

# infocus







UK200Group specialist panels and forum comprises of skilled technical advisers who work independently or as part of a multi-disciplinary business team to achieve the best possible solution for members and their clients. Each adviser brings experience from the different disciplines of business strategy, corporate finance, insolvency & business recovery, forensic accounting & dispute resolution and taxation.

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## New businesses NIC holiday claims

The national insurance contributions (NICs) holiday scheme started on 6 September 2010.

**Summary of the NIC holiday** The three-year scheme is available to qualifying new businesses set up after 21 June 2010 outside London, the South East and East England. For example, a business with its principle place of business in Warwickshire or Northamptonshire qualifies but one in Oxfordshire or Berkshire does not. Relief is not compulsory and businesses will need to apply and employees' records kept.

**What does the holiday cover?** The holiday exempts up to £5,000 of employer's NIC for each of the first 10 employees hired in the first year of business. Each holiday will last for the first 52 weeks of each employee's employment, providing these fall within the three-year holiday scheme period. The holiday does not cover the employees' NIC nor any NIC on benefits (referred to as Class 1A & Class 1B NIC).

**Which businesses qualify?** Most businesses, including property & investment businesses are eligible if they employ staff and meet other criteria, but some are excluded (eg domestic staff) or restricted (such as agriculture). New businesses in the EU can qualify where they send workers to the UK (and outside the excluded areas) in circumstances where liability to UK NIC exists.

**Which staff will be covered?** Most staff, including directors, will be included but employees operating under companies caught by the 'IR35' rules and employees engaged through managed service companies will not qualify. If employees leave, replacements will not qualify if 10 employees are already in place but, if the employee is re-employed, the holiday for that employee continues up to the original end-date or until the £5,000 maximum relief is reached.

**Making claims for the relief** Information needed to complete the online application form is as follows:

- PAYE & Accounts Office references
- Business name and Business address and post code
- Date the business started
- Region or country the principal business address falls within

Information can be kept on a new recording sheet (form E89) from HMRC website <http://www.hmrc.gov.uk/forms/e89.pdf>

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## More again on Pensions

Pensions continue to be high on the agenda for advisers looking after wealthy individuals. On 14 October the Government announced its proposals for the way forward. Below is a brief summary of some changes now anticipated and on that basis, immediate planning ideas for action. There is much more, and clients should consider taking independent financial advice as well as tax advice. The new rules are not all bad news!

### Funding

Going forward the maximum annual contribution (AA) with tax relief available at the individual's marginal income tax rate will be £50,000.

The annual allowance (AA) is compared with total pension inputs for all the individual's schemes, for Pension Input Periods (PIPs) that end in the particular tax year. (A PIP is effectively an accounting period for pension contributions.)

The reduced AA will first apply to PIPs ending in 2011/12. For those with a pre A Day pension plan, an election may be made by 5 April 2011 to change the current PIP which would normally end on 6 April 2011, so that instead it ends on 5 April, before the new AA regime kicks in.

With the scaling down of the AA, a carry forward relief will be reintroduced. You can look back 3 years to mop up unused relief, provided that in each year the individual was a member of a registered scheme at some time during that year.

### For those at retirement

Under the new rules there will be no blanket protection from the Annual Allowance (AA) charge in the year that benefits are taken. For those who happen to be ready to retire, now may be a one off opportunity for significant contributions to the individual's plan without suffering the AA charge, if in this same last year the individual crystallises the fund benefits.

Note that legislation for the above changes is currently in draft form and may therefore be subject to amendment.

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- 1 Capital Gains Tax
- 2 Corporate Tax Issues, Sales
- 3 Employee Share Incentives
- 4 Inheritance Tax
- 5 International Tax
- 6 Offshore Tax Planning
- 7 Partnership Tax Planning
- 8 PAYE and NI
- 9 Stamp Duty Land Tax
- 10 Tax Investigations
- 11 Taxation of Owner Managed Businesses
- 12 Trusts
- 13 UK Taxation of Foreign Expatriates
- 14 VAT



## Raising Finance in today's environment

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2010 has remained a challenging environment for entrepreneurial UK businesses as banking organisations remain reluctant to extend debt finance, a trend that looks set to continue and which has led to a shift in the way UK companies fund themselves.

