

BUSINESS BRIDGE

News and views for growing businesses and their owners



The rise (and fall?) of the gig economy

The way we work is changing. The regimented 9 to 5, clock in and clock out, mentality is becoming a thing of the past, being replaced by a growing desire for a more fluid working environment. This trend towards greater flexibility, which has sprouted buzzwords like “the gig economy” and “agile working”, is only likely to continue with the increasing number of millennials entering the workforce.

Nowhere has this flexibility been more clearly embodied than at organisations such as Uber and Deliveroo, whose workforces have been largely treated as self-employed, rather than as employees or as workers.

Benefits of flexibility

From a business perspective, there are numerous benefits to a self-employment arrangement. The ability to call upon the services of a workforce to react instantly to customer demand, whilst simultaneously not having to pay individuals during periods of downtime between work assignments, is extremely useful. There is no payroll to operate, no employer National Insurance to pay and self-employed individuals benefit from very little employment law protection.

It is not all a one-way street either – there are benefits for the individual as well. Principally, the ability to fit work around their personal life and, for some at least, to work in a number of organisations and more freely move around.

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The true nature of self-employment: for employment law and tax purposes

Recently, Uber has come under scrutiny in an employment tribunal for its classification of drivers as self-employed contractors. Uber drivers successfully argued that they ought to be treated as workers, with consequently greater protection under employment legislation than if they were self-employed. This landmark decision will affect not only the 40,000 Uber drivers, who will now benefit from rights such as paid holiday and the national living wage, but is also likely to have a knock-on effect for UK businesses operating similar models. Whilst Uber is likely to appeal the judgment, for now at least, its drivers should be treated as workers. The Uber judgment relates to classification for the purposes of employment law only. Although classification of employment status

for employment law is separate to classification for tax purposes, the assessment criteria used by HMRC is very similar to those used by the tribunals in employment cases. There is therefore a risk that HMRC, who are themselves launching a specialist unit to investigate these types of self-employed arrangements, could follow suit and determine that the individuals are workers for tax purposes too.

What are the alternatives for businesses?

Given the potential impact of a determination that self-employed contractors are actually workers or employees, businesses which adopt a similar model would be well advised to review their position as a priority and consider any alternatives where appropriate. One possible alternative is to use zero hours contracts. The concept behind these is simple – there is no

guarantee of work for the individual and, as a result, they are treated as workers, with fewer employment rights than employees. However, organisations using zero hours contracts, such as Sports Direct, have recently received negative media attention and have suffered reputational damage as a result. Further, the lack of investment in personal development and uncertainty of future work, which is typical in such arrangements, does not encourage loyalty or encourage individuals to “go the extra mile”.

While the emulation of Uber’s or Sports Direct’s staffing models might not be desirable for many businesses, it’s likely the trend towards more flexible and agile working will continue, even if checked slightly by the recent tribunal ruling and HMRC’s investigation.



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Welcome to Business Bridge

Welcome to this first edition of our refreshed newsletter produced exclusively for our clients and friends interested in the entrepreneurial sector. We hope you will find it relevant and interesting.

Over the many years I have worked at S&B, our relationships with owner managed businesses, their owners and those investing in and otherwise supporting them has been a strong and consistent theme. We lawyers love defined terms and our own definition of “entrepreneur” is broad – “a risk taker/owner manager, whose business interest may range from start-ups to substantial owner managed groups”.

We act for some of the largest privately owned businesses in the country, some we even helped to establish and have grown alongside. Equally, our

commitment to early stage enterprises continues, for example through our involvement with the Surrey Technology Centre and SETsquared Partnership, the Surrey 100 Club, Rocketdesk and TIGA. We lend our support to these organisations in various different ways, including through sponsorship and by offering our time and resources.

At a time of great political and economic uncertainty, our entrepreneurs are again expected to lead the UK towards growth and prosperity. We plan to play our part too, not only through our own business growth, but also by adding value to our many clients, whether through practical, partner-led and cost-effective legal advice or through other assistance such as regular social media bulletins and news,

recommending clients to experts we know well in other fields or simply helping them to connect with each other.

