



# First advice/information decision after BPE

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13 June 2017

On 19 May 2017 His Honour Judge Moulder handed down his judgment in the case of the *Halsall and others v Champion Consulting Ltd and others* [2017] EWHC 1079 (QB). This was first decision to apply the SAAMCo information/advice guidance in the Supreme Court decision in *BPE Solicitors and another v Hughes-Holland* [2017] UKSC 21.

## The claim

The claimants were solicitors who instructed the defendants (collectively “Champion”) to advise them in relation to two tax mitigation schemes. The first was a “charity shell” scheme which was intended to provide tax relief through the mechanism of gift aid. The second was a film finance scheme which was intended to provide tax benefits arising out of sideways loss relief claimed on certain expenditure linked to the acquisition of film rights.

The claimants alleged that Champion had negligently induced them to enter into the schemes and in particular that the charity shell scheme was susceptible to challenge by HMRC. In relation to the film scheme, the claimants alleged that Champion had advised them that the scheme had a 75/80% prospect of success and failed to advise them that they could lose more than their initial investment.

The Judge found on the evidence that the Champion had advised the claimants to participate in the charity shell scheme, had

given them a 100% assurance that it would reduce their tax liability and had failed to advise them that there were circumstances in which HMRC might challenge aspects of the scheme. As for the film scheme, the Judge found that the claimants had made the representation as to the merits of success and had failed to advise in relation to additional liabilities which could arise out of the scheme.

The claim failed on limitation grounds but a key issue addressed by His Honour Judge Moulder concerned the nature of the advice provided to the claimants in relation to the charity shell scheme.

## Information/advice distinction

The defendants argued that the advice provided fell within the “information” rather than “advice” category (as identified by Lord Hoffman in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191). Those categories distinguish between the duty to provide information for the purpose of enabling someone else to decide on a course of action

## Any comments or queries?

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(the “information” category) and a duty to advise somebody what course of action he should take (the “advice” category).

The claimants asserted that the advice was within the “advice” category. They submitted that Champion had taken it upon itself to evaluate all the advantages and disadvantages of the charity shell scheme and had positively advised the claimants to participate in it. The claimants in particular relied on Lord Sumption’s judgment in *BPE* and his guidance on distinguishing between information and advice cases.

His Honour Judge Moulder found that the advice provided by Champion fell within the “advice” category. He relied in particular on paragraphs 40 and 42 of Lord Sumption’s decision in *BPE*. In that case, Lord Sumption said that whether an adviser had given information or advice depended on whether he was responsible for “guiding” the whole decision making process, or whether he had simply “contributed a limited part of the material” on which the client relied in deciding whether to enter into the particular transaction.

His Honour Judge Moulder also noted that Lord Sumption had not suggested that it was necessary for the adviser himself to have made the decision as to whether to proceed in order for a particular case to fall within the “advice” category. The client would always make the ultimate decision to go ahead. The key distinction was whether the client retained any responsibility for assessing the merits of proceeding with the transaction. In this case, the adviser had retained full responsibility for assessing the merits. The tax adviser had “guided the whole decision-making process”.

### Commentary

This is the first case to apply Lord Sumption’s guidance on the information/advice distinction. It did not fall at one or other end of the “advice” and “information” spectrum (such as an investment adviser or valuer). It fell within the continuum in between. Accordingly it is informative to see the Judge apply Lord Sumption’s guidance to a particular set of facts.

One of the concerns raised by the defendants was the risk that the general categorisation of tax planning advice as an “advice” case would widen the class of different advisers who would be providing advice rather than information. That class could extend to accountants and solicitors, not just tax advisers. This suggestion was rejected by the Judge. He made it clear that the categorisation depended on the factual circumstances and the determination of the nature of the advice being given and not the type of adviser giving the advice.

The nature of solicitors’ work means that their advice ordinarily falls into the “information” category. In this case the solicitors were susceptible to “advice” categorisation because they guided the client in the whole decision-making process. Notionally asking the client to take the final decision as to whether to proceed did not move the advice into the “information” category.

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