As Head of RadcliffesLeBrasseur’s Tax and Private Client Department, I am delighted to announce that three solicitors have recently joined our department:

Hetty Maher trained at Tunbridge Wells firm Cripps Harries Hall and qualified as a solicitor three years ago. Hetty deals with all aspects of private client work.

Elena Tzialli trained at the London office of Pitmans Solicitors and qualified as a solicitor eighteen months ago. Elena has been involved in a wide range of private client activities for onshore and offshore clients.

Emma Coombs trained at RadcliffesLeBrasseur and qualified as a solicitor in September 2011. Emma assists with all aspects of private client work.

I hope you will join me in welcoming Hetty, Elena and Emma to the department.

New accolades
I am also pleased to report that I have just completed the Advanced Diploma in International Taxation (ADIT), a specialist advanced qualification in international and cross border taxation. My final examination was on US tax, which is an area upon which I advise regularly.

Finally, since our last newsletter the RadcliffesLeBrasseur Tax and Private Client Department has received another award, this time the Corporate INTL Magazine 2011 Global Award for ‘Tax Planning Law Firm of the Year in UK’. The Magazine states that the awards celebrate “those who have been active over the past 12 months and who have shown excellence not only in expertise but in service during a difficult global economic downturn.” The awards “merit leading firms in their chosen specialisms throughout the world and, as Corporate INTL magazine is read by business leaders, investors and advisers globally, it’s a huge accolade for those firms that are awarded as winners in their chosen categories.”

Wishing you a very happy New Year.

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Tax Return deadline fast approaching
REMINDER: The deadline for filing your tax return online is midnight on Tuesday 31 January 2012.
Filing even one day late will incur a penalty of £100.
If you wish to discuss your tax affairs please contact Michael Zakiewicz by email michael.zakiewicz@rlb-law.com or call 020 7227 7375.
Historically, wealthy clients have used trusts to protect family money from taxation and extravagance. Following a series of recent high profile divorce cases, clients are becoming equally anxious to protect their assets from financial claims made by a husband or wife on divorce. Some clients are now reviewing trust terms and letters of wishes with a view to protecting assets on divorce.

The Court's attitude towards, and powers in relation to, trusts

When considering financial claims on divorce, the main objective of the Family Court is to ascertain what financial resources are available and, adopting a broad-brush approach, to divide these as fairly as possible considering all circumstances of the case. In doing so, the Court will consider and take into account all of the parties’ financial resources. These may and often do include a whole raft of assets and income including property, company shares, pensions and interests in trusts. Clients are often surprised at how much discretion the Family Court has to distribute financial resources in order to achieve ‘fairness’ on divorce. Generally, Judges will find what they think is the right solution for a divorcing couple and find an appropriate interpretation of the law to achieve this.

Under the Matrimonial Causes Act 1973, the Court has a range of powers available to it. Importantly, as far as trusts are concerned, the Court has the power to vary the terms of ante- and post-nuptial settlements. Typically, a variation is made so that the husband or wife of a beneficiary under the trust is given income or capital from that trust. Establishing whether or not a trust is ‘nuptial’ is not always a straightforward exercise. However, generally speaking, a nuptial trust must have been made with reference to the marriage and, in terms of timing, the trust will have been made either in contemplation of the marriage or after it. The relevant law provides a very wide definition of what may amount to a nuptial settlement and, therefore, this often applies to a broad range of trusts.

If the resources in a nuptial trust only represent some of the marital assets then, usually, the Court will try to achieve a fair division of the overall assets and income without interfering with a trust. If all or most of the assets are held within a trust then, assuming the Court has the power to vary the terms of the trust, it is likely to do so. Even where the Court does not have the power to vary its terms, any trust or settlement could still be taken into account by the Court upon divorce as a relevant resource of the marriage. If a husband or wife has benefited from a trust not found to be nuptial in nature, either before or during the marriage, the Court can assume that such benefits will continue in the future. In those circumstances, the Court may make an ‘Encouragement Order’. Such an order requires the paying party to make financial provision for the other party on the basis and assumption that the paying party will receive assistance from the trust.

When trust assets are located in England and Wales, it is normally straightforward to enforce an English Court Order against them. However, for tax reasons, trust assets are often based offshore. In these circumstances, the precise location of the trust becomes very important. Specifically, parties and their lawyers will need to establish, as early as possible in divorce proceedings, whether or not an Order of the English Court varying the trust will be enforceable within the country where the trust is located. Encouragement Orders are often particularly relevant where a paying party is resident in England and Wales but the trust in question is based offshore in a country which will not recognise or enforce an English Court Order.

