

PRIVATE CLIENT BRIEFING

Issue 12

Welcome

Welcome to Issue 12 of **Private Client Briefing**, our periodical aimed at keeping you informed of current issues and news.

For further information on any issues raised in **Private Client Briefing** or individual legal advice generally please email tom.hewitt@burges-salmon.com.

Contents

- Caution needed when checking up on a spouse p2
- HMRC lose appeal p3
- Liechtenstein tax incentives deemed very attractive p4

Pre-nups work – but at what cost?

The well-publicised ruling of the Supreme Court in *Radmacher* means that pre-marital agreements, commonly known as pre-nups, are now more likely to be upheld on divorce, and so they will inevitably become more commonplace. For people who wish to have some certainty about what would happen to their assets in the event of divorce, and particularly those who want to protect family assets, legal advisers may now recommend having one. They are not however for everyone.

What did *Radmacher* say?

The judgment given by the Supreme Court, which must now be followed by the lower courts, introduces for the first time a presumption as to how the assets should be divided in the event of divorce; namely that the terms of pre-nups should be followed unless they are manifestly unfair. What this means is that, provided the terms of the pre-nup meets the basic needs of the parties and any children they have, a court is likely to uphold the terms in the event of divorce.

This is a radical shift in the law. There is now a recognition by the courts that people should be allowed to decide how their financial affairs are organised on separation. Provided there is no coercion by one party of the other and each of the couple understand the implications of the agreement they signed, the court will respect the terms and will not exercise their power to overrule it.

Who might benefit from a pre-nup?

People are increasingly taking advice about pre-nups. That is partly because they are commonplace in most other countries, but also because of inflation in English divorce settlements. Anyone who has or is likely to have assets which exceed basic needs may at least want to consider such an agreement if they wish

to protect those assets against future claims. However, there are certain circumstances where a pre-nup may be particularly appropriate; for example for those:

- who are marrying for the second time and wish to preserve assets for the benefit of their children from the first marriage;
- who wish to protect inherited wealth including a family business, trust or landholding;
- who have accumulated substantial assets before the marriage and wish to ring-fence those in the event of future separation; or
- who have offshore assets or connections, in which case an agreement may be strongly advisable.

For these people, provided the pre-nup meets the basic needs of their spouse and any children, such an agreement is now a realistic and valuable means of providing some security and certainty if the marriage goes wrong – but only of course if the other party is willing to sign.

What about post-nups?

An agreement signed after a marriage is just as good as one signed before; if of course you can both agree to sign one.

Good pre-nup, Bad pre-nup

There is a world of difference between an agreement which sets out a fair financial settlement in the event that the marriage goes wrong, and one that attempts to hold the spouse in the weaker financial position to an unfair bargain in which only the bare minimum of needs will be met.

An agreement which attempts to strike an unfair settlement is less likely to be upheld, quite apart from the damage that it may do to a relationship. By contrast, for many people an agreement which meets needs fully, while at the same time protecting family or inherited assets, will seem fair.

continued on page 3



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Finders keepers, losers weepers?

The recent Court of Appeal ruling in the high-profile case of *Imerman v Tchenguiz* means that divorcing and separating couples should exercise caution before searching for information about their spouse's finances. It is no longer acceptable for one spouse to access and copy the other's private documents and this may, in certain circumstances, be deemed a breach of confidentiality and be considered a criminal offence.

A survey of divorce lawyers by Grant Thornton published in July suggests that there may be significant concealed assets or income in 10-30% of divorce cases. Previously, if there were suspicions that a spouse was not providing the complete picture about their financial situation, it was acceptable for the other spouse to take, copy and retain copies of confidential documents and send them to his or her solicitor provided that no force was used to obtain the documents.

A radical change

The case of *Imerman* signifies a radical change in what constitutes acceptable conduct; married couples are now no exception to the rule that each person has the right to privacy. As a result great care should now be taken before a spouse (or indeed anyone acting on their behalf) considers looking for documents belonging to their husband or wife.

If the information is contained on a computer (shared or otherwise), even if that information is not password protected, if it is known that the other spouse would not freely consent to the information being copied or accessed, then it should not be copied. For documents contained in an office or filing cabinet (again, shared or otherwise), only if it is known that the other spouse would consent to this information being copied is it acceptable to do so. In both scenarios the only acceptable action is to take a "mental note" of the information to pass on to a solicitor.

Imerman v Tchenguiz

In *Imerman*, a South African fruit juice tycoon Vivien Imerman shared offices and a computer server with his wife's brothers. As the marriage broke down, Mrs Imerman's brothers feared that he might try to conceal some of his assets to avoid revealing the true extent of his finances. They copied 2.5 million pages of information belonging to Mr Imerman from the joint server and passed the data to their lawyers.

