Welcome to the Spring 2018 edition of our Private Client newsletter

Tim Newsome has stepped down as Senior Partner as of October 2017 after nine years in the role. Tim will remain with the firm until his retirement in March 2018. Tim leaves the firm in a strong position and has seen us through many changes, not least the London office’s move from Westminster to Fleet Street.

Andrew Parsons has now taken on the role after 32 years at the firm, with more than a decade on the Management Board. Andrew leads our renowned team of specialist lawyers acting for health and adult social care providers.

One of the biggest changes we have seen this year for trustees is the increase in regulation and compliance. Of particular interest is HMRC’s new Trust Registration Service which we cover on page 5. If you are a trustee, you need to act now. Do let us know if you would like any help or support.

The Finance Act 2017 (no.2) received Royal Assent on 16 November 2017 bringing with it the much publicised changes to the tax treatment of non-domiciled individuals and offshore structures for UK tax purposes. The combination of both of the 2017 Finance Acts has created the biggest change in taxation of international clients and related entities for a generation. There are more changes set for the Finance Act 2018 along with further measures to curtail tax avoidance.

We hope you find this newsletter interesting and informative. Would you like us to feature any topics or have questions answered in the next edition? If so, please let us know.

In this issue we cover:

- The property ladder as a first time buyer
- The rights of non-married couples who own property together
- Enduring Powers of Attorney v Lasting Powers of Attorney
- Changes in UK immigration law
- What you need to know about your employee bonus
- The perils of an outdated will

If you would like to discuss any matters we would be pleased to hear from you.

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In this issue:
Employment • Property • Family • Immigration • Private Client
Harassment at work

The Weinstein sexual harassment allegations have brought to the fore harassment allegations that occur in the workplace. There have been a recent stream of high profile individuals who have been accused of harassment. The Trades Union Congress in its recent research reported that more than half of women that they have spoken to have been sexually harassed at work and most admit not reporting it. The behaviour included groping, sexual advances and inappropriate jokes.

Sejal Raja, Head of Employment, considers what you need to do if you have been faced with harassment issued in the workplace.

Sexual harassment under the Equality Act 2010

Sexual harassment is defined under the Equality Act 2010 as:

‘A person (A) harasses another person (B). If A engages in unwanted conduct relevant to the person’s sex which has the purpose or effect of either:

• violating B’s dignity or
• creating an intimidating, hostile, degrading, humiliating or offensive environment.

Basically this means that the employee is subjected to unwanted conduct of a sexual nature, which has the purpose or effect of violating someone’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Harassment under the Protection from Harassment Act 1997

The Protection from Harassment Act has been implemented to stop a ‘course of conduct’ which amounts to harassment of another. Harassment is conduct that causes alarm or distress. The ‘course of conduct’ must involve such conduct on at least two occasions. The Act was originally introduced to deter stalkers but it also applies to workplace harassment.

What to do if you find yourself in such a situation?

If you find yourself in a situation where you feel that you are being subjected to unwanted conduct, then you should consider the following:

• If you are able to, speak to the individual concerned and ask them to stop the conduct that is causing the harassment.
• If you are unable to speak to the individual directly, or you have done and the harassment is still ongoing then speak to someone in the Human Resources department or your line manager to try and resolve it informally.
• If this is not possible, you can raise a formal complaint under your grievance or bullying and harassment policy.

If you are unable to resolve this then you can bring a claim in the Employment Tribunal against the individual personally and against your employer.

Getting onto the property ladder as a first time buyer

In recent years it has become notoriously difficult for first time buyers to take that first step on to the property ladder. The data published by the Government in the English Housing Survey in July this year, scrutinized the situation of first time buyers and was filled with statistics reflecting the hardship experienced by many. A few illustrative figures from that report were:

• The average deposit is now nearly £50,000
• The average age of a first time buyer nationwide is at present 32, but continuing to rise
• There has been a sharp increase in couples buying their first home together over the last 10 years, from 66% of all first time buyers to 74%, a figure which is attributable to that fact that it now generally takes two incomes to buy your first home.

