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Law and Practice

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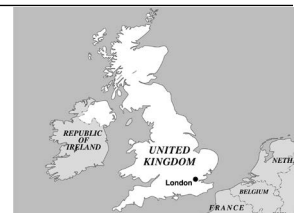

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1. Tax

1.1 Tax Regimes

The UK has a sophisticated tax regime designed to capture the value in assets belonging to and transactions/activities undertaken by both individuals and entities. The relevant direct private taxes are income tax on earned and unearned income and income gains, capital gains tax (CGT) on disposals generating chargeable gains, and inheritance tax (IHT) on some lifetime gifts and estates on death. The most relevant indirect private tax is stamp duty land tax (SDLT) on the purchase of real property in England and Wales.

The UK's tax regime revolves round the situs of assets, the tax residence of individuals and entities, and the domicile of individuals. Domicile is a common law concept – essentially it is the place to which an individual has the most permanent connection, but it is always necessary to consider their domicile of origin and any domiciles of dependency and choice. Statute then adds an overlay of "deemed domicile", whereby after broadly 15 years of residence in the UK an individual who is not actually domiciled in the UK is deemed to be domiciled for income tax, CGT and IHT purposes. Prior to an individual becoming deemed domiciled, they may opt for the remittance basis of taxation so that they are only taxed on foreign income and gains remitted or brought in to the UK, and on UK income and gains.

This attracts a remittance basis charge of GBP30,000 p.a. after residence for seven out of the nine preceding years of tax assessment and GBP60,000 p.a. after residence for 12 out of the 14 preceding years of tax assessment.

Individuals therefore fall into four main categories:

- UK resident and domiciled individuals whose income, capital gains and estate have a primary exposure to UK taxation, subject to any double tax treaty relief and unilateral relief;
- UK resident and deemed domiciled individuals whose position is parallel to the first category, albeit that it will be easier for them to shed their deemed domicile status than it is for the first category of individual to lose their domicile status;
- individuals who are UK resident but not domiciled or deemed domiciled and who choose the remittance basis; only UK income and gains and remitted income and gains will be exposed to UK tax, and only UK situs assets will be exposed to IHT; and
- individuals who are neither resident nor domiciled in the UK but have UK situs assets and who are potentially taxable on UK source income, gains on UK residential property and the value of UK situs assets on transfers/death.

For IHT, there is a lifetime allowance of GBP325,000 (which, once used, is available again after seven years), a small annual allowance (currently GBP3,000) and allowances for gifts on marriage and small gifts. Chargeable lifetime transfers (ie, transfers into trusts) are subject to lifetime rates at 20%. Gifts are treated as potentially exempt transfers that fall out of account if the donor survives seven years. Transfers to spouses and charities are exempt, and there are special reliefs for agricultural property, business property and heritage property. There is also a relief for normal expenditure out of income.

The UK recognises trusts, and in taxing the trustees HMRC will look at the situs of the assets, the domicile status of the settlor and the residence of the trustees. Trusts vary from bare trusts (effectively nominee arrangements), through interest in possession trusts to fully discretionary trusts. Where there is a UK trust with UK trustees, the trustees pay income tax, CGT on actual and deemed disposals and IHT on certain chargeable events. The position of offshore trustees of foreign law trusts is very complex, with detailed anti-avoidance provisions. There can be deferrals of income tax and CGT, and IHT will be restricted to UK situs assets and to UK residential property held in trust structures.

1.2 Stability of the Estate and Transfer Tax Laws

UK tax legislation constantly evolves, and in the last decade or so there have been radical changes to the tax treatment of non-UK domiciled individuals, UK and foreign trusts and UK residential property, and large increases in the rates of SDLT. These changes are driven by concerns over tax leakage, a policy aim of treating long-term residents who are non-UK domiciled in the same way as their UK domiciled counterparts, and hostility to trusts. This leads to a more uncertain tax environment; some clients find this unsettling, while others are more sanguine.

A notable trend has been the development of anti-abuse rules in the form of both a general anti-abuse rule (GAAR) and then targeted anti-abuse rules (TAARs) when draft legislation is introduced.

There has also been a trend towards increased transparency through the trusts register, which is presently a confidentially maintained register of certain express trusts, introduced in response to the EU Fourth Anti-Money Laundering Directive (MLD4). There has been much debate about the implementation of the recommendations in the EU Fifth Anti-Money Laundering Directive (MDL5) for the trust register. After an extensive period of consultation, it now seems that the regulations will exempt quite a number of trusts and will

include the restriction of a legitimate access basis. The increase in compliance and costs and the loss of privacy are concerns for clients, but their tax and estate planning remains largely driven by family needs and asset protection aims, as it always has been.

1.3 Transparency and Increased Global Reporting

The UK has always been at the forefront of transparency initiatives. The domestic US legislation, FATCA, was reinforced by the US/UK Inter-Governmental Agreement, with filing from 31 May 2015. The UK implemented the OECD's Common Reporting Standard with filing from 31 May 2017. It established a new corporate register of persons with significant control with effect from 6 April 2016, and adopted the Legal Entity Identifier for firms subject to the EU Markets in Financial Instruments Directive.

In March 2018, the OECD published model legislation that requires intermediaries to inform the tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD/G20 Common Reporting Standard or to prevent the identification of the beneficial owners of entities or trusts. This is implemented by the EU's Directive on administrative co-operation in the field of taxation (DAC6), which had to be implemented by Member States by 31 December 2019, with the law being applicable by 1 July 2020. In light of the COVID-19 pandemic, HMRC has deferred the reporting deadline for DAC6 to 31 January 2021.

For internationally mobile clients who may be affected by these initiatives in more than one jurisdiction, planning will need to take the domestic and global reporting requirements into account, and it may be an increasing influential strand in the years ahead.

2. Succession

2.1 Cultural Considerations in Succession Planning

The UK has three different jurisdictions (England and Wales; Scotland; and Northern Ireland), and the law that applies broadly depends on with which jurisdiction the individual is most closely connected. The jurisdictions have different succession regimes but, with the exception of Scotland to a limited extent, the basic principle is one of testamentary freedom.

An individual domiciled in England and Wales is free to leave their estate in the UK to whomever they choose upon their death. An exception is assets held jointly, which will generally pass to the surviving co-owner unless separate arrangements to the contrary are made. An individual is also free to make such lifetime gifts as they wish, which are only brought into account when the estate is divided in very limited circumstances.

