September 2019

Our quarterly update is designed to keep you up to speed with developments in disputes, and how you can avoid them, in the private client world. In this edition we explore key trends in the art market and potential reforms to both inheritance tax and the disclosure of ownership of corporate entities. We also offer our top 10 tips for a successful mediation. 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

What's happening in the art market?

UBS's third edition of its annual report on the art market identified some key trends - we explore these together with our own insights into this rapidly changing sector.

The US continues to dominate the world art market

In 2018, the US, UK and China together accounted for 84% of the total sales by value worldwide. Of those, the US was the largest market, contributing 44% of the total of sales by value. Its market saw sales of US$29.9bn in 2018, its highest recorded level to date. The UK's market bucked Brexit uncertainty to become the second largest market, with a rise of 8% to just under US$14bn – contributing 21% to the worldwide total. Third placed was China, whose market declined by 3% year-on-year to a total of US$12.9bn.

The contraction of China's art market in 2018 is at odds with the macro-economic trend in which countries increasing their GDP would usually see a corresponding growth in their art markets. This could be caused in part by President Xi's crackdown on bribery and corruption, which has generally curtailed luxury goods purchases in China. There are also restrictions on overseas dealers selling certain culturally important artefacts in China, and high import taxes. That said, international galleries continue to open at pace in both Hong Kong and Shanghai.

Auction figures grow

Sales at public auction of fine and decorative art and antiques displayed a rise of 3% year-on-year, to a total of US$29.1bn in 2018. This represents an increase of almost 30% on 2016 figures. Perhaps unsurprisingly, the US was the largest auction market, with China coming in second. Works sold for greater than US$1m made up only 1% of lots sold, but contributed 61% of the total sales value. The number of lots falling into this category grew, and in general values increased by 13%, fuelling the rise in aggregate auction sales figures.

Sales at art fairs also rise

The art fair offers a convenient "one stop shop" for collectors, who can view a number of works of art in one fell swoop. The format is increasingly prevalent, with sales at art fairs rising 6% year-on-year, to an aggregate of US$16.5bn in 2018. In 2016, sales at art fairs made up less than 30% of total dealer sales in 2010, and in 2018 that figure was 46%. Art fairs are particularly important in Asian markets: in 2018 92% of buyers in Hong Kong reported they had purchased from an art fair, as did 97% of buyers in Singapore. This rise signals a shift in the demographic of collectors. Not only from the leisure class to the "working rich" (as reported here), who require a more convenient market place, but potentially also to younger buyers. After all, at an art fair buyers can see and be seen – it is a rather glamourous meeting place.

This all presents benefits and disadvantages to dealers. Having collectors in one place might increase competition and encourage snap purchasing decisions, as buyers see others interested in the same pieces. If dealers are able to move out of expensive galleries they will see overheads decrease substantially, although arguably the cost of keeping the show on the road will eat up any cost savings.

Whatever the reason, and whatever the impact on dealers' bottom lines, it appears that the art fair is here to stay, and the one-on-one dealer/collector relationship is probably fading.

The online art market continued to grow

In 2018 online sales of art amounted to US$6bn, up 11% year-on-year and contributing 9% of the value of global sales. The majority of online-only companies sold the majority of artwork at values of US$5,000 or less, with only 10% of transactions being concluded at prices greater than US$250,000. For higher value pieces particularly, it is likely that provenance and authenticity

What's happening in the art market?/contd...

remain a concern for buyers. In February 2019 RPC considered whether blockchain would be adopted by the market as a way of standardising and fortifying provenance records, particularly for online purchases. We noted then that there were still substantial obstacles to widespread uptake. These obstacles have not yet been overcome, and buyers continue to exercise caution: the rate of growth of online sales in the art market lags behind that of e-commerce more generally, which in 2018 accounted for 12% of global sales.

Millennials are active in the art market

One group of buyers who have been particularly active in the online market are millennials, with 93% of this group reporting that they had bought art online (as opposed to "baby boomers", the majority of which had not bought art online). Over the period of 2016 to 2018, millennials were more active than other buyers. Their activity is particularly important to the market: in 2018 they made up just under half of buyers spending more than US$1m on art and objects.

The art market being cleaned up

As noted above in relation to China, many countries are increasingly concerned by the use of the art market as a way to launder money, traffic illegal goods, and raise money for terrorists. The EU has introduced a raft of legislation to extend anti-money laundering legislation to the art market, and increase controls imposed on the import of cultural goods. This concentration on "cleaning house" is arguably linked to the trend of restitution, for example, Italy's recent agreement to return hundreds of "illicitly traded" cultural relics to China.

Keep an eye on Spotlight for our insights into all of the latest developments in the art world going forward.

What's new?

