



Update

Employment, Tax, Commercial

Welcome to Anthony Gold

In this issue, lawyers at Anthony Gold look at the effects on the extension of the Information and Consultation of Employees Act to smaller businesses allowing far greater visibility of a business to its employees, the impact of Capital Gains Tax changes, Directors liability for company debts, the issues which arise out of different capital investments in Partnerships and an update on shareholders resolutions under the Companies Act 2006.

We hope you find the articles informative. Please contact the writers if you would like to discuss how any of the changes in the law may affect you. We are happy to have a preliminary discussion without charge.

Smaller Employers on Ice

Robert Perrett

Company and Commercial Department

The Information and Consultation of Employees (ICE) regulations were introduced in April 2005 and were heralded as a significant step forward in the nature and structure of employment relations within workplaces in the United Kingdom.

Currently these regulations only apply to organisations with 100 or more employees, but from April 2008 the minimum number of employees will reduce to 50 ensuring their impact on a far larger number of organisations.

The Rights

Under these regulations employees are entitled to important rights to be consulted and informed about work place issues. The regulations provide standard provisions which give employees the right to be consulted about:

- the business's economic situation
- employment prospects, and

- decisions likely to lead to substantial changes in work organisation or contractual relations, including redundancies and transfers.

However, the rights are not automatic. An employer is only obliged to inform and consult employees where a certain percentage of employees request that they do so. Where a valid employee request or employer notification has been made, but no negotiated agreement is reached within 6 months, the above default standard provisions will apply.

If the employer has a pre-existing agreement in place, the employer is not bound by the ICE regulations unless 40% per cent of the work force are in favour of a new agreement. It is a common position amongst professional advisors that currently uneffected employers should seek to have an agreement in place before the regulations take hold. This will allow the employer more freedom to formulate a system which suits its particular individual business needs and will prevent it from being forced to adopt the standard provisions outlined above.

Penalties

If the employer has an agreement in place which is covered by the legislation, or is subject to the standard provisions, and fails to inform and/or consult as required, a complaint can be made to the Central Arbitration Committee (the "CAC"). The CAC can then take such steps it thinks are needed to remedy the breach and on application to a tribunal, can impose a financial penalty of up to £75,000.

Since the introduction of the Regulations there have been a number of applications to the CAC, and three decisions have been issued.

Recently in *Amicus v Macmillan Publishers Ltd* the CAC found the company to be in breach of the Regulations as they only had pre-existing arrangements in place in some sites and they did not cover all employees. The company was fined £55,000.

