

Wedlake Bell

IN TRUST

NEWS AND VIEWS FROM OUR
PRIVATE CLIENT TEAM

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 @PrivateClientWB

WELCOME FROM THE EDITOR

Welcome to the Winter 2020 issue of In Trust. In this edition, we look at some of the issues for our future generations and particularly the protection of assets. **Rory Carter** looks at the tax changes proposed by the recently elected Conservative government. **Jenny Cutts** reminds us of the fundamental duties of trustees to protect the value of the trust fund and make investment decisions accordingly. While **Katie Turney** examines the issues surrounding gifts made by an attorney under a Lasting Powers of Attorney. Picking up on the theme of protecting assets – **Bhavini Taylor**, from our Residential Property team, highlights the value of the Land Registry Alert System as protection against property fraud, and we also profile new partner **Nick Stone**, in our Residential Property team.

Emma Loveday looks at the increasing threats to our online information and ways in which we can protect these, and look out for banking fraud.

Oliver Embley looks at Family Investment Companies (FICs) in his article Keeping It In The Family (Investment Company). One way for families to protect their central wealth and value is to set up a family office to help manage and administer family wealth. **Camilla Wallace** explains how a family office can assist with implementing effective and timely succession planning and ensure the implementation of family values and policy with a family charter.

In our regular column “Ask Ollie” we explain the changes to the Capital Gains Tax rules coming into effect from 6 April 2020 in relation to the disposal of second homes and buy to let properties.

May I take this opportunity to wish you all the best for a prosperous 2020.



ANDREW O'KEEFFE
PARTNER AND HEAD OF THE
PRIVATE CLIENT TEAM
T: +44 (0)20 7395 3009
E: aokeeffe@wedlakebell.com

TRUSTEES' DUTIES AND RESPONSIBILITIES: POWER OF INVESTMENT

The role of a trustee is ever onerous with statutory and common law duties to follow, and in recent times additional responsibilities have been imposed by regulations to crack down on international tax avoidance and money laundering. In this article we get back to basics and look at the fundamental duty of trustees to protect the value of the trust fund and make investment decisions accordingly.

The trustees' powers of investment are governed by the Trustee Act 2000 ("TA 2000") and any express terms in the trust deed itself.

Under the TA 2000 trustees have a general power of investment to "*make any kind of investment that he could make if he were absolutely entitled to the assets of the trust*". In exercising their powers of investment, the trustees should follow the "*standard investment criteria*" to ensure that the suitability, risk and diversification of the trust's assets are considered and are appropriate for the trust, and in the best interests of the beneficiaries. Trustees also need to consider the varying needs of the beneficiaries and there will often be competing interests between beneficiaries, some may have a right to income now while others will have an interest in the long term capital growth of the underlying investments. It is essential for trustees to develop an investment strategy that balances all of these needs, and any emanating consequences.

With limited exceptions, trustees must obtain and consider proper advice when making investment decisions and the TA 2000 allows trustees to appoint and remove agents to carry out their investment function on their behalf. In cases where investment managers are appointed, trustees must provide the investment manager with a policy statement detailing the trustees' investment policy. Trustees and investment managers will often work together to devise an appropriate investment policy and investment managers will have detailed questionnaires covering the financial needs of the trust and the trust's risk profile. This statement will set out the investment mandate of any portfolio of investments and can provide details on the trustees'

expectations for income returns and any limits on capital gains tax exposure. It will also detail the benchmarks against which the performance of the investments can be reviewed.

The role of the trustees is then to review the trust investments and their performance, raise questions and, where necessary, use their powers to intervene and take appropriate steps should the investments be underperforming and/or not following the investment strategy.

As the needs of the beneficiaries evolve it is key for trustees to keep the policy statement up to date and that these updates are discussed with the investment manager in order to plan for and meet the changing needs of the trust. Trustees who have kept good records and are able to demonstrate that they took advice and followed a well thought through investment strategy, whether for a portfolio of investments or any other assets, will be in a strong position to deal with questions from beneficiaries throughout the life time of the trust, and when final distributions are made.



JENNY CUTTS
PARTNER
T: +44 (0)20 7674 0578
E: jcutts@wedlakebell.com

LASTING POWER OF ATTORNEY AND GIFTS

Attorneys acting under a Financial Lasting Power of Attorney (“**LPA**”) often mistakenly, but understandably, assume that they have authority to make unlimited distributions from the donor’s assets.

