Private Client MAGAZINE

ISSUE 7

OFFSHORE EDITION: TOPICAL TROPICALS

INTRODUCTION

"The larger the island of knowledge, the longer the shoreline of wonder"

Ralf W. Sockman

We are delighted to present the Offshore issue of Private Client Magazine. In this edition our contributors discuss a range of topics impacting the offshore world, including crypto, deemed domicile, and onshoring.

We also get to know some of our community better with a series of 60 seconds with interviews, finding out their strangest/most exciting story in the industry, their role models, and what they are most looking forward to for the remainder of 2022.

Thank you to our authors and community partners for their consistent support, we hope you enjoy this latest edition.

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Private Client

Private Client Middle East

15th-17th November 2022

Shangri-La Hotel, Dubai

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60-SECONDS WITH:

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Q What do you like most about your job?

A Being constantly kept on my toes. The complexity of each dispute tends to go beyond just the law because the personal dynamics, cultural nuances and psychological drivers of the parties and players involved means that every matter is usually fascinating and unpredictable. This means there are always unique opportunities to be creative and original when formulating case strategy.

Q What would you be doing if you weren't in this profession?

A I would most likely be working in the world of global politics. Since a young age (when I bizarrely used to pretend I was John Major) I have been fascinated by international relations and the personalities and dynamics that drive global events. I became seriously interested in a career as an international diplomat but unfortunately did not have the requisite multilingual skills. Nevertheless, I have maintained a strong interest in global politics and over the past years I have been fortunate to attend major political conferences and events in Bogota, Colombia as well as in New York, Boston, Washington DC and New Hampshire.

Q What's the strangest, most exciting thing you have done in your career?

A I once acted for an Australian trust company that was administering trust funds for a US beneficiary. Significant funds had been misappropriated and our only traceable lead was the owner of an English bank account where the funds had passed through. I went to meet the account owner with the suspicion that she was the mastermind behind the money-laundering operation, but it turned out that the woman was in fact the victim of an elaborate and highly sophisticated international online dating scam. The events that unfolded served as a real-life pre-cursor to Netflix's recently released documentary 'The Tinder Swindler'!

Q What has been the best piece of advice you have been given in your career?

A Without setbacks, there are no opportunities to improve. So, embrace obstacles and disappointments as learning opportunities and use them as tools for self-improvement, growth and future success.

Q What is the most significant trend in your practice today?

A ESG and digital asset investing are increasingly on the agenda in the trust arena as beneficiaries and settlors are incorporating ESG data, fintech growth and the rise of new asset classes into decisions on investment objectives and strategy. Not only does this pose new challenges for trusts, it also increases the risk for breach of trust claims against trustees who will be facing increasing pressure from settlors or even the evolving market when trying to strike a balance between investment priorities, societal change and duty of care obligations.

Q What personality trait do you most attribute to your success?

A Extroversion. I am most engaged and energized when interacting with different types of people and immersing myself in novel situations. This has helped me form strong and collaborative bonds with colleagues, clients and counsel, and it has also given me the confidence to ask questions, take risks and seek out learning opportunities from a multitude of sources.

Q Who has been your biggest role model in the industry?

A It is too difficult to pick just one person. At MWE I work with a number of tenacious and admirable lawyers who truly operate at the highest level and have created advantages and achieved milestones in the industry that I would love to emulate in my own career.

Q What is something you think everyone should do at least once in their lives?

A Solo travel. It is an excellent way to learn about yourself, gain new perspectives, and push your boundaries to experience new things.

Q What is the one thing you could not live without?

A Coffee – I get an inordinate amount of joy from a barista-made Americano!

Q What is a book you think everyone should read and why?

A Meditations by Marcus Aurelius. It is a timeless series of personal reflections from the leader of the Roman Emperor that is relevant in its modern-day teachings. It is also a great book to revisit in small doses as it offers some very useful perspectives, particularly when you may be faced with a challenging or seemingly unjust situation.

Q What would be your superpower and why?

A The ability to time-travel. I would love to flit between ancient wonders and major moments in history, from spending an afternoon at the Hanging Gardens of Babylon or being a spectator at the Ancient Games in Olympia, to witnessing the moon landing, and being in the audience when Martin Luther King delivered his 'I Have a Dream' speech.

Q What are you most looking forward to this year?

A Spontaneous socializing, unconstrained travel opportunities and meaningful in-person interactions. And finally attending the Wimbledon men's tennis final after the tickets I had won in the public ballot had been deferred for two years due to the pandemic!

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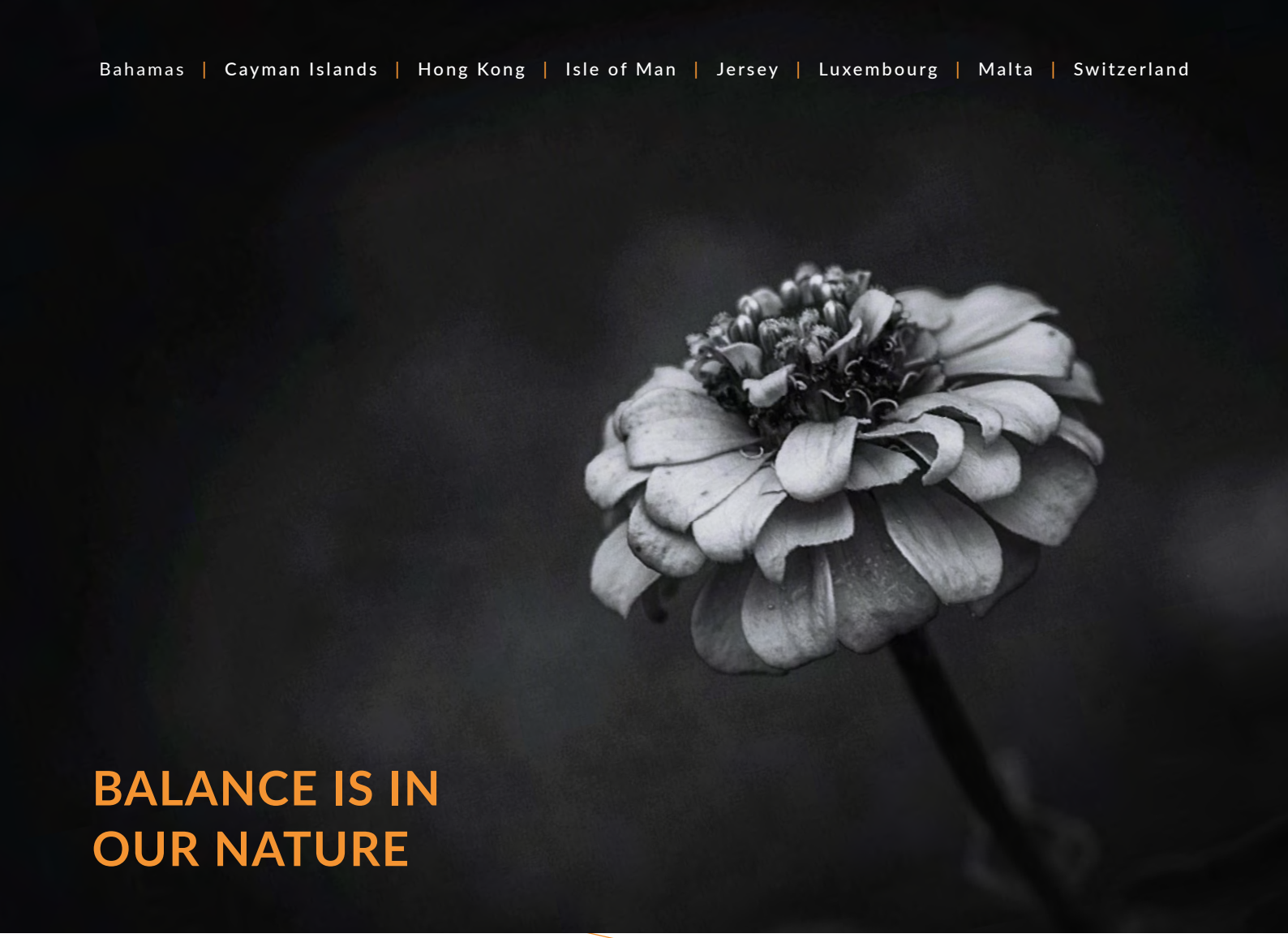

