



Spotlight on private wealth

December 2020

THE LATEST
DEVELOPMENTS
IN THE PRIVATE
WEALTH WORLD

Introduction

You'll have noticed that we have changed the design of the publication and we hope you like it as much as we do.

Our quarterly update is designed to keep you up to date with developments in the private wealth world. In this edition we explore cybercrime, key trends in the art world and a knotty problem concerning nieces and nephews.

We hope you find this helpful and as always, if you would like to know more about the issues covered, or anything else, please get in touch.

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The big question

Looking back at 2020 and ahead to 2021- what are the key trends in the art world?

The COVID-19 pandemic has had a major impact on the art market in 2020. Auctions and art fairs moved online and galleries closed their doors for a substantial portion of the year, with mixed success. Sothebys doubled the average value of items sold in online sales and many galleries reported that they had reached a new generation of buyers. However, there were signs that buyers were not prepared to purchase “big ticket” pieces without seeing them in “real life”.

The pandemic led to a flurry of claims under business interruption insurance policies, with a class action being launched against insurers on behalf of more than 50 art galleries, museums and sole traders. Museums and galleries forced to close welcomed the outcome of the FCA’s test case on business interruption cover in September. Though no art-specific clauses were considered in that case, the court decided that some of the policy wording it reviewed provided coverage if, for example, businesses could not be accessed as a result of government order. The decision is subject to appeal and the disruption to the art market shows no signs of slowing.

Looking ahead to 2021, it is likely that the innovations in online sales will not be the only way in which technology makes an impact in the art world.

Technology is being used in increasingly ingenious ways both to create and to test the authenticity of art. Art created by artificial intelligence is a growing area of the market. A new breed of artists are using “generative adversarial networks” to produce original artworks. The software is trained using a wide range of existing works and then produces its own works until it cannot distinguish between the two. The art produced is surreal, abstract and yet strangely familiar. It also crosses genres: Christies has auctioned an 18th century style portrait produced by AI and more recently a piece of software called GANsky has created street art murals.

Technology can also be used to detect fakes and forgeries. Software is taught to recognise an artist’s work, and then from as little as a single photograph indicates whether the piece is genuine. With some experts estimating that around 20% of artwork in major galleries is fake, this technology is likely to play an increasing role in resolving questions of attribution, though its status alongside more traditional attribution methods is unclear. Watch this space!

“The court grappled with the thorny issue of whether all 15 children should be entitled to the residue.”



What's new?

Nieces, nephews and knotty problems

The court recently solved a “familiar” problem arising from a legacy to a number of nieces and nephews and confirmed the correct approach to interpreting wills¹.

The deceased left his estate to “such all of my nephews’ and nieces’ children”. However, the deceased’s blood nephews and nieces had seven children while those of his late wife had another eight. The court grappled with the thorny issue of whether all 15 children should be entitled to the residue, or just the seven blood relations.

It decided that all of the nieces and nephews should benefit. The terms “nephew” and “niece” are usually confined

to blood relations, unless context or circumstances suggest a different interpretation should be adopted. In this case, the deceased and his wife made prior wills that benefited both sides of the family, and there was no evidence that the deceased intended to exclude his wife’s family when he changed his will. As such, the court decided the usual interpretation should not be adopted.

In reaching this conclusion, the court confirmed that when interpreting a will,

the court’s role is to find out what the testator intended by considering the ordinary meaning of the words used, the will’s overall purpose and the facts known at the time. Where any part of the will is meaningless or ambiguous, the court can use extrinsic evidence of the testator’s intention. The decision therefore provides some reassurance that the court will try to interpret ambiguous will provisions in the way the testator intended.

Number of arrests by HMRC drops to a five-year low

HMRC has in the past been criticised for its ‘gung-ho’ approach to arrests but recently published data shows that the number of HMRC arrests fell by 35% from 2019 to 2020², the lowest they have been for five years.

In recent years, HMRC has received criticism for making unnecessary arrests and has faced wrongful arrest claims as a result. The substantial resources needed to fight such claims, as well as negative publicity, may have resulted in HMRC exercising greater caution before exercising its power of arrest.

HMRC can only arrest a person in specified circumstances, for example, where there are genuine concerns that the suspect may destroy evidence or the suspect refuses to attend an interview under caution. Most taxpayers who are suspected of tax evasion voluntarily agree to attend interviews under caution. Where suspects are

cooperating, HMRC should not ordinarily exercise its power of arrest.

RPC act for a variety of individuals and businesses who have found themselves subject to investigations by HMRC and are well placed to advise on the exercise of HMRC’s extensive investigative powers.

1. *Wales v Dixon & Ors* [2020] EWHC 1979 (Ch)

2. Source: HMRC year-end report, 31st March 2020.

RPC asks...

Family businesses – when will the court intervene?

Minority shareholders can ask for the court’s assistance if they consider the affairs of the company are being run in a way which unfairly prejudices them. A recent case³ has confirmed that a court will only provide emergency help in the running of a business (while the main dispute is being determined) in exceptional circumstances.

