Welcome to the first RadcliffesLeBrasseur Private Client newsletter

I am Simon Goldring, the Head of our Tax and Private Client department. This newsletter encompasses a variety of topical issues to provide a flavour of the Private Client services that RadcliffesLeBrasseur offers, which include domestic and international tax advice, estate planning, family, property and employment services. It has never been more crucial than in the current economic climate for individuals to be aware of the legal and practical matters that may have a bearing on their personal affairs and how they are structured, and RadcliffesLeBrasseur seeks to support and educate its clients in as many different ways as possible.

I therefore hope you will find the contents of this newsletter interesting and informative. Our aim will be to issue regular newsletters so that at all times our clients and contacts are kept fully abreast of changes that might affect them.

If you wish to discuss any of the matters contained in this newsletter or any other matter then please use the contact details provided in the following pages, or please contact your usual RadcliffesLeBrasseur advisor.

Please also feel free to distribute copies of this newsletter to any family, friends, clients or acquaintances you feel may wish to receive it.

With very best wishes for the Summer of 2011.

Simon Goldring CTA, ATT (Fellow), TEP
Partner and Head of Tax and Private Client
e: simon.goldring@rlb-law.com
t: 020 7227 7290

Award winning

I am pleased to take this opportunity to announce that the RadcliffesLeBrasseur Tax and Private Client department is now award winning.

We recently received the award for ‘Best Wealth Manager for Inheritance Tax and Succession Planning’ at the Wealth Management Awards 2011, voted for by readers of the Financial Times and Investors Chronicle and a select panel of judges. The Wealth Management Awards are “unique because they are based on the verdicts of one of the most financially literate and affluent groups in the UK” and RadcliffesLeBrasseur is proud to share this exciting news with you.

If you wish to discuss any of the matters contained in this newsletter or any other matter then please use the contact details provided in the following pages, or please contact your usual RadcliffesLeBrasseur advisor.

Please also feel free to distribute copies of this newsletter to any family, friends, clients or acquaintances you feel may wish to receive it.

With very best wishes for the Summer of 2011.

Simon Goldring CTA, ATT (Fellow), TEP
Partner and Head of Tax and Private Client
e: simon.goldring@rlb-law.com
t: 020 7227 7290

In this issue

Is a pre-nuptial agreement for you? • Lasting Powers of Attorney • Tax matters
Discretionary Bonuses explained • Love thy neighbour?
Deciding to tie the knot is one of the biggest decisions a couple will make in their lifetimes and yet many will fail to ask themselves important questions before they embark upon this exciting journey together. Whilst no one wishes to entertain the prospect of his or her marriage breaking down it does not follow that this possibility should be ignored.

The unfortunate reality is that divorce is a very expensive process and the wide discretion afforded to family judges can create uncertainty as to the outcome of a spouse’s financial claim. Thankfully, the recent Supreme Court decision of Radmacher v Granatino affords couples far more certainty if they take the prudent step of entering into a pre-nuptial agreement. Katherine Radmacher was a wealthy heiress who fought to uphold a pre-nuptial agreement entered into by her and her husband. The Court’s decision has set a clear principle that a pre-nuptial agreement will be enforceable in the UK provided that a) it is freely entered into by each party b) the parties have a full appreciation of its implications and c) it would not be unfair in the circumstances prevailing to hold the parties to the agreement. As a result of this long awaited decision more and more people are now appreciating the importance of securing an element of certainty as to how their wealth will be divided if the unexpected happens. I am sure that almost every reader of this article has a life insurance policy and/or a Will in place; a pre-nuptial agreement should not be viewed any differently. It is a very important and sensible protective measure and far preferable to the alternative of the matter being placed in the hands of the Court.

### Inheritance

Working together to reach an agreement on financial matters before marriage is often considered unromantic but it should be viewed as an important forum for understanding one another’s wishes and expectations for the future before those futures become entwined. Take, for example, inheritance. Many people feel very strongly that they wish for their family assets to stay within the family. Often the family home, paintings or heirlooms will be passed down through generation after generation and will have a sentimental value far beyond their market value. On divorce these assets can form part of the “matrimonial pot” to be divided as the Court sees fit.

There is nothing to stop the Court transferring the assets to the other spouse or ordering a sale and division of the proceeds. Indeed in a recent case, Robson v Robson, the Court ordered the sale of a stately home to enable a wife to obtain her share of the assets on divorce. This was ordered despite great resistance from the husband. A pre-nuptial agreement can protect inherited assets and importantly the Supreme Court stated in Radmacher that a term in an agreement that seeks to ring-fence inherited wealth is likely to be recognised as fair.

