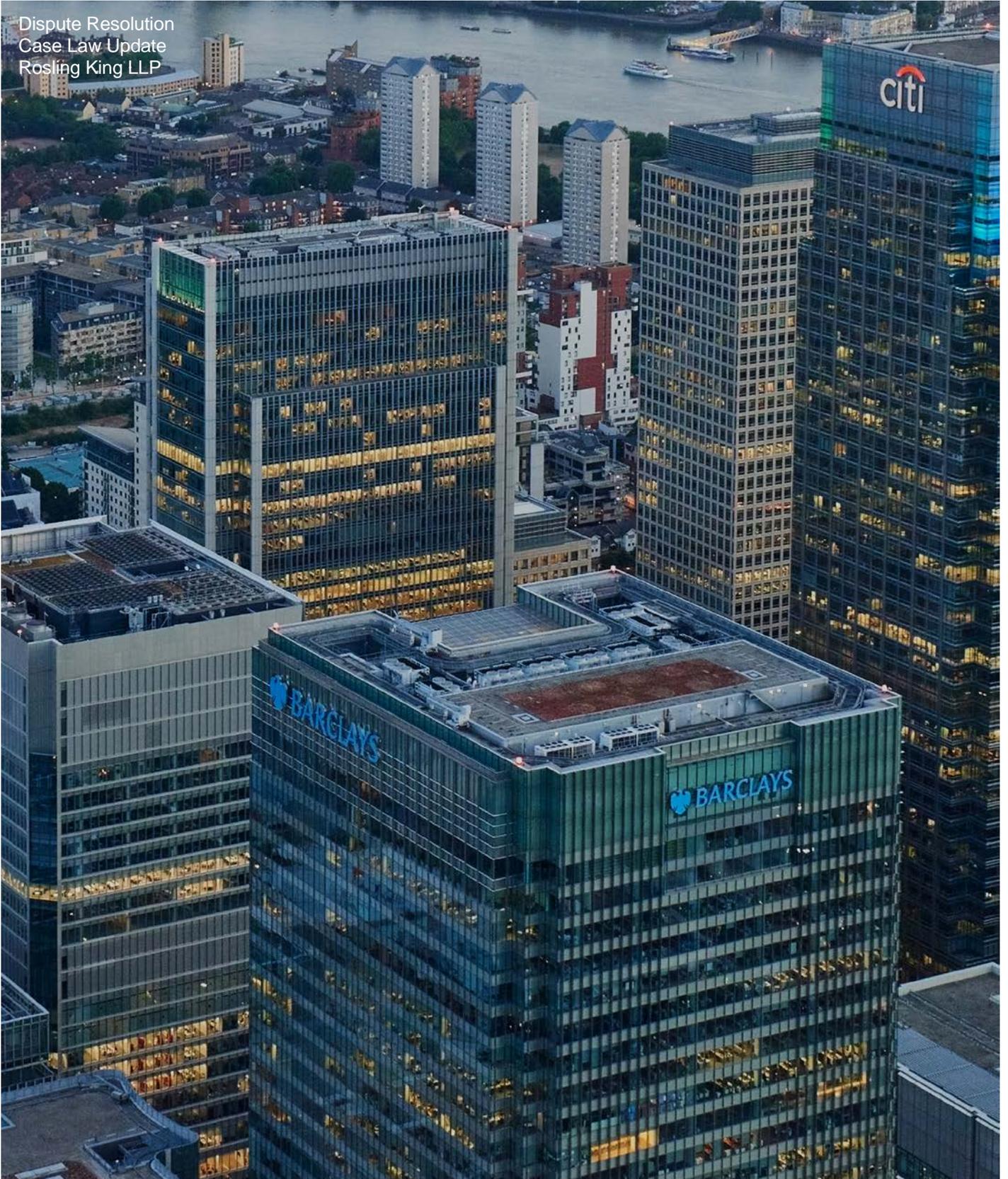


Dispute Resolution
Case Law Update
Rosling King LLP



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In the recent case of *Barker v Baxendale Walker Solicitors (a former firm) and another EWHC 664 (Ch)* the High Court dismissed a claim for professional negligence in respect of advice given in relation to a tax avoidance scheme. Despite being in breach of duty, the Court found that the firm's breach was not causative of the claimant's loss claimed in the proceedings.

