

# Spotlight on private wealth

June 2023

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 trustees' powers to the Register of Overseas Entities.

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

**What's the point? (the question all trustees should ask when exercising their powers)**

Trustees are usually given a wide range of powers in the document establishing a trust. The law restricts the exercise of these powers, including by obliging trustees only to use their powers in accordance with the purpose for which they were granted.

Trustees should determine the purpose of their powers by ascertaining the objective intention of the settlor at the time that person created the trust. They should also review the trust deed and any contemporaneous material which the settlor intended to be read with it, such as a letter of wishes. Whilst trustees may consider views expressed by the settlor after the trust was created to decide how to exercise their power, they should not take these into account to determine the purpose of that power. This ensures that there is certainty when the trust is created about the purpose for which trustees' powers can be exercised.

If a trustee exercises a power for an improper purpose the trustee would be acting in breach of trust and may be exposed to claims from beneficiaries and third parties. This is the case even if the trustee honestly believed that they were acting appropriately.

In a recent case<sup>1</sup>, the Privy Council decided that trustees had exercised their powers improperly. The case was an appeal from a decision in Bermuda but the court referred almost exclusively to English authorities. This indicates that the same result would have been reached had the claim been determined under English law.

In that case, two Bermudan trusts were created on the same day in 2001. The principal assets of both trusts were shares in a Taiwanese plastics conglomerate which had been founded by two brothers. The beneficiaries of the first trust were the children and descendants of the two founders (many of whom worked in the business). This trust held shares worth over US\$500m. The second trust was a "purpose trust" and held shares worth US\$3.5bn. Its purposes were to ensure the growth of the conglomerate and to support charities.

A few years later, the founders explained that they intended to leave some of their own shares to their families in their wills, so there was no longer any need to incentivise the family to develop the business by giving them shares through the first trust. The trustees of the first trust then decided to transfer the entire trust fund to the second trust. The trustees' decision was challenged by the beneficiaries of the first trust.

The court decided that the trustees had the power to transfer the trust fund to another trust. The court then reviewed the trust deed of the first trust to determine the purpose of the trustees' powers.

It was clear from the terms of the trust that it was intended to be a family trust for the benefit of the direct descendants of the founders. For example, if the trust assets were not distributed then they had to be split equally between the founders' children. The trustees' fees also had to be agreed by the adult beneficiaries. Whilst there was a wide power to add beneficiaries, this was very typical and could conceivably be exercised to confer a benefit on existing family beneficiaries (for example, by benefiting a spouse or stepchild). The second trust had very different purposes, namely, to promote the business and support charities. The fact that both trusts had been established on the same day confirmed that they had been established with different purposes in mind.

Accordingly, the court decided that the trustees had acted with an improper purpose: they had transferred the family trust fund to the second trust so that the founders' family would no longer benefit from the trust.

The case is a reminder that trustees should consider what was the purpose of their powers at the time the trust was created, and not by reference to views expressed by settlors at a later date.

1. *Grand View Private Trust Co Ltd v Wong and others* [2022] UKPC 47.

# What's new?

## Court decides Crown Estate property held on trust

The High Court recently decided<sup>2</sup> that property which had passed to the Crown on the dissolution of a company was held on trust for the shareholders of that company.

Property that has not been distributed on dissolution of a company passes to the Crown. In this case, a company which owned two properties was dissolved in 2010. The properties were not effectively transferred to its shareholders on dissolution.

By the time that mistake came to light it was too late to restore the company to the register to correct the error. However, the court found that the company and its accountant had wrongly represented that the properties had been effectively transferred to the shareholders on dissolution of the company.

The shareholders acted to their detriment in reliance on these representations and the court considered that it would be unconscionable if the shareholders did not now recover ownership of the properties. The court found that these circumstances gave rise to a trust for the shareholders and made an order vesting ownership of the properties in them.

## A tale of two court decisions

Two recent cases considered the knotty issues which can arise when estates are administered.

