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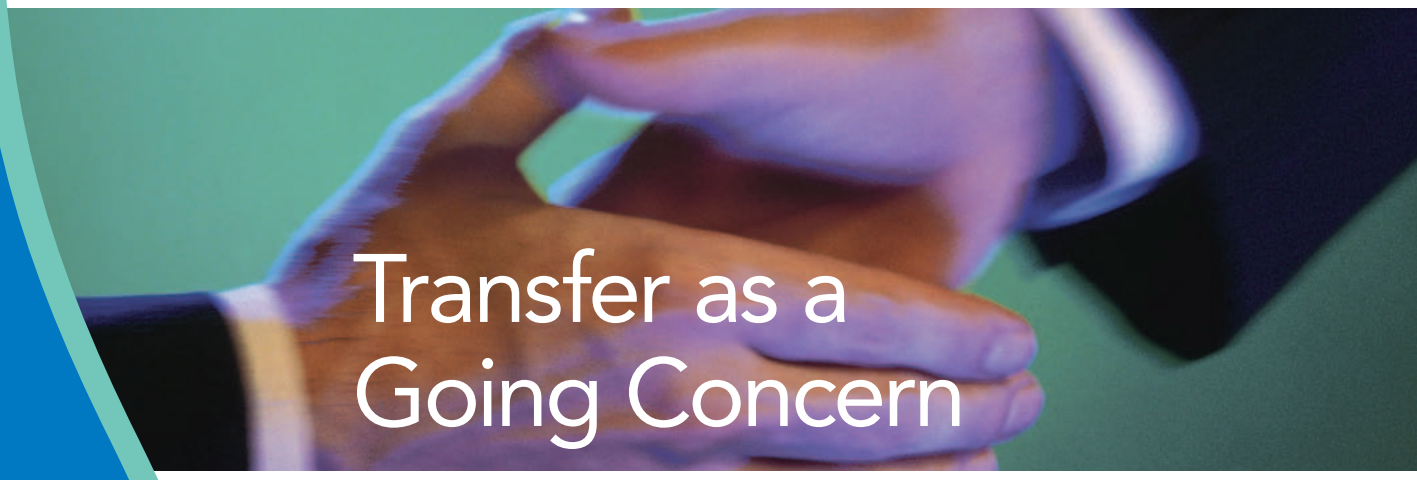

Transfer as a Going Concern

When a business which is already trading is sold, the transfer of the business to the new owner will normally be treated for VAT purposes as a 'transfer as a going concern' (TAGC).

This is an important VAT concept, because a TAGC is not a taxable supply – no VAT is charged and none is recovered. There are various criteria which have to be met for a transfer to qualify, the most important of which is that the new owner must become VAT registered for the transfer to be a TAGC. Another is that the new business must be the same as or not significantly different from the old one. A third is that the transfer must put the transferee in a position to run the business transferred.

For a vendor, it is essential that if the new owner claims to be taking over the business as a TAGC, you have evidence that the purchaser is VAT registered. If you do not do this, your proceeds of sale may be treated as including VAT at the appropriate rate.

For a purchaser, it is essential that you do not pay VAT if you take over a business, are VAT registered and intend to operate a business which is the same as or similar to the business taken over. If you do, the VAT you pay will not be recoverable.

HM Revenue and Customs (HMRC) can be very tough on this. In a recent case, a seaside café, which had taken over drinks stock from the upmarket eatery that preceded it, had to go to the Tribunal to win its argument that the transfer was not a TAGC and it did not have to register for VAT (its takings being below the VAT registration threshold). In another case, HMRC opposed the recovery of input tax paid by a couple who took over a country pub and they only won the argument because although the VAT registration and licence were in their names, the freehold title was in their names and that of their son. This meant that the couple could not take over the trade without entering into a lease, which meant TAGC was avoided... a lucky escape for the couple as the VAT involved was more than £30,000 and the failure was inadvertent!

It is always better to be safe than sorry with VAT. We can advise you on all purchases and sales of businesses.

Please contact Simon Jobson on 0121 746 3300 or by email to s.jobson@sydneymitchell.co.uk

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Wife Must Return Documents Obtained by Stealth

The Court of Appeal has reversed an earlier decision of the High Court that the ex-wife of a wealthy man could use documents downloaded from his computer without his permission to substantiate her claim for ancillary relief (the financial settlement on divorce).