### Business protection

Small or family run businesses can be particularly vulnerable upon divorce. The Court looks at each party’s net worth before determining how to divide the assets and it is likely that the value of a shareholding will be taken into consideration. If the company does not have adequate provisions in its articles of association, then it is possible for the Court to order a transfer of shares to the other spouse. This is likely to be highly undesirable for the particular shareholder and for the company as a whole.

Even where the appropriate restrictions on transfers are in place to prevent a transfer to the spouse there is still the problem that, if the financial order on divorce is substantial, the shareholder in question may feel they have no option but to consider selling or transferring shares elsewhere to raise the funds to, for example, pay a lump sum or re-house. These difficulties could be avoided by a prenuptial agreement that ring fences company assets, provided, of course, that care is taken to ensure that it is entered into correctly and the terms are fair.

Continued on page 3.
Why should I get a pre-nuptial agreement?

Wealth protection

One of the most cited reasons for entering into a pre-nuptial agreement is to protect wealth that a person may have worked years and years to accumulate. As with inherited assets, the judges in Radmacher indicated that a term in a pre-nuptial agreement ring fencing pre-marital assets is likely to be fair. A pre-nuptial agreement in this situation can be very important in ensuring that a couple is marrying for the right reasons and indeed it expels the myth that pre-nuptial agreements are unromantic.

Following her Supreme Court success, Katherine Radmacher quite rightly pointed out that she entered into the pre-nuptial agreement precisely because she wanted her marriage to be free from any suggestions that it was a marriage for money:

“I know some people think of pre-nuptial agreements as being unromantic, but for us it was meant to be a way of proving you are marrying only for love. It was a natural part of the marriage process.”

Second marriages

A primary concern for any parent is to provide for their children. A pre-nuptial agreement can therefore be particularly important in the case of second marriages because, if the marriage fails, the assets that were intended to pass to the children from a first marriage may instead be expended in settling the financial claims relating to the second.

Nothing to lose?

Many couples feel there is no point in entering into a pre-nuptial agreement because they do not have sufficient assets. However the suggestion that pre-nuptial agreements are the preserve of the wealthy is a dangerous myth.

If your future partner has any debt, then over time this could become a joint matrimonial debt and it may be shared on divorce. A young savvy saver marrying someone who has accrued significant debts will be disappointed to see that their prudence may not be rewarded on divorce in the absence of an agreement. In addition a spouse may be surprised to find that money lent or gifted to them by a family member or friend may also be vulnerable on divorce. Such loans are commonplace in the current economic climate where young people struggle to get on the property ladder and turn to their parents for assistance.

Whatever your circumstances the resounding message from the Supreme Court is that couples should be able to take steps to plan for what should happen in the event of marriage breakdown and can do so. However, there are of course important safeguards in place to ensure that such agreements do not create injustice and as such it is vital that legal advice is sought so that every step is taken to produce an agreement that is likely to be upheld by the Court.

For further information please contact:

Carina Smith
Solicitor
e: carina.smith@rlb-law.com
t: 020 7227 6716
A Lasting Power of Attorney is a document which allows you to appoint a person or persons as your Attorney(s) to act on your behalf in the event that you lose mental capacity and you are unable to make your own decisions.

You may have been familiar with Enduring Powers of Attorney, which had a similar purpose. Following changes to the law in 2007, it is no longer possible to put in place an Enduring Power of Attorney, although if you have an existing Enduring Power of Attorney, it remains valid.

You can choose your spouse, civil partner, other relation, friend or indeed a professional person to act as your Attorney. You may appoint more than one Attorney and you can choose if they should act either together or alone. You may also choose to appoint substitute Attorney(s) to act in the event that the Attorney(s) you appoint cannot act. You can provide guidance within the Lasting Power of Attorney as to how you wish your Attorney(s) to act and set out restrictions should you wish.

A Lasting Power of Attorney must be registered at the Office of the Public Guardian if it is to be used. Registration can take place immediately so you have everything in place, hopefully, well before it is required. Alternatively, registration can wait until you are no longer able to manage your own affairs. As it takes several weeks to register a Lasting Power of Attorney, we normally recommend that your Lasting Power of Attorney is registered immediately so that it is ready for use when needed.

There are two types of Lasting Power of Attorney:

Lasting Power of Attorney for Property and Financial Affairs

The Lasting Power of Attorney for Property and Financial Affairs allows you to appoint an Attorney or Attorneys who will make on your behalf any decisions which you would normally have made for yourself in regard to your finances, such as the payment of your bills, matters concerning your property and its possible sale.

Although a Lasting Power of Attorney must be registered before it may be used, it can be used with your consent prior to your losing mental capacity. This makes it a very useful document as you may wish to activate it if you are travelling abroad or perhaps unwell in hospital and unable to sign documents.