Larger companies have reverted to the bond markets which, according to a Standard & Poor's report, have replaced banks as the main provider of debt financing since the third quarter of 2008. Some large and medium-sized companies have also reverted to the equity markets, with rights issues and secondary equity offerings highly prevalent over the last two years. Whilst causing significant dilution for existing shareholders, these have allowed companies to reduce balance sheet debt and improve capital structure. However, the number of IPOs (Initial Public Offerings) in 2010, although higher than in 2009, are still considerably lower than the pre-recession years and while 2011 should see further improvement, we are still some distance away from the levels of 2005-2007.

Where does this leave SMEs, the so-called engines of economic recovery? Research suggests they are still struggling to access the finance needed to move from an inward-looking survival mentality to one of growth. The shift by larger companies towards the bond markets has so far not freed up any significant additional bank finance for SMEs, which means owner-managers have had to be more creative in sourcing finance. The recent £1.5bn growth fund for small businesses, set up by British banks, is a welcome development but businesses with turnovers lower than £10m could still fall through the net.

Nevertheless, in the many situations where bank loans or equity/debt funding from the capital markets or venture capital are not available, creative alternatives must be found. For instance, a joint venture with a client or a competitor may be a viable alternative to M&A where financing is an obstacle, providing opportunities to access new markets or sectors, particularly internationally and where both parties can add value to the venture.

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## Business Plans

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I recently attended a seminar run by the Corporate Finance Faculty of the Institute of Chartered Accountants in England and Wales entitled "*Financing Growth: Challenges for SME's in 2011*". One of the key issues raised at the Seminar in relation to the raising of finance of whatever type was the Business Plan. There are several areas that have to be addressed in drafting such a document. Some of the criticisms made of many plans and which will help you to attract the eye of financiers were as follows:

**Ensure that your proposition is succinct:** If you cannot explain your business proposition in the first page and explain what it is you are trying to sell to the investor then it is likely that the plan will not be read further than the first page.

**'Typos':** It is easy to accept what is in front of you on the computer screen. However, some potential investors do pay attention to detail and if there are typos in your business plan then they might wonder what other lack of attention to detail happens in your business.

**The plan is not just a sales pitch:** A plan needs to convince the investor that you know where you are going and have a vision of your business for the future. The investor will want to know how their money is going to be repaid and what will happen to the business at the end of the term.

**Team:** Most growing companies recognise the fact that they do not have all the required team members in place. There is no harm in identifying the gaps, but in so doing, you need to say how they will be filled.

**Competition:** An assessment of the strengths and weaknesses of the competition is vital and is often missed out in the business plan.

**Integrated model:** Ensure that all the details, which are in the spreadsheets and the commentaries, are consistent.

**Sensitivities:** Ensure that you have challenged your key assumptions including in particular sales; margins and working capital movements of stock and debtors.

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## Experts' immunity from suit

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Expert witnesses currently enjoy immunity from suit in respect of their performance in the witness box and the contents of their expert reports. However recent cases, in particular, *Jones v Kaney* [2010] EWHC 61 (QB), suggests that this immunity from suit may be heading in the same direction as that previously enjoyed by advocates, which was abolished in 2000. Since then, the court has held that an expert witness could be joined as a respondent for the purposes of costs (*Phillips v Symes* [2004] EWHC 2330)

In *Hall v Simons* [2000] UKHL 38, the House of Lords upheld immunity from suit for "witnesses" giving oral testimony, because it should be given "freely without being inhibited by the fear of being sued... for what they say".

In October 2006, the Court of Appeal again confirmed the position on experts' immunity from suit in *General Medical Council v Meadow* [2006] EWCA Civ 1390, and described the two objectives of that immunity as:

- To ensure that expert witnesses can give evidence "freely and fearlessly".
- To avoid multiplicity of actions in which the value or truth of a witness's evidence would be tried over again.

A direct challenge against expert witness immunity was made in *Jones v Kaney* (above). Blake J at first instance dismissed a negligence claim against Dr Kaney because of her immunity from suit. However, he noted that in recent cases the policy basis for expert witness immunity had been narrowed or undermined and acknowledged that blanket immunity might not be sustained long term. The Supreme Court hearing on *Jones v Kaney* took place on 11 and 12 January 2011. At the time of writing, judgment has not yet been handed down.