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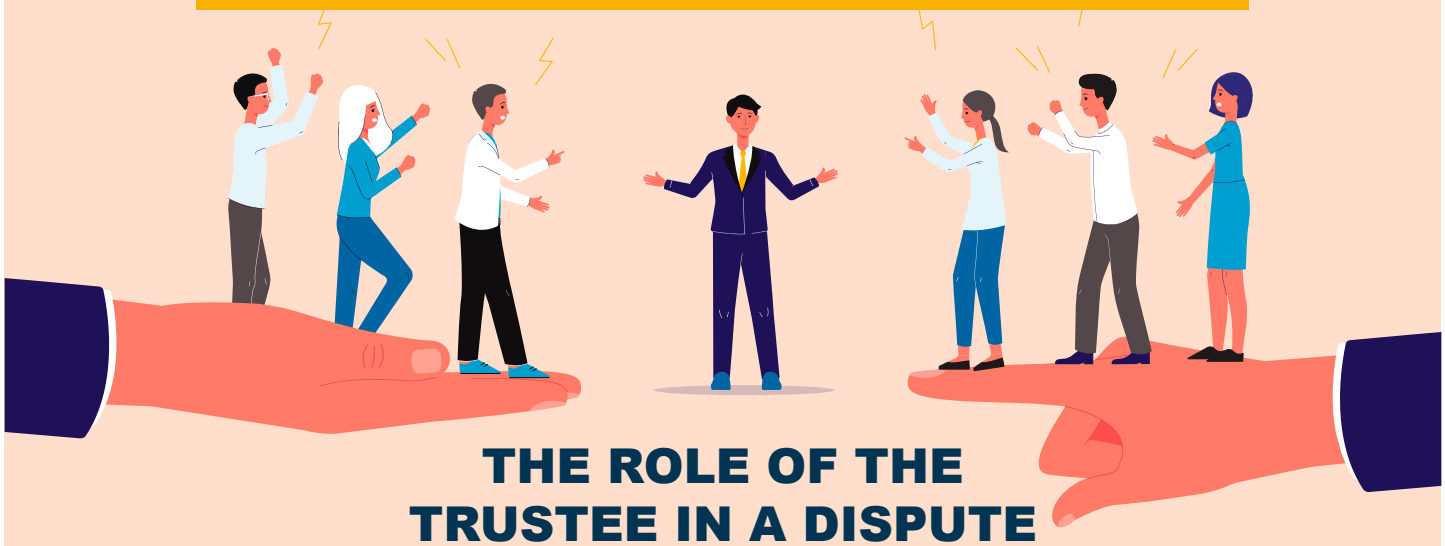

THE ROLE OF THE TRUSTEE IN A DISPUTE BETWEEN BENEFICIARIES

Authored by: Tom Cutts-Watson - Collas Crill

This article examines the very recent decision handed down by the Bermuda Court of Appeal in the matter of Ingham & Anor v Wardmanet al [2022] CA (Bda) 7 Civ.

The judgment by Justice Williams is unusual in its forcefulness and contains a number of specific criticisms of the actions and behaviour of the trustee executors. Those criticisms – and the overarching tenor of the judgment – should be at the forefront of a trustee's thinking in circumstances where a dispute arises between beneficiaries.

Background and procedural history

The proceedings relate to the estate of the late Elfrida Chappell. Butterfield Trust (Bermuda) Limited and Stephen Kempe were appointed as her executors in her last will (the **Executors**). Jonathan and Nicholas Ingham (**the Inghams**) represent one group of the family and the Wardmans – including the First Defendant – represent the other.

The Inghams took issue with the actions of the First Defendant and her late husband (George Wardman, Mrs Chappell's son) in relation to Mrs Chappell's financial affairs. They initiated proceedings in Bermuda seeking to pursue a derivative claim against the First and Second Defendants, on the basis that the Executors are unable to bring a claim themselves due to conflicts of interest.

Separate but related proceedings were also issued in Guernsey. In those proceedings certain documents were discovered which the Inghams believe have relevance for the purposes of the Bermuda proceedings (the **Documents**).

Guernsey proceedings carry the usual implied undertakings not to use disclosed documents for a collateral purpose, and the rules of civil procedure (The Royal Court Civil Rules, 2007) also confirm that documents disclosed in legal proceedings may only be used for the purpose of the proceedings in which they are disclosed, with certain exceptions.

Therefore the Inghams sought an order from the Royal Court of Guernsey for permission to use the Documents in the Bermuda proceedings.

That order was granted on the condition of privacy – the Documents were made subject to privacy orders such that prior to any use in Bermuda, the Bermuda Court would itself need to grant privacy orders prohibiting any further disclosure of the Documents other than for the purposes of the proceedings in that jurisdiction.

It was, in effect, a request for reciprocal privacy assurances, aimed at putting before the Bermuda Court documents that appeared to be relevant and of assistance to the Court in coming to its determination but respecting the usual protections afforded to documents disclosed in court proceedings. All of the main beneficiaries of the trust consented to that happening.

The Inghams sought and obtained the necessary privacy order (the Privacy Order) in the Supreme Court of Bermuda *ex parte*. However, that was challenged by the Executors and was set aside by the Supreme Court at a contested hearing.

The Executors argued – and the Court at first instance agreed – that:

1. the Privacy Order offended the principle of open justice in Bermuda; and
2. in granting it, the Court was enforcing a foreign judgment that was unenforceable on Bermudan reciprocal enforcement principles.

The appeal and the Court's findings

The Inghams appealed to the Court of Appeal. Having determined that all grounds of appeal had been made out, it restored the Privacy Order.

The Court of Appeal had little truck with the Executors' argument that the Privacy Order should be considered as a method of enforcement of a foreign judgment, describing that notion as "quite absurd". The Court found instead that the Privacy Order was no more and no less than a mechanism to put relevant documents from separate proceedings before the Bermuda court. The Guernsey order did not need to be – and was not being - enforced in Bermuda at all.

The argument that the Privacy Order would run contrary to the principles of open justice was also rejected. The Court held that it was clearly in the interest of justice that all relevant documents be put before the judge hearing the relevant application.

Of most interest to trustees and practitioners, however, will be the Court of Appeal's strident views as to the conduct and decision making of the Executors (and by analogy, trustees and other representative parties) when faced with a situation where there is – as was the case in these proceedings – an underlying dispute between beneficiaries. The Court considered that in choosing to challenge the Privacy Order the Executors' actions fell short of their duties. Importantly, the criticism of the Executors was not based on a legal technicality or one-off error, and instead was rooted in their very approach to the matter and their conscious decision to 'descend into the arena', forgoing the neutrality that would have been expected of them.

The Court referred to the well-known case of *Alsop Wilkinson (a firm) v Neary and others* [1995] 1 All ER 431 and specifically Lightman J's categorisation of the types of dispute in which trustees might find themselves, those being a trust dispute, a beneficiaries dispute and a third-party dispute. *Alsop Wilkinson* confirms that in a beneficiaries dispute – which the Court was concerned with here – "*the duty of the trustee is to remain neutral and…offer to submit to the court's directions*".

The Court of Appeal found that the Executors did not do so and instead sought to prefer one class of beneficiaries to another by deciding for themselves that the claims brought by the Inghams against the Wardmans lacked merit. As stated by Justice Williams, "*That is not their function; they are not the arbiter of that dispute. Rather, they should remain neutral, and follow the directions of the court*". The Court noted that if the Executors' approach was successful it would have the effect of shutting down a claim made by one group of beneficiaries against another. Seen in that light, the Executor's actions appeared to have strayed some way from true neutrality.

The Court of Appeal went further in its criticism of the Executors, however, saying:

"I have already indicated that in my view the Executors should have followed the course set out in Alsop Wilkinson v Neary…

I regard their conduct in relation to these proceedings exactly as Ms McDonnell [Counsel for the Inghams] described them; improper and unjustifiable, as well as hostile and potentially governed by self-interest".

Concluding thoughts

This case serves as an indication of the importance placed by the Court on a trustee acting appropriately when faced with a dispute and is in many ways a "what not to do" guide. In order to be able to act in accordance with their duties a trustee should first identify which category the dispute falls into, and what duties apply, considering the principles laid out in Alsop Wilkinson v Neary.

To the extent the dispute can be satisfactorily categorised as a beneficiary dispute, the trustee can and should leave them to it, and take a neutral position. A failure to do so may lead to delay, costs and criticism similar to those detailed in this judgment.

Trustees should also on a continuing basis reflect whether their proposed actions in a dispute can be considered to be truly neutral when looked at objectively. In this case the Court considered that it ought to have been obvious that the Executors' should have been neutral, and that their actions were not. Taking professional advice as to which of the beneficiary parties they should support (as the Executors effectively did here) is contrary to that principle of neutrality, and no defence to its contravention.

