Wealth and trusts quarterly digest

May 2018

Welcome to our latest Wealth and 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

GDPR – Beneficiaries' requests for information and the data protection regime

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Beneficiaries' requests for information

Particular classes of beneficiaries have the right to be informed about the existence of a trust and their interest in it[1] but otherwise beneficiaries have no automatic right to information or documents concerning a trust[2]. However, a beneficiary can seek the disclosure of trust documents from trustees. If these are not forthcoming, an application to court may provide a route for the beneficiary to gain access if the court considers that trustees did not have grounds fairly or honestly to withhold disclosure.

Accordingly, when a beneficiary requests information or documents, trustees should consider carefully whether to comply with the request, taking into account circumstances such as the nature of the beneficiary's interest and the type of documents requested. For example, trustees should usually disclose the trust deed and trust accounts to beneficiaries with a vested interest in the trust[3]. On the other hand, trustees may be more reluctant to disclose documents to beneficiaries with a remote or contingent interest in the trust. In addition, trustees are likely to be justified in withholding documents relating to the exercise of their powers and discretions, such as minutes of meetings that record the reasons for making distributions to particular beneficiaries. For this reason, trustees will not usually disclose the settlor's letter of wishes, as this is likely to have been considered as part of their confidential decision making process.

Trustees should be flexible and consider whether a beneficiary's request can be satisfied by the provision of redacted documents or whether disclosure could be made subject to a confidentiality undertaking being provided by the recipient. These should usually be sufficient to address trustees' concerns regarding the sensitivity of information that they are disclosing.

Trustees should also carefully assess whether they can withhold documents on the basis that they contain legal advice and so would be privileged. The general position is that documents cannot be withheld from beneficiaries on this basis as legal advice is usually paid for out of the trust fund and obtained for the benefit of the beneficiaries to enable trustees to discharge their duties. However beneficiaries may not be entitled to a copy of legal advice which, for example, relates to the trustees' defence of allegations of breach of trust.

If the trustees are not sure how to respond to a request for information, they may apply to court for directions and recover the costs of any such application from the trust. Conversely, if the trustees do not provide the requested information, the beneficiary may apply to court for an order for disclosure. The trustees themselves may be liable to pay both the beneficiary's and their own costs of such an application if the court considers they acted unreasonably in refusing disclosure.

1. For example, a beneficiary with an interest in possession is entitled to know that the trust exists and the nature of their interest in it *Brittlebank v Goodwin* (1868) LR 5 Eq 545).
2. *Schmidt v Rosewood Trustees Ltd* [2003] UKPC 26.
3. *Breakspear v Ackland* [2008] EWHC 220.

Disclosure of documents in court proceedings
Where the beneficiary is contemplating bringing hostile court proceedings against the trustees, such as a claim alleging breach of trust, the position is different. In such circumstances a beneficiary may apply to court for pre-action disclosure of trust documents before the claim is issued.

In making an application the beneficiary will need to show that:

- both the beneficiary and the trustees are likely to be parties to the proceedings
- the documents are ones which the trustees would be obliged to disclose in the legal proceedings anyway, and
- the disclosure would either be "desirable to dispose fairly of the proceedings, assist the dispute to be resolved without proceedings or save costs"[4].

If the beneficiary's application is successful, the trustees will be obliged to provide the beneficiary with the requested documents; subject to any claim of privilege (though as noted above, the trustees will only be able to withhold disclosure of certain documents on this basis). Once court proceedings have commenced, it is likely that the trustees will be ordered to give "standard disclosure" of documents. Standard disclosure requires the trustees to disclose documents on which they rely or which harm their case, or support or harm the claimant beneficiary's case. Importantly, the trustees will not be able to resist disclosure of documents that relate to the exercise of their decision making power. This differs from the position at the pre-action stage when a court is unlikely to allow a "fishing expedition" by a beneficiary for such documents unless there appears to be legitimate grounds for complaint.

Trustees and data protection
Trustees should also be aware that they may be "data controllers" or "data processers" for the purposes of the data protection regime, which is set to change when the General Data Protection Regulation (GDPR) comes into force on 25 May 2018. These new rules impose obligations regarding the processing of personal data of trust beneficiaries. Under the GDPR, what constitutes "personal data" is broader than under the current regime and individuals are granted additional rights including the "right to be forgotten".

The GDPR also preserves the right of individuals to access personal data held by data controllers, which can be exercised by making a subject access request (SAR). Individuals are entitled to a copy of their personal data held by the data controller and information about its source (subject to limited exceptions including where the request is manifestly unfounded or excessive). Data protection obligations can be enforced by the court and the Information Commissioner's Office.

