Entrepreneurs’ Relief – review and reform

Entrepreneurs that sell their businesses have been able to take advantage of Entrepreneurs’ Relief since 2008. It currently allows individuals to pay only 10% Capital Gains Tax on all gains on the sale of qualifying assets up to a lifetime allowance of £10m.

The Conservative Manifesto said that ER would be subject to “review and reform”. There is increasing speculation that changes will be introduced at the Budget in March.

Only the Government knows what changes will be made, but the likely possibilities are: reducing the lifetime limit of £10m of gains, increasing the 10% tax rate closer to the standard 20% rate, increasing the current 5% threshold for share capital/voting rights/economic entitlement or scrapping the relief altogether.

If changes are made, they could be introduced on the day of the Budget, or more likely, 6 April. We would hope that any changes would be subject to a consultation period over the summer, but it is impossible to tell.

ER is a significant element of many transactions within the construction sector, so we are seeing a number of business owners looking to fast track completion and crystallise gains prior to the Budget.

W&I Insurance – Aon report

Warranty and Indemnity Insurance (known as Reps and Warranties insurance in the US) protects the insured party to a deal against financial losses resulting from unknown breaches by a seller/warrantor of the warranties and indemnities given in a sale and purchase agreement.

In its report “Insurance for M&A: A coming of age and an exciting future ahead”, Aon found that 3,200 deals were transacted globally in 2018 using W&I insurance. The market for W&I reached USD 2.3 billion in 2018, a 35% increase from 2014. Alistair Lester, CEO of Aon M&A said:

“ Buyers, sellers and legal and professional services firms are fully aware of the value of insurance during the transaction process, and this has culminated with improved infrastructure within the insurance market. Insureds now have access to more sophisticated products, a wider choice of providers, larger coverage limits, lower premiums, and services such as capital advisory and consultancy.”

We are seeing increased interest in both the buy and sell sides for W&I insurance on construction deals. Whether it is taken out usually depends on a balance between the value of the transaction, the cost of the premium and the parties’ appetite for risk.

The report is available at: https://www.aon.com/inpoint/library/white-papers/insuranceForMA.

Update on the Parker Review into ethnic diversity on UK boards

The Parker Review Committee has published an update report into the ethnic diversity of UK boards.

The original report recommended, among other things, that there should be at least one director of colour on each FTSE 100 board by 2021 and on each FTSE 250 board by 2024. The update suggests that while there has been movement, overall progress has not been as expected.

Key findings are:

- Over half of FTSE 250 companies (52%) fail to mention ethnicity in their board diversity policy.
- Most of the FTSE 350 do not set measurable ethnicity targets.
- Only 14% of FTSE 100 companies set measurable objectives for board ethnic diversity. For FTSE 250 companies the figure is 2%. Even where objectives have been set, no FTSE 350 companies report progress against them.

The Financial Reporting Council will be monitoring how companies report on their policies or explain their lack of progress.

The report is available at: https://www.gov.uk/government/publications/ethnic-diversity-of-uk-boards-the-parker-review
Directors’ duties survive company insolvency
System Building Services Group Ltd [2020] EWHC 54 (Ch)

The High Court has found that the general duties of a director to their company, set out in sections 171 to 177 of the Companies Act 2006, survive a company’s entry into administration and creditors’ voluntary liquidation. The fact the Insolvency Act 1986 imposes a series of additional specific duties on the part of a director and limits his or her managerial powers, does not operate to extinguish the fundamental duties owed by a director.

In this case, the director was liable to pay the liquidators of his company money he saved by not placing a house owned by the company on the open market when the company became insolvent. The judge said it was clear:

"that he knew that he was getting the Property at a significant undervalue . . . It was plainly not in the interests of the creditors as a whole for Mr Michie to purchase the Property off-market at significantly below market value . . . Mr Michie has acted in breach of his fiduciary duty under s.172(3) of the CA 2006 to consider and act in the interest of the creditors as a whole."

Directors and creditors of insolvent companies will need to look carefully at any transactions involving directors or actions which might constitute a breach of duty.

Corporate Briefing is a monthly update from Beale & Co on M&A developments in the construction sector. It is edited by James Hutchinson, who leads the Corporate team. James can be contacted on the details below.

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This briefing does not constitute legal advice.