In the absence of a will, the estate of an individual domiciled in England and Wales will pass in accordance with the intestacy rules, under which the estate will be divided between the surviving spouse/civil partner and descendants. The wider family will inherit in the absence of a spouse/civil partner and descendants, and in the absence of wider family the estate will pass to the state.

Complete testamentary freedom could leave family members inadequately provided for so, where the deceased was domiciled in England and Wales at the time of death, the Inheritance (Provision for Family and Dependants) Act 1975 (IPFDA 1975) gives a mechanism for disappointed family members and dependants to make a claim against the estate if they consider that the deceased's estate does not provide adequately for them.

If an individual is not domiciled in a part of the UK under general law, then the law of their country of domicile will apply to their movable assets in the UK, which can bring foreign cultural considerations such as forced heirship or Shari'a law into play.

2.2 International Planning

Families and business are increasingly international – it is not uncommon to find people moving between countries for work, marrying people from different backgrounds or acquiring assets in a number of countries. It is therefore vital to have a detailed understanding of a family, its circumstances and assets, and to work closely with advisers in other jurisdictions.

Succession law in the UK is a scissionary system. The law that applies to movable assets is dependent on the domicile of the deceased, but for immovable assets it is the law of the country where the asset is located.

Whilst the UK takes domicile as its starting point for succession law, other countries may apply different concepts, such as nationality or habitual residence, and even those countries that use the term domicile in succession matters may have a different understanding of the term. With the exception of the EU Succession Regulation (to which the UK is not a party), there are no international treaties designed to resolve conflicts between the laws that apply in different jurisdictions, and the client and his advisers are left to navigate their way through as best they can, taking into account their practical experience and the family's circumstances. These difficulties can lead to high-profile disputes, and for the averagely wealthy the best advice may be for those in advancing years to simplify their assets and their location so far as is possible.

The UK has entered into double taxation agreements that apply to inheritance and estate taxes with only ten countries. Where there is no estate tax agreement, it may be possible to claim unilateral relief against UK tax for tax paid abroad.

2.3 Forced Heirship Laws

England and Wales does not have forced heirship laws, although they may apply to movable assets in the jurisdiction where the deceased was domiciled in a country that has forced heirship laws.

There are limited forced heirship laws for those domiciled in Scotland, under which a surviving spouse/civil partner and children can claim the value of a share in the deceased's net movable estate, as a debt of the estate. These rights effectively operate to ensure the protection of the family and to give a fixed entitlement in contrast to the discretionary position in England and Wales under the IPFDA 1975.

2.4 Marital Property

England and Wales does not have a matrimonial property regime. The regime is effectively one of "separation of assets", and there is no concept of community of property. Assets may be held by a couple in their individual names or jointly. Jointly held assets may be held as joint tenants (ie, they pass to the surviving co-owner by right of survivorship) or as tenants in common (ie, each co-owner has a distinct share, which will pass as under his will/the intestacy rules).

England and Wales does not recognise pre-nuptial and post-nuptial agreements as legally binding. However, a properly drawn-up agreement will be taken into account by the court when considering how the assets and income should be distributed following the breakdown of a marriage. Greater weight will be given to agreements where both parties are legally represented, where there has been full disclosure of assets, and where the agreement meets the parties' needs and has been entered into a reasonable time before the marriage.

By contrast, Scotland draws a distinction between assets owned before a marriage or gifted/inherited during the marriage and matrimonial property, and pre-nuptial and post-nuptial agreements can be used to ring-fence pre-marital and gifted/inherited assets.

2.5 Transfer of Property

In general, a lifetime gift is treated as a disposal by the donor of the asset at its market value on the date of the gift, and the normal CGT rules apply, with the gain or loss being taxed accordingly. The donee will acquire the asset at its market value on the date of the gift.

There are some exceptions. Lifetime transfers between spouses/civil partners take place on a no gain/no loss basis, with the donee acquiring the asset at the donor's base cost. In some circumstances, such as transfers into trust or transfers of assets that qualify for relief from IHT, any gain can be "held over" and the donee will acquire the asset at the donor's base cost.

On death, all assets in the estate are revalued for CGT purposes, and the beneficiary will acquire the asset at its value on the date of death.

2.6 Transfer of Assets: Vehicle and Planning Mechanisms

Historically, trusts were the preferred vehicle for transferring assets to younger generations. The transfer could be achieved free of IHT if assets were transferred into a suitable trust for the donor's children or grandchildren and the donor survived seven years from the date of the gift. The Finance Act 2006 made sweeping changes to the IHT regime for trusts, and it is now almost impossible to make lifetime transfers into trust without triggering an immediate charge to IHT. In practice, no tax may be payable on the transfer if it qualifies for agricultural or business property relief, is exempt as normal expenditure out of income or is below the tax threshold, but the scope for using trusts as a means of transferring assets to younger generations tax-free has been severely limited.

As a result, clients and their advisers have started exploring other options. One which is currently favoured is the family investment company (FIC), which is a private company whose shareholders are family members. Typically, parents or grandparents will set up and manage the company; they will also provide the funds to the FIC by way of loan or by subscribing for shares. Different share classes enable shares in the FIC to be passed to the younger generations by way of outright gift (which will be exempt from IHT if the donor survives by seven years), whilst control of the FIC remains with the parents/grandparents.

2.7 Transfer of Assets: Digital Assets

When assessing the treatment of digital assets, the first question to consider is what terms and conditions were agreed when the account was set up. Many accounts are personal to the person who created them, and the provider will not allow access to anyone else.

Under the law of England and Wales, if the deceased's rights under the contract with the provider survive death then they will pass to the personal representatives (PRs) as part of the estate. However, there is not yet any specific statutory provision that gives the PRs the right to deal with those assets, so it is helpful (particularly where those assets or their provider are

outside the UK) to include express wording in the will that allows the PRs to access and deal with digital assets.

3. Trusts, Foundations and Similar Entities

3.1 Types of Trusts, Foundations or Similar Entities

The use of trusts stretches back over centuries in England, and they have evolved into sophisticated arrangements that confer privacy, allow wealth to be transmitted efficiently across generations and, where relevant, provide a mechanism for the protection of minors and vulnerable beneficiaries.

More recently, trusts are used increasingly in a tax planning context, but significant changes in their tax treatment in 2006 mean that they are no longer as advantageous from a tax perspective. The focus is therefore tending to shift back to the use of trusts for succession purposes as a means of providing for the family but in a more tax-neutral way. This change in emphasis has resulted in the creation of far fewer lifetime trusts.