Our aim is to provide our busy friends with a mixture of topical legal updates, non-legal content and snippets of news about us, in the hope that you will look forward to receiving Business Bridge, and with a view to deepening the relationships we so value and enjoy. Your feedback and suggestions for future editions will be most welcome.



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Stevens & Bolton wins National/Regional Law Firm of the Year



Earlier this year, S&B was named 'National/Regional Law Firm of the Year' at the 2016 Legal Business Awards, held at the Grosvenor House Hotel in London. The firm was chosen ahead of six others from across the UK. The decision was made by a judging panel which included many of the top general counsel in the UK. This is the second time the firm has been awarded this accolade, having first won in 2009 and subsequently been shortlisted each year since 2012.

The Legal Business Awards, organised by Legal Business, are one of the most prestigious awards in the legal sector. The 'National/Regional Law Firm of the Year' award recognises the UK-based national or regional firm (with headquarters outside of London) that has made the most significant progress over the past year in advancing its strategy. Key factors taken into account for this award are evidence

of effective leadership, impressive financial performance and increased market share across the firm's major practice areas.

Ken Woffenden, managing partner said: "We are delighted to have won this highly prestigious award. It reflects the hard work and dedication of everyone in the firm – a fantastic team effort. I would like to thank all of them and also all our clients and friends

for their support for the firm – we really appreciate it."

This year S&B has also been shortlisted for a number of other industry awards including 'UK Law Firm of the Year' at the British Legal Awards 2016 and 'Regional Law Firm of the Year' at The Lawyer Awards 2016.



A Word from the Editor

A recent discussion with S&B colleagues about "entrepreneurial spirit" got me thinking; what does it really

mean? So, I googled it (naturally) and was presented with an array of suggestions from reputable and less reputable sources. But the overall message was pretty consistent. It's an optimistic, passionate and proactive mind-set, combined with critical thinking and a drive for continuous improvement; a veritable recipe for success. Bottle it up please, I'll have it to go!

For me, the term "entrepreneurial spirit" also encapsulates the people we had in mind when we created this publication. It's for those businesses and individuals

we work with who embody the concept. And it's working with these businesses and individuals that makes my job as a commercial lawyer so enjoyable. The eagerness to share and receive ideas and the drive for innovation is infectious and truly rewarding. As we move into the festive season, I feel thankful for having the opportunity to work with these individuals and businesses, and look forward to continuing to work with them in 2017.

This edition of Business Bridge offers a selection of articles to tickle your varied taste buds. Inside it you will find thoughts, tips and updates from our very own team and, just as every "signature bake" and "technical challenge" must be followed by a "showstopper" (Bake

Off withdrawal symptoms continue), we offer two "showstoppers" kindly contributed by Paddy McGwire, Managing Director at Silverpeak and William Bird, CEO and Founder at Intelligent Health. Paddy considers the current landscape for tech funding through the eyes of a corporate financier who has specialised in the sector for just about his whole working life (p.6/7), and William gives us a generous insight into his own entrepreneurial mind (p.4/5). So, there you have it; Business Bridge is officially up and running. We hope you find it an interesting, enjoyable and (hopefully!) useful read.

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The Lowdown

In the first of our series of interviews with successful entrepreneurs, we speak to William Bird, CEO and Founder of Intelligent Health Ltd, and find out what it's like to scale a company quickly and why it pays to try to anticipate every possible challenge.

Please describe your business in a nutshell

Intelligent Health is dedicated to increasing physical activity and improving the health of communities around the world. Working with local partners and stakeholders, we deliver community-led campaigns such as Beat the Street which increase the physical activity levels of thousands of residents in any community they're delivered in.

What was your initial spark for starting it? What were your aims, what did you want to achieve?

Inactivity is one the biggest issues in public health today – one in four people

in the UK do less than 30 minutes of exercise each week. Physical activity has more health benefits than any other single intervention, but traditional health campaigns have had limited success in engaging large numbers of people. The aim of Intelligent Health is to get entire communities active. We knew that our approach to public health was unique and would lead to major and lasting improvements in physical activity levels in towns, cities and boroughs across the world.

