

Accountants: no duty of care or fiduciary duty owed where professional had not assumed duty and was clearly acting for other party

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Carmela de Sena (1) Meltor Developments Ltd (2) v Joseph Notaro (1) S Notaro Group Ltd (2) Bishop Fleming (a firm) (3) Davies & Partners (a firm) (4)

Accountants were held not liable to a shareholder in connection with the demerger of a family business.

Facts

The litigation arose from a complicated demerger of a family owned company, S Notaro Holdings (Holdings). The first claimant (Carmela) and the first defendant (Joseph) were siblings who were both directors and shareholders of Holdings.

Relations in the family were difficult but an agreement was reached in 2011 which, in essence, provided that in exchange for Carmela's shares in Holdings, some assets of Holdings or its subsidiaries would be transferred to the second claimant, a company owned and controlled by Carmela and set up as part of the demerger. The third defendant, a firm of accountants, and the fourth defendant, a firm of solicitors, were both retained by Holdings in the transaction.

Following the demerger, Carmela issued proceedings in April 2017 claiming that the transaction was a sale at an undervalue procured by Joseph's undue influence. She also alleged that the firms of accountants and solicitors had acted in breach of their fiduciary duties and duty of care to the claimants. The firms denied that they owed any such duties to the claimants, having been retained to act for Holdings.

Decision

Carmela's claim of undue influence against her brother failed. She was an experienced businesswoman and this was a case of a hard negotiation by experienced business people in a commercial transaction.

Her claims for breach of fiduciary duty and negligence against the firm of accountants also failed. While the accountants had had a professional relationship with Carmela while she was company secretary and director of Holdings, the accountants had not assumed any fiduciary obligations towards her as a shareholder and she knew that the accountants were acting for Holdings and not her in this transaction. The accountants reasonably believed that she was agreeing to the demerger and did not appear to be at a disadvantage or otherwise vulnerable.

In relation to Carmela's claim for negligence, the accountants had not assumed responsibility to her in the transaction and although her loss was a reasonably foreseeable consequence of what they did (or allegedly failed to do), the relationship between the parties was not one of sufficient proximity for a duty of care to be imposed, and neither was it just and reasonable to impose such a duty in all the circumstances.

Carmela was advised by the accountants to obtain independent professional advice but chose not to. She was not entitled to rely on them, as professional advisors to the other side, to look after her interests. The judge commented "*where an experienced business woman deliberately chose not to be professionally advised in a commercial transaction, it would not just be an incremental change to hold that the [accountants] owed the other side in the transaction a duty of care: it would be revolutionary.*"

The judge briefly considered whether, if contrary to his view, the accountants had been in breach of duty, whether this would have caused any loss. He held Carmela was already dissatisfied with what she was getting in the demerger before the transaction concluded. A departing shareholder in a private company is only entitled to a value based upon commercial negotiation - she chose not to obtain any independent valuation, she would not have negotiated a better deal and would have entered into the demerger in any event. On this basis, the accountants had not caused her any loss.

The claims against the solicitors also failed on similar grounds.

Role Of Expert In Litigation

The judge was scathing of the claimants' expert accountancy evidence and he disregarded it on the basis that the witness,

while an accountant, had not demonstrated that he had sufficient expertise in demerger transactions to give expert evidence.

“It is just not enough to be a ‘forensic accountant’. It is not the experience of giving ‘expert’ evidence in court that makes you an expert. Those firms that provide expert witness services really ought to have learned by now that expertise is acquired by doing the thing in question, usually over many years, and that merely being an accountant (or anything else) for a long time does not mean that you thereby become an expert in everything that accountants (or whatever it may be) commonly do.”

The judge was also highly critical of the “extraordinary” questions that had been submitted to the experts. Expert evidence requires an expert of sufficient expertise to give his/her opinion on an issue in the proceedings, yet many of the questions put to the expert were questions of law or fact, being questions for the court to determine. The evidence was accordingly inadmissible.

Comment

The judgment is welcome confirmation that professional advisors, like accountants, do not owe fiduciary obligations or a duty of care to all parties in a transaction but only to his or her client. A possible exception may be where the professional has assumed a duty to another party, but such cases will be extremely rare in practice because the often conflicting interests of the parties in the transaction would prevent the professional from acting for both parties.

If the professional is concerned that a non-client may be looking to him or her for professional guidance or advice, then they should make it absolutely clear that they are only acting for a specific party in the transaction and recommend that the non-client seek independent professional advice.

Accountants who are asked to act as expert witnesses in litigation should heed the judge’s warnings regarding expert evidence. Experts must satisfy themselves that they have the relevant experience and expertise to provide their opinion on the issue in the dispute, and should refuse to answer questions of law or fact put to them by their instructing party.

DAC Beachcroft LLP acted for the successful fourth defendant (solicitors) in this case.

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