Background

The claimant, B, was looking for an exit strategy for the shareholders of his business, including himself. As the Capital Gains Tax liability on the sale of his shareholding was to be considerable, B sought tax planning advice and subsequently received two suggested options; a private trust unit scheme and an employee benefit trust (EBT) scheme. B was then introduced to the defendant firm (BWS) as they were solicitors specialising in tax planning and avoidance schemes.

In September 1998, BWS explained the concept of an EBT, its structure and requirements in line with their interpretation of the governing statute. Following BWS's advice B entered into the EBT scheme which, if successful, would have avoided significant Capital Gains Tax and Inheritance Tax liability.

HMRC raised assessments and challenged the scheme in 2010 and subsequently B was advised that the HMRC was likely to succeed. B's total liability to HMRC including interest and penalties could amount to £25 million, however HMRC indicated it would accept £11,266,722 and settlement was reached on that basis.

In April 2013, following the EBT being wound up and settlement achieved, B brought proceedings against BWS on two bases. The first, that BSW were negligent in that they advised that the EBT would satisfy the requirements for an EBT if B's wife and children were excluded during his lifetime but could benefit after his death. However, on the preferable construction of s 28(4) Inheritance Tax Act 1984 they had to be completely excluded. The second, or in the alternative, if BSW were not negligent in putting forward their construction, then BWS should still have warned B of the significant risk that their construction could be considered incorrect. B alleged that, had he been advised in either of these terms, he would not have gone ahead with the EBT scheme.

Decision

The Court observed that *"the relevant question was whether a reasonably competent specialist tax lawyer at the time, with particular expertise in tax avoidance schemes, applying proper skill and care, could have advised as BWS did regarding the EBT scheme."* The fact that other tax advisors may have taken an alternative view or that the statutory interpretation was eventually found to be incorrect by the tax tribunal did not establish negligence.

The Court accepted that BSW had not been negligent in their interpretation of the statutory provision. However, it found that they should have, in the course of advising B, made clear that since the scheme was a tax avoidance scheme (and that there was a possibility of a challenge by the HMRC) there was the chance that the scheme would not be held if the scheme was required to be defended in legal proceedings.

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BSW should have given B a “general health warning” about the risks of implementing a tax avoidance scheme, and the government’s attitude towards such schemes, and therefore the Court found BSW was in breach of duty for failing to give this warning.

The Court also found, on the facts, that had B received such a warning it would not have deterred B. He was aware that the scheme was an aggressive one and B would have entered into another scheme had he known that there was the possibility that the EBT would not succeed.

Subsequently, the Court found that the breach of duty was not causative of the loss that had occurred. It was accepted that had B received such a high level warning he would not have entered into the EBT scheme. However, the Court rejected the argument that BWS should have given B a high level warning on the significant risks associated with the EBT scheme. A solicitor whose interpretation of the statute was likely to be correct could not be in breach of duty for failing to warn their clients that they might be wrong.

Commentary

This judgment establishes important principles as to whether an advisor who gives correct advice about the construction of statute is nevertheless negligent if he does not give more than a "general health warning" that he might be wrong. This decision indicates that, in many cases, it will be appropriate for a “general health warning” to be given regarding the possibility of challenge or the risks of the course of action being proposed. The case also demonstrates the importance (and potential associated costs) of causation in professional negligence claims. Although the solicitor was found to be negligent in failing to give a “general health warning” and sizeable damages could have been required to be paid, the breach was not causative of the loss as the facts indicated that the claimant would have proceeded regardless.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.