The potential importance of SARs in the context of disputes between trustees and beneficiaries was highlighted in a recent case. In *Dawson-Damer and others v Taylor Wessing LLP*[5] beneficiaries successfully used a SAR to obtain personal data held by Taylor Wessing, the trustees' former solicitors. They had requested the information for the purposes of legal action against the trustees in the Bahamas. The court rejected Taylor Wessing's argument that the data should not be disclosed because the relevant documents were privileged under Bahamian law. The court confirmed that the documents could only be withheld if they were privileged under English law. The fact that the beneficiaries were not entitled to this information under Bahamian law was not a ground to refuse to comply with the request and the motive of

4. Civil Procedure Rule 31.16(3).
5. [2017] EWCA Civ 74.

intending to use the information in court proceedings did not render the request invalid. The court was also not persuaded on the evidence that compliance with the order would involve "disproportionate" effort.

Whilst a SAR was used with success in this case, there are limits to the utility of such requests for beneficiaries. For example, under the GDPR, an individual is only entitled to a copy of his/her personal data, not to documents or parts of documents which adversely affect the rights and freedoms of others. Disclosure is therefore likely to be narrow in scope and limited to information which is directly relevant to the beneficiary making the request. Whether a SAR is in fact aimed at obtaining documents (as opposed to personal data) and whether there is a more appropriate means of obtaining information (such as disclosure in legal proceedings), are factors which are likely to be relevant in the exercise of the court's discretion as to whether to order compliance[6].

Conclusion

Trustees should consider carefully any requests for documents made by beneficiaries and how any such requests should be accommodated whilst ensuring that they do not disclose any sensitive information or any more information than is necessary. Trustees should also review their arrangements for processing personal data and dealing with SARs to ensure they are fully compliant with the GDPR.

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6. *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2017] EWCA Civ 121.

News

Unexplained Wealth Orders

As part of the government's anti-corruption strategy, the Criminal Finances Act 2017 has introduced, amongst other things, Unexplained Wealth Orders (UWOs). UWOs came into force on 31 January 2018. They are a new investigative power designed to compel respondents to provide specific information to law enforcement agencies. To recover questionable property, a UWO must be used alongside another power under the Proceeds of Crime Act 2002.

The National Crime Agency, Her Majesty's Revenue and Customs (HMRC), the Financial Conduct Authority, the Serious Fraud Office and the Crown Prosecution Service are all able to issue UWOs. An agency which has not been awarded this new power may refer suitable cases to one of the above specified enforcement agencies.

On 16 April 2018, HMRC was given extended powers relating to the search, seizure and detention of cash and specific valuable property such as artwork. Without the need for court approval, HMRC can issue administrative forfeiture notices requiring cash and any sums in bank or building society accounts to be forfeited.

The targets

The intended targets of UWOs are persons reasonably suspected of being involved in or connected to a person involved in serious crime. Targeted persons will be required to explain the nature and extent of their interest in specific property and how such property was obtained. Where a response is not received within the court ordered time period, it will be presumed that the property is recoverable through civil recovery action.

The legislation is retroactive, which means it can affect property obtained before UWOs came into force.

The following conditions must be satisfied in order for a UWO to be issued without notice:

- the respondent must be a Politically Exposed Person (PEP) or there must be reasonable grounds to suspect the respondent or connected person of involvement in serious crime. There is no strict requirement for suspicion of serious criminality for a PEP outside the EEA
- the respondent holds the property in question which has a value greater than £50,000. Property can be aggregated and it is the value of the property, not the respondent's interest in the property, which must exceed £50,000
- there are reasonable grounds to suspect that the respondent's known and lawful income would not permit them to acquire such property.

The location of the property and the respondent is irrelevant. The fact that other persons may also hold property does not matter. UWOs can be obtained even if the respondent is absent and the burden of proof is on the respondent.

Further offences and penalties

An offence will be committed if a person knowingly or recklessly makes a false or misleading material statement in responding to a UWO.

Conviction of an offence on indictment can lead to imprisonment of up to two years and/or a fine. Summary conviction results can result in imprisonment of up to 12 months and/or a fine.

A copy of the published government guidance is available to view here.

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Beneficial ownership: government response to BEIS call for evidence on register of beneficial owners of overseas entities

On 22 March 2018, the Department for Business, Energy & Industrial Strategy (BEIS) published the government's response to its call for evidence on proposals to establish a register of the beneficial owners of overseas companies and other legal entities that own UK property or engage in UK government procurement.