The Court of Appeal decided that in such cases the ends (revealing a spouse's attempts to conceal assets) did not justify the means and found that the brothers had acted unlawfully. Importantly the court would not allow the information that was found to be used as evidence.

"... great care should now be taken before a spouse (or indeed anyone acting on their behalf) considers looking for documents belonging to their husband or wife."



A family affair

The case also highlights the perils of accessing documents in a business environment. Mr Imerman and Ms Tchenguiz's two brothers shared business interests, office space and computer facilities, but the accessing of the documents by her brothers was not permissible. The rules regarding accessing another person's documents do not just apply to married couples. The case is a reminder that when a person takes matters into their own hands they can face tough penalties; including potential criminal prosecution under the Computer Misuse Act 1990 or the Data Protection Act 1998.

Searching questions

For the majority of separating couples, information is exchanged openly and voluntarily. However, if that does not happen, there are a number of remedies available. This could be the exchange of sworn Financial Statements, or court orders for the production/disclosure of information, which can also require third parties (such as accountants or trustees) to bring documents to court. Taking the law into your own hands is now not a safe option: it is no longer a case of 'Finders Keepers, Losers Weepers'.

For further information on this subject, please contact Sarah Woodsford on +44(0) 117 902 7743 or on sarah.woodsford@burges-salmon.com or Mary Gaskins on +44(0) 117 307 6870 or on mary.gaskins@burges-salmon.com.

Pre-nups work – but at what cost?

continued from page 1

Not for everyone?

Although these agreements are becoming increasingly common, many people see them as undermining the institution of marriage. There is often a difference of moral perspective between older couples (perhaps divorced before) who see a common interest in having a pre-nup, and younger couples marrying for the first time. One should not underestimate the tension and unhappiness that can be caused by raising the subject of a pre-nup in the months leading up to a wedding.

For this reason, it is essential that any discussions about a possible pre-nup should be started well in advance. Many of our clients have found the subject more palatable if it is

discussed and agreed as part of a wider review of financial planning and the making of Wills, possibly with gifts of assets between spouses at the outset so that there is some reciprocity.

And if the other party won't sign? The remedy if you feel that strongly about it is not to get married at all; or to believe in your vows and go ahead anyway.

For further information on this subject, please contact Catherine Hallam on +44(0) 117 939 2245 or on catherine.hallam@burges-salmon.com or Tom Boyce on +44(0) 117 902 7710 or on thomas.boyce@burges-salmon.com

“Although these agreements are becoming increasingly common, many people see them as undermining the institution of marriage”

A victory for the inheritance tax payer

At the end of August we heard that HMRC had failed in their appeal in the Balfour case. The case concerned whether inheritance tax business property relief (BPR) was available on a Scottish agricultural estate which comprised of a mixture of in-hand farms and let land, cottages and buildings.

The IHT legislation provides that BPR is not available on a business which wholly or mainly holds investments (such as let-land and cottages) rather than trading assets. In the case of an estate with a mix of in-hand and investment activities an assessment is required of which type of activity predominates.

Lord Balfour held an interest in the Whittingehame Estate under the Will of his great-uncle, Arthur Balfour, the Prime Minister and World War I statesman. The estate comprised of 1,907 acres with three let farms, two in-hand farms, twenty six let houses and cottages and two business premises. There were also policy parks, woods and sporting rights and a farmhouse.

The case, and the subsequent appeal, focussed on two main issues. The first issue was a technical one relating to whether in the two years prior to death Lord Balfour had run a single business or whether for most of that time the Will trustees had a lettings business which was separate from Lord Balfour's in-hand farming activities. Here the judges have approved a widening of the concept of a single business for IHT purposes. The second issue was whether Lord Balfour's business was mainly involved in investment or trading activities.

HMRC will have been hopeful of winning the appeal, not least because the first instance judge had made a mistake in his judgement when he included the let farms as part of Lord Balfour's in-hand trade.

Previous case law has established various factors which

guide the assessment of whether a business is predominantly engaged in trading or investment; they closely follow those set out in the previous high profile case *Re Farmer* in 1999. The appeal judges' conclusions can be summarised as follows:

The "various factors"	Investment	Trade
Turnover	X	✓
Net Profit	X	✓
Time spent	X	✓
Capital value	✓	✓
Acreage	Equal	Equal
Overall context	X	✓

Although it was found that the capital value of the investment assets exceeded the value of the trading assets by nearly 2 to 1, the appeal judges did not think this was decisive and they accepted the view put forward by the executors that capital value should carry little weight given the estate's long term policy of holding land which would not be affected by relatively short term fluctuations in market value.