With the dispiriting reality presented by these statistics it is easy to understand why so many struggle to advance from serial renting, and why the number of young adults (aged 20-34) living with their parents is at an all-time high.

Help for first time buyers

Whilst the hurdles to overcome on the way to owning your first home are undeniably significant, it is also true that there are more options available than ever before to assist first time buyers financially. The existence of the Help to Buy scheme, Budget 2017 – Stamp duty

It is also noteworthy that the recent budget reform regarding stamp duty land tax will be of great assistance to a number of prospective buyers. Under the new regime stamp duty land tax for first time buyers purchasing homes up to £300,000 has been abolished, and reduced to 5% for the bracket of £300,000 - £500,000 on properties worth up to £500,000. For first time buyers in London, the government estimates that this change will result in stamp duty land tax being halved.

Taking the first step onto the ladder

Still, even with the increased level of assistance available it has to be said that if you are approaching the milestone of buying your first property, you have done incredibly well. Nevertheless, the actual process of buying your first home and navigating contracts, completion chains, and mortgages can be daunting.

It is therefore imperative that the solicitors acting for you have the expertise to provide you with the best service possible, and give you the guidance and support that you need to take your first step into the housing market.

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Enduring Powers of Attorney v Lasting Powers of Attorney

It is a decade since the Lasting Power of Attorney (LPA) replaced the Enduring Power of Attorney (EPA) following the implementation of the Mental Capacity Act 2005 on 1 October 2007. We are often asked about the differences between the two and, in particular, whether there is an advantage to putting in place an LPA if you already have an EPA.

The first point to note is that an EPA put in place before the 1 October 2007 remains valid and can still be registered after this date in the event of loss of mental capacity. Indeed, many EPAs were hastily done just prior to the change in the law as, at the time, the new LPA was perceived to be a rather long-winded document which was inevitably going to be more expensive to arrange.

However, since that date, the LPA document has become rather more straightforward to complete (although admittedly still much longer than an EPA) and as practitioners have become used to the process the costs have reduced.

The main differences between an EPA and an LPA are:

What they cover
An EPA can only cover property and financial matters. However, there are two types of LPA:

- one for property and financial affairs
- one for health and welfare

Registration and timeframes
An EPA can be used as an ordinary power of attorney (providing this was not restricted) but in the event of loss of mental capacity, the EPA must be registered with the Office of the Public Guardian. As an EPA can only be registered when there is loss of mental capacity the registration process, including the waiting time for the Office of the Public Guardian, takes place at exactly the same time as the family of the individual has to cope with the distressing situation of lost capacity.

By contrast, although an LPA must be registered before it can be used at all, it can be registered as soon as the forms are completed. The effect is that the LPA is ready for use immediately and when required.

Registration process
The registration process for LPAs is far more straightforward than for EPAs. When registering an EPA you are required to notify a large number of people; for example all of their children, brothers and sisters, and grandchildren. An LPA is registered simply by completing the registration page of the LPA and sending it to the Office of the Public Guardian together with the registration fee. There is no requirement to inform anybody of the registration, although you can elect to do so if you wish.

Replacement attorneys
In an LPA you are able to appoint replacement attorneys to act if your original attorneys are unable to do so or predecease you. This is popular where spouses wish to appoint each other in the first instance and then appoint their children as substitute attorneys. In an EPA you could only appoint an individual attorney or, if you appointed more than one attorney, your only choice was whether to appoint them jointly or jointly and severally.

The forms
Although they are more straightforward to register, the LPA forms are undoubtedly more complex, considerably longer and more detailed than the EPA forms. The development of these more robust forms was entirely deliberate and it was felt by many that the simplicity of the old EPA forms left vulnerable people open to the possibility of abuse.

