



# Wealth and trusts quarterly digest

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November 2018

Welcome to our latest Wealth & Trusts digest. Our quarterly digest is specifically tailored for you and aims to provide up to date commentary, analysis and guidance on key sector developments. It is written by our wealth and trusts teams to assist you and your clients in responding to market trends and legal developments. We would welcome the opportunity to discuss any issues you may have and always welcome feedback on the content of our publications.

## Feature

### Where there's a will, is there a way of challenging it?

What can someone do if they are left out of a will, dissatisfied with the gifts that are made to them or concerned that the testator was put under pressure when the will was made? The starting point in English law is that if a will is validly executed then it is presumed that the testator intended to leave their estate to those set out in the will. [more>](#)

## News and cases

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Funded litigation has been rapidly growing in popularity in recent years for clients and fund investors alike, more recently even extending to opportunities for individual investors to make investments through crowdfunding platforms. We explain what litigation funding is and why its popularity has grown. [more>](#)

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Two recent decisions indicate that both Guernsey and the British Virgin Islands will adopt the so-called *Hastings-Bass*<sup>12</sup> rule, as clarified by the Supreme Court in *Pitt v Holt*<sup>13</sup>. [more>](#)

Any comments or queries?

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The ability to trace assets across the world is becoming increasingly relevant as disputes cross borders and the assets which are the subject of a dispute may be moved away from the territory in which the dispute is decided. [more>](#)

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In *Gelber and another v The Sunderland Foundation and others*<sup>16</sup> the court gave trustees the power to transfer significant sale proceeds from land owned by the trust to a charity that was not a beneficiary to enable planning permission on the land to be used and its full value to be unlocked. [more>](#)

### Key trends in art – watch this space!

RPC has been involved in some of the most significant art-related disputes in recent years and we will be giving a flavour of RPC’s expertise in this next edition of this digest. [more>](#)

## Feature

### Where there's a will, is there a way of challenging it?

What can someone do if they are left out of a will, dissatisfied with the gifts that are made to them or concerned that the testator was put under pressure when the will was made? The starting point in English law is that if a will is validly executed then it is presumed that the testator intended to leave their estate to those set out in the will. Strong evidence is required to prove that is not the case. Despite the strength of this presumption, in the last decade there has been a significant rise in the number of individuals challenging wills through the courts and we explore the various ways in which this can be done. We also consider the consequences of a successful challenge; it may not always be as advantageous as it first appears.

### Has the will been validly executed?

In order to be valid a will must comply with certain formal requirements<sup>1</sup>:

- the will must be in writing and signed by the testator or by someone else at their direction. "Signed" is broadly defined. For example, a thumb print<sup>2</sup> and the words "your loving mother"<sup>3</sup> have been held to constitute a signature by the testator. The will does not need to be dated,
- it must appear that the testator intended by their signature to give effect to the will. When a husband and wife signed each other's wills by mistake their wills were still valid because they each signed the document with the intention that it was their will<sup>4</sup>, and
- the testator must sign the will or acknowledge their signature in the presence of at least two witnesses present at the same time (and the witnesses must also sign the will). If the witnesses receive a gift under the will the will is still valid but the gifts to them are not.

### Did the testator have capacity to make the will?

If the will appears to comply with those formal requirements but there is uncertainty about the testator's ability to understand fully the effect of the will, it may be possible to challenge the will on that basis. A challenge to a will needs to be supported by evidence, such as contemporaneous medical records or notes prepared by the solicitor who drafted the will, which proves that the testator did not have capacity to make a will because they did not understand either:

- the nature of a will and its effects
- the property they owned and were disposing of in the will, or
- the interests of the different individuals they could take into account in making the will<sup>5</sup>.

A will may be valid even if the testator did not have capacity at the time the will was executed, provided that the testator had capacity when they gave instructions for the will and could remember giving those instructions when the will was executed<sup>6</sup>.

### Did the testator know and approve of the contents of their will?

Even if the testator had capacity to make a will, circumstances may suggest they did not know or approve of its contents. For example, the will may differ significantly from the testator's comments at the time about their intentions or it may have been prepared by someone who receives benefit under it. However, challenging a will on this basis will be difficult if the will is straightforward, signed by the testator and the testator had time to read it<sup>7</sup>.