“The aim of Intelligent Health is to get entire communities active. We knew that our approach to public health was unique and would lead to major and lasting improvements in physical activity levels in towns, cities and boroughs across the world.”

Now the business is up and running have those aims changed, if so how?

Although our aim of building active communities hasn't changed – we have learned that we have to be much more

flexible to be able to achieve it. What engages residents living in Southall might not work in Belfast – by drawing upon the knowledge of our staff, listening to local people and being creative in our approach, we have been able to engage more than 500,000 people through our programmes.

What has been your biggest challenge so far?

Intelligent Health has grown from working in a few areas and employing just three people, to delivering programmes across the world with a team of over 50 people. The main challenge has been adjusting to this growth and ensuring that all our staff are able to work effectively together. As we've expanded to new areas in the UK and worldwide, we have had to innovate and refine our engagement approach to make sure we are able to succeed in unique and vibrant communities across the world.



What is the most surprising thing you have learned in the course of running the business?

We knew that our Beat the Street campaign would create a lasting legacy of physical activity in the communities it has been delivered in. However, I was surprised by the power of the brand – Beat the Street has been delivered in the UK, Austria, Italy, United Arab Emirates and other countries and it is successful regardless of language or culture.

If you could go back to when you were starting out and do one thing differently, what would it be?

One thing I would have done differently at the beginning would be spending more time anticipating the potential challenges we have encountered: whether it is the

impact of low temperatures in the Welsh valleys or how different international holidays could impact shipments. We are fortunate that each time we bring our programmes to a new area, we have the chance to reflect on what went well previously and ways we can continue to improve and refine our campaigns.

Do you view Brexit as a threat or an opportunity?

We are aware that it could reduce EU funding that we have previously secured such as the SWITCH programme. The fact is that we need to pay attention and adapt as the situation develops. Inactivity levels are growing and Brexit will not impact on that.

What is the best piece of advice you were given when you were launching the business?

Business is common sense, don't overcomplicate it. Deal with people with respect and decency.

Beyond technical expertise, what are the key characteristics you look for in your professional advisers?

I think it's important to recognise that good advice can come from anywhere – whether it is a board member with years of experience or a new member of staff who has spotted a way we could do things even better. As a result, the most important characteristics for a professional adviser for Intelligent Health are creativity, honesty and a strong belief in the work we are doing in communities across the world.

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Welcoming a new generation to Stevens & Bolton

We are delighted to welcome five new trainees to the firm. Charlotte Burroughs, Katie Green, Mary Liu, Jessica Ransley and Raveena Ubhi joined the firm in September and will spend time developing their legal skills and experience in various practice areas before qualifying in September 2018.

We're equally pleased to announce the qualification of our previous trainees into a number of departments at the firm. On completing their training in September, Angelica Liddell and Jennifer Howell

qualified into our Commercial team, and Katrina Walter and Lorna Sleeve qualified into our Dispute Resolution team.

We wish both our new trainees and newly qualified colleagues all the best for their future legal careers.



Charlotte Burroughs



Katie Green



Mary Liu



Jessica Ransley



Raveena Ubhi

Q&A with Paddy McCGwire

Managing Director, Silverpeak



Can you describe Silverpeak in a few sentences?

Silverpeak is a technology sector focussed investment bank with offices in London, Paris, Hamburg, Munich and soon to open in Berlin. Our expertise covers Software/SaaS, Hardware, Semi-conductors, Tech enabled services, IT services, Health tech, Fin tech, Internet and digital media, and Mobile.

We advise growing mid-market clients on larger fundraisings, typically from international investors; and M&A, mainly the sale of businesses to strategic and financial buyers around the world.

We have deep global reach with longstanding relationships resulting in most of our transactions being international. We are also founder members of Globalscope which provides us strong relationships with similar firms in 41 countries to overcome cultural or language hurdles where necessary.

What does a typical Silverpeak client look like?