The main types of trust arising during the settlor's lifetime or on death include:

- life interest or interest in possession (the income passing to one or more beneficiaries, with capital held for others);
- discretionary (giving the trustees wide discretionary powers over the distribution of income and capital); and
- bare trusts (with assets held by the trustees on behalf of a beneficiary who has an absolute right to the income and capital once they reach 18).

Some trusts within these broad categories still benefit from favourable tax treatment, including disabled person's trusts, bereaved minor's trusts, age 18-to-25 trusts, and trusts creating an immediate post-death interest.

Taking a different approach to succession planning, a family investment company may offer a family the opportunity to pass assets on to younger generations in a tailored, controlled and tax-efficient manner (see **2.6 Transfer of Assets: Vehicle and Planning Mechanisms**).

3.2 Recognition of Trusts

Trusts were invented by the English courts, and the current law of trusts is derived from judicial decisions in reported cases, but the common law has been supplemented by a substantial body of legislation that continues to develop to keep pace with the modern world in which trusts operate.

3.3 Tax Considerations: Fiduciary or Beneficiary Designation

For UK tax purposes, the residence status of a trust determines how the settlor, the trustees and the beneficiaries are taxed to income tax and CGT. The IHT position is governed by the situs of the assets and the domicile status of the settlor when he or she put the assets into the trust. If the trust is resident outside the UK, it is generally referred to as an "offshore trust"; in this context, the citizenship of a fiduciary or beneficiary is not relevant.

An offshore trust is one where either none of the trustees is resident in the UK, or there is a mixture of resident and non-resident trustees and, at the relevant time, the settlor was neither resident, domiciled nor deemed domiciled in the UK. This means that, in certain circumstances, a UK resident individual may serve as a trustee of an offshore trust without compromising its offshore status.

The rules applying to the taxation of income and gains derived from assets held by an offshore trust are complex. Non-UK resident trustees generally do not pay income tax and CGT on trust income and gains as they arise but there may be a charge, instead, on the settlor or the beneficiaries (depending on residence and domicile status and where the benefit is received).

3.4 Exercising Control over Irrevocable Planning Vehicles

It is possible to effect changes to English law trusts in a number of ways, as follows:

- the trust deed may give the trustees an express power to vary some or all of its provisions;
- powers of advancement and appointment can be exercised in order to bring about substantial alterations; and
- trustees and/or beneficiaries can apply to the court for an order to vary the trust.

It is possible for a settlor under English law to exert a degree of control over the management and ultimate destination of the assets after they have been settled. In the context of UK resident trusts, the usual way of doing so is for the settlor to be appointed as one of the trustees, which has no adverse tax consequences as long as the settlor/trustee is not also a beneficiary. Whether or not appointed a trustee, it is also common for the settlor to reserve the power to appoint new trustees. Against this background, it is more unusual for the settlor of a UK resident trust to reserve the range of powers that might be considered in relation to an offshore trust, and there are no specific statutory provisions under English law that enable a settlor to do so. An English law trust in which the settlor has reserved very extensive powers might also be open to challenge on the basis that control

of trust property has not genuinely passed from the settlor to the trustees and that the trust is a mere nominee arrangement. This may have serious adverse tax consequences.

4. Family Business Planning

4.1 Asset Protection

The trust has been used for generations in England as a vehicle to preserve and protect assets.

The principal benefit of a trust is the separation of legal ownership from beneficial interest. The legal ownership is held by trustees, who hold the assets for the benefit of a defined class of potential beneficiaries, who would typically comprise members of the settlor's family. For tax reasons, the settlor would normally be excluded from any benefit from the trust. In a modern trust, the trustees would typically be given complete discretion over how to use the assets of the trust for the benefit of the beneficiaries.

In the context of a family business, this means that if the business owner were to place part, or all, of his shareholding into a trust, those shares would be registered in the names of the trustees, who would hold the voting rights. The settlor could be a trustee, in order to retain a degree of control over the company, although any decisions taken by the trustees must be taken in the best interests of the beneficiaries.

Owning a business through a trust enables a wide class of family beneficiaries to benefit, without fragmenting shareholdings. The trustees, as shareholders, can ensure that the business is managed on a successful long-term basis. The trustees can ultimately determine the dividend policy of the business through the appointment of directors and thus control how funds from the business are used for the benefit of the owning family.

The trustees would not necessarily have to be involved in the day-to-day running of the business; they can instead appoint professional managers, or family members, to run it. The trust deed would normally provide the trustees with all necessary powers to enable them to hold the shares and join in any shareholders agreement, and provide protections for them in the event of difficulties arising in the business.

A trust can last for up to 125 years and the beneficiaries can include as yet unborn family members, so a carefully crafted structure can protect a family business for many generations.

4.2 Succession Planning

Businesses that survive for more than three generations in family ownership are rare, for good reasons. Value may be lost to punitive taxation on generational change, or the next generation of owners may not share the founder's talent, leaving the business to fail, or they may simply not be interested in the business, and choose to sell it.

The key to successful succession planning is to protect the business from undue taxation and engage the next generation, without giving them unrestricted control over it.

England currently has a relatively benign tax regime for trading businesses. If the ownership is structured correctly, the business is effectively free of IHT, whether held in outright ownership or in trust. It is important, however, to keep the nature of the business and the ownership structure under review, to ensure the strict conditions for relief continue to be met.

At some point, however, the owner will need to give up ownership, whether in his lifetime or on death. If he wants to restrict the ability of the next generation to deal with the shares, the simplest option is to include restrictions in the company's constitution on the shareholders' ability to deal with the shares. Examples might be that shares cannot be transferred outside the family, or there may be pre-emption rights giving other family members, or the company itself, the option to buy back the shares. An alternative approach could be to create different share classes, retaining shares with voting rights, and giving shares holding the value of the company – or a right to dividends – away to the next generation.

A shareholders' agreement could impose further restrictions on the next generation's ability to deal with the business, or set out circumstances in which the business could be disposed of. Such an agreement would require the co-operation of all shareholders, but could be of considerable value if a generation of shareholders is in agreement on how to transfer the business to the next generation. They could put an agreement in place between themselves and then only pass shares on to their children if they agreed to join in the terms of the shareholders' agreement.

