

Spotlight on private wealth

October 2022

THE LATEST
DEVELOPMENTS
IN THE PRIVATE
WEALTH WORLD



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 NFTs to unexplained wealth orders.

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

Unexplained wealth orders: what do they mean for trustees?

Unexplained wealth orders (UWOs) oblige the recipient to provide information about property and the funds used to obtain that property. The regime governing UWOs has recently been expanded, and trustees are now more likely to receive such an order than they were previously.

What are UWOs?

In 2018, the National Crime Agency, Serious Fraud Office, HMRC and the police were given the power to apply to court for a UWO to help them to confiscate the proceeds of crime.

The recipient of a UWO has to explain the nature and extent of their interest in property, how they obtained that property and any other information specified in the order. If the property is held on trust, they are also obliged to provide details of the trust. The court can freeze the property, and the enforcement authority then has 60 days following receipt of the information to decide whether to take any further action.

An application for a UWO can be made without notifying the recipient in advance, though the recipient can challenge the order once it has been made.

What does the authority need to show?

To obtain a UWO the authority needs to show that:

- the respondent has property worth over £50,000
- there are reasonable grounds for suspecting that either their lawful income was insufficient to purchase the property or that the property was obtained through unlawful conduct. For these purposes, whether income is lawful is considered by reference to the laws of the country in which the income arose, and it is assumed that property is acquired for market value and that a mortgage or loans are available

- the respondent is a politically exposed person (PEP) or there are reasonable grounds for suspecting that they, or a person connected with them, has been involved in serious crime. A PEP is someone entrusted with a prominent function in a state outside the EEA, or a family member, close associate or someone connected to that person.

What has happened in practice?

Very few UWOs have been obtained to date. The NCA obtained a UWO against the wife of a manager of an Azerbaijan bank who had been convicted of offences in Azerbaijan¹. The wife had spent £16 million in Harrods. The court decided that he was a PEP because he worked for a bank which was state controlled. It also decided that his legitimate income as a state employee was insufficient to purchase the property in question.

In a later case², three UWOs were discharged. The court decided that the facts did not support the making of the orders. It also commented that the use of offshore structures to acquire property was not sufficient evidence from which to infer the property had been acquired by criminal conduct. There were legitimate reasons why such structures were used, including for privacy, security and tax planning.

What does this mean for trustees?

Trustees may receive a UWO as the owner of property. The rules have recently been changed so that a UWO can also be made against a company director, even if they do not own property personally.

This means that directors of a corporate trustee may receive a UWO, and trustees which hold directorships in a company within a wealth holding structure may receive a UWO in that capacity. A trustee may also be asked by a beneficiary who has received a UWO to help them identify the requested information.

Trustees are obliged to provide the information requested by a UWO even if it conflicts with their duties of confidentiality. Similarly, the names of recipients of UWOs are not kept confidential by the court, so trustees may also have to address adverse publicity and reputational issues. Responding to a UWO may be a costly exercise, but the enforcement authority is not obliged to pay the recipient's costs unless it has acted unreasonably, dishonestly or improperly.

It is recommended that trustees who receive a UWO or are asked for assistance with responding to a UWO, seek expert legal advice on this relatively new regime.

1. *National Crime Agency v Mrs A (Zamira Hajiyeva)* [2020] 1 W.L.R. 3209.

2. *NCA v Baker* [2020] EWHC 822.

What's new?

NFTs treated as property under English law

In a recent case³, the court decided that “there is at least a realistically arguable case” that non-fungible tokens (NFTs) are to be treated as property under English law.

The case concerned two NFTs stolen from the digital wallet of Lavinia Deborah Osbourne, the founder of Women in Blockchain Talks. Ms Osbourne was able to trace the NFTs to two specified wallets on the OpenSea NFT marketplace but was unable to identify the owners of the wallets in question. She therefore applied to court for an interim injunction against persons unknown (the individuals or entities who owned the wallets in question) to freeze the assets until the end of legal proceedings

so that they could not be dissipated in the meantime. Such an order can only be made if the assets are regarded as “property” under English law.

The court found that “there is at least a realistically arguable case” that NFTs should be treated as property as a matter of English law. Historically, English law has recognised two categories of personal property: (1) “things in possession” (ie physical assets); and (2) “things in action” (ie property

conferring legal rights). Digital assets such as NFTs do not fit easily into either category.

The Law Commission has launched a consultation paper on the recognition and protection of digital assets which includes the central proposal of establishing a third category of personal property, called “data objects”. The outcome of the consultation remains to be seen but the court decision provides welcome comfort to victims of NFT theft that tools such as freezing orders and proprietary injunctions are available.



3. *Lavinia Deborah Osbourne v (1) Persons Unknown and (2) Ozone Networks Inc T/a OpenSea* [2022] EWHC 1021 (Comm).



A tale of two marriages

UK legislation gives spouses the right, in certain circumstances, to reasonable financial provision from their deceased spouse's estate. In two recent cases the court has reached very different conclusions about what provision, if any, should be made for the surviving spouse.

In one case⁴ the husband's will left the contents of the matrimonial home to his wife and the balance of his estate to his children. His wife argued that the ownership of the matrimonial home should be divided equally between her and her late husband because she had paid half of the mortgage. She also claimed that the will did not make sufficient financial provision for her.

The court agreed that she owned half of the home. It also varied the contents of the will to ensure (amongst other things) that she could remain in the home until her daughter finished school. The court considered what it would have ordered had the couple divorced, which would have

been much more favourable to the wife than provided for in the will. The court also took into account the fact that the couple were happily married, and the only people for whom the husband needed to provide were his wife and children.