The woman was afraid that her husband would conceal his assets. One of her brothers therefore accessed a server in an office which he shared with her husband and copied information and documents from it: eleven files were printed out and given to her solicitor. He passed them to a barrister, who removed those in respect of which it was thought the woman's husband could claim legal professional privilege, making them inadmissible as evidence in court.

The remaining seven files of documents were passed to the solicitors acting for her in her divorce. Her husband sought the return of the files and all copies of them and an order preventing the information contained therein from being used in evidence.

The High Court ruled that the files had to be returned to him so that he could remove any material which he claimed was subject to legal privilege, but the rest of the material would then have to be returned to his ex-wife. Both sides appealed against the decision.

The rules surrounding disclosure of one's circumstances in divorce proceedings require each party to give a 'full, frank, clear and accurate disclosure' of their financial position. Because this duty is often breached, the family courts 'will not penalise the taking, copying and immediate return of documents but do not sanction the use of any force to obtain the documents, or the interception of documents or the retention of documents... The evidence contained in the documents, even those wrongfully taken will be admitted in evidence because there is an overarching duty on the parties to give full and frank disclosure'.

However, the Court of Appeal considered that in this case the breach of confidence of the copying could not be condoned because at the time it occurred, the wife only feared that her husband would fail to make a full and frank disclosure when the divorce proceedings ensued. It was 'not open to her to pre-empt consideration of the husband's disclosure... 'Also, she failed promptly to disclose to her then husband that she had copied the files.

Lord Neuberger said, "There are no rules which dispense with the requirement that a spouse obeys the law."

Accordingly, the documents were required to be handed back to the ex-husband and the ex-husband's solicitors were reminded of their duty to attempt to ensure their client made a full and frank disclosure of his assets.

The Court concluded that 'in ancillary relief proceedings, while the court can admit such evidence, it has power to exclude it if unlawfully obtained, including power to exclude documents whose existence has only been established by unlawful means'.

This case has implications for those seeking to 'make sure' they get full evidence of their spouse's financial affairs when commencing divorce proceedings. Contact us for advice on all family law matters.

Karen Moores can advise you on any matrimonial matter - please contact her on 0121 700 1400 or via email to k.moores@sydneymitchell.co.uk

Default Retirement Age to be Scrapped

The Government intends to abolish, by 1 October 2011, the Default Retirement Age (DRA) of 65 contained in the Employment Equality (Age) Regulations 2006 and has published a consultation document on how it proposes to achieve its aim.

Under the proposals, there will be a six-month transition period beginning on 6 April 2011. From this date, employers will not be able to issue any notification for compulsory retirement using the DRA procedure. Between 6 April and 1 October, only employees who were notified before 6 April and whose retirement date falls before 1 October can be compulsorily retired using the DRA.

From 1 October 2011, the DRA will be abolished and the consultation proposes relieving employers of the administrative burden of the associated statutory

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Acceptance Can Follow Rejection of Counter-Offer

When a claim is brought for damages, the party that is claimed against can make an offer to the claimant under a procedure contained in Part 36 of the Civil Procedure Rules. 'Part 36 offers' are designed to make it more likely that a case will be settled before coming to court.

A recent case in the Court of Appeal looked at the position in which a Part 36 counter-offer was made and rejected, but subsequently accepted. Although the procedure includes the principles of offer and acceptance – key principles in contract law – the other principles of contract law are not applicable.

The case involved a claim for an injury resulting from a trip. The council responsible offered £1,150 in compensation, which was rejected. The claimant made a counter-offer, indicating that she would accept £2,500, which the council rejected. Later, the council sought to accept the offer, which had not been withdrawn. The Court confirmed that in the absence of a formal withdrawal of the offer, it could still be accepted. This differs from the position in contract law, in which an offer, once rejected, ceases to have effect.

Getting the strategy right regarding Part 36 offers is important because if an offer is not accepted and the court subsequently rules that the sum payable to the claimant should be less than or equal to the Part 36 offer, the claimant will normally bear some of the costs of the action. On the other hand, if the settlement ordered by the court 'beats the offer', it is the defendant who stands to pick up the bill for the costs.

The Court recently considered the question of who bears the costs when the Court awards judgment in a sum only slightly more than the Part 36 offer. The ruling indicates that in general, if the judgment 'beats the offer' by even a small amount, the loser will bear the costs.