A trust, as set out above, can be an ideal vehicle for succession planning. It takes value out of the settlor's estate, but retains control in the hands of the trustees, who can decide how and when to pass the shares outright to beneficiaries. It is a particularly useful mechanism for bypassing generations and setting aside shares for minors and as yet unborn family members. Trustees can join in a shareholders agreement to provide further control.

All of these approaches can limit the ability of family members to damage the business if there is a dispute, but the best approach is to prevent a dispute arising. The best way to protect the business is to keep the family together. Communication is key. There should be frank discussions about what is expected of family members: will they work in the business, or will it be run by outside managers; when and how can individual family members sell out; what is the policy on payment of dividends to those family members who do not work in the business? All of these can be set out in a family constitution.

4.3 Transfer of Partial Interest

If a transfer of only a partial interest in a business or company is made, it is usually possible to agree with HMRC a value less than the pro-rata proportion of the total value of the business. The discount that will be applied will depend on a number of factors, such as the size of the shareholding, whether it is a minority interest, the rights attached to the shares and dividend history. The smaller the shareholding, the greater the discount that can usually be agreed.

It is important to note, however, that if a lifetime gift is made of a partial interest, with the donor retaining the balance of the shares, the value transferred for IHT purposes is the loss in value of the donor's estate. Thus, the value transferred for tax purposes may be greater than the value of the shares received by the recipient.

5. Wealth Disputes

5.1 Trends Driving Disputes

There are a number of trends driving wealth disputes.

More than half of the adult population of the UK does not have a will, meaning those individuals are at risk of dying intestate. If thought is not given by the testator as to how his estate will be divided on death, it can give rise to disputes because the Intestacy Rules that will apply where a person dies without a will often impose unsatisfactory consequences for the deceased's family, particularly for co-habiting couples and families with step-children.

Family structures are growing increasingly complex. Fewer people are getting married, choosing instead to cohabit. The Divorce, Dissolution and Separation Bill has seen clear progress in the UK over the past year, and will introduce a "no fault" divorce system. The Bill is widely welcomed and, when it receives Royal Assent, will enable parties to divorce more easily. This may result in an increase in divorce rates and, in turn, an increase in more complex family structures.

People are living longer, increasing the scope for second or third marriages, and heirs are having to wait longer for their inheritance. Connected to this is the increased risk of mental capacity issues arising in an aging population, and an associated increase in cases of financial abuse and fraud of the elderly and vulnerable. This increases the likelihood of applications to the court to challenge the validity of a will because a testator lacked testamentary capacity, did not know or approve of the contents of the will or failed to execute the document correctly. Age UK conservatively estimates that 1-2% of people aged 65 or over in the UK today have suffered financial abuse since turning 65, which is roughly 130,000 people. This can result in applications to the Court of Protection during the person's lifetime to remove an attorney, to prevent a power of attorney from being registered, to seek the return of money taken, and so on. It can also result in an investigation into the lifetime transfers after death, with a view to undoing them.

The COVID-19 pandemic which took hold in the UK in March 2020 has posed some considerable practical difficulties for testators in ensuring compliance with the relevant formalities for a will's execution as set out in section 9 of the Wills Act 1837. It is anticipated that the requirement for the will to be signed by the testator (or the signature acknowledged by the testator) in the presence of two witnesses may not have been achievable in some cases due to the social distancing restrictions, which may lead to an increase in claims alleging that a will has not been validly executed or claims arising because the testator abandoned their plans to execute a will and therefore died intestate or prepared a will in a hurry. Claims in undue influence where it is alleged that a testator was coerced into drawing up the will may increase as a result of the pandemic, as may claims in forgery, in cases where there has been no oversight from a legally qualified professional in the drawing up and execution of the will or where "homemade wills" have been put in place.

At the end of July 2020, the Government announced that in September 2020 it will be introducing new legislation in England and Wales to allow the witnessing of wills remotely by video-link, provided that the video is of sufficient quality, it is live, and a "clear line of sight" exists throughout the signing procedure. The proposed changes are of a temporary nature resulting from the COVID-19 pandemic, and will apply retrospectively to wills created between 31 January 2020 and 31 January 2022. A will is not valid until the testator and the witnesses have signed it, and should the will be lost, damaged or otherwise tampered with whilst in transit, the whole process would need to be restarted. There is perhaps more opportunity for people to commit fraudulent acts within a virtual setting and so this modification may increase the likelihood of claims rather than reduce them.

Trust disputes have continued to increase since the introduction of GDPR, as non-beneficiaries of a trust such as a divorcing spouse or creditor now have a means of getting access to confidential trust information. Trustees and settlors are having to rethink the way they structure settlements, how they deal with information and the jurisdictions they use.

The fall in asset values due to COVID-19 will call trustees' investment decisions into question, and will possibly expose trustees to claims, if not immediately, then when the market has stabilised. With widespread job losses and the attendant loss of income to many individuals, coupled with falling property and asset values, beneficiaries of trusts will be keener than ever to extract their entitlements, which may lead to disquiet amongst beneficiaries with competing requirements. Where a trust is failing or insolvent, the beneficiaries will look to the trustees for compensation (restitution), or seek the trustees' removal.

With the forecasted increase in trust disputes, trustees are likely to make more applications, for their own protection, seeking the approval of the court in relation to a decision they consider may be challenged by one or more beneficiaries. Such applications are commonly known as "blessing applications".

Applications under the Variation of Trusts Act 1958 are expected to continue as a useful tool in estate planning for high net worth families as they look to the future and how they can benefit future generations. There are various reasons why it may be desirable to vary the terms of a trust, including succession planning, taxation, governance considerations or other strategic objectives. With many settlors reviewing their trust arrangements to account for the dramatic changes in the market due to COVID-19, we can perhaps expect to see more applications under the 1958 Act to rationalise or widen a beneficial class, or to accelerate or postpone the vesting of absolute entitlements under the trust.

5.2 Mechanism for Compensation

The mechanism for compensation depends greatly on the claim brought. English courts have a powerful, inherent, statutory and equitable jurisdiction over trusts and estates.

If a will is found to be invalid, the previous will stands and a successful claimant will receive the provision set out for them in the previous will; if there is no previous will, their entitlement will be calculated in accordance with the rules of intestacy.

If it is found that gifts were made during a person's lifetime when they did not have capacity to make them, the court can intervene to undo the gifts and order that these gifts are repaid in full or traced into the asset purchased with the gift.