Costs were not determined in the judgment due to the existence of a prior *Beddoe* order, which complicated the costs issue. Nevertheless the Court of Appeal's view that absent that *Beddoe* it would have had no hesitation in ordering that the Executors pay the Inghams' costs remains stark.

Practitioners may also welcome the Court of Appeal's pragmatic approach to the making of privacy orders to facilitate justice being done where proceedings have been initiated in different jurisdictions. The alternative view – that documents that are known to be relevant should be precluded from the Court's consideration – is a position that a party (and particularly a trustee) should be cautious in adopting.

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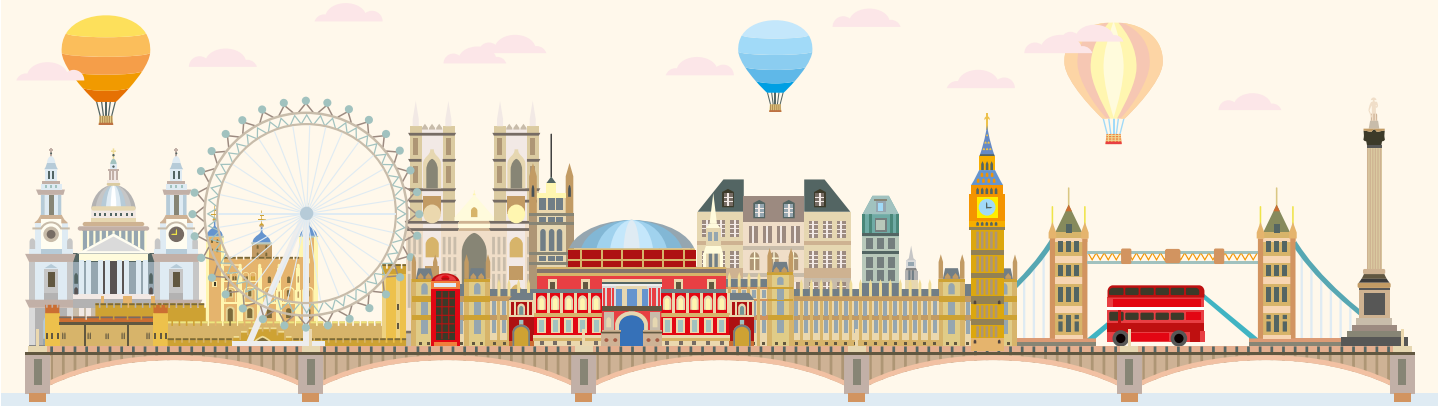
24th-26th Aug	Private Client Summer School
29th-30th Sep	HNW Succession: Planning, Trusts & Disputes
4th Oct	Private Client: Jersey
6th Oct	Private Client: Guernsey
15th-17th Nov	Private Client Middle East

For more information: **thoughtleaders4/private-client.com**
For event queries contact: **paul@thoughleaders4.com**

CAN ONSHORE BECOME THE NEW OFFSHORE?



Authored by: Richard Joynt and Ava Fairclough - Highvern

The UK has long existed as an attractive location for financial investment and is home to one of the financial capitals of the world - London. With its highly regarded legal framework, robust tax regime and its position in the centre of the world's time zones, it's easy to see why the UK holds such a prestigious place in the global financial services industry.

However, the UK has had to concede to a number of other jurisdictions, both onshore and offshore, in the availability of attractive products for both private client and fund/corporate investment. The offshore market in particular has positioned itself for many to be the historic location of choice for structuring. With attractive tax regimes, highly reputable financial products, and an abundance of expertise, "offshore" does offer some fantastic options for structuring wealth and investments.

What is the UK doing to improve its position?

In a post-Brexit world, the U.K. is making clear attempts to position itself in the market as a more attractive jurisdiction for structuring. A number of legislative changes and products are under discussion and, in some cases, shortly coming into force which will allow the UK to compete more effectively. A few of these are highlighted as follows:

UK Funds Regime Review

The UK Government announced a wide-ranging review of the UK funds regime in 2020 and, since this time, has been consulting on various proposed initiatives which it hopes will increase the UK's attractiveness for setting up, managing, and administering fund structures. Whilst this is very much a moving target, a few of these initiatives are coming into place with effect from April 2022 which will substantially improve the UK's position in the global fund market.

One of particular interest is the introduction of the Qualifying Asset Holding Company ("QAHC") product. The QAHC has a number of attractive tax advantages and will seek to offer a genuine alternative to the asset holding vehicles in fund structures more traditionally found in the likes of Luxembourg and Ireland.

Double Taxation Treaties

The UK is already particularly attractive from this standpoint as it holds one of the world's largest networks of double taxation treaties. However, the UK government is not standing still. As part of the response to the review of the UK funds regime, it has confirmed that it is actively engaging in negotiations in relation to its various tax treaties, particularly with EU countries.

Re-Domiciliation

The UK Government is currently in the process of consulting on a proposal to introduce a corporate re-domiciliation regime into UK legislation. Currently, the process of changing a corporate vehicle to a UK base is complex, requiring the set-up of a new company and the sale of all assets which brings into play various tax and legal concerns. The prospect of a formal regime would be welcomed and could encourage the movement of various structures to the UK which have historically been tied to their origin jurisdiction.

The trend towards UK

In recent years, there has been a change in attitude towards using the UK for wealth structuring. Where in the past there may have been a real desire to avoid UK structuring options, there are now many ways the UK can offer attractive structuring opportunities.

Increasingly, both individuals and corporate institutions are basing their decisions on where to structure on a combination of factors; taxation now rarely being the key driver.

In some cases, the perceived reputational risk of being associated with offshore structuring can be a deciding factor as to why individuals and corporates are choosing to move their operations to the UK.

There is also an increased desire to be contributing to the UK public purse. The idea of being fully tax reported in the UK is attractive for some, (perhaps for reputational reasons as mentioned above), but also for the moral notion of contributing taxes towards public institutions such as the NHS which has been seen as a public bastion over the course of the 2020-2022 turbulence created by the pandemic.

Another trend we have seen is that for individuals in recent years, there is a real drive towards simplicity. The pandemic has truly shown people what is important and, for many, that is being close to family.

More people are deciding to stay in the UK and to pay UK tax than checking the calendar and ticking off days to ensure the security of a different tax residency.

Recent upheaval has brought with it new priorities including flexibility and the ability to live an easy life.

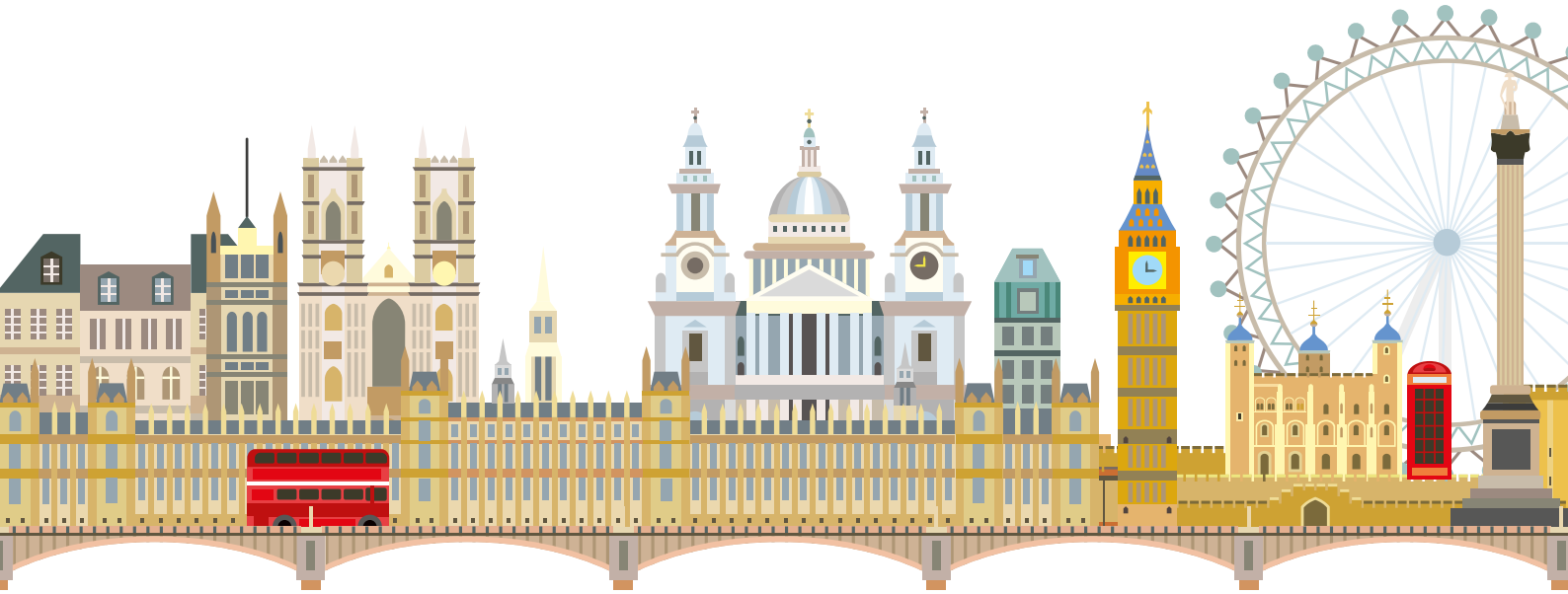
Finally, a key advantage of structuring in the UK is the ability to retain control. Fully managed and controlled UK structures are on the rise and having the main decision makers on the boards of corporations, family investment companies or indeed acting as trustees to trusts is important. However, the underpinning principles of governance should not be forgotten. There is still an important place for fiduciaries and corporate service providers in the onshore market, even where control and decision making is retained by clients elsewhere.