Victoria Fairley, TEP
Associate
e: victoria.fairley@rlb-law.com
t: 020 7227 7329

Lasting Power of Attorney for Health and Welfare

The Lasting Power of Attorney for Health and Welfare allows you to appoint an Attorney or Attorneys who will make decisions regarding your health including medical treatment and general welfare, such as where you should live.

In addition, should you wish, you may also expressly give your Attorney(s) the right to give or refuse consent to life-sustaining treatment on your behalf.

This Lasting Power of Attorney differs from the Lasting Power of Attorney for Property and Financial Affairs in that it may not be used until you have lost mental capacity. It must still be registered before use but whilst you retain mental capacity, your Attorney(s) have no authority to act under it.  Continued on page 5.
Why should I have a Lasting Power of Attorney?

Lasting Powers of Attorney should form part of a general estate planning exercise and should be put in place well before required. In just the same way that you would prepare a Will to deal with your affairs following your death, you should also be aware of the possibility of losing mental capacity and take steps to provide for your affairs to be managed on your behalf in this eventuality.

Mental capacity may be lost either gradually as a result of old age or illness, or suddenly as a result of an accident. Once mental capacity is lost, it is too late to consider Lasting Powers of Attorney and it will become necessary for a family member or other interested party to apply to the Court of Protection to be appointed as a Deputy to act on your behalf. The process of appointing a Deputy is expensive and lengthy and not one that we would recommend.

What information do I need to provide for a Lasting Power of Attorney?

We will need the full names, addresses and dates of birth of you and your chosen Attorney(s) and any substitute Attorney(s). If you are appointing more than one Attorney, we need to know if you wish to appoint your Attorneys jointly or jointly and severally, in other words if they should act together or independently of one another. We will also need details of any restrictions or guidance you wish to include.

We will need the full details of any individuals whom you wish to be notified when the Lasting Power of Attorney is registered.

The Lasting Power of Attorney requires either a longstanding friend or a professional, such as your solicitor or GP, to act as a Certificate Provider to sign the Lasting Power of Attorney to confirm that he or she believes that you understand the nature of the document and are under no undue influence or pressure to enter into it. Your advisor at RadcliffesLeBrasseur would be pleased to discuss acting as a Certificate Provider for you.

If you would like to put in place a Lasting Power of Attorney, please contact Victoria Fairley or Chris Lawn who will be happy to assist and advise you.
Many employers have traditionally chosen to incentivise their employees with bonus schemes. In the current economic climate it is essential that an organisation can work to strict budgets and gauge their fixed costs, whilst at the same time use the flexibility of bonus and share payments to retain and develop those employees who are vital to the organisation’s success.

Over the last few years financial institutions and businesses, in particular Banks, have come under increasing pressure to withhold bonus payments with the Business Secretary, Vince Cable, warning that they must not “engage in another self-indulgent bonus round”. However, as the amount of bonuses paid are at the forefront of both the media and the Court’s attention, the boundaries between contractual and discretionary bonus schemes have become blurred with Courts more willing than ever to interpret discretionary bonus schemes as actually giving employees contractual or quasi-contractual rights.

So just how discretionary is a discretionary bonus?

Typically bonus schemes are either contractual or discretionary. Where bonus schemes are contractual the issue of liability or entitlement is usually straightforward. The non-payment of a contractual bonus normally entitles an employee to seek to enforce payment by claiming breach of contract. Employers therefore often prefer a discretionary bonus scheme structure, which historically has allowed them to withhold bonus payments at their discretion and/or subject to the organisation’s or an individual’s performance criteria.

A discretionary bonus scheme usually states that a bonus is payable entirely at the employer’s discretion and/or subject to terms such as performance-based criteria. Employees will seek assurances, especially when trying to decide whether to join a new employer, of the likely level of their future bonus. However, it is not unusual for written bonus schemes to exclude any oral representations or pre-contractual negotiations.

Absolute discretion

Where employers have reserved an absolute discretion in respect of the level of bonus payable the Courts have held that, whilst it would be reasonable of an employee to expect to receive a bonus, their employer is not contractually obliged to confer one. By way of example, in the case of Lavarack v Woods of Colchester Ltd [1997] the employee’s contract specifically stated that payment of a bonus, if any, was “as the directors may from time to time determine”. The Court of Appeal held that, although an employee, on the basis of this wording, might reasonably expect their employer to provide them with a bonus, the employer had reserved an absolute discretion and therefore was not contractually obliged to confer a benefit on the employee.