For proprietary estoppel claims (saying that X made a promise to Y on which Y has relied and acted to his detriment), the remedy may be to fulfil the promise made in full or in part.

In a successful claim for reasonable financial provision, the court has wide-reaching powers, including the making of an outright capital award, the establishment of a life interest in trust or estate property, or the variation of a trust to ring-fence a portion of a trust for the claimant. The level of award made will depend on whether the claimant is a spouse or civil partner (where a more generous test is applied) or a child or a person who was being maintained by the deceased at the date of the deceased's death. For spousal/civil partner claims, the award will be assessed by what is reasonable for the spouse to receive in all of the circumstances of the case; in all other cases the award will be assessed by reference to what the claimant requires by way of provision from the estate for their maintenance.

If a trustee causes a loss to a trust, the court may order the trustee to restore the trust fund to the position it would have been in had the breach not occurred.

6. Roles and Responsibilities of Fiduciaries

6.1 Prevalence of Corporate Fiduciaries

Unlike trusts based in international finance centres, corporate fiduciaries are not as prevalent in the UK. Individual trustees are often found in express and statutory trusts in the UK, and will usually be drawn from professional advisers, family members and family friends. There is, however, a higher duty of care expected from corporate and professional fiduciaries, and this is enshrined in legislation.

Trusts may also arise through land ownership in England and Wales, so there are a large number of trusts of land with individual trustee owners.

The concept of the trust corporation is found in the UK (and not elsewhere). A company will qualify as a trust corporation if it is incorporated in the UK or the EU, is authorised to undertake trust business, has a place of business in the UK, and has share capital of at least GBP250,000, with GBP100,000 being paid up. Care has to be taken not to assume that every corporate trustee is a trust corporation, as trust legislation in the UK is based on a distinction between the two.

6.2 Fiduciary Liabilities

A trust in the UK has no separate identity and it is the trustees acting as a body who are subject to personal liability. Consequently, they need to ensure that there are sufficient

protections in the terms of the trust (eg, appropriate exoneration clauses depending on their standard of expertise), that they take steps to limit their liability when contracting with third parties, and that they consider bolstering their right to be reimbursed for properly incurred expenditure by preserving their equitable lien and possibly taking an express indemnity when distributing assets to beneficiaries. The trustee should also ensure that the powers conferred on the trustees expressly by the trust will, when coupled with the statutory powers, enable them to deal with the assets of the trust.

6.3 Fiduciary Regulation

See **6.4 Fiduciary Investment**.

6.4 Fiduciary Investment

The quite narrow approach to trustee investment allowed by the Trustee Investment Act 1961 was modernised in the wake of the deregulation of the City in the 1980s/1990s by the Trustee Act 2000. This allows trustees to invest as if they are absolute owners, but also provided that they must have regard to standard investment criteria when exercising their powers of investment and reviewing their investments to see if any should be varied. The standard investment criteria are the suitability of the proposed investment for the trust and the need to diversify so far as is appropriate. The trustees should take advice as appropriate and are permitted to delegate their investment function, provided they give (and review) their guidance in an investment policy statement. The position of the trustees in relation to investment is set in their overarching duty to have regard to the needs of the beneficiaries and to their duty to avoid conflict between their position as trustees and their personal position.

The definition of the standard investment criteria is closely modelled on modern portfolio theory but the power is also subject to the duty of care (see **6.1 Prevalence of Corporate Fiduciaries**), so other aspects may also need to be considered.

Diversification should be considered in order to avoid risk, but often the trust fund will comprise assets that a settlor has settled with the deliberate aspiration of retention and preservation for a family over generations. The asset may be an estate, a family business or a valuable collection of art or other chattels. It is incumbent on the trustees to keep such assets under review and, where there is an active business, even if their duty to intervene is restricted, they should intervene if they become aware of a problem, and therefore need to have a sufficient information flow to see if there are problems.

7. Citizenship

7.1 Requirements for Domicile, Residency and Citizenship

Domicile

Domicile is a key concept in common law jurisdictions and international conflict of laws in resolving which system of law should be applied to an individual who has connections with more than one jurisdiction and when questions arise as to personal law matters such as marriage, succession and taxation. Domicile is based upon the idea of a permanent home in a particular territory, but is tempered by principles that can mean an individual has never lived in such territory. An individual can only have one domicile at any point in time.

An individual starts life with a domicile of origin based upon the domicile of their father (or their mother if their parents are not married). This can change up to the age of 16 to a domicile of dependence if the relevant parent changes domicile, and thereafter can change through an individual's own choice by residence and intention to stay in a new territory habitually. Ceasing residence in a domicile of choice with no intention to return will result either in a resumption of a domicile of origin if there is no fixed intent to stay in the next country of residence, or in a new domicile of choice. Proving a change of domicile can be difficult, requiring reference to a myriad of facts and evidenced intentions regarding an individual.

Within UK tax legislation, domicile has long been one determining factor in how an individual is taxed. In recent years, UK tax law has extended the concept of deemed domicile from applying only to IHT to a general application to direct taxes, so that an individual will be treated as UK tax domiciled after living for 15 out of 20 tax years in the UK whilst for personal law purposes (for example, succession) still having their actual domicile elsewhere. In UK tax terms, it is also difficult to shed domicile instantly, and an individual leaving the UK can still be caught in the tax net as they are deemed domiciled for up to three years after leaving and changing domicile.

Residency

In the UK, as in many other countries (but notably not the USA), residence is a significant determinant in relation to the liability for the payment of taxes, and has been the subject of statutory redefinition in the last few years.

Under the statutory residence test, an individual will automatically be UK resident if they spend more than 183 days in a tax year in the UK but could be resident if they have a home in the UK for a consecutive period of at least 91 days and there are at least 30 separate days when the individual is present in the UK home and either has no overseas home or one or more homes

overseas and in the tax year there were fewer than 30 separate days when they are present in any overseas home.

An individual will automatically not be UK resident if they spend fewer than 16 days in the UK in any tax year, if they spend fewer than 46 days in a tax year having been UK resident in any of the preceding three tax years, or if they work sufficient hours overseas and actually spend fewer than 91 days in the UK and there are no more than 31 days when they do three hours or more of work in the UK.

