

NIIFA Raising Funds for the Matrimonial Settlement

Placing a value on the husband's business or company may prove to be an academic exercise if, after the separate housing needs of the husband and wife have been met, there is no significant capital available for a settlement.

Forensic accountants are often asked to consider the liquidity of the business and whether assets can be made available for the settlement, without damaging the business. A proposal that is also tax efficient will prove doubly attractive to the court and to the husband.

We need therefore to identify any available funds and then a tax efficient way of extracting them from the business.

IDENTIFYING AVAILABLE FUNDS/LIQUIDITY

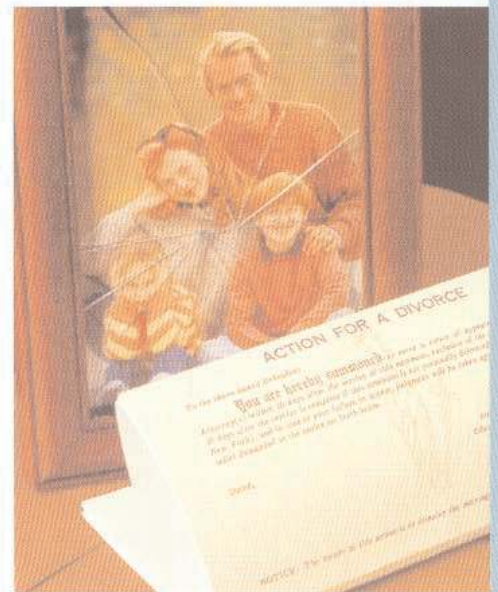
- Businesses often have greater liquidity at certain times of the year and so the seasonality of the business must be understood and represented in any assessment;
- It may be possible for the company to sell an asset without any particular detrimental effect on the business e.g. a farm could sell land that is marginal to the success of the business, or a piece of underutilised machinery may be sold;
- Can the business obtain and service additional finance e.g. a loan? This may require an assessment of its current level of borrowings and gearing, the relationship with its bankers, the nature and value of unencumbered assets and its future profitability;
- A sale and lease back of an asset could be effected, which would release immediate funds into the business;
- The husband may argue that the liquid funds are needed to continue the expansion of the business. Thus financial forecasts may need to be examined and considered.

EXTRACTING THE FUNDS

We list below a number of possibilities, but recommend that a detailed assessment be carried out:

- A bonus or an increase in remuneration – these will attract income tax and National Insurance. This may lead to a pro rata increase in the remuneration of the other directors and so may not be tenable. If the husband were the sole director then it might be an affordable option for the company.
- Dividends – do not attract National Insurance and may be a tax efficient way of withdrawing

funds. However, the corporation tax charge needs to be considered as well as the sufficiency of available reserves. Remember that any other shareholders also receive their share of the dividends voted, unless they waive their rights, which is doubtful.



- Using the husband's loan to the business – there will be no adverse tax consequences if the husband were to be repaid what he is owed. The business may be able to borrow funds from an outside source to repay the loan, and the interest it is charged will be allowable against tax.
- A loan from the business to the husband – this may be a possibility particularly for a partnership or sole trader, but there are restrictions for companies making loans to directors and shareholders.
- An increase in partners' drawings (in a partnership) – this will not affect the tax or National Insurance position, but the level of drawings may be restricted by the partnership agreement or by the wishes of the other partners.
- It may be possible for a company to buy back shares from a particular shareholder, which for the settlement could release funds to the husband and, indeed, the wife if she held shares in her own right. Advice should be sought as to the company law requirements and the tax consequences of the buy back, and consideration should be given to the resultant percentage shareholding.

IN SUMMARY

The issues of liquidity and the raising of funds often deserve a thorough and detailed examination of the accounting and financial information. We believe that experienced forensic accountants can greatly assist in effecting a credible and tax efficient solution to the problems of raising finance and to effecting a settlement acceptable to both parties.

NIFA Putting Questions to the Expert

Making the most of the opportunity

The CPR affords each party the opportunity to put written questions to an expert. This may present a lifeline to a party who has received an adverse expert's report, for a carefully worded question may elicit a response, which is helpful to the case, or reveal an area where the expert has failed to correctly address the issues.

The case of Mutch v Allen [2001] EWCA Civ 76 appears to have widened the scope for questions by allowing a party to ask an expert to cover a point not already dealt with. This potentially led to a significant extension to the report, as further issues or scenarios are requested to be addressed.

However, in our experience as forensic accountants we have noticed that often the opportunity to put questions is not always taken, or the questions lack the potency to produce the required result. Here are some suggestions:

- This could be your only chance (CPR Pt 35.6(2)(a)) so take time to word the question skilfully so as to elicit the response you desire;
- Remember that questions can be put not only to the Single Joint Expert, but to the other side's expert as well;
- Make sure you ask the questions within 28 days of receiving the expert's report;
- Try to extend the scope of the report, e.g. to include further scenarios or calculations which might support your case i.e. Mutch v Allen.

NIFA Equal Measures

Thorpe LJ said at the start of his judgment in the Court of Appeal case of Lambert v Lambert [2002] 1 FLR 642, that this case "would be very suitable for use in a text book on ancillary relief".

Reversing an earlier decision the Court awarded Mrs Shan Lambert 50% of the £20 million family fortune.

Lord Justice Thorpe stated, "There must be an end to the sterile assertion that the bread winner's contribution weighs heavier than the homemaker's".

The husband's newspaper business had been formed 9 months before the couple had met and the husband had described his wife's role in the development of the business as more or less ornamental. The phenomenal sale price for the company shares he put down to his special negotiating skills.

The Court ruled that the contributions to a marriage of a breadwinner and a homemaker were equal. However, Thorpe LJ still made it clear that exceptional contribution by a husband could still prove to be a basis upon which the court could depart from equality of division, thus leaving a certain sliver of uncertainty.

What will become of family businesses?

This ruling might mean that where the family resources are tied up in a business the husband might have to revert to radical measures to meet the wife's claims. He may have to achieve liquidity through the means already described in this newsletter or more drastically to transfer to the wife a substantial share of the wealth producing assets.

In effect this might mean transferring half of the share capital of the business, which would be unacceptable in a great majority of the cases.

NIFA A Pensions Duty

There is the temptation to consider that a husband with an occupational pension will have his future financial needs adequately met, which in turn persuades him to be generous in a clean break settlement. However, it is very possible that the pension fund may prove to have a shortfall and be unable to provide the income originally expected. Thus the divorce lawyer is well advised to investigate the viability of the pension provision before recommending that their client accept a potentially disastrous settlement.

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