Offshore and Onshore - The Hybrid Model

Even where there is a desire for UK structuring to maintain UK tax residence, we have seen that offshore services can still offer immense value. Privacy and anonymity is still a huge concern for many and the insertion of a Jersey company into a UK structure can provide the required protection of individuals' personal details, whilst maintaining a fully compliant and UK tax resident structure. This hybrid onshore/offshore model can also present advantages in terms of estate planning.

Conclusion

On the back of its exit from the EU, the UK is making huge steps forward to make itself a more attractive financial environment for structuring and there are an increasing number of trends towards the UK being the jurisdiction of choice for many individuals and corporates. If executed as planned, this raises the interesting prospect of the UK becoming a leader in the world of "offshore" structuring.



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Q What do you like most about your job?

A The variety – no two days are the same and you are constantly learning and developing your knowledge. I also get to work with some amazing people both colleagues and clients alike.

Q What would you be doing if you weren't in this profession?

A Running a coffee shop with my daughter who makes the most amazing cakes. She has recently graduated as a children's nurse though and is at the start of her career so I don't think she is quite ready for the change yet.

Q What's the strangest, most exciting thing you have done in your career?

A I have had so many exciting opportunities, but the standout has to be my involvement in the successful implementation of Dubai International Finance Centre Employee Workplace Savings plan (DEWS), a progressive end-of-service benefits plan introduced to transform end-of-service benefits (EOSB) for DIFC employees. From our initial pitch to become Trustee, to the roll out of the plan, it's been incredible to be a part of and I was lucky enough to spend 4 weeks in Dubai working alongside our DEWS partners Zurich and Mercer which was just a fantastic experience.

Q What has been the best piece of advice you have been given in your career?

A Be prepared. Failing to prepare is preparing to fail.

Q What is the most significant trend in your practice today?

A ESG is very topical. As Trustees we are the guardians of assets, and our job is to protect those assets for future generations. We are constantly looking to the future and responsible investing is at the forefront of our minds.

Sanctions are also a current hot topic. With the ongoing situation in Ukraine, we are continuously monitoring sanctions and undertaking closer scrutiny of all financial transactions to ensure we know who we are dealing with and that we do not breach any laws.

Q What personality trait do you most attribute to your success?

A Resilience and loyalty. Don't give up when the going gets tough. The tough days make you stronger.

Q Who has been your biggest role model in the industry?

A Too many to mention. I have been lucky to have worked with some fantastic role models both male and female during my career.

Q What is something you think everyone should do at least once in their lives?

A Run a marathon. I completed the Dublin marathon in 2016 and if I can do it, anyone can. As much as I hated it at the time, the sense of achievement at the finish was incredible.

Q What is the one thing you could not live without?

A Family – they love you unconditionally.

Q What is a book you think everyone should read and why?

A I am more of a chick lit or fiction reader than anything serious. I want to switch off when I read, not read something intense.

Q What would be your superpower and why?

A Healing powers. I know so many people who are going through a tough time currently whether it be health, experiencing loss or mental health. More selfishly it would also mean I could heal my aching joints as I get older…

Q What are you most looking forward to this year?

A Travel now the world is opening up. In 2019 I always said I would go back to Dubai with my husband and daughters and explore all the tourist attractions. This is now booked for October, and I look forward to making more memories with them.

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CROSS-BORDER INCAPACITY:

DEALING WITH A LACK OF COHESION BETWEEN JURISDICTIONS

Authored by: Emily Stoneham - Payne Hicks Beach

Navigating the sensitivities of a client who has lost capacity is difficult even in a relatively straightforward case. Matters become far more complicated in circumstances where multiple jurisdictions are involved.

Unfortunately, there is a lack of cohesion between how many jurisdictions deal with capacity. This means that you could be faced with a scenario where provisions put in place in one jurisdiction are not recognised in another resulting in an attorney being left unable to deal with assets in that jurisdiction. As the global population continues to age this issue is only likely to arise more regularly in practice.

Position in England and Wales

The relevant legislation for establishing whether or not a person has capacity to make particular decisions in England and Wales is the Mental Capacity Act 2005. There are effectively two ways to deal with an individual who has lost capacity to manage their affairs in England.

1. A Lasting Power of Attorney (LPA).

These are split into an LPA for property and financial affairs and an LPA for health and welfare.

A person needs to have the requisite capacity in order to execute an LPA. Therefore it requires advanced planning to ensure that an LPA is in place before a client loses capacity. It is by no means an easy conversation to have as no individual really wants to consider a scenario where they can no longer make decisions for themselves. However, an LPA offers significant advantages over a court order (as discussed below). The donor will have the opportunity to choose their attorneys and set out the scope of the LPA. As discussed in further detail below having the conversation in advance also offers the opportunity to consider how to deal with all of an individual's worldwide assets.

In contrast if no action until an individual loses capacity all decisions, including the identity of their attorneys, will be taken for them via the Court of Protection.

2. Deputyship

If an individual loses capacity and an LPA is not in place then an application will need to be made to the Court of Protection to appoint a Deputy to act on behalf of that individual. A Deputy, once appointed, has similar powers to that of an Attorney appointed under an LPA. However, it is worth noting that the procedure is far more complex and costly than implementing an LPA. Further expenses and complexities can arise in circumstances where there is a dispute between those wishing to take control of the individual's financial affairs.

International scope

The Hague Convention on International Protection of Adults (the "Convention") came into force on 1 January 2009. The idea behind this convention was to set out a cohesive set of rules that apply to all convention countries. This means that an attorney appointed in one Convention member state should be able to act on that individual's behalf in relation to assets located in another member state. The Convention should therefore offer a solution to the cross-border issue. Unfortunately, while the UK has signed the convention, only Scotland has ratified it.

So where does this leave an individual who has lost capacity in England?

The key areas the Court of Protection has jurisdiction over are:

1. **Property owned by an adult located in England;**
2. **An adult habitually resident in England regardless of where their property is located; and**
3. **An adult present in England.**

In addition, the High Court, but not the Court of Protection has jurisdiction to take protective steps in relation to British nationals outside England.

When seeking to establish whether or not an attorney has power over an individual's assets outside England, it will be necessary to look at the local laws of that jurisdiction. These issues can be considered and local legal advice taken at the time an LPA is being put in place. For some jurisdictions it may be possible to just add particular wording to the LPA in order to ensure it is recognised there. For others it may be necessary to put in place a completely separate power of attorney or equivalent. In circumstances where a deputy is being put in place, the process is likely to be far more complex and could involve multiple court applications in different jurisdictions.

