RPC

Spotlight on private wealth

July 2022

THE LATEST DEVELOPMENTS IN THE PRIVATE WEALTH WORLD

The big question:

Artist's resale right – trouble ahead?

What's new?

RPC asks...

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Welcome to spotlight on private wealth

This update is designed to keep you up to speed with developments in the private wealth world. In this edition we explore everything from tax on gifts to the meaning of knowledge.

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

Artist's resale right – trouble ahead?

The first court proceedings to enforce the artist's resale right have been commenced. The primary purpose of the right is to ensure that artists receive some of the uplift in the value of their works.

The right has been enshrined in certain continental legal systems for some time; the French right was introduced in 1920. The right was introduced in the UK in 2006, as a result of an EU directive.

The UK rules give creators of original works of art a royalty each time their work is resold through an art market professional or an auction house. In 2012 the right was extended so that the family of artists who have been dead less than 70 years can claim the royalty on their behalf. The artist does not claim the royalty directly from the seller; rather they claim it through the Design and Artists Copyright Society (**DACS**) or Artists Collecting Society (**ACS**).

The royalty does not need to be paid on sales between individuals without the involvement of an art market professional, or on works sold for less than €1,000. Similarly, if a work has been resold within three years of purchase for less than €10,000 no royalty has to be paid, so that dealers are not deterred from buying in new works as stock.

The size of the royalty depends on the sale price and is calculated in a similar way to stamp duty land tax. The first €50,000 of value is taxed at 4%, and there is a sliding scale with consideration of over €500,000 taxed at 0.25%. There is a cap on the royalty of €12,500. In 2020, over £15 million was distributed to artists in royalties.

However, the right is not free from controversy. The British Art Market Association campaigned against its introduction, and it is often criticised because it applies to the full value of artwork, as opposed to the seller's profit. As such, the royalty is payable even if the seller makes a loss. It is also seen as increasing the income of already successful and established artists, rather than protecting the interests of emerging artists. There is also concern that the right could drive sales to the US, which does not have equivalent rules.

The DACS and ACS have recently brought court proceedings against wealthy art dealer Ivor Braka and his companies seeking details of the sales he has been involved in since 2006. He has responded to the claim publicly and explained his principled objections to the right. These include the fact that it does not apply to collectors who are not "art market professionals" but who are nonetheless large traders in art, and that it is contrary to English property law, which otherwise treats the ownership of property as having passed on sale.

We have previously reported on the increase in non-fungible tokens in the art market, with Beeple selling a non-fungible token (**NFT**) art-work for $69 million last year. Questions have been raised about the application of the re-sale right to the sale of NFTs, which were not contemplated by the legislation introducing the right. The re-sale right only applies to original artworks which would attract copyright. NFTs may not attract copyright, as they are an entry in the block-chain related to the original work, not the original work itself. As such, the right may not apply to them and some NFT platforms have addressed this by introducing a mechanism by which sellers of NFTs are paid a royalty when they are sold on.

Recent court proceedings and the emergence of new art forms are likely to re-open the debate about this right, though it is perhaps unlikely to receive the attention of the government for some time to come.

What's new?

HMRC issues guidance on gifts

Calculating the inheritance tax (IHT) payable in respect of gifts can be complicated. HMRC has issued practical guidance with worked examples to help taxpayers work out what they owe.

The process suggested by HMRC includes listing all gifts made in the seven years before an individual died, identifying gifts that are exempt from IHT and establishing the value of gifts that are not exempt. It then sets out what to do if IHT is due.

The starting point is that IHT is only due if the deceased gave away more than £325,000 in gifts in the seven years before they died. The value of the gift for these purposes is usually the value at the time the gift was made. The recipient of the gift must pay the tax, and taxable gifts reduce the amount of property which can be transferred tax-free on death.

There are certain gifts which are exempt from IHT including:

- gifts made more than seven years before a person dies
- assets passed to a spouse or civil partner
- gifts of £3,000 or less in any tax year
- small gifts of £250 of less
- wedding or civil partnership gifts
- regular gifts that are part of normal expenditure and made out of income.

It is also not necessary to pay IHT on gifts to qualifying charities, housing associations and other exempt organisations. If a person leaves 10% or more of their net estate to a charity, the rate of IHT payable on their estate overall is reduced.

If a gift is made but is still used by the donor, it is treated as a 'gift with reservation of benefit'. An example would be transferring ownership of a house then continuing to live in it without paying rent at market rate. The rules for gifts with reservation of benefit are more complicated and these gifts are not necessarily exempt from IHT. With HMRC increasingly focussing on IHT issues (IHT receipts in the UK amounted to approximately £6 billion in 2021/22, compared with £5.32 billion in the previous financial year) it is important that careful consideration is given to this issue and the various means available of reducing the amount of IHT payable on a person's death.

Register of Overseas Entities introduced

The UK government recently passed the Economic Crime (Transparency and Enforcement) Act 2022 which introduces the long-awaited Register of Overseas Entities (**ROE**), among other key reforms.

