December 2019

Our quarterly update is designed to keep you up to speed with developments in the private wealth world. In this edition we explore privacy and confidentiality in court proceedings, statutory wills and proprietary estoppel. We also consider two cases in which the court has taken a pro-active approach to resolve private wealth disputes. If you have any feedback on this update or would like to know more about the issues covered, or anything else, get in touch.

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The big question

Open justice versus confidentiality – which wins?

Court proceedings can expose the most sensitive details of an individual's personal and financial affairs. However, the principle of open justice requires that the public is given sufficient information about proceedings so that they can understand and scrutinise the decisions courts make. Accordingly, the starting point is that court hearings take place in public and certain documents filed in those proceedings are available to all. If the court is persuaded that there is information which should be kept confidential to the parties, a recent Court of Appeal decision[1] has confirmed that the court will do the minimum necessary to protect this information in order to uphold the principle of open justice.

Court hearings – the key battleground

Court hearings usually take place in public, unless the court considers that exceptional grounds exist such that it is both necessary and proportionate to hold a private hearing. A private hearing can only be attended by the judge, the parties and their representatives, without any press or other members of the public present.

One of the grounds on which a hearing may be held in private is if publicity would defeat the object of the hearing. For example, the first hearing at which a freezing injunction may be ordered is likely to take place in private if there is concern that the subject of the injunction will remove assets from the jurisdiction if it learns about the proposed court proceedings.

Where there are orders in related foreign proceedings protecting the confidentiality of information disclosed in those proceedings, the English court may be persuaded to make an order that hearings be in private in order to uphold the confidentiality restrictions in place in the foreign proceedings and enable the information from foreign proceedings to be used in the English court.

However, in the ordinary course, a hearing is unlikely to be held in private just because the discussion of certain matters in open court may cause reputational damage to one of the parties, or the disclosure of sensitive business information. Even if one of the exceptional grounds exists, the court will consider if the parties' concerns can be addressed by less drastic measures, such as an order preventing the reporting of any confidential information inadvertently disclosed during a hearing. If a hearing is held in private, a court may still choose to give its judgment in public, meaning that parties must make sure that any sensitive information is redacted from the judgment.

Court documents – a fine balancing act

Once all defendants have acknowledged service or filed a defence, a hearing has been listed, or the court has determined the claim, anyone can obtain from the court file copies of statements of case and any judgments or orders made by the court. They can also make an application to obtain copies of any other documents filed by the parties or referred to in court hearings (whether or not a judge has been asked to read these in advance). This includes witness statements, expert reports and correspondence with the court.

The Supreme Court[2] has recently stressed that parties seeking such documents need to make a specific request explaining why access to these documents will advance the open justice principle; the court will not entertain a fishing expedition. The court will then weigh up open justice against any risk of harm to interests such as those of minor children. The final factor in the balancing exercise is how practical and proportionate it would be to disclose particular documents.

1. *MN v OP* [2019] EWCA Civ 679.
2. *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38

Open justice versus confidentiality – which wins? contd...

If a party is particularly concerned about the content of documents filed in proceedings, it can apply to court to restrict non-parties' access to such documents. The court starts from the presumption that a non-party should be able to obtain un-redacted documents from the file, so good reasons (such as the potential disclosure of minor children's financial interests) are required to persuade it to do otherwise.

It also pays to be clever about the documents which are filed at court in the first place. If the proceedings are compromised the signed settlement agreement should not itself be filed with the court. Instead, the order disposing of the proceedings can simply refer to the fact of its existence. This stops third parties finding out, for example, how much one party agreed to pay to settle the claim.

Anonymity – tipping the balance in favour of privacy?

Whether the hearing takes place in public or private, anonymity can be used to remove the names of parties from orders and transcripts and, in appropriate circumstances, other identifying features of the parties such as the nature of their business. It can be useful where the names of parties are well known and likely to attract press attention, so the case of Smith v Jones, could be referred to as A v B.

Anonymity can tip the balance in favour of the protection of confidential information where a public hearing is held. In one case, the parties had concerns about the effect that prematurely learning about the extent of family wealth in trusts would have on the child beneficiaries[3], and sought a private hearing. Rather than acceding to the parties' request, the court made an order anonymising sensitive information, as it considered that this adequately addressed the parties' concerns about confidentiality.