Position in offshore jurisdictions

Some offshore jurisdictions have recently updated their capacity laws and recognise LPAs for example:

1. **Jersey: The Capacity and Self Determination (Jersey) Law 2016 which came into effect on 1 October 2018 which means it is now possible for a Jersey resident to grant an LPA.**
2. **Guernsey: The Capacity (Baliwick of Guernsey) Law, 2020 which is about to come into force. This law also introduces LPAs and is many of its provisions are similar to the Mental Capacity Act 2005.**

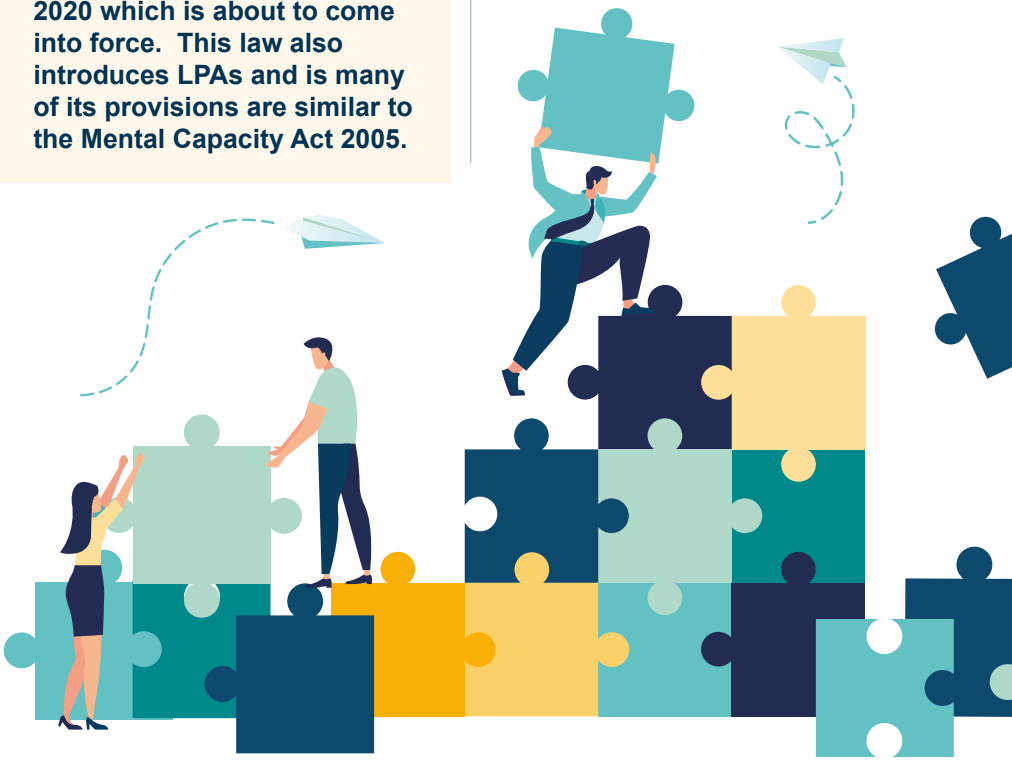
These changes mean it should be relatively easy for a person to enter into a LPA which is compatible in both England and these jurisdictions, although local legal advice will need to be taken.

However, in relation to other jurisdictions it is likely to be more complex and there may be circumstances where separate arrangements need to be made in different jurisdictions.

Conclusion

This area would be made far more straightforward if England was to ratify the Convention. This would mean that the issues of cross-border incompatibility would be resolved in relation to a significant number of jurisdictions.

At present, however the best approach is to consider this issue at an early stage not after individual has lost capacity. Not only will this allow the individual to have input into the provisions being put in place but it will allow their advisors to consider the full extent of their foreign assets and pre-empt any issues of incompatibility between jurisdictions.

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TRUSTS CAUGHT BY THE DEEMED DOMICILE NET

Authored by: Sarah-Jane Macdonald - Gillespie Macandrew

Following the Finance Act in 2017, a new category of "deemed domicile" was introduced into the UK's Inheritance Tax ("IHT") regime, for those who are "formerly domiciled residents" (FDRs). The result of this is that not only have various individuals become deemed domiciled in the UK for their own IHT purposes, but a number of non-resident or offshore trusts have been caught by this trap.

How does the deemed domicile work?

A person attains FDR status where all three of the below apply:-

- **they have a UK domicile of origin;**
- **they have become non-UK domiciled with a new domicile of choice; and**
- **they have become resident in the UK for 1 of the 2 previous tax years.**

As a result, anyone returning to the UK, who is going to become potentially UK resident for other tax purposes, will now also need to consider whether their residency status will bring them within the scope of becoming an FDR.

How does it apply to trusts?

Where a person settles assets on trust whilst they are non-UK domiciled, such assets would usually be excluded property and outside of the scope of our relevant property regime. By becoming an FDR, this effectively reads that back so that the assets settled whilst they were non-domiciled can now be within the scope of UK IHT.

This has come as a bit of a shock to various clients who had perhaps sought advice on their income or capital gains tax position when planning a return to the UK, but not considered the impact on their offshore trusts.

Are the trusts wholly liable to IHT?

The trust's assets will remain excluded property and out of the scope of IHT until the FDR status is triggered.

This means that if, on 6 April, a settlor was UK resident for 1 of the 2 previous tax years, the trust's assets will become relevant property at that date.

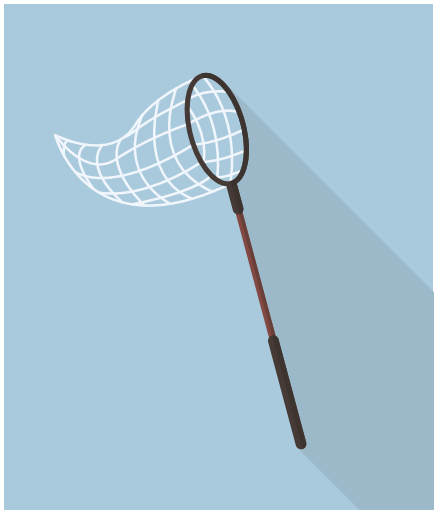
In practice, what this means is that the assets will not be liable to UK IHT for the period they were excluded, and that the relevant quarters can be deducted in the usual manner. However, UK IHT will apply from that point forwards meaning the trusts will suffer exit and 10 year anniversary charges.

Planning can be undertaken if it is clear a settlor will obtain FDR status to transfer assets out of the Trust whilst they remain excluded property, or it may be suitable to invest in assets qualifying for one of the IHT reliefs to mitigate the tax liability.

Difficulties can occur where parties were unaware that their offshore trust has become part of the relevant property regime and various withdrawals have been made from the trust. This is particularly the case where the trusts hold offshore bonds and parties have continued to withdraw their usual 5% each year.

Each withdrawal made from the trust, whether cash or assets, will generate not only an exit charge, but a potential reporting requirement. Trusts may find they have numerous IHT100 Returns to complete, with penalties and interest.

It is therefore important to identify these trusts as early as possible to bring the reporting up to date and review whether the trust (and the assets invested) still achieves its purpose.



What about settlor interested trusts?

The other big issue with these offshore trusts is that they were often created with the settlor named as a potential beneficiary. As they were not historically part of the UK IHT regime and were excluded property there would be no gift with reservation of benefit issues.

If the assets are no longer excluded property, this brings them within the meaning of s102(3) of the Finance Act 1986 and the value is aggregated with the settlor's estate on death.

This can create issues for settlors who had previously undertaken planning to dispose of these assets and ensure they were outside of their estate for UK IHT purposes.

Ideally, if an individual is seeking advice on becoming UK resident, any such trusts will be identified so that a reservation of benefit can be brought to an end whilst the assets remain excluded property.

Once the trust assets become relevant property, however, they have been caught by that s102 net and the difficulty is then planning around it.

By virtue of s102(4) if a reservation is brought to an end this will be treated as a deemed potentially exempt transfer.

As it is deemed, only, a lifetime disposal where a spouse becomes entitled wouldn't get the benefit of spouse exemption, which is an issue discussed in the Society of Trust & Estate Practitioner's ("STEP") Briefing Note (IHT – Gift with Reservation and Spouse Exemption, 24 February 2021).

It would therefore appear that the settlor would need to survive 7 years from the gift being made before the trust assets would finally be free from that trap.

The STEP Briefing Note did give some relief as it confirmed that because s18(1) of the IHT Act 1984 applies spouse exemption to property "which becomes comprised in the estate of the transferor's spouse", that it can apply on death where the spouse becomes beneficially entitled to the trust's assets on the settlor's death (either under the terms of the settlement or by an appointment pre-death).

Some clients may be hesitant to give up their interest if they rely on regular withdrawals and may query whether they could continue to receive funds by way of loans, repayable to the trust on their death. Whilst it may seem like a nice solution, the loans would come from assets previously settled and the other anti-avoidance net (s103 Finance Act 1986) would then drop - meaning there is little escape from this issue.

What should practitioners do?

Given the dangers of these trusts falling within the scope of UK IHT or settlor's estates, practitioners should be wary of any clients with offshore trusts if there is a return to the UK. Careful planning can be undertaken, but once the FDR status is triggered, the net will fall making any planning all the trickier (but not impossible).

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TALES FROM THE CRYPTO

Authored by: Alex Cooke – Schneider Financial Solutions

Alex Cooke is founder and CEO of litigation finance provider Schneider Financial Solutions, and recently completed the University of Oxford Blockchain Strategy Programme. Read this article to confidently engage in crypto discourse. There's a high chance you'll be asked about it.

