Spotlight on private wealth

June 2020

Our quarterly update is designed to keep you up to speed with developments in the private wealth world. In this edition we explore self-dealing by trustees, alongside a topical look at how Covid-19 is affecting will-making, fraud claims and the art world. If you have any feedback on this update or would like to know more about the issues covered, or anything else, please get in touch.

The big question

Deal or no deal?

Trustees intending to buy trust property should not take a gamble. A trustee's purchase of shares from the trust was set aside in the recent case of *Caldicott v Richards*[1]. The purchase was prohibited by the rule against self-dealing and the case provides a salutary reminder of the pitfalls trustees face if they want to do a deal with the trust.

The self-dealing rule – a deal breaker?

Trustees are under strict duties to avoid conflicts of interest and to refrain from profiting from their position. In the context of transactions involving trust property the trustees' knowledge of "what is in the box" means that there is a risk they will not act in the best interests of beneficiaries. For example, trustees may have acquired knowledge about the trust property which is to be sold which decreases its value. As the selling trustees, they have no interest in disclosing this and accepting a reduced price, but as the purchaser they will want to pay only the true value.

The self-dealing rule therefore prohibits trustees from purchasing property from the trust, regardless of whether the trustees have acted wrongfully. Unless an exception applies the sale of trust property in breach of the rule can be set aside and the property re-sold.

Who is the dealer?

A trustee cannot use third parties to purchase trust property and circumvent the self-dealing rule:

- A third party cannot purchase trust property if there is even an expectation that the third party will later deal with the trustee in relation to that property; the term "deal" can be interpreted loosely – no contractually binding commitment between the trustee and the third party is required.
- A trustee cannot use a company of which he is a director or shareholder to deal with the trust. This rule applies even if the trustee has a minority interest in the company, unless the interest is so small that it can effectively be disregarded.

Similarly:

- A trustee cannot retire from his position and then deal with the trust if that deal was contemplated when he retired.
- A trustee who is also a beneficiary cannot claim to have received the property as a distribution from the trust if in fact he purchased it - the attempt to run this argument in Caldicott was unsuccessful.

However, the rules are not all so clear-cut. Relatives of the trustee, such as a spouse, may be able to deal with the trust if the transaction is in the interests of the beneficiaries. This will depend on circumstances such as whether the property is being purchased at auction. It is also uncertain whether a trustee can sell property to another trust of which he is also trustee. As the self-dealing rule is a potential block to deals in these circumstances, a trustee should seek the consent of the beneficiaries to any proposed transaction and (if necessary) approval from the court.

1. *Caldicott v Richards* [2020] EWHC 767

Deal or no deal? contd...

Is there a way to cut a deal?

A deal is not necessarily destined for disaster if the self-dealing rule applies.

The trust deed may expressly permit self-dealing in certain circumstances. For example, it may allow a trustee to purchase property at full market value verified by an independent third party. If the trust arrangements placed the trustees in an unavoidable position of conflict concerning the sale of trust property at the outset, then by implication the trustees may be allowed to self-deal even if it is not expressly permitted by the trust deed.

A trust deed may also reduce the consequences of the application of the self-dealing rule. In Caldicott the trust deed allowed the trustee to keep the dividends paid on the shares wrongly purchased, which the trustee would otherwise have been obliged to return to the trust.

If all the beneficiaries of the trust are adults and have capacity they can agree to the trustee's proposed deal. If some of the beneficiaries cannot consent, for example because they are children, the court can consent on their behalf. Trustees should ensure that the beneficiaries are fully informed before they provide consent. In Caldicott the court was not convinced that the beneficiaries understood the deal and their written consent was therefore ineffective.

In exceptional circumstances the court will rubber stamp a deal if it considers it is reasonable and proper to do so, even if all the beneficiaries have not consented. In one case, an executor who tried and failed to renounce his role bid for estate property at an auction[2]. As he had never acted as an executor he had no inside knowledge about the property or any conflict of interest, so the court permitted the deal to go ahead despite the objections of some beneficiaries.

Deal or no deal?

The self-dealing rule can prohibit deals between trustees and the trust, even if they are on commercial terms. When trusts are established it is worthwhile considering whether there are any circumstances in which a trustee is likely to want, or need, to deal with trust property so that appropriate provision can be made in the trust deed. If there is no such provision, a trustee is well advised to seek the beneficiaries' approval before purchasing trust property. In any case, care should be taken to ensure that the price paid reflects the true market value and that this is supported by evidence, such as a report from an independent valuer.

2. *Holder v Holder* [1968] Ch 353

What's new?

Wills and windscreen wipers

Concerns about the Covid-19 pandemic have led to a sharp increase in demand for wills. Those executing wills in recent months have had to devise novel solutions to comply with the strict rules regarding valid execution of wills, as well as the guidance on social distancing.

To be valid, a will must be signed by the person making it, and this signature must be made in the presence of two witnesses, who must each sign the will in the presence of the person making it. Recent lockdown measures have made it challenging to meet these execution requirements.