In fact, in order to minimise the risk of financial abuse, an attorney’s power to make gifts is strictly limited to gifts to the donor’s relatives (which can include the attorney) on ‘customary occasions’ or to any charity to which the donor made or might have been expected to make gifts, provided the value of the gift is not unreasonable taking into account all the circumstances and particularly the size of the donor’s estate.

If larger or more complex gifts are proposed e.g. for tax planning reasons, to accelerate a beneficiary’s inheritance, or to someone who is not the donor’s relative, an attorney must first obtain permission from the Court of Protection (“**CoP**”). Unauthorised gifts are not effective for tax purposes and, if successfully challenged, the gift will also need to be returned to the donor potentially causing embarrassment, family discord and/or financial hardship.

The position with regular maintenance payments (e.g. supplementing the income of a needy relative or paying school fees rather than one-off gifts) is even more difficult to navigate, but a recent CoP case provides welcome guidance for lay attorneys¹. The CoP accepted there are situations where an attorney may use the donor’s funds to benefit someone other than the donor, provided this is in the donor’s best interests. As part of considering the donor’s best interests, an attorney is under a duty to consider the donor’s past and present wishes, feelings, values and beliefs and in particular, any relevant written statement made when the donor had capacity.

A well-drafted expression of wishes can therefore provide valuable assistance to attorneys, but must not be expressed in mandatory terms e.g. “funds must be used for my grandchildren’s education” because if the donor’s assets no longer stretch to protecting his/her interests and paying school fees, the attorney/s will not be able to give effect to the donor’s wishes as this would conflict with their duty to act in the donor’s best interests.

So, if you wish to ensure your assets can be used to maintain or benefit others after you have lost capacity, a carefully drafted expression of wishes will be vital. We can assist with preparing a suitable expression of wishes, and advise whether it is appropriate to include this in the LPA itself or by way of a confidential side letter to your attorneys.

We can also advise your attorneys as to the scope of their authority and if necessary, advise on making an application to the CoP to ensure gifts are effective for tax and succession purposes.

¹ In the matter of Various Lasting Powers of Attorney [2019] EW COP40.



KATIE TURNERY
SOLICITOR
T: +44 (0)20 7406 1680
E: kturney@wedlakebell.com

THE BUSINESS OF SUCCESSION

Setting up a family office to help manage and administer family wealth is often an efficient step as the investment and trading assets grow in value. However, a “family office” can be very much more than that – it can assist with implementing effective and timely succession planning and ensuring the implementation of family values and policy as detailed in any family charter. The family office can also assist with consolidated reporting of family assets and arranging funding for new ventures proposed by the next generation. There are many ways in which you can manage the long-term growth of your family’s wealth and setting up a family office with dedicated professionals who know your business and your personal philosophies inside out, is a growing trend in the market.

Each family will have its own unique culture and values; as will its business. In addressing succession, it is important to respect the approach of the older generation whilst considering how best to involve, educate and inspire the rising generation. The founder of the business or creator of the wealth may have had strong views as to how the business should be continued by future generations. It is vital to involve the next generation early enough to give them the opportunity to embrace the family’s values but also for the founder to be open to incorporating the next generation’s goals and ideals in order to retain their interest in a changing landscape. Different generations may look at new approaches to the business or family wealth with completely different perspectives and there may be conflict as well as new challenges to face.

In our experience those involved in family wealth tend to be philanthropic and have significant involvement in the support of good causes. Some family businesses see the pursuit of philanthropic causes as a means to strengthen family bonds and values, which in turn strengthens the business. While the family owns the business, philanthropy may be through a distribution of profits to charitable causes, or by donations and involvement in local community projects. It may be appropriate to consider setting up a charitable foundation to continue with the family’s philanthropic arms

particularly after a significant liquidity event. Often the continued involvement in such causes can be a unifying factor for the family and bring on the younger members of the family.

Philanthropy and profits are starting to merge for the next generation. Increasingly the next generation are thinking about the footprint of their business and asking themselves: what is the impact we are having on the environment and what is our contribution to the communities that we live and work in? There is a real opportunity for family businesses and investments offices which are valued to lead the way.

Succession is our business. Our practice of specialist private client, real estate and business advisory lawyers dates back to 1780. Indeed, we’ve been through succession ourselves. Our team of highly experienced lawyers can guide you through choosing an appropriate corporate structure, to the effective management of real estate interests, through to succession planning whether that is for the business, the family office or the family wealth generally.