Summary
Many people now choose to put in place an LPA even if they had a pre-existing EPA. There are significant advantages to using an LPA, including the ability to register the LPA at the outset and appoint replacement attorneys, the simpler registration process and the fact that it is now possible to cover health matters.
Establishing a beneficial interest in property

Many non-married couples may decide to purchase a property together and register both their names as legal owners on the title deeds. If they are contributing different amounts to the purchase price they may also want to record their contributions and therefore the proportions of the property they own in a declaration of trust. That way when the property is sold they will get a respective share of the net proceeds.

A declaration of trust is also a useful tool to protect one partner’s beneficial interest in the property, if for whatever reason they are not registered as a joint legal owner. However, if none of these steps have been taken then the non-legal owner may look to establish a beneficial interest in the property in the following ways:

1. To establish a common intention constructive trust

   There must have been a common intention to share ownership of the property.

   This is to say that there was a common intention for one of them as legal owner to hold the land on trust for the both of them. This can only be achieved by evidence of the parties’ actual intentions, express or inferred, ascertained objectively (Thompson v Hurst). In a straightforward case a declaration of trust would be express evidence of the parties’ intention and agreement to share ownership of the property in the terms stated.

   In cases where there is no evidence of an express written or oral agreement, arrangement or understanding between the parties, a common intention to share the property can be inferred from the parties’ conduct, which includes:

   **Contributions to the purchase price and/or mortgage**

   Direct contributions to the purchase price by the partner, who is not the legal owner, whether initially or by payment of mortgage instalments, will justify the inference necessary to create a constructive trust (Lloyds Bank v Rosset).

   **Contributions to outgoings including food and entertainment**

   The necessary common intention could not be inferred from a partner’s natural concern with the well-being of the household (Burns v Burns). The partner’s contributions to outgoings may be explained by the fact that the parties were making their lives together, rather than by the belief that a greater interest in land was being acquired (Morr v Morris). However, the House of Lords has stated that a wide view should be taken of what amounts to a contribution to the acquisition of a property (Stack v Dowden) and the parties’ whole course of conduct in relation to the property must be taken into account (Abbott v Abbott).

   The court has since decided that it was entitled to infer that the parties intended that a wife should have a beneficial interest as a result of what were to be seen her indirect contributions to the mortgage (Le Foe v Le Foe).

   **One partner acted to their detriment in reliance on that common intention**

   This may be satisfied by the same conduct which gives rise to the inference of common intention. The partner could argue that they have suffered financial detriment having contributed to the family’s outgoings, as whilst they were making these payments they were not investing money elsewhere.

   **Quantifying the interest**

   Once a common intention constructive trust is established, the parties are entitled to whatever share of the property they are found to have intended. Otherwise, the parties’ common intention as to shares has to be deduced objectively from their conduct. If this is not possible then the court will impute an intention to the parties and each will receive a share which the court considers fair having regard to the whole course of dealing between them in relation to the property (Oxley v Hiscock). This is where the partner’s contributions can be taken into account.

   The question of a constructive trust can arise where the parties are joint legal owners of the property, but where they never had a declaration of trust drawn up as to the percentage of their beneficial interests.

2. To establish proprietary estoppel

   Proprietary estoppel applies where someone has acted to their detriment upon a belief encouraged by the legal owner of the property that they have (or will have) an interest in that property.

   If the sole legal owner will need to have given their partner some sort of representation, assurance, or encouragement that if they paid towards outgoings such as utility bills, food or holidays for example they would receive a beneficial interest in the property.

   Unlike with a constructive trust, there does not have to be a common intention and so proprietary estoppel is more often found in cases where one party had intended to take advantage of the other.

   If property estoppel is established then it is for the court to decide in the exercise of its discretion what remedy is appropriate. The court may declare that a party is entitled to a share of the property, order the owner of the property to pay back to the other party the money they have spent or order that the other party can remain in the property for a period of time.
Employee bonuses – What you need to know

Bonuses can form a significant proportion of a remuneration package so it’s important when you start a new post to carefully consider what you’re entitled to.