The Court of Appeal considered a dispute between the owners of a family-run caravan park. One of the directors claimed to be the driving force behind the business and argued that as a shareholder he was being unfairly prejudiced as a result of the behaviour of his co-owners. The co-owners had removed him as a director and attempted to recover funds he had withdrawn from the company. Whilst his dispute with the co-owners was ongoing, the director applied for an order from the court entitling him to run the business to the exclusion of anyone else.

The court refused to make the order. It considered that the director was not entitled to special treatment under the company’s rules and to be protected from removal even if he had played a significant role in the development of the business. The court was also unpersuaded that his removal as a director was unfairly prejudicial, when he had removed funds from the company in direct contravention of the board’s wishes.

It was also significant that the “end game” of the director in the proceedings was not

in fact to secure control of the companies. The order applied for by the director would only be appropriate if there was evidence that those in control would cause serious damage to the business which could not be compensated by an award of damages.

The case demonstrates that the court will be reluctant to interfere in the running of family businesses, particularly at an interim stage, and that it is important for businesses to operate with carefully drafted constitutional documents, to reduce the potential for disputes to arise.

Cyber-crime in the age of Covid – on the rise?

COVID-19 has increased the security challenges for businesses across the globe. With most of the world going into ‘lockdown’ and remote working on the rise, there has been an increase in the number of cyber security threats.

This includes the hacking of websites, hijacking of videoconferences and data breaches. For example, in April 2020, Google blocked 18 million daily malware and phishing emails related to Covid-19 and confirmed data breaches in the healthcare industry increased by 58% in 2020. In order to minimise the risk of being a victim of cybercrime, common recommendations to individuals and businesses include:

- updating computer and mobile devices to the latest operating systems to patch flaws and reduce vulnerabilities for hackers to exploit
- using anti-virus software and anti-malware protection
- backing up data on computers and other devices and using complex passcodes and VPNs to access these
- implementing data security policies and practices, including protocols for identifying and reporting suspicious emails.

3. *Loveridge v Loveridge* [2020] EWCA Civ 1104



Can constructive trusts operate in a commercial context?

A recent case⁴ has confirmed that constructive trusts can operate in the commercial context and is a reminder that they can have an impact on the administration of a deceased's estate.

A constructive trust arises when it would be unconscionable for the holder of an asset to deny the beneficial interest of another person in that asset. For example, if the asset holder knows that funds have been paid to them by mistake or as a result of fraud. Similarly, a constructive trust will arise when two people intend that one will have a beneficial interest in an asset and that person acts to their own detriment on that understanding.

Constructive trusts are usually seen as arising when no express agreement exists. However, the Court of Appeal recently decided that a trust arose in the context of an agreement between two business partners. In that case, the partners decided that when they had acquired the freehold of flats in Belgravia through collective enfranchisement, the profits from the sale of the freehold would be held by them in equal shares. One partner relied on the agreement and assigned his interests in the properties to the other.

He subsequently died, and his heirs claimed a share of the sale proceeds of the flats. The court decided his heirs were entitled to the funds (which had been paid to a third party) because they were held on constructive trust. The finding of a constructive trust here had the effect of enforcing the express agreement between the business partners. An agreement reached by the deceased therefore had lasting implications after his death.

4. *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094

In the art world

Taxing matters

The acceptance in lieu of inheritance tax (IHT) scheme and the conditional exemption tax incentive are of particular importance to owners of art.

Acceptance in lieu enables taxpayers to transfer artworks to an approved museum or institution to settle IHT liabilities.

In 2018-2019 £58.6m worth of art was given to the Arts Council England in lieu of IHT. For example, art collector Erich Goeritz's descendants gave the Courtauld Gallery in London an illustrated Gauguin book of memoirs never previously exhibited in order to offset taxes payable by his estate.

If accepted, 25% of the IHT charged on the value of the artwork is refunded to the estate but the procedure to be accepted is complicated and time-consuming. HMRC first checks the tax liability and ownership of the artwork. The Arts Council's specialist panel will then obtain advice from art scholars and museum curators to assist it in deciding whether the work is of sufficient national, scientific, historic or artistic interest to qualify, and whether it is in an

acceptable condition. Once the work is valued then the government confirms whether it is accepted by the scheme and chooses the receiving gallery.

Separately, the conditional exemption tax incentive, exempts qualifying artwork from capital gains tax and IHT when it is transferred. To qualify the work must have a pre-eminent, national, scientific, historic or artistic interest. The new owner must not pay for the artwork and must promise to look after it and ensure that it is available for the general public to view in the UK, although the new owner may place restrictions on this viewing. The incentive can be used for a broad category of artwork including jewellery and manuscripts. However, once the work is sold, a tax burden will arise and the relief must be claimed within two years of the transfer.

It is recommended that specialist advice is sought before utilising either the scheme or incentive.

And finally...

'Nosecco' is a no-no, says the High Court

For those readers considering exercising restraint over the festive season, read our blog on 'Nosecco' [here](#).



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.

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