For many individuals, however, these automatic rules do not apply, and their residency depends upon the number of ties they have where they spend between 46, 92, 121 and 183 days per year. The connecting factors include the following:

- a family tie through the presence of a spouse, civil partner and/or minor children;
- an accommodation tie;
- a 90-day tie through having previously spent more than 90 days in the UK in either of the two preceding tax years;
- a country tie if they were previously resident for any of the three preceding tax years and spend more days in the UK than any other country; and
- a work tie.

An individual becoming resident needs four connecting factors if they are only spending up to 45 days, but just two if they are spending more than 121. An individual who is leaving the UK needs to reduce their connecting factors and days spent. It is perfectly possible to be tax resident in more than one country in any particular tax year, and regard should always be had to any available double tax treaties in determining tax status.

One feature of the Rules which may come into play following COVID-19 is the provision that up to 60 days of presence in a tax year can be disregarded where an individual spends a day in the UK due to "exceptional circumstances" beyond their control. HMRC has published a statement confirming that some circumstances will be considered exceptional, such as quarantine and official government advice not to travel as a result of the virus.

Citizenship

British citizenship takes a number of different forms, reflecting the history of the UK and its relationship with Crown dependencies, territories and former colonies.

Full British citizenship gives a right of abode in the UK and the ability to come and go without time restriction. Citizenship can be acquired by a number of routes, including birth in the UK before 1983, birth in the UK after 1983 to a British parent or settled parents, descent (over one generation) from a UK-born British parent where born abroad, registration or naturalisation. Naturalisation is usually on the basis of five years' residence in the UK where at least one year is with indefinite leave to remain (or three years if married to a British citizen), and knowledge of the English language and life in the UK, with an intention to have the principal home in the UK. As most paths to settlement in the UK require five years' residence first, this usually means a six-year residency before citizenship.

7.2 Expeditious Citizenship

The UK does not run a citizenship by investment programme. As noted in **7.1 Requirements for Domicile, Residency and Citizenship**, citizenship by naturalisation is usually available after residence in the UK for a period of at least five years, one of which is with indefinite leave. As exceptions to the general rule about obtaining indefinite leave after five years' residence in a qualifying category, the UK Investor programme (which offers a path to settlement for those investing more than GBP2 million in the UK by way of UK share capital or loan capital in active and trading UK registered companies) and the Global Talent visa (formerly the exceptional talent visa – for those working in a qualifying field as a recognised or emerging leader) have specific provisions to reduce the period before an application for indefinite leave can be made by investors who invest more that GBP5 million and GBP10 million, to three years and two years respectively.

COVID-19 has led to some adjustments to visa and immigration requirements and to rules for visa extensions due to travel restrictions and lock-down but these are relatively limited in scope and time.

8. Planning for Minors, Adults with Disabilities and Elders

8.1 Special Planning Mechanisms

As noted in **3.1 Types of Trusts, Foundations or Similar Entities**, **3.2 Recognition of Trusts** and **3.3 Tax Considerations: Fiduciary or Beneficiary Designation**, the particular features of the trust that make it suitable for use as a safeguarding tool for vulnerable persons include the flexibility available in terms of form and the vesting of assets in trustees who can look to the interests of beneficiaries who may be or may become incapable.

Whilst a discretionary trust may remain the most flexible form of trust, tax considerations are an important part of any planning as it can be difficult to achieve tax efficiently where there are no available reliefs. Specific tax rules apply to trusts for disabled persons, which have the advantage to the donor of not giving rise to immediate lifetime IHT issues whilst the disabled

beneficiary is treated as a life tenant of funds without having an automatic entitlement to the income and with access to state benefits maintained. For trusts created on death, the availability of particular tax treatments to bereaved minors and age 18-to-25 trusts provides variant trust structures for safeguarding minors, alongside the other main trust structures referred to above. Each can be used in appropriate circumstances to protect vulnerable persons. Those planning to benefit those with disabilities always need to take specific account of the rules regarding the availability of state benefits, which may be withdrawn where a beneficiary has entitlements to capital or income above stated levels.

8.2 Appointment of Guardian

The appointment of guardians for minor children can be effected by parents or by existing guardians, by the will of a parent or by a separate written instrument. Otherwise, the court holds power to appoint a guardian for a minor child and to intervene.

8.3 Elder Law

In the UK there has been a regime for powers of attorney that will survive or take effect upon a donor's incapacity since 1985, initially through enduring powers of attorney and since 2007 by making lasting powers of attorney (LPAs). Today, individuals can make LPAs to cover property and financial affairs and, separately, health and welfare issues. These enable an individual to appoint one or more persons to act as attorney and to take decisions on behalf of the individual following incapacity. Use of such powers enables an individual to appoint the attorneys he or she trusts, and to avoid the costs and expenses that would otherwise ensue upon an application being required to be made to the court if incapacity occurs and such powers do not exist. Attorneys are required to act in the best interests of the donor, and the powers must be registered with the Court of Protection.

The court has power to appoint a deputy for a person who lacks capacity, either for property and financial affairs or for health and welfare issues.

9. Planning for Non-traditional Families

9.1 Children

People often make gifts in their wills and by way of trusts to their children. Some of these gifts will refer to the beneficiary by name; others will more commonly refer to the class of beneficiaries as "my children". Historically, referring to a class of beneficiaries as "my children" was regarded as relatively straightforward; however, as more non-traditional families have emerged, the definition of the "child" in wills and such legal documents has assumed greater legal complexity, and specific advice needs to be obtained.

It remains the prerogative of the testator or settlor to choose whether to define the term "children" in their will in order to avoid any confusion about who should be included within that class. For example, a testator could define "children" to include their step-children, despite there being no biological nexus. Increasingly, society has been broadening the "child" category and the law has been attempting to catch up – hence the danger of assuming that the term "children" will reflect the personal interpretation of that expression on the part of the testator or settlor. Without a clear definition, the law may dictate an outcome that was not their intention.

The traditionalist family model – ie, husband and wife who produce children after marriage – is now one amongst a number of others, resulting from changes in societal values and advances in science and technology. Many children are born out of wedlock and, with parents marrying again, step-children frequently come into the picture, creating a "blended" family.

In the UK, illegitimate children are now treated by law as the legitimate children of their biological parents. As such, any references to "children" in a person's will made on or after 4 April 1988 will include both children of the traditional family unit and those born out of wedlock. Also, the definition of "children" in the intestacy rules includes legitimate and illegitimate children.

Before the advent of in vitro fertilisation, the most common means by which same-sex couples sought to have children was adoption. Adopted children are considered to be the legitimate children of the adopters from the date of the adoption. Any references to "children" in a will or settlement are therefore deemed to include the testator's or settlor's adopted children.