1. S9 Wills Act 1837
2. *Re Finn* (1935) 52 TLR 153
3. *In the Estate of Cook* [1960] 1 WLR 353
4. *Marley v Rawlings* [2014] UKSC 2
5. *Banks v Goodfellow* [1870] LR 5 QB 549
6. *Parker v Felgate* (1883) 8 PD 171
7. *Re Sherrington* [2005] EWCA Civ 326

## Do the circumstances suggest that the testator has been unduly influenced when making the will?

There may be concern, particularly when a testator was elderly and frail, that someone else influenced their decision about who should benefit under their will. To challenge a will on this basis it would have to be proved that a testator was so overpowered by another's influence that the decision about who to leave their property to ceased to be their own. A will may also be open to challenge when someone has made false aspersions about the character of a beneficiary in order to persuade the testator to remove that beneficiary from their will<sup>8</sup>.

## Are you a spouse, former spouse, child or other dependant?

The law permits certain individuals to apply to the court for reasonable financial provision from the testator's estate if they have not been properly provided for in the will<sup>9</sup>. If someone has been left out of the will or is dissatisfied with the gift made to them, such an application may be preferable to challenging the validity of the will itself.

The *Illott v The Blue Cross*<sup>10</sup> case which hit the headlines recently is an example of this type of application. A 50 year old woman successfully secured a legacy from her mother's estate, despite the fact they had been estranged for some years and her mother had left her estate to three animal charities. Previously the court has been slow to assist adult children on the basis that a testator should be able to leave their property to whomever they wish. Whether this has changed following *Illott v The Blue Cross* remains to be seen. This case and its implications will be covered in our next update.

## Is it worth a challenge?

Before considering whether to challenge a will, an individual who is dissatisfied with the gift made to them should consider the consequences of a 'successful' outcome. If the will is found to be invalid, the terms of any earlier will will be followed. If there is no such will, the intestacy rules will apply.

Such claims may also prove to be expensive; as with all litigation, success is not guaranteed and losing may mean a claimant has to pay the costs of the executors of the will as well as their own costs. Sometimes it is possible to agree a settlement with the executors rather than bringing court proceedings.

## Practical tips

- Following the death of the testator, if there are any suspicions about the circumstances in which the will was executed, taking legal advice as soon as possible is recommended.
- While suspicions are investigated, a "caveat" can be entered. This effectively prevents a grant of probate being issued until any dispute about the validity of the will is resolved.
- Evidence should be obtained as to the circumstances of the signing of the will, such as a copy of the testator's medical records and information from the witnesses.
- The solicitors who were involved in the drafting of the will should be contacted. They can prepare a "*Larke v Nugus*" statement, summarising their instructions and interactions with the testator. This may give an insight into the reasons why the testator made particular gifts and their state of mind at the time the will was signed.

## Is there a way?

Whilst there are ways to challenge a will, if the will complies with the formal requirements for validity a court will be keen to give effect to a testator's wishes. Persuasive evidence is key to displacing existing testamentary arrangements.

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8. *Re Edwards* [2007] EWHC 119
9. Inheritance (Provision for Family and Dependents) Act 1975
10. *Illott v The Blue Cross and others* [2017] UKSC 17

## News and cases

### NCA can rely on foreign convictions to secure Unexplained Wealth Orders

The High Court has dismissed an application to set aside the first Unexplained Wealth Order (UWO)<sup>11</sup>. This case hit the headlines recently when it emerged that the UWO had been made against an individual (Mrs Hajiyeva) who had spent over £16 million in Harrods over 10 years. It has subsequently been reported that the National Crime Agency (NCA) has seized £400,000 of Mrs Hajiyeva's jewellery as part of its investigations.

#### UWOs – what are they?

A UWO is an investigative tool that enables enforcement agencies to compel respondents to provide specific information about specified property. A UWO can be issued by a court without informing the respondent (“without notice”) where the following conditions apply:

- the respondent must be, or be connected to, a Politically Exposed Person (PEP) or the court must have reasonable grounds to suspect the respondent's involvement in serious crime
- the respondent must own property which exceeds £50,000 in value, and
- there must be reasonable grounds to suspect that the respondent's lawfully obtained income would have been insufficient to obtain that property.

In February 2018, the first UWO was obtained without notice by the NCA against Mrs Hajiyeva in relation to a property bought for £11.5 million. Mrs Hajiyeva made an application to discharge the UWO.

