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Remuneration packages: Income versus capital?

For more information, please contact Steven Holden on **0845 55 55 321**

By Steven Holden

For the last 20 years, Capital Gains Tax has been charged at an effective rate related to your income. So if you were a higher rate taxpayer, your gains would have been subject to tax at 40 percent, or a percentage thereof depending on the levels of relief that you could claim. This removed any advantage in receiving remuneration that was subject to Capital Gains Tax rather than Income Tax.

This changed on 6th April 2008, when the Chancellor set the headline rate for Capital Gains Tax at 18 percent (or an effective rate of 10 percent where Entrepreneurs' Relief is available). It should, therefore, come as little surprise that advisers and employers are looking to remuneration packages which are subject to Capital Gains Tax rather than Income Tax to reward their employees. Their focus has been further sharpened by the announcement that, from April 2010, the highest rate of Income Tax (for those earning more than £150,000) will rise to 50 percent, with the personal allowance tapering down to zero for those earning more than £100,000 (giving an effective rate of over 60 percent!).

Share schemes are one of the most common and popular forms of employee capital remuneration. HM Revenue & Customs (HMRC) approved share schemes are particularly attractive because as the normal Income Tax or National Insurance Contributions are levied at lesser amounts on gains, as they are subject to Capital Gains Tax instead. Such schemes include the Save as You Earn (SAYE) scheme, Share Incentive Plans (SIPs), Company Share Option Plans (CSOPs) and Enterprise Management Incentives (EMIs).

We most commonly find ourselves advising small to medium-sized enterprises on EMI schemes. In addition to the obvious tax advantages, the EMI share scheme enables companies to incentivise and attract key staff by giving them equity shares in the business. This is ideal for firms which are slightly short of cash, but want to keep or attract experienced and able staff.

Making pay rises in the current climate is not an option for many firms, and for their higher earning key staff it is no longer particularly attractive either. However, through an EMI scheme, employers can really incentivise their staff without paying out precious cash, or pushing those employees into the new higher tax brackets – and all without giving up control of their businesses.

EMI options can be structured in such a way that they can only be exercised on defined trigger "exit" events, such as when the business is sold. That way, company owners can retain the sole rights to dividend payments and voting. Meanwhile, employees have been incentivised with a financially rewarding share of the business, which shows them how valuable they are to the firm.

Tenant liquidation/administration – an end to future rent? Not quite...

For more information, please contact Harjie Bindra on 0845 55 55 321

By Harjie Bindra

Liquidation

When a tenant has gone into liquidation (or administration as described below), a landlord's initial reaction is to surrender all hope of receiving any future rental income. If the liquidator chooses to disclaim the lease, a landlord is unlikely to see any further rent, unless there are guarantors in place who are liable. In those circumstances, a landlord will join the long list of other creditors and will have no preferential status.

However, if the liquidator does not disclaim the lease, a landlord may be able to argue that the rent which continues to be due (from the date of the liquidation) is an expense of the liquidation. If this argument is successful, the landlord would have priority over the other creditors as well as the liquidator's own expenses. This emanates from the Insolvency Rules, which provide that the liquidator's first priority is to pay the *"expenses properly chargeable or incurred by ... the liquidator in preserving, realising or getting in any assets of the company"*. If the liquidator therefore retains the lease in order to sell it or to continue trading, a landlord could argue that this is an expense of the liquidation. However, the landlord must still show that the lease is being retained "for the benefit of the winding up".

Service charges may also fall within the same argument, but damages for disrepair are likely to fall outside.

Administration

Whilst there appears to be no specific reported case, it is reasonable to assume that the courts will adopt a similar stance to the "liquidation expense" principle with regards to rent falling due post-administration.

The Insolvency Rules state that *"The expenses of the administration are payable in the following order of priority.... any necessary disbursements by the administrator in the course of the administration"*. So, if the Administrator has retained the premises for the purposes of selling the business as a going concern, it is arguable that the rent is an administration expense falling within the Rules. If the rent qualifies as an administration expense, it would enjoy privileged status and become payable out of the property under the administrator's control in priority to any relevant floating charge.