You’ll find information related to your entitlement in your contract, or any additional bonus scheme documentation. However, interpreting the material can be a complex exercise and you should seek specialist legal advice if you’re not sure.

As a starting point, you might find the following advice helpful. Bonuses can be contractual or discretionary, but are usually a mixture of both. They may be linked to performance or reward loyalty and may include formulas or targets which are team or individual-oriented.

Contractual

This category of bonus is rare these days as, provided the requirements are met, it binds an employer to providing an employee with extra remuneration, not something particularly favoured by employers in a tough economic climate.

A ‘golden handshake’ is an example of a contractual bonus. These are sometimes offered as an incentive on joining a new company where an employee has lost out on their right to receive a bonus they would have been entitled to at their previous company.

How do you spot a contractual right? - The language of your contract may include terms like ‘ex gratia’, which means out of good will, ‘voluntary’, or phrases such as ‘provided 100% of the billing target is achieved’.

Your employer is entitled to have discretion over:

- Whether to award a bonus
- How much to award

However, your employer’s discretion is not unlimited and must:

- Be exercised on reasonable grounds
- Be exercised honestly in good faith
- Not be irrational or perverse

Not breach the implied term of trust and confidence between and employer and an employee

Where there has been a dispute regarding a discretionary payment, the courts have consistently offered judgment in favour of employees, even where bonus packages have been substantial.

In fact, even if the language of a bonus scheme states that payment is discretionary it may be possible to claim that certain factors have rendered it an implied contractual right.

Such factors could include:

- Custom and practice – if extra payments are made regularly over a long period of time
- Consistency of amount – the payment amounts are always the same or calculated in a similar way
- Publicity – if there is widespread knowledge amongst the workforce that they are entitled to extra benefits, e.g. if there is a transparent policy in place

In 2018:

Men and women should watch out for bonus figures required to be produced by employers with over 250 employees demonstrating the mean and median gender pay gap, as well as the proportion of males and females receiving a bonus payment across their organisation.

The perils of an outdated will

The recent case of Martin v Williams concerned the right of a cohabitee to make a claim for financial provision from her partner’s estate. This case serves as a useful reminder of the problems that can arise when a testator fails to update his will following a change in circumstances.

The facts

Mr Norman Martin made a will in 1986 in which he left his residuary estate to his wife, Mrs Martin. By his death in 2014, he had been separated from Mrs Martin for many years. Since 2009, he had been living with his partner Mrs Joy Williams in a property in Dorchester which they owned in equal shares as tenants in common. Mrs Williams also owned 50% of a mortgage-free property in Bristol which she had inherited on her father’s death in 2008. Mrs Williams’ sister owned the other 50% of the Bristol property and was living there.

Mr Martin failed to update the will or make a new will after separating from his wife. On his death, his residuary estate, which included his 50% share in the Dorchester property, passed to Mrs Martin.

Mrs Williams brought a claim under the Inheritance (Provision for Family and Dependants) Act 1975 for reasonable financial provision from Mr Martin’s estate.

The Court’s approach

Three key questions the court considers when dealing with Act claims are:

1. Does the claimant have standing under section 1 of the Act to bring the claim?
2. Does the will make reasonable financial provision for the claimant?
3. If the will does not make reasonable financial provision for the claimant, what provision should be made?

For cohabitees bringing a claim under the Act, they must show that they were living in the same household as the deceased for at least two years prior to the deceased’s death and lived together as husband and wife. The court will look for evidence of mutual interdependence, love, sharing of lives and lifetime commitment. Awards made by the court to a cohabitee (as well as to a child or individual maintained by the deceased) will be limited to provision for maintenance, which is the reasonable cost of everyday living.