Our typical clients are both owner managed and venture capital/private equity backed, showing good growth and looking at a point of change. We also advise listed companies. Clients may be looking for a further funding round of circa £10m or more to accelerate growth. Alternatively, they could be considering an exit and how to maximise the return on all their hard work by finding the optimal acquirer.

In the summer we sold the VC backed 30 month old Magic Pony to Twitter, and a German hospitality software business to a Chinese buyer. And we are currently

dealing with offers from buyers in Chicago, Florida, California, Paris and London for different clients.

What trends are you seeing in the market for mid market/sub £100m UK technology M&A?

The market is holding up well at a strong level. As well as US buyers who are often using their cash trapped overseas to buy strategic productive assets, we are also seeing a strong showing from the Far East and particularly Chinese investors/acquirers looking to apply the technology in their huge domestic market. We are currently negotiating with US parties on four different clients and sold one business to a Chinese buyer in the summer.

How has the Brexit vote changed market activity and sentiment? Do you think Brexit will have a long term impact on UK tech M&A activity?

We have seen little change in sentiment – arguably British assets have just got cheaper with the devaluation of sterling. None of our international ongoing transactions have been knocked off course.

In terms of raising growth capital for tech businesses, what is the current funder appetite and are there any particular funder sweet spots at the moment?

There is good investor appetite for strong management teams, so long as technology and market risk have been taken out. Investors want to know that if they put fuel in the tank, then the business can accelerate. They want to be able to see that there is large market for the product or service and that customers are buying it: taking out market risk.

The same can be said for technology risk – the technology must be proven and can scale if necessary.

Internet services is leading the way, followed by software

of European tech financings by sector (≥€7.5mn)
Total # of deals = 404

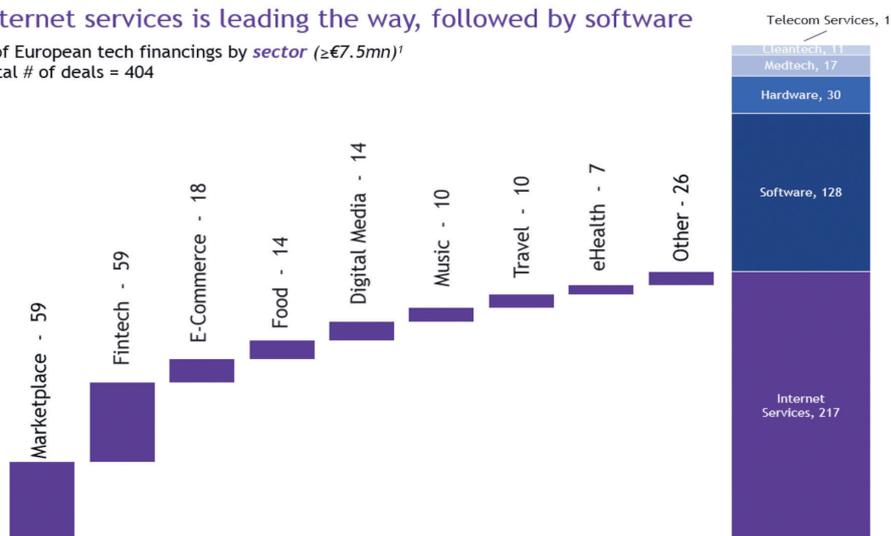


Fig. 1 1: Between Q1 2015-Q3 2016 Source: www.go4venture.com

If you can answer these questions positively then you will find good demand for growth capital. If not, most institutional investors will wait until those risks are removed.

Chart Fig.1 shows that Market Places and Fintech are the two largest sub-sectors making up Internet Services – the most attractive investment area.

Do you see crowd funding and peer to peer funding initiatives growing in importance?

Yes I do see it growing – at the smaller end of the spectrum, by which I mean in the less than £5m bracket, which has been abandoned by many venture capitalists. There are a few who still work at this level, but it is a small group.

“The most common weakness is poor financial control systems, generally without suitable personnel”

My feeling is that peer to peer funding (i.e. on electronic platforms) is likely to become more important, as it increases ease, takes out cost and provides an extra channel to market. Crowd funding is sometimes used to top up a larger round, particularly where the company sells to consumers.