Court confirms claim for a deceased's property can be brought out of time

If you are left out of a will you can make a claim for reasonable financial provision from the deceased's estate within six months of probate being issued. In our last update, we explained how the court barred a claim by the widow of the inventor of the black bin liner for a slice of her deceased's husband's £29m estate. The claim was brought 11 months late, though the parties had agreed to delay the time for bringing a claim.

The Court of Appeal has "binned" this decision and confirmed that the purpose of the six month time limit is to avoid unnecessary delays in the administration of estates, not to discipline parties who are late bringing claims. In deciding whether a claim can be made out of time, the court will look at the reasons for the delay, the prospects of the claim succeeding, the impact of litigation on other beneficiaries, and the availability of other remedies.

The court also encouraged parties to negotiate, rather than issue proceedings, and suggested that a written agreement between all parties providing for an extension of time to bring a claim would be honored by the court. As such, so-called "standstill agreements", where the parties agree between themselves that the time for bringing a claim will be extended to allow for negotiations, are back. They are a useful aid to negotiations and are certainly not to be thrown in the dustbin.

What's new?

Overseas owners of UK property – what about the new public register and privacy?

The government has published its draft Registration of Overseas Entities Bill that sets out the mechanics for establishing a public register of "beneficial owners" of overseas entities that own land in the UK. The government's aim is to increase transparency in the UK's property market to combat money laundering and terrorism financing. However, this bill will also affect those who have legitimate reasons to keep their property interests confidential.

In response to a Joint Committee's comments on the draft bill, the government stated that it will publish guidance to help parties understand the requirements but does not consider that a pre-clearance mechanism, which would allow parties to check in advance if certain entities would need to be registered, is required. It has also maintained that it does not need to lower the threshold of ownership at which beneficial owners need to register. The government is keeping under review the Joint Committee's suggestion of introducing civil penalties for non-compliance.

The government has also indicated that (subject to Brexit) it will implement the 5th Money Laundering Directive, in response to criticisms that trusts are excluded from the scope of the registration requirements. The Directive requires that:

- all EU-based trusts have to be registered on a central registry set up by the EU, even those that are not taxable
- certain non-EU trusts will have to register if they own UK property or engage services in the UK, and
- if a trust owns more than 25% of a non-EU company the information on the register will be available to anyone. Otherwise, anyone with a "legitimate interest" can access the register - this is defined broadly and could include investigative journalists.

The draft bill is now the subject of consultation and it remains to be seen how far the privacy of those owning UK property via offshore entities will be eroded.

What's new?

Trustees and privilege – a welcome clarification

Trustees can, in certain circumstances, resist the disclosure of documents in response to a data subject access request by using foreign law to satisfy a claim to legal privilege[1], so said the High Court in a recent case.

Beneficiaries of a trust governed by Bahamian law were unhappy with a gift of US$ 402m made by the trustees to some other beneficiaries. They made a data subject access request under the Data Protection Act 1998 (DPA) seeking disclosure of personal data held by the trustees' solicitors Taylor Wessing.

The court considered whether any documents were subject to legal privilege such that they did not need to be disclosed. Taylor Wessing had provided advice to the trustees and, under English law, "joint privilege" could apply, meaning that beneficiaries would benefit from that privilege and be entitled to see a copy of that advice. However, under Bahamian law the trustee was not obliged to disclose such advice. Accordingly, joint privilege did not apply and Taylor Wessing was entitled to withhold these documents.

This is a welcome decision for legal practitioners and offshore trustees and goes some way to ensuring consistency in the disclosability of trust documents in different jurisdictions.

The data protection regime has changed since this decision following the introduction of the General Data Protection Regulation (GDPR). Given the uncertainty created by this case, the Government has suggested that Article 15 of the GDPR, which sets out an individual's right to request copies of personal data, was expressly drafted to make clear that this right would not adversely affect the rights and freedoms of others, including the rights of trustees and other beneficiaries. We wait to see how the courts interpret the provisions of the GDPR.

Notes

1. *Dawson-Damer and others v Taylor Wessing LLP and others [2019] EWHC 1258 (Ch).*

RPC asks

Inheritance tax reform – finally here?

We considered the Office of Tax Simplification's (OTS) first report on its review of inheritance tax (IHT) in our previous Spotlight edition.

The OTS has now published the second report on its review, providing some further key recommendations, including:

- **Increasing the IHT exemption for lifetime gifts**: The report explains this is necessary because the exemptions for lifetime gifts have not kept pace with inflation. It also recommends reducing the seven-year exemption period to five years, meaning outright gifts made more than five years before a person's death will not be subject to IHT.
- **Keep IHT and capital gains tax**: The OTS has rejected a proposal to replace IHT with capital gains tax, on the basis that the two tax systems serve different objectives and the proposal would double the number of estates subject to tax but only raise around a quarter of the revenue currently produced by IHT.
- **All life policies to be exempt from IHT, whether or not they are held on trust**: The OTS explained that the purpose of such policies is to cover IHT and it is cumbersome to create a trust just to avoid an IHT charge.