Please contact a member of our Personal Injury team for advice concerning this or any other injury claim on 0121 698 2200 or by email to pi@sydneymitchell.co.uk

retirement procedures. From that date, individual employers will only be able to operate a mandatory retirement age if this can be objectively justified as a 'proportionate means of achieving a legitimate aim'. As the consultation points out, 'It is not easy to demonstrate that a retirement age is objectively justified, so the employer should be confident that it can be objectively justified before deciding to use a retirement age' and an employee will still have the right to request to work beyond the employer's mandatory retirement age where one is in operation. Where an employer chooses to have in place a mandatory retirement age and this cannot be objectively justified, it could face claims of age discrimination and/or unfair dismissal.

The consultation, Phasing out the Default Retirement Age, can be found at **www.bis.gov.uk/assets/biscore/employment-matters/docs/p/10-1047-default-retirement-age-consultation.pdf**

The consultation closes on 21 October 2010.

The Government's proposals will impact on many employment rights, such as pension schemes and age-related benefits, and this consultation specifically seeks views on the consequences of removing the DRA with regard to insured benefits and employee share plans.

This is a radical change in employment law and we would advise you to consider its implications for your business without delay.

When You Agree Terms and Conditions

When you do business with someone else, it is important to agree the applicable terms and conditions – merely exchanging terms can be a recipe for dispute, as a recent case shows.

The case involved a US company, which ordered goods from a British company. Both companies used standard terms of business, which were (of course) different. In particular, the US company's terms of business contained a clause that made a supplier liable without limit for consequential losses to the purchaser resulting from certain breaches of the contract. The vendor's terms limited its liability in such circumstances.

The goods supplied were defective and caused a considerable loss to the US company, which then sought compensation. The defendant argued that because the purchaser had taken delivery of the goods after having been sent a notification of its terms and conditions, its terms and conditions applied. The purchaser argued that by accepting the order in its terms and conditions, those applied.

The court held that:

- a contract will be formed on the most recent set of terms and conditions supplied unless the recipient objects;
- acceptance of one party's terms can be inferred in certain cases by the behaviour of the other party. However, merely taking delivery of the goods would not be sufficient to justify that inference; and
- where there are two 'competing' sets of terms and conditions and no agreement as to which applies, the inference is that neither does.

Accordingly, neither set of conditions applied. Because the applicable law was that of England, the provisions of the Sale of Goods Act 1979 applied instead.

"It is critical to make sure that when you form a contract, the terms of the contract are known and agreed by both parties," says John Irving.

Contact John for advice on 0121 698 2200 or by email to j.irving@sydneymitchell.co.uk

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Launch of e-script

Sydney Mitchell recently launched an online version of its newsletter.

Escript will be sent to subscribers on a regular basis, providing updates about the firm and news on developments in various areas of law.

If you would like to subscribe, please visit our website and complete the registration form to ensure you receive your copy.

http://www.sydneymitchell.co.uk/webform/subscribe-sydney-mitchell-mailing-list

Nelson thought it his Duty

There has been much written about the activities of unlicensed will writers, which culminated in the recent Panorama programme.

This article is not about "having a go" at will writers, but care should be taken in who you instruct. It is important to clarify fees and in particular what the costs are of storing your will. There is little point in having a will made cheaply if you pay hundreds of pounds for somebody merely to hold it in a cupboard! Most solicitors firms make no charge for storing wills.

The other main point is to ensure your will actually carries out your wishes and they have not been "adjusted" to fit in a template which makes it cheaper and easier to produce your will. In this regard be cautious who you appoint as your executor and ensure that you are aware of the charging structure when your estate is administered. Again there is no point in a cheap will to pay excessive fees for having your estate wound up.

This brings me on to the contents of wills. The shortest will ever written merely said "all to mother", with the longest will being one thousand and sixty six pages. A will is the way we allocate our possessions after death, and this has lead to many giving vent to extravagant whimsy. Many wills over the ages have contained unusual burial wishes. The most sensational has been the American woman who wanted to be buried in her nightgown, being placed in her 1964 Ferrari, her favourite car, "with the seat comfortably slanted". Wills have also been the subject of many courtroom battles. Nothing is new. In the 1890s the will of Sir Francis Jeune was contested. His previous office had been as president of the Probate, Divorce & Admiralty Division of the High Court.

Lord Nelson made a codicil to his will on the morning of the battle of Trafalgar. In this he recorded Lady Hamilton's patriotic service and then stated "I leave Emma Lady Hamilton, therefore, a legacy to my king and country". It is not recorded whether George III ever claimed his legacy.

Whilst this may not be the ideal basis on which to make a will, it is important to make plans for the future and to choose carefully who you advise to take care of these plans.

Please contact Derek Cook for advice on planning for the future on 0121 698 2200 or by email to d.cook@sydneymitchell.co.uk

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