#### Why was Mrs Hajiyeva a PEP?

Mrs Hajiyeva's husband had been the chairman of a bank in Azerbaijan, a non-EEA country, in which the government of that country held a majority shareholding. The court decided that Mr Hajiyeva was a PEP because the bank was a state-owned enterprise within which, as chairman, Mr Hajiyeva had been entrusted with a prominent function. As his wife, Mrs Hajiyeva was also deemed a PEP by association.

#### Sufficient income – can a PEP's foreign convictions be relied on?

When considering whether Mrs Hajiyeva's lawfully obtained income was sufficient to obtain the property in question, the NCA had made a connection between Mr Hajiyeva's conviction for fraud in Azerbaijan and the acquisition of the property. Mrs Hajiyeva challenged reliance on this conviction, arguing that there were serious deficiencies in the Azerbaijani criminal system.

Mrs Hajiyeva also contended that the UWO infringed her privilege against self-incrimination. She claimed that she and her husband were at risk of further criminal proceedings in both Azerbaijan and the UK, and she feared that information provided in answer to the UWO would be used to support these proceedings.

Despite this, the court did not discharge the UWO. It ruled that the NCA should not be prevented from relying on foreign convictions with the exception of serious cases where, for example, evidence was obtained through torture. The court also decided that the self-incrimination privilege could not be asserted in respect of foreign proceedings. In any event, it did not consider that the disclosure of information would result in a real risk of prosecution in the UK or non-EEA country.

11. *NCA v Mrs A* [2018] EWHC 2534

## Comment

The Court has set a high bar for respondents hoping to discharge a UWO. It is clear that the NCA will be able to rely on a wide variety of information when making an application for a UWO. The NCA's success in defending this application suggests that UWOs will increasingly form part of the enforcement authorities' procedural armoury.

A copy of the judgment can be viewed [here](#).

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## Why is litigation funding such an interesting investment option?

Funded litigation has been rapidly growing in popularity in recent years for clients and fund investors alike, more recently even extending to opportunities for individual investors to make investments through crowdfunding platforms. We explain what litigation funding is and why its popularity has grown.

### What is litigation funding?

Litigation funders provide upfront financing for claimants to fight legal disputes in return for a share of any settlement or damages. Claimants look for external funding either because they cannot afford to fund the proceedings themselves or because they do not want to take on the funding risk.

Funders primarily choose to back monetary claims by commercial claimants and do so for a return on the investment on a successful case. If the case is unsuccessful, the funder loses its investment. The return to the funder will usually be a multiple of the investment or a percentage of the damages. Sometimes non-cash returns such as equity in a company or a percentage of future profits are accepted.

### Growing popularity

The trend for this form of funding has grown in prominence in recent years and continues to gain momentum at a rapidly increasing pace. [RPC reported in February](#) of this year that UK litigation funders' "war chests" had reached £1 billion, a 42% increase from one year previously. Geraldine Elliott, Partner at RPC observed that this type of investment is increasingly attractive to private equity firms and hedge funds because returns are unrelated to the market cycles of mainstream assets, like equities or bonds, helping to diversify portfolio returns. The yield is also considered comparatively high for an investment category that typically carries less risk, due to the high number of settlements.

The attraction has not gone unnoticed by individual investors too; in August 2018 the [Financial Times reported](#) that litigation crowdfunding platforms had emerged, providing access to private investors. Jonathan Cary, Partner at RPC commented in the FT that litigation funding has become "a fully viable form of investment for a broader range of sophisticated professional investors".

With the growth of investment, litigation funders are looking at increasingly diverse investment opportunities. Parties to litigation are able to obtain case-specific funding, portfolio finance for multiple cases or advance monetisation of their claim to provide working capital for the business while litigation is underway. The economics of case-specific funding means that generally the funders are looking for high-value cases, where legal costs to damages ratios are forecast to be at least 1:10.

Group actions, in particular, are a target for funders. A litigation-funded group action against a retail bank was settled for £200 million earlier this year. Similarly, a high-profile group action

against a European car manufacturer accused of using software to cheat diesel emissions tests has been backed by litigation funders. Such cases increase funders' attention on group action investment opportunities.

RPC has acted and continues to act for funded claimants, and has significant experience in such cases.

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### **Hastings-Bass considered in offshore jurisdictions**

Two recent decisions indicate that both Guernsey and the British Virgin Islands will adopt the so-called *Hastings-Bass*<sup>12</sup> rule, as clarified by the Supreme Court in *Pitt v Holt*<sup>13</sup>.