Latest case law

In the recent case of *Whaley v Whaley (2011 EWCA Civ 617)*, the Court of Appeal was asked to consider when a family trust is to be treated as a ‘resource’ of a party. The main issue for the Court was in relation to the assets available for division. The husband argued the total assets were £3.17 million. The wife believed they were £11.8 million. The main reason for the difference was that the wife argued assets in a trust were effectively available to the husband and, therefore, should be treated as a resource available to him. The husband disputed this. The case was tried at first instance in the High Court in 2010.

In the High Court, the Judge found that the trust assets (valued at approximately £7 million) were assets which were likely to be made available to the husband and, therefore, should be taken into account within the overall division of the capital. Specifically, the Judge found that the husband ‘simply told the trustees how the funds were to be deployed and they followed his instruction’ and that ‘there is simply no evidence of the trustees ever failing to provide funds for the husband’s needs’. Continued on page 3.
Is my trust protected if I get divorced? continued

Including the capital in the trust, the Judge found that the total assets were £10.4 million. The wife was awarded 36% of this including a substantial lump sum which, in order to pay, the husband would need recourse to the trust assets. The bulk of the trust capital had been brought into the marriage by the husband and, therefore, this was reflected in an unequal division of the overall assets. The husband appealed on the basis that the Order would put improper pressure on the trustees, would require them to act against their stated intentions ignoring their duties to other beneficiaries and require them to realise assets at a time when it was not commercially prudent to do so. The Court of Appeal looked again at all of the evidence in relation to the trust, its structure and operation. In considering the husband’s appeal, the question for the Court was whether the trust assets were ‘likely’ to be available to the husband. Specifically, if the husband were to ask the trustees to advance him capital, would they be likely to do so?

The Court of Appeal upheld the findings of the High Court that the trustees had acted in accordance with the husband’s wishes and were likely in the future to make available such resources as the husband requested. In those circumstances, the Court of Appeal confirmed it had no alternative but to treat the trust assets as part of the husband’s resources and, accordingly, his appeal failed.

Protecting trusts from divorce

It is clear the Court has and regularly uses its powers to make orders in relation to trusts on divorce. It is important settlors fully consider the potential impact which divorce may have on a trust. There are a number of points and steps that settlors, trustees and beneficiaries should carefully consider in order to maximise the chances of a trust keeping assets out of the ‘matrimonial pot’:

- Avoid creating the trust at the time of the marriage and ensure the class of beneficiaries is as wide as possible
- Ensure the individual beneficiary who may divorce has no fixed interest in the trust assets and has no demonstrable control over the trustees
- The trustees should be aware that, should a beneficiary divorce, the history of distributions from the trust will be looked at closely by the family courts.
- If any distributions are made, it is better these are made as formal loans to the beneficiary

- Settlers should consider excluding themselves and their spouses as beneficiaries
- Trustees should be aware that, should a beneficiary divorce, the files of communications and other records in relation to the trust are likely to be scrutinised by the Family Court. Hence, letters of wishes should be worded carefully and regularly reviewed to protect, as much as possible, against financial claims on divorce
- Consideration needs to be given to beneficiaries being excluded from a trust if they fail to enter into a pre-nuptial agreement

The above is only a brief summary of the position. The Court’s treatment of trusts on divorce is, in itself, an evolving and complex area of matrimonial law. If you are concerned about the impact divorce may have on your trust assets or you are thinking of setting up trusts in order to protect assets, it is vital you obtain expert legal advice on these issues.

For further information please contact Ruben Sinha.
Why is estate planning important?
It is vital for us all to plan for “the inevitable”, but few of us properly understand why. Good estate planning, which starts with putting in place a Will, ensures that your assets pass to your chosen beneficiaries. Excellent estate planning ensures that those assets pass in the most tax-efficient manner possible, often significantly reducing the potential Inheritance Tax payable.
These issues are relevant to us all, but there are some key matters that business owners in particular must consider.

Your business assets form part of your estate
This means that:

• They will pass under your Will, or if you do not have a Will, under the intestacy rules. It is a common misconception that in the absence of a Will all of your assets pass to your surviving spouse or civil partner. Under the intestacy rules the destination of your assets depends on the value of your estate and which family members have survived you.

• They are potentially chargeable to Inheritance Tax. Whether or not your estate will be subject to Inheritance Tax depends on the type of assets that you own, to whom the assets are to pass and the overall value of your estate. However, Business Property Relief (BPR) can provide up to 100% relief from Inheritance Tax for qualifying business assets, which include:
  • a business or an interest in a business;
  • a holding of unlisted shares or AIM-listed shares;
  • a holding of listed shares or securities that give you control of a company; and
  • land, buildings, plant or machinery used wholly or mainly in the business throughout the last two years prior to death.

Inheritance tax is currently charged at 40% of the value of assets that exceed the ‘nil rate band’ threshold, which is presently £325,000. The figures speak for themselves; BPR is a valuable relief that should not be wasted.