In all cases the court will carefully assess any anonymity restrictions sought by the parties. In a recent case that concerned an application to vary trusts, the Court of Appeal[4] did not order the full extent of anonymity requested by the parties. Instead of anonymising the name of all parties and details of the trust, it simply anonymised the details of minor children, on the basis that they were the only individuals' interests the court was obliged to protect.

So, which wins?

Open justice will usually trump confidentiality unless very good reasons can be shown to depart from this principle. The court will then carefully balance the competing interests to ensure that open justice is only eroded to the minimum extent necessary to protect the relevant interests. Concerns about confidentiality should be addressed at the outset of proceedings and parties should consider carefully the matters which they refer to in court documents if no confidentiality restrictions are in place.

The most effective way to ensure confidentiality wins may be to avoid court proceedings altogether. If there are sensitive issues at stake, parties could agree to an alternative dispute resolution mechanism, such as mediation, before these issues are aired at a court hearing. Parties entering into a commercial relationship can agree that any disputes between them will be submitted to arbitration, which is usually confidential between the parties.

3. *V v T and another* [2014] EWHC 3432
4. *MN v OP* [2019] EWCA Civ 679

Whats hot?

Warring parties forced into early neutral evaluation in a dispute over a will

Parties can be ordered to have their dispute examined by an independent third party, following a recent Court of Appeal decision[5].

Early neutral evaluation (ENE) is a form of alternative dispute resolution in which an independent party is appointed to evaluate the issues and provide an objective and realistic assessment of the case. The aim of the process is for parties to use the analysis of the strengths and weaknesses of the case to start negotiations and resolve the dispute themselves.

In this case, a widow was making a claim for financial provision from her deceased husband's estate. She had invited the executors of her husband's will to consent to ENE, which they refused.

The Court of Appeal decided that it did not require the parties' consent to order ENE. The court recognised the practical benefits of ENE: that it can lead to agreement on some issues or do away with the need for expensive court proceedings altogether. The potential positive outcomes of ENE outweighed the fact that one party was resistant to it, so the court ordered the parties to engage in the procedure as soon as possible.

Reaching agreement on using alternative dispute resolution mechanisms can have significant benefits for those trying to resolve private wealth disputes. It is more beneficial for warring parties to agree the method themselves, rather than be compelled by the court. It remains to be seen whether ENE would be ordered if both parties refused to agree to it, rather than only one.

5. *Lomax v Lomax* [2019] EWCA Civ 1467

Whats hot?

Court takes an active approach to break trustee deadlock

In a recent case[6] the court intervened to break a deadlock between a professional trustee and his lay co-trustees.

The trustees disagreed about how trust funds should be distributed between the beneficiaries, with the lay trustees arguing that two beneficiaries should receive smaller shares considering the beneficiaries' treatment of their late grandfather (whose property comprised the trust fund). The professional trustee took the view that the lay trustees were allowing their personal feelings to prejudice their judgment. The trustees had reached an impasse and no distribution could take place.

In a rare move, the court decided to intervene and made the decision on behalf of the trustees that the two beneficiaries should not be treated equally to the other beneficiaries. It only intervened because it considered there were special circumstances: the trustees could not agree on the distribution, the costs of litigation were eroding the trust fund and the parties agreed the trusts should be wound up. This was an unusual intervention by the court, and indicates the court recognises the practical difficulties associated with trustees' decision making.

6. *AB v CD* [2019] EWHC 2324

Whats hot?

Supreme Court reduces tax on charitable gifts

In a recent case[7] the Supreme Court decided that the exemption from inheritance tax (IHT) for charitable gifts applied to a legacy to a charity without any connection to the UK. The charity was established by the deceased's will to build homes for the elderly in Jersey and as a result of the decision received the legacy of £1.8 million.

The court rejected HMRC's argument that the trust did not qualify for the IHT charity exemption because it was based in Jersey. It decided that Jersey was a 'third country' for the purposes of the EU principle of free movement of capital and that the principle must therefore be applied. The court considered that since EU rules on the free movement of capital apply to transfers of capital between the UK and Jersey, a refusal to grant relief from IHT in the circumstances of the case would constitute a restriction on such free movement. The court also found that a restricting relief from IHT to trusts governed by the law of a part of the UK could not be justified under EU law.