Partial discretion

The Court provided further guidance, as to the nature and extent of an employer’s “discretion”, in the case of Clark v BET plc [1997]. In this case the employer’s bonus scheme provided for a maximum bonus in any year. The scheme also specifically stated that the performance measures and terms for vesting the bonus awards would be notified to the employee each year. Whilst this created a discretionary bonus scheme, in contrast to the previous case, the employer’s discretion to award a bonus was held to be only partial and not absolute. The Court held that the wording of the bonus scheme created a legitimate expectation that an employee would receive a bonus; the employer did not have discretion as to whether or not to pay one. The employer’s discretion was partial and therefore was only in respect of the actual amount of any such bonus being paid.

Sejal Raja
Partner
e: sejal.raja@rlb-law.com
t: 020 7227 7410
How ‘discretionary’ is a Discretionary Bonus? continued

Exercise of conditions

The Court gave further guidance that, where conditions or criteria, such as performance, are used as factors in the decision making process, the employer’s discretion will be restricted by the fact that it must not be exercised either in bad faith or capriciously.

In the recent case of GX Networks Ltd v Greenland [2010] the employer’s bonus scheme was based on sales achieved by employees in excess of their individual targets. The employer had the opportunity to review individuals’ targets quarterly to ensure they were challenging but achievable. The employer knew the employee would substantially over-perform and exceed her targets but did not review them, as it did not want to de-motivate her. The employee’s employment contract permitted the Directors to reduce her bonus to nil “if required although such cases will be by exception only”. The employee achieved over three times her target and in spite of this her employer sought to use its discretion to cap her bonus. The Court of Appeal held that the employment contract did not allow the employer to do this, that the cap could only be used in exceptional circumstances and that in a scheme designed to reward and encourage success, success in itself was not an exceptional circumstance.

Custom and practice

Irrespective of whether bonus schemes are labelled as “discretionary”, in determining whether an employee is entitled to a bonus Employment Tribunals will look at all the relevant circumstances surrounding the scheme. These would include whether or not it has been the employer’s usual “custom and practice” to make bonus payments in previous years. If so, it may be held that, whilst the employer thought it had discretion to award a bonus, due to its past practice in awarding bonuses the scheme in fact has contractual effect. This would prevent the employer from being able to withdraw from the bonus scheme without any prior notice, especially once the bonus year has already begun. Further, the term “discretionary” itself may not have a binding effect where an employer has a past practice of consistently awarding bonus payments.

When commencing employment, employees need to ensure that they review the terms relating to bonuses. It is important for employees to understand whether they will indeed be entitled to a bonus in the future and what criteria will need to be met to achieve the bonus target. In the first year of employment it is not unusual for employees to agree a guaranteed minimum bonus and, if this has been agreed, it should be clearly documented in writing. Finally, employees should review clauses, which deal with the payment of bonuses on the termination of employment. For example will a bonus be paid if working out notice or on garden leave? If the employer decides to end the employment immediately by making a payment in lieu of notice, will that include the payment of the bonus? Therefore employees should always review the terms of their contract prior to commencing employment and negotiate with their employer to ensure that the terms forming the basis of any bonus scheme are clear and employees understand what to expect in terms of future bonuses.

Contact Michael Elks or Sejal Raja, they will be happy to help.

Michael Elks
Partner and Head of Employment

e: michael.elks@rlb-law.com
t: 020 7227 7255
A conflict with your neighbour over property issues can be unpleasant and costly. Some of the most common can be avoided if you bear in mind the following.

Establishing boundaries
Establishing where a boundary lies or who owns a boundary wall or hedge can sometimes be difficult but boundary disputes can become costly and agreement with your neighbour is always desirable. Initially referring to the deeds of the properties involved may answer the point but if not, you should obtain legal advice as to whether there is a presumption that determines who owns what and who is responsible for maintenance.

Overhanging branches
If branches from a neighbour’s tree cross over your boundary, you are entitled to cut them back to the boundary point but you may not cross the boundary to cut the branches or even lean a ladder over the boundary without the neighbours consent, as this is classed as trespassing. Any branches that are cut down, along with any fallen fruit, must be returned to the tree’s owner if requested by them. If leaves from a neighbour’s tree fall into your Property, you have no legal right to ask them to clear them. However, if the leaves block a drain or gutter you can ask them to pay to have them cleared or to pay for the cost of any damage caused.

Tree roots
Any roots that have grown onto your land can be removed without the tree owner’s permission. Tree roots can cause structural problems to buildings and it may be necessary to involve a professional workman to remove them. If a professional is required it is the tree owner’s responsibility to pay their costs. It is always recommended to discuss these matters with your neighbour before proceeding.

Property disputes can become expensive very quickly if they reach a litigious stage. It is always recommended that any issues are discussed amongst the relevant parties and, if a satisfactory agreement cannot be reached, independent legal advice should be sought.

For further information contact Karen Mayne, she will be happy to help.

Karen Mayne
Partner and Head of Property
e: karen.mayne@rlb-law.com
t: 020 7227 7273

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)