Landlords should not, therefore, readily accept the liquidator or administrator's refusal to pay rent without fully investigating the possibility of the rent qualifying as an expense of the liquidation or administration.

Preparing your business for swine flu

For more information, please contact Sally Morris on 0845 55 55 321

By Sally Morris

Latest government reports indicate that one in three people will contact swine flu this winter. This could have devastating effects on businesses that are not prepared.

Staff will be absent for a number of reasons - they may be ill themselves, caring for sick relatives, or could be stranded due to travel restrictions.

Scientists are also claiming that the number of cases of swine flu could be reduced by 45 percent if schools remain closed for up to 12 weeks after the summer break. This will impact significantly on employees with children who may be absent as they have no available child care.

In order to be fully prepared for the outbreak, you should consider the following:

Make sure that you have contingency plans for the absences. Could you:

- Enable staff to work from home - do you have the IT systems in place to allow this?
- Set up more telephone conferences or web cam meetings to avoid staff contact?
- Find another source of employees to cover absences - for example, recently retired employees?
- Train staff so that they could carry out different roles to cover for absences?

Review your existing sickness and absence policy AND manage sickness effectively

The government are looking at an initiative that allows employees to self-certificate for periods of up to two weeks during the height of the outbreak. Many employers are concerned that this could be open to abuse. Absences should therefore be carefully monitored, and good management should reduce the risk of such abuse.

Health and safety obligations

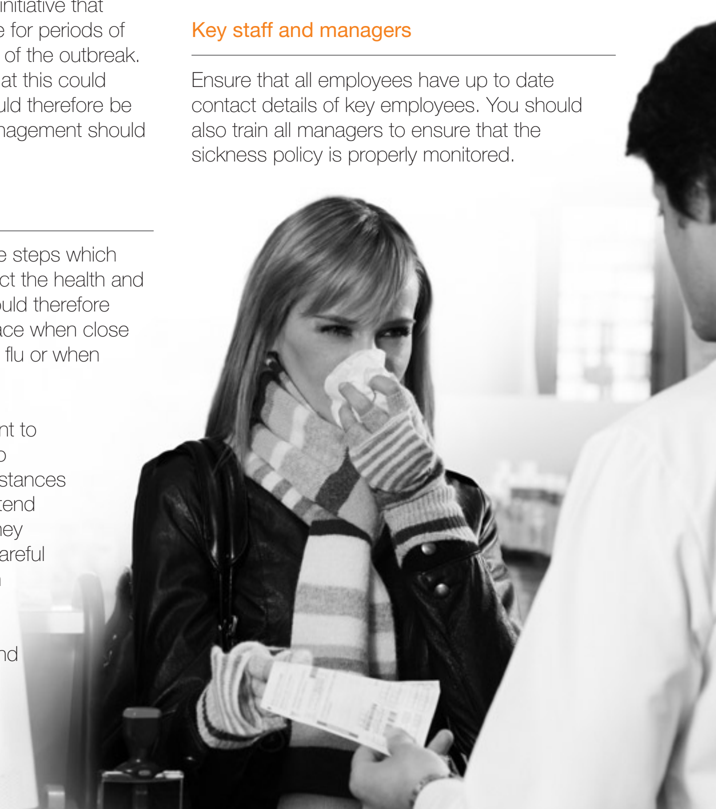
Employers are under a duty to take steps which are reasonably necessary to protect the health and safety of their employees. You should therefore consider what policy to have in place when close relatives are diagnosed with swine flu or when employees have mild symptoms.

For the sake of clarity you may want to consider issuing clear guidelines to employees, setting out the circumstances in which they will be required to attend work and the situations in which they will be required to stay away. Be careful about withholding pay during such absences as, without any express contractual right to do so, you are likely to be in breach of contract and risk a constructive dismissal claim. It is good practice to consult with employee representatives about any proposals you may have in this regard.