The government's decisions include:

- **scope of regime**. All legal forms of overseas entity that can hold property will be within the scope of the new register's requirements. Trusts will not be subject to the regime. The new registration requirement will apply to freehold property and all leases of registrable duration (not only those with a term exceeding 21 years)
- **period for registration**. Overseas entities that already own UK property will have longer than the originally proposed 12 months within which to comply with the new regime (period extension to be confirmed by the government)
- **blocking transfers of beneficial interests in property**. The government will not seek to prevent the transfer of any beneficial interest in property to an overseas entity without a valid registration, as this would not be workable within the broader framework of land law and could have damaging consequences for innocent third parties. The regime will allow the beneficial interest, but not the legal title, in property to pass to an overseas entity that does not have a valid registration number
- **updating the register**. The government is considering increasing the frequency of the required updates to information on the new register from the two-year period originally proposed. It will set out its preferred approach when publishing draft legislation. An approach requiring event-driven updates will not be pursued
- **protection regime**. The government is considering options to protect the residential addresses of named individuals on the register and will take account of respondents' suggestions when further developing the protection regime
- **third party protections**. It will be impractical to introduce a distinction that ensures that only legitimate lenders are able to repossess and dispose of a property with a restriction against it under the new regime.

The government plans to publish a draft Bill creating the register in the summer, with a view to introducing this to Parliament early in the second session. The intention is for the new register to become operational in 2021.

A copy of the government's response is available to view here.

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OECD issues model disclosure rules for CRS avoidance schemes

The Organisation for Economic Cooperation and Development (OECD) has published "model mandatory disclosure rules for CRS avoidance arrangements and opaque offshore structures", which would require advisers and intermediaries to disclose information to the tax authorities about schemes designed to avoid Common Reporting Standard (CRS) reporting obligations or the identification of beneficial owners. This is a response to a request by G7 finance ministers to develop rules based on the approach in BEPS Action 12.

The OECD has issued new model disclosure rules that require lawyers, accountants, financial advisors, banks and other service providers to inform tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD/G20 CRS or prevent the identification of the beneficial owners of entities or trusts. As the reporting and automatic exchange of offshore financial accounts pursuant to the CRS becomes a reality in over 100 jurisdictions this year, many taxpayers that held undeclared financial assets offshore have "come clean" to their tax authorities in recent years.

The new rules target those individuals (and their advisers) who continue to try and keep their affairs hidden from the tax authorities, by introducing an obligation on a wide range of intermediaries to disclose the avoidance schemes. The new rules also require the reporting of structures that are designed to avoid identifying beneficial owners of offshore assets, companies and trusts.

The model disclosure rules will be submitted to the G7 presidency and are part of a wider strategy of the OECD to monitor and act upon tendencies in the market that try to avoid CRS reporting and hide assets offshore.

A copy of the OECD's new model disclosure rules are available to view here.

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Case reports

The Public Trustee (as trustee of the Charles Willis Harrison 1924 Settlement) v Guy Charles David Harrison, Judy Tessa Rosemarie Mackay, Anne-Marie Helen Harrison-Mills[7]

The High Court has determined how the terms of a settlement should be construed and how a deceased beneficiary's disputed share of the settlement fund should be applied.

Background

By an indenture dated 6 March 1925, Charles Harrison (the settlor) settled certain property (the fund) on his daughter, Jeannette Harrison, on the terms and trusts set out in the indenture. The indenture was varied by a court approved scheme on 9 December 1953 (the scheme). The indenture as varied by the scheme is referred to below as the settlement.

At all material times, the trustee of the settlement was the public trustee.

Jeanette Harrison was an only child and died leaving no children. The settlor had a brother referred to in the judgment as N/K Harrison. N/K Harrison had 13 children, one of whom was James Harrison. James Harrison had two children, Jeffrey Harrison and David Harrison. David Harrison died without leaving any children and Jeffrey Harrison died leaving two living children, Guy Harrison (the first defendant) and Judy Mackay (the second defendant).

The question that the public trustee sought to have determined was whether, according to the terms of the settlement, the share of David Harrison (the disputed share) accrues to the share that was held for Jeffery Harrison, and so is payable to his children, the first and second defendants, or whether David Harrison's share accrues to the shares of N/K Harrison's 13 children.