The appeal

On appeal, the judge agreed that Mrs Williams had standing to bring the claim and that the will did not make reasonable financial provision for her. The judge also held that as a matter of law, the trial judge was entitled to disregard an asset because of the human cost of enforcing a right in the asset.

However, the judge disagreed with the decision to disregard Mrs Williams’ 50% interest in the Bristol property because it was a material asset (Mrs Williams’ share was worth approx £155,000) and Mrs Williams admitted in cross-examination that her sister could easily downsize. The judge also disagreed with the trial judge’s dismissal of Mrs Martin’s financial needs.

The judge held that reasonable financial provision to Mrs Williams required guaranteeing her a home but an absolute interest in property was excessive. The judge decided to award Mrs Williams a life interest in Mr Martin’s 50% share in the Dorchester property. The judge also held that Mrs Martin’s financial needs should be considered.

The Court

At trial, the judge found that Mrs Williams had standing to bring the claim because she had been living in the same household as Mr Martin for at least two years prior to his death and as husband and wife. The judge ruled that the will did not make reasonable financial provision for Mrs Williams’ maintenance because it made no provision for her at all.

After considering Mrs Williams’ financial needs and resources, amongst other matters, the judge decided to award her Mr Martin’s 50% share in the Dorchester property. In reaching this decision, the judge discounted her 50% interest in the Bristol property because ‘her sister lives there and she is of very limited resources so cannot really afford to pay any rent’ and she ‘would be lost, in fact would not...be prepared to exist...’ Mrs Martin appealed the judgment.

The trial

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Comment

This case highlights the vital importance of reviewing your will periodically and after a significant change in circumstances to ensure that it reflects your current wishes. It also demonstrates the court’s preference to award a life interest in property rather than a capital sum where provision is limited to maintenance. This approach was endorsed by the Supreme Court last year in the landmark case of Ilott v Blue Cross & Others.
The Home Office and the Immigration Rules: A year of change

We have seen many big changes over the past year in immigration law and legal updates which affect immigration generally. We provide a summary of the most important changes.

On 24 March 2016, the Government announced the second of two phases of changes to Tier 2 of the Points Based System.

The most significant change affects migrants who had a break of more than 60 days between employment. The Paragraph 245AA(2) of the Immigration Rules which stated that applicants who had a break of 60 days or more between employments could not apply for settlement. This paragraph has now been deleted.

Changes were made to support posts associated with the relocation of a high value business to the UK or a significant inward investment project, where the sponsor is a newly-registered branch (i.e. within the last three years) or subsidiary of an overseas business and the investment involves new capital expenditure of £27 million or the creation of at least 21 new UK jobs. Sponsors in such cases are exempt from carrying out a Resident Labour Market Test and from the requirement to assign a restricted Certificate of Sponsorship under the Tier 2 (General) limit.

The salary threshold for experienced workers was increased to £30,000 for the majority of new applicants. The salary threshold for new entrants remains at £20,800.

Changes were also made to the Shortage Occupation List following a separate review by the Migration Advisory Committee on teaching shortages, published on 26 January 2017.

The Home Office made updates to the salary thresholds for high earners (whose sponsors are exempt from carrying out a Resident Labour Market Test and from the requirement to assign a restricted Certificate of Sponsorship under the Tier 2 (General) limit and for indefinite leave to remain applications, based on the latest available Average Weekly Earnings data.

Minor technical changes were made to the Resident Labour Market Test, including widening the websites which may be used for graduate recruitment from a specified list of four to any freely-available, prominent, graduate recruitment website.

The Tier 2 (Intra Company Transfer) category supports inward investment and trade by allowing multinational employers to transfer key company personnel from overseas to their UK branch.

We saw the closing of the Tier 2 Short Term Staff sub-category.

The salary threshold for senior transferees who are able to extend their total stay in the category to up to nine years was reduced from £155,500 to £120,000.

The requirement for transferees to have at least one year’s experience working for the sponsor’s linked entity overseas was removed for applicants paid £73,900 or above.

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