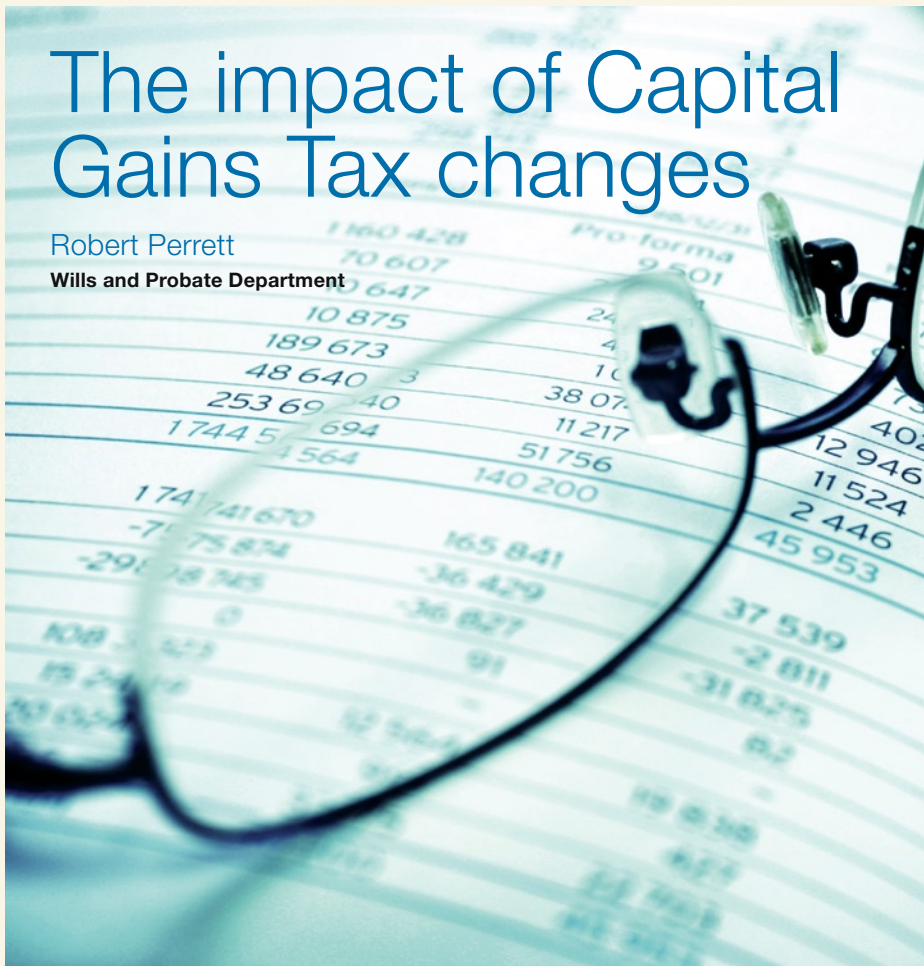
The lessons for both employers and employees not already covered by the ICE provisions is to take heed of the imminent changes but also to take advantage of the incentive that they provide to improve employee/employer relations and achieve a more motivated, and productive work force.



The impact of Capital Gains Tax changes

Robert Perrett

Wills and Probate Department



Priate individuals, trustees, and personal representatives should take note that from 6th April 2008 capital gains will be taxed at a flat rate of 18% and that the current system of taper relief and indexation allowance will be abolished.

The Current Situation

Currently Capital Gains are taxed as though they were added on the top slice of income. At present this produces two rates 20% and 40%. Since 1982 Indexation Allowance and Taper Relief have operated to reduce the gain, where assets are held for a period of time. Before Taper Relief was introduced, Indexation Allowance was calculated by applying an indexation factor supplied by the Inland Revenue. Its purpose was to remove any inflationary gain from the CGT calculation. Assets held prior to 1998 can benefit from both Indexation Allowance and Taper Relief.

In 1998 indexation allowance was replaced by taper relief which operated along the same principles, but with slightly different rules. To benefit from taper relief assets are divided into two categories: business assets, and non-business assets. Shares in private companies and shares owned by employees are normally classed as business assets. For business assets any capital gain is reduced by 50% if the asset is held for 1 year (an effective rate of 20% for a higher rate tax payer) and by 75% if the asset is held for two years (an effective rate of 10% for a higher rate tax payer).

Non-business taper relief is much less generous. The current situation here is that an asset has to be held for at least 3 years before any taper relief kicks in, and then the percentage of the gain is only reduced by 5% per year (an effective rate of

38% for a higher rate tax payer in the third year). The maximum relief is only available if the asset is held for over ten years when the effective rate of tax for higher taxpayers is 24%.

The New Proposals

From 6th April 2008 all capital gains will be taxed at a flat rate of 18%, irrespective of the type of asset, however long it has been held, and regardless of whether the individual is a higher rate or basic rate tax payer. Any indexation allowance and any taper relief that have been built up will be lost.

The personal annual exemption – currently £9,200 – will remain as will the ability to offset capital losses against other gains of the same year.

The effect of the changes

The changes will be to create winners and losers. Entrepreneurs, farmers, land owners, and owners of small businesses are potentially vulnerable to higher CGT charges on disposals. After April 6th 2008 this will mean that in some cases there will be an increase in CGT on selling their businesses from 10% tax charge to 18%.