You should have also considered how you will treat vulnerable employees, such as those with underlying medical conditions or pregnant women.

Key staff and managers

Ensure that all employees have up to date contact details of key employees. You should also train all managers to ensure that the sickness policy is properly monitored.



A Clean Break – now more than ever!

For more information, please contact Julia Bond on **0845 55 55 321**

By Julia Bond

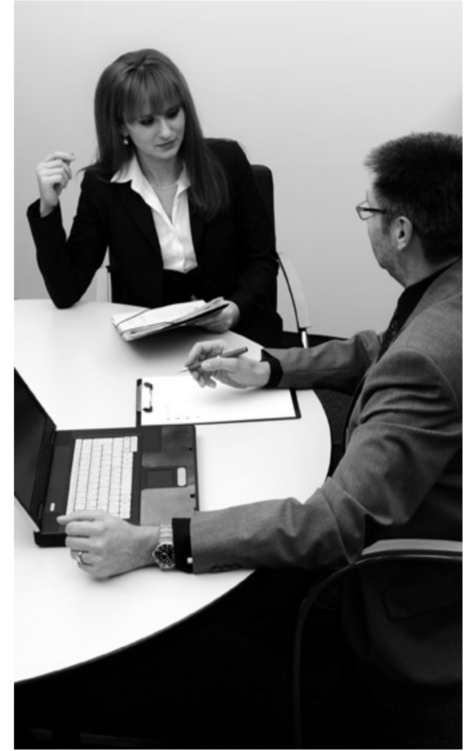
During the recent difficult financial times many businesses will have seen their profits diminish. What happens when, just as you think things cannot get worse, your marriage breaks down? If, sadly, a business owner is now faced with matrimonial proceedings, it will be more critical than ever to ensure that there is an Order for a Clean Break between the parties at the conclusion of financial proceedings to deal with the matrimonial assets.

A Clean Break ensures that neither party to a marriage can bring any further applications for financial provision against each other. Whilst the value of businesses are low, the opportunity to settle matrimonial proceedings might be advantageous, particularly before the market place recovers.

In the absence of a Clean Break, a party to the marriage might bring an application to vary any Orders for income and deferred payments of capital that have been made on dissolution of the marriage. Orders for income (Periodical Payments) can be increased or decreased by a Court on an application by either party during the lifetime of the Order. Clearly, this might have a profound impact on a recovering business in future years. Recently the Court of Appeal in the case of HVOROSTOVSKY –v- HVOROSTOVSKY made an Order in favour of a wife who applied to vary her maintenance payments. The woman was the former wife of a successful Opera singer and an Order for income had been made in her favour following a Divorce in February 2001. The husband had subsequently remarried and had two more children.

In the intervening years the husband`s income had grown substantially. The first wife then applied to vary the income payments upwards in her favour. The Court of Appeal decided that the wife was entitled to an increase in her income payments and held that the "single factor of greatest significance is the husband`s greatly increased income".

In times when financial recovery is hoped for and business owners plan to increase their profits, this judgement provides a timely warning. Family practitioners will be advising that any income Orders ought to be capitalised as soon as there is the financial wherewithal to do so. This will ensure that a Clean Break can be achieved and prevent any applications being subsequently made to substantially increase the income received by one party.



Shareholders and partners protection

For more information, please contact Alexander Hall on **0845 55 55 321**

By Alexander Hall

When a partner within a partnership or a shareholder of a private company dies, the issue of who should get the partnership share or the shares in the company arises - and for what value.

Disputes between the personal representatives or beneficiaries under the Will or intestacy of the deceased (PRs) and the remaining partner(s) or shareholder(s) can occur in relation to the ownership and value of the partnership share or the shares. The Articles of Association of many private companies give directors the discretion to refuse to register the PRs as shareholders. Surviving partners and shareholders have been known to transfer the assets of the business to a new entity in order to avoid having to buy the partnership share or shares from the PRs for a fair value.