The above cases show how experts' immunity from suit is gradually being eroded and indicate that it may soon be abolished:

- The key consideration for the House of Lords in *Hall* was whether immunity from suit was needed to ensure that advocates would respect their overriding duty to the court. The House of Lords found that it was not.
- Expert witnesses owe an overriding duty to assist the court, unlike witnesses of fact. In *Phillips*, the court

applied similar principles to those considered in *Hall*, asking whether "expert witnesses need immunity from a costs application against them as a furtherance of the administration of justice". It found that they did not.

- Following *Phillips*, it is now possible to obtain a costs order against an expert witness if certain criteria are met.
- The courts have hinted that immunity from suit may be unnecessary where an expert's liability is defined and limited. This was a key consideration by the House of Lords in the decision to remove the immunity from suit enjoyed by advocates.

The conflict between the duties that an expert owes to the court and those that he owes to his client is one of the main justifications for blanket immunity from suit. The expert should be able to put his true opinion to the court without having to worry about repercussions from his client.

The Supreme Court will shortly decide whether Experts' immunity from suit will continue. If it doesn't, will experts still be so keen to accept instructions in difficult cases given the potential consequences?

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## Attendance in Court

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I attended a forensic seminar last year. A straw poll indicated that most delegates had not attended and given evidence in court. Even the Chairman and head of the Institute's Special Interest Group had relatively limited court room experience given the breadth of his forensic instructions.

A view was expressed that something had gone wrong if the author of the forensic report finishes up in court having to defend his findings. I was not persuaded by this contention. Accountants stepping into the forensic arena must bear in mind that they are becoming part of a legal process which is adversarial. The report represents evidence, possibly crucial evidence, and a lot may hinge on it, financially or freedom wise. The other side may call you because of the quality of the report and the need, maybe in desperation, to try and



undermine that quality. Joint instruction can mark one out as the key witness for either side. I feel therefore that we should work on the basis that any instruction could end up in a court appearance and that we need to be prepared for this eventuality.

The nostrum that most cases are settled out of court may still hold good but settlement can be at the 11th hour. I have had one case where we have been at court and primed to give evidence when the deal was struck. I may have been unlucky in that I have been involved in a number of cases which have finished up in court but it has concentrated my mind, when considering taking up an instruction.

I am excluding criminal cases from consideration in this article, since the odds on being called as a witness are incomparably greater. I endeavour, therefore, to weigh up the issues, when considering the instruction to determine whether it is likely to finish up in court. The factors to be borne in mind are:

1. What is at stake? Is there enough that the parties will slug it out to the bitter end?

2. The attitude of the parties and the level of acrimony – one can not always discern this at the outset. There may be a party in a dispute who seems hell bent on having their ‘day in court’, despite the legal advice that it is not always a pleasant experience and the decision can always go either way.

3. Where is the case being heard? Is it a local court or a more distant one, which will involve travelling which would need to be built into costs.

4. The difficulty factor – are we onto a loser? Are we being called out of desperation? Are the odds stacked against us? Is it a cast iron case? The solicitor may be hoping for some alchemy on our part as a desperate throw of the dice.

5. Who are the dramatis personae – am I working with or against solicitors that I know?

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## 2020 Vision

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Do you have a clear picture of how your business will look in 5 or even 10 years time? Many clients are focussing on short term issues, like cash, and have no clear idea how the business is going to develop in a longer timeframe. Your role as an adviser is to help them see through this short term fog and ensure they are making the right decisions now to deliver the future they want.

But, how many of us have a clear vision of our own future? The EU are currently considering a proposal to remove financial regulation completely for “micro” businesses with a turnover below £1m. Does that concern you? It might when you realise that 91% of businesses in the UK meet that criteria. What proportion of your client base falls within that definition? HMRC have suggested returning to a cash basis if the rules are introduced.

We recently installed some new software for a client, developed in New Zealand. It will download all your bank transactions and match receipts to customers, payments to suppliers, reconcile the bank and generate the statutory accounts and tax returns. It costs a few hundred pounds.