When should prospective sellers start to build relationships with corporate finance advisers?

You should think about it up to three years before you want to sell. That’s because an advisor can then help you with material considerations to enhance value on the journey to sale - building in the steps you can take to get the best result.

An early conversation also means that if an inbound enquiry from a buyer comes, you are well equipped to deal with it. A growing firm of scale is likely to get a lot of enquiries both from private equity to trade investors, and they are a distraction to the management team.

Having an agreed strategy and framework in place is a very helpful way of keeping things on track.

When advising prospective sellers, what three things would you advise are most important for them to do to achieve a successful exit?

The first is to identify potential buyers in the years before commencing a sale process. These are likely to be in your value chain or in adjacent markets or geographies. It’s very easy to work in a silo – focusing only on your customers without looking out to where your potential buyers will be in years to come.

When you are thinking about buyers, be aware of what your potential value is to them, rather than just what you are. There are a number of reasons buyers make strategic acquisitions, so explore what need you can fulfil.

The second, linked point is to engage with industry analysts. It is a bit of a game – but they are still regarded as being able to provide important third party verification of “who is a player in the market”. When you form a relationship with a corporate finance advisor they can help develop the messaging you need for this sort of conversation.

Finally and crucially: prepare thoroughly and have good control of your numbers. You must have strong financial systems in place and be able to produce accurate figures quickly. And provide secondary analysis so one can understand the trends.

Show a record of delivering to forecast in the past, which will make forecast at sale more believable.

The most common weakness is poor financial control systems, generally without suitable personnel. And the biggest reason for deals falling over is a surprise in the numbers, or not hitting expectations. A good finance function is so much more than bean counting.

What is the recipe for a successful corporate adviser/tech business relationship?

You need to find an adviser who understands the dynamic of your business and has demonstrable reach to the buyers. A track record of delivering transactions in your ‘genre’ is important, but if you design a very niche type of software for example, it doesn’t matter if they have not worked on that exactly – but it’s important that they do understand the marketplace for companies of your type.

Outside of market knowledge you need to be in a relationship where there is mutual respect, for both the people and businesses involved. You want to work with a team who can see the inherent value of your business, but crucially is not going to flatter their way into the mandate with over ambitious predictions of what is an achievable sale price.

You need be sure that the chemistry is there – you are going to spend a lot of time with these people. Be sure you do have access to the senior people you think you are hiring. The sale process can be an emotional rollercoaster and having a partner you can trust and enjoy working with will make all the difference.

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Download free Stevens & Bolton legal guidance notes

On the S&B website you can find legal briefing notes prepared by our own team of experts, which aim to provide you with guidance on a variety of issues ranging from setting up your business, preparing standard terms of business and dealing with commercial disputes, to employee issues, share schemes and exiting.

Our guides are available on our website (www.stevens-bolton.com/publications/entrepreneurs) and are free to download.



Do you know who holds shares in your company?

It's a simple question – but one a surprising number of growing firms find they struggle to answer accurately.

When selling or taking an investment into your company, the highest priority when it comes to buyer/investor legal due diligence is likely to be ensuring that the company's issued share capital and individual shareholdings are clear.

It sounds straightforward, and yet problems in this area are common and attempting to put them right can cause significant additional cost, embarrassment and delay, or even the collapse of your deal.

Why do such problems arise? Usually it's for one or more of these reasons:

- Business owners and managers lack a commercial appreciation of the importance of the issue, or the need to address it at all;
- Particularly during the early stages of a company's life, founders understandably wish to minimise professional costs and they may adopt a self-help approach without realising the potential traps for the unwary;
- Businesses receive poor professional advice.

Here we discuss the scenarios that occur most often and highlight what entrepreneurs should be aware of if they want to avoid potentially serious problems further down the line, whether they are funding or exiting the business.