<https://thebusinessofsuccession.com/>



CAMILLA WALLACE
PARTNER
T: +44 (0)20 7406 1678
E: cwallace@wedlakebell.com



KEEPING IT IN THE FAMILY (INVESTMENT COMPANY)

Clients who have built up their own wealth will be aware of the saying *'the first generation makes the money, the second generation maintains it and the third generation blows it'*. A Family Investment Company (“**FIC**”) can therefore be a good way of ‘dynastic’ wealth planning; the whole family are involved in the running of the FIC which, at the same time, can be used as a tool to educate future generations in the management and preservation of family wealth.

The basic concept of a FIC is that control of wealth is separated from economic ownership (like a trust). Parent ‘settlers’ are able to take value out of their estates for Inheritance Tax (“**IHT**”), pass value to children/grandchildren, but can decide if and when to benefit those family members.

Parents will normally own the controlling A Shares which give them voting rights and they will also be on the Board of the FIC so they can take key company decisions. Children or grandchildren will normally hold the economic B/C/D etc. shares which will have the right to receive income from the FIC and the right to capital on winding up.

A FIC will often hold an investment portfolio and any dividends paid out from the portfolio to the FIC will not be liable for any tax. However, other income and gains will be liable for Corporation Tax (“**CT**”) which is currently 19%.

When the Board declares dividends, the economic shareholders will pay Income Tax (“**IT**”) at their marginal rates. Dividends can be paid to non or lower rate taxpayers, and if their total annual income is less than £50,000 they will only pay IT at 7.5%.

FICs are bespoke to each individual family’s circumstances. If family circumstances change and share rights need to be altered this may give rise to tax charges. One way of ‘future proofing’ a FIC is to include a trust within the structure so that future born generations can benefit without needing to alter share rights in the future.

We work closely with our Business Advisory team in setting up FICs and offer a bespoke service which covers tax, compliance, and corporate governance.



OLIVER EMBLEY
SENIOR ASSOCIATE
T: +44 (0)20 7395 3011
E: oembley@wedlakebell.com

CYBER SECURITY PART 1: THE LAND REGISTRY ALERT SYSTEM

The Land Registry's Property Alert System allows property owners and professionals to sign up for a free property monitoring service to receive email alerts on a property when any conveyancing activity occurs. If an application or search is lodged against a property then the Alert System ensures that the recipient is notified by the Land Registry who can then decide whether the activity warrants any intervention. The Alert System can be set up so that the same property can be monitored by different people which is particularly useful for those who are most at risk and it provides a half-yearly update to confirm any activity in relation to the property.

We highly recommend that the Land Registry's advice to set up the Property Alert is followed as scammers can transfer properties into their name using false documents, or stolen identities, and have even been known to do this whilst the owners are living there. Having impersonated the owner of a property, scammers are then able to obtain mortgages against the property, or sell it without the owners knowledge. Victims are left with having to leave their homes and then claim compensation from the Land Registry in order to replace their property which may or may not be successful.

Children may wish to take advantage of the Alert System for elderly parents or other vulnerable persons. Whilst property fraud can be targeted at anyone, there are certain categories who are at higher risk including:

- Rental Properties (e.g. buy to lets) – with a property owner living away from the property, a tenant or other third party posing as the owner may be able to claim ownership without the landlord's knowledge.
- Vacant Properties – if the owner is not occupying the property on a long term basis.
- Properties which do not have a mortgage.
- Unregistered properties.

These types of properties are less likely to be noticed until the fraud has been completed and the scammers have then long since disappeared. There are a number of ways in which homeowners can protect themselves including:

- If the property is unregistered, the owner should make an application for first registration.
- Sign up to the Property Alert service, which can include alerts for up to 10 properties and ensure that their contact details remain up to date e.g. email addresses.
- Place a restriction on the title to the Property at the Land Registry, preventing any disposition of the property without a certificate signed by a conveyancer confirming that they are satisfied the person who has signed the transfer document is the same person as the registered proprietor.



BHAVINI TAYLOR
CHARTERED LEGAL EXECUTIVE
T: +44 (0)20 7395 3142
E: btaylor@wedlakebell.com

CYBER SECURITY PART 2: SCAMS AND HACKING

As we increasingly put more information online, and use online services to conduct our banking and investment activities as well as share information on social media, we are potentially at risk of sophisticated individuals finding ways to access our confidential and sensitive information. This “fourth industrial revolution” where an increasing amount of our personal and corporate data is available in a digitized form is great in terms of new and improved services for consumers, however, it does open the door to savvy cyber criminals.