The ROE aims to "level the playing field" so that overseas entities cannot hide behind anonymity but will need to disclose the identities of those owning UK property. The measures have been introduced to help combat unlawful practices, such as money laundering, by foreign criminals.

The ROE is a new public register that will be kept at Companies House and it will follow a similar model to the existing "Person with Significant Control" regime.

The ROE will apply to any company or similar legal entity that is governed by the law of a country or territory outside the UK (overseas entity) and individuals who have significant influence or control over the entity (beneficial ownership).

Overseas entities holding or buying UK land will need to disclose whether they have registrable beneficial ownership. This is determined by reference to certain thresholds, including holding over 25% of the entity's share capital or voting rights, whether directly or indirectly, or otherwise holding the right to exercise significant influence or control over the entity. Individual beneficial owners must provide details such as their name and date of birth, though not all of these details will be available on the public register. Corporate beneficial owners are obliged to provide information about the nature of their beneficial ownership. Entities need to apply for registration within six months of the regime coming into effect and update the information annually.

There are severe penalties for non-compliance ranging from criminal sanctions, including a prison sentence of up to five years, to civil sanctions such as the imposition of restrictions on selling, leasing or dealing with land. Implementation of the regime is expected to proceed "at pace".

High Court finds that a cryptocurrency exchange arrangement was not a trust

The High Court decided that no trust could arise where two parties had agreed to an exchange of cryptocurrencies (in essence a sale and repurchase agreement), as the essential economic reciprocity precluded the existence of any trust. Read the full story here.

RPC asks...

What is severance?

In a recent case[1] the court considered when joint property owners can change the nature of their ownership.

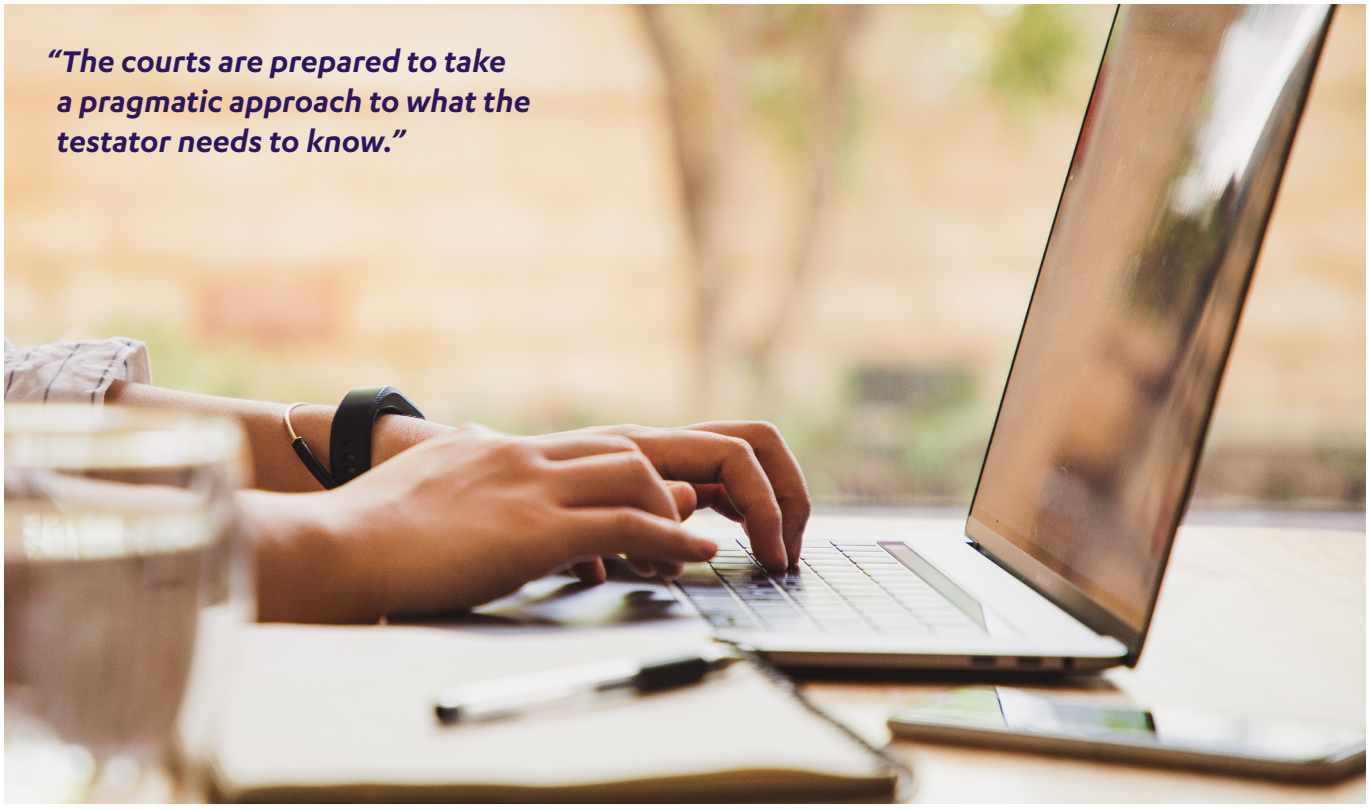
A "joint tenancy" is a form of co-ownership of property where the parties are treated as owning the entire property together in such a way that none of the co-owners has a legal right to, or ownership of, any portion of the property. By contrast "tenants in common" are treated as owning distinct shares in the property. If one of the co-owners of property owned as joint tenants dies, the survivor(s) automatically retain full ownership of the property. However, if land is owned as tenants in common, each co-owner can leave their share to whomever they wish in their will or it passes under intestacy rules to family members.