Under English law, where a trustee considers irrelevant matters or does not take into account relevant matters when making a decision, the ensuing transaction is voidable: the court may set it aside under the *Hastings-Bass* rule. In *Pitt v Holt* the Supreme Court determined that the rule can only be used to set aside transactions where a trustee has breached its fiduciary duties. So if trustees seek and rely upon professional advice, their duty is not breached. Similarly, the fact that a trustee may have acted differently had it taken into account relevant matters is not a sufficient reason to set aside a transaction.

*M v St Anne's Trustees*<sup>14</sup> placed the spotlight on the application of this rule in Guernsey, and *Gany Holdings v Khan and others*<sup>15</sup> focussed on the rule in the British Virgin Islands.

#### **Guernsey: *M v St Anne's Trustees***

The Court of Appeal in Guernsey set aside the transfer of shares into a pension trust because the trustee had failed to take its own tax advice and a large tax liability was incurred as a result of the transfer. The Court of Appeal applied the *Hastings-Bass* rule and decided that the trustee's inadequate deliberation was of sufficient gravity to constitute a breach of fiduciary duty and was an "extremely serious failure to consider a relevant matter".

The Court of Appeal reached its decision on the presumption that the *Hastings-Bass* rule (as clarified in *Pitt v Holt*) applied as neither party challenged the lower court's decision on this point. It seems likely that Guernsey courts will adopt this approach in future. The court also confirmed that a transaction does not need to be "unconscionable" before it is set aside and that the breach of the trustee's duty is not required to be extremely serious or the cause of any prejudice or loss.

#### **British Virgin Islands: *Gany Holdings v Khan and others***

The Privy Council held that the rule in *Hastings-Bass*, as clarified in *Pitt v Holt*, applied in the British Virgin Islands. Applying this rule, the Privy Council set aside the appointment of the entire trust fund to one of beneficiaries on the basis that the trustee had misunderstood which property was in the trust at the time and the value of that property.

The judgment clarified that it is not necessary to demonstrate that a trustee "would" or "might" have acted differently had there not been a misunderstanding. However, any evidence demonstrating it would have acted differently may be relevant to the court's decision as to whether to exercise its discretion.

A copy of the judgment can be viewed [here](#).

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12. *Re Hastings-Bass* [1974] EWCA Civ 13

13. [2013] UKSC 26

14. 20 June 2018

15. [2018] UKPC 21

## Launch of TerraLex Global Asset Tracing Guide

The ability to trace assets across the world is becoming increasingly relevant as disputes cross borders and the assets which are the subject of a dispute may be moved away from the territory in which the dispute is decided. RPC (in association with its global network, TerraLex) will shortly be publishing its Guide to Tracing Assets Around the World covering over 30 jurisdictions.

Watch this space!

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## HMRC publishes changes to guidance on registering and record keeping for trusts

HMRC has updated its guidance: “Register your client’s trust” and “Records to keep for trusts”.

### What are the updates?

“Register your client’s trust” covers:

- which trusts must be registered on HMRC’s Trusts Register
- how to register and the deadline for doing so, and
- what information must be provided to HMRC and how this can be updated.

It now includes details of the penalties which apply if the deadlines for registration are not met. It also confirms that only changes to the lead trustee’s name and address should be notified to HMRC, and that HMRC is consulting in relation to the possible registration of changes to other individuals’ details.

“Records to keep for trusts” outlines what information trustees should keep about the trust and its finances. The updates to the guidance explain that the records and information that must be kept for express trusts should include details of the settlors, trustees and/or beneficiaries such as their name, national insurance number, date of birth and address.

The guidance also makes clear that certain law enforcement agencies will be entitled to access information regarding the beneficial owners of a trust.

### GDPR compliance and record keeping

With GDPR in mind, the record keeping guidance confirms how long trustees should keep records once the final payment to beneficiaries has been made:

- if the trust has business income the trustees must keep the records for five years after the deadline for filing the last tax return for the trust
- if the trust has no business income the trustees must keep the records for one year after the deadline to file the last tax return for the trust.

If the tax return is filed late, the records should be kept until the latest of either 15 months from when the return was submitted or (if they are business records) 5 years after the deadline for filing.

A link to the updated guidance can be found [here](#) and [here](#).