The techniques began with, what seems now, quite naïve attempts to extract law firm client account details (the so-called “Nigerian Fraud” scam) by offering huge sums of money in return for the payment of a legacy for a long lost client, or similar. These then evolved into scammers establishing fake accounts. For example, Wedlake Bell was targeted by a “Mr Wedlake Bell” who set up an account with the aim of diverting cheques into it. Fortunately we have systems in place to protect us from such attacks.

Particularly at risk are individuals and small businesses who don’t have the time, money and resources to sufficiently protect themselves with sophisticated IT systems and training. Either by getting a foothold in an SMB’s network, or by using “social engineering” to coerce an employee into divulging valuable information, cyber criminals are able to divert bank account funds relatively easily using unsophisticated means. One particularly common email-based attack is for criminals to buy a similar looking domain name of a trusted party, i.e. wedlakebelll.com (notice the extra l before .com). Following which, they will send an email from a fraudulent welakebell.com email address, to a client of the firm, stating that bank details have changed and can funds relating to a transaction be sent to a new bank account. Taking it a step further they may have infiltrated the IT systems of the aforementioned client and be deleting any legitimate emails from wedlakebell.com. Once any money is transferred to a fraudulent bank account, it is very difficult to recover any sums through the bank, and for a small business the loss of funds and reputational damage can be devastating.

Smartphones also potentially provide access to financial and sensitive information, and are vulnerable if lost or, worse, the owner is the victim of knife crime, and forced to give over protective pins.

It is also not unknown for fraudsters to make an excuse to gain access to your home to check its contents with a view to a burglary. We all need to be very aware of these risks, and alert to anything that doesn’t look right, such as emails with an unknown sender’s address, and avoid clicking on links from unknown senders. Investment fraud is widespread both online and offline. If it looks too good to be true it usually is. Your best protection is to ensure that you use quality and reliable investment advisers. This is more expensive in the short term, but will give more protection, and prove a sensible decision in the long term.

For individuals and SMBs the best advice is to ensure any devices are up-to-date with security and anti-virus, invest in a decent password manager which will allow you to use different strong passwords for each online service you consume, and finally use two-factor authentication to properly secure any particularly important websites you use, for example any external email accounts like Office 365.



EMMA LOVEDAY
PARTNER
T: +44 (0)20 7395 3154
E: eloveday@wedlakebell.com



ASK OLLIE

Senior Associate Oliver Embley answers all your questions.

I AM A BUY TO LET LANDLORD; I HAVE HEARD THAT THE TAX RULES ON SELLING PROPERTY ARE CHANGING NEXT YEAR AND WONDERED HOW THOSE WILL AFFECT ME?

You are right; the government are changing the Capital Gains Tax ('CGT') rules from 6 April 2020 in relation to the disposal of second homes and buy to let properties.

If you sell or give away a property you don't live in, you might have to pay CGT at 28% on your net gain. Under the current rules you have until 31 January in the year after disposal to report this in your tax return and pay any CGT owed. However if a sale/disposal takes place on or after 6 April 2020 you will need to report the gain to HM Revenue and Customs and pay any CGT within 30 days.

If you dispose of a buy to let property which has, at some point, been your sole or main residence you can claim CGT Principal Private Residence ('PPR') Relief for the period you actually lived there plus a final 18 month period of 'deemed occupation'. This final period exemption is being reduced from 18 months to nine months for disposals after 6 April 2020.

Finally if you rent out a property which has, at some point, been your PPR, you are able to claim lettings relief ('LR') for the period when the property is rented out (capped at £40,000). However, from 6 April 2020 LR can only be claimed if you are in occupation of the property together with your tenant.

If you are concerned, you can sell property before 6 April 2020 to take advantage of the current (more generous) CGT rules. Provided that contracts are exchanged before 6 April 2020, and contracts are unconditional, the tax point is exchange of contracts rather than completion.