Subscriber shares and “incorrect” share issues

A company will often be incorporated with one or two initial subscriber shares held by the founders to get it “up and running”. If a company is incorporated with two initial subscriber shares and then issues another 100 shares, it has 102 shares in issue – but often the subscriber shares are forgotten when the second issue takes place. Then, subsequent shareholder meetings ignore those shares, regulatory filings such as annual returns ignore them and it's surprising how often this issue is missed by any auditors as the company grows.

Founders may also fail to appreciate the importance of correctly filing details of new share issues at Companies House. We recently encountered a case where the founders of the company filed a return suggesting that 100 shares

had been issued in 70/20/10 ratios to three founders, but then changed their minds and filed another return shortly after recording the issue of 100 shares in different ratios and including a fourth shareholder. There were no other contemporaneous records some 20 years later, and the investor was understandably concerned that there had in fact been two issues of a total of 200 shares, when for 20 years all regulatory filings and shareholder meetings had simply ignored the “first” issue – and by then one of the founders was dead and another had left the company on bad terms!

Own share purchases

A purchase by a company of its own shares (“buyback”) is commonly used as an exit route for departing shareholders. A buyback needs to follow a detailed procedure under the Companies Act and failure to comply with every element of that procedure can result in the buyback being void – meaning that the buyback is treated as not having taken place and the “departing” shareholder remains a shareholder.

Share options

Share options can be a great way to incentivise a management team and other employees. Many companies introduce tax-efficient share option schemes as they grow, most commonly within the enterprise management incentive (EMI) statutory framework. If these schemes are not set up or operated correctly, it is again when the company is under the spotlight of a due diligence process that this is likely to be highlighted. Examples include:

- Scheme rules and company governance documents failing to work together to provide a clear procedure for the exercise of options and forced sale of the shares arising when the company is being sold;
- Procedurally incorrect share option grants, resulting in buyers refusing to accept that there are no PAYE income tax/national insurance contribution (NIC) consequences of options being exercised;
- Misunderstanding of the significance on exit of a “rump” of unallocated share options, particularly where the share option scheme is operated by an employee benefit trust in relation to

- issued shares held by that trust;
- Uncertainty as to whether former employees who had been granted options still hold option rights.

Due diligence can also highlight “informal” promises made by founders to provide shares or options to employees. For continuing employees when a company is being sold, the result can be that it’s too late to deliver the promise in a tax efficient manner, substantially reducing the net value of the incentive compared with the founder promise made. Where employees have left in the meantime, or due diligence throws up promises to continuing employees which founders in the end decided not to implement in whole or in part, any buyer/investor will be concerned if there is any uncertainty as to whether legally-enforceable rights remain which should have been terminated.

Prevention is better than cure

We often help to solve problems of the kinds described above in the run up to a major transaction for a company and its founders. Doing so can be costly and time

consuming, possibly involving having to track down former shareholders to ask them to sign documents which, many years on, may not be possible if the relationship has broken down or may only be possible with a financial carrot.

It may not be possible to remedy tax problems in relation to improperly documented share issues or option arrangements, without a long and commercially unrealistic delay.

So, when it comes to your company’s share capital and any share options or other incentives, “cheap is dear”. Without specialist advice from a lawyer, you may be storing up significant challenges when you want to sell or raise investment for your company. Beware of advisers offering “standard” products or solutions, as tailored advice is nearly always required.



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Stevens & Bolton raises over £20,000 for Phyllis Tuckwell

At S&B we aim to play a positive role in the communities in which we inhabit and to carefully manage the impact of our business socially and environmentally. Our current firm charity is Phyllis Tuckwell, the only Hospice Care service which provides supportive and end of life care for adult patients and families affected by cancer or other serious progressive illnesses in West Surrey and North East Hampshire.

Our CSR activities in support of Phyllis Tuckwell have included everything from bake sales and promises auctions, to the firm’s home-grown choir, Nota Bene, performing

at the Legal Harmony Competition in Southwark Cathedral in October. We are delighted to have been able to raise more than

£20,000 for Phyllis Tuckwell through these activities, and look forward to continuing to support them in 2017.