How can BPR be wasted, and why does it matter?
The most common way that BPR can be wasted is if your business assets pass to someone who is already an ‘exempt’ beneficiary for Inheritance Tax purposes, such as your surviving spouse or civil partner. In that scenario your assets would not be subject to Inheritance Tax on your death, but they would then form part of the estate of your spouse or civil partner, and may not qualify for BPR when your spouse or civil partner dies. Continued on page 5.
If the relief is not available on the death of your spouse or civil partner and the business assets subsequently pass to a ‘chargeable’ beneficiary (such as children or other family members) those assets will be taxable to the extent they exceed your spouse’s or civil partner’s nil rate band. This is a situation that can be avoided with proper estate planning.

What is the solution?
It is common to build into a Will a specific gift of business assets on discretionary trusts, thereby ensuring that BPR, if available, is not wasted. The trust would be held for a class of beneficiaries, which may include your spouse or civil partner and other ‘chargeable’ beneficiaries such as children and grandchildren.

This structure provides the opportunity and flexibility for your business assets to be passed to ‘chargeable’ beneficiaries in a tax-efficient manner, whilst allowing for your spouse or civil partner to receive the business assets (or the income from them) if required.

What practical matters should I consider?

Business owners are also faced with practical issues such as:

- **How will your business continue to run immediately after your death?** Shareholders agreements, Articles of Association and partnership agreements sometimes contain specific provisions relating to the death of directors, shareholders or partners, but do you know what those provisions are (if any)?

- **Will the beneficiary of your business assets be involved in the running of the business, or might the business (or your share in it) need to be sold?** The use of a discretionary trust in a Will provides flexibility so that your executors may deal with a variety of eventualities.

- **Would it be preferable for the surviving shareholders to buy your shares from your estate after your death?** If so, how would the purchase be funded?

For shareholders, the solution to this final issue is to put in place a cross-option agreement between all of the current shareholders in the company and, at the same time, to insure the life of each shareholder using a term life assurance policy, under which the insured sum would be calculated by reference to the value of the shares owned by each shareholder.

This agreement would provide that, after your death, the surviving shareholders would have the option and ability to purchase your shares from your estate, using the proceeds from the life assurance policy to do so.

These matters highlight the need for us all, but especially business owners, to carry out proper estate and tax planning.

If you would like further details on any of the matters discussed above then please contact Sharon Healy.

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To contact Sharon, please click on her email address.
When the employment relationship comes to an end (this is particularly so in the current climate of economic uncertainty when opportunities are fewer and competition more fierce), employees want to be free to take advantage of the skills they have acquired during the course of their employment. However, more often than not, an employer will seek to restrict an employee’s ability to work for a competitor by including restrictive covenants in contracts of employment which it then seeks to enforce.

Sejal Raja considers whether or not such clauses are enforceable.

The contractual terms used by employers to restrict ex-employees’ activities after they have left employment are known as restrictive covenants and fall into three broad categories:

- non-solicitation covenants, which prevent ex-employees from soliciting an ex-employer’s customers (and sometimes prospective customers) or suppliers;
- non-dealing covenants, which prevent ex-employees from dealing with or acting for an ex-employer’s customers or suppliers (this goes further than non-solicitation as it includes approaches made to and not just by the ex-employee); and
- non-competition covenants preventing ex-employees from working for or carrying on a business competing with the ex-employer.

Can employers seek to enforce such restrictions?

The Courts will not generally enforce a blanket ban on competition that is not reasonable. The Courts will weigh up the public interest upon an employee’s right to work against the employer’s entitlement to reasonable protection of their legitimate business interests.

What is a legitimate business interest?

In general terms, the Court is likely to enforce clauses designed to protect an employee exploiting confidential information, secrets or other confidential information. The clauses seeking to protect the employer’s business should not exceed what is necessary to achieve this legitimate aim.

Employees are normally prevented in law from disclosing information amounting to trade secrets after they have left their employment, whether or not their contract expressly prohibits it (and it almost always does). For this reason, the additional protection provided by non-competition covenants can be held to be unnecessary and, accordingly, non-competition covenants are therefore harder to enforce than non-solicitation covenants.

How wide is too wide?

Relevant factors include the geographical area to which the covenant applies, its duration and the commercial realities. A non-solicitation clause covering the whole world, lasting for eighteen months and concerned with all customers and suppliers of the group (whether or not the employee has had personal dealings with them) will almost certainly be too wide when applied to a mid-level executive working exclusively for one company in the group. However, when applied to a Global Operations Director, whose responsibilities span across the group, the position could well be different.

What happens when an ex-employee breaches a covenant?