In one case<sup>3</sup>, the court decided that a son was too late to challenge the validity of the codicil to his father's will. The will permitted his second wife to live in the family home for her lifetime; the codicil gave her an absolute interest in the home. The son did not bring a claim until nine years after his father's death, and six years after receiving legal advice about challenging the codicil. The court did not accept that concerns about creating divisions amongst the remaining family was a reason to delay bringing proceedings. In

the time since the father's death written documents had been lost and some of those who would have given evidence had died as well, such that there was good reason for the court insisting that any challenge to the codicil should have been brought promptly.

In another case<sup>4</sup>, the court made a declaration of presumption of death in respect of a missing person. The person seeking the declaration was the deceased's friend and the executor under her will.

The court had to consider if she had a "sufficient interest" in seeking the declaration, because she was not the spouse, civil partner, parent, child or sibling of the missing person. The court decided that she did have "sufficient interest" to apply for the declaration, as that would allow those benefitting under the deceased's will to receive their gifts. Further, there was no risk to the estate, as the applicant would still need to prove that the will was valid before obtaining a grant of probate.

2. *Dixon v The Crown Estate Commissioners* [2022] EWHC 3256.

3. *James v Scudamore* [2023] EWHC 996.

4. *Re Fisher* [2023] EWHC 979 (Ch).

Key takeaways from the first year of the UK's national security screening regime on foreign investment

Read RPC's thoughts [here](#).



## RPC asks

### How can trust beneficiaries get in the driving seat and vary a trust?

In certain circumstances the beneficiaries of a trust can unanimously agree to vary the terms of a trust or dissolve the trust and distribute its assets between themselves – this is known as the rule in *Saunders v Vautier*.

For the rule to apply, the beneficiaries must all be aged 18 or over, have capacity to make that decision and collectively be entitled to all the trust assets.

If a single beneficiary disagrees with the proposal, is not yet 18 or does not have capacity then the rule cannot be applied. Unanimous agreement may be difficult to achieve where the class of beneficiaries is widely defined. Even a potential beneficiary who does not yet exist, such as an unborn child, can prevent the application of the rule.

Neither the trustees nor the original settlor of the trust can prevent the beneficiaries from exercising these rights. Accordingly, if a settlor is determined to prevent the beneficiaries ending or varying the trust, the settlor would need to exclude the rule indirectly by carefully limiting the beneficiaries' entitlements to the trust assets.

In a recent case<sup>5</sup>, the Privy Council confirmed that the rule can also apply to beneficiaries under a will. Any variation the beneficiaries make is, of course, subject to the prior rights of creditors (including tax authorities) and the payment of administration expenses. Apart from this, the beneficiaries can agree to alter the distributions of assets under a will, both between themselves and to include third parties.