The changes do not spell doom and gloom for everybody. Those individuals who hold non-business assets such as buy-to-let properties, or shares in listed companies, may be advised to hold on to their investments until after 5 April 2008 to take advantage of a rate cut from 40% to 18%.

Full details of the changes will not be released until the publication of the 2008 Finance Bill. Until then there may be further concessions or further surprises. Watch this space.

Directors' liability for Company Debts

David Wedgwood

Partner and Head of Commercial Department

A recent case indicates that individual suppliers can in some cases bypass the liquidators and pursue company directors personally for company debts, if the company was trading whilst insolvent when the debt was incurred.

In November 2007, the Court of Appeal in the case of *Contex Drauzhba Ltd –v– Wiseman and Another* [2007] All ER (D) 293, held that a director, who signed an order on behalf of the company, was liable to the supplier in relation to the goods supplied, when the company later went into liquidation.

In this case, the director knew that the company had no realistic prospect of paying the bill, but signed the order in any event. As a result the supplier brought a case of fraudulent misrepresentation against the director in person. The director put forward a defence based on the Statute of Frauds Amendment Act 1828, which at section 6 states a person cannot be charged for deceit or misrepresentation, unless the representation was made by that person in writing. The director contended that in signing the order, he signed for the company, not in his individual capacity. He also maintained that any assurances that the company was able to pay its debts at that point, were either oral or by conduct. Lord Justice Wallis rejected that argument, holding that a document signed by a director contained an implied representation by the director, that the company could pay and hence the director could be sued personally.

It has long been the case that a Liquidator may pursue a director for trading whilst insolvent, although that rarely happens in practice. However, individual creditors may now have the option of suing directors personally, if they can establish that the director knew the company was insolvent. Although the Court took pains to indicate that each case must be judged on its own facts, it is now likely that many creditors will take direct action against directors, who sign orders personally.

Unequal partners: how different capital investments are dealt with under the law of partnerships

Robert Perrett
Company and Commercial Department



Many small businesses are partnerships, and have no written agreement in place. In circumstances such as this, partners that have made unequal capital contributions to a business can find that this may have unintended consequences.

The Law as it stands

In the scenario where a partnership exists without a written or express agreement, the starting point is to fall back on the Partnership Act 1890. A written agreement is not required for formation of a partnership and, in the absence of an agreement, the Act provides the basis for the rules regulating the relationship between partners

Section 24 is a key provision, and provides that if there is no prior agreement the partners are entitled to share equally in the capital and profits of the business. This rule clearly has important consequences for those who have entered into a partnership in unequal terms.

Share of Capital

Despite the presumption of an even split, the law does account for capital contributions. As the law stands where the partner's capital contributions are unequal this is sufficient to count as an implied agreement that the partners are entitled to withdraw the capital unequally, in the proportions that were originally contributed.

Thus, for example, if A contributes £10,000 and B £20,000, those are the sums which they are entitled to withdraw on dissolution of the partnership, in the absence to any agreement to the contrary.

This would seem to be a logical consequence of an unequal contribution, and protects those that have contributed a greater share.

Share of Profits

If the partners of a business make different capital contributions that does not displace the rule of equality in relation to profits under s.24.

Thus if unequal contributions have been made, partners in a business will still share the profits equally unless there is contrary agreement specifying the shares in which the profits are to be divided.

What are profits?

Readers should take note of an additional point, namely that the courts have defined profits within s.24 as both profits on capital and profits on income. Thus appreciating capital assets such as property would fall within the ambit of 'profit' under s.24

This is well illustrated by the case of *Popat v Schonchhatra* [1997] 3 All ER. In this particular case, the two partners of the business had made unequal capital contributions and no partnership agreement was in place. It was held that the unequal contributions of capital made at the start of the business were not determinative of the size of the partner's shares of the assets on dissolution. The assets amounted to the profits on capital as well as income and the partners were entitled to share these equally.