It may be possible for the employer to obtain an interim injunction to prevent an ex-employee from breaching or continuing to breach a restrictive covenant (though any injunction will, of course, only last for the duration of the covenant). To bring a successful claim for damages, it is not sufficient for an employer to show that the covenant is enforceable and that the employee is in breach; it must also show that he has suffered a loss as a result of that breach. To establish loss, an employer will normally need to prove that, but for the breach by the ex-employee, the employer would have retained the business it claims to have lost. An employer may also have a cause of action against its ex-employee’s new employer if it can prove that the ex-employee was induced to commit a breach.

If you would like your contract reviewed prior to commencement of employment or if you are planning to work for a competitor or set up in competition and would like advice on the terms of your contract of employment, then please contact Sejal Raja who will be delighted to assist you.
UK signs agreement with Switzerland to secure billions in unpaid tax

The long-standing abuse of the secrecy of the Swiss banking system, aiding the concealment of the proceeds of tax evasion, is being vigorously tackled under a new agreement between the UK and Switzerland. As a result of negotiations dating back to 25 October 2010, on 6 October 2011 the UK Government signed an historic agreement with Switzerland under which billions of pounds of unpaid tax is expected to be recouped for the UK exchequer.

Following scrutiny by Parliament and the completion of Swiss ratification procedures, the agreement will come into force on 1 January 2013.

Under the new agreement:-

- existing funds will be subject to a one-off tax deduction;
- a withholding tax on investment income and gains will be imposed and a new information sharing provision will be established, allowing HMRC to discover whether a UK taxpayer has a Swiss bank account.

A quote from George Osborne, Chancellor of the Exchequer, reads, “We will be as tough on the richest who evade tax as on those who cheat on benefits. The days when it was easy to stash profits of tax evasion in Switzerland are over.”

The terms of the agreement are as follows:

Bank accounts held by individual UK taxpayers

In 2013, individual UK taxpayers who hold funds in Swiss bank accounts will be subject to a one-off deduction of between 19% and 34% (in respect of past tax liabilities), providing the account was open on 31 December 2010 and remains open on 31 May 2013.

The deduction will settle Income Tax, Capital Gains Tax, Inheritance Tax and VAT liabilities in relation to the funds in the account. The account holder’s anonymity will be preserved.

However, the deduction will not be applied if the account holder authorises the bank to disclose the account details to HMRC. Should such disclosure be authorised, HMRC will seek payment of unpaid taxes together with relevant interest and penalties.

Investments held by individual UK taxpayers

From 2013, income and gains arising on investments held by individual UK taxpayers will be subject to a withholding tax. The rate of tax will be similar to the top rates of UK tax: 48% on investment income; and 27% on gains. UK tax liabilities on the income and gains will be satisfied by the payment of this withholding tax and the account holder’s anonymity will, again, be preserved.

Where an account holder elects to authorise disclosure of the details of their income and gains to HMRC this withholding tax will not apply and the account holder will be liable to pay the related taxes in the UK.

Uncovering Swiss accounts

In addition to the existing provisions for information exchange already in place under the UK-Switzerland Double Taxation Agreement, a powerful new provision will soon allow HMRC to discover whether or not an individual UK taxpayer holds an account in Switzerland.

What will happen next

UK taxpayers who hold Swiss accounts will be contacted by the relevant Swiss bank or financial institution in due course.

The Liechtenstein Disclosure Facility is unaffected by this proposed agreement.

For further information, please contact Simon Goldring

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REMEMBER The Tax Return deadline: 31st January 2012
RadcliffesLeBrasseur secures Law Society’s new Conveyancing Quality Mark

RadcliffesLeBrasseur has secured membership of the Law Society’s Conveyancing Quality Scheme – the mark of excellence for the home buying process.

Our membership of the Scheme recognises the high standards we deliver in residential conveyancing and the professional quality of our services. We underwent rigorous assessment by the Law Society in order to secure Conveyancing Quality standard status which is based on the integrity of the staff involved, the firm’s good practice management standards and both prudent and efficient procedures.

The Law Society is promoting the accreditation scheme and its kitemark through national and local media coverage. The scheme is only open to members of the Law Society who meet the standards set by the scheme and has the support of insurers, lenders and regulators.

Please do not hesitate to contact Karen Mayne if you would like any further information regarding our conveyancing services.

Further information on the Law Society’s Conveyancing Quality Scheme can be obtained from www.lawsociety.org.co.uk/cqs

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We would be delighted to hear from you with any comments or feedback you may have in response to this newsletter. If you have received this newsletter in hard copy and would prefer to receive a copy by e-mail in the future, or vice versa, or you have any other comments or feedback then please contact: Victoria Fairley (victoria.fairley@rlb-law.com 020 7227 7329) or Sharon Healy (sharon.healy@rlb-law.com 020 7227 7414)

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The printed version of this newsletter uses material from sustainable sources.