Such disputes may be avoided by the use of a specific type of agreement. For example, the shareholders of a private limited company agree that, on the death of one of them, either the surviving shareholders may exercise an option to purchase the shares from the PRs or the PRs may exercise their option to sell the shares to the survivors.

The agreement includes a method of calculating the value of the shares, which is linked to life insurance policies that each shareholder agrees to take out and maintain, so that on death the value is paid out.

The insurance policies are written in trust by each shareholder for the other shareholders and, on the death of one of them, the proceeds of the policy may be used by the survivors to purchase the shares from the PRs.

Not only does such an arrangement assist in the prevention of disputes, but the survivors retain control of the company, do not have to deal with new shareholders (the PRs), and do not have to find any funds in order to purchase the shares. This assists with the continuity of the business.

In addition, the PRs benefit from the deceased's hard work by having a buyer for the shares that, without that market, might otherwise have been valueless.

Take legal advice

Many clients come to us following a discussion with their IFA, who has encouraged the client to purchase the insurance policies from them. IFAs should correctly point out to their clients that they need to take legal advice before taking out the insurance policies, to ensure the correct framework exists. It is important that certain matters are checked first.

For example, the Articles of Association of the company may already contain provisions as to the transfer and value of shares should a shareholder die. Alternatively, the shareholders may have entered a Shareholders' Agreement, which may contain similar provisions (and the same is true for partners who may have a Partnership Agreement).

These documents may conflict with the proposed arrangement and may be fatal to it.

There are other ways in which a standard agreement may be inappropriate. It is also important to make sure the trust deed used to write the insurance policies in trust is carefully drafted to avoid a scenario where the survivor receives the policy proceeds, but fails or refuses to purchase the shares from the PRs.

These agreements should be an important part of your succession planning if you are a partner in a partnership or a shareholder in a private limited company. Whilst this may be considered at any time, the issue is best dealt with at the time of making a Will or when seeking tax and estate-planning advice.

mfg appoints a liquor licensing specialist

For more information, please contact Amanda Pillinger on 0845 55 55 321

Amanda Pillinger

mfg Solicitors has appointed Amanda Pillinger as an associate solicitor. Amanda specialises mainly in Employment Law, but is also a well-respected liquor licensing lawyer. She has been described in the Legal 500 as "well regarded amongst her peers", while her clients have said that she is willing to go the extra mile. We are excited that she has chosen to join mfg.

"I am looking forward to continuing my licensing work with mfg," says Amanda. "I have a very practical approach to licensing applications. Having spent my student years working behind the bar, I am aware that licence holders appreciate good, straightforward and honest advice. I believe that I give this to my clients.

"Much of my work in licensing involves negotiating with police, environmental health, trading standards and fire officers, as well as local authorities. My in depth knowledge of licensing legislation, together with my ten years' experience, ensures that such negotiations are effective and beneficial to my clients.

"I have been involved in numerous applications before local authorities and, on appeal, magistrates throughout the country. I get to know and understand my clients' business and aims, so that I can offer commercial advice and obtain the best possible results."

Recent cases Amanda has been instructed on include:

- obtaining a licence for a major supermarket chain, despite receiving over 30 residential objections
- obtaining a 5am licence for a bar, despite receiving objections from the police and the environmental health officer
- successfully defending an application to review an application by a local resident for a club premises certificate to be revoked

Licensing Law is an extremely specialist area. If you wish to discuss any licensing issue, please contact Amanda.

New Partner Harjie Bindra

Harjie promoted to partner

For more information, please contact Harjie Bindra on 0845 55 55 321

mfg Solicitors is delighted to announce the promotion of Harjie Bindra to partner. Harjie joined mfg Solicitors in May 2007 to bolster the strength of the commercial litigation division, and now heads the property litigation team.

As a specialist commercial landlord and tenant litigator, Harjie provides invaluable advice and assistance to both landlords and tenants on a wide range of issues, including contested lease renewals, lease termination, dilapidation claims, actions for breach of covenants, possession claims and enforcement.

You may contact Harjie on 0845 5555 321 or harjie.bindra@mfgsolicitors.com

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