The implications are clear. Those that enter into a partnership without an express written agreement do so at their own risk. While a partnership is running happily, healthily and without contention, such an agreement may not seem important. However without an agreement, those partners that have made a greater capital contribution could find themselves out of pocket.

Two new Specialist partners for Anthony Gold

Peter Walker



Peter Walker joined the firm this month and is a Wills and Trust Specialist with over 22 year experience. He is an appointed Property and Affairs Deputy of the Court of Protection and is regularly instructed by the Court to act as Financial Deputy or as a Professional Trustee where there are inter-family disputes. He strengthens Anthony Gold's Wills and Trusts department and allows it to tailor its services to all the needs of the client and their family.

Jennifer Brathwaite



Jennifer Brathwaite joins our Property Dispute Resolution and Housing team as a Specialist in Landlord and Tenant law and an expert in the complex field of Leasehold Enfranchisement. (Buying your Freehold). Having previously worked as a sole practitioner and for the Leasehold Advisory Service she has advised government bodies, the general public and the legal profession on Landlord and Tenant law.

Contact us



If you would like further information about how Anthony Gold can help you please contact or call Robert Perrett on **0800 389 2374**

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We also have specialist lawyers to advise on employment law, commercial property, clinical negligence, collaborative law, family law, housing law, mediation, personal injury, property dispute resolution, public law and human rights and residential property.

For further information on all the services we provide visit www.anthonygold.co.uk or call us free on **0800 389 2374**

Companies Act 2006 Update – Shareholder Resolutions

Mark Cornish

Company and Commercial Department

Government plans to introduce the final set of changes to company law on 1 October 2008 have now been put back to 1 October 2009. However, phased implementation of the Act will continue. The 1 October 2007, saw the introduction of some significant changes to provisions relating to shareholder resolutions.

Private companies are no longer required to hold an annual general meeting (though they may still choose to do so for their own reasons) – in effect the Elective regime that existed prior to 1 October 2007, is now the default position for private companies.

Prior to 1 October 2007, companies could only pass written resolutions if they had 100% unanimity in favour of a resolution. Now, an ordinary or special resolution can be passed without a formal meeting, by obtaining the written agreement of a simple majority, or 75% of the shareholders respectively.

The exceptions are resolutions for the removal of either a director or auditors, which still require a formal meeting to be held.

The company must still give notice to everyone entitled to vote of a proposed resolution, but may do so simply by circulating a copy of the proposed resolution to everyone entitled to vote and informing them of what they need to do to vote for or against the resolutions (where a meeting is actually called minimum notice periods will still apply). The circulated resolution remains open for acceptance by the shareholders for a prescribed period (which has a default of 28 days, or such time as may be specified in the company's articles). As soon as the company has received the required number of votes in favour of

a resolution it will be passed. If the company does not receive the required number of votes within that prescribed period the resolution fails.

Combined with the increased availability of electronic communications under the Act, this enables the passing of resolutions by email. The person charged by the company with obtaining approval for a resolution (which may or may not be a company secretary as from 6 April 2008 the legal requirement to retain a company secretary will cease), can circulate a proposed resolution to all the members, and invite them to agree or reject it by replying by email. Once the company receives replies containing votes in favour of a resolution, the resolution is effectively passed. This could lead to very quick resolutions is properly utilised. Records of the emails in reply must obviously be retained, and care will have to be taken to note the time of the particular email that takes the company to the required majority. We wait with interest to see if this will become common practice.

Existing company articles may change the way these new provisions operate in unforeseen ways, although any provision in the articles would be void in so far as it prevents a resolution from being passed as a written resolution in line with the new format. Companies are advised to consider reviewing their articles to take full advantage of the changes to the law on shareholder resolutions and indeed, the Act as a whole.

Legal Milestones 2007

At the beginning of a year Anthony Gold reflects on the work it has done and is committed to continuing. 2007 saw a number of significant developments and noteworthy cases and deals. Legal Milestones 2007, a new section under News at www.anthonygold.co.uk, looks at the highlights of the year for each of the firms departments.



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