When a property is purchased co-owners decide how they wish to own the property. Joint tenants can also choose to become tenants in common, in a process known as "severance". A joint tenancy can be severed in a number of ways, including by formal written notice or by mutual agreement or conduct.

In this case, the court decided that a joint tenancy had been severed because the couple's wills contained the phrase "my share of the property" as well as an explanatory note referring to "half of the house". The court decided this reflected a mutual agreement that the joint tenancy be severed. The terms on which a property is co-owned have significant consequences when one co-owner dies, so it is important that co-owners are clear about the terms on which they own property.

Is your phone tracking you?

Perhaps, but is a mere witness to your whereabouts, according to the Court of Appeal. Read the full story here.



1. *Dunbabin & Ors v Dunbabin* [2022].

When do you "know" something?

In two recent cases, the court has considered what a testator needs to know to execute a valid will.

In one case, a will was contested on the basis that the testator did not have the appropriate capacity or knowledge to understand that a piece of land gifted to one of the children was likely to increase in value significantly before his death[2]. The court decided that the will was valid, the testator knew what he wanted and the fact that his gifts did not achieve "mathematical equality" did not mean that the will was invalid.

In another case[3], the court decided that a testator does not need to recall the terms of a past will they have made, or the reasons why the will provided as it did, in order to make a new valid will. The important issue is whether they are capable of accessing the information if they need it, and of understanding it once they are reminded of it.

These cases show that the courts are prepared to adopt a pragmatic approach to what a testator needs to "know" to make a valid will, and will try to honour the testator's wishes if they can.

2. *Skillett v Skillett* [2022] EWHC 233 (Ch).
3. *Hughes v Pritchard* [2022] EWCA Civ 386.

And finally in the art world...

Family Feud: A Damien Hirst Special

In a dispute over the sale of one of Damien Hirst's "Spin" paintings, Beautiful tropical, jungle painting (with pink snot)[4], the court decided that a high-profile art collector was its rightful owner despite his father's claim to title .

The collector, Robert Tibbles, bought the painting for £68,000 in 1998 for display in his London flat. He paid a £10,000 deposit and his father, Nigel Tibbles, provided a short-term loan for £18,000, which was paid together with the balance of £40,000 through another company controlled by Nigel, called Jimson. Robert pre-paid Jimson £40,000 before completion. In accordance with Robert's usual practice, the purchase was invoiced to his father's offshore company for VAT management purposes. The painting was then delivered and insured in Robert's name.

Robert sold several paintings from his collection through Phillips Auctioneers in February 2020, including Beautiful tropical for £280,000. His father became aware of the sale online and promptly brought proceedings against Phillips and Robert, attempting to stop its release to the buyer and claiming that his offshore company owned the painting. Nigel claimed that he had acquired the painting as an investment on his company's behalf and had asked Robert to negotiate the purchase. The court rejected this argument and decided that Robert was the owner of the painting, such that it could be released to the buyer.

A code of practice for art buyers?

A group of collectors now proposes the introduction of a code, the Code of Conduct for Contemporary Art Collectors to address concerns about power imbalance and transparency in the art market

The proposal involves a set of voluntary principles and standards for art collectors. The Code aims to set and emphasise ethical duties towards artwork, its creators and the surrounding professional environment. It was written by a group of collectors in an attempt to self-regulate and show accountability.

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The Code comprises seven sections and deals with subjects ranging from insider trading, corruption and fraud, to interactions and communication with curators and other actors in the art world.

After the publication of the guidelines, the news service ARTnews interviewed one of the Code's authors, Piergiorgio Pepe, who stated that "[c]ompliance and ethics rules are ubiquitous in most fields, but for some reason there is not the same language available in the art world".

There are other developments in the industry which indicate there is an appetite for the introduction of ethical standards. Examples include the formal ethics guidelines introduced by auction houses Christie's and Sotheby's, and the existence of other, less comprehensive ethics codes, such as the Basel Trade Guidelines. We have reported previously that the art market is now subject to the anti-money laundering regime. It remains to be seen if this trend will prompt the Code to be adopted by the industry more broadly.

4. *Hilden Developments Ltd v Phillips Auctioneers Ltd & Anor* [2022] EWHC 541 (QB) (14 March 2022).

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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