7. *Routier and another v Commissioners for Her Majesty's Revenue and Customs* [2019] UKSC 43

RPC asks...

Can you get out of bad tax planning?

Bad tax planning by trustees can result in substantial financial losses, but two recent cases[8] tell us that all may not be lost. In both cases, the trustees had received poor advice in respect of their tax planning and transferred funds into trusts that attracted significant IHT liability. Fortunately, the court allowed the trustees to set aside these transfers because the trustees had acted in breach of their fiduciary duty by failing to take into account the true tax position when making the decision to transfer funds.

However, these cases concerned unexceptional tax mitigation, with no element of artificiality. If mistakes had been made in relation to less "vanilla" tax planning, it is questionable whether the court would have allowed the transfers to be set aside.

8. *Payne and another v Tyler and another* [2019] EWHC 2347 (Ch) and *Hartogs v Sequent (Schweiz) AG and others* [2019] EWHC 1915 (Ch)

RPC asks...

When is a promise more than a promise?

"All of this will be yours one day"...Parents often promise their children that they will inherit property, and many children will plan their lives in the expectation of an inheritance. But parents may change their mind or fail to update their will to reflect their intentions. Their promises are only enforceable in limited situations so children should tread carefully before relying on them.

If a parent promises to leave a child some property in their will and instead leaves it to someone else (deliberately or not), it may be possible for the child to enforce that promise after their parent has died and make a claim to the property. Although cases involving promises made by parents most frequently come to court, anyone who has been promised an interest in property may be able to make a claim.

In order to succeed, a child would need to show that:

- they received an assurance that they would receive the property in question. An assurance can take many forms. It could be an express promise that particular property would be passed on, or a failure to correct the child's clear assumption to that effect
- they relied on the assurance. The child must believe the assurance is true and be unaware that their parent's will makes a different provision
- they acted to their detriment as a result of relying on the assurance. The detriment needs to be substantial. For example, they may spend time and money developing the property which they have been promised.

The court has discretion as to how it gives effect to the promise, and it will not necessarily give a child complete ownership of the property concerned. The court will take into account a number of factors including the conduct of the parties and the need to achieve a clean break. The court's aim is to satisfy the claim in a manner which is proportionate to the detriment the child has suffered. The clearer the assurance, the more likely it is that the court will try and satisfy the child's expectation as to what they would receive.

Unsurprisingly, these claims regularly appear in court rooms. The court recently[9] awarded a farmer's daughter £1.2 million in recognition of the fact that she had been promised control of the dairy farm following her father's death. In reliance on this promise she had worked on the farm for 30 years; the fact that she had declined an offer of joint partnership with her parents was not sufficient to defeat her claim.

Despite such successes, it is advisable to act cautiously when relying on a promise and seek advice if the position is unclear.

9. *Habberfield v Habberfield* [2019] EWCA Civ 890

RPC asks

Is it too late to make a will?

When an individual loses capacity, it may seem too late for them to make a will, or change a will they already have in place. This may be problematic when:

- they do not have a will and the rules which apply in the absence of a will (the intestacy rules) would not reflect their wishes
- the circumstances of the beneficiaries under the existing will, or the value of the estate, has changed significantly since a will was made or
- there may be serious inheritance tax liability if the estate is not restructured.

In these circumstances it may be possible to obtain a "statutory will" from the court on a person's behalf, and certain applicants (such as a donee under a power of attorney) do not need the court's permission to make an application.

The court decides if the proposed statutory will is in the best interests of the individual, considering a number of factors such as their past and present wishes and feelings, particularly those evidenced in previous wills they may have made, and the beliefs and values likely to influence their decision if they had capacity.

Statutory wills should be viewed as a last resort, and individuals should put a will in place themselves so they (and not the court) can decide exactly who gets what on their death.

And finally ...

RPC considers why equine law has increased in prominence and what you might expect to see in an equine law practice (here).

The RPC 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. Drawing on extensive tax, asset management and commercial expertise, we can help resolve any type of dispute, from family settlements and inheritance issues to conflicts over assets, including art and valuables. We have a global reach with offices in London, Hong Kong and Singapore, and access to the TerraLex network of lawyers in over 100 jurisdictions.

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