OLIVER EMBLEY
SENIOR ASSOCIATE
T: +44 (0)20 7395 3011
E: oembley@wedlakebell.com

TAX CHANGES PROPOSED BY THE NEW CONSERVATIVE GOVERNMENT

The election resulted in a resounding victory for Boris Johnson with the largest Conservative majority since Margaret Thatcher won her third term in 1987. During the election campaign, the Conservatives pledged to increase spending by £13.8bn by 2121 with a further £33.9bn for the health budget by 2023-24. This majority will provide the new prime minister with a platform from which he can implement these manifesto pledges but how the new government will honour these promises is the big question.

The Conservatives had already announced prior to the election that they would shelve their plans to reduce the rate of Corporation Tax to 17% and the proposal to increase the higher rate income tax threshold from £50,000 to £80,000 which Boris had promised when running to be the party leader. Corporation tax will therefore remain at 19% with the £6bn tax yield being spent on the NHS with a further saving of £8bn gained by not increasing the income tax threshold. These changes in party policy will help retain the funds needed to meet the party's spending pledges.

Whilst this continuation of the status quo might not be the tax cuts some hoped for, the Conservatives have made a significant pledge to not increase the rates of income tax, national insurance or VAT. These taxes account for 74% of HM Revenue & Custom's revenue. Whilst the rates are to remain the same, the Conservatives have pledged to increase the national insurance threshold from £8,632 to £9,500 in April 2020 and intend to raise it further to £12,500 in due course. On paper, these changes of threshold will decrease revenue by £9.2bn over the next five years.

So how will the government raise these extra funds? In the hustings to become party leader both Boris Johnson and Sajid Javid talked of reducing the tax burden to stimulate the economy. Economic growth itself feeding an increase in tax revenues whilst also leaving more money in people's pockets to spend.

The government may also look to other less prominent taxes as a means of raising revenue in order to help meet their spending plans. An attack has been signalled on capital gains tax entrepreneurs' relief. This currently allows a taxpayer to pay capital gains tax at a rate of 10% (as opposed to 20%) when selling certain business assets standing at a profit. The Conservatives plan to carry out a consultation on this relief and, whilst not as major as Labour's election pledge to abolish it altogether, there may be significant changes.

It will be up to the government to make ends meet whilst delivering on its spending pledges and we will see what the 11 March Budget delivers.



RORY CARTER
SOLICITOR
T: +44 (0)20 7395 3090
E: rcarter@wedlakebell.com

PROFILE

NICK STONE

Q: Please tell us a little about your career

I qualified as a Solicitor in 2004 and over the past 15 years I have worked incredibly hard to build a reputation as a leading lawyer in residential property, with significant experience operating within the Prime Central London market. I have a large portfolio of clients and business introducers based all over the world. Over the past eight years, Asia has become a significant area of focus for me. I regularly travel to Singapore (most recently with four other colleagues) and I act for a number of high net worth investor clients from Hong Kong and Mainland China. I spend a lot of my time now focusing on business development, always looking to create new opportunities for the department and for the firm as a whole, taking advantage of the excellent all round service that we offer at Wedlake Bell.

Q: What advice would you give the international property investor?

London has long been seen as a safe haven when it comes to residential property investment and people from all over the world want a little piece of the pie. The additional Stamp Duty Land Tax on second homes and the dreaded 'B' word (Brexit), have without doubt affected the property market and caused widespread uncertainty. At the same time, it is without question a buyer's market and there are always property investors looking to take advantage of the currency play if the price is right. Currently I am advising on two residential property transactions where the value exceeds £30M – these clients like many others are focusing on the continued benefits of long term investment in prime central London, almost unphased by what is currently happening in the UK.

Our clients regularly require the opinion of their trusted property lawyer. We are not just there to process the legal work - we are there to help our clients purchase the right property at the right price in the right location; we are there to recommend the 'strategic partners' who will cater for the client's every needs, be it a Surveyor, a Mortgage Broker, a Bank or an Insurance Broker; we are there to connect our clients with the excellent array of lawyers within the Private Client department who will in turn provide advice as to how best to structure the ownership of their property purchase and to create a UK Will for the client amongst other things.

I am of the opinion that the outcome of the election last month will have a positive effect on the UK residential property market in 2020. Now more than ever our clients need us to step up and provide the best possible all round advice.

Q: What do you like to do in your spare time?

My weekends are very family and football orientated! My two boys are eight and four and they can be a real handful! I coach the under 9's football team that my eldest son plays for and for my sins, I have followed Leeds United religiously for the past 30 years.



NICK STONE
PARTNER
T: +44 (0)20 7395 3033
E: nstone@wedlakebell.com





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