Talking Heads

Matt Carman

Personal Wealth and Families Group

In this edition of Business Bridge we interview Matt Carman, a Senior Associate in the S&B Tax and Trusts team, part of the wider Personal Wealth and Families Group. Matt advises individuals, families and trustees, including often working with business owners, on a wide range of tax and trust issues.

Matt is a full member of STEP (the Society of Trust and Estate Practitioners), having recently completed the STEP Diploma in Trusts & Estates with distinction for which he was awarded the Brendan Hall Prize and was subsequently elected onto the committee of the STEP Central London Branch. Matt was also recently named as one of eprivateclient's top 35 private client professionals under the age of 35 and is recommended in the Legal 500.

Matt, can you start by giving a short overview of the S&B Tax and Trusts team?

As you would expect, we cover the full range of "regular" private client matters (such as wills, inheritance tax planning, trusts and probate). In addition, we do a lot of work in the more general tax advisory space - particularly for business owners, for example, advising on entrepreneurs' relief, business property relief and employee benefit trusts. A number of the team (myself included)

started off life as corporate tax lawyers and so we are well placed to advise (in conjunction with our corporate tax team) on the cross-over of personal and corporate tax issues.

Can you give us a flavour of some of the recent work you've been doing?

A particular theme in the last year or so has been exits - we have advised several clients on pre-sale structuring. This has often involved transferring shares (for values above entrepreneurs' relief thresholds) into trust as part of future inheritance tax planning. This is efficient as transferring value into trust post sale is very difficult to do without tax leakage. Following sale, we have then been advising clients on succession planning and asset holding vehicles (including the establishment of bespoke family investment companies).

We have also been busy advising non-domiciled clients on the impact of the 2017 tax changes (which will see long term UK residents pay UK tax on worldwide income and gains regardless of their domicile).

What do you think are the key private tax and trusts issues which entrepreneurs/owner managers should bear in mind

when establishing and exiting their business?

A key thing to think about when establishing a business is the ownership structure from a tax (rather than just a commercial) point of view - this is often overlooked. Generally, it is (much) easier to establish a tax efficient structure than it is to re-order an existing structure.

In terms of exit, there are a number of things that can be done to achieve tax efficiencies on sale like maximising entrepreneurs' relief and putting in place Enterprise Management Incentives. Bear in mind though that the vast majority of these require action to be taken at least a year before sale. So, get advice early!

What you do think are the main challenges facing entrepreneurs/owner managers at the moment from a tax and trust perspective?

I'd say the overall main difficulty is the constant change in tax legislation and difficulty in planning accordingly. It is difficult for a tax adviser to keep on top of - let alone a business. The sudden unexpected increase in rates of dividend tax was a good example of this, which has adversely affected a number of owner managers.

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Structuring for Success

The top 5 IP mistakes growing businesses make, and how to avoid them

Every entrepreneur looks back and thinks about what they might have done differently in the early days. Mistakes happen, and often they are a valuable part of the learning curve, a rite of passage to success. However, making the wrong decisions around your new company's IP can have serious and unwelcome long term implications, so it's vital to know the potential pitfalls.

Commercial success is the common aspiration shared by all entrepreneurs, whether that's securing outside investment for further expansion, or the sale of the business to realise a return. Here we unpick the mistakes ambitious start ups often make in handling their IP issues, and advise on how to avoid them.

1. Can you really rely on unregistered rights alone?

Whilst not all IP rights are registrable (copyright, for example, arises automatically upon creation), where

available, registration can offer their proprietor a powerful tool when it comes to enforcement. For some start-ups, registrations are understandably seen as an extra cost or "non-essential luxury", which can be particularly difficult to justify in the early days when money is tight. However, there remains a fine balance to be struck, and businesses should be careful not to dismiss all registration opportunities entirely out of hand. Whilst some may be desirable rather than essential, others could prove vital to growth.

For example, the valuable reputation and goodwill which a business builds as it trades attaches to its trade or brand name. When it comes to protecting your rights in that name, a business with a registered trade mark will be better placed to bring infringement proceedings under trade mark legislation, whilst the holder of an unregistered trade mark will be left to rely on a more complex and challenging claim under the law of passing off. Further, that great innovative idea or concept which promises to make you millions could lose

its novelty, and therefore any prospect of a patent being granted, if made public prior to a patent application being filed. In short, a well-meant (yet misguided) attempt to commercialise your idea without the proper security in place, whether due to time or financial pressures, could prove costly for the business in the long term.