In vitro methods and surrogacy have probably done more than anything else to challenge the law in the context of non-traditional families, but changes have been made to recognise the diversity of family models. Trends in artificial reproductive technology have made elective single parenting possible, as well as extending the options for same-sex couples. In the UK, surrogacy is legal but it cannot be advertised or commercialised, and surrogacy agreements are not enforceable. As the surrogate will be the child's legal parent at birth, it is usual to transfer legal parenthood by parental court order or by adoption.

Medical advances now permit the banking of reproductive material, making even posthumous reproduction possible. Legislation is now in place to control posthumous reproduction from genetic material, inheritance by individuals reproduced

posthumously from genetic material, and posthumous paternity and maternity testing.

9.2 Same-Sex Marriage

Same-sex couples can enter into civil partnerships or marry (as can opposite-sex couples). Civil partners and married couples are essentially able to enjoy the same rights, and owe the same responsibilities for tax and other purposes as those inherent in a marriage.

The UK does not recognise domestic partners. Without a will in place to make appropriate financial provision for a cohabiting partner, an application may need to be made to the court under the Inheritance (Provision for Family and Dependants) Act 1975.

10. Charitable Planning

10.1 Charitable Giving

The UK has implemented various tax incentives to encourage individuals to give to charity.

There is an IHT exemption for donations made to a UK registered charity during the donor's lifetime or on death. On lifetime gifts, any gains arising on the disposal created by the gift are also exempt from CGT.

Gift Aid is an income tax relief for cash gifts, and allows charities to reclaim the basic rate of income tax on any personal donation from a UK taxpayer. Therefore, if a charity receives a cash gift of GBP100 under Gift Aid, it can reclaim 25% from HMRC and ultimately receive a gross donation of GBP125. Gift Aid is beneficial to higher and additional rate taxpayers because they can reclaim from HMRC the difference between the basic rate of tax claimed by the charity on their donation and the higher rate of tax they actually paid – ie, higher and additional rate taxpayers are respectively able to claim 20% and 25% of their gross donation. However, there must also be sufficient income and realised capital gains in the hands of the donor to warrant the Gift Aid claim.

Income tax relief is available for gifts of quoted securities or land made to a charity. It allows the donor to deduct its market value on the date of the gift from their total taxable income in the year in which the gift was made.

When an individual leaves 10% of their net estate to charity, the rate of IHT on a deceased's estate is reduced from 40% to 36%. This relief applies to the estates of those who died on or after 6 April 2012.

The Cultural Gift Scheme has an element of philanthropy and allows individuals or companies to offer pre-eminent objects as gifts to the nation in return for a limited tax reduction. If eligible, the donor of the gift can reduce their liability to income tax, CGT or corporation tax by 30% of the fair market value of the object if an individual or 20% if a company. An independent expert panel is used to determine whether the object is eligible to qualify as a donation under the scheme, is in an appropriate condition and is offered at fair market value.

10.2 Common Charitable Structures

The trust instrument charity (TIC) is the generally favoured vehicle for an exclusively grant-giving foundation, and where the risks associated with operations are minimal. The charity trustees are jointly and severally liable to third parties, and comprise the sole legal personalities.

For service provider and/or fundraising charities (likely to be subject to greater third party risks), the typical vehicles are a company limited by guarantee (CLG) or a charitable incorporated organisation (CIO), a recently created UK corporate charitable body. The directors of a CLG are also charity trustees, and the board of a CIO comprises trustees, but liability to third parties attaches in each case to the corporate body that has limited liability.

The TIC is probably the most straightforward and economical entity to administer, but the trustees must be sure to avoid liabilities that exceed the value of the trust fund. TICs are also only subject to one regulator: the Charity Commission.

By contrast, the CLG is regulated by both the Charity Commission and Companies House. The CIO shares the advantages of a single Charity Commission regulator with the TIC but it only assumes a legal personality upon registration with the Commission. The CLG becomes a company upon registration with Companies House, which is a much faster process than registration with the Charity Commission, the second stage for a CLG that confirms its charitable status.

Other structures for charities are available, such as an unincorporated association or a royal charter corporation, but are generally less common in charitable planning.

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Trends and Developments

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If we look back at the conversations we have had with our private clients over the last 12 months from a UK perspective, a common theme emerges. Political events (the December election in the UK and the UK's exit from the EU, on terms still to be agreed or not, as the case may be) and world events (for example and most importantly, the COVID-19 pandemic) have meant that private clients have focused on their personal affairs, perhaps as never before. Asset protection, succession, lifetime gifts, will planning and governance are ultimately all about planning for future generations and this has been the recurrent theme in the planning done over the last year.

These discussions are always held against the backdrop of developments in tax policy and regulatory change. The further element now is the realisation that the cost of the Government help granted to individuals and businesses during the pandemic will have to be funded and how will this be done.

UK Tax Policy

It has been noticeable that in the last 18 months or so there has been a move towards re-assessing some very long-established methods of taxation.

Taxation of trusts

First, HMRC issued a consultation on the taxation of trusts on 7 November 2018, the objective of which was to look at the principles underpinning the taxation of trusts and the extent to which the status quo aligns with them. There has not, as yet, been any announcement about the findings.

Review of inheritance tax

Next, the Office of Tax Simplification was asked to undertake a review of inheritance tax, which is relevant in the context of lifetime gifts and estates on death. The Office of Tax Simplification has published two reports – the second, in July 2019, focused particularly on lifetime gifts, the interaction of inheritance tax and capital gains tax, and the reliefs for businesses and farms. These areas are all relevant to the tax planning of private clients, and it remains to be seen what will be done with the report recommendations.

There are various strands to what should be done about inheritance tax, which conflict with each other. One strand is that inheritance tax should be used to reduce the wealth inequality that exists and is increasing. Other commentators argue that inheritance tax actually increases wealth inequality as the less wealthy heirs pay more in taxes relative to their wealth. Another more pragmatic view is that the cost of paying for the measures to mitigate the effect of COVID-19 will have an impact on public borrowing such that reform of inheritance tax would bring forward economic benefits for the system.