For the uninitiated "crypto" is enticing, confusing and often a little scary. The crypto road is fraught with risk from setting up accounts on exchanges, to price volatility, let alone transferring assets from one wallet to another - especially when one wrong move could send your crypto to the land of the lost forever. That's right, there's no getting it back, no-one to call, and no Ombudsman or government to turn to. Crypto is not for the faint-hearted.

That being said, as an investor in crypto and a verifiable blockchain enthusiast, it does not surprise me to see crypto assets becoming increasingly prevalent in private client and matrimonial disputes; Bitcoin is after all "digital gold", and the current market cap across all crypto assets stands at just under $2 trillion. If Elon has his way, Dogecoin will be the future currency of Mars.

At last count crypto is responsible for 19 billionaires according to Forbes, which recently featured Binance's CEO "CZ" or Changpeng Zhao on its front cover. It is estimated that there are between 100-300 million Bitcoin users currently (noting that one wallet address does not equal one user).

Love it (like Michael Saylor) or hate it (like the European Central Bankers), crypto is going to become an increasingly common asset in our clients' portfolios, and I believe often the source and medium of their wealth.

Advisors can no longer afford a lack of understanding about cryptocurrency and how it works. In this article I will explain the basics which will hopefully get you started in thinking about the right questions to be asking your clients where crypto assets are involved.

BLOCKCHAIN

Cryptocurrency is intangible. As it does not operate through any traditional banking system, one of the main questions often asked is "where does it actually exist"? Whilst there are some (technical) exceptions, crypto assets exist on blockchains.

So, what exactly is a blockchain and why is this important? A blockchain is a decentralised and immutable digital ledger secured by a large, distributed network of nodes (computers with relevant software connected to the network), each holding an identical copy of the full ledger.

For a new transaction to occur and be entered into the ledger the majority of nodes must verify the transaction as true. So essentially a blockchain is a system for recording information in a way that makes it almost impossible to change the data or cheat the system.

According to Cointelegraph the number of active Bitcoin nodes in July 2021 exceeds 13,000.

Whilst I will concentrate on public blockchains in this article, it is important

to note that there are both private and public blockchains. The likes of Bitcoin, Etherium, Terra and Avalanche (to name but a few) are all public blockchains, meaning that they are fully decentralised, and transactions are visible, (if you know how to get the analysis).

Private blockchains on the other hand are centralised and as the name suggests entirely private. Sectors such as (non-decentralised) finance and healthcare use private blockchains.

Whilst often overlooked, at least 57 central banks are at various stages of creating digital versions of their own fiat currencies, known as Central Bank Digital Currencies (CBDC's). CBDC's will run through private government-owned blockchains with CBDC's held in secure digital wallets.

TERMINOLOGY

The terms "digital assets", "cryptocurrencies" and "tokens" are often used interchangeably, however there are differences. A "digital asset" is a non-tangible asset that is created, traded and stored in a digital format. "Cryptocurrencies" and crypto "tokens" are sub-classes of digital assets that utilize advanced encryption techniques, or cryptography, to ensure authenticity of the asset, as well as eliminating the potential for counterfeiting or double spending. So, what's the difference between a currency and a token?

A cryptocurrency, (for example Ether "ETH" on the Etherium blockchain), is issued directly by the blockchain protocol (the computer-coded rules that establish the structure of the blockchain) and is therefore the native asset of a blockchain that can be traded, utilised as a medium for exchange and used as a store of value. When completing transactions on blockchains, fees (known as "gas") will be incurred, which will be charged in the native currency. Cryptocurrencies will also be used to incentivise users to maintain the network security, i.e., for Proof of Work (PoW) consensus mechanisms, in return for verifying transactions a node will be rewarded in the native cryptocurrency.

Tokens on the other hand are units of value that blockchain-based organisations develop on top of existing blockchains and allow for interoperability across the blockchain's ecosystem. Building and maintaining your own blockchain is expensive and time consuming, therefore most protocols are built on top of existing major blockchains, (in the same way that if I wanted to create a taxi company, I don't need to set up a car manufacturing plant to build my own cars). Tether's USDC stable coin is a good example of an Etherium based (ERC-20) token.

There are four common traits of tokens:

- **Programmable – they run on software protocols, composed of smart contracts;**
- **Permissionless – they can participate within the ecosystem without special credentials;**
- **Trustless – no centralised authority controls the system; and**
- **Transparent – the rules of the protocol and its transactions are viewable and verifiable by all.**

The ease of building on top of existing blockchains and the interoperability of tokens, means that the number of new protocols is likely to continue to grow extensively.

DIGITAL WALLETS

A digital, or non-custodial wallet is used to store, send and receive cryptocurrencies and tokens on a blockchain. The wallet owner maintains control and security over their assets instead of a third-party custodian, such as a bank. Whilst no third-party custodian can prevent wallets making transactions, in very rare cases it would be possible for a wallet operator to prevent a particular wallet address from making transactions. Such action would be extremely uncommon and would likely involve a directive from the Courts.

A digital wallet has two primary components:

- **Private Key: denoted by a randomly generated series of numbers and letters that is only known by the owner; and**
- **Public Key: The public key can be given to anyone who wishes to send funds to that digital wallet.**

Through public key addresses, users can view transactions that occur "on-chain". This is a critical part of blockchain's transparency, and whilst the name of the person associated with a particular wallet address is never associated with that address on the blockchain, the balance of the wallet is easily verifiable along with the associated transactions to and from other wallets.

Digital wallets come in two forms:

- **Cold wallets: Hardware wallets that are not connected to the internet, making them more secure against hackers who are unlikely to get access to them offline; and**
- **Hot wallets: Digital wallets connected to the internet, such as MetaMask.**

ACQUISITION AND "HODLING" CRYPTO ASSETS

While Decentralised Finance (or DeFi) offers crypto investors and speculators significant opportunities to create (and lose) wealth through mechanisms such as staking and yield farming, for the purposes of this article I am going to refrain from going into the detail on these fascinating protocols and will focus on the more common and longer-term strategy of buying and holding, or "hodling" as it is now known in the cryptoverse due to a celebrated typo.

It is likely that the majority of clients will acquire their (non-CBDC)

cryptocurrencies and tokens (collectively "crypto assets") initially through a centralised exchange, such as Binance or Coinbase, however it is less likely that they will necessarily maintain the assets on that exchange.

For some, centralised exchanges are simply an "on-ramp" to convert fiat currency into crypto that will then quickly leave the exchange to a "hot" wallet such as MetaMask to be deployed into a decentralised exchange (DEX) such as Pancake Swap or Trader Joe. Such DEX's allow investors to acquire less-mainstream crypto assets or participate in token sales before listings on the larger centralised exchanges in the hope of locking in 100x+ returns. DEX's do not custody assets acquired through their exchanges, but rather the assets are transferred directly into the hot wallet, that likely lives on the owner's phone or computer.

Others will acquire their preferred crypto assets and then withdraw these assets from the centralised exchange to a cold storage wallet. Maintaining crypto assets on an exchange means that these holdings are potentially at risk from hacking or business risk (such as the failure of the exchange). To mitigate these risks, the majority of investors (both institutional or retail) will send their crypto assets to a cold wallet for safekeeping.

By way of example just 12.36% of all BTC (Bitcoin) in circulation is held on centralised exchanges. This means that the vast majority of BTC is currently being hodled off-exchange.

Given the effort, risk, and gas fees in moving crypto assets on and off exchanges, it is generally considered that assets held off-exchange are long term investment assets, whilst assets held on-exchange are available for trading.

The rapid growth in awareness in this ever-growing asset class and ease of access to major crypto through consumer banks is leading to mass adoption and bringing about an interesting challenge for private client practitioners, trustees, and executors. There will be an increasing need to consider and deal with vast ranges of crypto assets, held across multiple centralised exchanges, hot and cold wallets and throughout the metaverse(s). Considerations will need to be made as to how private keys may be held securely and anonymously until required, as well as strategies around the monetisation and liquidation of assets, as well as tax issues. In contentious disputes, practitioners will also have to consider how to identify where crypto assets are held and how they can be enforced against.

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Q What would you be doing if you weren't in this profession?

A I would love to have been an architect, creating something permanent and hopefully tasteful.

Q What's the strangest, most exciting thing you have done in your career?

A The strangest was finding myself appearing for the New Zealand government in the Privy Council on my first day in practice, collecting a judgment and trying to remember to bow in the right direction. Most exciting was opening the letter which announced that I was being appointed a QC.