Having considered these factors the appeal judges concluded that the decision of the first instance judge was correct and that the BPR claim should be allowed.

The fact that the significant capital value of the investment assets did not tip the "investment business balance" will be of comfort to land owners with similar situations. But the decision will also be welcomed for its clear summary of the law which will help those wishing to make business planning decisions to maximise the availability of inheritance tax relief.

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Opportunity to regularise your offshore tax affairs

This article written by Kaiser Ritter Partner, whose executive chairman helped to negotiate the Liechtenstein Disclosure Facility (LDF) with HMRC on behalf of Liechtenstein, provides a useful insight into the LDF.

For many years, Liechtenstein has been known as a tax haven – a tiny and opaque jurisdiction where the world's wealthy could take advantage of low taxes and strong banking secrecy laws to shelter assets from the taxman. The low taxes and commitment to client privacy remain. But its image as a shelter for tax evaders is rapidly becoming outdated.

Much of this can be credited to Otmar Hasler, Prime Minister between 2001 and 2009. Hasler created the Futuro Committee, a panel of experts including Fritz Kaiser, executive chairman of Kaiser Ritter Partner, to develop a vision for Liechtenstein's future as a financial centre. One of the committee's first tasks was addressing international regulatory pressure over tax compliance.

A forward looking strategy was developed and the 2009 "Liechtenstein Declaration" set out Liechtenstein's commitment to go beyond existing OECD standards in transparency and information exchange. Bilateral agreements with various countries followed, including the unique understanding reached between Liechtenstein and the UK in 2009. The negotiated arrangements included the introduction by Liechtenstein of a five-year taxpayer assistance and compliance programme and the introduction by the competent authority of the UK of the LDF. As part of the arrangements, the UK and Liechtenstein have entered into a Tax Information Exchange Agreement accompanied by a Memorandum of Understanding and a Joint Declaration concerning the arrangements between the Liechtenstein Government and HMRC.

The arrangements between Liechtenstein and the UK go above and beyond OECD standards, offering UK residents the opportunity to regularise their tax affairs on extremely advantageous terms.

How the LDF works

Compared with previous disclosure opportunities offered by HMRC, the LDF offers real incentives for tax payers to regularise their tax affairs. Defining characteristics include:

- Fixed 10% penalty on unpaid tax
- No penalty in cases of "innocent error"
- "Look back" period limited to accounting periods/tax years commencing on or after 1 April 1999 (the "10 year" look back)
- Option to use a 40% "composite" rate or calculate and pay actual tax due
- Guaranteed immunity from prosecution for tax related offences
- No naming and shaming
- "Bespoke" service from HMRC including the option of a "no-names" discussion

The LDF is open to virtually all UK residents with offshore accounts, not just those with an existing account in Liechtenstein – to take advantage of it, all you need to do is to establish an interest in "relevant property", which could involve, among others, opening a new account in Liechtenstein.

Although the LDF runs until August 2015, clients are advised to register for it as soon as possible, since you will not be able to take advantage of the facility if HMRC starts investigating your tax affairs before you have registered.

The Kaiser Ritter Partner Group

The Kaiser Ritter Partner Group (based in Liechtenstein and Switzerland) represents the interests of high net worth families, helping private clients and advisers protect and grow their assets over the long term. Over the last five years, a key focus has been developing transparent solutions to international tax compliance issues in response to the new environment for banks and trust companies. It offers clients a wide range of services, including private banking, trust services and reporting systems for UK tax compliance.

Kaiser Ritter Partner has developed a wide range of banking and trust services especially for the LDF, all of which offer fast-track execution and transparent pricing.

But it is important to recognise that Liechtenstein is more than just the LDF. It has a solid budget surplus and a government that is committed to the development of financial services. This means the jurisdiction is a real alternative for any UK resident client, domiciled or non-domiciled, who wishes to diversify their banking and investment arrangements.

For further information on the LDF please contact John Barnett on +44(0) 117 902 2753 or on john.barnett@burges-salmon.com or to contact Kaiser Ritter Partner please email ldf-desk@krpartner.com

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News from the Private Client team at Burges Salmon

We are delighted to announce that **Sarah Woodsford**, a Senior Associate in our Family Unit specialising in complex financial settlements on divorce, has been included in the list of the "Top 35 Under 35" by Private Client Practitioner magazine for the second year running.

Since the last edition of Private Client Briefing, we welcome **Zoe Fatchen** (Senior Associate, Corporate Tax and International Tax and Trusts), **Jon Rollason** (Associate, International Tax and Trusts), **Natalie Stoter** (Solicitor, Corporate Tax), **Mary Gaskins** (Solicitor, Family) and **Berry Bloomberg** (Solicitor, International Tax and Trusts) to the Private Client Team.

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