In another case⁵, the husband's will provided that his wife was entitled to the income from his estate during her lifetime, and she was one of a number of discretionary beneficiaries of the rest of his estate. The couple had separated, but not divorced, before he died. The court refused to vary the will. It decided that she had sufficient assets of her own to meet her needs.

The court considered that if the couple had divorced, the court would not have ordered the husband to transfer anything to his wife.

These cases demonstrate that the provision which a court will make for a spouse who challenges a will is highly fact specific, and that considering what would have happened if the couple had divorced can be a useful cross-check.

Court considers authorised push payment fraud

The court declined to order a fraudster's bank to offer relief to a victim of push payment fraud. Read the full story [here](#).

4. *Paul v Paul & ors* [2022] EWHC 1638 (Fam).

5. *Ramus v Holt* [2022] EWHC 2309.

RPC asks...

Can trustees adopt an eco-friendly investment policy?

In a recent case⁶ the court explored the extent to which trustees of charities can consider “non-financial considerations” when exercising their powers of investment.

The investment policies of two charities excluded investments in companies that contributed to climate change, such as fossil fuel conglomerates. However, the trustees wished to go a step further by only making investments which conformed with the Paris Climate Agreement. Such a strategy would, in effect, have prevented them from investing in the majority of publicly traded companies and investment funds.

The court decided this was a lawful exercise of the trustee’s investment powers. It distinguished between investments which are specifically prohibited by a trust deed and those which are not. In the case of the latter, the trustees must weigh “all relevant factors”. These include the probability and seriousness of any potential conflict with the charity’s purposes, as well as the financial impact of including or excluding such investment. The financial impact includes the risk of losing sponsors and any detrimental impact on the charity’s reputation.

The court concluded that the trustees had properly weighed these different factors and had still sought to deliver financial returns via their investments.

The decision demonstrates that the courts are willing to permit charitable trustees to pursue an eco-friendly investment policy, as long as they still consider the relevant factors and deliver viable financial returns. It is not yet clear whether the courts will adopt a similar approach in the context of private (non-charitable) trusts.



Is the UK going to become a global cryptoassets hub?

The UK government intends to make the country a “global cryptoassets hub”, according to a speech made by the Economic Secretary to the Treasury earlier this year.

One way it intends to do this is by encouraging investment managers to include cryptoassets in their portfolios by removing current tax disincentives for overseas investors.

Currently there are a number of obstacles to cryptoasset investment for non-resident investors: they do not benefit from the Investment Manager Exemption which would allow them to appoint UK investment managers to invest on their behalf without creating a risk of becoming liable to tax in the UK. The Exemption is a key attraction for overseas investors to invest in UK assets. The Economic

Secretary proposed expanding the Exemption to include cryptocurrency and token trading.

The UK government may continue down a path of removing obstacles to investment in the cryptoasset market which could provide investment opportunities for individual and institutional investors and fund managers. We can expect continued developments in the coming year, such as the Law Commission’s consideration of the legal status of Decentralized Autonomous Organisations and ongoing experimentation in the FCA’s regulatory sandbox.

Re-commerce: the future of luxury fashion?

With Gen Z successfully catapulting fashion resale platforms like Depop, StockX and Vinted into the limelight over the last decade, has the time come for the luxury market to enter the world of re-commerce? Read the full story [here](#).

And finally in the art world...

First fines issued to art market participants

HMRC has begun to issue fines to art market participants who failed to register under the UK's Art Anti-Money Laundering regulations by the June 2021 deadline.

The new regulations were introduced by the UK government in order to implement the EU Fifth Money Laundering Directive into UK law. Anti-money laundering regulations now apply to those selling and purchasing art as a business, where the purchase price is over €10,000. The regulations oblige these businesses to:

- register with HMRC
- carry out a written risk assessment of the extent to which they are exposed to money laundering

- maintain a written prescribed range of policies, controls and procedures, and
- carry out due diligence measures on customers before they conclude a transaction.

HMRC's focus on the art market is likely to continue whilst the sector adapts to the new regulatory regime.

Auction houses look for new ways to do business

Auction houses are expanding the scope of their offering to attract new sellers and buyers in all art mediums.

Sotheby's has set up a new sales channel to sell works by contemporary artists directly from their studios. Such sales are usually handled by galleries and dealers. Our last edition of Spotlight commented on the artist's resale right, which aims to give artists some of the benefit of the increase in the value of their works when they are sold on, including at auction. Sotheby's expects that selling works directly at auction may enable artists to realise, when the work is sold for the first time, some of the upside which auctions can bring. Sotheby's also hopes that the new channel will enable buyers to benchmark the prices which they are paying for new works.

Christie's has already paved the way for NFT sales by selling the work "Everydays: The First 5000 Days" in March 2021 for US\$69.3m. It has now launched "Christie's 3.0", a platform dedicated to NFT art. Buyers need a digital wallet to bid for assets, and sales are recorded on the Ethereum blockchain. The highest price achieved in the inaugural sale of works by Diana Sinclair made approximately US\$26,000.



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.

Key contacts



Adam Craggs
Partner, Tax disputes
+44 20 3060 6421
adam.craggs@rpc.co.uk



Geraldine Elliott
Partner, Private wealth and trusts disputes
+44 20 3060 6435
geraldine.elliott@rpc.co.uk



Davina Given
Partner, Commercial and banking litigation
+44 20 3060 6534
davina.given@rpc.co.uk



Emma West
Senior Associate, Private wealth and trusts disputes
+44 20 3060 6508
emma.west@rpc.co.uk