Q What has been the best piece of advice you have been given in your career?

A "Preparation, preparation, preparation."

Q What is the most significant trend in your practice today?

A I have noticed more interest in trust and estate disputes being brought to a conclusion privately, whether by arbitration or private FDR. If this escalates, it will have a huge impact not only upon the costs and efficiency of resolving disputes, but also upon the development of case law in this practice area.

Q What personality trait do you most attribute to your success?

A Staying cool under pressure.

Q Who has been your biggest role model in the industry?

A My former pupil supervisor Sarah Asplin (as she then was), as an example of the women who made it at the Bar. I was inspired never to doubt that women barristers can and should be equally as successful as their male colleagues. Having that experience at the outset was invaluable.

Q What is something you think everyone should do at least once in their lives?

A Scuba dive, for a glimpse of a world we otherwise never get to see.

Q What is the one thing you could not live without?

A My husband and our two boys are Number One. My Nespresso machine is in second place.

Q What is a book you think everyone should read and why?

A Pride and Prejudice, not just because it's funny but because of the wonderfully precise way in which Jane Austen used English.

Q What would be your superpower and why?

A Indefatigability. I wish I had limitless energy.

Q What are you most looking forward to this year?

A Moving out of London and starting to restore the wreck of a house we bought last year in the countryside. It's a daunting prospect, but it will be worth every moment to be able to live in tranquil green space and to be able finally to get a dog.

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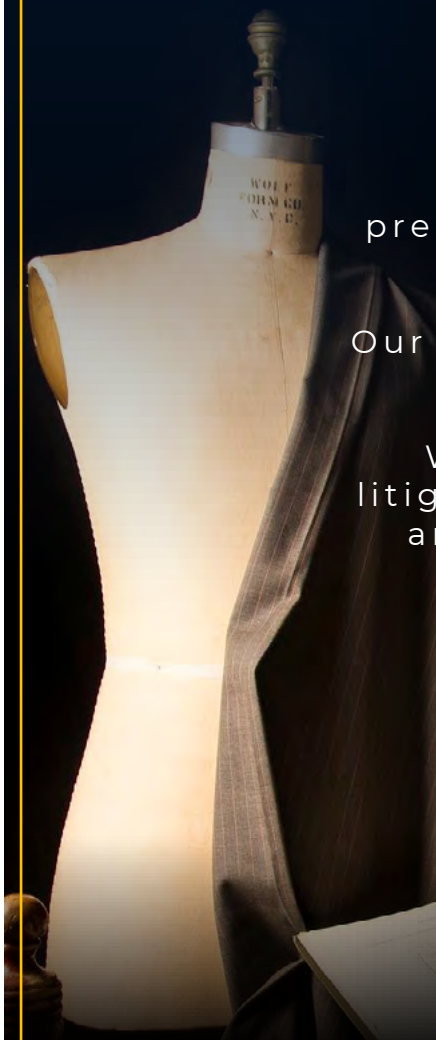

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LETTERS OF WISHES AND MAINTAINING THE SETTLOR/TRUSTEE RELATIONSHIP

Authored by: Paul Buckle - Ocorian

Discretionary trusts give trustees wide decision-making powers. However, settlors usually want trust monies applied within certain parameters, and may fear trustees, unfamiliar with family circumstances, will not observe the purposes for which they established the trust. Likewise, trustees may lack sufficient information to make informed decisions, and absent clear guidance, may find it impossible to undertake a proper survey of the objects of their fiduciary discretion. A way to inform the trustees' decisions is therefore needed.

There are various ways in which this can be done - having a protector or reserving powers to the settlor are examples. Very often, however, and for certainty, this is done by settlors stating their wishes in a letter (or memorandum) of wishes.

Letters of wishes ("LOWs") usually apply to the exercise of trustees' dispositive discretions, but may extend to other matters such as investment, or purely administrative powers.

The letters are generally addressed to trustees, but sometimes, for consistency in the decision-making process, to a protector as well. When properly deployed, LOWs have considerable value. Aside of informing the trustees' discretion, that they can be issued quickly and informally, means they can be used to respond to unforeseen changes in family circumstances. Also, if (as is usual) they are expressed to be confidential, they become an ideal medium within which the settlor can express possibly controversial views whilst preserving family harmony and mutual respect.

The prevailing view now is that LOWs are always material to the exercise of a trustee discretion, and that trustees are therefore obliged to consider them.[1]

In many cases, the trustees will follow any guidance or wishes expressed by the settlor, and provided they have properly reviewed any other material considerations, there is nothing wrong in that. Conversely, of course, blind observance of a LOW to the exclusion of other relevant considerations is likely to lead to a decision being set aside, as it will not have been made in a sufficiently informed manner.

Given their prominence in the decision-making process, the content of a LOW is very important. This is not simply because the trustees will be making significant decisions in reliance on it. It is also because they may have to consider what weight should be given to the contents. A settlor's wishes for her family may well change over time, as the family dynamics alter. LOWs should therefore be kept under constant review and if necessary revised. In that event, it is helpful to record clearly that

1 See eg, in Jersey, In Re Piedmont Trust and the Riviera Trust [2021] JRC248, [63].

all previous letters are to be disregarded to avoid any confusion. Care should be taken, however, to make sure that a later letter is not improperly motivated as trustees can still give greater weight to an earlier letter if a later one was written at a time when the settlor may have been influenced by an ongoing dispute with one or more of the beneficiaries, whom she then disadvantaged by the content of the second letter.

Where there is no letter, the trustee should obtain one, because, as was said in one Jersey case, "……the absence of a letter of wishes makes it important for the good ongoing administration of the [trust] ..for the wishes of the settlors in establishing and settling the funds into it to be determined ".[2]

The recent pandemic may have resulted in a decrease in direct contact between settlors and trustees. It may also have provided the opportunity for families to reflect on their circumstances and aspirations. As a result, the need to review LOWs has surely increased. Recent court cases involving restructuring of trusts and substantial distributions of trust assets invariably involve detailed scrutiny of LOWs, the weight to be afforded to them, and the way in which trustees took them into account (whether they followed them or not). There have been instances where professional trustees have been rightly criticised for not having a proper LOW or disregarding one they do have on the sale of a significant family asset earmarked for the settlor's children's benefit.[3]

So, for those looking at ensuring a proper LOW is in place, what from should it take, and whether an original or a replacement letter? Ideally, a number of things should be taken into account, such as the following;

- Always make it clear the letter is not binding and use language like "In considering whether and how to exercise your powers and discretions" and "I would also like you to consider any suggestions put to you by me or after my death, by my [ ] …"
- Do not make the letter too long or complicated.
- Avoid expressions like "I am to have the fullest possible access to the capital and income of the Settlement"[4]
- Make wishes clear and unbiased
- Include a statement to the effect that the settlor wishes the letter to be confidential
- Never include anything that contradicts with the express terms of the trust
- Ensure if relevant that the letter includes wording that it replaces any previous letter

There are those who criticise discretionary trusts for what they see as a tendency to place their most important "terms" within in a confidential LOW, leaving trustees with limited accountability. However, if properly used, LOWs still surely have an important and acceptable role, which balances the need to inform trustees with the prevention of family discord, and is demonstrative of the way in which a trustee and a settlor should interact with one another in the proper administration of the trust.

2 In Re A Trust [2012] JRC066, [62].

3 See in Guernsey, in Re AAA Children's Trust, GJ 29/2014, [63]; in ignoring the LOW the trustees also ignored the "emotional and sentimental factors", and wrongly treated the matter purely as an investment decision.

4 The wording of the LOW in the UK Charman litigation which was material to the family court's conclusion that the trust assets were resource of the husband.