Held

The Court said that it would be wrong, as a matter of law, to consider anything other than the terms of the two relevant instruments, namely, the indenture and the scheme as there was no relevant external context to consider in view of the fact that the indenture was made by the settlor alone and the scheme varying it was approved by the Court. The manner in which the issues had been framed in the course of the dispute and the manner in which the dispute had been brought before the Court was considered irrelevant to the question of the true construction of the indenture. Accordingly, the trustee and future beneficiaries were entitled to rely on the wording of the indenture, unaffected by considerations which might (or might not) have weighed upon the mind of the settlor.

Accordingly, on a proper construction of the indenture, David Harrison's share of the fund accrued to his brother, Jeffery Harrison, and fell to be distributed to the first and second defendants.

Comment

Generally, it will only be necessary for trustees to consider the terms of the trust instruments themselves when making appointments out of a trust fund. In the case of a unilateral

7. [2018] EWHC 166 (Ch).

instrument, it is difficult to see what external material could be considered relevant. Trustees should ensure that they are not influenced by the views of interested parties and should make appointments in accordance with the actual wording of the trust instrument.

A copy of the judgment is available to view here.

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Payne & Anor v Payne[8]

The Court of Appeal has overturned a decision of the High Court and has concluded that a will was validly executed according to the formalities set out in section 9, Wills Act 1837 (as substituted by the Administration of Justice Act 1982 in relation to wills taking effect after 1982) even though the two witnesses had not signed the will when attesting the testator's signature.

Background

This case concerned contentious probate proceedings in relation to the estate of John Henry Adrian Payne (the deceased) who died on 22 August 2012.

The deceased left two purported wills. The first will was dated 19 May 1998 (the 1998 will) which was allegedly made some 14 months after the deceased's marriage to his first wife. In the 1998 will, the deceased appointed his first wife as his executor, and after standard directions for payment of his death and funeral expenses, and a clause revoking any previous wills, the deceased left all of his estate to his first wife. The two witnesses were stated as being a Michael Hogwood and Robert Gordon, who were respectively described as a "security auditor" and a "costume designer", although Mr Gordon's occupation was illegible on the photocopies of the 1998 will (the original of the 1998 will was not before the High Court). Their names, addresses and occupations were inserted in capital letters in the designated places, apparently in different hands, but there were no separate "signatures" in the sense in which that word is commonly understood.

The second purported will (the 2012 will) was dated 1 April 2012, a few months before the deceased's death. In the 2012 will, the deceased purported to appoint his son and his grandson as his executors, and subject to two pecuniary legacies of £15,000 each to the deceased's second wife and to his grandson, the deceased left the residue of his estate to his son. There was an attestation clause in substantially standard form, the attesting witnesses being the girlfriend of his grandson and her mother.

The issue to be determined by the High Court was which, if any, of the deceased's two wills had been validly executed and was therefore the true last will and testament of the deceased.

The High Court concluded that neither will should be admitted to probate and the result was that the deceased died intestate.

Permission to appeal the High Court's decision to the Court of Appeal was granted in respect of the 1998 will but not in relation to the 2012 will. In granting permission to appeal in relation to the 1998 will, Briggs LJ said he thought it arguable, on the evidence before the High Court, that it was not entitled to conclude that the 1998 will failed to comply with the requirements of formal validity.

8. [2018] EWCA Civ 985.

Held
The appeal was allowed. The Court concluded that the 1998 will had been validly executed in accordance with the formalities set out in section 9, Wills Act 1837 (as substituted by the Administration of Justice Act 1982 in relation to wills taking effect after 1982) even though the two witnesses had not signed the will when attesting the testator's signature.

The Court overturned the High Court's decision on the basis of witness evidence heard at the Court of Appeal hearing indicating that the witnesses had seen the testator add his signature and they then filled in details of their names, addresses and occupation but had not signed the will form because it did not provide a place for them to insert their signatures.

The Court compared the pre-1982 wording in section 9 with the substituted wording contained in the Administration of Justice Act 1982, in relation to wills taking effect after 1982. The requirement that witnesses should "subscribe" had been replaced with a requirement that they should "sign".

The Court said that the change in wording appeared to be designed to remove archaic phraseology rather than introduce stricter formality requirements for witnesses and that therefore, the word "sign" should be interpreted as having the same meaning as "subscribe". It therefore concluded that the provision merely required the witnesses to write their name with the intention that the act of writing should operate as an attestation.

Accordingly, the Court held that the 1998 will was to be treated as the true last will and testament of the deceased.