Review of capital gains tax

Following the review of inheritance tax, the Chancellor has recently announced that he has asked the Office of Tax Simplification to undertake a review of capital gains tax and aspects of the taxation of chargeable gains in relation to individuals and smaller businesses. He would like to simplify the taxation of chargeable gains, and to understand where the present rules with their much lower rates on gains distort behaviour or do not meet policy intent. There has been an increasing amount of discussion about the need to achieve parity between the taxation of unearned/inherited wealth and earned wealth, and it is interesting that the Chancellor has commissioned a review rather than just suddenly introducing an increase in the tax rates.

The hope is that we might achieve a more considered policy approach for both inheritance tax and capital gains tax, but the worry is whether the helpful aspects of capital gains tax, such as the loss of the market value uplift on death and the encouragement of entrepreneurs, will suffer to the detriment of the economy.

Once this review has been completed and considered, it is likely that we will see some proposals that will affect private clients. The recent economic downturn in the wake of COVID-19 has actually encouraged clients to make lifetime gifts and if, as is commonly supposed, there is an increase in rates as well as a change in policy before too long, there may be further lifetime giving.

Wealth Tax

Fuelled by the growth in Government spending to mitigate the COVID-19 funding, there is an increasing debate about the introduction of a wealth tax. Again, this is based on the concern about growing inequalities in wealth, a concern about the rebuilding of public finances and a view that the way capital gains and unearned income are taxed less heavily than employment income should be redressed. A series of papers will be written by experts on tax policy and will include a reflection

on the reports of countries that have, or have had, a wealth tax. A report will be issued at the end of 2020.

Land for the Many

Land for the many is a report commissioned by the Labour Party, published in June 2019. Its key intension was to address the current imbalance between income levels and house prices. Land for the many works on the basis of replacing the current system with a radically different and much more collectivist system. Given the results of the UK December election, it is unlikely that the ideas will be implemented in the near future but one of the interesting strands was how the report targeted those who are not domiciled in the UK – ie, those who are resident in the UK but do not consider it to be their permanent home. The report showed a prejudice towards foreigners and the skills, talent and investment many of them bring with them, which seems short-sighted as we leave the EU.

Rather than going down this route, taxation policy has continued to chip away at the benefits non-UK residents enjoyed in relation to UK property. Non-resident capital gains tax is now firmly established for individuals, companies and trusts disposing of UK residential property, and also for commercial property in some cases.

Making Tax Digital

The UK originally set out its ambition for making tax digital in 2015 and has been in frequent dialogue with businesses and their agents since then to support them as they begin to operate their tax compliance digitally.

The Government sees a modern digital tax service as being key to plugging the tax gap in terms of errors in tax compliance. Research suggests that the shift to digital will increase productivity and enable businesses to save time that can be spent on other business opportunities. The Government has therefore announced a new timeline for their programme, which will extend making tax digital for VAT to all businesses that are VAT registered. The programme will be extended to businesses and landlords within income tax self-assessment from April 2023. The Government has noted that the COVID-19 pandemic has highlighted the need for a flexible, resilient and responsive tax system, and one of the notable characteristics of the Government's measures in this period was the speed of which measures were announced and then implemented by HMRC.

Regulatory Change

This has been a constant trend over the last two decades, and there is always activity on this front.

In March 2018, the OECD published model legislation that requires intermediaries to inform the tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD/G20 Common Reporting Standard or to prevent the identification of the beneficial owners of entities or trusts. This was implemented by the EU's Directive on administrative co-operation in the field of taxation (DAC6,) which had to be implemented by Member States by 31 December 2019, with the law being applicable by 1 July 2020. In one sense, the legislation was always going to be backdated as intermediaries were required to report any material cross-border arrangement where the first step was implemented on or after 25 June 2018.

The European Commission proposed to extend the reporting deadline in light of the COVID-19 pandemic, and HMRC has followed suit. A deferral has been introduced for six months, save that the first reporting deadline will now be 31 January 2021 for cross-border arrangements that are reportable between 1 July 2020 and 31 December 2020. The date for reporting the arrangements between 25 June 2018 and 30 June 2020 has been put back to 28 February 2021. HMRC hopes that this will provide taxpayers and intermediaries dealing with the impact of the pandemic with additional time to ensure that they can comply with their obligations.

The UK tax register was put in place to meet the European Union's Fourth Anti-Money Laundering Directive, which contains requirements to have registers showing beneficial ownership; it also met the UK's wish to capture data digitally about express trusts with a UK tax liability. The Fourth Anti-Money Laundering Directive was swiftly followed by the Fifth Anti-Money Laundering Directive, and this looks set to have a significant impact on trust registration. After a consultation period and a long delay, the outcome of a technical consultation was published in July 2020 and it seems that some of the more concerning aspects of the proposal have been modified.

So the final regulations will exempt a significant number of categories of trust from registration, and non-EU trustees of an express trust forming a business relationship in the UK will not be required to be registered. A deadline of 10 March 2022 has been set for existing trusts to register on the Trust Registration Service and there will therefore need to be an exercise of evaluating what further trusts should be registered. New trusts have to be registered within 30 days but Will Trusts are among the trusts exempted. Public access to the register will be on a

legitimate interest basis, requiring evidence of money laundering or terrorist financing activity.

Finally, the pressure for the Crown Dependencies and the British Overseas Territories to produce publicly accessible registers of the beneficial ownership of companies has continued. At the time of writing, eight British Overseas Territories have committed to introduce such registers. This follows the decision by the Crown Dependencies in 2019 that they would introduce publicly accessible registers, taking control of the timing in the process for themselves.

Investment Performance under the Spotlight

Finally, it is worth noting a case which may be reassuring to trustees at the present time. The economic turmoil resulting from the COVID-19 pandemic will mean that many beneficiaries will see a reduction in their trust income and in the overall trust capital in the short to medium term. Trustees have been liaising with their investment managers and their beneficiaries on this, looking very carefully at investment performance and policy, and giving advance warning of reduction.

It may be of some comfort to trustees who own shares in a company which is an investment company or is particularly geared to one business activity that there has been an important judgment by the Hong Kong Court of Final Appeal in the case of Zhang Hong Li and others v DBS Bank (Hong Kong) Limited and others, in which it was determined that trust deeds that contain anti-Bartlett clauses (ie, clauses that exclude the duties of control and supervision of trustee shareholders in relation to an underlying company and any duty to diversify) do indeed exempt the trustees from any liability for losses incurred in the underlying company, unless there is actual knowledge of dishonesty. The case arose out of the financial crisis in 2008. It remains to be seen what litigation may arise out of the current crisis.

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