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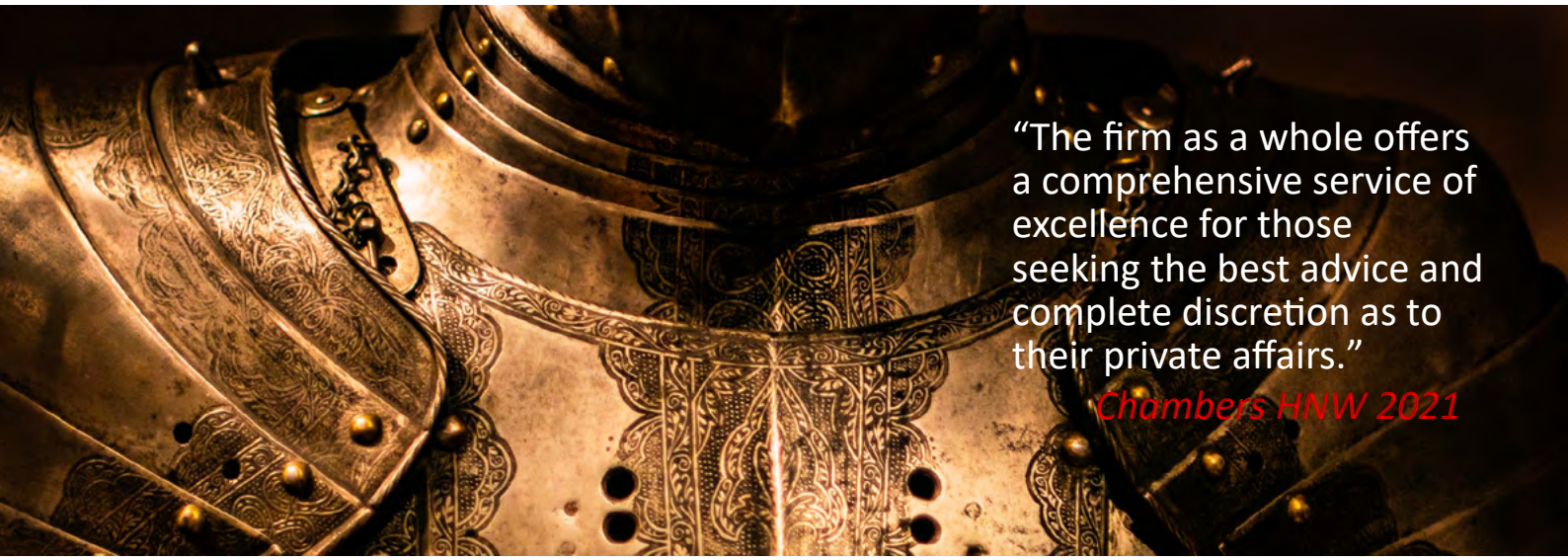

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INVESTORS TURN TO PRIVATE ASSETS IN SEARCH FOR DIVERSIFICATION

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As investors have sought diversified sources of return, alternative assets have benefited. Private equity in particular has seen strong growth over the last decade. But how has this come about?

The growing attraction of private assets

An unprecedented period of loose monetary policy has supported global economies since the onset of the pandemic. It has also helped financial markets soar to new heights by the end of 2021. With elevated public market valuations, low fixed income yields, and the outlook from here looking increasingly uncertain, it is little wonder that investors are increasingly turning their attention to alternative investments to diversify their portfolios.

Private assets in particular allow investors to obtain an illiquidity premium over the long term and add additional sources of return to their portfolio.

Private equity, venture capital, infrastructure and other private assets have seen inflows explode over the last 12-18 months as asset allocators increasingly tap into these different portfolio drivers.

Why private equity?

The search for diversification has been one of the key reasons for the attraction. Public businesses tend to already be at a certain stage of maturity. In contrast, private equity and venture capital have been able to offer investors access to businesses at an earlier stage of their growth trajectory.

For investors, this means exposure to areas that is not easily attainable through traditional investments.

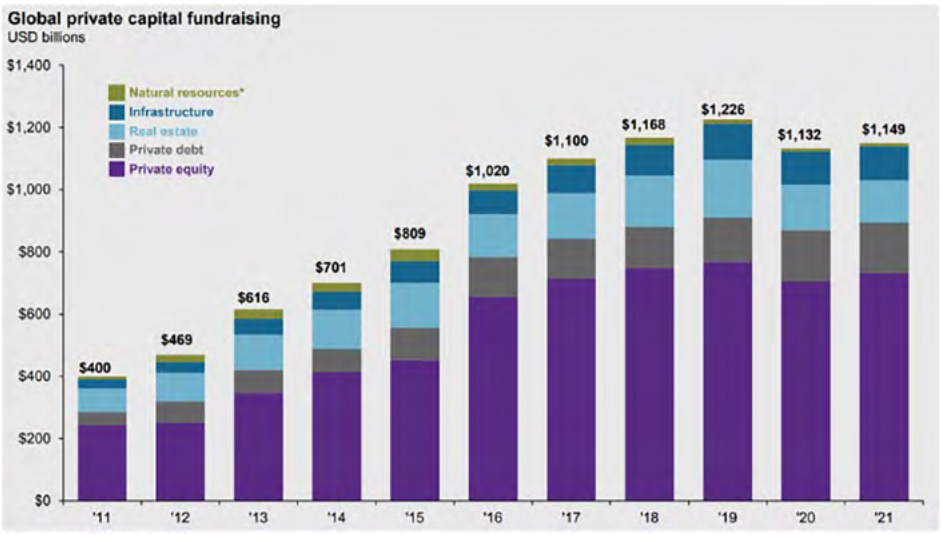
These alternative vehicles seek companies with different business models, often with new technology or targeting untapped markets. Disruptive technology in private equity companies have long been grabbing headlines.

Some of these have listed in the last few years, including well-known businesses such as Uber, Airbnb and Spotify. As was evident from the share price performance of these companies, most of the investment gains were made prior to their listings. There are many more highly interesting industries to be accessed through private markets.

Some examples include:

- **Blockchain is continuing its ascent to help transform many businesses and processes. Essentially a secured, shared database, blockchains store information in blocks that arranged in a chain. While cryptocurrency may be the most famous blockchain application, it can do far more than just this.**
- **Artificial intelligence (AI) is increasingly popular to help streamline business operations in numerous industries. This includes healthcare, financial services and education. By the first half of 2018, nearly 12% of global private equity investments went to AI businesses – a substantial growth from 2011 when it represented 3%.[1]**

As these investments are often in more niche areas of the market, they have been particularly attractive to investors who wish to be more selective about their areas of market exposure. Added to this, alternative assets often carry an illiquidity premium, due to their more specialist nature. This offers extra compensation for long-term investors seeking additional reward in the face of rising inflation.



Source: Preqin, J.P. Morgan Asset Management.

A strong runway

Throughout 2021, fund flows, dealmaking and exits all remained at elevated levels and on many metrics hit historic records for the year. Fundraising activity for private debt, real estate and infrastructure has also remained robust.

These significant fund flows have led cumulative dry powder in private markets to accelerate to around $3.3tln according to Pitchbook. This locked-in capital indicates a bright future for the private equity industry as money is put to work over the next few years, supporting the businesses and technology which will drive the future of the global economy.

While alternatives are showing strong growth and healthy potential, it is still a specialist area of the market. Like any other asset class, it requires thorough analysis to find the opportunities that offer the best value, while complementing the other assets in an investment portfolio.

1 https://www.oecd-ilibrary.org/sites/3abc27f1-en/index.html?itemId=/content/component/3abc27f1-en#:~:text=AI%20now%20represents%20over%2012,start%2Dups%20focused%20on%20AI.

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Supporting Durrell & Jersey Zoo

Jersey Zoo is the heartbeat of the Durrell Wildlife Conservation Trust. All of their conservation work around the globe is underpinned by the zoo. Despite their hardest efforts, the present pandemic is having a devastating effect on the income of Durrell.

When they wrote to inform us that their global conservation program and 61-year history of saving species and habitats from the brink of extinction was in real danger due to the financial impact of the pandemic on Jersey Zoo, we asked how we could help.

After discussions with Durrell, we are delighted that ARC is now the proud sponsor of their Blue Poison Dart Frogs display.

Find out more about the Durrell Wildlife Conservation Trust, their work and the frogs on their website **www.durrell.org**

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)

Native to Suriname

The poison frogs of Central and South America are famous for their toxic secretions, used by native communities when hunting. The poisons are not made by the frogs themselves, but are taken up from their diet of invertebrates, which have in turn ingested plant chemicals. However, in captivity the poison decreases considerably in strength as the food chain needed to supply them with their raw materials does not exist.

The frogs' bright colours advertise their poisonous nature. The blue poison frog's pattern of black spots on a blue background is particularly striking and varies from individual to individual. After they metamorphose into tadpoles, the male carries the young on his back to a small pool, water trapped in a hole or a bromeliad, where they develop into frogs after 10-12 weeks.

With the world's amphibians in crisis, captive populations are vital to conservation efforts.

Extremely sensitive to environmental change, amphibians give us early warning of problems that might be due to global warming, pollution and so on. The blue poison frog, like many others, is threatened with extinction.

Durrell has successfully bred this species, and their biosecure facilities at the Trust's headquarters in Jersey will enable them to continue studying and breeding the blue poison dart frog and other threatened amphibians in captivity, developing techniques to help slow their decline.

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