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## Court gives trustees power to transfer trust property to charitable non-beneficiary

In *Gelber and another v The Sunderland Foundation and others*<sup>16</sup> the court gave trustees the power to transfer significant sale proceeds from land owned by the trust to a charity that was not a beneficiary to enable planning permission on the land to be used and its full value to be unlocked.

### The court's jurisdiction to grant additional powers to trustees

The court was required to consider the extent of its jurisdiction under section 57 of the Trustee Act 1925 to give the trustees new powers; the section can be used when the court considers that the powers are necessary in order to undertake an expedient transaction.

### What powers did the trustees want?

In 1986 the trustees acquired 166 acres of agricultural land in Woodstock, Oxfordshire (Woodstock Land). The Woodstock Land was valued at around £1,000 per acre. In May 2018 the local planning authority gave planning permission for up to 300 homes on this land, substantially increasing its value. Planning permission was granted subject to the condition that 70% of the development value of the land be contributed to the Blenheim Palace Heritage Foundation (the BPHF).

The trustees sought powers from the court authorising them to:

- pay part of the proceeds of sale of the Woodstock Land to the BPHF, and
- retire and appoint a single non-natural person as the sole trustee of the trust.

### Requirements to be satisfied for the exercise of the court's powers under section 57

For the power under section 57 to be used, the court had to be satisfied that:

- the trustees lacked the proposed power
- the proposed power related to the management or administration of the trust property
- the proposed power would authorise the trustees to effect a disposition or other transaction of the type contemplated by the section
- the proposed disposition or transaction was 'expedient' in the opinion of the court
- the exercise of the power would not amount to a re-writing of the trust
- it was appropriate for the court to exercise its discretion.

### Is a power to pay a proportion of the proceeds of sale of a trust asset to a charity "expedient" for the purposes of section 57?

The principal issue was whether the proposed payment to the BPHF was "expedient", the court having decided that the other requirements were met. Expediency involves something advantageous or beneficial for the trust as a whole, rather than for specific beneficiaries. Compliance with the condition requiring contribution to the BPHF was the only way to unlock the development value of the Woodstock Land and release development value of 90 to 100 times its value as agricultural land. As a result of the development, the trust would be in a vastly improved financial position which would be of benefit to the trust's beneficiaries. As such, the court decided that the exercise of the power would be expedient.

16. [2018] EWHC 2344 (Ch)

**Can section 57 be used to appoint or remove trustees?**

The court also decided that section 57 could be used to modify the trustees' statutory powers, authorising the appointment of a single non-natural person as the sole trustee. There was greater administrative convenience, continuity and simplicity if the trustee was a non-natural legal person. The power under section 57 could be used to effect this modification as the essential feature of a change of trustees was the transfer of the title to the trust property from the outgoing trustees to the new trustee, which could be seen as a disposal of property.

**Comment**

The case demonstrates that section 57 can be used to permit the transfer of a significant portion of trust property to a non-beneficiary. It also confirms, for the first time, that the jurisdiction under section 57 extends to powers to appoint or replace trustees.

A copy of the judgment can be found [here](#).

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**Key trends in art – watch this space!**

RPC has been involved in some of the most significant art-related disputes in recent years and we will be giving a flavour of RPC's expertise in this next edition of this digest. In our next edition we will be looking back at 2018 in the world of art and giving our view on what we predict will be a key trend of 2019: using blockchain to track provenance. In the meantime click [here](#) to read about RPC's experience in this area.

## About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 83 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

*"... the client-centred modern City legal services business."*

At RPC we put our clients and our people at the heart of what we do:

- Best Legal Adviser status every year since 2009
- Best Legal Employer status every year since 2009
- Shortlisted for Law Firm of the Year for two consecutive years
- Top 30 Most Innovative Law Firms in Europe

We have also been shortlisted and won a number of industry awards, including:

- Winner – Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17
- Winner – Law Firm of the Year – The British Legal Awards 2015
- Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015
- Winner – Law Firm of the Year – The Lawyer Awards 2014
- Winner – Law Firm of the Year – Halsbury Legal Awards 2014
- Winner – Commercial Team of the Year – The British Legal Awards 2014
- Winner – Competition Team of the Year – Legal Business Awards 2014

### Areas of expertise

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| • Corporate Insurance        | • IP                      | • Restructuring & Insolvency |
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