Video conferencing is of no assistance; witnesses must be physically present for the will to be validly executed. The Ministry of Justice has indicated that there are no plans to relax the rules regarding the execution of wills.

Creative solutions have therefore been adopted. The BBC has reported on wills being held in place by windscreen wipers and signed on car bonnets, while witnesses have maintained social distancing by witnessing the signing of documents through windows or over fences.

Solicitors advising clients on wills are now providing additional guidance beyond the well-established rules regarding execution formalities and the ineffectiveness of any gift to a witness under the will.

A will can be witnessed from two metres. Clients and witnesses are advised to maintain social distancing during the execution of the will. Solicitors are also advising that the signing and witnessing of wills should take place outside, with all participants wearing gloves and using separate pens. Clients are encouraged to record the signing of wills and may be advised to re-sign once social distancing measures have been lifted.

Though there has been flexibility in other areas of the law because of Covid-19 – most obviously in the transition to remote hearings in the civil courts – the rules around executing wills have not changed. However, the ways in which people have been observing those rules certainly has.

What's new?

Catching fraudsters and phishers

As the recent EasyJet data breach demonstrates, global disruption has not hindered hackers. In fact, reports indicate that fraud and cybercrime are on the rise since the outbreak of Covid-19. The fear and urgency caused by the pandemic, as well as the novelty of working from home, are being taken advantage of by criminals. Businesses need to move fast to control the fall-out from data breaches.

Fortunately, the current situation has not impacted the English court's ability to hear claims and deal with urgent applications; the courts are still open, with most hearings being conducted remotely. Victims of commercial fraud still have the full suite of remedies at their disposal to prevent assets being lost forever. These include freezing injunctions, which prevent the disposal of assets and search orders, which permit the search of property to preserve evidence. RPC is well placed to advise those seeking, or resisting, these remedies and have extensive experience in asset tracing and in dealing with complex and multi-jurisdictional disputes in which fraud is alleged.

Businesses are advised to train staff in cyber security and check they have appropriate systems in place to protect personal data. Whilst the Information Commissioner's Office has indicated that it will take a more pragmatic approach to enforcement under the GDPR during the pandemic, businesses are still required to report any breaches within 72 hours. Victims of data breaches therefore need to act quickly to comply with their regulatory obligations, limit damage and preserve their reputation. RPC provides the innovative ReSecure data breach response service. ReSecure gives access to a team of experts who provide data breach management, technical forensic investigation, legal advice, notification, web and credit monitoring and public relations services.

Fraudulent conduct or data breaches can be highly damaging, but despite the current circumstances it is business as usual in the courts and for those assisting businesses to reduce the impact of data breaches.

What's new?

Fraud and the Furlough Scheme

HMRC have announced an increase in the number of reports of suspected abuse of the Coronavirus Job Retention (Furlough) Scheme. It is likely that criminal investigations and prosecutions will follow in the coming months.

During this period of heightened risk, businesses should ensure that they do not find themselves unwittingly committing corporate criminal offences under the Criminal Finances Act 2017. The Act imposes criminal liability on organisations who fail to prevent their people from helping others to commit tax evasion. The only defence to criminal liability is having in place reasonable procedures to prevent any wrongdoing.

The risk of assisting others to commit tax evasion arises in the current circumstances because, for example, managers may require furloughed staff to continue to work, in breach of the furlough scheme rules. Remote working inevitably leads to less control and oversight than would ordinarily be in place. Businesses should updating their risk assessments on the risks of financial crime to reflect the dramatic changes in working practices that we have seen in recent months. Any procedures that are in place will need to withstand an increased level of scrutiny in the coming months as reports of suspected wrongdoing during the Covid-19 pandemic are investigated by HMRC.

RPC's Tax Team, which includes former senior HMRC lawyers, regularly advises and defends businesses facing tax related investigations and prosecutions. The team has developed a unique toolkit to support businesses in developing their procedures to reduce the risk of tax evasion. It provides a step-by-step solution for those businesses which currently have no, or very limited, procedures in place.

RPC asks...

A helping hand on the property ladder – but on what terms?

Where an individual transfers property to another person, or contributes to the purchase of property in their name, the presumption of advancement can apply. This means that the law presumes that the transfer or contribution was intended to be a gift rather than a loan, unless there is evidence to the contrary.

The presumption of advancement applies to transfers of property from parents to children and between spouses. Recent cases have provided a reminder that the presumption can apply when parents purchase property for their adult children emphasising the importance of documenting the terms on which property is acquired within families. The government has introduced legislation abolishing the presumption, but this has yet to be implemented.

In a recent case[3] a father purchased a property in his son's name, listing his own residential property as security for the mortgage. The pair subsequently fell out, and the father brought a claim for the repayment of the money which he alleged that he had loaned to the son for the purchase of the property.

The court applied the presumption to conclude that the house had been a gift and not a loan. There had been no mention of a loan in previous correspondence or documentation. This follows a similar case last year, in which the presumption was upheld in relation to the transfer of property from a father to his adult daughter[4], the effect of which was to shield the property from the father's creditors.