Let us imagine a combination of the VAT flat rate scheme and the Construction Industry Scheme. Every business has to submit a monthly return summarising the amounts paid to each supplier by UTR number. HMRC collate the information and apply a Flat Rate Sales Tax.

Time for a bonfire of micro business regulation?

The opportunity for us all is to identify the customers we want to work with, understand their problems, and develop solutions they need. To put it simply, if you want to succeed make sure you can supply something people want to buy. Unfortunately many businesses only offer the products which they can make.

Next time you meet a client, ask them to name their best customer. What makes that a great customer? What challenges will that customer face over the next 5 years? Do they have the skills they need to deliver a solution to meet those challenges? If not, what will they need to do and what resources will they need to retain that client? The trick then is

to shut up and listen. You may be surprised by the results – the best meeting you or your client ever had? Would that be something your client really valued and would gladly pay for?

I cannot tell you what the world will look like in 2020, but I do believe that if businesses are not providing products that their customers value or need, then they are very likely to seek what they want somewhere else.

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## Employees have duties too!

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Acting as the liquidator of a company, I have recently settled a claim against its former sales manager.

The background to the case was that the director & owner of the company, who did not have any previous business experience, had bought the company and had employed the sales manager. The sales manager was highly paid - £50,000 per year compared with the directors own salary of £20,000 per year. Unfortunately for the director, the sales manager immediately started trading on his own account.

The company made substantial losses and within two years was placed into liquidation. At the start of the liquidation process we attended the premises, declared the employees redundant and sent them home. At this point we discovered in the sales manager's desk a hand written ledger showing his private dealings and commissions paid to him which totalled more than £125,000. The sales manager later came back to "collect some personal possessions from his office" but by then we had his ledger and he left empty handed.

We challenged the sales manager and the suppliers he had been dealing with and they all came back with the same story, that the sales manager was carrying out "after hours trading" and therefore it was nothing to do with us. Unfortunately for the sales manager, by saying this, he had admitted a breach of his duty as an employee to his employer. An employee of a business has a duty to act in good faith and not do private deals in secret – even if the deals are done in his own time. If he had obtained his employers permission to carry out private trading he would have been ok, but he did not.

We therefore issued a claim against the sales manager to recover the secret profit he had made from his breach of duty. The sales manager issued a spurious defence and the matters proceed with a date for a Court hearing eventually being set. However, to avoid going to Court and the extra costs that would involve we agreed to attempt to mediate a settlement. The mediation took place after much discussion; offer and counter offer we eventually agreed the settlement of our claim for £70,000.

We often hear that employers owe duties to their employees; this is a good example that employees also owe duties to their employer.

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## Dividend or salary? Owner-managed businesses beware!

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### When can a dividend be paid?

In the first instance, the company's Memorandum and Articles lay down the procedure for payment of dividends. They usually require shareholder approval of distributions but may allow directors to approve interim dividends subject to later shareholder ratification at the next general meeting.

Secondly, the Companies Act 2006 is quite clear that a dividend can only be paid out of 'profits available for distribution'. This is generally an accounting issue and therefore directors should ensure that copies of accounts showing available profits are examined before each and every dividend is paid and that evidence is retained to support the legality of the payment. This is particularly important if profits are falling and a regular monthly dividend is paid.

In addition, the directors must consider their statutory duty under the Companies Act 2006 to promote the success of the company for the benefit of the members and must consider the consequences of the distribution on the longer term future of the company and its ability to pay creditors.

### Consequences of an illegal payment

If a shareholder knows or has grounds to believe that a company has insufficient profit for payment of a dividend the shareholder is liable to repay the distribution, irrespective of whether there is a formal insolvency of the company. Any such payments would be classified as 'illegal' dividends.

For a director, receipt of an 'illegal' dividend is a breach of fiduciary duty and there is an obligation to repay.

In the event of a formal insolvency any insolvency practitioner appointed will review all dividends and can take action on behalf of the company to recover any illegal payments.

Receipt of illegal dividends is also a matter that will be taken into account by an Insolvency Practitioner submitting a report on a director's conduct to the Insolvency Service. It might therefore contribute towards the decision to bring disqualification proceedings.

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