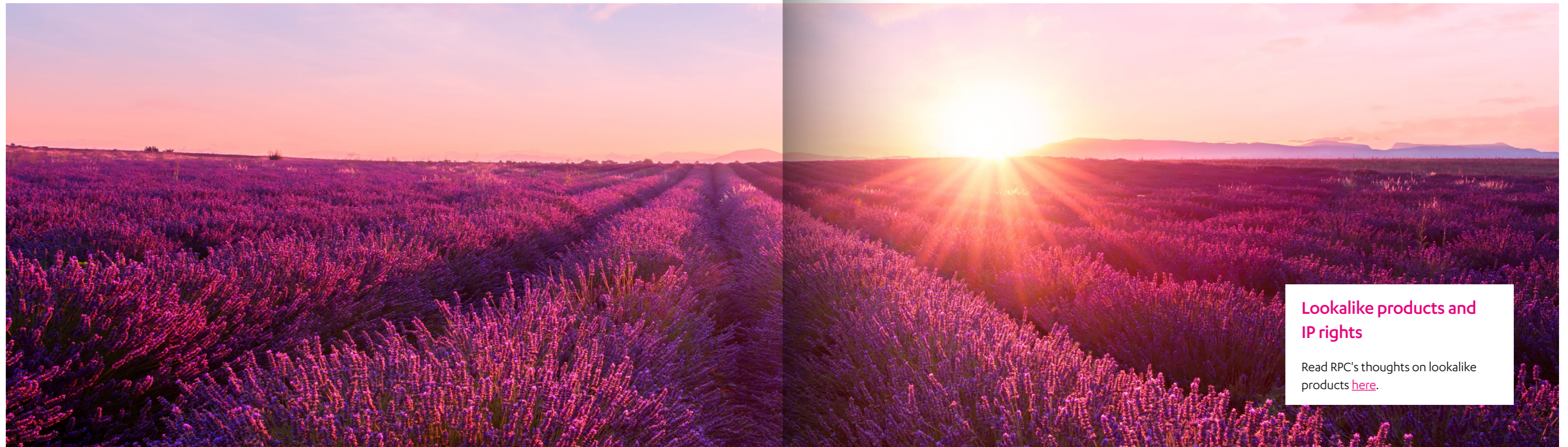
### What is the latest guidance issued on the Register of Overseas Entities?

The Register of Overseas Entities holds information about the beneficial owners of overseas entities who own land in the UK. It is designed to expose criminal activity by increasing the transparency around the ownership of these entities.

The [latest guidance](#) confirms that an individual or corporate body will be a beneficial owner if they meet one of five conditions. These include holding 25% of the shares or voting rights in an overseas company, having the right to remove the majority of its board, or exercising significant control over the company. Where a trust satisfies any of these conditions in respect of an overseas company, individuals who exercise significant control or influence over that trust will also be deemed to be beneficial

owners of that company. Significant control and influence in relation to a trust includes being able to appoint or remove trustees, making investment decisions for the trust or deciding how the trust assets are used. Typically, a person managing the trust on a daily basis will be considered to have significant influence and control over it unless they are advising the trust in a professional capacity (for example, as a solicitor, accountant or tax adviser).

The overseas entity must provide Companies House, which manages the register, with information about its beneficial owners. The type of information required will vary for each type of beneficial owner. Where the beneficial owner is a trustee, that information will include information about the trust such as its name and its trustees. Once registered, the overseas entity has a duty to ensure that it keeps the information on the register up to date annually.



#### Lookalike products and IP rights

Read RPC's thoughts on lookalike products [here](#).

5. *Deonarine v Ramcharan* [2022] UKPC 57.

## And finally in the art world...

### Sotheby's and ArtTactic review the art market

Sotheby's and ArtTactic's Insight Report reveals a promising recovery in the art market, notwithstanding disruptions caused by the pandemic and an uncertain economic climate.

The report highlights recent trends in the market for works sold for over US\$1m. Between 2018 and 2022, these works accounted for 74% of the total value of auction sales. Most notably, even during the peak of the pandemic in 2020, private sales of these works reached a new high, rising to US\$1.41bn at Sotheby's alone. The biggest growth within sales of these works was observed with "trophy" pieces in the range of US\$20m or above, accounting for 45.2% of all sales of works worth over US\$1m in 2022.

Sotheby's and ArtTactic also saw a domination of Impressionist and modern art in this market, and this was the subject of more than half of the sales at auction by

value in 2022. Meanwhile, contemporary art accounted for almost 60% of these works sold privately. Not only have sales of works by contemporary female artists doubled from 2018 to 2022, but sales of artworks by young contemporaries (artists born in 1977 or after) in this market have also soared by more than 350% in value since 2018.

Asian collectors and young buyers remain a significant presence in this US\$1m plus market. Asian bidders made up nearly a third of the bidders for these works at Sotheby's between 2018 and 2022.

The proportion of millennial bidders more than doubled in 2022, perhaps indicating where the future lies.

## 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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