr Ferguson is an ordinary witness. Counsel for the pursuer did not identify any basis upon which he maintained that the general rule (that the opinion evidence of ordinary witnesses is inadmissible) ought not to apply here. In the absence of any such justification being advanced it seems to me that the correct course is to sustain the objection.

[143] Besides, I doubt whether the evidence is relevant, and its irrelevancy is a further reason for not admitting it. The questions were very similar to the inquiry to Mrs McQuillan already discussed. They were hypothetical, vague and general. They were not directed to showing the existence of any specific practice or standard which the pursuer relied upon. If they were designed to elicit an admission of what the defender's duty was on the hypothesis put, that is a question of law for the court. It is for the court to decide what the defender's particular duty was in the whole circumstances and whether that duty was breached. I do not consider this evidence to be of any assistance in determining either of those matters.

[144] If, contrary to my view, Mr Ferguson's evidence on this point had been admissible, I would not have attached any weight to it, largely for the same reasons. In my opinion

Mr Ferguson's answers to the questions are of no assistance in resolving the matters which the court requires to decide.

### **Disposal**

[145] I shall sustain the defender's second and third pleas-in-law, repel the pursuer's pleas-in-law, and pronounce decree of absolvitor. I shall reserve meantime all questions of expenses.