2. Ownership isn't always automatic

An equally important consideration is whether the business actually owns the IP which has been created. If the business is large enough to have employees, then legislation provides that title in IP created in the course of employment passes to the employer. However, application of this can be challenging in practice, particularly when considering the input of founders, friends and freelancers in the early days.

Any IP created by these "non-employees" will belong to them, unless it is assigned to the company. The take away point

here is clear: when it comes to engaging others in the creation of IP for your business (whether employee, consultant or founding party), the written contract remains king when it comes to certainty of title.

3. Is sharing always caring?

Often overlooked, a business' key confidential information (namely its trade secrets) is a valuable resource which should be protected, not neglected. Business methods and plans, statistical and financial information, recipes and customer lists (to name but a few) are all capable of protection, provided they are not public knowledge. In certain circumstances, the law on confidential information can provide businesses with a useful right of recourse in the event of a breach or misuse.

“Commercial success is the common aspiration shared by all entrepreneurs, whether that’s securing outside investment for further expansion, or the sale of the business to realise a return.”

For these reasons, businesses should include confidentiality clauses when preparing consultant or employee contracts, and enter into non-disclosure agreements when engaging third parties in business-sensitive areas. Further, for those dealing with large quantities of confidential information, the implementation of clear internal policies and procedures for the handling and sharing of such information should not be discounted, as these can greatly reduce the risk of unwelcome “leaks”. This being said, there can of course be no substitute for guardedness when it comes to such disclosures – do they really need to know?

4. Eyes open

So your business has created or obtained IP, what next? Well, as an intangible asset of the company, its value and integrity

directly impact upon the ultimate success of the business. However, the majority of start-ups fail to take a proactive approach to protecting their IP, meaning that infringing activities can occur unnoticed for some time before any action is taken by the business in response. By taking steps to monitor how, when and where competitors and other third parties might be using your IP, businesses are well placed to identify and respond to such activities before any permanent or long-

term damage occurs. Useful practices for achieving this include: keeping clear up-to-date records of owned IP assets; diarising registration renewal dates; and monitoring competitors online and even engaging third party service providers to carry out

specialist monitoring tasks (i.e. trade mark watching).

Furthermore, vigilant portfolio management and wider awareness can help to identify IP belonging to others, allowing a business to ensure its own activities do not unwittingly infringe this IP.

5. Realising a return

As an asset of the business, any opportunity to commercialise and harness the potential of your IP should not be overlooked. Whether this is best done in-house, utilising the operator model, or licensed out to third parties to achieve a royalty revenue stream, will depend on the nature of the business, its resources and the appetite of its founders. Each comes with its own advantages and disadvantages in terms of reward, risk and investment. Ultimately, a business will need to consider: (i) how much responsibility and risk it is willing to assume; and (ii) how much control and independence it wants to retain when it comes to issues such as



finances, business direction and execution, decision-making, quality control, and sales and marketing.

Whichever route is chosen, the critical point to remember is the value of a clear plan. Not only will this plan help guide the business, ensuring continuity in decision-making and allow for clear road-mapping for the future, but it can also prove an incredibly attractive resource to an investor or buyer further down the line when it comes to justifying forecast targets and growth.

The bigger picture...

We know the two major factors which impact on the decisions made by owners and managers of a growing business are time and costs. Both are in short supply in the early years, and founders must decide how these two precious resources are invested.

By considering the issues and options discussed above, and committing time and money “little and often”, where appropriate, the overall result can be preferable to the challenge of dealing with critical, and often complex, IP issues on the eve of that promising investment or buyout.



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We welcome feedback, so please do get in touch if you have any comments or ideas for topics you would like us to explore in future issues. Please contact Emer O’Kelly on 01483 406 994 or emer.okelly@stevens-bolton.com