Between its two reports, the OTS has made several recommendations in line with its mandate to focus on the simplification of the IHT regime, but it has also strayed into recommendations of policy. Such changes would be sweeping and have widespread impact.

However, the OTS review was not a government consultation, and it is important to remember that any change prompted by the reports is unlikely to come at a pace. Previous OTS proposals have been slow to take effect, if they have progressed at all.

The speed at which these recommendations may be enacted will also depend largely on the attitude of the current government; in the current political climate, IHT may not be top of the agenda.

RPC asks

Who died first and why does it matter?

If two people die in circumstances in which it is not possible to confirm the order of death, the presumption is that the older individual died first.

A well-publicised battle arose between two step-sisters earlier this year after their parents (Mr and Mrs Scarle) tragically died at home from hypothermia, without leaving wills. Mr Scarle's daughter tried to argue that Mrs Scarle (the younger spouse) had died first, meaning that the family home passed to Mr Scarle and his children. Despite a careful review of the medical evidence, the court could not be satisfied that Mrs Scarle had died first. As such, the family home passed to Mrs Scarle's estate and to her children.

This case, though unusual, demonstrates that it is very difficult to displace the presumption that the oldest individual died first, and that cogent evidence will be required to do this. This unfortunate litigation may have been avoided if Mr and Mrs Scarle had left wills, so it pays to prepare a will to ensure that the intended beneficiaries receive their share – whatever the circumstances.

RPC asks

How do you have a successful mediation?

Preparation for a mediation is key – you get out what you put in. Here are our top 10 tips for making the most out of the mediation process to successfully settle your dispute.

1. **Crunch the numbers**. Work out the costs to you and your opponent of your best case scenario (you recover everything claimed + your costs of the litigation) and your worst case scenario (you get nothing + pay your opponent's costs of the litigation).

2. **Get Real**. Take a step back, assess the merits of your case and work out the most likely outcome, which will probably fall somewhere in between the best and worst case scenarios. Use this to identify the range in which you would be happy to settle. If you want to get technical on settlement strategy- and see a graphical illustration of the optimal settlement zone-check out our series of blogs on the art of settlement and game theory here.

3. **Think outside the box**. What are you really hoping to achieve from the mediation? Whilst damages are often sought in court proceedings, parties to mediation have the flexibility to agree to a wider range of solutions to the dispute which simply could not be ordered by a court. For example, they could enter into a new agreement to regulate their relationship going forward.

4. **Give and take**. Work out if there are any easy gives which will encourage the other party to settle without breaking the bank. Sorry can be the hardest word but it can also be the cheapest! It is always worth having bargaining chips ready to throw in to get the negotiations moving. Equally, are there things you need from the other party which are non-negotiable? Know where your red lines are.

5. **Help is at hand**. Remember, the mediator is a neutral facilitator- they are there to help make the deal happen. Build a relationship with the mediator before the mediation and maintain good communication with them throughout the day.

6. **Set the tone**. Consider carefully if you wish to make an opening statement. It can be an opportunity to get your side of the story across - particularly if the dispute has affected you personally. It can also give you the chance to knock your opponent's confidence in their case and address any obvious weaknesses in your own-before your opponent does. However, be mindful that opening statements can backfire by leading parties to become entrenched in their own position before the day has even started or they may be ill advised if relations have broken down so much that putting parties together would torpedo any deal.

7. **Patience is a virtue**. Expect and be ready for a long day- it may take hours for the parties to consider each other's offers. However, setting a deadline for a final agreement to be reached can help focus minds when the finer points of detail are being thrashed out.

8. **Be prepared**. Have a template settlement agreement ready which can be adapted depending on what is agreed during the day. This should help keep the momentum going once the headline terms have been agreed. Make sure that the representatives for both parties are authorised to agree a settlement. Deals can fall apart if a binding agreement is not signed on the day.

9. **Pick your team**. You reach a log jam- what do you do? Mix it up and try lawyer or principal only meetings to break the deadlock.

10. **Flex it**. Start with a plan but be ready to go with flow to achieve the deal you want. Don't be afraid to be creative!

And finally ...

On Monday 9 September a Florentine court is set to decide on the custody of a painting known as the "Earlier Mona Lisa". The painting usually resides in a Swiss vault, and the family who claim to own 25% of the painting objected to the painting being exhibited in Florence earlier this year. There is also some debate about whether or not the painting can in fact be attributed to Leonardo da Vinci. With many events celebrating 500 years since da Vinci's death, the outcome of this case is unlikely to go unnoticed – watch this space!

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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