It is recommended that families document the terms on which property is transferred to adult children or purchased for them. This enables everyone to understand their position and ensures that the transaction is properly accounted for if the parent passes away or faces insolvency.

3. *Kelly v Kelly* [2020] 3 WLUK 94
4. *Wood v Watkin* [2019] EWHC 1311

RPC asks...

How are political donations treated for tax purposes?

The Upper Tribunal has recently decided that the inheritance tax (IHT) rules do not discriminate between taxpayers on the grounds of political belief.

Donations to political parties are exempt from IHT when at the last election preceding the donation the party had at least two MPs or one seat and 150,000 votes.

Mr Banks, a British businessman and co-founder of the LeaveEU campaign, donated almost £1 million to the UK Independence Party (UKIP) and its affiliated organisations between October 2014 and March 2015. At the time of the donation UKIP was a registered political party with no elected MPs, so HMRC charged IHT on all of Mr Banks' donations.

The Upper Tribunal decided that this did not discriminate against Mr Banks on the grounds of his political beliefs: the purpose of the legislation is to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons, and not in respect of individual independent MPs. As the exemption achieves this aim proportionately, it decided that the exemption was not discriminatory.

Before considering a significant political donation, it pays to check carefully the rules governing exemptions from IHT.

5. *Banks v HMRC* [2020] UKUT 101

And in the art world...

Covid-19- a bleak picture?

With some commercial art galleries re-opening in London, we explore how the art world has adapted in the wake of Covid-19 and the potential effects of the pandemic going forward.

The last few months have not painted an entirely bleak picture for art lovers, with many galleries adopting a "show must go on" attitude by moving exhibitions online, providing virtual "360" tours and engaging with the public through social media. For example, the Tate Modern provides a 7-minute virtual tour of Andy Warhol's work and the National Gallery has produced a video of enthusiasts explaining why Gainsborough's Mr and Mrs Andrews is so intriguing.

Despite this, it is clear that there will be a long-lasting impact on how art lovers view and purchase art. The prospects of London's art fairs taking place in person soon seem slim, and it is likely that the ability of buyers to travel to view potential acquisitions will be reduced for some time. Some commercial galleries in London, undoubtedly driven by economic imperative, are beginning to re-open with timed entries and limits on visitor numbers. However, the industry is concerned that it may not be financially viable for smaller galleries to re-open. It is also uncertain what the volume and revenue of sales will be in a more "remote" art market.

Public galleries in the UK have indicated that when they do re-open, they will be operating at reduced capacity and are considering timed ticketing, mirroring the approach of galleries abroad, such as the Guggenhiem in Bilbao. Given the cancellation of many temporary exhibitions and the resulting loss in revenue, it remains to be seen whether public galleries that are currently free will introduce entry charges. It is expected that future exhibitions will last for longer in order to spread the cost, and that galleries may be dig deeper into their permanent collections instead of funding blockbuster exhibitions that include works from across the globe.

Whilst Covid-19 has not placed publicly accessible art into lockdown, it seems likely that the art world will undergo a significant change for some time to come.

Import licencing for cultural goods- all change

An EU Regulation 2019/880 introduces common import rules for cultural goods with the purpose of preventing their illicit trade and their use in funding criminal activity.

The Regulation only applies to the permanent import of cultural goods made outside the EU, and categorises them as follows:

- high-risk objects which encompass 'products of archaeological excavations or of discoveries on land or underwater' or 'elements of artistic or historical monuments or archaeological sites which have been dismembered'. Objects fall into this category if they are over 250 years old, regardless of their value. An export licence is required from the country in which the objects were created or discovered, together with an EU import licence
- low-risk objects which include zoological or botanical collections, paintings, sculptures and books. Only objects which are over 200 years old and worth over €18,000 are included in this category. The importer is obliged to sign a declaration stating the object was lawfully exported from the country of origin and provide a description of the cultural object.

These requirements do not apply when it cannot be established in which country the object was created or discovered, or export from that country occurred before April 1972, acknowledging that establishing provenance can be difficult. In these circumstances, all that is required is an export licence from the country in which the object has been located for the last five years.

The centralised electronic system for the storage and exchange of information between EU authorities, necessary to support the implementation of the Regulation, is not yet fully operational. The EU does not expect the database to be in place for another five years.

In the light of the Regulation dealers should undertake a thorough audit of their collections and retain any export documentation. Coupled with the recent application of anti-money laundering rules to the art market, the Regulation represents a significant increase in dealers' regulatory burden.

The RPC private wealth disputes team

Disputes can get complex. As one of the few top law firms handling private wealth litigation, our large team of lawyers has an impressive track record of handling disputes both in and out of court. We act for trustees, family offices and other asset and wealth holders and commonly act against HMRC. Drawing on extensive tax, asset management and commercial expertise, we can help resolve any type of dispute, from family settlements and inheritance issues to conflicts over assets, including art and valuables. We have a global reach with offices in London, Hong Kong and Singapore, and access to the TerraLex network of lawyers in over 100 jurisdictions.

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