Comment
It will be interesting to see whether this decision will be reflected in the Law Commission's report on reforming the law of wills, which is expected by the end of 2018, following its consultation published in July 2017. Consultation questions 23 and 24 asked whether the statutory requirement for witnesses to "attest" the will should be removed as this is not clearly defined or understood.

A copy of the judgment can be viewed here.

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Burnden Holdings (UK) Limited v Fielding and another[9]

The Supreme Court considered the proper construction of section 21(1)(b), Limitation Act 1980, in the context of a misfeasance claim against company directors and whether a trustee's direct or indirect control of a company which receives trust property is sufficient to engage that section, even though it requires the trust property or its proceeds to be in the possession of the trustee, or previously received by the trustee and converted to his use. It also considered the meaning of "unlikely to be discovered for some time" in section 32(2), Limitation Act 1980.

The Court dismissed the appeal, finding that section 21(1)(b) applies to trustees who are company directors, who are to be treated as being in possession of the trust property from the outset. The Court declined to express a final view on section 32.

9. [2018] UKSC 15.

Background
Burnden Holdings (UK) Limited (Burnden) was a holding company with several trading subsidiaries. Mr and Mrs Fielding (the defendants) were its directors and controlling shareholders. Vital Energi Utilities Ltd (Vital) was a subsidiary of Burnden.

On 4 October 2007, the defendants exchanged their shares in Burnden for shares in a new holding company, BHU Holdings Ltd (BHU) and approved the distribution of the shareholding in Vital to BHU. This shareholding in Vital was later transferred to another new holding company Vital Holdings Limited (VHL) before Mrs Fielding later sold her shareholding in VHL and Burnden went into Liquidation.

On 15 October 2013, the liquidator issued proceedings for the unlawful distribution of the shareholding in Vital on the basis that the defendants were trustees and the trust property was the shares in Vital. The defendants argued that this was outside of the six-year limitation period in respect of an action for breach of trust under section 21(3), Limitation Act 1980. The defendants applied for summary judgment on the basis that the claim was time barred. The High Court granted the application.

The Court of Appeal set aside the order for summary judgment on the basis that the limitation period of six years did not apply because section 21(1)(b) provides that there is no limitation period for an action by a beneficiary (in this case Burnden) to recover trust property from a trustee which had been converted to the trustee's use. The Court of Appeal decided that there was an issue as to whether section 32 applied, which provides that if the defendants concealed a relevant fact, the period of limitation does not begin to run until the claimant discovers the concealment. The defendants appealed to the Supreme Court on the application of section 21(1)(b) and section 32 to the facts of their case.

Held
The Supreme Court dismissed the appeal and agreed that section 21(1)(b) applied. The Court did not express a final view on section 32.

It was observed therefore that the judgment turned on the application of section 21(1): if the defendants fell within that exception, the six-year limitation period would not apply, and the claimant should be allowed to proceed with the claim (rather than the case being summarily dismissed). If section 21(1) did not apply to the defendants, the normal six-year limitation period would apply to prevent the claim.

The Court took as a given, for the purposes of its judgment, that the distribution was unlawful. The Court said that although the wording of section 21(1) refers to "trustees", it is an established principle that a director who misappropriates the company's property is analogous, for the purposes of section 21, to a trustee, and the company itself to a beneficiary. A director, like a trustee, is a "fiduciary steward" of the company's property.

The defendants argued that the alleged misappropriated property remained the property of corporate entities, as the shares were at all times owned by holding companies and never held by the defendants themselves. The Court found that the defendants were trustees for the purposes of section 21(1)(b) and Burnden was the beneficiary of the trust, as the defendants owed fiduciary duties to Burnden and were custodians of its property.

The Court also found that the purpose of section 21(1)(b) was to provide trustees, who may have done something legally wrong, but not dishonestly or morally wrong, with the benefit of time lapse. However, the purpose was not to provide trustees with protection where they would benefit from something they should not have done. The conversion to the defendants' use of trust property was found to be the distribution of the claimant's shares in Vital to BHU as the defendants stood to gain an economic benefit by virtue of being the majority shareholders in BHU. The distribution was therefore caught by section 21(1)(b).

The Court declined to decide on the issue of section 32, as the decision on section 21(1)(b) made the case unsuitable for summary judgment and there was no need to consider section 32.

Comment

This case provides an interesting commentary on the relationship between directors, shareholders and company property. The judgment also provides a helpful explanation of the application of section 21 in the context of a misfeasance claim against company directors for wrongdoing.

A copy of the judgment is available to view here.

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